MANUAL ON NEW JERSEY

SENTENCING LAW

by
HEATHER YOUNG KEAGLE
STAFF ATTORNEY, CENTRAL APPELLATE RESEARCH STAFF

APPELLATE DIVISION,
NEW JERSEY SUPERIOR COURT

May 2, 2017 Revision
© 2017

INTRODUCTION

This Manual is designed to outline and summarize sentencing law in New Jersey. It provides brief topical discussions of court rules, statutory provisions primarily in Title 2C, and case law. Since it is intended as a complement to the Criminal Code, statutory sections have not been reproduced; they have been paraphrased and quoted where pertinent.

The research into statutory changes, court rule changes, and published court decisions is current through May 2, 2017. Legal discussion of relevant statutes is addressed to the current versions of these provisions, unless specifically noted otherwise.

I. SENTENCING PROCEDURE *1*

A. The Presentence Investigation and Report: Statutory Provisions and Court Rules 1

B. Rights Relating to the Sentencing Hearing: Statutory Provisions and Court Rules 2

C. Sentencing Policies and Dispositions: Statutory Provisions 4

D. Imposing a Sentence: Case Law 7

II. SENTENCES ASSOCIATED WITH PLEA AGREEMENTS *15*

A. Plea Agreements: Court Rules 15

B. Plea Agreements: Case Law 16

III. MERGER *29*

A. Merger in General: Statutory Provisions 29

B. Merger Precluded: Statutory Provisions 30

C. Standards Regarding Merger: Case Law 34

IV. IMPRISONMENT *42*

A. Presumptions in Favor of and Against Imprisonment: Statutory Provisions 42

B. Ordinary Terms of Imprisonment: Statutory Provisions .. 44

C. Standards Relating to Imprisonment: Statutory Provisions 48

D. Standards Relating to Imprisonment: Case Law 49

V. PROBATION, SPLIT SENTENCES AND SUSPENDED SENTENCES *53*

A. Probation, Split Sentences and Suspended Sentences: Statutory Provisions 53

B. Violation of a Term of Probation or of a Suspended Sentence: Statutory Provisions 57

C. Probation and Suspended Sentences: Case Law 59

VI. AGGRAVATING AND MITIGATING FACTORS *63*

A. The Aggravating and Mitigating Factors: Statutory Provisions 63

B. Aggravating Factors: Case Law 65

C. Mitigating Factors: Case Law 68

D. Case Law Applicable to Both Types of Factors 70

VII. PAROLE INELIGIBILITY 75

A. Parole Ineligibility Imposed at the Court's Discretion: Statutory Provisions 76

B. Mandatory Parole Ineligibility Under The No Early Release Act (NERA): Statutory Provisions 76

C. Non-NERA Mandatory Parole Disqualifiers: Statutory Provisions 79

D. NERA: Case Law 88

E. Parole Ineligibility, Non-NERA Offenses: Case Law 91

VIII. EXTENDED TERMS 95

A. Discretionary Extended Terms: Statutory Provisions 95

B. Mandatory Extended Terms: Statutory Provisions 99

C. Extended Terms: Case Law 105

IX. CONCURRENT AND CONSECUTIVE SENTENCES 113

A. Consecutive Terms Within the Court's Discretion: Statutory Provisions 113

B. Mandatory Consecutive Terms: Statutory Provisions 115

C. Consecutive and Concurrent Terms: Case Law 118

X. FINES 123

A. Fines in General: Statutory Provisions 123

B. Specific Fines Authorized, or Required, by Law: Statutory Provisions 125

C. Standards Regarding Fines: Case Law 132

XI. RESTITUTION 134

A. Restitution in General: Statutory Provisions 134

B. Mandatory and Specific Restitution: Statutory Provisions 135

C. Standards Regarding Restitution: Case Law 137

XII. PENALTIES, FEES, ASSESSMENTS AND REGISTRATIONS 143

A. Penalties, Fees, Assessments and Registrations: Statutory Provisions 143

B. Payment of Penalties, Fees and Assessments: Statutory Provisions 156

C. Penalties, Fees and Assessments: Case Law 157

XIII. THE GRAVES ACT AND ASSAULT WEAPONS SENTENCING 162

A. Graves Act Sentencing: Statutory Provisions 162

B. Assault Weapons Sentencing: Statutory Provisions 167

C. Graves Act Sentencing: Case Law 170

D. Assault Weapons Sentencing: Case Law 176

XIV. DRUG OFFENDER SENTENCING 177

A. Special Probation: Statutory Provisions 177

B. Special Probation and Drug Court: Case Law 188

C. Fines Specific to Drug Offenses: Statutory Provisions 190

D. Penalties, Fees and Assessments Specific to Drug Offenses: Statutory Provisions 192

E. Merger of Certain Drug Offenses: Statutory Provisions 197

F. Standards Relating to Imprisonment: Statutory Provisions 199

G. Parole Ineligibility: Statutory Provisions 200

H. Extended Terms: Statutory Provisions 202

I. Consecutive Terms: Statutory Provisions 203

J. N.J.S.A. 2C:35-12 Waiver of Drug Offender Sentencing Enhancements: Statutory Provisions 205

K. Drug Offender Sentencing Enhancements: Case Law 206

XV. SEX OFFENDER SENTENCING 216

A. Merger of Certain Offenses Prohibited: Statutory Provisions 216

B. Enhanced Ordinary Terms of Imprisonment for Certain Offenses: Statutory Provisions 216

C. Restrictions on Noncustodial Terms: Statutory Provisions 217

D. Parole Supervision for Life: Statutory Provisions 218

E. Parole Ineligibility: Statutory Provisions 221

F. Mandatory Extended Terms: Statutory Provisions 223

G. Fines Authorized, or Required, by Law: Statutory Provisions 227

J. Sex Offender Treatment: Statutory Provisions 230

K. Sex Offender Sentencing: Case Law 236

XVI. JAIL AND GAP-TIME CREDITS 242

A. Jail Credit: Court Rules and Statutory Provisions 242

B. Gap-Time Credit: Statutory Provisions 242

C. Jail Credit: Case Law 243

D. Gap-Time Credit: Case Law 247

XVII. MOTION TO CHANGE A SENTENCE 252

A. Motion to Change a Sentence: Court Rules 252

B. Motion to Change a Sentence: Case Law 253

XVIII. DIRECT APPEAL BY A DEFENDANT 255

A. Direct Appeal by a Defendant of a Sentence: Court Rules and Statutory Provisions 255

B. Excessive Sentence Challenges: Case Law 256

C. Illegal Sentence Challenges: Case Law 256

D. Standards Relating to Direct Appeal of a Sentence: Case Law 261

E. Double Jeopardy Concerns on Remand: Case Law 264

XIX. APPEAL BY THE STATE IN CRIMINAL CASES 269

A. Appeal by the State: Court Rules 269

B. Appeal by the State: Statutory Provisions 270

C. Appeal by the State: Case Law 271

D. Double Jeopardy Concerns on Remand: Case Law 274

XX. POST-CONVICTION RELIEF 278

A. Post-Conviction Relief: Court Rules 278

B. Post-Conviction Relief: Case Law 278

I. SENTENCING PROCEDURE

The process of sentencing generally begins with a presentence investigation and report (see section A). The matter then proceeds to a sentencing hearing (see section B) where the court may impose a number of dispositions (see section C). The chapters in this manual discuss in more detail the specific dispositions available to the court. This chapter provides a general overview of the process. Section D discusses case law on the process.

A. The Presentence Investigation and Report: Statutory Provisions and Court Rules

1. Statutory Authority for a Presentence Investigation and Report. N.J.S.A. 2C:44-6(a) provides that before sentencing on an indictable offense, the court must order a presentence investigation of the defendant to be conducted by court support staff. See also R. 3:21-2(a). If a municipal court is imposing the sentence, no presentence investigation is required. R. 7:9-1(a).

(a) Information Included in the Presentence Report. N.J.S.A. 2C:44-6(b)(1) to (3) provides a list of information the presentence investigation shall address, including (among other factors): the circumstances attending the commission of the offenses; any history of delinquency, criminality, substance abuse and treatment or civil commitment; the defendant's family situation, financial resources and debts, child support obligations, and employment history; the disposition of charges against any codefendant; and the harm the victim suffered.

(b) Medical and Psychological History. N.J.S.A. 2C:44-6(b) provides that unless the court exercises its discretion to waive a medical and psychological examination (discussed further below), the presentence report should include information on the defendant's medical and psychological history if the court is imposing sentence on a first or second degree crime of violence and the defendant has any of the following:

- a prior acquittal by reason of insanity or suspension of charges on a finding of unfit-to-proceed; or

- a prior conviction for murder (N.J.S.A. 2C:11-3), aggravated sexual assault or sexual assault (N.J.S.A. 2C:14-2), kidnapping (N.J.S.A. 2C:13-1), or endangering the welfare of a child in the second degree (N.J.S.A. 2C:24-4), third degree stalked (N.J.S.A. 2C:12-10); or

- a previous diagnosis of psychosis.

The court may "order any additional psychological or medical testing of the defendant" after reviewing the initial presentence report. N.J.S.A. 2C:44-6(c). See also R. 3:21-2(b).

(c) Medical and Psychological History Exception. N.J.S.A. 2C:44-6(b) grants the court discretion to waive the medical and psychological examination, unless the case involves a conviction for: endangering the welfare of a child (N.J.S.A. 2C:24-4); criminal trespass of a school building or on school property (N.J.S.A. 2C:18-3); attempting to lure or entice a child with purpose to commit a criminal offense (N.J.S.A. 2C:13-6); stalking (N.J.S.A. 2C:12-10); or kidnapping where the victim is less than eighteen years old (N.J.S.A. 2C:13-1).

(d) Victim Statement. The presentence report may contain a statement by the victim regarding the physical, psychological and financial harm the defendant caused. N.J.S.A. 2C:44-6(b).

B. Rights Relating to the Sentencing Hearing: Statutory Provisions and Court Rules

1. Timely Sentence. Rule 3:21-4(a) requires the imposition of a sentence "without unreasonable delay." "Pending sentence the court may commit the defendant or continue or alter the bail." R. 3:21-4(a).

2. Defendant's Presence at Sentencing. Rule 3:21-4(b) provides: "Sentence shall not be imposed unless the defendant

is present or has filed a written waiver of the right to be present." Similarly, Rule 3:16 instructs: "The defendant shall be present at every stage of the trial, including . . . the imposition of sentence, unless otherwise provided by Rule."

3. The Defendant's Right to Speak at Sentencing (the Right of Allocution). "Before imposing sentence the court shall address the defendant personally" and ask if he or she wishes to speak on his or her own behalf or "present any information in mitigation of punishment. The defendant may answer personally or by his or her attorney." R. 3:21-4(b).

4. The Victim's Right to Speak. The Crime Victim's Bill of Rights, N.J.S.A. 52:4B-34 to 38, grants the victim the right to speak at sentencing. N.J.S.A. 52:4B-36(n). In the case of a homicide, the victim's survivor may speak and present a photograph of the victim. N.J.S.A. 52:4B-36.1(a).

5. Consolidation of Charges in Multiple Counties. Rule 3:25A-1 provides that prior to sentencing, the defendant, or a prosecutor with the defendant's consent, may move for consolidation of charges pending in multiple counties for the purposes of entering a plea and for sentencing. The prosecutor in each county shall receive written notice of the motion and be provided an opportunity to be heard. Ibid.

> **(a) Factors for the Court to Consider in Deciding a Motion to Consolidate Charges.** In determining whether to order consolidation and, if so, the forum county, the court should consider the number of crimes committed in each county, the comparative gravity of the crimes, the similarity or connection of the crimes, the locations of the most recent and most serious crimes, the defendant's sentencing status, the victim's rights, and any other relevant factor. R. 3:25A-1.
>
> **(b) Post-Consolidation Proceedings.** "Each county prosecutor of the county in which a charge is pending shall be allowed to participate fully in the disposition of that charge after consolidation is ordered. If a plea agreement is entered that resolves less than all of the consolidated charges, the judge in the forum county shall order each unresolved charge to be returned immediately to the originating county. In the event that the consolidated charges have not been resolved within a reasonable period after consolidation, the judge in the forum county shall

order each charge to be returned immediately to the originating county." R. 3:25A-1.

C. Sentencing Policies and Dispositions: Statutory Provisions

1. Statutory Authority on the Purposes of the Sentencing Laws. N.J.S.A. 2C:1-2(b) provides that the general purposes of sentencing provisions are:

(1) "To prevent and condemn the commission of offenses";

(2) "To promote the correction and rehabilitation of offenders";

(3) "To insure the public safety by preventing the commission of offenses through the deterrent influence of sentences imposed and the confinement of offenders when required in the interest of public protection";

(4) "To safeguard offenders against excessive, disproportionate or arbitrary punishment";

(5) "To give fair warning of the nature of the sentences that may be imposed on conviction of an offense";

(6) "To differentiate among offenders with a view to a just individualization in their treatment";

(7) "To advance the use of generally accepted scientific methods and knowledge in sentencing offenders"; and

(8) "To promote restitution to victims."

2. Sentencing in Accordance With Chapter 43. N.J.S.A. 2C:43-2(a) provides: "Except as otherwise provided by this code, all persons convicted of an offense shall be sentenced in accordance with this chapter [i.e. Chapter 43, N.J.S.A. 2C:43-1 to -22]." "'Offense' means a crime, a disorderly persons offense or a petty disorderly persons offense." N.J.S.A. 2C:1-14(k).

3. General Authorized Dispositions. N.J.S.A. 2C:43-2(b) to (d) provides that a court may impose as a sentence:

- A suspended sentence;
- A fine;
- Restitution;
- Probation;
- Imprisonment;
- Community service;
- Participation in a halfway house or other residential facility;
- Participation in a training or educational program in addition to imprisonment at night or on the weekends;
- Revocation of a license;
- Forfeiture of, or removal from, office; and
- A civil penalty.

4. Young Adult Offender Sentencing. N.J.S.A. 2C:43-5 provides that when sentencing a defendant who was less than twenty-six years old at the time of sentencing, the court may impose an indeterminate term to a youth correctional facility.

(a) Excluded Defendants. The court may not sentence a young adult offender to an indeterminate term at a youth correctional facility if:

- The crime is subject to the Graves Act mandatory minimum term (N.J.S.A. 2C:43-6(c)), N.J.S.A. 2C:43-5; or
- The defendant has a prior conviction for a crime punishable by imprisonment in State prison, N.J.S.A. 30:4-147; or
- The defendant has been previously sentenced to a State Prison in this State or any other state, N.J.S.A. 30:4-147.

(b) Maximum Length of the Sentence. The maximum sentence imposed on a young adult offender shall not exceed five years, absent "good cause shown." N.J.S.A. 30:4-148. If good cause is established for a longer term, then the maximum term shall not be "greater than the maximum provided by law." N.J.S.A. 30:4-148. If the maximum sentence for the crime for which the court is imposing sentence is less than five years, then the maximum term applicable to the crime--not five years--shall be the maximum sentence. Ibid.

5. Downgrading and Lenient Sentences. N.J.S.A. 2C:44-1(f)(2) provides that where the defendant committed a first or second degree crime, the court may sentence the defendant to a term appropriate to a crime of one degree lower or impose a non-custodial term if the court is "clearly convinced that the mitigating factors substantially outweigh the aggravating factors" and "the interest of justice demands" a downgrading for purposes of sentencing.

6. Rationale for the Sentence Must Be Stated. N.J.S.A. 2C:43-2(e) instructs: "The court shall state on the record the reasons for imposing the sentence, including its findings pursuant to the criteria for withholding or imposing imprisonment or fines under sections 2C:44-1 to 2C:44-3 [criteria for imposing imprisonment, fines, restitution and extended terms], where imprisonment is imposed, consideration of the defendant's eligibility for release under the law governing parole and the factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence."

7. Parole Laws Must Be Explained to the Defendant Sentenced to Imprisonment. N.J.S.A. 2C:43-2(f) provides: "The court shall explain the parole laws as they apply to the sentence and shall state":

(1) The approximate period the defendant will serve in custody before becoming eligible for parole;

(2) Any jail credits that will be subtracted from the sentence;

(3) The defendant's entitlement to good time and work credits; and

(4) The defendant's potential eligibility for participation as an inmate in the Intensive Supervision Program (N.J.S.A. 2C:43-11).

"Release of offenders on parole, recommitment and reparole after revocation shall be governed by the 'Parole Act of 1979,'" N.J.S.A. 30:4-123.45 to -123.76. N.J.S.A. 2C:43-9.

D. Imposing a Sentence: Case Law

1. Waiver of the Right to Be Present at Sentencing. A defendant does not have an absolute right to be absent from sentencing. State v. Tedesco, 214 N.J. 177, 182 (2013). He or she must submit to the sentencing court a written request to be absent from the hearing. Id. at 191. In deciding whether to grant the request, "trial judges should be guided by a number of relevant factors: the interests of the public, the defendant, the victims, and the State." Id. at 191-92.

2. A Sentence May Not Be Based Solely on Failure to Appear at the Hearing. The court may not use the defendant's failure to appear at sentencing as the sole rationale for a sentence. State v. Wilson, 206 N.J. Super. 182, 184 (App. Div. 1985).

3. The Defendant's Right to Speak at Sentencing (the Right of Allocution). Denial of the right of allocution will require an automatic remand on direct appeal regardless of whether the defendant suffered prejudice. State v. Blackmon, 202 N.J. 283 (2010); State v. Cerce, 46 N.J. 387, 396-97 (1966); State in the Interest of J.R., 244 N.J. Super. 630, 639 (App. Div. 1990). The same is not true if the defendant waits to raise the challenge in a petition for post-conviction relief. State v. Cerce, 46 N.J. 387, 395-96 (1966) (holding that in a post-conviction relief proceeding the defendant must establish prejudice or other aggravating circumstances to warrant a remand). See also R. 3:22-2(c) (on post-conviction-relief sentencing challenges).

4. Statements from Others. "[O]ther than defendants, and crime victims or their survivors, there is no absolute right to speak at a sentencing proceeding; instead, permitting others to address the court directly is a matter entrusted to the sentencing court's discretion." Sentencing courts "need not entertain mere pleas for mercy" or "permit presentations that

are cumulative" or repetitive of "previously-submitted written comments. Nor are they required to permit presentations that are scurrilous, vengeful, or inflammatory." The court should consider whether the individual "has information that bears upon an aggravating or mitigating factor, and may require a proffer consistent with one of those factors from defendant's counsel, electing to limit the grant of permission accordingly." State v. Blackmon, 202 N.J. 283, 305 (2010).

> **Jurors May Not Participate in Sentencing.** While the sentencing court has discretion to hear from others, this rule does not apply to those who served as jurors at the defendant's trial. State v. Mahoney, 444 N.J. Super. 253, 259 (App. Div. 2016). Jurors "have no relevant information to add for consideration by the sentencing judge because they are limited to addressing the evidence presented during the trial." Allowing jurors to speak at sentencing "ignores the primary and important fundamental role of the jury and unnecessarily runs the substantial risk of distracting the jurors and undermining the sanctity of the jury's deliberative process." Ibid.

5. The Right to Counsel. The defendant has a constitutional right to have counsel present at sentencing. N.J. Const. art. I, ¶ 10; State v. Jenkins, 32 N.J. 109, 112 (1960). "Sentencing hearings under the Criminal Code are crucial stages of a trial for which counsel must be available" State v. Briggs, 349 N.J. Super. 496, 501 (App. Div. 2002) (internal quotation omitted).

6. Counsel's Alleged Conflict of Interest. If the defendant alleges a conflict of interest and requests an adjournment to retain new counsel, the court must address the conflict of interest claim prior to proceeding any further. State v. Vasquez, 432 N.J. Super. 354, 359-60 (App. Div. 2013), certif. denied, 217 N.J. 296 (2014). If a per se conflict of interest arose prior to sentencing, a reviewing court will presume prejudice, in the absence of a waiver by the defendant, and will order a new sentencing hearing. State v. Alexander, 403 N.J. Super. 250, 257-60 (App. Div. 2008). This is so even if the defendant raises the challenge for the first time in a petition for post-conviction relief. Ibid.

7. Sixth Amendment Right to a Speedy Trial. The Sixth Amendment guarantee to a speedy trial "protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty

to criminal charges. For inordinate delay in sentencing, although the Speedy Trial Clause does not govern, a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." Betterman v. Montana, ___ U.S. ___, ___, 136 S. Ct. 1609, 1612, 194 L. Ed. 2d 723, 729 (2016) (fourteen month delay in sentencing).

8. Considerations as of the Date of Sentencing. "[A] defendant should be assessed as he stands before the court on the day of sentencing." State v. Jaffe, 220 N.J. 114, 116 (2014) (citing State v. Randolph, 210 N.J. 330, 354 (2012)). Thus, "the sentencing court must consider a defendant's relevant post-offense conduct in weighing aggravating and mitigating factors." Ibid.

9. Courts Apply the Sentencing Law in Effect at the Time of Sentencing. When the Legislature changes punishment prior to the imposition of sentence, the court applies the law in effect at the time of sentencing. State in Interest of C.F., 444 N.J. Super. 179, 191 (App. Div. 2016).

10. Findings and Rationale. "At the time of sentencing, the court must 'state reasons for imposing such sentence including . . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence.'" State v. Fuentes, 217 N.J. 57, 73 (2014) (quoting R. 3:21-4(g)). "Central to the success of" the sentencing "process is the requirement that the judge articulate the reasons for imposing sentence." State v. Case, 220 N.J. 49, 54 (2014). But see State v. Molina, 168 N.J. 436, 442 (2001) (providing that "on occasion" courts have "dispensed with the need for a remand for a statement of . . . reasons when . . . convinced that the sentences clearly fall within the sentencing guidelines"). Inconsistent and unclear findings will require a remand, even though a remand may not result in a lesser sentence than the one initially imposed. State v. Sene, 443 N.J. Super. 134, 144-45 (App. Div. 2015), certif. denied, 224 N.J. 282 (2016).

11. Individualized Assessment. In imposing sentence, the court must make an individualized assessment of the defendant based on the facts of the case and the aggravating and mitigating sentencing factors. State v. Jaffe, 220 N.J. 114, 122 (2014). "[A] remark in open court, even in a subsequent, unrelated proceeding, that a judge 'always' sentences defendants convicted of" a particular offense to a specific prison term "undermines

public confidence" in our criminal justice system and suggests that the court did not set a sentence based on "the unique facts of a defendant's case." State v. McFarlane, 224 N.J. 458, 469 (2016).

12. Excessive and Arbitrary Sentencing. N.J.S.A. 2C:1-2(b)(4) provides that one general purpose of the provisions governing sentencing is "[t]o safeguard offenders against excessive, disproportionate or arbitrary punishment." To that end, "'[t]he central theme' of our sentencing jurisprudence is the exercise by courts of 'a structured discretion designed to foster less arbitrary and more equal sentences.'" State v. Roach, 146 N.J. 208, 231, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996) (Roach I) (quoting State v. Roth, 95 N.J. 334, 345 (1984)).

13. Uniformity. Our Court "has consistently stressed uniformity as one of the major sentencing goals in the administration of criminal justice." State v. Roach, 146 N.J. 208, 231, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996) (Roach I). See also State v. Hodge, 95 N.J. 369, 379 (1984) (providing that "there can be no justice without a predictable degree of uniformity in sentencing").

14. Sentencing Co-Defendants. In light of the Code's goals to promote uniformity, fairness and public confidence in sentencing, an "otherwise sound and lawful sentence" will be invalid if it is different from a similarly situated co-defendant's sentence. State v. Roach, 146 N.J. 208, 232-33, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996) (Roach I).

> **The Substantially Similar Standard.** In sentencing a co-defendant, the "trial court must determine whether the co-defendant is identical or substantially similar to the defendant regarding all relevant sentencing criteria. The court should then inquire into the basis of the sentences imposed on the other defendant. It should further consider the length, terms, and conditions of the sentence imposed on the co-defendant. If the co-defendant is sufficiently similar, the court must give the sentence imposed on the co-defendant substantive weight when sentencing the defendant in order to avoid excessive disparity." State v. Roach, 146 N.J. 208, 233, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996) (Roach I).

15. The Standard for Downgrading. In deciding whether to downgrade an offense for purposes of sentencing, the court considers whether the mitigating factors substantially outweigh the aggravating and whether the interest of justice demands the downgrade. State v. Megargel, 143 N.J. 484, 495 (1996); State v. L.V., 410 N.J. Super. 90, 112-13 (App. Div. 2009), certif. denied, 201 N.J. 156 (2010). The decision to downgrade "in the interest of justice" should be limited to circumstances where a defendant can provide "compelling" reasons in addition to, and separate from, the mitigating factors that substantially outweigh the aggravating factors. State v. Megargel, 143 N.J. 484, 505 (1996); State v. L.V., 410 N.J. Super. 90, 112-13 (App. Div. 2009), certif. denied, 201 N.J. 156 (2010) (downgrading where the defendant's mental illnesses, young age, "very limited intelligence," cognitive inabilities, language and social barriers, years of having been sexually abused and threatened by her father, and having been twice impregnated by him explained why she had acquiesced to his orders to throw her newborn infant out a window and to not aid the other newborn when her father threw that infant out a window).

(a) Factors to Consider in Deciding Whether to Downgrade. In deciding whether to downgrade an offense, the court should consider the degree of the crime, whether the surrounding circumstances make the offense similar to one of a lesser degree, and the defendant's characteristics as they relate to the offense. State v. Megargel, 143 N.J. 484, 500-01 (1996); State v. Rice, 425 N.J. Super. 375, 384 (App. Div.), certif. denied, 212 N.J. 431 (2012). The severity of the crime is the most important factor. State v. Megargel, 143 N.J. 484, 500 (1996).

(b) Offenses With Enhanced Penalties. Where the Legislature has provided an enhanced penalty for an offense, "the downgrade of that offense requires more compelling reasons than the downgrade of an offense for which the Legislature has not attached an enhanced penalty." State v. Rice, 425 N.J. Super. 375, 385 (App. Div.) (quoting State v. Megargel, 143 N.J. 484, 502 (1996)), certif. denied, 212 N.J. 431 (2012). A sentencing court should not use its discretion to ignore the legislative design. State v. Lopez, 395 N.J. Super. 98, 108-09 (App. Div.), certif. denied, 192 N.J. 596 (2007).

(c) Rationale for a Downgrade. A trial court must state on the record its reasons for downgrading and should

particularly state why a sentence at the lowest end of the sentencing range is not a more appropriate sentence. State v. Megargel, 143 N.J. 484, 502 (1996).

(d) Presumption of Imprisonment. On a downgrade from a second to third degree crime, the defendant remains "convicted" of a second degree crime for purposes of applying a presumption of imprisonment. State v. O'Connor, 105 N.J. 399, 404-05 (1987); State v. Lebra, 357 N.J. Super. 500, 507 (App. Div. 2003).

(e) The No Early Release Act (NERA). When a defendant pleads guilty to a second degree crime subject to the NERA, and the court downgrades the crime to one of the third degree, the court must impose a term of incarceration because the crime to which the defendant pled guilty was subject to a mandatory minimum term of imprisonment. State v. L.V., 410 N.J. Super. 90, 113 (App. Div. 2009), certif. denied, 201 N.J. 156 (2010).

(f) Drug Offenses and Parole Ineligibility. When downgrading from a first to second degree crime, the mandatory period of parole ineligibility for first degree drug distribution (N.J.S.A. 2C:35-5(b)(1)) survives the downgrade. State v. Barber, 262 N.J. Super. 157, 162 (App. Div.), certif. denied, 133 N.J. 441 (1993).

(g) Downgrades Pursuant to a Plea Agreement. Where the parties agree to a downgrade in a plea agreement, the court must consider the aggravating and mitigating factors and whether the interest of justice warrant a downgrade before imposing sentence pursuant to the agreement. State v. Nemeth, 214 N.J. Super. 324, 326-27 (App. Div. 1986).

(h) Maximum Term Permissible on a Downgraded Offense. The court may grant a request to downgrade an offense and impose the maximum term on the downgraded offense. State v. Balfour, 135 N.J. 30, 38 (1994); State v. Nemeth, 214 N.J. Super. 324, 326-27 (App. Div. 1986). The decisions to downgrade and to set a term of imprisonment are distinct and independent decisions within the court's discretion. State v. Balfour, 135 N.J. 30, 38 (1994). The court may conclude that a plea agreement tipped the scale in favor of downgrading, but that a term at the higher end of the range is warranted in light of the aggravating and mitigating factors. Id. at 39.

16. Young Adult Offender Sentencing.

(a) Certain Defendants Excluded. The court may not impose an indeterminate sentence under the young adult offender statute (N.J.S.A. 2C:43-5) if the defendant: committed a Graves Act offense, State v. Des Marets, 92 N.J. 62, 76 (1983); has previously been sentenced to a state prison or to a federal prison or penitentiary, State v. Levine, 253 N.J. Super. 149, 162 (App. Div. 1992); committed a crime subject to the No Early Release Act period of parole ineligibility, State v. Corriero, 357 N.J. Super. 214, 217-18 (App. Div. 2003); or committed a drug offense that requires a period of parole ineligibility, State v. Luna, 278 N.J. Super. 433, 437-38 (App. Div. 1995).

(b) No Preference in Favor of a Young Adult Offender Sentence. The young adult offender indeterminate sentence is an option within the sentencing court's discretion; the Code contains no preference for it. State v. Styker, 262 N.J. Super. 7, 21-22 (App. Div.), aff'd o.b., 134 N.J. 254 (1993).

(c) Ordinary Term of a Young Adult Offender Sentence. The ordinary term for a young adult offender sentenced to an indeterminate term is five years, since the sentence may not exceed five years, absent good cause shown. State v. Scherzer, 301 N.J. Super. 363, 497 (App. Div.), certif. denied, 151 N.J. 466 (1997).

(d) Good Cause Standard for a Longer Term. Good cause to impose a term longer than five years may exist where the aggravating factors preponderate over the mitigating factors, State v. Ferguson, 273 N.J. Super. 486, 495 (App. Div.), certif. denied, 138 N.J. 265 (1994), or where the facts and circumstances of the case, or the real-time consequences of the sentence warrant a term longer than five years, State v. Scherzer, 301 N.J. Super. 363, 498-500 (App. Div.), certif. denied, 151 N.J. 466 (1997).

(e) Consecutive Terms. A judge may impose consecutive indeterminate sentences on a young adult offender; however, "routine use of this kind of sentence . . . is undesirable and should be avoided." State v. Carroll, 66 N.J. 558, 561 (1975). Because young adult offender sentencing focuses on correction and rehabilitation, not punishment, the Yarbough

factors (discussed in the chapter on concurrent and consecutive terms) do not apply. State v. Hannigan, 408 N.J. Super. 388, 396-400 (App. Div. 2009). Rather, consecutive indeterminate sentences for young adult offenders "must be justified with reference to offender-based criteria centered on rehabilitation." Id. at 400.

II. SENTENCES ASSOCIATED WITH PLEA AGREEMENTS

Plea bargaining is "central to the administration of the criminal justice system," Missouri v. Frye, ___ U.S. ___, ___, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379, 389 (2012). Section A of this Chapter discusses Court Rules on plea bargaining, and Section B discusses relevant case law.

A. Plea Agreements: Court Rules

1. Court Rule Authorizing Plea Negotiations. Rule 3:9-3(a) authorizes the State and the defendant to discuss pleas and sentences to "promote a fair and expeditious disposition of the case." For a discussion of plea agreements in drug cases where the prosecutor waives enhanced terms, see the chapter on drug offender sentencing.

2. Consolidation of Charges in Multiple Counties for Purposes of Plea Negotiations and Sentencing. Rule 3:25A-1 provides that at any time prior to sentencing, the defendant, or a prosecutor with the defendant's consent, may move for consolidation of charges pending in multiple counties for the purposes of entering a plea and for sentencing. The prosecutor in each county shall receive written notice of the motion and shall be provided an opportunity to be heard. If a plea agreement does not resolve all charges, the unresolved charges shall "be returned immediately to the originating county." If the defendant and prosecutor do not resolve the consolidated charges "within a reasonable period after consolidation, the judge in the forum county shall order each charge to be returned immediately to the originating county."

3. Authorized Discussions With the Court. Rule 3:9-3(c) allows the parties to disclose to the court a tentative plea agreement. The court may indicate "whether it will concur in the tentative agreement or, if no tentative agreement has been reached," the court may notify the defendant of "the maximum sentence it would impose in the event the defendant enters a plea of guilty."

4. Conditional Pleas. So long as the State consents and the court approves, the defendant "may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. If the

defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea." R. 3:9-3(f).

5. Plea Cut-Off Date. The court may not accept a plea "[a]fter the pretrial conference has been conducted and a trial date set," unless the criminal presiding judge approves the plea "based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice." R. 3:9-3(g).

6. Accepting a Plea. Rule 3:9-2 provides that the court should accept a plea of guilty if, after questioning the defendant on the record, the court is satisfied that the admitted facts support the charges and that the defendant is entering the plea knowingly and voluntarily. The court may accept a written stipulation of facts signed by the defendant, defense counsel, and the prosecutor.

7. Waiver of the Right to Appeal. If the defendant waives the right to appeal in a plea agreement, the court must notify the defendant that he or she may still file an appeal, but that the State may annul the agreement upon the defendant's filing the notice of appeal. R. 3:9-3(d).

8. Withdrawal of the Plea at the Time of Sentencing. Rule 3:9-3(e) provides: "If at the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement . . . or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea."

9. Post-Sentencing Motion to Withdraw a Guilty Plea. The court may grant a motion to withdraw a guilty plea after sentencing "to correct a manifest injustice." Rule 3:21-1.

B. Plea Agreements: Case Law

1. Constitutional Right to Counsel. A defendant has Sixth Amendment rights that attach when the State offers a plea agreement and when a defendant accepts a plea offer. Missouri v. Frye, ___ U.S. ___, ___, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379, 389 (2012). Accord Lafler v. Cooper, ___ U.S. ___, ___, 132 S. Ct. 1376, 1385-91, 182 L. Ed. 2d 398, 407-14 (2012).

2. Entering a Plea Waives Constitutional Rights. "[A] defendant who pleads guilty waives important constitutional rights, including the right to avoid self-incrimination, to confront his accusers, and to secure a jury trial." State v. Barboza, 115 N.J. 415, 420 (1989).

3. Maximum Sentence Authorized by the Sixth Amendment. The maximum sentence authorized for Sixth Amendment purposes depends on the defendant's admissions at the plea hearing and on the defendant's prior criminal convictions. Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 417 (2004); State v. Franklin, 184 N.J. 516, 537-38 (2005); State v. Natale II, 184 N.J. 458, 495 (2005). The defendant may also "consent to judicial factfinding as to sentence enhancements." State v. Franklin, 184 N.J. 516, 538 (2005) (quoting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 417 (2004)). Implicit agreement to judicial factfinding may be found where a defendant pleads guilty and acknowledges exposure to a specific sentence in exchange for waiver of trial by jury. State v. Natale II, 184 N.J. 458, 495 n.12 (2005); State v. Soto (I), 385 N.J. Super. 247, 253-55 (App. Div. 2006); State v. Anderson, 374 N.J. Super. 419, 423-24 (App. Div.), certif. denied, 185 N.J. 266 (2005).

4. Consolidation of Charges in Multiple Counties. Pursuant to Rule 3:25A-1, a defendant, or the prosecutor with the defendant's consent, may move to consolidate charges in multiple counties for the purpose of entering a plea and for sentencing. State v. Rountree, 388 N.J. Super. 190, 212 (App. Div. 2006), certif. denied, 192 N.J. 66 (2007). "Consolidated plea negotiations are generally advantageous to a defendant. Obviously, consolidated plea negotiations have potential benefits for the State and for the judicial system as well." Ibid. "[W]hen a defendant has indictments pending in more than one vicinage, defense counsel is obligated to consider the factors set forth in Rule 3:25A-1, and to move for consolidation at an early stage where appropriate." Ibid.

5. Post-Verdict Plea Agreements. "While not common, post-verdict guilty pleas are not against public policy." State v. Owens, 381 N.J. Super. 503, 510-11 (App. Div. 2005) (referring to N.J.S.A. 2C:35-12, which allows the defendant and prosecutor to enter a post-conviction agreement that waives the extended and mandatory minimum term applicable to certain drug offenders).

6. Prohibited and Authorized Provisions of a Plea Agreement.

(a) The Agreement May Be Conditioned Upon Defendant's Presence at Sentencing. A plea agreement may be valid and enforceable if it allows a court to increase a defendant's sentence in the event the defendant fails to appear for sentencing. State v. Shaw, 131 N.J. 1, 15 (1993) (allowing the State to condition waiver of a minimum term in a drug case on the defendant's appearance at sentencing). But see State v. Wilson, 206 N.J. Super. 182, 184 (App. Div. 1985) (holding that an extended sentence based entirely upon nonappearance is illegal because it is unrelated to any of the sentencing criteria set forth in the Code).

(b) The Agreement May Not Restrict Judicial Discretion. A plea agreement may not restrict the court's discretion in imposing sentence. State v. Hess, 207 N.J. 123, 151 (2011). "[A] criminal sentence is always and solely committed to the discretion of the trial court to be exercised within the standards prescribed by the Code of Criminal Justice." Ibid. (quoting State v. Warren, 115 N.J. 433, 447 (1989)); State v. Watford, 261 N.J. Super. 151, 157 (App. Div. 1992) (explaining that the prosecutor may not make any binding promises regarding the sentence).

(c) Restrictions on the Defense Are Prohibited. A plea agreement that restricts the defendant's ability to present mitigating evidence, or to argue for a sentence lesser than the one agreed to, denies the defendant the right to effective assistance of counsel. State v. Hess, 207 N.J. 123, 152-53 (2011); State v. Briggs, 349 N.J. Super. 496, 501-03 (App. Div. 2002).

(d) Illegal Sentences Are Prohibited. The court may not impose an illegal sentence, even if the prosecutor and defendant request the sentence. State v. Crawford, 379 N.J. Super. 250, 258 (App. Div. 2005); State v. Manzie, 335 N.J. Super. 267, 278 (App. Div. 2000), aff'd, 168 N.J. 113 (2001); State v. Baker, 270 N.J. Super. 55, 70 (App. Div.), aff'd o.b., 138 N.J. 89 (1994).

(e) Civil Commitment of a Sexual Predator. "A plea agreement by a county prosecutor which operates as an impediment to a valid civil commitment of a sexual predator is void as against public policy." In re Commitment of P.C., 349 N.J. Super. 569, 572 (App. Div. 2002).

(f) A Plea Agreement May Provide for Restitution. Since compensation to the victim is a relevant sentencing factor, the parties may include a restitution award in a plea agreement. State v. Corpi, 297 N.J. Super. 86, 92-93 (App. Div.), certif. denied, 149 N.J. 407 (1997).

7. Conditional Pleas. When a defendant enters a guilty plea and intends to appeal an issue, other than a search and seizure issue, the defendant must enter a conditional plea with the court's approval and consent of the prosecutor. State v. Benjamin, 442 N.J. Super. 258, 263 (App. Div. 2015) (explaining that "[o]rdinarily, the failure to enter a conditional plea would bar appellate review of other than search and seizure issues"), affirmed as modified, ___ N.J. ___ (2017).

8. Rules Relating to the Factual Basis of a Plea.

(a) Factual Basis for a Plea. "The factual basis for a guilty plea can be established by a defendant's explicit admission of guilt or by a defendant's acknowledgment of the underlying facts constituting essential elements of the crime." State v. Gregory, 220 N.J. 413, 418-19 (2015). Accord State v. Urbina, 221 N.J. 509, 527-28 (2015). The court may not "presume facts required to establish the essential elements of the crime." State v. Gregory, 220 N.J. 413, 421 (2015) (internal quotation marks omitted). Accord State v. Tate, 220 N.J. 393, 406 (2015); State v. Perez, 220 N.J. 423, 433-34 (2015).

(b) Challenge to the Factual Basis of a Plea. "Challenges to the sufficiency of the factual basis for a guilty plea are most commonly brought by way of a motion to the trial court to withdraw that plea"; however, "a defendant may also challenge the sufficiency of the factual basis for his guilty plea on direct appeal." State v. Urbina, 221 N.J. 509, 528 (2015).

(c) Motion to Vacate a Plea Based on Inadequate Facts, Standard of Review. "The standard of review of a trial court's denial of a motion to vacate a guilty plea for lack of an adequate factual basis is de novo." State v. Urbina, 221 N.J. 509, 528 (2015) (quoting State v. Tate, 220 N.J. 393, 402 (2015)).

(d) Remedy for an Insufficient Factual Basis for a Plea. If an appellate court finds "that a plea has been accepted without an adequate factual basis, the plea, the judgment of conviction, and the sentence must be vacated, the dismissed charges reinstated, and defendant allowed to re-plead or to proceed to trial." State v. Barboza, 115 N.J. 415, 420 (1989). The same remedy applies when the defendant enters the guilty plea "without a plea offer from the prosecutor, but after the defendant has been advised by the trial court regarding the maximum sentence the judge was 'inclined' to impose." State v. Ashley, 443 N.J. Super. 10, 13 (App. Div. 2015), certif. denied, 224 N.J. 526 (2016).

9. Collateral and Penal Consequences of a Guilty Plea.

(a) Knowledge of the Consequences. To ensure that a plea is entered knowingly and voluntarily, as required by Rule 3:9-3, the court must advise the defendant of the penal consequences of a guilty plea. State v. Johnson, 182 N.J. 232, 236-37 (2005); State v. Smullen, 437 N.J. Super. 102, 110 (App. Div. 2014). Lack of understanding of a collateral consequence, however, will not warrant a reversal unless the collateral consequence was "a material element of the plea." State v. Jamgochian, 363 N.J. Super. 220, 225 (App. Div. 2003). Accord State v. Maldon, 422 N.J. Super. 475, 485 (App. Div. 2011) (stating that "if a defendant is affirmatively misinformed about a collateral consequence that is a central issue in the plea negotiations, the plea may not be knowing and voluntary"). In assessing a lack-of-understanding claim, the court's statements to the defendant at the plea hearing are the primary concern, but the contents of the plea form are also relevant. State v. Williams, 342 N.J. Super. 83, 91 (App. Div.), certif. denied, 170 N.J. 207 (2001); State v. Rumblin, 326 N.J. Super. 296, 299-302 (App. Div. 1999), aff'd, 166 N.J. 550 (2001).

(b) Parole Ineligibility Must Be Explained. The court must advise the defendant of any period of parole ineligibility associated with a guilty plea. State v. Kovack, 91 N.J. 476, 483 (1982). See State v. Bailey, 226 N.J. Super. 559, 567-68 (App. Div. 1988) (requiring the court to notify the defendant of a mandatory parole ineligibility term pursuant to N.J.S.A. 2C:43-6(c) (the Graves Act)).

(c) Sex Offender Consequences of a Guilty Plea Must Be Explained. The court must notify the defendant of the parole consequences and potential sex-offender treatment consequences of a guilty plea to a sex offense. State v. Howard, 110 N.J. 113, 124-25 (1988); State v. Luckey, 366 N.J. Super. 79, 89-90 (App. Div. 2004). This includes instruction on parole and community supervision for life requirements. State v. Smullen, 437 N.J. Super. 102, 110 (App. Div. 2014); State v. Schubert, 212 N.J. 295, 307-08 (2012); State v. Bellamy, 178 N.J. 127, 138 (2003); State v. J.J., 397 N.J. Super. 91, 99 (App. Div. 2007), appeal dismissed, 196 N.J. 459 (2008); State v. Jamgochian, 363 N.J. Super. 220, 224 (App. Div. 2003).

(d) The No Early Release Act (NERA) Must Be Explained. If the defendant pleads guilty to an offense subject to the NERA, the court must advise the defendant of the NERA requirements, including explanation that if the defendant violates a term of parole, parole supervision may extend beyond the term of the original sentence. State v. Johnson, 182 N.J. 232, 240-41 (2005).

(e) Consecutive Terms Must Be Explained. "Where it has been brought to the attention of the court that the defendant has either pleaded to or has been found guilty on other charges or is presently serving a custodial term and the plea agreement is silent on the issue, the accused should, in all fairness, be informed of the contingency that all sentences may be made to run consecutively." State v. Cullars, 224 N.J. Super. 32, 40-41 (App. Div.), certif. denied, 111 N.J. 605 (1988). However, the court need not inform a defendant that if the defendant violates a term of probation in the future, the court may impose a consecutive sentence. State v. Garland, 226 N.J. Super. 356, 364-65 (App. Div.), certif. denied, 114 N.J. 288 (1988).

(f) Extended Term Must Be Explained. The court must advise the defendant of the consequences of an extended term where the prosecutor reserves the right to request one. State v. Cartier, 210 N.J. Super. 379, 381-82 (App. Div. 1986).

(g) The Possibility of an Enhanced Term in the Future Need Not Be Explained. The court need not inform the defendant

that pleading guilty to a crime could result in the imposition of an enhanced sentence in the future if the defendant were to commit another crime. State v. Wilkerson, 321 N.J. Super. 219, 224-28 (App. Div.), certif. denied, 162 N.J. 128 (1999).

(h) Probation Violation Penalties Must Be Explained. Rule 3:21-4(c) requires the court to inform a defendant sentenced to probation of the penalties that might be imposed upon revocation of probation. State v. Ervin, 241 N.J. Super. 458, 470 (App. Div. 1989), certif. denied, 121 N.J. 634 (1990).

(i) Community Service Need Not Be Explained. Prior to accepting a guilty plea the court need not explain to the defendant that the sentence may include community service. State v. Saperstein, 202 N.J. Super. 478, 483 (App. Div. 1985).

(j) Failure to Mention the Possibility of Restitution May Not Require Reversal. Prior to accepting a plea, the court should advise a defendant on a possible restitution award; however, failure to do so will not necessarily require a reversal. State v. Kennedy, 152 N.J. 413, 425-26 (1998); State v. Rhoda, 206 N.J. Super. 584, 596 (App. Div.), certif. denied, 105 N.J. 524 (1986). The question is whether the restitution award was "beyond defendant's reasonable anticipation." State v. Saperstein, 202 N.J. Super. 478, 483 (App. Div. 1985) (remanding to allow the defendant to withdraw the plea where the court imposed a $150,000 restitution award that the defendant did not reasonably contemplate in pleading guilty).

(k) The Court Should Explain a Substantial Fine. Where a substantial fine is an integral and material part of a sentence, the court should have instructed the defendant on it prior to accepting the plea. State v. Alford, 191 N.J. Super. 537, 540 (App. Div. 1983), appeal dismisssed, 99 N.J. 199 (1984).

(l) Forfeiture of Public Employment Need Not Be Explained. Forfeiture of public employment is not a penal consequence of a plea; thus, the court does not have a duty to advise a defendant that it may be a consequence of a guilty plea. State v. Medina, 349 N.J. Super. 108, 122 (App. Div.), certif. denied, 174 N.J. 193 (2002); State v. Heitzman, 209

N.J. Super. 617, 621-22 (App. Div. 1986), aff'd, 107 N.J. 603 (1987).

(m) Clearly Defined Deportation Consequences Must Be Explained. Failure to notify a noncitizen defendant that deportation is a "presumptively mandatory" consequence of a guilty plea will form a basis for a post-conviction relief plea withdrawal when "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences." Padilla v. Kentucky, 559 U.S. 356, 368, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284, 295-96 (2010). See State v. Gaitan, 209 N.J. 339, 372 (2012) (holding that the Padilla ruling has no retroactive effect), cert. denied, ___ U.S. ___, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013). Under State law, defense counsel is ineffective if he or she affirmatively provides incorrect information or misleading advice on the deportation consequences of a plea. State v. Gaitan, 209 N.J. 339, 354-55 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013); State v. Nuñez-Valdéz, 200 N.J. 129, 140 (2009); State v. Blake, 444 N.J. Super. 285, 295 (App. Div.), certif. denied, 226 N.J. 213 (2016). When the deportation consequences are "unclear or uncertain," trial counsel is not ineffective under Padilla and Nuñez-Valdéz in advising that deportation "might" be a consequence of a guilty plea. State v. Telford, 420 N.J. Super. 465, 470-71 (2011), certif. denied, 209 N.J. 595 (2012).

(n) Drunk Driving Mandatory Jail Time Must Be Explained. The court must notify the defendant of the mandatory jail time applicable to third-time drunk driving offenders. State v. Regan, 209 N.J. Super. 596, 607 (App. Div. 1986).

10. Rejection of a Guilty Plea.

(a) The Court May Reject a Plea. "[T]here is no absolute right to have a plea accepted." State v. Salentre, 275 N.J. Super. 410, 419 (App. Div.), certif. denied, 138 N.J. 269 (1994). Accord State v. Barboza, 115 N.J. 415, 422 (1989).

(b) Self-Defense Suggested by the Facts. "[I]f a suggestion of self-defense is raised in the plea colloquy, then the trial court must inquire whether the defendant is factually asserting self-defense. If the defendant states that he is not claiming self-defense, then the plea can be

accepted. On the other hand, if the defendant claims that he used deadly force against the victim in the reasonable belief that his life was in danger, then the defendant is asserting that he did not commit the crime," and the court may not accept the plea unless the defendant waives the defense. State v. Urbina, 221 N.J. 509, 528 (2015).

(c) Standard of Review of the Trial Court's Rejection of a Plea. An appellate court reviews a lower court's refusal to accept a plea under the abuse-of-discretion standard. State v. Daniels, 276 N.J. Super. 483, 487 (App. Div. 1994), certif. denied, 139 N.J. 443 (1995). A trial court abuses its discretion when it rejects a plea because the court believes the agreed upon sentence was too lenient or a jury could convict the defendant of a greater offense. State v. Madan, 366 N.J. Super. 98, 110 (App. Div. 2004).

11. Rules Relating to the Sentence.

(a) The Sentence Must Be Based on Evidence. Like a sentence imposed after a trial, a sentence imposed pursuant to a plea agreement must be "based upon findings of fact that are grounded in competent, reasonably credible evidence." State v. Roth, 95 N.J. 334, 363 (1984). The court may "look beyond [the facts admitted in] a defendant's plea allocution." State v. Hupka, 407 N.J. Super. 489, 498 (App. Div. 2009), aff'd, 203 N.J. 222 (2010).

(b) Imposition of a Lighter Sentence and Withdrawal by the State. If the court imposes a sentence that is less than that agreed to, the State may not rescind the agreement. State v. Hess, 207 N.J. 123, 151 (2011); State v. Warren, 115 N.J. 433, 442 (1989).

(c) A Harsher Sentence Than Agreed Upon. "If the sentencing court is convinced that the sentence envisioned by the plea bargain is inappropriate, the court may vacate the plea or permit the defendant to withdraw the guilty plea." State v. V.D., 401 N.J. Super. 527, 535 (App. Div. 2008).

(d) Defendant's Right to Appeal. A defendant may appeal a sentence that was the product of a plea agreement. State v. Vasquez, 129 N.J. 189, 194 (1992).

(e) Imposition of a Suspended Term Versus Probation. A defendant's reasonable expectations under a plea bargain are not violated when the court imposes a five-year suspended sentence instead of a five-year probationary term, since the potential future consequences of both sentences are the same. State v. Cullen, 351 N.J. Super. 505, 509 (App. Div. 2002).

(f) Standard of Review of a Sentence Imposed Pursuant to a Plea Agreement. Unless the appeal raises a question of law, a court reviews a sentence imposed pursuant to a plea agreement under the abuse-of-discretion standard. State v. Sainz, 107 N.J. 283, 292 (1987); State v. Roth, 95 N.J. 334 (1984). Where a defendant receives the exact sentence bargained for, a presumption of reasonableness attaches to the sentence. State v. S.C., 289 N.J. Super. 61, 71 (App. Div.), certif. denied, 145 N.J. 373 (1996); State v. Tango, 287 N.J. Super. 416, 422 (App. Div.), certif. denied, 144 N.J. 585 (1996).

12. Plea Agreements and a Violation of Probation. On resentencing after a violation of probation, the court is not required to impose a sentence in accordance with the initial plea agreement, as "the original plea agreement does not survive a violation of probation." State v. Frank, 280 N.J. Super. 26, 40 (App. Div.), certif. denied, 141 N.J. 96 (1995).

13. Motion to Withdraw a Guilty Plea.

(a) The Slater Factors. In considering a motion to withdraw a plea that is supported by an adequate factual basis, regardless of whether the defendant makes the motion before or after sentencing, the judge must consider and balance: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." State v. Slater, 198 N.J. 145, 157-58 (2009). Accord State v. Tate, 220 N.J. 393, 404 (2015); State v. McDonald, 211 N.J. 4, 16 (2012).

(b) Standard of Review of the Slater Factors. In reviewing a trial court's findings on the Slater factors, an appellate court applies the abuse of discretion standard. State v. Tate, 220 N.J. 393, 404 (2015).

(c) Standard of Review Based on Lack of Factual Basis. In reviewing a trial court's denial of a motion to withdraw a guilty plea based on an inadequate factual basis, the appellate division owes no deference to the lower court's decision, and reviews the decision de novo. State v. Tate, 220 N.J. 393, 405 (2015).

(d) Post-Sentencing Plea Withdrawal. A defendant may withdraw a plea after the court imposes sentence "only if withdrawal of the plea is necessary to correct a 'manifest injustice.'" State v. Johnson, 182 N.J. 232, 237 (2005) (quoting R. 3:21-1). That discretionary determination necessitates a weighing of "the policy considerations which favor the finality of judicial procedures against those which dictate that no man be deprived of his liberty except upon conviction after a fair trial or after the entry of a plea of guilty under circumstances showing that it was made truthfully, voluntarily and understandably." Ibid. (quoting State v. McQuaid, 147 N.J. 464, 487 (1997)).

(e) Remedy When a Court Grants a Motion to Withdraw a Plea. Where the court grants a motion to withdraw a plea the defendant may: (1) "renegotiate the plea agreement, if the State is willing to do so;" (2) proceed to trial on all counts charged in the indictment; or (3) withdraw the motion to withdraw or vacaten the plea and accept the original sentence. State v. Johnson, 182 N.J. 232, 244 (2005) (citing State v. Kovack, 91 N.J. 476, 485 (1982)).

(f) Post-Sentencing Plea Withdrawal and Double Jeopardy. When the defendant withdraws a plea after sentencing "the slate [i]s wiped clean," and the court may impose any lawful sentence after conviction. State v. Naji, 205 N.J. Super. 208, 216 (App. Div. 1985), certif. denied, 103 N.J. 467 (1986) (noting that a defendant is "not subjected, oppressively and vexatiously, to multiple or enhanced punishment" when the defendant chooses "to be resentenced fully aware of the possible benefits and detriments").

14. Reversal of the Conviction on Appeal, Downgrading by the State. Where a reviewing court reverses a conviction that was the product of a plea agreement, the State may not downgrade the conviction to a lesser-included offense in an effort to save the plea, unless the defendant consents to the downgrade. State v. Barboza, 115 N.J. 415, 422 (1989). "[T]o allow a court to

direct the entry of a guilty plea to a lesser-included criminal offense without defendant's consent is tantamount to permitting a court to direct a verdict against a defendant in a criminal case." Id. at 423. "[I]t would also violate Rule 3:9-2, which prohibits the use of an admission elicited in support of a refused guilty plea." Ibid.

15. Misunderstanding as a Basis to Vacate a Plea.

(a) Defendant's Misunderstanding. A defendant may successfully challenge a guilty plea on the ground that he or she misunderstood the sentencing terms of the plea agreement. State v. Alevras, 213 N.J. Super. 331, 338 (App. Div. 1986) (misunderstanding applicable credits and real-time consequences of the plea); State v. Reinhardt, 211 N.J. Super. 271, 275 (App. Div. 1986) (erroneously believing the plea agreement allowed for drug treatment).

(b) Court's Misunderstanding of Merger. As a matter of fundamental fairness, a defendant may withdraw a plea on remand where the defendant detrimentally relied upon the court's mistaken understanding of the effect of merger on eligibility to drug-court special-probation. State v. Ancrum, ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 20-21 (reversing a sentence of special probation because the defendant committed an offense that precludes special probation, and that offense survived merger for purposes of determining special-probation eligibility).

16. Ineffective Assistance of Counsel Claims.

(a) Claims Based on Incorrect Information. "[A]n attorney's gross misadvice of sentencing exposure that prevents defendant from making a fair evaluation of a plea offer and induces him to reject a plea agreement he otherwise would likely have accepted constitutes remediable ineffective assistance." State v. Taccetta, 351 N.J. Super. 196, 214 (App. Div.), certif. denied, 174 N.J. 544 (2002). Accord Lafler v. Cooper, ___ U.S. ___, ___, 132 S. Ct. 1376, 1385-91, 182 L. Ed. 2d 398, 407-14 (2012).

(b) Claims Based on Failure to Convey an Offer. Failure to notify a defendant of a plea offer may result in a successful ineffective assistance of counsel claim if the defendant accepted a less favorable offer. Missouri v.

Frye, ___ U.S. ___, ___, 132 S. Ct. 1399, 1407, 1408-11, 182 L. Ed. 2d 379, 390-94 (2012).

III. MERGER

Merger prevents a defendant from being punished more than once for a single wrongdoing. Prior to imposing a sentence, the court must determine whether similar crimes merge (see section A). Section B of this Chapter addresses offenses where the Legislature has prevented merger. Section C discusses case law on merger.

A. Merger in General: Statutory Provisions

1. Statutory Authority for Merging Offenses. N.J.S.A. 2C:1-8(a)(1) provides that when conduct establishes more than one offense, the defendant may be prosecuted for each offense, but may not be convicted of more than one offense if:

> (1) "One offense is included in the other," as defined in N.J.S.A. 2C:1-8(d); or
>
> (2) One offense is a conspiracy or preparation to commit the other offense; or
>
> (3) The offenses require inconsistent findings of fact; or
>
> (4) The offenses differ only in that one prohibits "a designated kind of conduct generally," and the other prohibits "a specific instance of such conduct."

2. "One Offense Included in Another." Pursuant to N.J.S.A. 2C:1-8(d), an offense is included in another if any of the following circumstances apply:

> (1) "It is established by proof of the same or less than all the facts required to establish the commission of the offense charged";
>
> (2) "It consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein"; or
>
> (3) "It differs from the offense charged only in the respect that a less serious injury or risk of injury to the

same person, property or public interest or a lesser kind of culpability suffices to establish its commission."

Note: The New Jersey Supreme Court has criticized the N.J.S.A. 2C:1-8(a) standard as "mechanical" in nature, choosing instead to apply the more flexible pre-Code standard set forth in State v. Davis, 68 N.J. 69, 77-81 (1975). State v. Tate, 216 N.J. 300, 306-07 (2013). Section C of this chapter further discusses the Davis standard.

B. Merger Precluded: Statutory Provisions

1. Leaving a Motor Vehicle Accident Resulting in Death. N.J.S.A. 2C:11-5.1 precludes merger of the offense into a conviction for aggravated manslaughter (N.J.S.A. 2C:11-4) and vehicular homicide (N.J.S.A. 2C:11-5).

2. Second or Third Degree Leaving the Scene of a Boating Accident. N.J.S.A. 2C:11-5.2(c) prohibits merger into a conviction for aggravated manslaughter (N.J.S.A. 2C:11-4) and vehicular homicide (N.J.S.A. 2C:11-5).

3. Leaving a Motor Vehicle Accident Resulting in Serious Bodily Injury. N.J.S.A. 2C:12-1.1 precludes merger of the offense into a conviction for aggravated assault (N.J.S.A. 2C:12-1(b)) and assault by auto (N.J.S.A. 2C:12-1(c)).

4. Endangering an Injured Victim. N.J.S.A. 2C:12-1.2(d) provides that the conviction "shall not merge with a conviction of the crime that rendered the person physically helpless or mentally incapacitated."

5. Third Degree Reckless Endangerment. N.J.S.A. 2C:12-2(b)(2) instructs that the conviction "shall not merge with a conviction for any offense that the defendant intended to commit or facilitate, when the defendant violated the provisions of this section." **Note**: Effective January 11, 2016, this statute was repealed and replaced by N.J.S.A. 2C:24-7.1 (endangering another person), which does not include an anti-merger provision.

6. Luring or Enticing a Child. N.J.S.A. 2C:13-6(f) precludes merger "with any other criminal offense."

7. Luring or Enticing an Adult. N.J.S.A. 2C:13-7(f) precludes merger "with any other criminal offense."

8. Third Degree Recording and Third Degree Disclosing Images of Sexual Contact. N.J.S.A. 2C:14-9(h) precludes one offense from merger into the other.

9. Bias Intimidation. N.J.S.A. 2C:16-1(e) precludes merger with an offense, or attempt to commit an offense, in Chapters 11 through 18 of Title 2C, or with the following offenses: harassment (N.J.S.A. 2C:33-4); prohibited weapons and devices (N.J.S.A. 2C:39-3); possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4); and unlawful possession of a weapon (N.J.S.A. 2C:39-5).

10. Leader of a Cargo Theft Network, Repeat Offender. N.J.S.A. 2C:20-2.4(a)(2) precludes merger with the crime of robbery. N.J.S.A. 2C:20-2.4(b) precludes merger "with the conviction for any offense which is the object of the conspiracy."

11. Leader of Organized Retail Theft Enterprise. N.J.S.A. 2C:20-11.2 prohibits the offense from merging with any offense that is the object of the conspiracy.

12. Use of a Juvenile in Theft of an Automobile. N.J.S.A. 2C:20-17(a) prohibits merger with the offense of auto theft.

13. Leader of Auto Theft Trafficking Network. N.J.S.A. 2C:20-18 prohibits the offense from merging with any offense that is the object of the conspiracy.

14. Computer Theft. N.J.S.A. 2C:20-25(h) provides that the conviction shall not merge with a conviction under any subsection of N.J.S.A. 2C:20-25 (computer theft), with a conviction under N.J.S.A. 2C:20-31 (wrongful access, disclosure of information), or with a conspiracy or attempt to commit either offense.

15. False Use of Personal Identification. N.J.S.A. 2C:21-17.2(b) prohibits merger with another conviction under this statute or any other statute.

16. Financial Facilitation of Criminal Activity. N.J.S.A. 2C:21-27(c) precludes merger "with the conviction of any other offense constituting the criminal activity involved or from which the property was derived, and a conviction of any offense

constituting the criminal activity involved or from which the property was derived shall not merge with a conviction of an offense defined in" N.J.S.A. 2C:21-25 (financial facilitation of criminal activity).

17. Use of a Juvenile to Commit a Crime. N.J.S.A. 2C:24-9(c) prohibits merger with the underlying offense.

18. Witness Tampering. N.J.S.A. 2C:28-5(e) prohibits merger with "an offense that was the subject of the official proceeding or investigation."

19. Official Deprivation of Civil Rights. N.J.S.A. 2C:30-6(c) precludes merger with any other criminal offense.

20. Pattern of Official Misconduct. N.J.S.A. 2C:30-7(b) provides that the conviction "shall not merge with a conviction of official misconduct, official deprivation of civil rights, or any other criminal offense."

21. Solicitation of Street Gang Members. N.J.S.A. 2C:33-28(g) provides that the conviction shall not merge with another conviction under this statute, nor with "a conviction for any criminal offense that the actor committed while involved in criminal street gang related activity."

22. Leader of a Dog Fighting Network. N.J.S.A. 2C:33-32(c) (effective Aug. 10, 2015) provides that the conviction "shall not merge with the conviction for any offense, nor shall such other conviction merge with a conviction under this section, which is the object of the conspiracy."

23. Leader of a Narcotics Trafficking Network. N.J.S.A. 2C:35-3 precludes merger with any offense that is the object of the conspiracy.

24. Booby Traps in the Manufacturing or Distribution of Drugs. N.J.S.A. 2C:35-4.1(e) prohibits the conviction from merging with a conviction for any drug offense in Chapter 35 of Title 2C, or a conspiracy or attempt to commit a Chapter 35 offense.

25. Employing a Juvenile in a Drug Distribution Scheme. N.J.S.A. 2C:35-6 provides that the conviction shall not merge with a conviction for a violation of N.J.S.A. 2C:35-3 (leader of narcotics trafficking network), N.J.S.A. 2C:35-4 (maintaining or operating a CDS production facility), N.J.S.A. 2C:35-5

(manufacturing, distributing or dispensing a CDS), or N.J.S.A. 2C:35-9 (strict liability for drug induced death).

26. Manufacturing, Distributing or Dispensing a Controlled Dangerous Substance on School Property. N.J.S.A. 2C:35-7(c) precludes the conviction from merging with a conviction under N.J.S.A. 2C:35-5 (manufacturing, distributing or dispensing a CDS) or N.J.S.A. 2C:35-6 (employing a juvenile in a drug distribution scheme).

27. Drug Distribution Within 500 Feet of Public Property. N.J.S.A. 2C:35-7.1(c) precludes merger with a conviction under N.J.S.A. 2C:35-5 (manufacturing, distributing or dispensing CDS), or N.J.S.A. 2C:35-6 (employing a juvenile in a drug distribution scheme).

28. Drug Induced Death. N.J.S.A. 2C:35-9(d) precludes merger "with a conviction for leader of narcotics trafficking network, maintaining or operating a controlled dangerous substance production facility, or for unlawfully manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense the controlled dangerous substance or controlled substance analog which resulted in the death."

29. Terrorism. N.J.S.A. 2C:38-2(f) precludes merger with any other offense.

30. Possession of a Weapon During a Drug or Bias Crime. N.J.S.A. 2C:39-4.1(d) prohibits merger with any of the following offenses:

- Leader of a narcotics trafficking network (N.J.S.A. 2C:35-3);
- Maintaining or operating a drug production facility (N.J.S.A. 2C:35-4);
- Manufacturing or distributing drugs (N.J.S.A. 2C:35-5);
- Manufacturing and dispensing Gamma Hydroxybutyrate (N.J.S.A. 2C:35-5.2);
- Manufacturing and dispensing Flunitrazepam (N.J.S.A. 2C:35-5.3);

- Employing a juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6);

- Possession of drugs on or near school property (N.J.S.A. 2C:35-7);

- Distribution or possession of drugs on public property (N.J.S.A. 2C:35-7.1);

- Possession, distribution, or manufacturing imitation drugs (N.J.S.A. 2C:35-11); and

- Bias intimidation (N.J.S.A. 2C:16-1).

31. Leader of Firearms Trafficking Network. N.J.S.A. 2C:39-16 prohibits merger with any offense that is the object of the conspiracy.

C. Standards Regarding Merger: Case Law

1. Merger Described. Merger prohibits a defendant from being punished more than once for a single wrongdoing. State v. Tate, 216 N.J. 300, 302 (2013); State v. Davis, 68 N.J. 69, 77-81 (1975). Under the New Jersey Constitution, the right derives from "double jeopardy, substantive due process, or some other legal tenet." State v. Davis, 68 N.J. 69, 77 (1975). Accord State v. Diaz, 144 N.J. 628, 637 (1996). Under the Federal Constitution, the right falls within the prohibition against double jeopardy. State v. Dillihay, 127 N.J. 42, 47-48 (1992).

2. The New Jersey Davis Standard. In determining whether a defendant may be punished for two convictions, a court must first determine whether the Legislature intended to create separate offenses. State v. Davis, 68 N.J. 69, 78 (1975). If the Legislature intended to create two separate offenses, then the court must decide whether the offenses are so similar that conviction for both is nonetheless prohibited by the Constitution. Id. at 81. The court should employ a "flexible approach" that considers the elements of the crime and the facts of the case "attended by considerations of fairness and fulfillment of reasonable expectations." Ibid. (internal quotation omitted).

Considerations. The Davis standard requires the court to consider the following, in addition to any other relevant circumstances: "the time and place of each purported violation"; whether the proof for each offense is the same; "whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed." State v. Davis, 68 N.J. 69, 81 (1975). The weight that any factor receives "depend[s] on the circumstances of the particular case." Ibid.

3. The Federal Blockburger Test. Federal law applies a narrower test than the Davis standard to determine whether offenses are the same for purposes of merger. Rutledge v. United States, 517 U.S. 292, 297-98, 116 S. Ct. 1241, 1245-46, 134 L. Ed. 2d 419, 426 (1996); Blockburger v. United States, 284 U.S. 299, 302, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932). The federal Blockburger test asks whether one offense requires proof of a fact that the other offense does not require. 284 U.S. at 304, 52 S. Ct. at 182, 76 L. Ed. at 309. This test mirrors the standard set forth in N.J.S.A. 2C:1-8(a), which our Court has criticized as "mechanical." State v. Truglia, 97 N.J. 513, 520 (1984).

4. Legislative Authority to Impose Multiple Punishments. Under federal law, the Legislature may impose multiple punishments for one offense, so long as it clearly expresses its intention to do so. Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S. Ct. 673, 679, 74 L. Ed. 2d 535, 544 (1983). The New Jersey Supreme Court has not determined "whether or to what extent New Jersey's constitutional guarantee affords greater protection." State v. Dillihay, 127 N.J. 42, 47-48 (1992) (citing State v. Churchdale Leasing, 115 N.J. 83, 108 (1989)). But in Davis, the Court said that if the Legislature did "no more than simply apply different labels to what is in fact the same charge, it would plainly exceed its authority." Id. at 80. In a later decision the Court said that this proposition expressed "a more restrictive view of legislative power" than that authorized by the United States Supreme Court in Hunter. State v. Churchdale Leasing, 115 N.J. 83, 123 (1989).

5. Greater Offenses Do Not Merge. "No crime of greater degree or culpability can merge into one of lesser degree or culpability." State v. Hammond, 231 N.J. Super. 535 (App. Div. 1989), certif. denied, 117 N.J. 636 (1989). Accord State v. Dillihay, 127 N.J. 42, 49-50 (1992); State v. Battle, 256 N.J.

Super. 268, 283 (App. Div.), certif. denied, 130 N.J. 393 (1992).

6. Mandatory Penalties. "[M]andatory penalties attendant upon a lesser charge" survive merger and must be included in the sentence on the greater offense. State v. Frank, 445 N.J. Super. 98, 109 (App. Div. 2016) (quoting State v. Baumann, 340 N.J. Super. 557 (App. Div. 2001), in holding that a mandatory penalty for a motor vehicle violation survived merger). See also State v. Wade, 169 N.J. 302, 303 (2001) (driving while intoxicated); State v. Dillihay, 127 N.J. 42, 55 (1992) (drug distribution in a school zone); State v. Connell, 208 N.J. Super. 688, 696 (App. Div. 1986) (the Graves Act).

7. The Harshest Sentence Must Be Imposed. When offenses merge, the court must impose "the more severe aspects of the sentence for each offense." State v. Robinson, 439 N.J. Super. 196, 200 (App. Div. 2014) (imposing the maximum term on the conviction that merged and the parole ineligibility term on the conviction that survived merger to impose the most severe sentence authorized by the two convictions), certif. denied, 221 N.J. 492 (2015).

8. Merger of the General With the Specific. Convictions for lewdness and endangering the welfare of a child merge when the basis of the conviction for endangering the welfare of a child is the same as the facts that establish lewdness. State v. Hackett, 166 N.J. 66, 77 (2001).

9. Additional Element. Aggravated arson and first degree arson do not merge because first degree arson requires an additional element of offering or accepting payment to start a fire. State v. Allison, 208 N.J. Super. 9, 24-25 (App. Div.), certif. denied, 102 N.J. 370 (1985).

10. Separate Culpable Harm. Similar crimes will not merge when they involve separate culpable harms. State v. Soto, 385 N.J. Super. 257, 264-65 (App. Div.), certif. denied, 188 N.J. 491 (2006) (drug possession within 1000 feet of a school and unlawful possession of a firearm while committing a drug offense do not merge); State v. Walker, 385 N.J. Super. 388, 409-11 (App. Div.), certif. denied, 187 N.J. 83 (2006) (maintaining a structure within which drugs are sold and possession of drugs with intent to distribute do not merge).

11. Different Protected Interests. Aggravated sexual assault of a child, (N.J.S.A. 2C:14-2(a)(1)) and child endangerment (N.J.S.A. 2C:24-4(a)) do not merge because the statutes protect different interests. State v. Miller, 108 N.J. 112, 118 (1987).

12. Different Elements. Aggravated assault (N.J.S.A. 2C:12-1(b)(1) and (4)) and possession of a handgun with the purpose of using it unlawfully against another (N.J.S.A. 2C:39-4(a)) do not merge because the elements of the crimes differ. State v. Truglia, 97 N.J. 513, 521 (1984).

13. Separate Victims. Aggravated assault convictions will not merge when the defendant harmed separate victims. State v. Lewis, 223 N.J. Super. 145, 152 (App. Div.), certif. denied, 111 N.J. 584 (1988).

14. Conspiracy and Preparatory Offenses. When the only purpose of the conspiracy or preparatory offense was to commit the substantive offense, the convictions will merge. State v. Grunow, 102 N.J. 133, 147 (1986); State v. Hardison, 99 N.J. 379, 386-91 (1985).

15. Broader and Independent Purpose. A weapons offense will not merge with a substantive offense when the evidence supports a finding that the purpose in possessing the weapon was broader than, or independent of, the purpose of the substantive crime, and the jury charge did not limit the defendant's purpose to the commission of the substantive crime. State v. Diaz, 144 N.J. 628, 636-37 (1996). An example is when a defendant uses a weapon to commit a robbery and also to frighten victims. Ibid. The purpose in possessing the weapon exceeds the intent to commit a robbery, thus the two convictions do not merge. Ibid. Accord State v. Tate, 216 N.J. 300, 302 (2013) (explaining that "a conviction for third-degree possession of a weapon for an unlawful purpose must merge with a conviction for first-degree aggravated manslaughter when the evidence does not support the existence of another unlawful purpose for possession of the weapon"); State v. Best, 70 N.J. 56, 65-67 (1976) (merging a conviction for possession of a weapon with a robbery conviction).

16. Motor Vehicle Offenses. Title 39 motor vehicle violations "fall within the generic category of petty offenses that do not fit within the Code's definition of a lesser-included criminal offense." State v. Frank, 445 N.J. Super. 98, 108 (App. Div. 2016) (quoting State v. Stanton, 176 N.J. 75, 98, cert. denied,

540 U.S. 903, 124 S. Ct. 259, 157 L. Ed. 2d 187 (2003)). However, when motor vehicle offenses are consolidated with indictable offenses for purposes of trial, it is appropriate for the court to merge a motor vehicle violation with a criminal conviction. Ibid.

17. Verdicts. When the verdict does not answer whether the defendant possessed a weapon with a purpose broader than that needed to commit the substantive offense, the court should not merge the weapons offense unless: (1) the indictment charged possession of a "weapon with a broader unlawful purpose, either generally or specifically, than using the weapon to" commit the substantive offense; (2) the evidence supports a finding of broader purpose; (3) the judge instructed the jury on the difference between possession with the specific unlawful purpose to commit the substantive crime and a broader unlawful purpose; and (4) the verdict "express[es] the jury's conclusion that the defendant had a broader unlawful purpose." State v. Diaz, 144 N.J. 628, 639 (1996).

18. Special Verdict Form. When a defendant is charged with felony murder and more than one felony that resulted in the murder, the court should ask the jury to designate on a special verdict form which felony or felonies constitute the predicate crime. State v. Hill, 182 N.J. 532, 548 (2005). "If the jury designates more than one felony, . . . the trial court at sentencing is to merge only the predicate felony that set in motion the chain of events leading to the murder--the 'first-in-time' predicate felony--into the felony murder conviction." Ibid.

19. Ambiguity Resolved in Defendant's Favor. "Where one set of facts would support merger and another not, and neither the charge to the jury nor the verdict gives any clue as to which set of facts the jury chose, the convictions should merge." State v. Bull, 268 N.J. Super. 504, 516 (App. Div. 1993), certif. denied, 135 N.J. 304 (1994).

20. Jury charge. If the jury charge instructed that the purpose in possessing a weapon was to use it against a victim in the substantive offense, then the weapons offense must merge with the substantive offense, even if the evidence could have supported a separate unlawful purpose for the weapons offense. State v. Diaz, 144 N.J. 628, 641 (1996).

21. Possession and Distribution Convictions. A conviction for possession of a controlled dangerous substance (N.J.S.A. 2C:35-10) will not merge with a conviction for distribution of a controlled dangerous substance (N.J.S.A. 2C:35-5) if the "core conduct" and "mental element" of the offenses is different; if the two are not different, then the offenses will merge. State v. Davis, 68 N.J. 69, 82-83 (1975) (distinguishing State v. Booker, 86 N.J. Super. 175, 177-78 (App. Div. 1965)). See also State v. Miller, ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 20) (fourth degree possession of child pornography ((N.J.S.A. 2C:24-4(b)(5)(b)) merged with second degree distribution of child pornography (N.J.S.A. 2C:24-4(b)(5)(a)) because "the crimes were reasonably proximate in time and place" and the defendant's use of computer file-sharing programs "was a necessary ingredient and integral part of both" crimes).

22. Drug Distribution and Distribution in a School Zone. While N.J.S.A. 2C:35-7 precludes merger of distribution-within-a-school-zone with a N.J.S.A. 2C:35-5 distribution conviction, subjecting a defendant to punishment under both statutes would violate principles of double jeopardy because N.J.S.A. 2C:35-5, does not require proof of any additional element. State v. Dillihay, 127 N.J. 42, 45, 51 (1992); State v. Brana, 127 N.J. 64, 67 (1992). To comply with double jeopardy principles, a N.J.S.A. 2C:35-7 offense may merge with another drug offense, so long as the "period of parole ineligibility mandated by Section 7 is preserved." State v. Dillihay, 127 N.J. 42, 54 (1992); State v. Brana, 127 N.J. 64, 67 (1992).

23. Drug Distribution and Distribution on Public Property. The same rationale applies to the anti-merger provision of N.J.S.A. 2C:35-7.1 (precluding merger of a conviction for distributing within 500 feet of a public housing facility, public park, or public building with a conviction under N.J.S.A. 2C:35-5 (drug distribution), or N.J.S.A. 2C:35-6 (employing a juvenile to distribute drugs)). State v. Gregory, 336 N.J. Super. 601, 607 (App. Div. 2001) (merging a third degree conviction under N.J.S.A. 2C:35-5 into a second degree conviction under N.J.S.A. 2C:35-7.1); State v. Parker, 335 N.J. Super. 415, 420 (App. Div. 2000) (holding that a "third degree conviction under N.J.S.A. 2C:35-7 should have merged into" the defendant's N.J.S.A. 2C:35-7.1 second degree conviction, with the N.J.S.A. 2C:35-7 mandatory minimum term's surviving merger).

24. Drug Induced Death and Drug Distribution. Although the anti-merger provision of N.J.S.A. 2C:35-9 (drug induced death)

explicitly prohibits merger into a conviction under N.J.S.A. 2C:35-5(a) (drug distribution), a Section 5 offense will merge into a Section 9 offense if the crimes arise out of the same transaction. State v. Maldonado, 137 N.J. 536, 583-84 (1994).

25. Drug Induced Death and Distribution Within a School Zone. These two offenses (N.J.S.A. 2C:35-9 and N.J.S.A. 2C:35-7) do not merge because they require different proofs. State v. Maldonado, 137 N.J. 536, 582 (1994).

26. Possession of a Weapon During a Drug Crime. N.J.S.A. 2C:39-4.1(d) (precluding merger of a conviction for possession of a weapon while committing certain drug offenses with the underlying drug conviction), does not violate principles of due process and double jeopardy under either the Federal or State Constitution. State v. Martinez, 387 N.J. Super. 129, 142-46 (App. Div.), certif. denied, 188 N.J. 579 (2006); State v. Soto (II), 385 N.J. Super. 257, 261-66 (App. Div.), certif. denied, 188 N.J. 491 (2006).

27. Booby Traps During Drug Distribution or Manufacturing. N.J.S.A. 2C:35-4.1(e) (precluding merger of a conviction for using booby traps in connection with drug manufacturing or distribution with a drug offense) does not violate a defendant's right of due process or protection against double jeopardy under either the Federal or State Constitution. State v. Walker, 385 N.J. Super. 388, 408-11 (App. Div.), certif. denied, 187 N.J. 83 (2006).

28. Penalties and Assessments. The court may not impose penalties and assessments on a merged conviction. State v. Francis, 341 N.J. Super. 67, 69 (App. Div. 2001).

29. Merged Crimes Are Not Extinguished. Because merger does not extinguish the conviction on the lesser charge, if the conviction on the greater charge is reversed on appeal the State may request the court to impose sentence on the lesser offense instead of retrying the defendant on the greater offense. State v. Pennington, 273 N.J. Super. 289 (App. Div.), certif. denied, 137 N.J. 313 (1994). This principle also applies where the State retries the defendant on the greater offense and the jury acquits the defendant of that offense. State v. Becheam, 399 N.J. Super. 268, 275-76 (Law Div. 2007).

30. Merged Offenses and Drug Court Eligibility. An offense that precludes a sentence of drug-court special-probation, pursuant

to N.J.S.A. 2C:35-14(b), survives merger and renders a defendant ineligible for special probation. State v. Ancrum, ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 18-19) (reversing a sentence of special probation because the defendant committed an aggravated assault). The merged offense is not extinguished for purposes of determining special-probation eligibility. Ibid.

31. Merger Is Inapplicable to Charges. Convictions merger; charges do not. State v. Martin, 335 N.J. Super. 447, 450 (App. Div. 2001). Thus, the court may not merge a charged offense into an offense to which the defendant pleads guilty. Ibid.

32. Illegal Sentence. "[T]he failure to merge convictions results in an illegal sentence for which there is no procedural time limit for correction," because merger implicates a defendant's substantive state constitutional rights. State v. Romero, 191 N.J. 59, 80 (2007).

33. Plea Agreements.

(a) Waiver. A defendant may waive the right to merger in a plea agreement. State v. Crawley, 149 N.J. 310, 319 (1997); State v. Truglia, 97 N.J. 513, 523-24 (1984).

(b) Information at Plea Entry. "[W]here the ultimate resolution of the merger issue is uncertain, a guilty plea need not necessarily be overturned when a trial court fails to inform a defendant about the possibility of merger because such a failure does not misinform the defendant about his potential sentence." State v. Crawley, 149 N.J. 310, 316-17 (1997).

IV. IMPRISONMENT

In deciding whether to impose a term of imprisonment, the court must first consider whether the offense is subject to the presumption of imprisonment or the presumption of non-imprisonment (see section A). If the court decides to impose a sentence of imprisonment, the court must set a term within the ordinary range applicable to the offense (see section B), unless the court decides to downgrade the offense (see Chapter I on sentencing procedure) or to impose an extended term (see Chapter VIII on extended terms). The location of incarceration depends upon the length of the sentence (see section C(4)). For statutory rules and case law relating to imprisonment, see sections C and D, respectively.

A. Presumptions in Favor of and Against Imprisonment: Statutory Provisions

1. Statutory Authority on the Presumption of Imprisonment. N.J.S.A. 2C:44-1(d) provides that the court shall impose a sentence of imprisonment on a defendant convicted of: (1) a first degree crime; (2) a second degree crime; (3) a third degree crime if the court finds (a) the defendant is involved in organized criminal activity, (b) the offense involved an act of domestic violence in the presence of a child under sixteen years of age, or (c) the offense involved an act of domestic violence and " the defendant committed at least one act of domestic violence on more than one occasion," N.J.S.A. 2C:44-1(a)(15); or (4) a third degree crime of auto theft or unlawful taking of an auto if the defendant "has previously been convicted of either offense," N.J.S.A. 2C:44-1(d).

> **An Exception to the Presumption of Imprisonment.** The court need not impose a sentence of imprisonment on a defendant subject to the presumption of imprisonment if the court concludes, "having regard to the character and condition of the defendant, . . . that his [or her] imprisonment would be a serious injustice which overrides the need to deter such conduct by others." N.J.S.A. 2C:44-1(d).

2. Statutory Authority on the Presumption of Non-Imprisonment. N.J.S.A. 2C:44-1(e) instructs: "The court shall deal with a person convicted of an offense other than a crime of the first

or second degree, who has not previously been convicted of an offense, without imposing a sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his [or her] imprisonment is necessary for the protection of the public under the criteria set forth" in N.J.S.A. 2C:44-1(a) (the aggravating factors).

3. Offenses to Which the Presumption of Non-Imprisonment Does Not Apply. The presumption of non-imprisonment does not apply if the court finds that (a) the defendant is involved in organized criminal activity, the offense involved an act of domestic violence in the presence of a child under sixteen years of age, the offense involved an act of domestic violence and " the defendant committed at least one act of domestic violence on more than one occasion," N.J.S.A. 2C:44-1(a)(15), or (b) the defendant committed any of the following third degree crimes (N.J.S.A. 2C:44-1(e)):

- Third degree theft of a motor vehicle (N.J.S.A. 2C:20-2);
- Third degree unlawful taking of a motor vehicle;
- Third degree eluding (N.J.S.A. 2C:29-2);
- Third degree using a false government document (N.J.S.A. 2C:21-2.1(c));
- Third degree distributing, manufacturing, or possessing an item containing personal identifying information of another person (N.J.S.A. 2C:21-17.3(b));
- Third or fourth degree bias intimidation (N.J.S.A. 2C:16-1);
- Third degree assault (N.J.S.A. 2C:12-1(b)(12));
- Third degree knowingly leaving the scene of an accident that results in serious bodily injury to another person (N.J.S.A. 2C:12-1.1);
- Third or fourth degree gang criminality (N.J.S.A. 2C:33-29); or

- Third or fourth degree promotion of organized street crime (N.J.S.A. 2C:33-30).

The following offenses also provide that the presumption of non-imprisonment shall not apply:

- Leaving the scene of a boating accident (N.J.S.A. 2C:11-5.2(a));

- A first offense of third degree interference with the custody of a child (N.J.S.A. 2C:13-4(a));

- Possession of 100 or more items depicting the sexual exploitation or abuse of a child (Note that the court may make an exception if "imprisonment would be a serious injustice which overrides the need to deter such conduct by others" (N.J.S.A. 2C:24-4(b)(5)(b));

- Corrupting or influencing a jury (N.J.S.A. 2C:29-8(c));

- Pattern of official misconduct, first time offender (N.J.S.A. 2C:30-7(b)); and

- Drug distribution to a minor or a pregnant female (N.J.S.A. 2C:35-8).

B. Ordinary Terms of Imprisonment: Statutory Provisions

1. Statutory Authority for Ordinary Terms of Imprisonment. The Code classifies crimes into four degrees (first through fourth). N.J.S.A. 2C:43-1(a). If the Code is silent on the degree of crime, or if the offense is designated a misdemeanor, then the crime is one of the fourth degree. N.J.S.A. 2C:43-1(a). A high misdemeanor is a crime of the third degree. N.J.S.A. 2C:43-1(b).

N.J.S.A. 2C:43-6(a) sets forth the following ordinary terms of imprisonment for first through fourth degree crimes, while N.J.S.A. 2C:43-8 provides for disorderly persons and petty disorderly persons offense:

- First degree crime: between ten and twenty years;
- Second degree crime: between five and ten years;
- Third degree crime: between three and five years;
- Fourth degree crime: not to exceed eighteen months;
- Disorderly persons offense: a term not to exceed six months; and
- Petty disorderly persons offense: a term not to exceed thirty days.

2. Enhanced Ordinary Terms for Certain Offenses. The following offenses have enhanced ordinary terms.

(a) Murder. A murder conviction requires one of the following two sentences:

(1) Thirty-Year Minimum. A defendant must serve between thirty years to life imprisonment for first degree murder with a thirty-year period of parole ineligibility. N.J.S.A. 2C:11-3(b)(1). The thirty-year minimum term also applies to a conviction for an attempt or conspiracy to murder five or more persons. N.J.S.A. 2C:5-4(a).

(2) Life Without Parole. If the following circumstances apply, the defendant "shall be sentenced" to life imprisonment without the possibility of parole:

(i) The victim was a law enforcement officer murdered while performing official duties or because of his or her official status, N.J.S.A. 2C:11-3(b)(2); or

(ii) The victim was less than fourteen years old and the murder was carried out during a sexual assault (N.J.S.A. 2C:14-2) or criminal sexual contact (N.J.S.A. 2C:14-3), N.J.S.A. 2C:11-3(b)(3); or

(iii) The defendant purposely or knowingly caused the death, or serious bodily injury resulting in death, "by his her own conduct," or procured the commission of the offense by the payment or promise of payment of something of pecuniary value, or solicited the commission of the offense as a leader of a narcotics trafficking network, or committed a crime of terrorism during which a murder occurred, and a jury finds beyond a reasonable doubt that any of the twelve aggravating factors listed in N.J.S.A. 2C:11-3(b)(4), are applicable. N.J.S.A. 2C:11-3(b)(4).

(b) First Degree Aggravated Manslaughter: between ten and thirty years (N.J.S.A. 2C:11-4(c)).

(c) Kidnapping in the First Degree:

(1) Victim Is Sixteen Years of Age or Older: between fifteen and thirty years. N.J.S.A. 2C:13-1(c)(1).

(2) Victim Is Less Than Sixteen Years Old: twenty-five years without parole eligibility, or a term between twenty-five years and life imprisonment with a parole ineligibility period of twenty-five years, if: (a) the defendant subjected the victim to a sexual assault (N.J.S.A. 2C:14-2), a criminal sexual contact (N.J.S.A. 2C:14-3), or endangerment (N.J.S.A. 2C:24-4) or (b) the defendant sold or delivered the victim for pecuniary gain, and the sale did not lead to the victim's return to a parent or guardian. N.J.S.A. 2C:13-1(c)(2).

(d) Human Trafficking: twenty years without parole eligibility, or a prison term between twenty years and life with a parole ineligibility period of twenty years. N.J.S.A. 2C:13-8(d).

(e) Carjacking: between ten and thirty years with a five year period of parole ineligibility. N.J.S.A. 2C:15-2(b).

(f) Bias Intimidation: where the underlying crime is a crime of the first degree, between fifteen and thirty years. N.J.S.A. 2C:16-1(c).

(g) Unauthorized Acts at a Nuclear Electric Generating Plant: between fifteen and thirty years. N.J.S.A. 2C:17-7.

(h) Gang Criminality: where the underlying crime is a crime of first degree, between fifteen and thirty years. N.J.S.A. 2C:33-29(b).

(i) Promoting Organized Street Crime: between fifteen and thirty years. N.J.S.A. 2C:33-30(b).

(j) Leader of a Narcotics Trafficking Network: life imprisonment with a twenty-five-year period of parole ineligibility. N.J.S.A. 2C:35-3. (Note that pursuant to N.J.S.A. 2C:35-12, the State may waive this enhanced term. See Chapter XIV on drug offender sentencing for further discussion.)

(k) Drug Distribution to a Minor or a Pregnant Female: "twice the term of imprisonment, fine and penalty . . . authorized or required to be imposed by" any provision of Title 2. N.J.S.A. 2C:35-8. (Note that pursuant to N.J.S.A. 2C:35-12, the State may waive this enhanced term. See Chapter XIV on drug offender sentencing for further discussion.)

(l) Terrorism:

(1) Death Does Not Result: thirty years without parole eligibility, or a term between thirty years and life imprisonment with a parole ineligibility period of thirty years. N.J.S.A. 2C:38-2(b)(1).

(2) Death Results: life imprisonment without parole. N.J.S.A. 2C:38-2(b)(2).

(m) Producing or Possessing Chemical Weapons, Biological Agents, or Nuclear or Radiological Devices:

(1) Death Does Not Result: thirty years without parole eligibility, or a term of years between thirty years and life imprisonment with a parole ineligibility period of thirty years. N.J.S.A. 2C:38-3(a)(1).

(2) Death Results: life imprisonment without parole. N.J.S.A. 2C:38-3(a)(2).

C. Standards Relating to Imprisonment: Statutory Provisions

1. Guilty Pleas and Failure to Plead May Not Be Considered in Deciding Whether to Impose a Prison Term. Pursuant to N.J.S.A. 2C:44-1(c)(1), the court may not consider a plea of guilty or a failure to plead guilty in deciding whether to withhold or impose a sentence of imprisonment.

2. The Court Must Consider the Real-Time Consequences of Incarceration. N.J.S.A. 2C:44-1(c)(2) instructs: "When imposing a sentence of imprisonment the court shall consider the defendant's eligibility for release under the law governing parole, including time credits awarded pursuant to Title 30 of the Revised Statutes, in determining the appropriate term of imprisonment."

3. Presumptive Terms Eliminated. The Code used to require the court to impose presumptive terms set forth in N.J.S.A. 2C:44-1(f) unless the aggravating and mitigating factors warranted a longer or shorter term. In State v. Natale II, 184 N.J. 458, 487 (2005), the Court declared this practice unconstitutional under the Sixth Amendment. See section D of this chapter for further discussion.

4. Statutory Authority for Places of Imprisonment. N.J.S.A. 2C:43-10(a) to (c) provides for the following places of incarceration based on the length of the sentence:

> **(a) Terms of One Year or Longer.** Unless the court imposes an indeterminate term pursuant to the young adult offender statute (N.J.S.A. 2C:43-5), and except as provided in N.J.S.A. 2C:43-10(b) below, "when a person is sentenced to imprisonment for any term of 1 year or greater, the court shall commit him [or her] to the custody of the Commissioner of the Department of Corrections for the term of his [or her] sentence and until released in accordance with law."
>
> **(b) Terms Not Exceeding Eighteen Months.** A defendant sentenced to imprisonment for a term not exceeding eighteen

months may serve the time at a county penitentiary or workhouse.

(c) Terms Less Than One Year. A defendant sentenced to one year or less shall serve the term at "the common jail of the county, the county workhouse or the county penitentiary . . . . In counties of the first class having a workhouse or penitentiary, however, no sentence exceeding 6 months shall be to the common jail of the county."

5. Place of Imprisonment Based Upon the Aggregate Sentence. For purposes of deciding the location of imprisonment, the court shall aggregate the length of the sentence. N.J.S.A. 2C:43-10(d).

D. Standards Relating to Imprisonment: Case Law

1. Deciding Whether a Presumption Is Applicable. The first step in imposing a term of incarceration is to determine whether the presumption of incarceration (N.J.S.A. 2C:44-1(d)) is applicable. Sate v. Rivera, 124 N.J. 122, 125-26 (1991). The presumptions for and against incarceration are not all-inclusive. For example, a second-time offender charged with third or fourth degree crimes is generally not subject to either presumption. State v. Maurer, 438 N.J. Super. 402, 411 (App. Div. 2014); State v. Devlin, 234 N.J. Super. 545, 555 (App. Div.), certif. denied, 117 N.J. 653 (1989). Accord State v. Crawford, 379 N.J. Super. 250, 259 (App. Div. 2005) (explaining that neither presumption applied because the "defendant was convicted of three fourth-degree crimes but he was not a first-time offender").

2. When Neither Presumption Applies. Where neither presumption applies, the court must weigh the aggravating and mitigating factors to determine whether incarceration is appropriate. State v. Baylass, 114 N.J. 169, 173 (1989).

3. The Presumption of Imprisonment and Plea Agreements. When a defendant pleads guilty to a first or second degree crime, the presumption of imprisonment applies even if the plea agreement can be construed as providing that the defendant would be sentenced as if for a crime of a lesser degree. State v. O'Connor, 105 N.J. 399, 404-05 (1987). The presumption's

applicability is determined by the offense for which the defendant is convicted. Ibid.

4. Overcoming the Presumption of Imprisonment, the Serious Injustice Exception. "The 'serious injustice' exception to the presumption of imprisonment applies only in 'truly extraordinary and unanticipated circumstances.'" State v. Jabbour, 118 N.J. 1, 7 (1990) (quoting State v. Roth, 95 N.J. 334, 358 (1984)). To satisfy the standard, the defendant should show that he or she is "idiosyncratic." State v. Jarbath, 114 N.J. 394, 408 (1989). See State v. E.R., 273 N.J. Super. 262, 274-75 (App. Div. 1994) (uncontradicted prognosis of imminent death within six months due to AIDS-related disease constitutes "idiosyncratic" situation). The court must also consider "the gravity of the offense with respect to the peculiar facts of a case to determine how paramount deterrence will be in the [sentencing] equation." State v. Evers, 175 N.J. 355, 395 (2003).

(a) Clear and Convincing Evidence. The court should determine whether there is "clear and convincing evidence that there are relevant mitigating factors present to an extraordinary degree and, if so, whether cumulatively, they so greatly exceed any aggravating factors that imprisonment would constitute a serious injustice overriding the need for deterrence." State v. Evers, 175 N.J. 355, 393-94 (2003).

(b) Mitigating Factors Preponderate and First-Time Offenders. The court is not justified in finding the presumption of imprisonment overcome on the basis that the mitigating factors preponderate and the defendant is a first-time offender. State v. Evers, 175 N.J. 355, 388 (2003). Rather, these are reasons to downgrade a sentence or impose a sentence at the low end of the sentencing range. Ibid. Accord State v. Lebra, 357 N.J. Super. 500, 511 (App. Div. 2003).

(c) Hardship. A defendant's finding incarceration difficult and the hardship that will come to his or her family are not sufficient reasons to overcome the presumption of imprisonment and the need for deterrence. State v. Jabbour, 118 N.J. 1, 8 (1990); State v. Johnson, 118 N.J. 10, 17-19 (1990). This is true even if the defendant is a police officer who might face peculiar hardship in prison. State v. Corso, 355 N.J. Super. 518,

528-29 (App. Div. 2002), certif. denied, 175 N.J. 547 (2003).

(d) Court's Disagreement With the Verdict. Disagreement with a jury verdict cannot justify a finding of "serious injustice" so as to overcome the presumption of incarceration. State v. Cooke, 345 N.J. Super. 480, 489-90 (App. Div. 2001), certif. denied, 171 N.J. 340 (2002).

5. Overcoming the Presumption of Non-Imprisonment. To overcome the presumption of non-imprisonment, "the sentencing court must be persuaded by a standard that is higher than 'clear and convincing' evidence that incarceration is necessary." State v. Gardner, 113 N.J. 510, 517-18 (1989). An element of the crime cannot be an aggravating factor, and general deterrence alone is insufficient to overcome the presumption. Id. at 517-20.

6. Enhanced Ordinary Terms and Cruel and Unusual Punishment.

(a) Leader of a Drug Trafficking Network Life Imprisonment. The requirement that a leader of a narcotics trafficking network serve an ordinary term of life imprisonment with twenty-five years of parole ineligibility (N.J.S.A. 2C:35-3) does not constitute cruel and unusual punishment. State v. Kadonsky, 288 N.J. Super. 41, 45 (App. Div.), certif. denied, 144 N.J. 589 (1996).

(b) Carjacking. The enhanced imprisonment range of ten to thirty years with a five year period of parole ineligibility for carjacking (N.J.S.A. 2C:15-2) does not constitute cruel and unusual punishment. State v. Zadoyan, 290 N.J. Super. 280, 286 (App. Div. 1996); State v. Williams, 289 N.J. Super. 611, 617-18 (App. Div.), certif. denied, 145 N.J. 375 (1996).

(c) Life Without Parole for Juvenile Offenders. "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller v. Alabama, ___ U.S. ___, ___, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (2012). See also Montgomery v. Louisiana, ___ U.S. ___, ___, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599, 620 (2016) (ruling that Miller v. Alabama applies retroactively). The Miller rule "applies with equal strength to a sentence that is the practical equivalent of life without parole." State v. Zuber, 227 N.J. 422, 447 (2017). "The focus at a juvenile's

sentencing hearing belongs on the real-time consequences of the aggregate sentence. To that end, judges must evaluate the Miller factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense." Id. at 447.

7. Presumption of Imprisonment and Split Sentences. Where the presumption of imprisonment applies and the facts present no basis to overcome the presumption, the court may not impose a "split sentence" (a probationary term with a jail term as a condition of probation, N.J.S.A. 2C:43-2(b)(2)). State v. O'Connor, 105 N.J. 399, 410-11 (1987). The jail term in a split sentence is a condition of probation and does not equate to imprisonment for purposes of the presumption of imprisonment. Ibid.

8. Presumption of Non-Imprisonment and Split Sentences. Where the presumption of non-imprisonment applies and the facts present no basis to overcome the presumption, the court may impose a split sentence of probation with a jail term. State v. Hartye, 105 N.J. 411, 418-19 (1987).

9. Prior Record. When considering a defendant's prior record, an "offense" includes disorderly persons and petty disorderly persons offenses. State v. Battle, 256 N.J. Super. 268, 285 (App. Div.), certif. denied, 130 N.J. 393 (1992); State v. Kates, 185 N.J. Super. 226, 227-28 (Law Div. 1982). A prior uncounseled conviction for a nonindictable offense is not an offense for purposes of enhanced sentencing. State v. Garcia, 186 N.J. Super. 386, 389 (Law Div. 1982).

V. PROBATION, SPLIT SENTENCES AND SUSPENDED SENTENCES

In certain cases, the sentencing court may impose a sentence of probation, a split sentence, or a suspended sentence (see sections A and C). If the defendant violates a term of the sentence, the court must resentence the defendant on the original charge and must impose a sentence for any violation that constitutes an offense (see sections B and C).

A. Probation, Split Sentences and Suspended Sentences: Statutory Provisions

1. Statutory Authority for Probation. N.J.S.A. 2C:43-2(b)(2) provides that a court may impose a sentence of probation, except as provided in N.J.S.A. 2C:43-2(g). N.J.S.A. 2C:43-2(g) prohibits the court from imposing probation for any of the following offenses, which require a special sentence of parole supervision for life:

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-2(b) or (c));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Kidnapping (N.J.S.A. 2C:13-1(c)(2));
- Endangering the welfare of a child by engaging in sexual conduct that impairs or debauches the morals of the child (N.J.S.A. 2C:24-4(a));
- Endangering the welfare of a child by way of child pornography (N.J.S.A. 2C:24-4(b)(3));
- Luring (N.J.S.A. 2C:13-6); or
- A violation of a special sentence of community supervision for life (N.J.S.A. 2C:43-6.4(d)).

2. Duration of Probation. A period of probation shall be "not less than 1 year nor more than 5 years." N.J.S.A. 2C:45-2(a).

3. Statutory Authority for a Split Sentence. N.J.S.A. 2C:43-2(b)(2) provides that the court may impose as a condition of probation a term of incarceration. This type of probation is commonly referred to as a split sentence. If the defendant was convicted of a crime, the jail term may not exceed 364 days. N.J.S.A. 2C:43-2(b)(2). If the defendant was convicted of a disorderly persons offense, the jail term may not exceed 90 days. Ibid.

4. Statutory Authority for a Suspended Sentence. N.J.S.A. 2C:43-2(b) authorizes the court to suspend a sentence.

Duration of a Suspended Sentence. Pursuant to N.J.S.A. 2C:45-2(a), a suspended sentence shall not "exceed the maximum term which could have been imposed or more than 5 years whichever is lesser."

5. Offenses That Preclude Suspension of Sentence and Noncustodial Terms.

(a) Luring or Enticing a Child. N.J.S.A. 2C:13-6(f) prohibits the court from suspending a sentence and from imposing a noncustodial term against anyone convicted of luring or enticing a child. N.J.S.A. 2C:13-6(d) and (e) have the same requirement for repeat offenders (subsection (d)) and persons with certain prior convictions (subsection (e)).

(b) Luring an Adult. N.J.S.A. 2C:13-7(f) prohibits the court from suspending a sentence and from imposing a noncustodial term for luring an adult. N.J.S.A. 2C:13-7(d) and (e) have the same requirement for repeat offenders (subsection (d)) and persons with certain prior convictions (subsection (e)).

(c) Sexual Assault or Criminal Sexual Contact. N.J.S.A. 2C:14-6 prohibits the court from suspending a sentence and imposing a noncustodial term if the defendant has a prior conviction for sexual assault or criminal sexual contact.

(d) Arson. N.J.S.A. 2C:17-1(e) prohibits the court from suspending a sentence or imposing a noncustodial term if the defendant committed aggravated arson of a health care facility or physician's office. N.J.S.A. 2C:17-1(g) prohibits a court from suspending sentence or imposing a

noncustodial term if the targeted structure was a place of worship.

(e) Leader of a Cargo Theft Network. N.J.S.A. 2C:20-2.4(e) prohibits the court from imposing a noncustodial sentence and from suspending sentence for a second or subsequent offense of leader of a cargo theft network.

(f) Theft From a Cargo Carrier. N.J.S.A. 2C:20-2.6(c) prohibits the court from imposing a noncustodial sentence and from suspending sentence against a person convicted of a second or subsequent offense of theft from a cargo carrier.

(g) Possession of 100 or More Items Depicting the Sexual Exploitation or Abuse of a Child. N.J.S.A. 2C:24-4(b)(5)(b) requires the court impose a term of imprisonment if the defendant possessed 100 or more items depicting the sexual exploitation or abuse of a child " unless, having regard to the character and condition of the defendant, it is of the opinion that imprisonment would be a serious injustice which overrides the need to deter such conduct by others."

(h) Drug Tampering. N.J.S.A. 2C:40-17(c) prohibits the court from suspending the sentence or imposing a noncustodial term on a health care professional or agent who "knowingly tampers with a cosmetic, drug or food product."

6. Authorized Conditions of Probation and Suspended Sentences. N.J.S.A. 2C:45-1(a) provides that the court may place "such reasonable conditions" on a probation sentence or a suspended sentence "as it deems necessary to insure that" the defendant "will lead a law-abiding life." Authorized conditions include, N.J.S.A. 2C:45-1(b) to (g):

- Supporting dependents;
- Continued employment;
- Medical or psychiatric treatment;
- Vocational training or course of study;

- Maintaining certain residence;
- Refraining from frequenting certain places;
- Refraining from possessing a weapon;
- Maintaining residence within the jurisdiction;
- Regularly reporting to a probation officer;
- Allowing access to the defendant's home;
- Payment of a fine, fee, assessment and restitution;
- Community service;
- Restricted internet access and computer examinations; and
- Any other condition reasonably related to rehabilitation.

7. Imposing Sentence in the Context of Multiple Offenses. The following rules apply when imposing sentence for multiple offenses or when the defendant is serving a sentence for another offense at the time of sentencing.

(a) Probation Prohibited In Certain Cases. N.J.S.A. 2C:44-5(f) instructs that when a court imposes sentence on a defendant who is already serving a sentence for an offense "committed prior to the former offense," the court may not impose a term of probation, "except as authorized by N.J.S.A. 2C:43-2(b)(2)" (the split sentence provision). N.J.S.A. 2C:44-5(f)(1).

(b) Concurrent and Consecutive Terms. "Multiple periods of suspension or probation shall run consecutively, unless the court" orders otherwise. N.J.S.A. 2C:44-5(f)(2).

(i) Sentence of One Year or More. "When a sentence of imprisonment in excess of one year is imposed, the service of such sentence shall satisfy a suspended sentence on another count or prior suspended sentence or sentence to probation, unless the suspended

sentence or probation has been violated in which case any imprisonment for the violation shall run consecutively." N.J.S.A. 2C:44-5(f)(3).

(ii) Sentence of One Year or Less. "When a sentence of imprisonment of one year or less is imposed, the period of a suspended sentence on another count or a prior suspended sentence or sentence to probation shall run during the period of such imprisonment, unless the suspended sentence or probation has been violated in which case any imprisonment for the violation shall run consecutively." N.J.S.A. 2C:44-5(f)(4).

8. Modifications of Probation and Suspended Sentence. On application of a probation officer or the defendant, or on its own initiative, the court may modify the terms of probation or a sentence suspension and may add conditions to the sentence. N.J.S.A. 2C:45-2(b). "The court shall eliminate any requirement that imposes an unreasonable burden on the defendant." Ibid.

9. Extension of Probation and Suspended Sentence. If the defendant has not satisfied a fine, penalty, or restitution at the end of the probationary or suspended sentence term, the court may extend the sentence for an additional period not to exceed a period authorized by N.J.S.A. 2C:45-2(a). N.J.S.A. 2C:45-2(c).

10. Discharge of Probation and Suspended Sentence. On application of the defendant or a probation officer, or on its own initiative, the court may discharge the defendant from probation or a suspended sentence "at any time." N.J.S.A. 2C:45-2(a).

B. Violation of a Term of Probation or of a Suspended Sentence: Statutory Provisions

1. Statutory Authority for Summons, Arrest, and Detention. N.J.S.A. 2C:45-3(a)(1) provides that at any time during a term of sentence suspension or probation the court may summons the defendant to appear before it or issue a warrant for the defendant's arrest. N.J.S.A. 2C:45-3(a)(2) allows a probation officer or peace officer to arrest the defendant without a

warrant upon probable cause that the defendant violated a term of sentence suspension or probation.

(a) Hearing. N.J.S.A. 2C:45-4 instructs that the defendant must receive written notice of the violation charges and must be provided a hearing at which he or she "shall have the right to hear and controvert the evidence against him [or her], to offer evidence in his [or her] defense, and to be represented by counsel." The court may hold the defendant without bail pending decision on the charges. N.J.S.A. 2C:45-3(a)(3).

(b) Tolling Pending Disposition of the Charges. The probation or suspension period is tolled pending disposition of the violation charges. N.J.S.A. 2C:45-3(c). In the event the court finds no violation of probation, the period will be deemed not tolled. Ibid.

2. Revocation of Probation or Sentence Suspension. If the court finds "that the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of" probation or sentence suspension, or if the defendant is convicted of another offense, the court "may revoke the suspension or probation and sentence or resentence the defendant." N.J.S.A. 2C:45-3(a)(4). However, "[n]o revocation of suspension or probation shall be based on failure to pay a fine or make restitution, unless the failure was willful." Ibid.

3. Resentencing the Initial Offense. In resentencing the initial offense, the court may impose "any sentence that might have been imposed originally." N.J.S.A. 2C:45-3(b).

4. Credit for time served. Pursuant to N.J.S.A. 2C:45-1(e), if the court imposes a term of incarceration as a condition of probation or sentence suspension, "[t]he term of imprisonment . . . shall be treated as part of the sentence, and in the event of a sentence of imprisonment upon the revocation of probation, the term of imprisonment served hereunder shall be credited toward service of such subsequent sentence."

5. Sentencing on the New Offense Where the Court Does Not Revoke Probation or Sentence Suspension. N.J.S.A. 2C:44-5(g) provides: "When a defendant is convicted of an offense committed while under suspension of sentence or on probation and

such suspension or probation is not revoked," the following rules apply.

> **(a) Imprisonment in Excess of One Year.** Where the court imposes imprisonment in excess of one year, the new sentence "shall not satisfy the prior suspended sentence or sentence to probation, unless the court determines otherwise at the time of sentencing." N.J.S.A. 2C:44-5(g)(1).
>
> **(b) Imprisonment of One Year or Less.** Where the court imposes a term of imprisonment of one year or less, "the period of the suspension or probation shall not run during the period of such imprisonment." N.J.S.A. 2C:44-5(g)(2).
>
> **(c) Imposition of Another Term of Probation or Sentence Suspension.** Where the court imposes another suspended term or period of probation, "the period of such suspension or probation shall run concurrently with or consecutively to the remainder of the prior periods, as the court determines at the time of sentence." N.J.S.A. 2C:44-5(g)(3).

C. Probation and Suspended Sentences: Case Law

1. The Difference Between Probation and Suspended Sentence. "The difference between suspension and probation is that probation places the defendant under the supervision of the County Probation Office and normally carries a requirement to report to that office periodically whereas suspension is ordinarily without such supervision." State v. Malave, 249 N.J. Super. 559, 563-64 (App. Div. 1991), certif. denied, 127 N.J. 559 (1992). "In essence, suspension of imposition of sentence is tantamount to 'unsupervised' or 'non-reporting' probation. It is less onerous than probation." State v. Cullen, 351 N.J. Super. 505, 508 (App. Div. 2002).

2. Suspended Sentence. "A court may suspend the imposition of a sentence only after first determining that a non-custodial sentence is authorized and appropriate." State v. Rivera, 124 N.J. 122, 126 (1991).

3. Reasons for a Suspended Sentence. "As a practical matter, a sentencing court may postpone the imposition of sentence for certain reasons such as obtaining information about the

defendant or to permit a defendant to comply with a plea agreement, for example, by cooperating with the prosecution and testifying in another matter. Sentence, however, 'shall be imposed without unreasonable delay.'" State v. Rivera, 124 N.J. 122, 126 (1991) (quoting R. 3:21-4(a)).

4. Aggravating and Mitigating Factors and Probation. The court must weigh the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) in deciding whether to impose a term of probation. State v. Baylass, 114 N.J. 169, 174 (1989).

5. Sentencing on Multiple Offenses, Probation and Imprisonment. "When a defendant is sentenced for more than one offense, . . . N.J.S.A. 2C:44-5(f)(1) prohibits the court from imposing both a sentence of probation and a sentence of imprisonment, except as authorized by N.J.S.A. 2C:43-2(b)(2)" (split sentence). State v. Crawford, 379 N.J. Super. 250, 259 (App. Div. 2005).

6. Conditions of Probation. The court may impose as a condition of probation a requirement that is not expressly authorized by N.J.S.A. 2C:45-1(b) (conditions of probation), as long as the condition "substantially relate[s] to an appropriate penological and rehabilitative objective" and "is not unduly restrictive of" a defendant's liberty. State v. Krueger, 241 N.J. Super. 244, 256-57 (App. Div. 1990). The condition must end with the probationary term. Id. at 256.

7. Resentencing After a Violation of Probation or Suspended Sentence.

(a) Right of Allocution. The defendant has the right to speak on his or her own behalf at resentencing on a violation of probation. State v. Lavoy, 259 N.J. Super. 594, 598-99 (App. Div. 1992).

(b) Considerations in Resentencing, the Baylass Standard. When resentencing a defendant after a violation of probation or a suspended sentence, the court considers how the violation affects the weight accorded to the mitigating factors identified at the initial sentencing hearing. State v. Baylass, 114 N.J. 169, 178 (1989); State v. Molina, 114 N.J. 181, 184-85 (1989). State v. Hannigan, 408 N.J. Super. 388, 391 (App. Div. 2009) (applying the Baylass standard to a violation of a suspended sentence term). The court may not find any new aggravating factors, and it may not use the violation of probation as a basis to

impose consecutive terms. State v. Baylass, 114 N.J. 169, 176-78 (1989). In weighing the mitigating factors, the court may consider the defendant's amenability to probation, including the ability to lead a law-abiding life and the likelihood that the defendant will respond to probationary treatment. Id. at 176-77.

(c) Downgrading. A downgrade to one degree lower, pursuant to N.J.S.A. 2C:44-1(f)(2), does not survive a violation of probation. State v. Frank, 280 N.J. Super. 26, 40 (App. Div.), certif. denied, 141 N.J. 96 (1995). In resentencing, the court must reweigh the aggravating and mitigating factors found at the initial sentencing hearing in relation to the probation violation. Ibid.

(d) Sentence Modification and the No Early Release Act. Where the court modified, pursuant to Rule 3:21-10, a second degree robbery conviction to probation, and the defendant subsequently violated probation, on resentencing the court had to impose a period of parole ineligibility mandated by the No Early Release Act. State v. Kearns, 393 N.J. Super. 107, 110-11 (App. Div. 2007).

(e) Generally Parole Ineligibility Should Not Be Imposed on Resentencing. A parole disqualifier should not ordinarily be imposed when resentencing a defendant after a probation violation since, at the original sentencing, the mitigating factors weighed in favor of probation. State v. Baylass, 114 N.J. 169, 178 (1989).

(f) Credit for Time Served. A defendant receives credit against a sentence for a probation violation for time served in jail as a condition of probation and for time served on parole following release from jail. State v. Rosado, 131 N.J. 423, 426-28 (1993) (explaining that parole is the legal equivalent of imprisonment for purposes of determining credit under N.J.S.A. 2C:45-1(e) (formerly N.J.S.A. 2C:45-1(d)); State v. Mercadante, 299 N.J. Super. 522, 533-32 (App. Div. 1997). "[T]he credit is to be applied against the aggregate term, and not against [a] Legislatively required parole ineligibility term of incarceration." State v. Mercadante, 299 N.J. Super. 522, 533 (App. Div. 1997). However, the Court said, " [w]e perceive a different result if, in fact, there was no ability to credit parole time against the base term because of the expiration of too great a portion of the aggregate

term to permit full credit for the time served on parole." Id. at 534.

(g) Young Adult Offender Sentencing. The Baylass guidelines applicable to ordinary sentences "are not wholly applicable" to a young adult offender indeterminate sentence because unlike ordinary sentences, the purpose of a young adult offender sentence is to rehabilitate, not to punish. State v. Hannigan, 408 N.J. Super. 388, 393 (App. Div. 2009).

VI. AGGRAVATING AND MITIGATING FACTORS

In setting a term of imprisonment, the court must qualitatively weigh the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) (see section A). The term of imprisonment should be proportional to the weight assigned to the factors. Sections B through D discuss case law regarding the factors.

A. The Aggravating and Mitigating Factors: Statutory Provisions

1. The Statute Listing Aggravating Factors. N.J.S.A. 2C:44-1(a) provides for the following aggravating factors:

> (1) The "nature and circumstances of the offense" and the defendant's role in the offense, including whether the defendant committed it "in an especially heinous, cruel, or depraved manner";
>
> (2) The "gravity and seriousness of harm" to the victim, "including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance;
>
> (3) The risk of reoffending;
>
> (4) Whether the defendant violated public trust;
>
> (5) Whether the defendant was involved in organized crime;
>
> (6) The "defendant's prior criminal record and the seriousness of the offenses";
>
> (7) Whether the defendant committed the offense for payment;
>
> (8) Whether the defendant committed the offense against a law enforcement officer, a public servant, or a sports official;

(9) The "need for deterring the defendant and others from violating the law";

(10) Whether the offense involved fraud against the state or a state department;

(11) Whether imposition of a fine, penalty or order of restitution alone would be perceived as a "cost of doing business";

(12) Whether the defendant knew or should have known the victim was disabled or 60 years of age or older; and

(13) Whether the defendant used a stolen vehicle during the crime;

(14) Whether the offense involved an act of domestic violence, as defined in N.J.S.A. 2C:25-19(a), in the presence of a child under 16 years of age; and

(15) Whether the offense involved an act of domestic violence, as defined in N.J.S.A. 2C:25-19(a), "and the defendant committed at least one act of domestic violence on more than one occasion."

2. The Statute Listing Mitigating Factors. N.J.S.A. 2C:44-1(b) provides the following mitigating factors:

(1) The defendant "neither caused nor threatened serious harm";

(2) The defendant "did not contemplate that his [or her] conduct would cause or threaten serious harm";

(3) The defendant "acted under a strong provocation";

(4) "[S]ubstantial grounds" tend to "excuse or justify the defendant's conduct";

(5) The victim "induced or facilitated" the crime;

(6) The defendant compensated the victim or will participate in community service;

(7) The defendant lacks a history of delinquency or criminal activity;

(8) The defendant's conduct was the result of circumstances unlikely to recur;

(9) The defendant's character and attitude indicate an unlikelihood of reoffending;

(10) The defendant "is particularly likely to respond" to probation;

(11) Imprisonment "would entail excessive hardship to" the defendant or his or her dependents;

(12) The defendant cooperated with law enforcement; and

(13) The defendant is a youthful offender and "was substantially influenced by" a more mature person.

B. Aggravating Factors: Case Law

1. Cruelty. The court may consider the cruel manner of an attack, State v. Soto, 340 N.J. Super. 47, 71-72 (App. Div.), certif. denied, 170 N.J. 209 (2001), and the intent to inflict pain or suffering on the victim. State v. O'Donnell, 117 N.J. 210, 217-18 (1989).

2. Nature of the Offense. "[A]n application of aggravating factor one must be premised upon factors independent of the elements of the crime and firmly grounded in the record." State v. Fuentes, 217 N.J. 57, 63 (2014). See also State v. Miller, ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 18-19) (the court double counted in finding aggravating factor one because defendant's crime of possessing numerous pornographic images of very young children was no more heinous, cruel or deprived than the offense was by definition).

3. Harm to the Victim. When considering the harm a defendant caused to a victim for purposes of aggravating factor two, N.J.S.A. 2C:44-1(a)(2), a court should engage in a "pragmatic assessment of the totality of harm inflicted." State v. Carey, 168 N.J. 413, 426 (2001). Defendants who purposely or recklessly inflict substantial harm receive more severe sentences. Id. at 426.

4. Harm to Non-Victims. For purposes of N.J.S.A. 2C:44-1(a)(2), the harm to the victim is limited to victims of the crime for which the defendant is being sentenced. State v. Lawless, 214 N.J. 594, 613 (2013). As part of the "nature and circumstances of the offense" (aggravating factor one), the court may consider the harm caused to a non-victim of the crime for which the defendant is being sentenced. Id. at 615.

5. Vulnerability. The "vulnerability" referred to in aggravating factor two, N.J.S.A. 2C:44-1(a)(2), is not limited to the intrinsic condition of the victim, and includes any reason that renders the victim substantially incapable of resistance. State v. O'Donnell, 117 N.J. 210, 218-19 (1989).

6. Risk of Reoffending.

(a) Denial of Responsibility. The defendant's denial of responsibility supports a finding under aggravating factor three that the defendant is at risk of reoffending. State v. Carey, 168 N.J. 413, 427 (2001).

(b) Failure to Appear at Sentencing. The defendant's failure to appear at the sentencing hearing may be relevant to defendant's risk of reoffending and to the need for deterrence. State v. Subin, 222 N.J. Super. 227, 237-40 (App. Div.), 111 N.J. 580 (1988).

7. Seriousness of the Offense and Public Trust. "Depreciat[ing] the seriousness of the defendant's offense," N.J.S.A. 2C:44-1(a)(4), deals only with violations of public trust under Chapters 27 and 30, or breaches of a position of trust or confidence. State v. Mosch, 214 N.J. Super. 457, 463 (App. Div. 1986), certif. denied,. denied, 107 N.J. 131 (1987).

8. Organized Crime. The "organized criminal activity" aspect of aggravating factor five, N.J.S.A. 2C:44-1(a)(5), applies if there is proof that the defendant is involved in such activity, even though the offenses for which he or she has been convicted have no relationship to that activity. State v. Merlino, 208 N.J. Super. 247, 259 (Law Div. 1984), aff'd in part, vacated in part on other grounds, 208 N.J. Super. 147 (App. Div. 1985), certif. denied,. denied, 103 N.J. 460 (1986).

9. Prior Driving While Under the Influence (DWI). Prior convictions for DWI may not be considered an aggravating factor

under N.J.S.A. 2C:44-1(a)(6), because DWI does not constitute an "offense" under N.J.S.A. 2C:1-14(k). However, they may be considered as part of the defendant's overall personal history. State v. Lawless, 423 N.J. Super. 293, 305 (App. Div. 2011), aff'd, 214 N.J. 594 (2013); State v. Radziwil, 235 N.J. Super. 557, 575-76 (App. Div. 1989), aff'd o.b., 121 N.J. 527 (1990).

10. Juvenile and Driving Records. Although aggravating factor six refers to a defendant's "prior criminal record," the court may consider a defendant's juvenile record and driving record in assessing that factor. State v. Pindale, 249 N.J. Super. 266, 288 (App. Div. 1991).

11. Lack of Prior Record and Need to Deter. In an appropriate case, the court may find a need to deter (aggravating factor nine) even though the defendant has no prior record. State v. Fuentes, 217 N.J. 57, 80 (2014).

12. Public Safety and Deterrence. "The need for public safety and deterrence increase proportionally with the degree of the offense." State v. Carey, 168 N.J. 413, 426 (2001).

13. Specific and General Deterrence. Aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), includes specific and general deterrence. State v. Fuentes, 217 N.J. 57, 78 (2014). It requires a qualitative analysis of the risk of recidivism based not only on a prior record, but on an evaluation of the defendant as an individual. Ibid.

14. Lack of Personal Deterrence. In the absence of a need for personal deterrence, the need for general deterrence is lessened. State v. Case, 220 N.J. 49, 68 (2014); State v. Jarbath, 114 N.J. 394, 405 (1989). See also State v. Gardner, 113 N.J. 510, 520 (1989) (providing that "general deterrence alone is insufficient to overcome the presumption against imprisonment"); State v. Powell, 294 N.J. Super. 557, 567 (App. Div. 1996) (explaining that the need for general deterrence alone is insufficient to prevent downgrading).

15. Deterrence and Severity of Harm. "[D]emands for deterrence are strengthened in direct proportion to the gravity and harmfulness of the offense." State in Interest of C.A.H., 89 N.J. 326, 337 (1982).

16. Lack of Remorse. A need to deter a defendant from similar conduct in the future, N.J.S.A. 2C:44-1(a)(9), may be supported

by a defendant's lack of remorse and consistent denial of wrongdoing. State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991).

17. Risk of Recidivism, Prior Record and Need to Deter. Implicit in the findings on a defendant's risk of reoffending, N.J.S.A. 2C:44-1(a)(3), the seriousness and extent of a defendant's prior criminal record, N.J.S.A. 2C:44-1(a)(6), and the need to deter defendant and others, N.J.S.A. 2C:44-1(a)(9), are "determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history." State v. Thomas, 188 N.J. 137, 155 (2006).

18. Cost of Doing Business. Pursuant to N.J.S.A. 2C:44-1(a)(11), a finding that a fine or other monetary penalty would be perceived as a cost of doing business, applies only when the sentencing judge is balancing a noncustodial term against a prison sentence. State v. Dalziel, 182 N.J. 494, 502 (2005). Hence, unless the court is being asked to overcome the presumption of imprisonment, this factor should not be used when sentencing for first and second degree crimes. Ibid.

C. Mitigating Factors: Case Law

1. Serious Harm. Distribution of cocaine may constitute conduct that causes and threatens serious harm, so as to render inapplicable mitigating factors one, N.J.S.A. 2C:44-1(b)(1), (defendant did not cause serious harm), and two N.J.S.A. 2C:44-1(b)(2) (defendant did not contemplate causing serious harm). State v. Tarver, 272 N.J. Super. 414, 434-35 (App. Div. 1994).

2. Strong Provocation. "Strong provocation" under N.J.S.A. 2C:44-1(b)(3) refers to the conduct of the victim towards the actor, not to the defendant's own mental compulsions. State v. Jasuilewicz, 205 N.J. Super. 558, 576 (App. Div. 1985), certif. denied, 103 N.J. 467 (1986).

3. Addiction May Not Excuse Conduct. Drug or alcohol dependency or intoxication does not necessarily establish substantial grounds tending to excuse or justify the defendant's conduct (mitigating factor four). State v. Ghertler, 114 N.J. 383, 390 (1989); State v. Setzer, 268 N.J. Super. 553, 567-68 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994).

4. History of Abuse Perpetrated by the Victim. A history of continuous physical, sexual, and psychological abuse perpetrated by the victim against the defendant may be highly relevant in determining whether the following mitigating factors apply: N.J.S.A. 2C:44-1(b)(2) (defendant did not contemplate the conduct would cause or threaten serious harm); N.J.S.A. 2C:44-1(b)(4) (substantial grounds tending to excuse or justify conduct); and N.J.S.A. 2C:44-1(b)(5) (the victim induced or facilitated the commission of the crime). State v. Briggs, 349 N.J. Super. 496, 504 (App. Div. 2002).

5. Lack of Prior Record. A court may give minimal weight to a defendant's lack of a prior record, N.J.S.A. 2C:44-1(b)(7), so long as the finding is based on the record and is sufficiently explained by the court. State v. Soto, 340 N.J. Super. 47, 72 (App. Div.), certif. denied, 170 N.J. 209 (2001).

6. Prior Arrests. A court does not abuse its discretion by finding mitigating factor seven (lack of prior record) when the defendant has prior arrests and no prior conviction. State v. Rice, 425 N.J. Super. 375, 382 (App. Div.), certif. denied, 212 N.J. 431 (2012).

7. Specific Deterrence Not Necessary. Where N.J.S.A. 2C:44-1(b)(8) (conduct was result of circumstances unlikely to recur), N.J.S.A. 2C:44-1(b)(9) (defendant is unlikely to commit another crime), and N.J.S.A. 2C:44-1(b)(10) (defendant is likely to respond to probationary treatment) apply, the need for specific deterrence is essentially negated. State v. Briggs, 349 N.J. Super. 496, 505 (App. Div. 2002).

8. Medical Condition and Excessive Hardship. A defendant's medical condition, established by medical evidence, may support a finding that imprisonment would entail excessive hardship, N.J.S.A. 2C:44-1(b)(11), if the condition is extraordinary, idiosyncratic or terminal. State v. M.A., 402 N.J. Super. 353, 371-72 (App. Div. 2008).

9. Confession and Cooperation with Law Enforcement. It is questionable whether a confession qualifies as cooperation under N.J.S.A. 2C:44-1(b)(12), especially where the confession does not identify other perpetrators or assist in solving other crimes. State v. Read, 397 N.J. Super. 598, 613 (App. Div.), certif. denied, 196 N.J. 85 (2008).

10. Youth and Substantial Influence. Youth may be considered a mitigating factor if the defendant was "substantially influenced by another person more mature than the defendant," N.J.S.A. 2C:44-1(b)(13), but this factor may not apply where the defendant participated in a premeditated, cold-blooded, execution-style murder. State v. Torres, 313 N.J. Super. 129, 162 (App. Div.), certif. denied, 156 N.J. 425 (1998).

11. Mental Condition and Rejected Insanity Defense. A sentencing court may consider a defendant's mental condition in assessing mitigating factors, even if the jury rejected the defendant's insanity defense. State v. Nataluk, 316 N.J. Super. 336, 349 (App. Div. 1998).

12. Mitigating Factors Raised by the Defendant. The sentencing court must consider and issue findings on mitigating factors raised by the defendant. State v. Case, 220 N.J. 49, 68 (2014). "[M]itigating factors that are suggested in the record, or are called to the court's attention, ordinarily should be considered and either embraced or rejected on the record." State v. Blackmon, 202 N.J. 283, 297 (2010). Those that are "amply based in the record . . . , must be found." State v. Dalziel, 182 N.J. 494, 504 (2005). But see State v. Miller, 205 N.J. 109, 130 (2011) (agreeing with the Appellate Division's holding that a remand for clarification is not necessary when the judge's reasons for rejecting mitigating factors can be deduced from the sentencing record); State v. Bieniek, 200 N.J. 601, 609 (2010) (holding that a trial court need not "explicitly reject each and every mitigating factor argued by a defendant").

D. Case Law Applicable to Both Types of Factors

1. Underlying Policy of the Factors. The purpose of the aggravating and mitigating factors is "to insure that sentencing is individualized without being arbitrary." State v. Sainz, 107 N.J. 283, 288 (1987). "Careful application" of the factors promotes uniformity in sentencing. State v. Cassady, 198 N.J. 165, 179-80 (2009).

2. Qualitative Weighing. The sentencing court qualitatively, not quantitatively, weighs and analyzes the aggravating and mitigating factors. State v. Case, 220 N.J. 49, 65 (2014); State v. Fuentes, 217 N.J. 57, 72 (2014); State v. Kruse, 105 N.J. 354, 363 (1987). "The factors are not interchangeable on a one-to-one basis. The proper weight to be given to each is a

function of its gravity in relation to the severity of the offense." State v. Roth, 95 N.J. 334, 368 (1984).

3. Proportionality. "[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Natale II, 184 N.J. 458, 488 (2005)).

4. Factors in Equipoise. Where the aggravating and mitigating factors are in equipoise, a term in the middle of the sentencing range will be appropriate. State v. Fuentes, 217 N.J. 57, 73 (2014); State v. Natale II, 184 N.J. 458, 488 (2005).

5. Double Counting Prohibited. An element of the offense may not be cited as an aggravating factor to increase punishment. State v. Fuentes, 217 N.J. 57, 74-75 (2014); State v. Kromphold, 162 N.J. 345, 353 (2000); State v. Yarbough, 100 N.J. 627, 633 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986), as amended by N.J.S.A. 2C:44-5a. The same prohibition applies to mitigating factors. State v. Teat, 233 N.J. Super. 368, 372-73 (App. Div. 1989) (holding that a trial judge may not consider "strong provocation" as a mitigating factor where the jury already considered it in reducing murder to manslaughter). State v. Kromphold, 162 N.J. 345, 356 (2000) (prohibiting the sentencing court from citing the defendant's level of intoxication as an aggravating factor when a jury considered the defendant's excessive intoxication in finding "recklessness" to convict the defendant of second degree aggravated assault).

(a) Nuanced Analysis. The sentencing court must provide a "nuanced analysis of the defendant's offense, clearly explained so that an appellate court may be certain that" the lower court did not double-count the elements of the offense. State v. Fuentes, 217 N.J. 57, 76 (2014).

(b) Multiple Charges. Where a court sentences on multiple charges, facts that establish elements of one charge may be used to establish aggravating factors for another charge without violating the rule against double counting. State v. Boyer, 221 N.J. Super. 387, 405-06 (App. Div. 1987), certif. denied, 110 N.J. 299 (1988).

(c) Multiple Deaths by Auto. In sentencing a defendant on multiple counts of death by automobile, the sentencing court may consider as an aggravating factor the number of deaths caused, State v. Travers, 229 N.J. Super. 144, 154 (App. Div. 1988), and whether surviving victims sustained injuries, State v. Carey, 168 N.J. 413, 425 (2001).

(d) Possession of an Excessive Amount of Drugs. The rule against double counting is not violated when a court cites as an aggravating circumstance the defendant's having possessed far more drugs than was required to constitute the crime. State v. Ascencio, 277 N.J. Super. 334, 336-37 (App. Div. 1994), certif. denied, 140 N.J. 278 (1995); State v. Varona, 242 N.J. Super. 474, 490-91 (App. Div.), certif. denied, 122 N.J. 386 (1990).

(e) Multiple Injuries. Multiple life-threatening injuries to one victim may be considered an aggravating factor when only one life-threatening injury was required to satisfy an element of the crime. State v. Mara, 253 N.J. Super. 204, 214 (App. Div. 1992).

(f) Injury Inflicted and Not an Element of the Crime. Because a conviction for attempted murder does not require "injury" to the victim, a court may consider the extent of any injury as an aggravating factor. State v. Noble, 398 N.J. Super. 574, 599 (App. Div.), certif. denied, 195 N.J. 522 (2008).

6. Inconsistent Findings. A court may find aggravating and mitigating factors that appear internally inconsistent, so long as the findings are "supported by a reasoned explanation" and "grounded in competent, credible evidence in the record." State v. Case, 220 N.J. 49, 67 (2014) (holding that while aggravating factor three (risk defendant will reoffend) "stood as counterpoise" to mitigating factor seven (no prior record), the two factors could coexist in a case, so long as they were based on the evidence). See also State v. Fuentes, 217 N.J. 57, 63 (2014) (explaining that "any determination that aggravating factor nine and mitigating factor eight are applicable to the same case should be specifically explained").

7. Requisite Findings. "[C]ritical to the sentencing process and appellate review is the need for the sentencing court to explain clearly why an aggravating or mitigating factor presented by the parties was found or rejected and how the

factors were balanced to arrive at the sentence." State v. Case, 220 N.J. 49, 66 (2014) (citing State v. Fuentes, 217 N.J. 57, 73 (2014)). The findings "must be based on the evidence." State v. Case, 220 N.J. 49, 64 (2014) (concluding that the sentencing court based its finding of aggravating factor three "not on credible evidence in the record but apparently on the unfounded assumption that defendant had pursued minors through the Internet on previous occasions"). "Speculation and suspicion must not infect the sentencing process." State v. Case, 220 N.J. 49, 64 (2014). The court's "explanation should thoroughly address the factors at issue." State v. Fuentes, 217 N.J. 57, 73 (2014). Inconsistent and unclear findings on the factors will require a remand, even though a remand may not result in a lesser sentence than the one initially imposed. State v. Sene, 443 N.J. Super. 134, 145 (App. Div. 2015), certif. denied, 224 N.J. 282 (2016).

8. Emphasis on Certain Factors. The sentencing court must "sufficiently explain its reason for placing 'particular emphasis'" on an aggravating factor. State v. Case, 220 N.J. 49, 68 (2014). The court is also "required to explain the weight it assigned to the factors it found." Id. at 69.

9. Findings Restricted to Listed Factors. "[T]he sentencing court lacks the power to import aggravating factors not contained within the Criminal Code's sentencing guidelines." State v. Thomas, 356 N.J. Super. 299, 310 (App. Div. 2002). But see State v. Taylor, 226 N.J. Super. 441, 454 (App. Div. 1988) (N.J.S.A. 2C:44-1(a) does not limit sentencing judges to the thirteen specified aggravating factors).

10. Juror Participation Prohibited. " The jury plays no role at sentencing in assisting the judge to identify aggravating and mitigating factors." State v. Mahoney, 444 N.J. Super. 253, 260 (App. Div. 2016). Jurors "have no information relevant to establishing aggravating and mitigating factors other than what they and the judge learned through the evidence adduced at the trial. The only other information they have is derived from their mental impressions developed during the deliberative process, which cannot be revealed." Id. at 260-61.

11. Considerations as of the Date of Sentencing. "[A] defendant should be assessed as he stands before the court on the day of sentencing"; thus, "the sentencing court must consider a defendant's relevant post-offense conduct in weighing aggravating and mitigating factors." State v. Jaffe, 220 N.J.

114, 116 (2014) (citing State v. Randolph, 210 N.J. 330, 354 (2012)).

12. Resentencing After Appeal. "[W]hen 'reconsideration' of sentence or 'resentencing' is ordered after appeal, the trial court should view defendant as he stands before the court on that day unless the remand order specifies a different and more limited resentencing proceeding such as correction of a plainly technical error or a directive to the judge to view the particular sentencing issue from the vantage point of the original sentencing." State v. Randolph, 210 N.J. 330, 354 (2012).

VII. PAROLE INELIGIBILITY

In setting a sentence, the court must consider whether the convictions warrant a period of parole ineligibility. Generally, the court may exercise its discretion to impose a parole disqualifier if the facts so warrant (see section A). However, if the offense falls under the No Early Release Act (see sections B and D), or if the Legislature has otherwise mandated a parole disqualifier in a criminal statute (see section C), the court has no choice but to impose the minimum term required by statute. More than one statute may mandate a parole disqualifier for an offense. Section E discusses case law on parole ineligibility.

Note: In accordance with the decision in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000), that to comply with the Sixth Amendment, the jury, not the court, must find a fact that subjects a defendant to an extended term, the Sixth Amendment similarly requires that a fact that increases the mandatory minimum term must be found by the jury, not a judge. "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury" and found beyond a reasonable doubt. Alleyne v. United States, ___ U.S. ___, ___, 133 S. Ct. 2151, 2162, 186 L. Ed. 2d 314, 329 (2013). Accord State v. Grate, 220 N.J. 317, 335 (2015) (finding unconstitutional under Alleyne the N.J.S.A. 2C:39-5(i) requirement that the court must impose a period of parole ineligibility if it finds a substantial likelihood that the defendant was involved in organized criminal activity). In the case of a guilty plea, the maximum sentence authorized by statute is the maximum sentence supported by the defendant's admissions. State v. Franklin, 184 N.J. 516, 537-38 (2005) (interpreting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)). The defendant may also "consent to judicial factfinding as to sentence enhancements." State v. Franklin, 184 N.J. 516, 538 (2005) (quoting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)).

Though no United States Supreme Court or published New Jersey decision has so held, presumably the Apprendi prior-conviction exception will apply to mandatory minimum terms, just as it applies to extended terms. See Apprendi v. New Jersey, 530 U.S.

466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

The statutes discussed in this chapter are subject to the foregoing Sixth Amendment requirements.

A. Parole Ineligibility Imposed at the Court's Discretion: Statutory Provisions

Statutory Authority for Discretionary Parole Disqualifiers. N.J.S.A. 2C:43-6(b) instructs that "the court may fix a minimum term not to exceed one-half of" the sentence imposed when:

- "the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors," set forth in N.J.S.A. 2C:44-1(a) and (b); or

- the court finds a substantial likelihood that the defendant was involved in organized criminal activity (aggravating factor five, N.J.S.A. 2C:44-1(a)(5)).

B. Mandatory Parole Ineligibility Under The No Early Release Act (NERA): Statutory Provisions

Note: In 2001 the Legislature substantially amended NERA, thus rendering moot a significant amount of case law interpreting the former version of the statute. See Cannel, New Jersey Criminal Code Annotated, comments 1 and 3 on N.J.S.A. 2C:43-7.2 at 1138-43 (2016-2017); Pressler & Verniero, Current N.J. Court Rules, comment 1.3.5 on R. 3:21-4 at 1133-35 (2017).

1. The NERA Mandatory Parole Disqualifier. N.J.S.A. 2C:43-7.2(a) requires the court fix "a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole," for the following first and second degree crimes:

- Murder (N.J.S.A. 2C:11-3);

- Aggravated manslaughter or manslaughter (N.J.S.A. 2C:11-4);
- Vehicular homicide (N.J.S.A. 2C:11-5);
- Aggravated assault (N.J.S.A. 2C:12-1(b));
- Disarming a law enforcement officer (N.J.S.A. 2C:12-11(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-2(b) and (c)(1));
- Robbery (N.J.S.A. 2C:15-1);
- Carjacking (N.J.S.A. 2C:15-2);
- Aggravated arson (N.J.S.A. 2C:17-1(a)(1));
- Burglary (N.J.S.A. 2C:18-2);
- Extortion (N.J.S.A. 2C:20-5(a));
- Booby traps in manufacturing or distributing a controlled dangerous substance (N.J.S.A. 2C:35-4.1(b));
- Drug induced deaths (N.J.S.A. 2C:35-9);
- Terrorism (N.J.S.A. 2C:38-2);
- Producing or possessing chemical, biological, nuclear, or radiological weapons (N.J.S.A. 2C:38-3);
- Racketeering in the first degree (N.J.S.A. 2C:41-2);
- Firearms trafficking (N.J.S.A. 2C:39-9(i)); and
- Endangering the welfare of a child by way of child pornography (N.J.S.A. 2C:24-4(b)(3)).

(a) The Parole Disqualifier Applies to All Types of Terms. The NERA minimum term is required whether the sentence is imposed as an ordinary term of imprisonment (N.J.S.A. 2C:43-6), an extended term (N.J.S.A. 2C:43-7), a term for murder (N.J.S.A. 2C:11-3), or a term pursuant to "any other provision of law, and shall be calculated based upon the sentence of incarceration actually imposed." N.J.S.A. 2C:43-7.2(b).

(b) Relation to Other Parole Disqualifiers. In the event the NERA and another statute require two different periods of parole ineligibility, NERA "shall not be construed or applied to reduce the time that must be served." N.J.S.A. 2C:43-7.2(b).

(c) A Life Sentence. "Solely for the purpose of calculating the minimum term of parole ineligibility . . . a sentence of life imprisonment shall be deemed to be 75 years." N.J.S.A. 2C:43-7.2(b).

2. The NERA Mandatory Parole Supervision Period. In addition to the 85% period of parole ineligibility, the court must also impose a five-year term of parole supervision on a first degree crime, and a three years of parole supervision for a second degree crime, which shall commence upon the defendant's release from incarceration. N.J.S.A. 2C:43-7.2(c).

(a) Supervision by the Bureau of Parole. During the term of parole supervision, the defendant remains in the legal custody of the Department of Corrections and is supervised by the Bureau of Parole, subject to the provisions of N.J.S.A. 30:4-123.51b. N.J.S.A. 2C:43-7.2(c).

(b) Parole Violation. If the defendant violates a condition of parole, he or she can be re-incarcerated for the balance of the five-year or three-year parole term. N.J.S.A. 30:4-123.51b(a).

3. Notice. According to Rule 3:21-4(f), notice to impose a NERA sentence must be filed with the court and served on the defendant within fourteen days of entry of a plea or return of the verdict, but the court may extend the time for good cause.

C. Non-NERA Mandatory Parole Disqualifiers: Statutory Provisions

1. Murder. A murder conviction requires one of the following two sentences:

> **(a) Thirty-Year Minimum.** A defendant must serve between thirty years to life imprisonment for first degree murder with a thirty-year period of parole ineligibility. N.J.S.A. 2C:11-3(b)(1). The thirty-year minimum term also applies to a conviction for an attempt or conspiracy to murder five or more persons. N.J.S.A. 2C:5-4(a).
>
> **(b) Life Without Parole.** If the following circumstances apply, the defendant "shall be sentenced" to life imprisonment without the possibility of parole (N.J.S.A. 2C:11-3(b)(4)):
>
> > (i) The victim was a law enforcement officer murdered while performing official duties or because of his or her official status, N.J.S.A. 2C:11-3(b)(2); or
> >
> > (ii) The victim was less than fourteen years old and the murder was carried out during a sexual assault (N.J.S.A. 2C:14-2) or criminal sexual contact (N.J.S.A. 2C:14-3), N.J.S.A. 2C:11-3(b)(3); or
> >
> > (iii) The defendant purposely or knowingly caused the death, or serious bodily injury resulting in death, "by his her own conduct," or procured the commission of the offense by the payment or promise of payment of something of pecuniary value, or solicited the commission of the offense as a leader of a narcotics trafficking network, or committed a crime of terrorism during which a murder occurred, and a jury finds beyond a reasonable doubt that any of the twelve aggravating factors listed in N.J.S.A. 2C:11-3(b)(4) are applicable.

2. Death by Vehicular Homicide. N.J.S.A. 2C:11-5(b)(1) requires a period of parole ineligibility between one-third and one-half of the sentence imposed, or three years, whichever is greater if the defendant caused death while operating a vehicle under the influence of alcohol or narcotics, or with a blood alcohol level prohibited by N.J.S.A. 39:4-50, or while his or her driver's license was revoked or suspended. According to

N.J.S.A. 2C:11-5(b)(2), the prosecutor must establish at a separate hearing, which may occur at the time of sentencing, the requisite fact for imposing a mandatory minimum sentence, and the court must find the fact by a preponderance of the evidence.

3. Third Degree Reckless Endangerment. N.J.S.A. 2C:12-2(b)(2) requires a parole ineligibility period of eighteen months for a third degree crime, or six months for a fourth degree crime, if the defendant enticed another with a poisonous, disorienting or otherwise harmful substance. **Note**: As of January 11, 2016, this statute was repealed and replaced by N.J.S.A. 2C:24-7.1 (Endangering Another Person), which does not impose a parole ineligibility period.

4. Kidnapping of a Minor. N.J.S.A. 2C:13-1(c)(2) requires the court to impose a term between twenty-five years and life imprisonment with a parole ineligibility period of twenty-five years when (a) the victim was less than sixteen years old and was subjected to a sexual assault (N.J.S.A. 2C:14-2), a criminal sexual contact (N.J.S.A. 2C:14-3), or endangerment (N.J.S.A. 2C:24-4); or (b) the defendant sold or delivered the victim for pecuniary gain, and the sale did not lead to the victim's return to a parent or guardian. The court must merge the underlying offenses into the kidnapping conviction. N.J.S.A. 2C:13-1(c)(2).

5. Luring or Enticing a Child (Repeat Offenders). N.J.S.A. 2C:13-6(d) requires a parole disqualifier of one-third to one-half of the sentence imposed, or three years, whichever is greater for a second or subsequent offense of luring or enticing a child into a motor vehicle, structure or isolated area with the purpose to commit a criminal offense with or against the child. If the court imposes an extended term, the term of parole ineligibility must be one-third to one-half of the sentence imposed, or five years, whichever is greater. N.J.S.A. 2C:13-6(d).

6. Luring or Enticing a Child (Certain Persons). N.J.S.A. 2C:13-6(e) requires a five-year parole ineligibility term for the crime of luring or enticing a child (N.J.S.A. 2C:13-6), when the defendant has a prior conviction for a violation of N.J.S.A. 2C:14-2 (sexual assault), N.J.S.A. 2C:14-3(a) (aggravated criminal sexual contact), or N.J.S.A. 2C:24-4 (endangering the welfare of a child). If the court imposes an extended term, then the parole disqualifier provision is inapplicable. N.J.S.A. 2C:13-6(e).

7. Luring or Enticing an Adult (Repeat Offenders). N.J.S.A. 2C:13-7(d) mandates a parole ineligibility period of one-third to one-half the sentence imposed, or one year, whichever is greater, for a second or subsequent offense of luring or enticing a person into a motor vehicle, structure or isolated area with the purpose to commit a criminal offense with or against the person or any other person. If the defendant is sentenced to an extended term, the period of parole ineligibility shall be one-third to one-half the sentence imposed, or five years, whichever is greater. N.J.S.A. 2C:13-7(d).

8. Luring or Enticing an Adult (Certain Persons). N.J.S.A. 2C:13-7(e) requires a parole ineligibility period of three years for luring or enticing an adult if the defendant has a prior conviction for a violation of N.J.S.A. 2C:14-2 (sexual assault), N.J.S.A. 2C:14-3(a) (aggravated criminal sexual contact), or N.J.S.A. 2C:24-4 (endangering the welfare of a child). If the court imposes an extended term, then the parole ineligibility provision is inapplicable. N.J.S.A. 2C:13-7(e).

9. Human Trafficking. N.J.S.A. 2C:13-8(d) mandates a twenty-year term of parole ineligibility.

10. Assisting in Human Trafficking. N.J.S.A. 2C:13-9(c)(1) requires a period of parole ineligibility of one-third to one-half of the term of imprisonment, or three years, whichever is greater.

11. Aggravated Sexual Assault of a Child. N.J.S.A. 2C:14-2(a) requires a twenty-five-year period of parole ineligibility be imposed on a defendant convicted of aggravated sexual assault of a child under age thirteen. However, N.J.S.A. 2C:14-2(d) allows the prosecutor to negotiate a fifteen-year sentence with no possibility of parole. N.J.S.A. 2C:14-2.1 provides that "the victim of the sexual assault shall be provided an opportunity to consult with the prosecuting authority prior to the conclusion of any plea negotiations."

12. Sexual Assault or Aggravated Criminal Sexual Contact (Repeat Offender). N.J.S.A. 2C:14-6 requires the court impose on a second or subsequent offender of N.J.S.A. 2C:14-2 (sexual assault) or N.J.S.A. 2C:14-3(a) (aggravated criminal sexual contact), a minimum period of parole ineligibility of at least

five years on an ordinary sentence (i.e., a non-extended term sentence).

13. Carjacking. N.J.S.A. 2C:15-2(b) requires a five-year period of parole ineligibility.

14. Arson Against a Place of Worship. N.J.S.A. 2C:17-1(g) requires a fifteen year period of parole ineligibility if the targeted structure was a place of public worship.

15. Leader of a Cargo Theft Network (Repeat Offender). N.J.S.A. 2C:20-2.4(e) requires a mandatory minimum term of one-third to one-half of the sentence imposed for a subsequent offense under N.J.S.A. 2C:20-2.4 (leader of cargo theft network).

16. Theft From a Cargo Carrier (Repeat Offender). N.J.S.A. 2C:20-2.6(c) mandates a period of parole ineligibility of one-third to one-half of the sentence imposed.

17. First Degree Computer Theft. N.J.S.A. 2C:20-25(g) requires a period of parole ineligibility of one-third to one-half of the sentence imposed. N.J.S.A. 2C:20-25(h) provides that the court shall consider it an aggravating circumstance if the victim was eighteen years old or younger.

18. Computer Theft Against the Government. N.J.S.A. 2C:20-25(h) mandates a parole disqualifier of one-third to one-half of the sentence imposed.

19. Unauthorized Access of Computer Data. N.J.S.A. 2C:20-31(b) mandates a parole ineligibility term of one-third to one-half of the sentence imposed.

20. Financial Facilitation of Criminal Activity. N.J.S.A. 2C:21-27(a) mandates a parole ineligibility term of one-third to one-half of the sentence imposed.

21. Endangering the Welfare of a Child (Computer-Related Sex Offense). N.J.S.A. 2C:24-4(b)(5)(a) requires a parole disqualifier of one-third to one-half of the sentence imposed, or five years, whichever is greater, for distributing, possessing, storing or maintaining by way of a file-share program, twenty-five or more items depicting the sexual exploitation or abuse of a child.

22. Third Degree Hindering Apprehension or Prosecution. N.J.S.A. 2C:29-3(a) requires at least a one-year term of imprisonment with a one-year parole disqualifier when the defendant hindered apprehension or prosecution of a violation of Title 39 or Chapter 33A of Title 17 by giving false information or concealing evidence, knowing that the conduct violated N.J.S.A. 2C:11-5.1 (leaving the scene of a motor vehicle accident that results in the death of another). N.J.S.A. 2C:29-3(a) (hindering apprehension or prosecution of another); N.J.S.A. 2C:29-3(b) (hindering apprehension or prosecution of one's self).

23. Harm to a Law Enforcement Animal. N.J.S.A. 2C:29-3.1(a) requires a five-year period of parole ineligibility.

24. Escape From an Institution. N.J.S.A. 2C:29-6(a)(1) and (2) require a period of parole ineligibility of three years.

25. Leader of a Narcotics Trafficking Network. N.J.S.A. 2C:35-3 requires the court impose a life sentence with a twenty-five-year period of parole ineligibility. **Note:** This statute is subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in Chapter XIV on drug offender sentencing.

26. Maintaining or Operating a Controlled Dangerous Substance Production Facility. N.J.S.A. 2C:35-4 requires a period of parole ineligibility between one-third and one-half of the sentence imposed. **Note:** This statute is subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in Chapter XIV on drug offender sentencing.

27. First Degree Manufacturing, Distributing or Dispensing Certain Controlled Dangerous Substances. N.J.S.A. 2C:35-5(b)(1) and (6) require a period of parole ineligibility between one-third and one-half of the sentence imposed. **Note:** This statute is subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in Chapter XIV on drug offender sentencing.

28. Employing a Juvenile in a Drug Distribution Scheme. N.J.S.A. 2C:35-6 mandates a period of parole ineligibility at or between one-third and one-half of the sentence imposed, or five years, whichever is greater. **Note:** This statute is subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in Chapter XIV on drug offender sentencing.

29. Manufacturing, Distributing or Dispensing a Controlled Dangerous Substance on or Near School Property. N.J.S.A. 2C:35-7(a) provides that if the offense involved less than one ounce of marijuana, then the period of parole ineligibility must be between one-third and one-half of the sentence imposed, or one year, whichever is greater, and in all other cases the period of parole ineligibility must be at or between one-third and one-half of the sentence imposed, or three years, whichever is greater.

(a) Waiver of the Minimum Term Permitted. N.J.S.A. 2C:35-7(b)(1) allows the court to waive the mandatory minimum term after considering the defendant's prior record, seriousness of the offense, location of the offense in relation to the school and children, and whether school was in session when the defendant committed the offense. N.J.S.A. 2C:35-7(b)(2), however, does not permit waiver if the defendant used or threatened violence, possessed a firearm, or committed the offense on a school bus or property owned by an elementary or secondary school, or a school board.

(b) State Appeal. If the court does not impose a minimum term, the sentence shall not be final for ten days to allow the State time to appeal the sentence. N.J.S.A. 2C:35-7(b)(2)(b). "The Attorney General shall develop guidelines to ensure the uniform exercise of discretion in making determinations regarding whether to appeal" a sentence imposed pursuant to N.J.S.A. 2C:35-7(b)(1).

Note: This statute is also subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in Chapter XIV on drug offender sentencing.

30. Drug Distribution to a Minor or a Pregnant Female. N.J.S.A. 2C:35-8 requires the court impose, upon application of the prosecutor, "twice the term of imprisonment, fine and penalty, including twice the term of parole ineligibility, if any, authorized or required to be imposed by" N.J.S.A. 2C:35-5(b) (drug distribution) or N.J.S.A. 2C:35-7 (distribution within a school zone) "or any other provision of this title." If the defendant is convicted of more than one offense, the court must impose one enhanced sentence on the most serious offense. Ibid. The prosecutor must establish the basis for the enhanced sentence by a preponderance of the evidence, and the court must hold a hearing on the matter. Ibid. **Note:** This

statute is subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in Chapter XIV on drug offender sentencing.

31. Terrorism. N.J.S.A. 2C:38-2(b)(2) requires a term of life imprisonment without the possibility of parole if the terrorism resulted in death. If death did not occur, then the court must impose a thirty-year period of parole ineligibility. N.J.S.A. 2C:38-2(b)(1).

32. Producing or Processing Chemical, Nuclear, Biological or Radiological Weapons. N.J.S.A. 2C:38-3(a)(2) requires a term of life imprisonment without the possibility of parole if the crime resulted in death. If death did not occur, then the court must impose a thirty-year period of parole ineligibility. N.J.S.A. 2C:38-3(a)(1).

33. Possession of a "Community Gun" for an Unlawful Purpose. N.J.S.A. 2C:39-4(a)(2) requires a period of parole ineligibility of one-half of the sentence imposed, or three years, whichever is longer.

34. Certain Persons Prohibited from Possessing a Firearm. N.J.S.A. 2C:39-7(b)(1) requires the sentence include a five-year parole-disqualifier if the defendant purchased, owned, possessed or controlled a firearm and has a prior conviction for any of the following:

- Aggravated assault (N.J.S.A. 2C:12-1(b));
- Arson (N.J.S.A. 2C:17-1);
- Burglary (N.J.S.A. 2C:18-2);
- Escape (N.J.S.A. 2C:29-5);
- Extortion (N.J.S.A. 2C:20-5);
- Homicide (N.J.S.A. 2C:11-2);
- Kidnapping (N.J.S.A. 2C:13-1);
- Robbery (N.J.S.A. 2C:15-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));

- Sexual assault (N.J.S.A. 2C:14-2(b));

- Bias intimidation (N.J.S.A. 2C:16-1);

- Endangering the welfare of a child (N.J.S.A. 2C:24-4);

- Stalking (N.J.S.A. 2C:12-10);

- A crime involving domestic violence (N.J.S.A. 2C:25-19);

- Certain controlled dangerous substance crimes (N.J.S.A. 2C:35-3 through N.J.S.A. 2C:35-6, N.J.S.A. 2C:35-7, or N.J.S.A. 2C:35-11);

- Possession of certain weapons and devices (N.J.S.A. 2C:39-3);

- Unlawful possession of a firearm, community gun, explosive, or destructive device (N.J.S.A. 2C:39-4); and

- Manufacturing, transporting, disposing of, and defacing certain weapons and dangerous instruments (N.J.S.A. 2C:39-9).

If the court imposes an extended term pursuant to N.J.S.A. 2C:43-7, then the parole disqualifier "shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or five years, whichever is greater." N.J.S.A. 2C:39-7(b)(1).

35. Certain Persons Prohibited from Transferring a Firearm. N.J.S.A. 2C:39-10(a)(4) requires a period of parole ineligibility of eighteen months be imposed against a licensed dealer who sold or transferred a firearm to a person knowing that person intended to transfer the firearm to a person who was disqualified from possessing a firearm under State or federal law. If the firearm was used in the commission of a crime, the parole disqualifier must be three years, rather than eighteen months. N.J.S.A. 2C:39-10(a)(4).

36. Transferring a Firearm to a Minor. N.J.S.A. 2C:39-10(e) requires a five-year period of parole ineligibility be imposed on anyone "who knowingly sells, gives, transfers, assigns or otherwise disposes of a firearm to a person who is under the age of eighteen years." However, N.J.S.A. 2C:43-6.2 provides that

upon request by the State, or at the sentencing court's request with the State's approval, the assignment judge shall place the defendant on probation or reduce the parole ineligibility term to one year if the interest of justice would not be served by imposition of a parole disqualifier, and the defendant has no prior conviction for a Chapter 39 weapons offense.

37. Operating a Motor Vehicle With a Suspended License. N.J.S.A. 2C:40-26(c) requires the court to impose a parole disqualifier of 180 days against a defendant convicted of operating a motor vehicle with a suspended license if (1) the license suspension resulted from a first violations of N.J.S.A. 39:4-50 (driving while intoxicated), or N.J.S.A. 39:4-50.4(a) (revocation for refusal to submit to a breath test); and (2) the defendant "had previously been convicted of violating N.J.S.A. 39:3-40 while under suspension for that first offense."

38. Certain Crimes While in Possession of a Firearm (the Graves Act). N.J.S.A. 2C:43-6(c) mandates a period of parole ineligibility that is (a) either one-half of the sentence imposed or forty-two months, whichever is greater, for first through third degree enumerated offenses, or (b) eighteen months for a crime of the fourth degree. See Chapter XIII on Graves Act and assault weapons sentencing for further discussion.

39. Certain Crimes While in Possession of a Machine Gun or Assault Firearm. N.J.S.A. 2C:43-6(g) requires a parole ineligibility term of (a) ten years for a first or second degree enumerated crime, (b) five years for a third degree crime, or (c) eighteen months for a fourth degree crime if, while in the course of committing or attempting to commit the crime the defendant used or was in possession of a machine gun or assault firearm. See Chapter XIII on Graves Act and assault weapons sentencing for further discussion.

40. Assault While Fleeing Police. N.J.S.A. 2C:43-6(i) mandates a period of parole ineligibility between one-third and one-half of the sentence imposed.

41. Public Officers Convicted of Certain Crimes. N.J.S.A. 2C:43-6.5(a) requires the following terms of parole ineligibility be imposed against a public officer or employee convicted of a crime set forth in N.J.S.A. 2C:43-6.5(b): ten years (first degree crimes); five years (second degree crimes); two years (third degree crimes); one year (fourth degree crimes).

(a) Exception. Under circumstances discussed in N.J.S.A. 2C:43-6.5(c)(1) and (2) the court may waive or reduce the mandatory minimum term of imprisonment. The sentence does not become final for ten days in order to permit the State to appeal. N.J.S.A. 2C:43-6.5(c)(3).

(b) Guidelines. N.J.S.A. 2C:43-6.5(e) requires the Attorney General develop guidelines to ensure the uniform exercise of discretion in making waiver and reduction determinations. The guidelines are dated May 31, 2007, and can be found at www.nj.gov/oag/dcj (click on "Directives/Guidelines," then "Guidelines," then "Prosecutions of Public Officials").

D. NERA: Case Law

1. Purpose. The purpose of NERA is to protect society from the risks associated with violent offenders by increasing prison for the most serious offenders. State v. Friedman, 209 N.J. 102, 119-20 (2012). See also State v. Drake, 444 N.J. Super. 265, 278 (quoting State v. Thomas, 166 N.J. 560, 569 (2001), for the proposition: "NERA was enacted primarily because of New Jersey's alarmingly high rate of parolee recidivism")), certif. denied, 226 N.J. 213 (2016).

2. Crimes Subject to NERA. NERA applies to all of the crimes listed in N.J.S.A. 2C:43-7.2(d), including sexual assault under N.J.S.A. 2C:14-2(b) or (c)(1). State v. Drake, 444 N.J. Super. 265, 283, certif. denied, 226 N.J. 213 (2016).

3. NERA Is Mandatory. Failure to apply NERA to an enumerated crime renders the sentence illegal and requires a remand for resentencing. State v. Ramsey, 415 N.J. Super. 257, 271-72 (App. Div. 2010), certif. denied, 205 N.J. 77 (2011); State v. Kearns, 393 N.J. Super. 107, 113 (App. Div. 2007).

4. Real-Time Consequences. Sentencing courts must consider the real-time consequences that NERA will have on a sentence. State v. Marinez, 370 N.J. Super. 49, 57-58 (App. Div.), certif. denied, 182 N.J. 142 (2004). A reviewing court will "consider the judge's evaluation of the aggravating and mitigating factors in that light." Id. at 58.

5. Real-Time Consequences and Plea Agreements. Under NERA's mandatory period of parole supervision, "the fixed period of a defendant's supervision may extend beyond the term of the original sentence." State v. Johnson, 182 N.J. 232, 240 (2005). A violation of probation "could subject [the] defendant to additional incarceration . . . that could make the custodial sentence, in the aggregate, far exceed the original sentence imposed." Ibid. A defendant must be informed of the consequences of being subject to this extended parole supervision when pleading guilty to a NERA offense. Id. at 241. See Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. 2C:43-7.2 at 1138-43 (2016-2017) (explain that unlike other sentencing decisions that focus on the minimum term a defendant must serve, NERA's 85% parole ineligibility term and violation-of-parole provision turn the focus to the maximum term a defendant could serve).

6. Downgrading. Although an offense may be downgraded to the second degree for sentencing under N.J.S.A. 2C:44-1(f)(2), the defendant remains "sentenced for a crime of the first degree" for purposes of parole supervision under NERA. State v. Cheung, 328 N.J. Super. 368, 371 (App. Div. 2000). See also State v. L.V., 410 N.J. Super. 90, 113 (App. Div. 2009), certif. denied, 201 N.J. 156 (2010) (explaining that while the court downgraded the offenses to third degree crimes for purposes of sentencing, the court nonetheless had to sentence the defendant to a term of incarceration because she had pleaded guilty to second degree crimes that were subject to NERA).

7. Credits. Gap-time credit (N.J.S.A. 2C:44-5(b)(2)) may not reduce the NERA 85% parole ineligibility term. Meyer v. N.J. State Parole Bd., 345 N.J. Super. 424, 426 (App. Div. 2001), certif. denied, 171 N.J. 339 (2002). Similarly, commutation and work credits may not reduce the NERA mandatory minimum. State v. Webster, 383 N.J. Super. 432, 436-37 (App. Div. 2006), aff'd o.b., 190 N.J. 305 (2007). They may be applied towards the remaining 15% of a defendant's prison sentence under NERA. Ibid.

8. Accomplices and Co-Conspirators. NERA applies to accomplices, State v. Rumblin, 166 N.J. 550, 553-56 (2001), and co-conspirator, State v. Natale, 348 N.J. Super. 625, 628 n.2 (App. Div. 2002), aff'd o.b., 178 N.J. 51 (2003). The statute is not limited to principals. State v. Rumblin, 166 N.J. 550, 553-56 (2001) (finding NERA applicable to an armed robbery

conviction even though the defendant did not hold the weapon during the robbery).

9. Application to a Murder Sentence. The court computes the 85% NERA parole-ineligibility period for a murder sentence on the whole term imposed for the murder conviction. State v. Rambo, 401 N.J. Super. 506, 522 (App. Div.), certif. denied, 197 N.J. 258 (2008), cert. denied, 556 U.S. 1225, 129 S. Ct. 2165, 173 L. Ed. 2d 1162 (2009). The court does not base the NERA parole ineligibility period on the part of the murder sentence that exceeds the thirty-year parole disqualifier required by the murder statute (N.J.S.A. 2C:11-3(b)(1)). Thus, if the court imposes a fifty-year term on a murder conviction, N.J.S.A. 2C:11-3(b)(1) would require the defendant serve at least thirty of those fifty years, but NERA would require the defendant serve forty-two-and-one-half years imprisonment (50 x .85 = 42.5).

10. Young Adult Offender. A young adult offender sentence (N.J.S.A. 2C:43-5) cannot be imposed on a conviction for any crime to which NERA applies. State v. Corriero, 357 N.J. Super. 214, 217-18 (App. Div. 2003).

11. Specifying the Length of the NERA Term. Trial judges should specifically state the length of the "NERA ineligibility term in terms of years, months and days to avoid any problem long after the time of sentencing." State v. Hernandez, 338 N.J. Super. 317, 319 n.1 (2001).

12. Violation of Probation. If, for a crime subject to NERA, a defendant obtained a reduced sentence of probation pursuant to Rule 3:21-10, then on resentencing after the probation violation, the court must impose an 85% period of parole ineligibility for the offense subject to NERA. State v. Kearns, 393 N.J. Super. 107, 111 (App. Div. 2007).

13. Application for Reconsideration. A defendant sentenced under NERA may not apply for reconsideration of his or her sentence pursuant to Rule 3:21-10(b) until the mandatory term of parole ineligibility has been served. State v. Le, 354 N.J. Super. 91, 96 (Law Div. 2002).

14. Cruel and Unusual Punishment. NERA does not violate the Federal or State constitutional prohibitions against cruel and unusual punishment. State v. Johnson, 166 N.J. 523, 548-49 (2001). This is so even when the act is applied to accomplices. State v. Rumblin, 166 N.J. 550, 557 (2001).

15. The Graves Act and NERA. The 85% parole disqualifier under NERA subsumes a Graves Act parole disqualifier. See State v. Garron, 177 N.J. 147, 163 (2003), cert. denied, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004). However, a court should state in the judgment that the Graves Act applied to the NERA offense to avoid confusion in the future if the defendant commits an offense that would subject him or her to the Graves Act repeat offender extended term. State v. Cheung, 328 N.J. Super. 368, 371 (App. Div. 2000).

E. Parole Ineligibility, Non-NERA Offenses: Case Law

1. The Standard in Balancing the Aggravating and Mitigating Factors. Although the court considers the same aggravating and mitigating factors in setting a prison term and a period of parole ineligibility, the standard for balancing the factors is different. State v. Case, 220 N.J. 49, 66 (2014). In determining the prison term, the court decides whether "there is a preponderance of aggravating or mitigating factors." Ibid. (quoting State v. Kruse, 105 N.J. 354, 359 (1987)). In determining parole ineligibility, the court must be "clearly convinced that the aggravating factors substantially outweigh the mitigating factors." Ibid. (quoting State v. Kruse, 105 N.J. 354, 359 (1987)).

2. Requisite Findings. "To facilitate meaningful appellate review, trial judges must explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 65 (2014). "[C]ritical to the sentencing process and appellate review is the need for the sentencing court to explain clearly why an aggravating or mitigating factor presented by the parties was found or rejected and how the factors were balanced to arrive at the sentence." Id. at 66. But see State v. McBride, 211 N.J. Super. 699, 705 (App. Div. 1986) (sustaining a parole disqualifier in the absence of express findings because the record clearly established that the aggravating factors substantially predominated the nonexistent mitigating factors), and State v. Morris, 242 N.J. Super. 532, 546 (App. Div.), certif. denied, 122 N.J. 408, 127 N.J. 321 (1990).

3. Prohibition Against Double Counting. The prohibition against double counting applies whether the court is setting a prison term or deciding whether to impose a period of parole ineligibility. State v. C.H., 264 N.J. Super. 112, 140 (App.

Div.), certif. denied, 134 N.J. 479 (1993); State v. Link, 197 N.J. Super. 615, 620 (App. Div. 1984), certif. denied, 101 N.J. 234 (1985). Thus, where an element of the crime is a specific fact, that element may not be used as an aggravating factor to impose a parole disqualifier. State v. C.H., 264 N.J. Super. 112, 140 (App. Div.), certif. denied, 134 N.J. 479 (1993).

4. Parole Ineligibility Is the Exception. Periods of parole ineligibility "are not to be treated as routine or commonplace." They are the exception, not the rule. State v. Case, 220 N.J. 49, 66 (2014) (quoting State v. Martelli, 201 N.J. Super. 378, 382-83 (App. Div. 1985)).

5. Proportionality. The need for uniformity in sentencing and the heightened standard for parole ineligibility suggest that a minimum term will rarely be imposed when the court sets a sentence within the middle of the sentencing range. State v. Kruse, 105 N.J. 354, 362 (1987); State v. Modell, 260 N.J. Super. 227, 254-55 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993).

6. Aggregate Term. The court may not impose a parole ineligibility term on an aggregate sentence; rather, the parole disqualifier must be imposed on a specific count. State v. Orlando, 269 N.J. Super. 116, 141 (App. Div. 1993), certif. denied, 136 N.J. 30 (1994).

7. Imprisonment as a Condition of Probation and Discretionary Parole Disqualifiers. "[A] defendant sentenced to a prison term as a condition of probation may not be exposed to the parole ineligibility term authorized by N.J.S.A. 2C:43-6(b)" (a discretionary parole disqualifier). State v. Hartye, 105 N.J. 411, 419 (1987).

8. Mandatory Minimum Terms Must Be Served in Jail or Prison. When sentencing for a violation of N.J.S.A. 2C:40-26 (operating a motor vehicle during a period of license suspension), the court may not substitute the parole ineligibility term with time spent in a rehabilitation program, community service program, or in-home detention; the minimum term must be served in prison or jail. State v. Harris, 439 N.J. Super. 150, 159-60 (App. Div.), certif. denied, 221 N.J. 566 (2015); State v. French, 437 N.J. Super. 333, 336-40 (App. Div. 2014), certif. denied, 220 N.J. 575 (2015).

9. Ineligibility for the Intensive Supervision Program. A defendant serving a statutorily mandated period of parole ineligibility or a discretionary parole disqualifier may not obtain entry into an intensive supervision program until after the minimum term has been served. State v. McPhall, 270 N.J. Super. 454, 457 (App. Div.), certif. denied, 137 N.J. 309 (1994).

10. Transfer to a Drug Treatment Program. A defendant serving a term that includes a period of parole ineligibility pursuant to N.J.S.A. 2C:35-7 (drug distribution within a school zone) may not obtain transfer to a drug treatment program until he or she completes the mandatory parole ineligibility period. State v. Diggs, 333 N.J. Super. 7, 10-11 (App. Div.), certif. denied, 165 N.J. 678 (2000). Similarly, a defendant cannot obtain a transfer to a drug treatment program until any Graves Act mandatory term has been served. State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986).

11. Probation Violation. A parole disqualifier should not ordinarily be imposed when resentencing a defendant for a probation violation since, at the original sentencing, the mitigating factors weighed in favor of probation. State v. Baylass, 114 N.J. 169, 178 (1989). In reweighing the factors upon a probation violation, a court should consider the aggravating factors found to exist at the original hearing and the mitigating factors as affected by the probation violation. Ibid. State v. Molina, 114 N.J. 181, 184-85 (1989).

> **Negotiated Plea.** These standards also apply to a defendant being resentenced for a violation of probation following a negotiated plea agreement pursuant to N.J.S.A. 2C:35-12, by which the prosecutor waived a mandatory minimum. Once the prosecutor waives a parole disqualifier under N.J.S.A. 2C:35-7 (applicable to drug offenses), it is no longer "mandatory" for purposes of sentencing a probation violation. State v. Vasquez, 129 N.J. 189, 199-200 (1992). However, the court may impose a period of parole ineligibility under appropriate circumstances, and based on adequate findings. Id. at 205.

12. Repeat Sex Offender. The parole disqualifier set forth in N.J.S.A. 2C:14-6 applies equally to defendants sentenced to jail terms and to sex-offender treatment. State v. Chapman, 95 N.J. 582, 588-89 (1984).

13. Young Adult Offender Sentencing in Drug Cases. A defendant subject to the mandatory parole ineligibility provisions of N.J.S.A. 2C:35-5(b)(1) (drug distribution) and N.J.S.A. 2C:35-7 (distribution within a school zone) may not be sentenced to an indeterminate term as a young adult offender pursuant to N.J.S.A. 2C:43-5. State v. Luna, 278 N.J. Super. 433, 437-38 (App. Div. 1995). The drug offense "strategy of deterrence by mandatory incarceration for a fixed minimum period is inconsistent with the . . . strategy expressed in the Young Adult Offenders statute which offers an early release from an indeterminate sentence in return for evidence of rehabilitation." State v. Luna, 278 N.J. Super. 433, 438 (App. Div. 1995).

14. First-Time Firearms Offenders, Constitutionality. N.J.S.A. 2C:43-6.2 (allowing the court to eliminate or limit the period of parole ineligibility for certain first-time offenders) has withstood constitutional challenge on separation-of-powers grounds. State v. Alvarez, 246 N.J. Super. 137, 145-47 (App. Div. 1991). The "interests of justice" standard avoids arbitrary, unreasonable and capricious decision-making by the prosecutor and poses no constitutional impediment to exercise of the legislative will. Ibid.

15. Murder Statute Parole Disqualifier and Cruel and Unusual Punishment. The thirty-year period of parole ineligibility mandated by the murder statute (N.J.S.A. 2C:11-3(b)(1)), does not constitute cruel and unusual punishment, as applied to adults, State v. McClain, 263 N.J. Super. 488, 497 (App. Div.), certif. denied, 134 N.J. 477 (1993), or juveniles. State v. Pratt, 226 N.J. Super. 307, 324-26 (App. Div.), certif. denied, 114 N.J. 314 (1988).

16. Credits Do Not Decrease a Parole Disqualifier. Commutation and work credits cannot reduce a statutorily or judicially imposed parole disqualifier. Curry v. N.J. State Parole Bd., 309 N.J. Super. 66, 70 (App. Div. 1998); Merola v. Dep't of Corr., 285 N.J. Super. 501, 509 (App. Div. 1995), certif. denied, 143 N.J. 519 (1996).

17. Computing the Aggregate Term. "[T]he mechanical function of aggregating sentences," including terms of parole eligibility, "is to be performed by the Parole Board, not the sentencing court." State v. Curry, 309 N.J. Super. 66, 71 (App. Div. 1998).

VIII. EXTENDED TERMS

An extended term of imprisonment exceeds the ordinary sentence range for the degree of crime committed. The sentencing court may impose an extended term upon application of the prosecutor (see section A), unless a statute mandates the imposition of an extended term (see section B). Section C discusses case law on extended terms.

Note: Pursuant to the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000). Stated another way, "the Sixth Amendment does not permit a defendant to be 'exposed . . . to a penalty exceeding the maximum he [or she] would receive if punished according to the facts reflected in the jury verdict alone.'" Ring v. Arizona, 536 U.S. 584; 122 S. Ct. 2428; 153 L. Ed. 2d 556 (2002) (quoting Apprendi v. New Jersey, 530 U.S. 466, 483, 120 S. Ct. 2348, 2359, 147 L. Ed. 2d 435, 450 (2000)). In the case of a guilty plea, the maximum sentence authorized by statute is the maximum sentence supported by the defendant's admissions. State v. Franklin, 184 N.J. 516, 537-38 (2005) (interpreting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)). The defendant may also "consent to judicial factfinding as to sentence enhancements." State v. Franklin, 184 N.J. 516, 538 (2005) (quoting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 417 (2004)).

The statutes discussed in this chapter are subject to the foregoing Sixth Amendment requirements.

A. Discretionary Extended Terms: Statutory Provisions

1. Statutory Authority for Discretionary Extended Terms. N.J.S.A. 2C:44-3 provides that upon application of the prosecutor the court may impose an extended term if the following situations in (a) or (b) apply:

(a) The defendant has been convicted of a crime of the first, second or third degree AND:

- The defendant is a "persistent offender" (i.e. at least twenty-one years old at the time of the offense; previously convicted on two separate occasions of two crimes while at least eighteen years old; and either the latest crime or the defendant's release from confinement is within ten years of the crime being sentenced) (N.J.S.A. 2C:44-3(a)); OR

- The defendant is a "professional criminal," (i.e. "a person who committed a crime as part of a continuing criminal activity in concert with two or more persons, and the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood") (N.J.S.A. 2C:44-3(b)); OR

- The defendant committed the crime for payment or pecuniary value (N.J.S.A. 2C:44-3(c)).

OR

(b) The defendant used, or was in possession of, a stolen vehicle in the commission of any of the following crimes (N.J.S.A. 2C:44-3(f)):

- Manslaughter (N.J.S.A. 2C:11-4);

- Aggravated assault (N.J.S.A. 2C:12-1(b));

- Kidnapping (N.J.S.A. 2C:13-1);

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));

- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a);

- Robbery (N.J.S.A. 2C:15-1);

- Burglary (N.J.S.A. 2C:18-2);

- Resisting arrest and eluding an officer (N.J.S.A. 2C:29-2(b));

- Escape (N.J.S.A. 2C:29-5); and

- Manufacturing, distributing or dispensing a controlled dangerous substance (N.J.S.A. 2C:35-5).

2. Prior Conviction Rules.

(a) "Prior Conviction" Defined. A prior conviction of an offense is "[a]n adjudication by a court of competent jurisdiction that the defendant committed an offense." N.J.S.A. 2C:44-4(a).

(i) Adjudication. For a prior crime, an adjudication is sufficient, even if the sentence has been suspended, as long as the time to appeal has expired and the defendant has not been pardoned. N.J.S.A. 2C:44-4(b).

(ii) Foreign Jurisdiction. A conviction in "another jurisdiction" constitutes a prior conviction if the law of that jurisdiction authorized a prison sentence in excess of six months. N.J.S.A. 2C:44-4(c).

(b) Proof of Prior Conviction. "Any prior conviction may be proved by any evidence, including fingerprint records made in connection with arrest, conviction or imprisonment, that reasonably satisfies the court that the defendant was convicted." N.J.S.A. 2C:44-4(d).

3. Extended Term Ranges. N.J.S.A. 2C:43-7(a)(1) to (7) provides the following extended term ranges:

- Murder (N.J.S.A. 2C:11-3): thirty-five years to life imprisonment with a thirty-five-year parole disqualifier;

- Aggravated manslaughter (N.J.S.A. 2C:11-4), first degree kidnapping (N.J.S.A. 2C:13-1(c)(1)), and aggravated sexual assault (N.J.S.A. 2C:14-2: thirty years to life imprisonment;

- First degree kidnapping of a child age sixteen or less (N.J.S.A. 2C:13-1(c)(2)): thirty years to life imprisonment with a thirty year parole disqualifier;

- First degree crimes (besides the five crimes listed above): twenty years to life imprisonment;

- Second degree crime: ten to twenty years;

- Third degree crime: five to ten years; and

- Fourth degree crime: five years.

4. Multiple Extended Terms. N.J.S.A. 2C:44-5(a)(2) prohibits a court from imposing multiple extended terms. The case law discussed in section C of this chapter clarifies that a court must impose extended terms mandated by statute (see section B of this chapter), even if the result is multiple extended terms. The court may not impose a discretionary extended term in addition to a mandatory extended term.

(a) Sentencing at One Proceeding. When a court imposes sentence for multiple offenses in the same proceeding, "[n]ot more than one sentence for an extended term shall be imposed." N.J.S.A. 2C:44-5(a)(2).

(b) Sentencing at Different Times. "When a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for an offense committed prior to the former sentence, other than an offense committed while in custody[, t]he multiple sentences imposed shall so far as possible conform to" N.J.S.A. 2C:44-5(a)(2). N.J.S.A. 2C:44-5(b)(1).

5. Notice and Hearing. The prosecutor must provide the defendant written notice of the basis for the extended term, and the court must provide the defendant an opportunity to respond at a hearing. N.J.S.A. 2C:44-6(e). The prosecutor must file a motion for an extended term within fourteen days of the verdict or guilty plea unless the court extends the time for "good cause shown." R. 3:21-4(e).

6. Mandatory Period of Parole Ineligibility. If the court imposes a discretionary extended term for kidnapping (N.J.S.A. 2C:13-1(c)(2)), or murder (N.J.S.A. 2C:11-3), then the court must also impose a period of parole ineligibility. N.J.S.A. 2C:43-7(a)(6) and (7). For murder the parole disqualifier must be thirty years. N.J.S.A. 2C:43-7(a)(6). For a violation of N.J.S.A. 2C:13-1(c)(2) (kidnapping), the parole disqualifier must be thirty years. N.J.S.A. 2C:43-7(a)(7).

7. Optional Period of Parole Ineligibility. With the exception of sentences for murder (N.J.S.A. 2C:11-3) and kidnapping (N.J.S.A. 2C:13-1(c)(2)), as part of a N.J.S.A. 2C:44-3(a) discretionary extended term "the court may fix a minimum term [of parole ineligibility] not to exceed one-half of the term" or, in the case of life imprisonment, twenty-five years. N.J.S.A. 2C:43-7(b).

B. Mandatory Extended Terms: Statutory Provisions

1. Second Degree Sexual Acts With a Child and Child Pornography. N.J.S.A. 2C:24-4(b)(5)(a) requires the court to impose an extended term on a person convicted of a second or subsequent offense of second degree (1) engaging in sexual acts with a child or the simulation of such acts knowing or intending that the act may be photographed, filmed or reproduced; or (2) filming, photographing or reproducing the image of a child in a sex act; or (3) distributing, possessing or sharing an item depicting the sexual exploitation or abuse of a child.

2. Third Degree Sexual Acts With a Child and Child Pornography. N.J.S.A. 2C:24-4(b)(5)(b) provides that a person convicted of a second or subsequent offense of third degree knowingly possessing, receiving, viewing or having under his or her control an item depicting the sexual exploitation or abuse of a child shall be sentenced to an extended term of imprisonment.

3. Soliciting a Minor to Join a Street Gang. N.J.S.A. 2C:33-28(f) requires the court to impose an extended term for soliciting, recruiting, coercing or threatening a person under the age of eighteen to join a street gang.

4. Drug Distribution to a Minor or a Pregnant Female. N.J.S.A. 2C:35-8 requires the court to impose, upon application of the prosecutor, "twice the term of imprisonment, fine and penalty, including twice the term of parole ineligibility, if any, authorized or required to be imposed by" N.J.S.A. 2C:35-5(b) (drug distribution) or N.J.S.A. 2C:35-7 (distribution within a school zone) "or any other provision of this title." If the defendant is convicted of more than one offense, the court shall impose one enhanced sentence on the most serious offense. Ibid. The prosecutor must establish the basis for the

enhanced sentence by a preponderance of the evidence, and the court must hold a hearing on the matter. Ibid.

Note: This statute is subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in Chapter XIV on drug offender sentencing.

5. State Taxes. N.J.S.A. 2C:43-6(e) provides that the court may impose an extended term for "a third or subsequent offense involving State taxes under N.J.S.A. 2C:20-9 [theft by failure to make required disposition of property received], N.J.S.A. 2C:21-15 [misapplication of entrusted property and property of government or financial institution], any other provision of this code, or under any of the provisions of Title 54 of the Revised Statutes [taxation], or Title 54A of the New Jersey Statutes [New Jersey Gross Income Tax Act]."

6. Repeat Drug Offender. N.J.S.A. 2C:43-6(f) provides that upon application of the prosecutor and after a hearing, the court must impose an extended term with a parole disqualifier on anyone convicted of the following crimes if the person also has a prior conviction of "manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog":

- Manufacturing, distributing, dispensing or possessing with intent to distribute any dangerous substance or controlled substance analog (N.J.S.A. 2C:35-5);

- Maintaining or operating a controlled dangerous substance production facility (N.J.S.A. 2C:35-4);

- Employing a juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6);

- Being a leader of a narcotics trafficking network (N.J.S.A. 2C:35-3); or

- Distributing, dispensing or possessing with intent to distribute within a school zone (N.J.S.A. 2C:35-7).

N.J.S.A. 2C:43-6(f) requires the extended term include a parole ineligibility term between one-third and one-half of the sentence imposed, or three years, whichever is greater. If the defendant violated N.J.S.A. 2C:35-6 (employing a juvenile in a

drug distribution scheme), the period of parole ineligibility must be at least seven years, and if the crime is one of the fourth degree, the period must be at least eighteen months. N.J.S.A. 2C:43-6(f). **Note:** The enhanced sentencing provisions of N.J.S.A. 2C:43-6(f) are subject to waiver under N.J.S.A. 2C:35-12. See the Chapter XIV on drug offender sentencing for additional discussion.

7. The Graves Act and Assault Weapons. N.J.S.A. 2C:43-6(c) and N.J.S.A. 2C:43-6(g) require an extended term be imposed when the defendant has previously been convicted of a crime involving the use or possession of a firearm and then commits an enumerated offense. See Chapter XIII on Graves Act and assault weapons sentencing for additional discussion.

8. Sex Offender Violation of Parole Supervision for Life. N.J.S.A. 2C:43-6.4(e) provides that if a defendant commits any of the following offenses while serving parole supervision for life, the court must impose an extended term, and the defendant must serve the entire term before returning to parole supervision for life:

- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Death by auto or vessel (N.J.S.A. 2C:11-5);
- Aggravated assault (N.J.S.A. 2C:12-1(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Luring a child (N.J.S.A. 2C:13-6);
- Sexual assault (N.J.S.A. 2C:14-2);
- Criminal sexual contact (N.J.S.A. 2C:14-3);
- Endangering the welfare of a child (N.J.S.A. 2C:24-4);
- Second degree burglary (N.J.S.A. 2C:18-2); or
- Possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4(a)).

9. Persistent Violent Offenders (also known as the "Persistent Offenders Accountability Act" and the "Three Strikes and You're In" Law). N.J.S.A. 2C:43-7.1 requires the court to impose either a life sentence without parole or an extended term, depending on the crime committed, and after a hearing.

(a) Life Without Parole. N.J.S.A. 2C:43-7.1(a) provides that a person convicted of any of the following crimes, or their substantial equivalent under any similar statute, "who has been convicted of two or more crimes that were committed on prior and separate occasions, regardless of the dates of the convictions," shall be sentenced to a term of life imprisonment without parole:

- Murder (N.J.S.A. 2C:11-3);
- Aggravated manslaughter (N.J.S.A. 2C:11-4(a));
- First degree kidnapping (N.J.S.A. 2C:13-1);
- Sexual assault (N.J.S.A. 2C:14-2(a)(3) to (6));
- First degree robbery (N.J.S.A. 2C:15-1); or
- Carjacking (N.J.S.A. 2C:15-2).

Note: Pursuant to N.J.S.A. 2C:43-7.1(e), a defendant sentenced to life without parole under N.J.S.A. 2C:43-7.1(a) may be released on parole if the defendant "is at least 70 years of age" and "has served at least 35 years in prison pursuant to" N.J.S.A. 2C:43-7.1, and "the full Parole Board determines that the defendant is not a danger to the safety of any other person or the community."

(b) Extended Term. N.J.S.A. 2C:43-7.1(b) requires the court to impose an extended term if the circumstances in subsection (1) or (2) exist:

(1) the defendant is being sentenced for any of the following crimes and has two or more convictions for any of those crimes or the crimes enumerated in N.J.S.A. 2C:43-7.1(a) (listed above), "regardless of the dates of the convictions":

- Second degree manslaughter (N.J.S.A. 2C:11-4);

- Second or third degree assault (N.J.S.A. 2C:12-1(b));

- Second degree kidnapping (N.J.S.A. 2C:13-1);

- Aggravated criminal sexual contact under any circumstances set forth in N.J.S.A. 2C:14-2(a)(3) to (6) (N.J.S.A. 2C:14-3);

- Second degree robbery (N.J.S.A. 2C:15-1);

- Second degree burglary (N.J.S.A. 2C:18-2); or

- Second degree possession of weapons for unlawful purposes (N.J.S.A. 2C:39-4).

OR

(2) The defendant: (1) is convicted of a crime enumerated in N.J.S.A. 2C:43-7.1(a) (listed above); (2) "does not have two or more prior convictions that require sentencing under" N.J.S.A. 2C:43-7.1(a); and (3) has two or more prior convictions that would require sentencing under" N.J.S.A. 2C:43-7.1(b)(1) if the defendant "had been convicted of a crime enumerated in" N.J.S.A. 2C:43-7.1(b)(1).

(c) Timing of Convictions. N.J.S.A. 2C:43-7.1(c) provides: "The provisions of this section shall not apply unless the prior convictions are for crimes committed on separate occasions and unless the crime for which the defendant is being sentenced was committed either within 10 years of the date of the defendant's last release from confinement for commission of any crime or within 10 years of the date of the commission of the most recent of the crimes for which the defendant has a prior conviction."

(d) Notice and Hearing. Within fourteen days of entry of a guilty plea or return of a verdict, the State must serve notice upon defendant of the intention to impose sentence pursuant to N.J.S.A. 2C:43-7.1(d). See also R. 3:21-4(f). The court may not impose a sentence pursuant to N.J.S.A. 2C:43-7.1 unless the ground for the sentence has been established at a hearing.

10. Sexual Assault or Aggravated Criminal Sexual Contact Against Minors. N.J.S.A. 2C:44-3(g) requires that a defendant convicted of sexual assault (N.J.S.A. 2C:14-2) or criminal sexual contact (N.J.S.A. 2C:14-3) be sentenced to an extended term of imprisonment upon application of the prosecutor, if the crime involved violence or the threat of violence and the victim was sixteen years of age or less. See Chapter XV on sex offender sentencing for further discussion.

11. Crimes Committed While Released on Bail. N.J.S.A. 2C:44-5.1(a) requires the court to impose an extended term and double the fine authorized for the offense if the defendant committed any of the following offenses and "at the time of the commission of the crime, the defendant was released on bail or on his own recognizance for one of the enumerated crimes and was convicted of that crime":

- Possession of a firearm with intent to use it unlawfully against the person of another (N.J.S.A. 2C:39-4);
- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a);
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Robbery (N.J.S.A. 2C:15-1);
- Second degree burglary, or burglary of a structure adapted for overnight accommodations (N.J.S.A. 2C:18-2); or
- First, second or third degree assault (N.J.S.A. 2C:12-1(b).

Notice and Hearing. Notice to impose a sentence pursuant to this statute must be filed with the court and served upon the defendant by the prosecutor within fourteen days of entry of the defendant's guilty plea or return of the verdict. R. 3:21-4(f). The court must provide the

defendant an opportunity to challenge the basis for the extended term at a hearing. N.J.S.A. 2C:44-5.1(b).

C. Extended Terms: Case Law

1. Imposing a Discretionary Extended Term.

(a) Setting a Term, the Dunbar Factors. After finding the defendant meets the statutory requirements for a discretionary extended term, the court must assess the aggravating and mitigating factors, including the need to protect the public, and set a term within the bottom of the ordinary term and top of the extended term range. State v. Pierce, 188 N.J. 155, 168-169 (2006) (modifying the prior rule set forth in State v. Dunbar, 108 N.J. 80, 89 (1987) to eliminate judicial factfinding, as required by the Sixth Amendment).

(b) Parole Ineligibility. To impose a period of parole ineligibility, the court must be "clearly convinced that the aggravating factors substantially outweigh the mitigating factors." State v. Dunbar, 108 N.J. 80, 89 (1987).

(c) Deference to the Prosecutor's Request. "Because it is the prosecutor's choice whether to seek an extended term . . . the trial judge should give weight to the prosecutor's determination." State v. Thomas, 195 N.J. 436, 436 (2008).

(d) Sentencing Range. The range of sentence that a persistent offender is subject to "starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range." State v. Pierce, 188 N.J. 155, 169 (2006).

(e) Specificity in the Motion for an Extended Term. When the defendant faces multiple charges, the prosecutor's notice of motion should identify the offense for which the prosecutor seeks an extended term. State v. Thomas, 195 N.J. 431, 436 (2008).

2. Discretionary Extended Terms and Prior Convictions.

(a) Foreign Jurisdiction. Absent a showing of fundamental unfairness, a prior conviction from a foreign country is presumed appropriate where the jurisdiction had a judicial system with protections similar to our own. State v. Williams, 309 N.J. Super. 117, 123 (App. Div.), certif. denied, 156 N.J. 383 (1998). One criteria for fundamental fairness is that the defendant had legal counsel in the prior proceeding. Id. at 124.

(b) Constitutionality. There is no Sixth Amendment violation in the sentencing court's consideration of a defendant's prior conviction in order to determine whether the defendant qualifies as a "persistent offender" because such findings fall within the "prior conviction" exception of Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403, 412 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 488, 120 S. Ct. 2348, 2361-62, 147 L. Ed. 2d 435, 454 (2000). State v. Pierce, 188 N.J. 155, 163 (2006).

(c) Prior Conviction Pending Appeal. The sentencing court may consider a prior conviction, even if an appeal challenging it is pending. State v. Cook, 330 N.J. Super. 395, 422 (App. Div.), certif. denied, 165 N.J. 486 (2000). If the prior conviction is reversed on appeal, then the extended term would have to be vacated. Ibid.

(d) Timing of Offenses. Under N.J.S.A. 2C:44-3(a), a defendant may not be sentenced as a persistent offender if the "latest in time" prior crime and the "last release from confinement" both occurred more than ten years before the crime for which the defendant is being sentenced, even if the latest prior conviction was entered within the ten-year period. State v. Henderson, 375 N.J. Super. 265, 266, 270 (Law Div. 2004).

(e) Prior Convictions Considered Previously by a Court. A court is not precluded from considering prior convictions that a prior court used as a basis for an extended term. State v. Reldan, 231 N.J. Super. 232, 237-38 (App. Div. 1989).

(f) Chronology of the Crimes. The sentencing judge may consider convictions for crimes committed after the crime for which the court is imposing a sentence. State v. Cook, 330 N.J. Super. 395, 421 (App. Div.), certif. denied, 165

N.J. 486 (2000). The timing of the conviction, not the crime, is the significant fact. Ibid. Compare this approach to the following methods used to calculate persistent-offender status for other purposes:

(i) Sex Offenders: Under N.J.S.A. 2C:14-6, a second or subsequent sex offender conviction is subject to mandatory parole ineligibility (unless given an extended sentence under N.J.S.A. 2C:43-7), if the person has been convicted of a sexually oriented offense "at any time." The "first" or "earlier" crime had to result in a conviction by the time the later offense was committed. State v. Anderson, 186 N.J. Super. 174, 176 (App. Div. 1982), aff'd o.b., 93 N.J. 14 (1983).

(ii) The Graves Act: The Graves Act does not limit the chronological sequence of convictions subject to its extended term provision; the only requirement is that there be a prior conviction. State v. Hawks, 114 N.J. 359, 365-67 (1989). It has been postulated, but not decided, that a Graves Act extended term cannot be imposed based upon convictions and sentences entered in the same proceeding. State v. Rountree, 388 N.J. Super. 190, 207-09 (App. Div. 2006), certif. denied, 192 N.J. 66 (2007).

(iii) Repeat Drug Offenders: An extended term under N.J.S.A. 2C:43-6(f) does not depend on the chronological sequence of the offenses or convictions. The defendant must have been convicted "at any time." State v. Hill, 327 N.J. Super. 33, 41-42 (App. Div. 1999), certif. denied, 164 N.J. 188 (2000). However, the statute will not apply if the defendant enters guilty pleas to two different charges pursuant to one agreement, on the same day, at one proceeding. State v. Owens, 381 N.J. Super. 503, 512-13 (App. Div. 2005).

(iv) Domestic Violence Act: The enhanced penalty provisions of N.J.S.A. 2C:25-30 apply only to individuals who have been previously convicted of a domestic violence offense as of the date the subsequent offense was committed. Hence, these provisions do not apply to someone simultaneously convicted of offenses occurring on two separate

occasions. State v. Bowser, 272 N.J. Super. 582, 588-89 (Law Div. 1993).

3. Rules When Imposing Multiple Extended Terms.

(a) Discretionary Extended Terms. N.J.S.A. 2C:44-5(a)(2) prohibits a court from imposing multiple discretionary extended terms, even if the terms are to be served concurrently. State v. Mays, 321 N.J. Super. 619, 636 (App. Div.), certif. denied, 162 N.J. 132 (1999).

(b) Mandatory and Discretionary Extended Terms. The prohibition against multiple extended terms is inapplicable to mandatory extended terms required by the Graves Act (N.J.S.A. 2C:43-6(c)), State v. Robinson, 217 N.J. 594, 597 (2014) (citing State v. Connell, 208 N.J. Super. 688, 697 (App. Div. 1986)), and the Comprehensive Drug Reform Act (N.J.S.A. 2C:43-6(f)), State v. Singleton, 326 N.J. Super. 351, 355 (App. Div. 1999). Thus, if the defendant is convicted of two Graves Act offenses and a drug offense, all of which are subject to mandatory extended terms, the court must impose three extended terms. The court may not, however, impose a discretionary extended term in addition to a mandatory extended term. State v. Robinson, 217 N.J. 594, 609-10 (2014).

(c) Multiple Extended Terms. N.J.S.A. 2C:44-5(a)(2) prohibits a court from imposing multiple discretionary extended terms in one sentencing proceeding; it "has no application . . . where extended terms are imposed by two different courts for different offenses at proceedings separated by a span of nine years." State v. Reldan, 231 N.J. Super. 232, 238 (App. Div. 1989) (affirming an extended term where the defendant was serving an extended term pursuant to a former persistent offender statute). Pursuant to N.J.S.A. 2C:44-5(b), a defendant serving an extended term cannot be sentenced to a discretionary extended term by a subsequent sentencing court for a crime committed before the crime for which he or she is already serving an extended term, unless the first offense occurred while the defendant was in custody. State v. Pennington, 418 N.J. Super. 548, 554-58 (App. Div. 2011), certif. denied, 209 N.J. 595 (2012).

(d) Crime Committed While "In Custody." A defendant who committed a subsequent offense while released on bail

committed that offense while "in custody" for purposes of N.J.S.A. 2C:44-5(b), and thus, may be subject to a second discretionary extended term by a second sentencing court. State v. Boykins, 447 N.J. Super. 213, 221-23 (App. Div. 2016), certif. denied, ___ N.J. ___ (2017).

(e) Probation Violation. If a defendant commits a crime while serving probation on a suspended extended term, the court may revoke probation, reinstate the original extended term, and impose an extended term for the crime committed while on probation, without violating N.J.S.A. 2C:44-5(a)(2). State v. Williams, 299 N.J. Super. 264, 272-73 (App. Div. 1997).

(f) Severed Charges. When charges in an indictment are severed, and the court imposes an extended term on a conviction from the first trial, N.J.S.A. 2C:44-5(b)(1) precludes the court from imposing an extended term on a conviction from the second trial. State v. Hudson, 209 N.J. 513, 531-33 (2012). The Hudson decision did not create new law, and therefore has retroactive effect. State v. Bull, 227 N.J. 555, 563 (2017).

(g) Guilty Pleas at Different Times. N.J.S.A. 2C:44-5(b)(1) precludes a sentencing court from imposing a second extended term for an offense that a defendant "pled to second in time but that was committed earlier than the imposition of the extended-term sentence she [the defendant] is serving." State v. McDonald, 209 N.J. 549, 555 (2012).

4. Repeat Drug Offenders.

(a) Separation of Powers. As written, N.J.S.A. 2C:43-6(f) (requiring the court impose an extended term on a repeat drug offender upon application of the prosecutor) violates the doctrine of separation of powers by giving unfettered power to prosecutors in the sentencing determination. State v. Lagares, 127 N.J. 20, 31 (1992). To comply with the separation of powers doctrine, our Court has interpreted the statute as requiring that guidelines be adopted to assist prosecutorial decision-making while reflecting the legislative intent that extended sentences for repeat drug offenders should be the norm. State v. Lagares, 127 N.J. 20, 32 (1992).

(i) Guidelines. For the guidelines effective May 20, 1998, through September 14, 2004, see Attorney General Directive 1998-1, incorporating by reference Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12, available at www.nj.gov/oag/dcj (click on "Directives/Guidelines," then "Directives"). For a discussion of the statewide guidelines issued in response to Lagares, see State v. Kirk, 145 N.J. 159, 168-69 (1996).

For offenses committed on or after September 15, 2004, the Attorney General promulgated revised guidelines. They are available at www.nj.gov/oag/dcj (click on "Directives/Guidelines," then "Guidelines," then "Brimage Guidelines 2").

(b) Arbitrary and Capricious Challenge. Prosecutors must state their reasons on the record for seeking an extended sentence under the repeat drug offender statute (N.J.S.A. 2C:43-6(f)), and the court may deny or vacate an extended term where a defendant clearly and convincingly establishes that the prosecutor's decision was arbitrary and capricious. State v. Lagares, 127 N.J. 20, 32-33 (1992).

(c) Sixth Amendment. The requirement that the court find the basis for a mandatory extended term falls within the "prior conviction" exception of Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403, 412 (2004), and thus does not offend the Sixth Amendment jury-finding requirement. State v. Thomas, 188 N.J. 137, 149-52 (2006).

(d) Chronology of Offenses and Convictions. Similar to the Graves Act repeat-offender provision, the chronological sequence of the offenses and convictions is irrelevant for purposes of N.J.S.A. 2C:43-6(f). State v. Hill, 327 N.J. Super. 33, 41-42 (App. Div. 1999), certif. denied, 164 N.J. 188 (2000). The only requirement is that there be a previous conviction "at any time." Ibid. But where a defendant enters guilty pleas to two different charges on the same day, in the same proceeding, and pursuant to one agreement, N.J.S.A. 2C:43-6(f), will apply. State v. Owens, 381 N.J. Super. 503, 512-13 (App. Div. 2005).

(e) The Dunbar Factors. The factors set forth in State v. Dunbar, 108 N.J. 80 (1987), as modified in State v.

Jefimowicz, 119 N.J. 152 (1990), for setting an extended term apply when imposing a mandatory extended term under N.J.S.A. 2C:43-6(f). State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005); State v. Williams, 310 N.J. Super. 92, 98-99 (App. Div.), certif. denied, 156 N.J. 426 (1998).

5. Persistent Offenders Accountability Act (the Three Strikes and You're in Law).

(a) Robbery. The Persistent Offender Law's reference to N.J.S.A. 2C:15-1 (robbery) applies only to first degree robbery. State v. Jordan, 378 N.J. Super. 254, 258-61 (App. Div. 2005).

(b) Hearing. The State must establish the basis for a term under the Three Strikes Law at a hearing where the defendant has the right to hear and controvert the evidence against him or her and to offer evidence in his or her own behalf. N.J.S.A. 2C:43-7.1(d); R. 3:21-4(f). The standard of proving a defendant's prior conviction under the statute is proof by a preponderance of the evidence. State v. Oliver, 162 N.J. 580, 590-92 (2000).

(c) Conviction in Another Jurisdiction. A foreign conviction must be "substantially equivalent" to an enumerated offense. State v. Rhodes, 329 N.J. Super. 536, 544 (App. Div.), certif. denied, 165 N.J. 487 (2000).

(d) Timing of Convictions and Punishments. The law is not limited to defendants who have been convicted and punished for the first two offenses before committing the third offense. State v. Galiano, 349 N.J. Super. 157, 164-65 (App. Div. 2002), certif. denied, 178 N.J. 375 (2003). "If two qualifying convictions precede the sentencing of the third offense and that offense was committed either within ten years of defendant's most recent release from confinement for commission of any crime or within ten years of the commission of the most recent of the crimes for which defendant has a prior conviction, then defendant is eligible for the enhanced punishment of N.J.S.A. 2C:43-7.1(a), even though the present sentence is for an offense committed prior to the entry of the pre-qualifying convictions." Id. at 168.

(e) Timing of Crimes. To qualify as "strikes," the two other offenses must have occurred "on prior and separate occasions." Thus, the defendant must have committed them on different occasions and prior to the third offense. State v. Parks, 192 N.J. 483, 488 (2007).

(f) Constitutionality. As applied to adults, the Three Strikes Law does not violate the double jeopardy, ex post facto, due process, or equal protection clauses of the federal or state constitutions, does not violate the separation of powers doctrine, and does not constitute cruel and unusual punishment. State v. Oliver, 162 N.J. 580, 585-89 (2000). A statute that mandates life imprisonment without the possibility of parole for a defendant who was under the age of eighteen at the time he or she committed the offense violates the Eighth Amendment prohibition against cruel and unusual punishment. Miller v. Alabama, ___ U.S. ___, ____, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 415 (2012). See also Montgomery v. Louisiana, ___ U.S. ___, ___, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599, 620 (2016) (ruling that Miller v. Alabama applies retroactively).

IX. CONCURRENT AND CONSECUTIVE SENTENCES

When a defendant is subject to multiple terms of imprisonment, the sentencing court must decide whether the terms will run concurrently or consecutively. A few statutes require imposition of consecutive terms (see section B). In all other cases the decision is left to the sentencing court's discretion (see section A). Section C discusses case law on concurrent and consecutive terms.

A. Consecutive Terms Within the Court's Discretion: Statutory Provisions

1. Statutory Authority for Discretionary Consecutive Terms. N.J.S.A. 2C:44-5(a) provides that where a defendant receives multiple sentences of imprisonment "for more than one offense, including an offense for which a previous suspended sentence or sentence of probation has been revoked, such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence." "There shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses"; however, the aggregate of consecutive terms to county jail may not exceed eighteen months. Ibid.

2. Sentences Imposed at Different Times. N.J.S.A. 2C:44-5(b) instructs the court to decide whether to run terms consecutively or concurrently when a defendant, previously sentenced to imprisonment, is later sentenced for an offense committed prior to the former sentence. See also N.J.S.A. 2C:44-5(d) (instructing that multiple terms of imprisonment shall run concurrently or consecutively when a second or subsequent sentence is imposed).

3. Offense Committed While Released Pending Disposition of Charges. N.J.S.A. 2C:44-5(h) limits the court's discretion in imposing concurrent terms where the defendant committed the offense while released, with or without bail, pending disposition of charges. The court may impose concurrent terms only if, after considering "the character and conditions of the defendant," the court "finds that imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others." Ibid.

4. The Yarbough Guidelines. N.J.S.A. 2C:44-5 does not specify when consecutive or concurrent sentences are appropriate. In State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986), the Supreme Court set forth the following guidelines for sentencing courts when the offender "has engaged in a pattern of behavior constituting a series of separate offenses" or "multiple offenses in separate, unrelated episodes":

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> >
> > (d) any of the crimes involved multiple victims;
> >
> > (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors;
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and
>
> (6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms

(including an extended term, if eligible) that could be imposed for the two most serious offenses.

[State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).]

Note: Yarbough guideline number six has been superseded by a 1993 amendment to N.J.S.A. 2C:44-5(a), which provides that there "shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses."

5. Calculation of the Terms. N.J.S.A. 2C:44-5(e)(1) instructs that when terms run concurrently, "the shorter terms merge in, and are satisfied by discharge of the longest term." When the terms run consecutively, they "are added to arrive at an aggregate term to be served equal to the sum of all terms." N.J.S.A. 2C:44-5(e)(2).

B. Mandatory Consecutive Terms: Statutory Provisions

1. Leaving a Motor Vehicle Accident Resulting in Death. N.J.S.A. 2C:11-5.1 instructs that "when the court imposes multiple sentences of imprisonment for more than one offense, those sentences shall run consecutively."

2. Second or Third Degree Leaving the Scene of a Boating Accident. N.J.S.A. 2C:11-5.2(d) instructs that "when the court imposes multiple sentences of imprisonment for more than one offense, those sentences shall run consecutively."

3. Leaving a Motor Vehicle Accident Resulting in Serious Bodily Injury. N.J.S.A. 2C:12-1.1 provides that "whenever in the case of such multiple convictions the court imposes multiple sentences of imprisonment for more than one offense, those sentences shall run consecutively."

4. Third Degree Endangering an Injured Victim. N.J.S.A. 2C:12-1.2(d) requires the sentence "be served consecutively to that imposed for any conviction of the crime that rendered the person physically helpless or mentally incapacitated."

5. Third Degree Reckless Endangerment. N.J.S.A. 2C:12-2(b)(2) provides that the sentence "shall be ordered to be served consecutively to that imposed for a conviction of the offense

that the defendant intended to commit or facilitate when the defendant violated the provisions of this subsection." **Note:** As of January 11, 2016, this statute was repealed and replaced by N.J.S.A. 2C:24-7.1 (Endangering Another Person), which does not require a consecutive term.

6. Throwing Bodily Fluid at a Department of Corrections Employee. N.J.S.A. 2C:12-13 provides: "A term of imprisonment imposed for this offense shall run consecutively to any term of imprisonment currently being served and to any other term imposed for another offense committed at the time of the assault."

7. Kidnapping a Minor and Homicide. N.J.S.A. 2C:13-1(c)(2) provides that if the kidnapped victim is killed, the kidnapping conviction must "be served consecutively to any sentence imposed pursuant to" Chapter 11 (criminal homicide).

8. Financial Facilitation of Criminal Activity. N.J.S.A. 2C:21-27(c) requires the conviction "be served consecutively to that imposed for a conviction of any offense constituting the criminal activity involved or from which the property was derived."

9. Witness Tampering. N.J.S.A. 2C:28-5(e) requires the sentence be served consecutively to the sentence for "an offense that was the subject of the official proceeding or investigation."

10. Violation of a Protective Order Prohibiting Witness Tampering. N.J.S.A. 2C:28-5.2(b) authorizes the court to impose a consecutive sentence to the sentence on the underlying offense. In the event the court does not impose a consecutive term, it must state its rationale on the record. Ibid.

11. Solicitation of Street Gang Members. N.J.S.A. 2C:33-28(e) instructs that if the defendant solicited another to join a criminal street gang while under official detention, the sentence must be served consecutively to the sentence the defendant was serving when the defendant solicited gang members. Additionally, the sentence under this statute must be served consecutively to a sentence "imposed upon any other such conviction."

12. Gang Criminality. N.J.S.A. 2C:33-29(b) requires the sentence imposed for the crime of gang criminality be served

consecutively to the sentence on any of the following underlying offenses: "any crime specified in chapters 11 through 18, 20, 33, 35 or 37 of Title 2C"; prostitution (N.J.S.A. 2C:34-1); possession of prohibited weapons and devices (N.J.S.A. 2C:39-3); possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4); possession of a firearm while committing certain offenses (N.J.S.A. 2C:39-4.1); unlawful possession of a weapon (N.J.S.A. 2C:39-5); or manufacturing weapons (N.J.S.A. 2C:39-9).

13. Promoting Organized Street Crime. N.J.S.A. 2C:33-30(b) requires the sentence be served consecutively to the sentence imposed on an underlying offense pursuant to Chapters 11 through 18, 20, 33, 35, or 37 of Title 2C, or a conviction under N.J.S.A. 2C:39-4.1 (possession of a firearm while committing certain offenses); N.J.S.A. 2C:39-5 (unlawful possession of a weapon); or N.J.S.A. 2C:39-9 (manufacturing weapons).

14. Booby Traps in the Manufacturing or Distribution of Drugs. N.J.S.A. 2C:35-4.1(e) requires the sentence be served consecutively to the sentence for a conviction of any offense in Chapter 35 (drug offenses), or a conspiracy or attempt to commit an offense under Chapter 35, "unless the court, in consideration of the character and circumstances of the defendant, finds that imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others. If the court does not impose a consecutive sentence, the sentence shall not become final for 10 days in order to permit the appeal of such sentence by the prosecution."

15. Possession of a Weapon During a Drug or Bias Crime. N.J.S.A. 2C:39-4.1(d) requires the sentence run consecutively to the sentence for any of the following offenses:

- Leader of a narcotics trafficking network (N.J.S.A. 2C:35-3);
- Maintaining or operating a drug production facility (N.J.S.A. 2C:35-4);
- Manufacturing or distributing drugs (N.J.S.A. 2C:35-5);
- Manufacturing and dispensing Gamma Hydroxybutyrate (N.J.S.A. 2C:35-5.2);

- Manufacturing and dispensing Flunitrazepam (N.J.S.A. 2C:35-5.3);

- Employing a juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6);

- Possession of drugs on or near school property (N.J.S.A. 2C:35-7);

- Distribution or possession of drugs on public property (N.J.S.A. 2C:35-7.1);

- Possession, distribution, or manufacturing imitation drugs (N.J.S.A. 2C:35-11); and

- Bias intimidation (N.J.S.A. 2C:16-1).

16. Assault by an Inmate of a correctional employee, sheriff's department employee, or law enforcement officer. N.J.S.A. 2C:44-5(i) requires the court impose a term of incarceration on an inmate for assault on an employee of a correctional facility, juvenile facility, county sheriff's department, or law enforcement officer. The sentence must "run consecutively to any term of imprisonment currently being served and to any other term imposed for any other offense committed at the time of the assault." Ibid.

C. Consecutive and Concurrent Terms: Case Law

1. Aggravating and Mitigating Factors. "[F]or each crime in a series the court should impose a sentence, taking into account the appropriate aggravating and mitigating circumstances set forth in N.J.S.A. 2C:44-1(a) and -1(b), before considering whether the sentences should run consecutively or concurrently." State v. Rogers, 124 N.J. 113, 119 (1991).

2. Expired Sentences. The court may not run a sentence concurrently to a sentence that has fully expired. State v. Mercadante, 299 N.J. Super. 522, 532 (App. Div.), certif. denied, 150 N.J. 26 (1997).

3. Sentences in Foreign Jurisdictions. The consecutive term provisions of the Code do not allow a court to impose a sentence to run consecutive to a sentence in a foreign jurisdiction.

Breeden v. N.J. Dep't of Corr., 132 N.J. 457, 465-66 (1993). However, if supported by adequate reasons, a court may impose a sentence consecutive to a federal sentence that a defendant is currently serving. State v. Walters, 279 N.J. Super. 626, 634-37 (App. Div.), certif. denied, 141 N.J. 96 (1995). And a federal court may order that its sentence run consecutive to a state sentence that has not yet been imposed. Setser v. United States, ___ U.S. ___, ___, 132 S. Ct. 1463, 1467-73, 182 L. Ed. 2d 455, 459-65 (2012).

4. Requisite Findings. The court must state separately its reasons for imposing consecutive sentences. State v. Miller, 205 N.J. 109, 129 (2011) (remanding for resentencing where the court failed to address the Yarbough factors). However, a reviewing court may uphold a sentence that lacks a specific statement of reasons and findings "where the sentencing transcript makes it possible to 'readily deduce' the judge's reasoning." Id. at 129-30 (quoting State v. Bieneck, 200 N.J. 601, 609 (2010)).

5. The Yarbough Guidelines on Procedural Matters. "The second, fourth, fifth, and sixth guidelines do not assist a court in making the threshold decision whether to impose concurrent or consecutive sentences; rather, they establish certain procedural requirements." State v. Carey, 168 N.J. 413, 423 (2001).

6. Yarbough Guideline Three. The guideline that provides the "clearest guidance" to sentencing courts is the third one, which sets forth five factors that focus on the facts relating to the crime. State v. Carey, 168 N.J. 413, 423 (2001).

7. Qualitative Weighing. The court should qualitatively, not quantitatively, weight the factors set forth in guideline three. State v. Carey, 168 N.J. 413, 427 (2001). A court may impose consecutive sentences "even though a majority of the Yarbough factors support concurrent sentences." Id. at 427-28. See State v. Swint, 328 N.J. Super. 236, 264 (App. Div.) (explaining that even when offenses are connected by "unity of specific purpose," are somewhat interdependent of one another, and are committed within a short period of time, the court may impose consecutive terms), certif. denied, 165 N.J. 492 (2000).

8. Severity of the Circumstances. When deciding whether to impose concurrent or consecutive sentences, the court should determine whether the Yarbough factor under consideration "renders the collective group of offenses distinctively worse

than the group of offenses would be were that circumstance not present." State v. Carey, 168 N.J. 413, 428 (2001).

9. Multiple Victims and Harms. "Crimes involving multiple deaths or victims who have sustained serious bodily injuries represent especially suitable circumstances for the imposition of consecutive sentences." State v. Carey, 168 N.J. 413, 428 (2001). Accord State v. Roach, 146 N.J. 208, 230-31, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996); State v. Johnson, 309 N.J. Super. 237, 271-72 (App. Div.), certif. denied, 156 N.J. 387 (1998). This is because the "total impact of singular offenses against different victims will generally exceed the total impact on a single individual who is victimized multiple times." This is true even when the defendant did not intend to harm multiple victims but it was foreseeable that his or her reckless conduct would have that effect. State v. Carey, 168 N.J. 413, 429 (2001).

10. Multiple Victims of Vehicular Homicide. "[I]n vehicular homicide cases, the multiple-victims factor is entitled to great weight and should ordinarily result in the imposition of at least two consecutive terms when multiple deaths or serious bodily injuries have been inflicted upon multiple victims." State v. Carey, 168 N.J. 413, 429-30 (2001).

11. Need to Protect Society. Consecutive sentences are especially appropriate where society must be protected from those who are unwilling to lead productive lives and who resort to criminal activities. State v. Taccetta, 301 N.J. Super. 227, 261 (App. Div.), certif. denied, 152 N.J. 187, 188 (1997).

12. Maximum Terms. "Where the offenses are closely related, it would ordinarily be inappropriate to sentence a defendant to the maximum term for each offense and also require that those sentences be served consecutively, especially where the second offense did not pose an additional risk to the victim. The focus should be on the fairness of the overall sentence." State v. Miller, 108 N.J. 112, 122 (1987).

13. Deviation From the Yarbough Guidelines. Some cases are so extreme and extraordinary that deviation from the guidelines is appropriate. State v. Yarbough, 100 N.J. 627, 647 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986); State v. Hammond, 231 N.J. Super. 535, 544 (App. Div.) (affirming three consecutive terms due to the extreme nature of the crimes), certif. denied, 117 N.J. 636 (1989); State v.

Lewis, 223 N.J. Super. 145, 154 (App. Div.) (affirming four consecutive terms), certif. denied, 111 N.J. 584 (1988).

14. Excessive Sentences. For examples of cases where consecutive terms were found excessive, see State v. Louis, 117 N.J. 250, 256-58 (1989) (aggregate term of 130 years with a 65 year parole disqualifier excessive); State v. Candelaria, 311 N.J. Super. 437, 454 (App. Div.) (six consecutive sentences totaling 105 years plus a life sentence), certif. denied, 155 N.J. 587 (1998); State v. Rodgers, 230 N.J. Super. 593, 604 (App. Div.) (reversing three consecutive terms for theft offenses), certif. denied, 117 N.J. 54 (1989).

15. Sentence Must Be Based on the Verdict. A judge may not impose consecutive sentences to compensate for what he or she believes was an unjust verdict in the defendant's favor. State v. Tindell, 417 N.J. Super. 530, 568-72 (App. Div. 2011) (imposing five maximum consecutive terms totaling thirty years' imprisonment on the basis that the defendant committed murder and the jury erroneously found him guilty of reckless manslaughter).

16. Split Sentencing. A judge may not impose sentences that are partially consecutive and partially concurrent. State v. Rogers, 124 N.J. 113, 118 (1991). Such a split-sentencing scheme would contravene the Code's paramount goal of uniformity. Ibid.

17. No Free Crimes. The "no free crimes" guideline stated in Yarbough "tilts in the direction of consecutive sentences because the Code focuses on the crime, not the criminal." State v. Carey, 168 N.J. 413, 423 (2001). However, this guideline does not eliminate concurrent sentences from a court's sentencing options because not every additional crime in a series must carry its own increment of punishment. State v. Rogers, 124 N.J. 113, 119 (1991).

18. Plea Agreements. The court may appropriately consider and weigh a plea agreement in deciding whether to impose consecutive sentences. State v. S.C., 289 N.J. Super. 61, 71 (App. Div.), certif. denied, 145 N.J. 373 (1996).

19. Order of Terms. Neither Yarbough nor any statutory provision precludes a sentencing judge from requiring that the less restrictive term of a consecutive sentence be served first. State v. Ellis, 346 N.J. Super. 583, 594 (App. Div.), aff'd

o.b., 174 N.J. 535 (2002). Although such a requirement does not render the sentence illegal, it may constitute an abuse of discretion since it effectively extends the real time the defendant must serve in prison. Id. at 597.

20. Young Adult Offenders. Because the Yarbough guidelines focus on punishment and young adult offender sentencing is premised on rehabilitation, a court should not apply the Yarbough guidelines in deciding whether to impose consecutive indeterminate sentences on young adult offenders. State v. Hannigan, 408 N.J. Super. 388, 398-400 (App. Div. 2009). Rather, the court should consider "offender-based criteria centered on rehabilitation." Id. at 400.

21. Juveniles. Although consecutive dispositions are authorized by the Code of Juvenile Justice, they should be the exception and not the rule. State in Interest of J.L.A., 136 N.J. 370, 380 (1994). In addition to weighing the Yarbough factors, the court must "exercise a heightened level of care before imposing multiple consecutive sentences on juveniles." State v. Zuber, 227 N.J. 422, 450 (2017). "[A] sentencing court must consider not only the factors in Yarbough but also the ones in Miller when it decides whether to impose consecutive sentences on a juvenile which may result in a lengthy period of parole ineligibility." Ibid. (referring to the five factors set forth in Miller v. Alabama, ___ U.S. ___, ___, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 423 (2012).

22. Offenses Committed While Released From Custody. Whenever a defendant commits an offense while released on probation, parole, or bail, N.J.S.A. 2C:44-5, presumes the terms will run consecutively. State v. Sutton, 132 N.J. 471, 484 (1993). The Yarbough standards should guide the court's decision. Id. at 485.

23. Sentences for Crimes Committed While on Parole, a Suspended Sentence, Probation or Bail. N.J.S.A. 2C:44-5(c), (f), (g) and (h), create a presumption that sentences for these offenses will run consecutively. State v. Sutton, 132 N.J. 471, 484 (1993).

X. FINES

Imposition of a fine is within the court's discretion (see section A), unless a statute requires a fine (see section B). Section C discusses case law on fines.

Note: The Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000). This rule applies to fines. Southern Union Co. v. United States, ___ U.S. ___, ___, 132 S. Ct. 2344, 2350, 183 L. Ed. 2d 318, 326 (2012). In the case of a guilty plea, the maximum sentence authorized by statute is the maximum sentence supported by the defendant's admissions. State v. Franklin, 184 N.J. 516, 537-38 (2005) (interpreting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)). The defendant may also "consent to judicial factfinding as to sentence enhancements." State v. Franklin, 184 N.J. 516, 538 (2005) (quoting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)).

In Alleyne v. United States, ___ U.S. ___, ___, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314, 321 (2013), the Court extended Apprendi to mandatory minimum terms. Thus, the jury, not the court, must find a fact that increases the mandatory minimum term. State v. Grate, 220 N.J. 317, 334-35 (2015) (finding invalid under Alleyne a mandatory parole disqualifier based on the court's finding that the defendant was involved in organized crime). No published New Jersey decision has yet to decide whether the Alleyne rule applies to fines.

A. Fines in General: Statutory Provisions

1. Statutory Authority for Imposing a Fine. N.J.S.A. 2C:43-2(b)(1) and (4) provide that the court may order the defendant to pay a fine alone or in conjunction with imprisonment or probation.

2. Criteria for Imposing a Fine. Pursuant to N.J.S.A. 2C:44-2(a), the court may impose a fine if:

- the defendant derived a pecuniary gain from the offense or the court believes that "a fine is specially adapted to deterrence of the type of offense involved or to the correction of the offender"; and

- the defendant is able, or will be able, to pay the fine; and

- the fine will not prevent the defendant from complying with a restitution order.

The court must consider the defendant's financial resources and the burden a fine will impose on those resources. N.J.S.A. 2C:44-2(c)(1).

3. Fine Amounts. N.J.S.A. 2C:43-3(a) to (h) provide the maximum fines as follows:

(a)(1) First degree crime: $200,000;

(a)(2) Second degree crime: $150,000;

(b)(1) Third degree crime: $15,000;

(b)(2) Fourth degree crime: $10,000;

(c) Disorderly persons offense: $1000;

(d) Petty disorderly persons offense: $500;

(e) "Any higher amount equal to double the pecuniary gain to the offender or loss to the victim";

(f) "Any higher amount specifically authorized by another section of this code or any other statute";

(g) "Up to twice the amounts authorized in subsection a., b., c. or d. of this section, in the case of a second or subsequent conviction of any tax offense defined in Title 54 of the Revised Statutes or Title 54A of the New Jersey Statutes, as amended and supplemented, or of any offense defined in chapter 20 or 21 of this code"; and

(h) Three times the street value of a controlled dangerous substance for drug crimes under Chapter 35. See N.J.S.A.

2C:44-2(e) (setting forth the procedure to determine street value and the standard of appellate review).

4. Timing of Payment. N.J.S.A. 2C:46-1(a) provides that the fine shall be "payable forthwith" unless the court granted "permission for the payment to be made within a specified period of time or in specified installments." "[T]he court shall file a copy of the judgment of conviction with the Clerk of the Superior Court." Ibid. See also N.J.S.A. 2C:46-1(d); N.J.S.A. 2C:46-1.1 (imposing transactional fees on fines).

(a) Probation. The court may order continued payments a condition of probation. N.J.S.A. 2C:46-1(b)(1).

(b) Installments and Imprisonment. Where the defendant is sentenced to a term of imprisonment, the court may order the defendant to pay installments. N.J.S.A. 2C:46-1(b)(2).

5. Nonpayment. N.J.S.A. 2C:46-2 sets forth the rules regarding failure to pay. The State may institute a summary collection action, or take any other authorized action for the collection of a civil judgment. N.J.S.A. 2C:46-2(a) and (b). If the default is without good cause, the court shall order the suspension of the defendant's driver's license or prohibit the defendant from obtaining a license, and take "such other actions as may be authorized by law." N.J.S.A. 2C:46-2(a)(1)(a) to (d).

Willful Nonpayment. If the defendant's default was without good cause and was willful, the court may imprison the defendant or order participation in a labor assistance program or enforced community service. N.J.S.A. 2C:46-2(a)(2).

6. Petition to Revoke a Fine. N.J.S.A. 2C:46-3 provides that a defendant may petition the court "for a revocation of the fine or of any unpaid portion thereof." The court may grant the request if it finds that "the circumstances which warranted the imposition of the fine have changed, or that it would otherwise be unjust to require payment."

B. Specific Fines Authorized, or Required, by Law: Statutory Provisions

1. Human Trafficking. N.J.S.A. 2C:13-8(d) requires a fine not less than $25,000 for a first degree crime. N.J.S.A. 2C:13-

9(c)(1) requires a fine not less than $15,000 for a second degree crime.

2. Assisting in Human Trafficking. N.J.S.A. 2C:13-9(c)(1) mandates a fine of at least $15,000.

3. Commercial Sexual Abuse of a Minor. N.J.S.A. 2C:13-10(c) provides that a person who commits the offense of advertising commercial sexual abuse of a minor, contrary to N.J.S.A. 2C:13-10(b), shall be ordered to pay a fine of at least $25,000, which shall be deposited in the Human Trafficking Survivor's Assistance Fund.

4. Pornography. N.J.S.A. 2C:14-9(c) authorizes "a fine not to exceed $30,000" for a third degree pornography offense.

5. Burglary. N.J.S.A. 2C:18-6(b) requires a fine of at least $500 for third degree burglary, $200 for fourth degree burglary, and $100 for a disorderly persons offense of burglary.

6. Auto Theft. N.J.S.A. 2C:20-2.2 provides that where the value of the stolen auto exceeds $7500 and the auto is not recovered, the court may award a fine equal to the value of the vehicle.

7. Removal of Headstones and Markers from Gravesites. N.J.S.A. 2C:20-2.3(b) allows a fine up to $1000 for each stolen maker.

8. Leader of a Cargo Theft Network. N.J.S.A. 2C:20-2.4(a)(2) provides that for first degree leader of a cargo theft network, the court may impose a fine of up to $500,000, or five times the retail value of the property seized, whichever is great. If the crime is one of the second degree, the fine shall not exceed $250,000, or five times the retail value of the property seized, whichever is greater. N.J.S.A. 2C:20-2.4(a)(1).

9. Theft From a Cargo Carrier. N.J.S.A. 2C:20-2.6(b) authorizes a fine up to $250,000, or five times the retail value of the stolen property, whichever is greater, for theft from a cargo carrier.

10. Theft of Services. N.J.S.A. 2C:20-8(k) requires a $500 minimum fine for each theft of services offense.

11. Leader of Organized Retail Theft Enterprise. N.J.S.A. 2C:20-11.2 provides that "the court may impose a fine not to exceed $250,000 or five times the retail value of the merchandise seized at the time of the arrest, whichever is greater."

12. Leader of Auto Theft Trafficking Network. N.J.S.A. 2C:20-18 authorizes "a fine not to exceed $250,000 or five times the retail value of the automobiles seized at the time of the arrest, whichever is greater."

13. Theft of Electronic Vehicle Identification System Transponder. N.J.S.A. 2C:20-38 requires "a fine of not less than $500 nor more than $10,000" for theft of an electronic vehicle identification system transponder.

14. Health Care Claims Fraud. N.J.S.A. 2C:21-4.3(a) and (b) authorize "a fine of up to five times the pecuniary benefit obtained or sought to be obtained" for a practitioner convicted of second and third degree health care claims fraud. The court must impose on a non-practitioner convicted of a second, third or fourth degree offense, "a fine of up to five times the pecuniary benefit obtained or sought to be obtained." N.J.S.A. 2C:21-4.3(c) and (d).

15. Business of Criminal Usury. N.J.S.A. 2C:21-19(b) mandates a fine not to exceed $250,000 for business of criminal usury.

16. Pirating Recordings. N.J.S.A. 2C:21-21(d) allows for the following fines:

- Up to $250,000 if the offense involved "at least 1000 unlawful sound recordings or at least 65 audiovisual works within any 180-day period";

- Up to $150,000 if the offense involved "more than 100 but less than 1000 unlawful sound recordings or more than 7 but less than 65 unlawful audiovisual works within any 180-day period";

- If the offense is not covered by the foregoing provisions, then up to $25,000 for a first offense, up to $50,000 for a second offense, and up to $100,000 for a third and subsequent offense.

17. Money Laundering. N.J.S.A. 2C:21-27(a) allows the court to impose a fine not to exceed $500,000 for money laundering.

18. Trademark Counterfeiting. N.J.S.A. 2C:21-32(d) requires the court to impose a fine "up to threefold the retail value of the items or services involved, providing that the fine imposed shall not exceed the following amounts: for a crime of the fourth degree, $100,000; for a crime of the third degree, $250,000; and for a crime of the second degree, $500,000."

19. Unlawful Disposition of Human Body Parts. N.J.S.A. 2C:22-2(a) and (b) authorize a fine not to exceed $50,000 for unlawful disposition of human body parts.

20. Harm to a Law Enforcement Animal. N.J.S.A. 2C:29-3.1(a) requires a $15,000 fine for the purposeful killing of a law enforcement animal. N.J.S.A. 2C:29-3.1(d) requires a $1000 fine for interfering with the use of a law enforcement animal.

21. False Public Alarms. N.J.S.A. 2C:33-3.2 provides that the defendant "shall be liable for a civil penalty of not less than $2000 or actual costs incurred by or resulting from the law enforcement and emergency services response to the false alarm, whichever is higher."

22. Parent or Guardian's Failure to Comply With an Order Regarding Cyber Harassment. N.J.S.A. 2C:33-4.1(d) provides that "[a] parent or guardian who fails to comply with a condition imposed by the court pursuant to subsection c. of this section" (applicable to parents and guardians of minors age sixteen and under who were adjudicated delinquent for cyber harassment) "shall be fined not more than $25 for a first offense and not more than $100 for each subsequent offense."

23. Smoking in Public. N.J.S.A. 2C:33-13(b) provides a $200 maximum fine for smoking in a prohibited public place.

24. Sale of Cigarettes to a Person Under Age Nineteen. N.J.S.A. 2C:33-13.1(a) requires the court to impose a fine as provided for a petty disorderly persons offense (i.e. a fine up to $500) if the defendant sold or otherwise provided tobacco to a person under age nineteen. The court may impose a fine of twice that applicable to a petty disorderly persons offense for a person convicted of a subsequent offense.

25. Under-Age Drinking. N.J.S.A. 2C:33-15(a) requires a fine of at least $500 for under-age drinking.

26. Leader of Narcotics Trafficking Network. N.J.S.A. 2C:35-3 provides that the court may "impose a fine not to exceed $750,000 or five times the street value of the controlled dangerous substance, controlled substance analog, gamma hydroxybutyrate or flunitrazepam involved, whichever is greater."

27. Maintaining or Operating a Drug Production Facility. N.J.S.A. 2C:35-4 allows "a fine not to exceed $750,000 or five times the street value of all controlled dangerous substances, controlled substance analogs, gamma hydroxybutyrate or flunitrazepam at any time manufactured or stored at such premises, place or facility, whichever is greater."

28. Manufacturing and Distributing a Controlled Dangerous Substance. N.J.S.A. 2C:35-5(b) authorizes a fine up to $300,000 or $500,000, depending on the offense, for first degree drug manufacturing and distribution; $25,000 or $75,000 for a third degree crime (depending on the offense); and $25,000 for certain fourth degree crimes.

29. Manufacturing and Dispensing Gamma Hydroxybutyrate. N.J.S.A. 2C:35-5.2(b) authorizes a fine up to $150,000 for manufacturing and dispensing gamma hydroxybutyrate.

30. Manufacturing and Dispensing Flunitrazepam. N.J.S.A. 2C:35-5.3(b) and (c) allows a fine not to exceed $250,000 for first degree manufacturing and dispensing flunitrazepam, and $150,000 for a second degree offense.

31. Employing a Juvenile in a Drug Distribution Scheme. N.J.S.A. 2C:35-6 allows "a fine not to exceed $500,000 or five times the street value of the controlled dangerous substance or controlled substance analog involved, whichever is greater," for employing a juvenile in a drug distribution scheme.

32. Manufacturing, or Dispensing Drugs on or Near School Property. N.J.S.A. 2C:35-7(a) authorizes a fine not to exceed $150,000 for manufacturing and distributing drugs on or near school property.

33. Drug Distribution to a Minor or a Pregnant Female. N.J.S.A. 2C:35-8 requires the court to impose, upon application

of the prosecutor, "twice the term of imprisonment, fine and penalty, including twice the term of parole ineligibility, if any." If the defendant is convicted of more than one offense, the court must impose one enhanced sentence on the most serious offense. Ibid. The prosecutor must establish the basis for the enhanced sentence by a preponderance of the evidence, and the court must hold a hearing on the matter. Ibid.

Note: The enhanced sentencing provisions of N.J.S.A. 2C:35-8 are subject to waiver under N.J.S.A. 2C:35-12. See Chapter XIV on drug offender sentencing for additional discussion.

34. Possession of a Controlled Dangerous Substance or Analog. N.J.S.A. 2C:35-10(a)(1) to (3) authorize a fine not to exceed $35,000 for third degree drug possession, and $15,000, or $25,000 for a fourth degree crime, depending on the circumstances.

35. Possession of Gamma Hydroxybutyrate. N.J.S.A. 2C:35-10.2(b) authorizes a fine up to $100,000 for possession of gamma hydroxybutyrate.

36. Possession of Flunitrazepam. N.J.S.A. 2C:35-10.3(b) allows a fine up to $100,000 for possession of flunitrazepam.

37. Distribution of a Prescription Legend Drug. N.J.S.A. 2C:35-10.5(a)(3) and (4) authorize a fine of up to $200,000 or $300,000, depending on the circumstances, for distribution of a prescription legend drug.

38. Possession or Distribution of an Imitation Controlled Dangerous Substance. N.J.S.A. 2C:35-11(d) authorizes a fine not to exceed $200,000 for possession or distribution of an imitation drug.

39. Obtaining a Controlled Dangerous Substance by Fraud. N.J.S.A. 2C:35-13 allows a fine up to $50,000 for fraudulently obtaining a drug.

40. Promoting Gambling. N.J.S.A. 2C:37-2(b)(2) requires a fine not to exceed $35,000 for third degree promoting gambling, $25,000 for a fourth degree crime, and $10,000 for a disorderly persons offense.

41. Possession of Gambling Records. N.J.S.A. 2C:37-3(b)(2) requires a fine not to exceed $35,000 for third degree

possession of gambling records, $20,000 for fourth degree crime, and $10,000 for a disorderly person offense.

42. Maintenance of a Gambling Resort. N.J.S.A. 2C:37-4(a) and (b) mandate a fine not to exceed $25,000 for maintaining a gambling resort.

43. Producing or Possessing Chemical, Biological, or Radioactive Agents. N.J.S.A. 2C:38-3(b) requires a "fine of up to $250,000 for each violation" for possession or production of chemical, biological, or radioactive agents.

44. Leader of Firearms Trafficking Network. N.J.S.A. 2C:39-16 provides that the court may also impose on the leader of a firearms trafficking network "a fine not to exceed $500,000 or five times the value of the firearms involved, whichever is greater."

45. Production, Delivery of Ignition Key, Documentation Required. N.J.S.A. 2C:40-23(d) authorizes a fine not to exceed $2000 for delivering a motor vehicle key without proper identification of the recipient.

46. Unlawfully Dispensing of Contact Lenses. N.J.S.A. 2C:40-25(b)(1) to (3) require the following fines for unlawfully dispensing contact lenses: at least $1000 for a first offense; not less than $5000 and 40 hours of community service for a second offense; and at least $10,000 and 100 hours of community service for a third and each subsequent offense.

47. Crimes Committed While Released on Bail or on One's Recognizance. N.J.S.A. 2C:44-5.1(a) requires the court impose an extended term of imprisonment and double the fine required for the underlying crime, for any of the following offenses if the defendant committed the offense while released on bail or on his or her own recognizance:

- Possession of a firearm with intent to use it unlawfully against the person or property of another (N.J.S.A. 2C:39-4(a));
- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);

- Kidnapping (N.J.S.A. 2C:13-1);

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a);

- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));

- Robbery (N.J.S.A. 2C:15-1);

- Second degree burglary, or burglary of a structure adapted for overnight accommodations (N.J.S.A. 2C:18-2); or

- First, second, or third degree assault (N.J.S.A. 2C:12-1(b).

Notice and Hearing. The prosecutor must provide the defendant notice of intent to request a sentence under N.J.S.A. 2C:44-5.1 within fourteen days of a guilty plea or verdict. R. 3:21-4(f); N.J.S.A. 2C:44-5.1(b). The prosecutor must establish the basis for the sentence at a hearing. N.J.S.A. 2C:44-5.1(b).

C. Standards Regarding Fines: Case Law

1. Purpose of a Fine. Unlike restitution, a court imposes a fine to punish the defendant and to deter conduct that causes social harm. State v. Newman, 132 N.J. 159, 177 (1993).

2. Future Earnings. While N.J.S.A. 2C:44-2(c) "focus[es] on defendant's present financial condition," in determining the amount of a fine, the statute "does not exclude consideration of defendant's future financial circumstances." State v. Newman, 132 N.J. 159, 179 (1993).

3. Findings. The court must state on the record its reasons for imposing a fine. State v. Newman, 132 N.J. 159, 170 (1993); State v. Ferguson, 273 N.J. Super. 486, 499 (App. Div.), certif. denied, 138 N.J. 265 (1994).

4. Drug Offender Fines.

(a) Drug-Buy Money. The court may consider money the defendant received in selling drugs when determining the

defendant's ability to pay a fine. State v. Newman, 132 N.J. 159, 177-79 (1993).

(b) Order of Payment. A defendant convicted of a drug offense must pay the Victims of Crime Compensation Board (N.J.S.A. 2C:43-3.1), laboratory fee (N.J.S.A. 2C:35-20), and the drug enforcement and demand reduction penalty (N.J.S.A. 2C:35-15) before paying a fine. State v. Newman, 132 N.J. 159, 178 (1993). For further discussion, see Chapter XII on penalties, fees and assessments, and Chapter XIV on drug offender sentencing.

XI. RESTITUTION

The court may exercise its discretion to require the defendant to make restitution to the victim (see section A), unless a statute requires restitution (see section B). Section C discusses case law on restitution.

A. Restitution in General: Statutory Provisions

1. General Statutory Authority for Imposing Restitution. N.J.S.A. 2C:44-2(b)(1) and (2) provide that a court "shall" order a defendant to make restitution if the victim "suffered a loss" and "[t]he defendant is able to pay or, given a fair opportunity, will be able to pay." See also N.J.S.A. 2C:43-2(b)(1) and (4) (authorizing a restitution award in addition to any fine or other sentence); N.J.S.A. 2C:45-1(c) (providing for restitution as a condition of probation or sentence suspension); N.J.S.A. 2C:46-1(a) and (b)(2) (providing for restitution installment payments); N.J.S.A. 2C:1-2(b)(8) (stating that restitution to victims is one purpose of the sentencing laws).

2. Amount of Restitution. N.J.S.A. 2C:43-3(h) provides that the restitution amount "shall not exceed the victim's loss." In cases involving the failure to pay a State tax, the amount of restitution shall be the full amount of the tax plus civil penalties and interest. N.J.S.A. 2C:43-3(h).

3. Restitution Is Conditioned Upon Loss to a Victim and Defendant's Ability to Pay. N.J.S.A. 2C:44-2(b)(1) and (2) condition a restitution award on the victim's suffering a loss and the defendant's ability to pay.

4. Restitution Is Unaffected by the Victim's Recovery From the Violent Crimes Compensation Board. N.J.S.A. 2C:44-2(c)(2) instructs: "The court shall not reduce a restitution award by any amount that the victim has received from the Violent Crimes Compensation Board, but shall order the defendant to pay any restitution ordered for a loss previously compensated by the Board to the Violent Crimes Compensation Board."

5. Multiple Victims. N.J.S.A. 2C:44-2(c)(2) requires the court to set priorities of payment if it orders restitution to more than one victim.

6. Findings. N.J.S.A. 2C:43-2(e) requires the court to place on the record its rationale for imposing the sentence.

7. Timing of Payment. N.J.S.A. 2C:46-1(a) provides that restitution shall be "payable forthwith" unless the court granted "permission for the payment to be made within a specified period of time or in specified installments." "[T]he court shall file a copy of the judgment of conviction with the Clerk of the Superior Court." Ibid. See also N.J.S.A. 2C:46-1.1 (imposing transactional fees on restitution payments).

> **(a) Probation.** The court may order continued payments as a condition of probation. N.J.S.A. 2C:46-1(b)(1).
>
> **(b) Installments and Imprisonment.** Where the defendant is sentenced to a term of imprisonment, the court may order the defendant to make restitution installment payments. N.J.S.A. 2C:46-1(b)(2).

8. Nonpayment. In the event the defendant fails to pay restitution, the State may institute a summary collection action, or take any other authorized action for the collection of a civil judgment. N.J.S.A. 2C:46-2(a) and (b). The victim may also institute summary collection proceedings. N.J.S.A. 2C:46-2(c).

> **(a) Default Without Good Cause.** If after notice and opportunity to be heard, the court finds by a preponderance of the evidence that the default was without good cause, the court shall order the suspension of the defendant's driver's license or prohibit the defendant from obtaining a license, and shall take "such other actions as may be authorized by law." N.J.S.A. 2C:46-2(a)(1)(a) and (d).
>
> **(b) Willful Default Without Good Cause.** If the defendant's default was without good cause and was willful, the court may impose a term of imprisonment, community service, or participation in a labor assistance program. N.J.S.A. 2C:46-2(a)(2).

B. Mandatory and Specific Restitution: Statutory Provisions

1. Murder. N.J.S.A. 2C:11-3(c) requires the defendant to "pay restitution to the nearest surviving relative of the victim."

2. Interference With Custody. N.J.S.A. 2C:13-4(f)(1) requires the court to order restitution "of all reasonable expenses and costs, including reasonable counsel fees, incurred by the other parent in securing the child's return. "

3. Human Trafficking. N.J.S.A. 2C:13-8(e)(1) and (2) require the court to award the victim restitution which is the greater of (1) "the gross income or value to the defendant of the victim's labor or services," or (2) "the value of the victim's labor or services as determined by" law.

4. Graffiti Offenses. The following statutes require a restitution award in the amount of the pecuniary damage the defendant caused: N.J.S.A. 2C:17-3(c) and (e), N.J.S.A. 2C:33-10, N.J.S.A. 2C:33-11, and N.J.S.A. 2C:33-14.1(b).

5. Burglary. N.J.S.A. 2C:18-6(b) requires the court to order restitution to the burglarized victim.

6. Theft of Services. N.J.S.A. 2C:20-8(k) requires the defendant to make restitution to the vendor. "In determining the amount of restitution, the court shall consider the costs expended by the vendor, including but not limited to the repair and replacement of damaged equipment, the cost of the services unlawfully obtained, investigation expenses, and attorney fees." Ibid.

7. Theft of Personal Identifying Information. N.J.S.A. 2C:21-17.1 authorizes the restitution award to include costs incurred by the victim in clearing credit.

8. Forgery. N.J.S.A. 2C:21-17.4(c) requires the court, upon request by the prosecutor, to impose restitution, which may include reimbursement for expenses incurred in clearing credit history or rating, and pursuing civil or administrative proceedings to satisfy a debt.

9. Violation of Minimum Wage Provisions for Employees Engaged in Public Works. N.J.S.A. 2C:21-34(c) requires restitution in the amount owed to the employee.

10. Interfering With a Law Enforcement Officer and Animal. N.J.S.A. 2C:29-3.1(d) requires the court to impose restitution

where the defendant interfered with the use of a law enforcement animal.

11. Offenses Against Service Animals. N.J.S.A. 2C:29-3.2(d) requires restitution "for all damages that arise out of or are related to the offense, including incidental and consequential damages incurred by the handler of the service animal or guide dog."

12. Dog Fighting. N.J.S.A. 2C:33-31(b)(1)(b) (effective Aug. 10, 2015) requires restitution for the animal's food, shelter, and care.

13. Leader of a Dog Fighting Network. N.J.S.A. 2C:33-32(b)(1)(b) (effective Aug. 10, 2015) requires restitution for the animal's food, shelter, and care.

14. Auto Theft. N.J.S.A. 2C:43-2.1 requires a restitution award to be paid to the owner of the stolen car to compensate for expenses and damages incurred as a result of the auto theft.

15. State as Victim. N.J.S.A. 2C:43-3(h) requires the court to order restitution where the State is the victim of the crime.

16. Extradition Costs. N.J.S.A. 2C:43-3.4 provides that the court may order restitution "for costs incurred by any law enforcement entity in extraditing the defendant from another jurisdiction if the court finds that, at the time of the extradition, the defendant was located in the other jurisdiction in order to avoid prosecution for a crime committed in this State or service of a criminal sentence imposed by a court of this State."

17. Probation or Suspension of Sentence. N.J.S.A. 2C:45-1(c) provides that the court shall order the defendant to pay restitution where the court imposes probation or suspends the defendant's sentence.

C. Standards Regarding Restitution: Case Law

1. Purpose of a Restitution Award. "Our Criminal Code contemplates two goals from a restitution order: restoration of the victim and rehabilitation of the offender." State v. Scribner, 298 N.J. Super. 366, 371 (App. Div.), certif. denied, 150 N.J. 27 (1997). Restitution is predominantly non-penal in

nature, though it may serve a rehabilitative purpose by deterring criminal conduct. State v. Harris, 70 N.J. 586, 593 (1976); State v. DeAngelis, 329 N.J. Super. 178, 186-88 (App. Div. 2000); State v. Krueger, 241 N.J. Super. 244, 253 (App. Div. 1990). See also State v. Newman, 132 N.J. 159, 164-69 (1993) (discussing the historical distinction between fines and restitution). "Imposing a sentence of restitution that requires payment of more than a defendant can afford would frustrate the goal of rehabilitation." State v. Newman, 132 N.J. 159, 173 (1993).

2. Burden of Proof. The State bears the burden of establishing the victim's loss by a preponderance of the evidence. State v. Martinez, 392 N.J. Super. 307, 320 (App. Div. 2007). The court may accept a reasonable estimate of the victim's loss when the State cannot calculate it with precision. Ibid. The presentence report should address and explain the victim's losses and the defendant's ability to pay. State In the Interest of D.G.W., 70 N.J. 488, 503-05 (1976).

3. Hearing. Ordinarily, the court should conduct a hearing to determine the defendant's ability to pay and the value of the victim's loss. State v. Newman, 132 N.J. 159, 169 (1993); State v. Martinez, 392 N.J. Super. 307, 321-22 (App. Div. 2007). But if neither party disputes the victim's loss and the defendant's ability to pay, a hearing may be futile. State v. Pessolano, 343 N.J. Super. 464, 479 (App. Div.), certif. denied, 170 N.J. 210 (2001); State in Interest of R.V., 280 N.J. Super. 118, 122-24 (App. Div. 1995); State v. Orji, 277 N.J. Super. 582, 589-90 (App. Div. 1994).

> **Evidence.** Strict rules of evidence do not apply to a restitution hearing. State v. Harris, 70 N.J. 586, 598 (1976). The defendant may cross-examine witnesses, present evidence and challenge the presentence report. Ibid.; State In the Interest of D.G.W., 70 N.J. 488, 506 (1976).

4. Fixed Amount. A restitution award should be a fixed amount. State v. Pessolano, 343 N.J. Super. 464, 479 (App. Div.), certif. denied, 170 N.J. 210 (2001). It should not be conditioned upon an "unknown credit" in the amount that a codefendant might pay. Ibid.

5. Present Inability to Pay. The court may order restitution if the defendant is presently unable to pay, but will likely be able to pay in the future. State in the Interest of R.V., 280

N.J. Super. 118, 121-22 (App. Div. 1995). In this case, the court should reduce the restitution award to a civil judgment, subject to future enforcement. Id. at 123.

6. Pension Income. In setting a restitution amount, the court may consider the defendant's pension income. State v. Pulasty, 136 N.J. 356, 361 (holding that the non-alienability clause of the Employee Retirement Income Security Act of 1974 (ERISA) does not prevent the State from requiring a defendant to make restitution after pension funds have been distributed), cert. denied, 513 U.S. 1017, 115 S. Ct. 579, 130 L. Ed. 2d 494 (1994).

7. Pecuniary Gain Unnecessary. In order to impose a restitution order the court need not find that the defendant derived a pecuniary gain from the crime. State v. Martinez, 392 N.J. Super. 307, 320 (App. Div. 2007).

8. Multiple Defendants.

(a) Proportionality. Where a defendant was one of multiple defendants who committed the crime, there is "a rebuttable presumption of proportionate liability against the" defendant. State In the Interest of D.G.W., 70 N.J. 488, 508 (1976).

(b) Joint and Several Liability. The court may impose joint and several liability where the facts justify it. Id. at 508 n.5 (1976); State v. Pessolano, 343 N.J. Super. 464, 479 n.10 (App. Div.), certif. denied, 170 N.J. 210 (2001); State v. Scribner, 298 N.J. Super. 366, 371 (App. Div.), certif. denied, 150 N.J. 27 (1997).

9. Crimes Against the State.

(a) Corporate Officers and Taxes. N.J.S.A. 2C:43-3, "reveals a strong legislative intention to require full restitution from those who defraud the public," including corporate officers who fail to remit taxes on behalf of their corporations. State v. Paone, 290 N.J. Super. 494, 496-97 (App. Div. 1996).

(b) Drug-Buy Money. The State is not a "victim" when the prosecutor's office purchases drugs from a defendant as part of an undercover investigation. Thus, the court may not impose restitution as a sanction to recover drug-buy money. State v. Newman, 132 N.J. 159, 176-77 (1993).

10. Third-Party Recovery. The court may order the defendant to pay restitution to a third party, such as an insurance company, health provider or employer who reimbursed a victim for losses suffered as a result of the defendant's criminal conduct. State v. Jones, 347 N.J. Super. 150, 153-54 (App. Div.), certif. denied, 172 N.J. 181 (2002) (interpreting N.J.S.A. 2C:43-2.1); State v. Hill, 155 N.J. 270, 275-76 (1998) (interpreting N.J.S.A. 2C:43-(e)).

11. Plea Agreements.

(a) Disclosure. When accepting a plea, a court should advise the defendant on the restitution implications of the guilty plea. State v. Kennedy, 152 N.J. 413, 425-26 (1998); State v. Krueger, 241 N.J. Super. 244, 255 (App. Div. 1990); State v. Saperstein, 202 N.J. Super. 478, 482 (App. Div. 1985).

(b) Dismissed Charges. A court may not impose restitution for a crime that the State dismissed in a plea agreement, unless there is (1) "a relationship between the restitution and the goal of rehabilitation with respect to the offense for which the defendant is being sentenced," and (2) "an adequate factual basis supportive of the restitution." State v. Krueger, 241 N.J. Super. 244, 252 (App. Div. 1990) (quoting State v. Bausch, 83 N.J. 425, 435 (1980)); State v. Corpi, 297 N.J. Super. 86, 91-92 (App. Div.), certif. denied, 149 N.J. 407 (1997).

12. Pretrial Intervention Program. The court may impose restitution as a condition of the pretrial intervention program. State v. Jamiolkoski, 272 N.J. Super. 326, 329 (App. Div. 1994) (analogizing the pretrial intervention program with probation).

13. Appellate Review. Restitution is within the court's discretion and thus will not be reversed on appeal unless it amounts to an abuse of discretion. State v. Harris, 70 N.J. 586, 598-99 (1976); State v. Martinez, 392 N.J. Super. 307, 318-19 (App. Div. 2007).

14. Resentencing After a Probation Violation. If the defendant violated a term of probation and the court revokes probation and imposes a term of imprisonment, the court may reconsider its initial restitution award, but need not do so. State v. Zeliff, 236 N.J. Super. 166, 171 (App. Div. 1989).

15. Double Jeopardy. A restitution award may be increased on resentencing after remand without offending double jeopardy principles. State v. Rhoda, 206 N.J. Super. 584, 590 (App. Div.), certif. denied, 105 N.J. 524 (1986).

16. Cruel and Unusual Punishment. A restitution order does not violate the Federal or State constitutional prohibition against cruel and unusual punishment, even if the defendant entered a civil settlement agreement with the victim. State v. DeAngelis, 329 N.J. Super. 178, 189-90 (App. Div. 2000).

17. Payment Collection. The procedure for collecting restitution is governed by the Model Collection Process by the Chief Probation Officers, approved by the Administrative Office of the Courts as of September 22, 1997. Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 389-90 (App. Div. 2008), certif. granted, 203 N.J. 440 (2010). See also Cannel, New Jersey Criminal Code Annotated, comment 7 on N.J.S.A. 2C:44-2 at 1215 (2016-2017).

18. Order of Payments. According to the guidelines, "where there are multiple convictions, assessments are to be paid off chronologically, by the date of the restitution order. All assessments for the earliest conviction are to be collected and disbursed first, before moving on to the next-in-time judgment of conviction." Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 390 (App. Div. 2008), certif. granted, 203 N.J. 440 (2010).

(a) Victim's Rights. The first-in-time policy does not violate a victim's rights under the New Jersey Civil Rights Act or the federal or State due process or equal protection clauses. Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 397-401 (App. Div. 2008), certif. granted, 203 N.J. 440 (2010).

(b) Multiple Orders in One Day. "[W]hen multiple restitution orders are issued against a criminal defendant on the same day, . . . the restitution orders are processed based on the date of the indictment with which each is associated, with the earliest indictment being entered first." Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 391 (App. Div. 2008), certif. granted, 203 N.J. 440 (2010). Restitution payments will be distributed on a pro-rated basis "only when a court specifically so orders,

or there are multiple victims listed on the same restitution order." Ibid.

(c) Court's Discretion. In the exercise of discretion, a sentencing judge "may order a different priority based on the amount of restitution owed to, or the financial circumstances of, the requesting recipient, or may even order that restitution payments be disbursed regardless of the recipient's individual circumstances on a pro-rata basis." Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 395 (App. Div. 2008), certif. granted, 203 N.J. 440 (2010).

19. Civil Damages. A restitution order does not preclude a victim from obtaining civil damages against the defendant. State v. Harris, 70 N.J. 586, 597-98 (1976). However, if the victim obtains a civil judgment, the award must be reduced by any restitution the victim received to avoid a double recovery. State v. DeAngelis, 329 N.J. Super. 178, 184 (App. Div. 2000).

20. Bankruptcy. Where a restitution order is converted to a civil judgment in favor of the State, the debt may not be discharged in a bankruptcy proceeding. State v. Kemprowski, 265 N.J. Super. 471, 472-74 (App. Div. 1993).

XII. PENALTIES, FEES, ASSESSMENTS AND REGISTRATIONS

Penalties, fees, assessments, and registrations are required by statute (see section A). Unless the court authorizes otherwise, with respect to a monetary penalty, a fee, or an assessment, a defendant is expected to make payment in full following sentencing (see section B). Section C discusses relevant case law.

Note: The Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000). In the case of a guilty plea, the maximum sentence authorized by statute is the maximum sentence supported by the defendant's admissions. State v. Franklin, 184 N.J. 516, 537-38 (2005) (interpreting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)). The defendant may also "consent to judicial factfinding as to sentence enhancements." State v. Franklin, 184 N.J. 516, 538 (2005) (quoting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)). In Alleyne v. United States, ___ U.S. ___, ___, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314, 321 (2013), the Court extended Apprendi to mandatory minimum terms. Thus, the jury, not the court, must find a fact that increases the mandatory minimum term. State v. Grate, 220 N.J. 317, 334-35 (2015) (finding invalid under Alleyne a mandatory parole disqualifier based on the court's finding that the defendant was involved in organized crime). No published New Jersey decision has yet to decide whether these rules apply to penalties, fees, and assessments. However, in Southern Union Co. v. United States, ___ U.S. ___, ___, 132 S. Ct. 2344, 2350, 183 L. Ed. 2d 318, 326 (2012), the Court found Apprendi applicable to fines.

A. Penalties, Fees, Assessments and Registrations: Statutory Provisions

1. Registration Requirements and Penalties for "Sex Offenders" (also known as Megan's Law).

(a) Megan's Law Registration Requirements. N.J.S.A. 2C:7-1 to -23 sets forth registration and public notification requirements for a person who committed a "sex offense." Pursuant to N.J.S.A. 2C:7-2(b), a sex offense includes the following crimes:

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-1));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a);
- Kidnapping (N.J.S.A. 2C:13-1(c)(2));
- Endangering the welfare of a child by engaging in sexual conduct that would impair or debauch the morals of the child (N.J.S.A. 2C:24-4(a));
- Endangering the welfare of a child (N.J.S.A. 2C:24-4(b) (3) or (4) or (5)(a));
- Luring or enticing a child (N.J.S.A. 2C:13-6);
- Criminal sexual contact of a minor (N.J.S.A. 2C:14-3(b);
- Kidnapping (N.J.S.A. 2C:13-1);
- Criminal restraint (N.J.S.A. 2C:13-2);
- False imprisonment "if the victim is a minor and the offender is not the parent of the victim" (N.J.S.A. 2C:13-3; and
- Knowingly promoting prostitution of a child (N.J.S.A. 2C:34-1(b)(3) or (4)).

Failure to comply with Megan's Law registration requirements is a third degree crime. N.J.S.A. 2C:7-2(d)(1) and (2).

(b) Megan's Law Penalties. N.J.S.A. 2C:14-10(a) provides that in addition to any other fine, fee, assessment or penalty authorized by Title 2C, a person convicted of a sex

offense, as defined by N.J.S.A. 2C:7-2(b), "shall be assessed a penalty for each such offense not to exceed:"

- $2000 for a first degree crime;
- $1000 for a second degree crime;
- $750 for a third degree crime; and
- $500 for a fourth degree crime.

2. Death by Auto or Vessel. N.J.S.A. 2C:11-5(b)(4) requires the court to impose a suspension to operate a motor vehicle for a period between five years to life, to commence upon the expiration of any prison term, if the defendant committed the homicide while operating a vehicle in violation of N.J.S.A. 39:4-50 (driving while intoxicated) or N.J.S.A. 39:4-50.4(a) (revocation for refusal to submit to breath test). N.J.S.A. 2C:11-5(e) provides that if the defendant committed first degree vehicular homicide (N.J.S.A. 2C:11-5(b)(3)), the defendant shall forfeit the auto or vessel, unless the defendant can establish by a preponderance of evidence that forfeiture would constitute a serious hardship to the family of the defendant, which outweighs the need to deter.

3. Stalking. N.J.S.A. 2C:12-10.1(a) provides that "[a] judgment of conviction for stalking shall operate as an application for a permanent restraining order limiting the contact of the defendant and the victim who was stalked." Unless the victim requests otherwise, the court must hold the hearing on the restraining order at the time of the guilty plea or verdict. N.J.S.A. 2C:12-10.1(b).

4. Assisting in Human Trafficking. N.J.S.A. 2C:13-9(c)(2) provides that "the court shall direct any issuing State, county, or municipal governmental agency to revoke any license, permit, certificate, approval, registration, charter, or similar form of business or professional authorization required by law concerning the operation of that person's business or profession, if that business or profession was used in the course of the crime."

5. Bias Intimidation. N.J.S.A. 2C:16-1(f)(1) to (3) allows the court to order a person convicted of bias intimidation to (1) complete a sensitivity class or program, (2) participate in counseling to reduce violent or antisocial behavior, or (3) make

payments or other compensation to a community-based program or local agency that provides services to victims of bias intimidation.

6. Graffiti. N.J.S.A. 2C:17-3(c) provides that if the court imposes community service, the service must be at least twenty days in length or the time it takes to remove thee graffiti.

7. Auto Theft. N.J.S.A. 2C:20-2.1(a)(1) to (3) requires a penalty of $500 and a one-year suspension or postponement of the person's driver's license for a first offense of auto theft, a $750 penalty and two-year license suspension for a second offense, and a $1000 penalty and ten-year license suspension for a third or subsequent offense.

8. Removal of Headstones and Markers From Gravesites. N.J.S.A. 2C:20-2.3(c) requires the court to impose up to thirty days of community service for the unlawful removal of a headstone of gravesite marker.

9. Theft by a Fiduciary, Leader of a Cargo Theft Network or Cargo Theft Sales. N.J.S.A. 2C:20-2.5(a)(1) to (3) requires the court to impose: (1) a $5000 penalty for first degree theft by a fiduciary or cargo theft; (2) a $2500 penalty for a second degree crime; and (3) a $500 penalty for a third degree crime.

10. Shoplifting. N.J.S.A. 2C:20-11(c) provides that any person convicted of shoplifting shall be sentenced to perform at least ten days of community service for a first offense, at least fifteen days of community service for a second offense, and a maximum of twenty-five days of community service plus at least ninety days imprisonment for third or subsequent offense.

11. Operation of a Facility for Sale of Stolen Automobile Parts. N.J.S.A. 2C:20-16(b) requires forfeiture of one's driver's license for three to five years.

12. Offenses Involving False Government Documents. N.J.S.A. 2C:21-2.1(e) requires suspension of the defendant's driver's license for six months and two years.

13. Pirating Recordings. N.J.S.A. 2C:21-21(e) provides that all recordings and equipment used in the crime shall be subject to forfeiture.

14. Money Laundering and Illegal Investment. N.J.S.A. 2C:21-27.1 and N.J.S.A. 2C:21-27.2(a) to (c) requires the court to impose, upon application of the prosecutor, a penalty of $500,000 for first degree money laundering, $250,000 for a second degree crime, $75,000 for a third degree crime, or three times the value of any property involved in a money laundering activity. If the prosecutor requests the penalty of three times the value of property involved, the prosecutor must establish the basis for the penalty by a preponderance of the evidence. N.J.S.A. 2C:21-27.2(c). N.J.S.A. 2C:21-27.3 prohibits the court from reducing or revoking the penalty. N.J.S.A. 2C:21-27.4 allows the court to create a payment schedule for good cause shown. N.J.S.A. 2C:21-27.5 requires the penalty be imposed "in addition to and not in lieu of any forfeiture or other cause of action instituted pursuant to chapter 41 or 64 of Title 2C of the New Jersey Statutes."

15. Fleeing Arrest While in an Automobile. N.J.S.A. 2C:29-2(b) requires a driver's license suspension between six months and two years for fleeing arrest while in an automobile.

16. Domestic Violence Offenses. N.J.S.A. 2C:25-27 provides that the court may enter a restraining order and may require the defendant to receive counseling for a crime or offense involving domestic violence. N.J.S.A. 2C:25-30 and -31 address the consequences of violating a restraining order. N.J.S.A. 2C:25-29.4 requires a $100 surcharge to fund grants for domestic violence prevention, training, and assessment.

17. Public Corruption Profiteering. N.J.S.A. 2C:30-8(c)(1) to (5) requires the court, upon application of the prosecutor, to impose a penalty "when a person is convicted of a crime or an attempt or conspiracy to commit a crime involving the negotiation, award, performance or payment of a local, county or State contract, including, but not limited to" violations of any provision in Chapters 21 or 27 to 30 of Title 2C. N.J.S.A. 2C:30-8(d)(1) and (2) provides the following penalty values: $500,000 for a first degree crime; $250,000 for a second degree crime; $75,000 for a third degree crime; or "an amount equal to three times the value of any property involved in" an included offense. N.J.S.A. 2C:30-8(g) authorizes a payment schedule for good cause shown.

18. False Public Alarm Offense. N.J.S.A. 2C:33-3.1(a) and (b) require the court to suspend for six months the driver's license

for a false public alarm offense by anyone age twenty-one and under.

19. Graffiti That Implies Threats or Violence. N.J.S.A. 2C:33-10 requires that if the court orders the defendant to community service, the service must include removal of the graffiti, "if appropriate," and must be "not less than twenty days nor less than the number of days necessary to remove the graffiti."

20. Desecrating Religious or Sectarian Premises. N.J.S.A. 2C:33-11 provides that if the court orders community service, the service must include removal of the graffiti, "if appropriate," and must be "not less than twenty days or not less than the number of days necessary to remove the graffiti."

21. Vandalizing a Railroad Crossing Device. N.J.S.A. 2C:33-14.1(b) provides that if the court orders community service, the service must include removal of the graffiti, "if appropriate," and must be "not less than twenty days or not less than the number of days necessary to remove the graffiti."

22. Under-Age Drinking. N.J.S.A. 2C:33-15(b) requires the court to suspend the defendant's driving license for six months if the defendant was drinking under age while inside a vehicle.

23. Leader of a Dog Fighting Network. N.J.S.A. 2C:33-32(b)(2) (effective Aug. 10, 2015) provides that the court may prohibit the defendant from possessing another animal "for any period of time the court deems reasonable."

24. Prostitution Driver's License Suspension for Certain Patrons. N.J.S.A. 2C:34-1(c)(5) provides that the court must suspend the defendant's driver's license for six months if the defendant used a vehicle during the crime.

25. Prostitution Penalties for Certain Patrons. N.J.S.A. 2C:34-1(f)(2) requires the court to impose on a defendant convicted of promoting prostitution a penalty of at least $10,000 but not more than $50,000, except if the offense involved promotion of child prostitution, then the penalty shall be at least $25,000.

26. Prostitution Offender Program. Pursuant to N.J.S.A. 2C:34-1.2(a), a person convicted of a disorderly persons offense of engaging in prostitution as a patron must participate in the Prostitution Offender Program, unless the prosecutor waives

participation. If the court orders a person convicted of engaging in prostitution as a patron to participate in the Prostitution Offender Program, the person must contribute $500 to the cost of the program. N.J.S.A. 2C:34-1.2(b).

27. Drug Offender Restraining Orders. N.J.S.A. 2C:35-5.7(h) provides: " When a person is convicted of or adjudicated delinquent for any criminal offense, the court, upon application of a law enforcement officer or prosecuting attorney pursuant to N.J.S.A. 2C:35-5.9 [certification of offense location] and except as provided in subsection e. of this section, shall, by separate order or within the judgment of conviction, issue an order prohibiting the person from entering" the place where the offense occurred.

(a) Exception. N.J.S.A. 2C:35-5.7(e) provides: "The court may forego issuing a restraining order . . . only if the defendant establishes by clear and convincing evidence that":

(1) "the defendant lawfully resides at or has legitimate business on or near the place, or otherwise legitimately needs to enter the place. In such an event, the court shall not issue" a restraining order "unless the court is clearly convinced that the need to bar the person from the place in order to protect the public safety and the rights, safety and health of the residents and persons working in the place outweighs the person's interest in returning to the place." The court may also impose an order permitting entry with conditions; or

(2) imposition of a restraining order "would cause undue hardship to innocent persons and would constitute a serious injustice which overrides the need to protect the rights, safety and health of persons residing in or having business in the place."

(b) Appeal by the State. If the court denies a request to impose a restraining order, the sentence shall not be final for ten days to allow the State time to file an appeal. N.J.S.A. 2C:35-5.7(k).

28. Drug Enforcement and Demand Reduction Penalty for Certain Offenses. N.J.S.A. 2C:35-5.11 provides: "Any person who possesses, distributes, dispenses or has under his control with

intent to distribute or dispense 3,4-methylenedioxymeth-amphetamine, 3,4-methylenedioxyamphetamine, gammabutyrolactone, gamma hydroxybutyrate or flunitrazepam, or a controlled substance analog of any of these substances, shall, . . . be subject to a drug enforcement and demand reduction penalty of twice the amount otherwise applicable to the offense."

29. Drug Distribution to a Minor or a Pregnant Female. N.J.S.A. 2C:35-8 requires the court to impose, upon application of the prosecutor, "twice the term of imprisonment, fine and penalty, including twice the term of parole ineligibility, if any, authorized or required to be imposed by" N.J.S.A. 2C:35-5(b) (drug distribution) or N.J.S.A. 2C:35-7 (distribution within a school zone) "or any other provision of this title." If the defendant is convicted of more than one offense, the court must impose one enhanced sentence on the most serious offense. Ibid. The prosecutor must establish the basis for the enhanced sentence by a preponderance of the evidence, and the court must hold a hearing on the matter. Ibid.

Note: The enhanced sentencing provisions of N.J.S.A. 2C:35-8 are subject to waiver under N.J.S.A. 2C:35-12. See Chapter XIV on drug offender sentencing for additional discussion.

30. Possession of a Controlled Dangerous Substance or Analog. N.J.S.A. 2C:35-10(a) requires the defendant to "perform not less than 100 hours of community service" if the court does not impose a prison term and the defendant committed the crime while inside a school bus or within 1000 feet of school property.

31. Drug Enforcement and Demand Reduction Penalty. N.J.S.A. 2C:35-15(a)(1) requires the court to impose the following drug enforcement and demand reduction (DEDR) penalties on anyone convicted of a Chapter 35 or 36 drug offense:

- $3000 for a first degree crime;
- $2000 for a second degree crime;
- $1000 for a third degree crime;
- $750 for a fourth degree crime; and
- $500 for a disorderly persons or petty disorderly persons offense.

(a) Multiple Offenses. N.J.S.A. 2C:35-15(a)(2)(a) and (b) provide that the court may, in its discretion, impose one penalty based on the highest degree offense if: (1) the defendant was not placed in supervisory treatment or ordered to perform reformative service; (2) "multiple penalties would constitute a serious hardship that outweighs the need to deter the defendant from future criminal activity"; and (3) "imposition of a single penalty would foster the defendant's rehabilitation."

(b) Treatment Program in Lieu of Payment. N.J.S.A. 2C:35-15(e) authorizes the court to suspend collection of the penalty "provided the person is ordered by the court to participate in a drug or alcohol rehabilitation program," and the defendant "agrees to pay for all or some portion of the costs associated with the rehabilitation." Upon proof of successful completion of the program the defendant may request the court reduce the penalty by any amount the defendant paid for participation in the program. Ibid.

(c) Service in Lieu of Payment. N.J.S.A. 2C:35-15(f) provides that the defendant "may propose to the court and the prosecutor a plan to perform reformative service in lieu of payment of up to one-half of the penalty amount imposed."

32. Drug Offenses and License Forfeiture. N.J.S.A. 2C:35-16(a) requires forfeiture of a defendant's driver's license for a period between six months and two years absent compelling circumstances and upon conviction of a drug offense under Chapter 35 or 36 of Title 2C. "[C]ompelling circumstances warranting an exception exist if the forfeiture . . . will result in extreme hardship and alternative means of transportation are not available."

Post-Sentencing Motion to Revoke the License Suspension. N.J.S.A. 2C:35-16(d) allows the defendant to request the court revoke a remaining license suspension term based on compelling circumstances.

33. Controlled Dangerous Substance Lab Fee. N.J.S.A. 2C:35-20(a) and (b) require that a $50 criminal laboratory analysis fee be imposed on anyone convicted of a Chapter 35 drug offense; a $50 criminal laboratory fee be imposed on anyone placed in supervisory treatment pursuant to N.J.S.A. 2C:36A-1 or N.J.S.A.

2C:43-12; and a $25 laboratory analysis fee be imposed on anyone adjudicated delinquent for a Chapter 35 offense.

34. Anti-Drug Profiteering Penalty. N.J.S.A. 2C:35A-4(a)(1) to (3) requires the court impose the following penalties for certain drug offenders in accordance with the criteria set forth in N.J.S.A. 2C:35A-3:

- $200,000 for a first degree crime; $100,000 for a second degree crime; $50,000 for a third degree crime; and $25,000 for a fourth degree crime; or

- "three times the street value of all controlled dangerous substances or controlled substance analogs involved, or three times the market value of all drug paraphernalia involved, if this amount is greater than that provided" above; or

- "an amount equal to three times the value of any benefit illegally obtained by the actor for himself or another, or any injury to or benefit deprived of another."

Note: This statute is subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in Chapter XIV on drug offender sentencing.

35. Unlawful Transfer of a Firearm. N.J.S.A. 2C:39-10(a)(3) and (4) require the court to revoke a dealer's license for the unlawful transfer of firearms in certain situations.

36. Causing Death or Injury While Driving With a Suspended License or Without a License. N.J.S.A. 2C:40-22(a) and (b) require the court to suspend the defendant's driver's license for one year where the defendant caused death while driving without a valid license. The license shall run consecutively to any current driver's license suspension. N.J.S.A. 2C:40-22(a) and (b).

37. Unauthorized Use of a Traffic Control Preemption Device. N.J.S.A. 2C:40-24(d) requires the court to impose a civil penalty not to exceed $5000 for unauthorized use of a traffic control preemption device.

38. Crimes With Automobiles. N.J.S.A. 2C:43-2(c) authorizes the court to suspend, postpone or revoke a defendant's driver's license for a period not to exceed two years where the defendant

used a motor vehicle in the course of a crime, disorderly persons offense, or petty disorderly persons offense. In deciding whether to suspend, postpone or revoke a license and in fixing the length of the suspension, the court must consider "the severity of the crime or offense and the potential effect of the loss of driving privileges on the person's ability to be rehabilitated." Ibid. In the event the court suspends, postpones or revokes driving privileges, the suspension "shall be imposed consecutively with any custodial sentence." Ibid.

39. Serological Testing. N.J.S.A. 2C:43-2.2(a) provides for the serological testing of the defendant "for acquired immune deficiency syndrome (AIDS) or infection with the human immunodeficiency virus (HIV) or any other related virus identified as a probable causative agent of AIDS" in certain cases where a person suffered a prick from a hypodermic needle or the defendant's bodily fluids were transmitted. The court may order the defendant to pay the cost of the testing. N.J.S.A. 2C:43-2.3(c).

40. Victims of Crime Compensation Board (VCCB) Assessments.

(a) Certain Crimes Resulting in Injury or Death. N.J.S.A. 2C:43-3.1(a)(1) requires the court to assess at least $100 and not more than $10,000 for each of the following offenses if the defendant injured or killed the victim:

- "[A] crime of violence"; or
- Theft of an automobile (N.J.S.A. 2C:20-2); or
- Eluding a law enforcement officer (N.J.S.A. 2C:29-2(b)); or
- Unlawful taking of a motor vehicle (N.J.S.A. 2C:20-10(b), (c) or (d)).

In imposing an assessment under N.J.S.A. 2C:43-3.1(a)(1), "the court shall consider factors such as the severity of the crime, the defendant's criminal record, defendant's ability to pay and the economic impact of the assessment on the defendant's dependents."

(b) Offenses Not Resulting in Injury. N.J.S.A. 2C:43-3.1(a)(2)(a) mandates a $50 assessment be imposed for each crime, disorderly person offense, or petty disorderly

person offense the defendant committed that did not result in injury.

(c) Juvenile Offenders. N.J.S.A. 2C:43-3.1(a)(2)(b) requires for each adjudication of delinquency an assessment of at least $30 and not more than "the amount which could be assessed pursuant to paragraph (1) or paragraph (2) (a) of subsection a. of this section if the offense was committed by an adult."

(d) Driving or Operating a Vessel While Impaired. N.J.S.A. 2C:43-3.1(a)(2)(c) provides that any person convicted of operating a motor vehicle or vessel while under the influence of alcohol or drugs "shall" be assessed $50 payable to the VCCB.

(e) Supervisory Treatment and Conditional Discharge. N.J.S.A. 2C:43-3.1(a)(2)(d) provides: "In addition to any term or condition that may be included in an agreement for supervisory treatment pursuant to N.J.S.A. 2C:43-13, or imposed as a term or condition of conditional discharge pursuant to N.J.S.A. 36A-1, a participant in either program shall be required to pay an assessment of $50."

41. Safe Neighborhoods Services Assessment. N.J.S.A. 2C:43-3.2(a) requires any person convicted of a crime, a disorderly persons or petty disorderly persons offense, or a drunk driving offense to be assessed $75 per conviction to be deposited into the Safe Neighborhoods Services Fund (SNSF).

42. Law Enforcement Officers Training and Equipment Assessment. N.J.S.A. 2C:43-3.3(a) requires the court to impose a $30 penalty on any adult convicted of a crime, for deposit into the Law Enforcement Officers Training and Equipment Fund. A juvenile shall be assessed a $15 penalty. N.J.S.A. 2C:43-3.3(b).

43. Drug Abuse Education Assessment. N.J.S.A. 2C:43-3.5(a) requires the court to impose a $50 assessment for each drug offense under Chapter 35 or 36 of Title 2C.

44. Sexual Assault Nurse Examiner Program Assessment. N.J.S.A. 2C:43-3.6(a) requires an $800 assessment for any sex offense defined in N.J.S.A. 2C:7-2.

45. Surcharge for Certain Sex Offenders. N.J.S.A. 2C:43-3.7 requires any person convicted of aggravated sexual assault

(N.J.S.A. 2C:14-2(a)), sexual assault (N.J.S.A. 2C:14-2(b)), aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a)), or criminal sexual contact (N.J.S.A. 2C:14-3(b)), to pay a $100 surcharge to fund programs and grants for the prevention of violence against women.

46. Computer Crime Prevention Penalty. N.J.S.A. 2C:43-3.8(a) provides that any person convicted of depicting a child engaging in a prohibited sexual act (N.J.S.A. 2C:24-4(b)(5)), child obscenity (N.J.S.A. 2C:34-3), or an offense involving computer criminal activity contrary to any provision within Chapter 20 of Title 2C (theft offenses), shall be assessed the following penalties to be deposited in the Computer Crime Prevention Fund:

- $2000 for a first degree crime;
- $1000 for an second degree crime;
- $750 for a third degree crime;
- $500 for a fourth degree crime; and
- $250 for a disorderly persons offense.

47. Restricted Internet Access. N.J.S.A. 2C:43-6.6(a)(1) to (4) provides that any person who (1) committed a sex offense as defined in N.J.S.A. 2C:7-2(b) and is required to register under Megan's Law (N.J.S.A. 2C:7-2); or (2) is serving a special sentence of parole supervision under N.J.S.A. 2C:43-6.4, or has been convicted of promoting or providing obscene materials to a minor (N.J.S.A. 2C:34-3), "shall" be subject to the following Internet access conditions "where the trier of fact makes a finding that a computer or any other device with Internet capability was used to facilitate the commission of the crime":

> (1) Prohibited access of "a computer or any other device with Internet capability without the prior written approval of the court," with the exception that a person on probation or parole "may use a computer or any other device with Internet capability in connection with that person's employment" or to "search for employment with the prior approval of the person's probation or parole officer";
>
> (2) "[P]eriodic unannounced examinations of the person's computer . . . including the retrieval and copying of all

data . . . and removal of such information, equipment or device to conduct a more thorough inspection";

(3) Installation, "at the person's expense, [of] one or more hardware or software systems to monitor the Internet use"; and

(4) "[A]ny other appropriate restrictions concerning the person's use or access of a computer or any other device with Internet capability."

A violation of the Internet access restrictions constitutes a fourth degree crime. N.J.S.A. 2C:43-6.6(b).

48. Sex Offender Restraining Order. N.J.S.A. 2C:44-8 authorizes the court to enter an order restraining a sex offender from contact with the victim or the victim's family and from entering certain locations.

49. Probation or Suspension of Sentence. N.J.S.A. 2C:45-1(c) requires the defendant to pay a victims of crime compensation board assessment (N.J.S.A. 2C:43-3.1), where the court imposes probation or suspends the defendant's sentence.

B. Payment of Penalties, Fees and Assessments: Statutory Provisions

1. Statutory Authority for Timing of Payment. N.J.S.A. 2C:46-1(a) provides that a penalty, fee and assessment shall be "payable forthwith" unless the court grants "permission for the payment to be made within a specified period of time or in specified installments." "[T]he court shall file a copy of the judgment of conviction with the Clerk of the Superior Court." Ibid. N.J.S.A. 2C:46-1(d)(1) and N.J.S.A. 2C:46-1.1(a) also impose transactional fees.

2. Payments While on Probation. The court may order continued payments as a condition of probation. N.J.S.A. 2C:46-1(b)(1).

3. Installment Payments While Incarcerated. Where the defendant is sentenced to a term of imprisonment, the court may order the defendant to make installment payments. N.J.S.A. 2C:46-1(b)(2).

4. Nonpayment. In the event the defendant fails to pay, the State may institute a summary collection action or take any other authorized action for the collection of a civil judgment. N.J.S.A. 2C:46-2(a) and (b). If the default is without good cause, the court shall order the suspension of the defendant's driver's license or prohibit the defendant from obtaining a license, and take "such other actions as may be authorized by law." N.J.S.A. 2C:46-2(a)(1)(a) to (d).

5. Willful Nonpayment. If the defendant's default was without good cause and was willful, the court may imprison the defendant, order participation in a labor assistance program, or order community service. N.J.S.A. 2C:46-2(a)(2).

C. Penalties, Fees and Assessments: Case Law

1. Merger. The court may not impose penalties and assessments on a merged conviction. State v. Francis, 341 N.J. Super. 67, 69 (App. Div. 2001).

2. Sex Crime Victims Treatment, Setting the Penalty Amount. The sex offender penalty amounts listed in N.J.S.A. 2C:14-10(a) are the maximum penalties the court may impose. State v. Bolvito, 217 N.J. 221, 224 (2014). In fixing the penalty amount, the court should consider the nature of the offense and the defendant's ability to pay. Id. at 233-35.

3. Megan's Law Offenses. While Megan's Law requires registration for "sex offenses," the N.J.S.A. 2C:7-2(b) offenses that define a sex offense encompass more than just sex offenses; they include non-sex crimes against children. In re T.T., 188 N.J. 321, 333 (2006).

4. Victims of Crime Compensation Board (VCCB) Assessment.

(a) Mandatory Assessments. The N.J.S.A. 2C:43-3.1 VCCB assessments are mandatory and may not be withheld, even if the defendant has limited financial resources. State v. Malia, 287 N.J. Super. 198, 208 (App. Div. 1996).

(b) Defendant's Ability to Pay. A court may not impose the maximum assessment on the ground that the defendant "might come into a substantial amount of money in the future. . . . There must be some relationship between defendant's ability to pay over the course of his

incarceration and parole, and the actual VCCB penalty imposed." State v. Gallagher, 286 N.J. Super. 1, 23 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

(c) Injury to the Victim. "Mental or nervous shock" constitutes injury for purposes of the victim of crime compensation board assessment. State v. Diaz, 188 N.J. Super. 504, 508 (App. Div. 1983). Thus, when a robber threatens a victim "as if he had a gun," one may infer that the victim suffered an injury, "no matter how transitory." Ibid.

(d) Lack of Injury. If there is no proof of injury to the victim, the court may not impose an assessment greater than the minimum penalty. State v. Thompson, 199 N.J. Super. 142, 144-45 (App. Div. 1985).

(e) Refusal to Submit to a Breathalyzer. The court may not impose an assessment for refusing to submit to a breathalyzer test. State v. Tekel, 281 N.J. Super. 502, 510-11 (App. Div. 1995).

(f) Standard of Review. A court reviews the amount of the VCCB penalty under the abuse of discretion standard. State v. Diaz, 188 N.J. Super. 504, 507-08 (App. Div. 1983).

5. Domestic Violence Surcharge, Attempt Excluded. The court may not order a defendant convicted of attempted murder to pay a domestic violence surcharge. State v. Lee, 411 N.J. Super. 349, 353 (App. Div. 2010).

6. Offenses with Automobiles. In order to suspend, postpone or revoke a driver's license under N.J.S.A. 2C:43-2(c), the defendant must have committed the offense with an automobile. State v. Gross, 225 N.J. Super. 28, 31 (App. Div. 1988). The court may not revoke a license under N.J.S.A. 2C:43-2(c) for possession of a vehicle knowing that the vehicle identification number had been removed. Ibid.

7. Drug Offense Penalties.

(a) Conspiracy. "[T]he mere conviction under N.J.S.A. 2C:5-2 for the 'ordinary' crime of conspiracy, does not render a person subject to the mandatory penalties of the Comprehensive Drug Reform Act, even if the object of that conspiracy constitutes a Chapter 35 offense." State in the

Interest of W.M., 237 N.J. Super. 111, 118 (App. Div. 1989).

(b) Accomplices. A defendant convicted of a drug offense as an accomplice is subject to the mandatory drug offense penalties. State v. Bram, 246 N.J. Super. 200, 208 (Law Div. 1990).

8. **Drug Offender Restraining Orders.** Where the court denies a N.J.S.A. 2C:35-5.7(h) request to impose a drug offender restraining order, N.J.S.A. 2C:35-5.7(k) imposes a ten-day limitation period on the State's right to appeal. State v. Fitzpatrick, 443 N.J. Super. 316, 320 (App. Div. 2015).

9. **Drug Offense License Suspension.**

(a) Multiple Offenses. Where a court imposes sentence for multiple drug offenses subject to the mandatory forfeitures of one's driver's license, pursuant to N.J.S.A. 2C:35-16, the license suspension terms may vary in duration, but must run concurrently. State in the Interest of T.B., 134 N.J. 382, 387 (1993).

(b) Timing. License suspension under N.J.S.A. 2C:35-16 begins on the day of sentencing; the court has no discretion to postpone or delay it. State v. Hudson, 286 N.J. Super. 149, 154-55 (App. Div. 1995). In the case of a juvenile, license suspension begins the day after the defendant turns seventeen. State in the Interest of T.B., 134 N.J. 382, 388 (1993); State in the Interest of J.R., 244 N.J. Super. 630, 641 (App. Div. 1990). If the defendant's license is under suspension at the time of sentencing, then the new license suspension will begin on the final day of the current suspension. State in the Interest of T.B., 134 N.J. 382, 388 (1993).

(c) License Forfeiture Exception. In determining whether compelling circumstances exist to justify not revoking a defendant's driving privileges under N.J.S.A. 2C:35-16(a), the court should consider whether revocation will result in the defendant's loss of employment or extreme hardship. State v. Bendix, 396 N.J. Super. 91, 95-96 (App. Div. 2007). Where a defendant "has occasioned the loss of his employment through his unauthorized and criminal use of his employer's vehicle," the court should not find compelling circumstances to justify not revoking the defendant's

license. State v. Carrero, 399 N.J. Super. 419, 425-26 (Law Div. 2007).

9. The Drug Enforcement and Demand Reduction (DEDR) Penalty.

(a) Policy. "As its name suggests, the penalty is designed to reduce the demand for drugs by providing a source for helping convicted defendants to reduce their demand for illegal substances." State v. Monzon, 300 N.J. Super. 173, 177 (App. Div. 1997).

(b) Treatment Program in Lieu of Payment and Wages. In reducing a penalty pursuant to N.J.S.A. 2C:35-15(e) by the amount actually paid for participation in a treatment program, the court should consider the amount withheld from a defendant's pay for work completed at the treatment program. N.J.S.A. 2C:35-15(e). State v. Monzon, 300 N.J. Super. 173, 177-78 (App. Div. 1997).

(c) Constitutionality. The drug enforcement and demand reduction penalty does not constitute cruel and unusual punishment under the Federal or State Constitution, and does not violate the equal protection clauses, substantive or procedural due process rights, or the State Constitution prohibition against amendment by reference. State v. Lagares, 127 N.J. 20, 36-37 (1992); State in the Interest of L.M., 229 N.J. Super. 88, 94-102 (App. Div. 1988), certif. denied, 114 N.J. 485 (1989).

(d) Merger and Conspiracy. "Since the principle of merger involves the avoidance of double penalties for the same crime, Chapter 35 DEDR penalties may not be imposed on a conviction for both conspiracy to possess a controlled dangerous substance, N.J.S.A. 2C:5-2, and for the actual possession under N.J.S.A. 2C:35-10." State in the Interest of M.A., 227 N.J. Super. 393, 395 (Ch. Div. 1988).

(e) Pretrial Intervention Program. The court may impose a drug enforcement and demand reduction penalty as a condition of entry into a pretrial intervention program. State v. Bulu, 234 N.J. Super. 331, 342, 346-48 (App. Div. 1989).

(f) The DEDR Penalty Is Mandatory. The DEDR penalty is mandatory and must be set in accordance with the degree of crime of which the defendant was convicted. State v.

Malia, 287 N.J. Super. 198, 208 (App. Div. 1996); State v. Williams, 225 N.J. Super. 462, 464 (Law Div. 1988). The court may not revoke the penalty after sentencing. State v. Gardner, 252 N.J. Super. 462, 465-66 (Law Div. 1991).

10. Plea Agreements May Not Alter a Mandatory Penalty. Where a defendant pleads guilty to a second degree drug offense with the understanding that the court will impose a sentence for a third degree crime, the court may not honor the agreement in relation to the mandatory DEDR penalty. State v. Williams, 225 N.J. Super. 462, 464 (Law Div. 1988). The court must impose a penalty for a second degree crime. Ibid.

XIII. THE GRAVES ACT AND ASSAULT WEAPONS SENTENCING

N.J.S.A. 2C:43-6(c) and (d) (commonly called the Graves Act), and N.J.S.A. 2C:43-6(g) and (h), require enhanced sentences for crimes committed with firearms (N.J.S.A. 2C:43-6(c) and (d)) and with assault weapons or machine guns (N.J.S.A. 2C:43-6(g) and (h)).[1] See N.J.S.A. 2C:39-1(f), (i) and (w) for the definitions of firearm, machine gun, and assault firearm, respectively.

Both laws require the court to impose: (1) a parole disqualifier, and (2) an extended term with a parole disqualifier for certain repeat offenders. Unlike the assault weapons statute, the Graves Act also has a parole disqualifier exception for first-time offenders. Sections A and C, respectively, discuss statutory provisions and case law on the Graves Act. Sections B and D, respectively, discuss statutory provisions and case law on assault weapons sentencing.

A. Graves Act Sentencing: Statutory Provisions

1. Graves Act Enumerated Offenses. The Graves Act (N.J.S.A. 2C:43-6(c)) requires enhanced sentencing where the defendant committed any of the following enumerated offenses under the circumstances listed in either (a) or (b):

(a) The defendant committed any of the following offenses:

- Possession of a sawed-off shotgun or defaced firearm (N.J.S.A. 2C:39-3(b) or (d));

[1] It is unclear whether N.J.S.A. 2C:43-6(g) and (h), covering crimes committed with assault weapons, may appropriately be called part of "the Graves Act." Subsections (g) and (h) were enacted eleven years after the Graves Act (N.J.S.A. 2C:43-6(c) and (d)), and while the subsections are similar to the Graves Act, the two provisions differ in certain respects. No published New Jersey decision that mentions N.J.S.A. 2C:43-6(g) or (h), refers to either subsection as the Graves Act. Presumably, even if those sections are not part of the Graves Act, a significant amount of case law on the Graves Act would apply by analogy to assault weapons sentencing.

- Possession of a firearm with purpose to use it unlawfully against a person or property of another (N.J.S.A. 2C:39-4(a));

- Possession of a firearm while committing certain drug-related offenses or bias intimidation (N.J.S.A. 2C:39-4.1(a));

- Possession of a machine gun, handgun, rifle, shotgun, or assault firearm without the required license, permit, or identification card, or possession of a loaded rifle or shotgun (N.J.S.A. 2C:39-5(a), (b), (c) or (f));

- Possession of a weapon by a certain person prohibited from such possession (N.J.S.A. 2C:39-7(a), (b)(2) or (b)(3)); or

- Manufacturing, transporting and disposing a machine gun, sawed-off shotgun, defaced firearm, or assault firearm (N.J.S.A. 2C:39-9(a), (b), (e) or (g));

OR

(b) The defendant committed any of the following offenses and used, or was in possession of, a firearm (defined at N.J.S.A. 2C:39-1(f)), while committing or attempting to commit the crime, including the immediate flight therefrom:

- Murder (N.J.S.A. 2C:11-3);

- Manslaughter (N.J.S.A. 2C:11-4);

- Aggravated assault (N.J.S.A. 2C:12-1(b));

- Kidnapping (N.J.S.A. 2C:13-1);

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));

- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));

- Robbery (N.J.S.A. 2C:15-1);

- Burglary (N.J.S.A. 2C:18-2); or

- Escape (N.J.S.A. 2C:29-5).

2. Graves Act Parole Disqualifier. N.J.S.A. 2C:43-6(c) provides that if the defendant committed any of the enumerated offenses (see section A(1) above), the court must impose a period of parole ineligibility that is either one-half of the sentence imposed or forty-two months, whichever is greater, or, in the case of a fourth degree crime, eighteen months.

Note: Effective August 8, 2013, the Legislature amended N.J.S.A. 2C:43-6(c) to provide fixed mandatory minimum terms for the enumerated crimes (listed in section A(1) above). Prior to this amendment, the statute required a mandatory minimum term within a specified range.

3. Graves Act Extended Term With Parole Disqualifier for Certain Repeat Offenders. N.J.S.A. 2C:43-6(c) provides that the court must impose an extended term if the defendant committed or attempted to commit an enumerated offense (see section A(1) above) while possessing a firearm; is at least eighteen years old; and has a prior conviction for committing with a firearm any of the following offenses set forth in N.J.S.A. 2C:44-3(d):

- Murder (N.J.S.A. 2C:11-3);

- Manslaughter (N.J.S.A. 2C:11-4);

- Aggravated assault (N.J.S.A. 2C:12-1(b));

- Kidnapping (N.J.S.A. 2C:13-1);

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));

- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));

- Robbery (N.J.S.A. 2C:15-1);

- Burglary (N.J.S.A. 2C:18-2);

- Escape (N.J.S.A. 2C:29-5);

- Possession of a firearm for an unlawful purpose (N.J.S.A. 2C:39-4(a); or

- Any offense in Title 2A (Administration of Civil and Criminal Justice).

N.J.S.A. 2C:43-6(c) instructs the court to impose the extended term in accordance with N.J.S.A. 2C:43-7(c), which requires that the extended term include a parole disqualifier at or between one-third and one-half the sentence imposed, or five years, whichever is greater. If the sentence is life imprisonment, the parole disqualifier must be twenty-five years, unless the sentence is for a violation of N.J.S.A. 2C:35-3 (leader of a narcotics organization); then the parole disqualifier must be thirty years. N.J.S.A. 2C:43-7(c).

4. Hearing and Required Findings to Support a Graves Act Sentence. N.J.S.A. 2C:43-6(d) provides that the court shall not impose a Graves Act enhanced sentence unless the prosecutor establishes, and the court finds, by a preponderance of the evidence at a hearing, which may occur at the time of sentencing, "that the weapon used or possessed was a firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information."

(a) The Sixth Amendment and the Graves Act Extended Terms: Sixth Amendment jurisprudence renders invalid the Graves Act requirement (N.J.S.A. 2C:43-6(d)) that the court find the facts, other than proof of a prior conviction, that subjects a defendant to a Graves Act extended term. State v. Franklin, 184 N.J. 516, 533-34 (2005) (applying the holding in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000)). To impose a Graves Act extended term after trial, the jury must have found that the defendant used or possessed a firearm during the crime. State v. Franklin, 184 N.J. 516, 533-34 (2005). In the case of a guilty plea, the maximum sentence authorized by statute is the maximum sentence supported by the defendant's admissions. State v. Franklin, 184 N.J. 516, 537-38 (2005) (interpreting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)). The defendant may also "consent to judicial factfinding as to sentence enhancements." State v. Franklin, 184 N.J. 516, 538 (2005) (quoting Blakely v. Washington, 542 U.S. 296, 309-11, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 403 (2004)).

(b) The Sixth Amendment and the Graves Act Parole Disqualifiers: In accordance with the decision in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000), that to comply with the Sixth Amendment, the jury, not the court, must find a fact that subjects a defendant to an extended term, the Sixth Amendment similarly requires that a fact that increases the mandatory minimum term must be found by the jury, not a judge. Alleyne v. United States, ___ U.S. ___, ___, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314, 321 (2013).

Our Court has yet to address the Alleyne decision in relation to the Graves Act parole disqualifier, but it has found that a mandatory parole disqualifier based on the court's finding that the defendant was involved in organized crime was invalid under Alleyne. State v. Grate, 220 N.J. 317, 335 n.2 (2015) (refusing to issue an advisory opinion on whether the Graves Act mandatory parole disqualifier was also invalid).

Though no United States Supreme Court or published New Jersey decision has so held, presumably the Apprendi prior-conviction exception will apply to mandatory minimum terms, just as it applies to extended terms. See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

5. Certain Offenses Excluded From Graves Act Enhanced Sentencing. N.J.S.A. 2C:43-6(d)(2) provides that the court shall not impose a Graves Act enhanced sentence for the following crimes:

- Unlawful possession of a handgun in which the propelling force is air or similar force (N.J.S.A. 2C:39-5(b)(2));

- Unlawful possession of a rifle or shotgun in which the propelling force is air or similar force (N.J.S.A. 2C:39-5(c)(2)); and

- Possession of a rifle or shotgun without a firearms purchaser identification card (N.J.S.A. 2C:39:5(c)(1)).

6. Parole-Disqualifier Exception for First-Time Offenders. N.J.S.A. 2C:43-6.2 provides that upon request of the State, or at the sentencing court's request with the State's approval, the assignment judge shall place the defendant on probation or reduce the parole ineligibility term to one year if the interest of justice would not be served by imposition of a parole disqualifier, and the defendant has no prior conviction for an enumerated offense (listed in section A(1) above).

B. Assault Weapons Sentencing: Statutory Provisions

1. Assault Weapons Enumerated Offenses. N.J.S.A. 2C:43-6(g) requires enhanced sentencing if the defendant used or was in possession of a machine gun (defined in N.J.S.A. 2C:39-1(i)) or assault firearm (defined in N.J.S.A. 2C:39-1(w)) while committing, or attempting to commit, any of the following enumerated offenses, including the immediate flight therefrom:

- Possession of a firearm for an unlawful purpose (N.J.S.A. 2C:39-4(a));
- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Aggravated assault (N.J.S.A. 2C:12-1(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Robbery (N.J.S.A. 2C:15-1);
- Burglary (N.J.S.A. 2C:18-2);
- Escape (N.J.S.A. 2C:29-5); or
- Manufacture, distribute or dispense a controlled dangerous substance (N.J.S.A. 2C:35-5).

2. Assault Weapons Parole Disqualifier. If the defendant committed an enumerated offense (see section B(1) above) while possessing a machine gun or assault weapon, the court must impose a term of parole ineligibility of (a) ten years for a first or second degree crime, (b) five years for a third degree crime, or (c) eighteen months for a fourth degree crime. N.J.S.A. 2C:43-6(g).

3. Extended Term With Parole Disqualifier for Certain Assault Weapons Repeat Offenders. N.J.S.A. 2C:43-6(g) provides that the court must impose an extended term if the defendant committed an enumerated offense (see section B(1) above) while possessing a machine gun or assault weapon, is at least eighteen years old, and has a prior conviction for committing with a firearm any of the following offenses set forth in N.J.S.A. 2C:44-3(d):

- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Aggravated assault (N.J.S.A. 2C:12-1(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Robbery (N.J.S.A. 2C:15-1);
- Burglary (N.J.S.A. 2C:18-2);
- Escape (N.J.S.A. 2C:29-5);
- Possession of a firearm for an unlawful purpose (N.J.S.A. 2C:39-4(a); or
- Any offense in Title 2A (Administration of Civil and Criminal Justice).

N.J.S.A. 2C:43-6(g) instructs the court to impose the extended term in accordance with N.J.S.A. 2C:43-7(d), which requires that the extended term include a parole disqualifier as follows:

- First and second degree crimes: fifteen years, unless:
    - The sentence is one of life imprisonment, then the parole disqualifier must be twenty-five years or thirty years if the defendant violated N.J.S.A. 2C:35-3 (leader of a narcotics trafficking network);
- Third degree crime: eight years; and
- Fourth degree crime: five years.

4. Hearing and Findings Required to Support an Assault Weapons Sentence. N.J.S.A. 2C:43-6(h) requires the prosecutor to establish, and the court to find, by a preponderance of the evidence at a hearing, which may occur at the time of sentencing, "that the weapon used or possessed was a machine gun or assault firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information."

(a) Note on the Parole Disqualifier as Applied to Second, Third and Fourth Degree Crimes: Because N.J.S.A. 2C:43-6(g) effectively imposes a 100% period of parole ineligibility on second, third and fourth degree offenses, the jury, not the court, must find beyond a reasonable doubt that the weapon used was an assault firearm or machine gun and that the defendant possessed it to use it against another. State v. Petrucci (II), 365 N.J. Super. 454, 462-63 (App. Div.), certif. denied, 179 N.J. 373 (2004).

(b) The Sixth Amendment and Assault Weapons Extended Terms: The Sixth Amendment requires the jury, not the court, find a fact, other than proof of a prior conviction, that subjects a defendant to a mandatory extended term. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000). Though no published New Jersey decision applies this rule to the assault weapons sentencing statute (N.J.S.A. 2C:43-6(h)), the Court has declared unconstitutional under Apprendi the parallel Graves Act extended term provision (N.J.S.A.

2C:43-6(d)). State v. Franklin, 184 N.J. 516, 533-34 (2005).

(c) The Sixth Amendment and Assault Weapons Parole Disqualifiers: In accordance with the decision in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000), that to comply with the Sixth Amendment, the jury, not the court, must find a fact that subjects a defendant to a mandatory extended term, the Sixth Amendment similarly requires that a fact that requires a mandatory minimum term must be found by the jury, not a judge. Alleyne v. United States, ___ U.S. ___, ___, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314, 321 (2013). Though no United States Supreme Court or published New Jersey decision has so held, presumably the Apprendi prior-conviction exception will apply to mandatory minimum terms, just as it applies to extended terms. See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

Our Court has yet to address the Alleyne decision in relation to the assault weapons parole disqualifier, but it has found that a mandatory parole disqualifier based on the court's finding that the defendant was involved in organized crime was invalid under Alleyne. State v. Grate, 220 N.J. 317, 334-35 (2015). The Grate Court declined to issue an advisory opinion on whether the Graves Act mandatory parole disqualifier, which is similar to the assault weapons parole disqualifier, was invalid under Alleyne. State v. Grate, 220 N.J. 317, 335 n.2 (2015).

C. Graves Act Sentencing: Case Law

1. Policy. The focus of the Graves Act is deterrence, not rehabilitation. State v. Haliski, 140 N.J. 1, 9 (1995).

2. Proportionality and a Parole Disqualifier. The length of a parole ineligibility term under the Graves Act "must ordinarily be consistent with the length of the base term" and "the court's evaluation of the relevant aggravating and mitigating factors." State v. Towey, 114 N.J. 69, 81 (1989). Since, however, "the

weight of the aggravating and mitigating factors is irrelevant to the imposition of a minimum term in Graves Act cases, . . . there may be less correlation than in non-Graves Act cases between the length of the base term and the severity of the parole ineligibility term." Id. at 81-82. See also State v. Benjamin, ___ N.J. ___, ___ (2017) (explaining that "even if the trial court finds that the mitigating factors of N.J.S.A. 2C:44-1(a) outweigh the aggravating factors listed in subsection (b) of that statute, the court must still impose the minimum term of incarceration.").

3. Merger. "[W]hen a Graves Act crime merges with a non-Graves Act crime, the sentence must be at least equal in length to the mandatory sentence required for the Graves Act crime. If the sentencing guidelines for the non-Graves Act crime do not permit that long a sentence, the Graves Act crime survives the merger." State v. Connell, 208 N.J. Super. 688, 696 (App. Div. 1986).

4. Operability and Design of the Firearm. "The Graves Act contemplates a 'firearm' not in terms of a device's present operability, but in terms of its original design." State v. Gantt, 101 N.J. 573, 584 (1986). The weapon must have been designed to deliver a potentially lethal projectile; it need not be operable as well. Id. at 585. Inoperability is relevant only when substantial evidence tends to show that the weapon has changed to such a degree that it has permanently lost the characteristics of a real gun. Id. at 589. State v. Orlando, 269 N.J. Super. 116, 130-33 (App. Div. 1993), certif. denied, 136 N.J. 30 (1994).

5. Accomplice. An accomplice who had the purpose to promote or facilitate the crime with the use of a firearm is guilty of that crime even though he or she did not personally possess or use the firearm. State v. White, 98 N.J. 122, 130 (1984). Even where the accomplice is found guilty only of an unarmed offense, if he or she knew or had reason to know before the crime was committed that his or her cohort would possess or use a firearm during the crime or immediate flight therefrom, the Graves Act applies to the accomplice. Id. at 131. Accomplice liability depends on proof of a shared purpose. State v. Wooters, 228 N.J. Super. 171, 175, 178-79 n.1 (App. Div. 1988).

6. The Graves Act and the No Early Release Act (NERA). Where a defendant is subject to a NERA and a Graves Act parole disqualifier, the NERA parole disqualifier will require a longer

mandatory minimum term, and thus, will subsume the Graves Act parole disqualifier. See State v. Garron, 177 N.J. 147, 163 (2003), cert. denied, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004). In this situation the court should state in the judgment of conviction the crime or crimes subject to the NERA and the Graves Act to avoid confusion in the future if the defendant commits an offense that would subject him or her to the Graves Act repeat offender extended term. State v. Cheung, 328 N.J. Super. 368, 371 (App. Div. 2000).

7. Application for Transfer to a Drug Treatment Program. A defendant cannot seek relief under Rule 3:21-10(b)(1) (application to enter drug treatment program), until the Graves Act mandatory term has been served. State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986).

8. Extended Terms.

(a) Notice and Hearing. "[N]otice and hearing are required before a mandatory extended term may be imposed based on a prior Graves Act conviction." State v. Martin, 110 N.J. 10, 14 (1988).

(b) Burden of Proof. The burden is on the State to prove to the sentencing judge that the defendant has a prior conviction that qualifies him or her for a Graves Act extended term. State v. Robinson, 253 N.J. Super. 346, 358 (App. Div.), certif. denied, 130 N.J. 6 (1992). Note that the Sixth Amendment is not violated by the court's finding the existence of a prior conviction as a basis to impose a sentence enhancer. State v. Franklin, 184 N.J. 516, 521 (2005); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000).

(c) Timing of Prior Conviction. To impose a Graves Act extended term, the State must establish that the defendant had a prior conviction for an enumerated offense with a firearm. State v. Hawks, 114 N.J. 359, 361, 365 (1989). Conviction for the first crime need not precede the commission of the second crime. Ibid.

(d) Prior Conviction Pending Appeal. The court may sentence a defendant to a Graves Act extended term while the prior Graves Act conviction is pending appeal, or before the time for such an appeal has expired. State v. Haliski, 140 N.J. 1, 17-18 (1995). If the prior Graves Act

conviction is reversed on appeal, the extended term must be vacated upon the defendant's motion, pursuant to Rule 3:21-10(b)(6). State v. Haliski, 140 N.J. 1, 18-20 (1995).

(e) Convictions in the Same Proceeding. It is an open question whether an extended Graves Act sentence may be imposed based upon convictions and sentences entered in the same proceeding. State v. Rountree, 388 N.J. Super. 190, 207-09 (App. Div. 2006).

(f) Defense Challenge to the State's Proof. The defendant may challenge the State's proof as insufficient, but if the defendant's challenge would invalidate a prior conviction, the defendant "must proceed by an appropriate application for post-conviction relief. R. 3:22. In the absence of such an application, the sentencing court is entitled to rely on the record of the prior conviction to satisfy itself that the prior conviction constitutes a Graves Act offense." State v. Jefimowicz, 119 N.J. 152, 160-61 (1990).

(g) Multiple Graves Act Extended Terms. When sentencing more than one Graves Act offense, the judge must impose a Graves Act extended term on each conviction. State v. Robinson, 217 N.J. 594, 597 (2014) (citing State v. Connell, 208 N.J. Super. 688, 697 (App. Div. 1986)). An extended Graves Act term is not subject to the limitation in N.J.S.A. 2C:44-5(a)(2), which prohibits more than one extended term sentence, because a Graves Act extended term is the "ordinary sentence" for the crime. State v. Connell, 208 N.J. Super. 688, 691 (App. Div. 1986).

9. Mandatory Terms, State Appeals and Double Jeopardy. The State may appeal a sentencing court's refusal to impose a Graves Act mandatory extended term based on a finding that the proof did not establish the requisite prior offenses. State v. Robinson, 253 N.J. Super. 346, 358-59 (App. Div.), certif. denied, 130 N.J. 6 (1992). On remand, the State may present additional proofs of the prior offenses only if the sentencing court first finds that to do so would not violate due process or double jeopardy. Id. at 359. See Monge v. California, 524 U.S. 721, 734, 118 S. Ct. 2246, 2253, 141 L. Ed. 2d 615, 628 (1998) (double jeopardy clause does not preclude retrial on a prior conviction allegation in a noncapital sentencing case).

10. Remand and Original Jurisdiction. Where a sentencing court illegally imposes a Graves Act period of parole ineligibility, the appellate court should not impose a discretionary term of parole ineligibility to correct the sentence, but rather, should remand for reconsideration of the sentence. State v. Wooters, 228 N.J. Super. 171, 174 (App. Div. 1988). However, if the reviewing court reverses a discretionary parole disqualifier and finds that the court should have imposed a Graves Act mandatory parole disqualifier, then the appellate court may amend the judgment of conviction to reflect the mandatory minimum term under the Graves Act. State v. Copeman, 197 N.J. Super. 261, 265 (App. Div. 1984).

11. Graves Act Parole Disqualifier Exception for First-Time Offenders (N.J.S.A. 2C:43-6.2).

(a) Constitutionality. The Graves Act parole disqualifier exception for first time offenders, N.J.S.A. 2C:43-6.2, which allows the assignment judge to eliminate or decrease to one year the parole disqualifier in the interest of justice, has withstood constitutional challenge on separation-of-powers grounds. State v. Alvarez, 246 N.J. Super. 137, 145-47 (App. Div. 1991). The "interests of justice" standard avoids arbitrary, unreasonable and capricious decision-making by the prosecutor and poses no constitutional impediment to the legislative will. Ibid.

(b) Arbitrariness Challenge by the Defense. A defendant has the right to move before the assignment judge for a hearing to determine whether the prosecutor arbitrarily or unconstitutionally discriminated against him or her in determining whether the interests of justice warranted consent or referral for leniency pursuant to N.J.S.A. 2C:43-6.2. State v. Watson, 346 N.J. Super. 521, 535 (App. Div. 2002), certif. denied, 176 N.J. 278 (2003); State v. Alvarez, 246 N.J. Super. 137, 147-49 (App. Div. 1991); State v. Miller, 321 N.J. Super. 550, 555-56 (Law Div. 1999). "[T]he prosecutor must provide written reasons for withholding consent to a waiver in order to promote procedural fairness and to ensure meaningful judicial review." State v. Benjamin, 442 N.J. Super. 258, 266 (App. Div. 2015), affirmed as modified, ___ N.J. ___ (2017). But the defendant is "not entitled to discovery of a prosecutor's case-specific memorializations and cumulative files when challenging the denial of a Graves Act waiver . . . because there are sufficient procedural safeguards in

place for meaningful judicial review . . . ." State v. Benjamin, ___ N.J. ___, ___ (2017) (slip op. at 30).

(c) Defense Request for Referral. A defendant may also request the sentencing judge refer the matter to the assignment judge for leniency. State v. Alvarez, 246 N.J. Super. 137, 141 n.2 (App. Div. 1991).

(d) Assignment Judge Discretion. "When an application for a waiver under section 6.2 is made by motion of a prosecutor, the assignment judge or his or her designee has the authority to choose one of two sentences: he or she 'shall place the defendant on probation pursuant to [N.J.S.A. 2C:43-2(b)(2)] or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole.'" State v. Nance, ___ N.J. ___, ___ (2017) (slip op. at 22) (quoting N.J.S.A. 2C:43-6.2). While the prosecutor may argue for a certain sentence, "nothing in the statute suggests that the assignment judge or designee must accept the prosecutor's recommendation." Id. at ___ (slip op. at 22-23).

(e) Presumption of Incarceration. N.J.S.A. 2C:43-6.2 does not exempt a defendant convicted of a first-degree or second-degree Graves Act offense from the N.J.S.A. 2C:44-1(d) presumption of incarceration. State v. Nance, ___ N.J. ___, ___ (2017) (slip op. at 25).

(f) Remand to Seek Leniency. Where a defendant argues at sentencing only that the Graves Act does not apply, and where that argument is rejected on appeal, the interests of justice may nevertheless militate in favor of remanding to the trial court so that the defendant can be afforded the opportunity to seek the prosecutor's consent and move for leniency under N.J.S.A. 2C:43-6.2. State v. Mello, 297 N.J. Super. 452, 467-68 (App. Div. 1997).

12. Cruel and Unusual Punishment. Ordinarily, a Graves Act sentence will not constitute cruel and unusual punishment, even if the defendant is a youthful offender, State v. Des Marets, 92 N.J. 62, 81-82 (1983), or a law enforcement officer who needs solitary or segregated confinement, State v. Muessig, 198 N.J. Super. 197, 203-04 (App. Div.), certif. denied, 101 N.J. 234 (1985).

D. Assault Weapons Sentencing: Case Law

1. 100% Parole Ineligibility. In effect, N.J.S.A. 2C:43-6(g) does not allow any possibility of parole for second, third and fourth degree offenses because the mandatory parole ineligibility terms are equal to the top of the ordinary sentencing ranges for crimes of those degrees (the ordinary ranges are: second degree crimes--five to ten years; third degree crimes--three to five years; and fourth degree crimes--a term not to exceed eighteen months). State v. Petrucci (II), 365 N.J. Super. 454, 460 n.2, 462-63 (App. Div.), certif. denied, 179 N.J. 373 (2004).

XIV. DRUG OFFENDER SENTENCING

In sentencing drug offenders, the court may impose a term of special probation, which is intended to treat a defendant's substance abuse problem and is managed by drug court personnel. If the court does not impose special probation, the defendant must be sentenced in accordance with Title 2C. Sections A and B of this chapter discuss special probation and drug court. Sections C through K discuss enhanced sentencing provisions specific to drug offenders.

A. Special Probation: Statutory Provisions

1. Statutory Authority for Special Probation. N.J.S.A. 2C:35-14(a) provides that on its own initiative, or at the defendant's request, after considering all relevant information, the court may sentence a drug or alcohol dependent offender, as defined in N.J.S.A. 2C:35-2, to a five-year period of special probation if the offender is not eligible for regular probation (N.J.S.A. 2C:45-1) because the conviction carries a presumption of imprisonment or requires a period of parole ineligibility, and the court makes the following findings on the record:

(1) The defendant underwent a professional diagnostic assessment (N.J.S.A. 2C:35-14.1) to determine whether and to what extent the defendant is drug or alcohol dependent (N.J.S.A. 2C:35-2) and whether the defendant would benefit from treatment; and

(2) The defendant is dependent upon drugs or alcohol within the meaning of N.J.S.A. 2C:35-2, and was drug or alcohol dependent at the time of the offense; and

(3) The defendant committed the offense while under the influence of drugs or alcohol, or to acquire property or money to support drug or alcohol dependency; and

(4) The defendant will benefit from substance abuse treatment and monitoring, thereby reducing recidivism; and

(5) The defendant did not possess a firearm at the time of the offense or at the time of any pending criminal charge; and

(6) The defendant has not been convicted on two or more separate occasions of: (i) first or second degree crimes other than those listed in the following subsection (7); or (ii) a first or second degree crime and a third degree crime, other than N.J.S.A. 2C:35-10 drug possession crimes; and

(7) The defendant does not have pending charges or a prior conviction or delinquency adjudication for murder, aggravated manslaughter, manslaughter, kidnapping, aggravated assault, aggravated sexual assault, or sexual assault; and

(8) A suitable treatment facility licensed and approved by the Division of Addiction Services is able and has agreed to provide the defendant appropriate treatment; and

(9) A sentence of special probation will not pose a danger to the community.

Note: In 2012 the Legislature amended N.J.S.A. 2C:35-14(a)(7) to remove robbery from the list of pending charges that made a defendant ineligible for special probation. L. 2012, c. 23.

2. "Drug or Alcohol Dependent Persons" Defined. Pursuant to N.J.S.A. 2C:35-2, a drug or alcohol dependent person is a person who "has been in a state of psychic or physical dependence, or both, arising from the use of" drugs or alcohol "on a continuous or repetitive basis. . . . [D]ependence is characterized by behavioral and other responses, including but not limited to a strong compulsion to take the substance on a recurring basis in order to experience its psychic effects, or to avoid the discomfort of its absence."

3. Diagnostic Assessment Requirement. N.J.S.A. 2C:35-14.1(a) provides that the court shall require a defendant to submit to a professional diagnostic assessment if the following circumstances exist:

(1) The court has a reasonable basis to believe that the defendant may be drug dependent, as defined in N.J.S.A. 2C:35-2; and

(2) The crime the defendant committed is:

(a) Subject to a presumption of imprisonment pursuant to N.J.S.A. 2C:44-1(d); or

(b) A third degree crime and the defendant has previously been convicted of a crime subject to the presumption of imprisonment or that resulted in a term of imprisonment; and

(3) The defendant is eligible for consideration of special probation pursuant to N.J.S.A. 2C:35-14.

Exception to the Diagnostic Assessment Requirement. The court need not order diagnostic testing if "it is clearly convinced that such assessment will not serve any useful purpose. If the court does not order a diagnostic assessment, the court shall place on the record the reasons for its decision." N.J.S.A. 2C:35-14.1(c).

4. Reasonable Basis to Believe a Person Is Drug or Alcohol Dependent. Pursuant to N.J.S.A. 2C:35-14.1(b), any of the following circumstances constitute a reasonable basis to believe that a person may be drug or alcohol dependent:

(1) The offense involved a controlled dangerous substance;

(2) The defendant has previously been convicted of a drug offense, or "was admitted to pretrial intervention or supervisory treatment, or received a conditional discharge for a charge involving a controlled dangerous substance";

(3) The defendant has a pending controlled dangerous substance charge in this State or another jurisdiction;

(4) The defendant received drug treatment or counseling in the past;

(5) "[T]he defendant appears to have been under the influence of a controlled dangerous substance during the commission of the present offense, or it reasonably appears that the present offense may have been committed to acquire property or monies to purchase" drugs for the defendant;

(6) "[T]he defendant admits to the unlawful use of a controlled dangerous substance within the year preceding the arrest for the present offense";

(7) "[T]he defendant has had a positive drug test within the last 12 months"; or

(8) "[T]here is information, other than the circumstances enumerated in paragraphs (1) through (7) of this subsection, which indicates that the defendant may be a drug dependent person or would otherwise benefit by undergoing a professional diagnostic assessment within the meaning of" N.J.S.A. 2C:35-14(a)(1).

5. Special Probation Ineligibility. Pursuant to N.J.S.A. 2C:35-14(b), a defendant is not eligible for special probation if the defendant is convicted of or adjudicated delinquent for:

(1) A first degree crime; or

(2) Any of the following first or second degree offenses, which are subject to the No Early Release Act (N.J.S.A. 2C:43-7.2) (NERA), "other than a crime of the second degree involving N.J.S.A. 2C:15-1 (robbery) or N.J.S.A. 2C:18-2 (burglary)":

- Murder (N.J.S.A. 2C:11-3);
- Aggravated manslaughter or manslaughter (N.J.S.A. 2C:11-4);
- Vehicular homicide (N.J.S.A. 2C:11-5);
- Aggravated assault (N.J.S.A. 2C:12-1(b));
- Disarming a law enforcement officer (N.J.S.A. 2C:12-11(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-2(b) and (c)(1));
- Robbery (N.J.S.A. 2C:15-1);
- Carjacking (N.J.S.A. 2C:15-2);
- Aggravated arson (N.J.S.A. 2C:17-1(a)(1));

- Burglary (N.J.S.A. 2C:18-2);
- Extortion (N.J.S.A. 2C:20-5(a));
- Booby traps in manufacturing or distributing a controlled dangerous substance (N.J.S.A. 2C:35-4.1(b));
- Drug induced deaths (N.J.S.A. 2C:35-9);
- Terrorism (N.J.S.A. 2C:38-2);
- Producing or possessing chemical, biological, nuclear, or radiological weapons (N.J.S.A. 2C:38-3);
- Racketeering in the first degree (N.J.S.A. 2C:41-2);
- Firearms trafficking (N.J.S.A. 2C:39-9(i)); and
- Child pornography (N.J.S.A. 2C:24-4(b)(3)).

(3) A crime, except drug distribution within 1000 feet of school property (N.J.S.A. 2C:35-7), "for which a mandatory minimum period of incarceration is prescribed under" Chapter 35 of Title 2C "or any other law"; or

(4) "[A]n offense that involved the distribution or the conspiracy or attempt to distribute a controlled dangerous substance or controlled substance analog to a juvenile near or on school property."

Note: In 2012 the Legislature removed second degree burglary (N.J.S.A. 2C:18-2) and robbery (N.J.S.A. 2C:15-1) from the list of NERA offenses that rendered a defendant ineligible for special probation. N.J.S.A. 2C:35-14(c), deleted by, L. 2012, c. 23. It also eliminated the prosecutor's ability to object to imposition of special probation. Ibid.

6. Presumption of Special Probation for Certain Drug Offenders. N.J.S.A. 2C:35-14.2(b) instructs that the court shall sentence a defendant to special probation, regardless of whether the defendant requests it or consents to it, if diagnostic testing concludes that the defendant is a drug dependent person, as that term is defined in N.J.S.A. 2C:35-2, and the court

concludes that the defendant is a person in need of treatment, as defined in N.J.S.A. 2C:35-14.2(f), unless:

(1) "[T]he court finds that a sentence of imprisonment must be imposed consistent with the provisions of chapters 43 and 44 of Title 2C"; or

(2) The court is clearly convinced that:

(a) The treatment, monitoring and supervision services afforded by regular probation (N.J.S.A. 2C:45-1) adequately address the defendant's clinical needs; and

(b) "[T]he defendant's treatment needs would not be better addressed by sentencing the defendant to special probation pursuant to N.J.S.A. 2C:35-14"; and

(c) "[N]o danger to the community would result from placing the person on regular probation"; and

(d) A sentence of regular probation would be consistent with the provisions of chapters 43 and 44 of Title 2C.

7. "Person in Need of Treatment" Defined. N.J.S.A. 2C:35-14.2(f) provides that a "person in need of treatment" means a defendant who:

(1) Is a drug dependent person as defined in N.J.S.A. 2C:35-2; and

(2) Has been convicted of:

(a) A crime subject to a presumption of imprisonment, pursuant to N.J.S.A. 2C:44-1(d); or

(b) A third degree crime "if the person has previously been convicted of a crime subject to a presumption of imprisonment or a crime that resulted in the imposition of a State prison term"; and

(3) "[I]s eligible to be considered for a sentence to special probation," pursuant to N.J.S.A. 2C:35-14.

Appeal by the State. If the court imposes a sentence of regular probation (N.J.S.A. 2C:45-1) instead of special probation under N.J.S.A. 2C:35-14.2, the sentence shall not be final for ten days to allow the prosecutor time to file an appeal. N.J.S.A. 2C:35-14.2(d).

8. Presumption of Inpatient Treatment for Certain Defendants. Unless the court suspends inpatient treatment and imposes outpatient treatment pursuant to N.J.S.A. 2C:35-14(j) (discussed below), N.J.S.A. 2C:35-14(d) requires the court to order the defendant to treatment at a residential facility if the defendant: (i) is convicted of or adjudicated delinquent for a second degree crime or for drug distribution within 1000 feet of school property (N.J.S.A. 2C:35-7); or (ii) was previously convicted of or adjudicated delinquent for manufacturing, distributing or dispensing drugs (N.J.S.A. 2C:35-5). N.J.S.A. 2C:35-14(d). If the facility cannot house the defendant immediately, then the defendant shall be incarcerated until he or she can be transferred. Ibid.

(a) Duration of Residential Treatment. The defendant must serve a minimum of six months at the treatment facility. N.J.S.A. 2C:35-14(d). The term shall end upon successful completion of the treatment program, and shall not exceed five years. Ibid. "Upon successful completion of the required residential treatment program, the person shall complete the period of special probation . . . with credit for time served for any imprisonment served as a condition of probation and credit for each day during which the person satisfactorily complied with the terms and conditions of special probation while committed pursuant to this section to a residential treatment facility." Ibid.

(b) Reporting Requirements. N.J.S.A. 2C:35-14(e) provides that the probation department, or other appropriate agency designated by the court, shall periodically provide reports to the court on the defendant's progress and shall immediately notify the court of a refusal to submit to a drug or alcohol test. Ibid. The treatment facility must "promptly report" to the probation department or designated agency all "significant failures" by the defendant and must immediately notify the prosecutor and the court of any action that would constitute an escape. Ibid.

9. Outpatient Treatment as a Condition of Suspended Inpatient Treatment. N.J.S.A. 2C:35-14(j) provides that if the defendant

meets the criteria for inpatient treatment set forth in N.J.S.A. 2C:35-14(d), "the court may temporarily suspend imposition of all or any portion of the term of commitment . . . and may instead order the person to enter a nonresidential treatment program, provided that the court finds on the record that":

(1) The diagnostic assessment recommends that "the proposed course of nonresidential treatment services is clinically appropriate and adequate to address the person's treatment needs"; and

(2) The defendant's participation in outpatient treatment will not danger the community; and

(3) " [A] suitable treatment provider is able and has agreed to provide clinically appropriate nonresidential treatment services."

(a) Special Conditions of Outpatient Treatment In Lieu of Inpatient Treatment. A defendant sentenced to nonresidential treatment in lieu of residential treatment pursuant to N.J.S.A. 2C:35-14(j) must undergo urine testing at least once a week. N.J.S.A. 2C:35-14(k)(1). Additionally, "the court shall impose appropriate curfews or other restrictions on the person's movements, and may order the person to wear electronic monitoring devices to enforce such curfews or other restrictions." Ibid.

(b) Appeal by the State. If the court imposes nonresidential treatment over the prosecutor's objection, the sentence shall not become final for ten days to permit the State to file an appeal. N.J.S.A. 2C:35-14(j).

(c) Permanent Suspension of Inpatient Treatment Based on Defendant's Progress. If the defendant successfully progresses in outpatient treatment for six months and there is a substantial likelihood that he or she will successfully complete the program, the court may permanently suspend residential treatment, in which case the N.J.S.A. 2C:35-14(k) special monitoring provisions will no longer apply. N.J.S.A. 2C:35-14(j).

10. Mandatory Conditions of Special Probation. As conditions of special probation the defendant must:

- "[E]nter a residential treatment program at a facility licensed and approved by the Division of Addiction Services" or participate in a nonresidential treatment program offered by a licensed and approved treatment provider, N.J.S.A. 2C:35-14(a); and

- Comply with the treatment program rules and with the requirements of treatment, N.J.S.A. 2C:35-14(a); and

- Submit to periodic urine testing for drugs or alcohol, N.J.S.A. 2C:35-14(a); and

- Comply with any other reasonable terms and conditions that the court may impose pursuant to N.J.S.A. 2C:45-1 (the regular probation statute), N.J.S.A. 2C:35-14(a); and

- Contribute to the cost of treatment, N.J.S.A. 2C:35-14(h); and

- Pay any applicable fine, penalty, fee and restitution award, N.J.S.A. 2C:35-14(i).

11. Modifications of Special Probation. At any time during the special probation term the court may change a defendant's treatment to provide inpatient or outpatient services if the modification "is clinically appropriate and necessary to address the person's present treatment needs." N.J.S.A. 2C:35-14(j).

12. Early Discharge From Special Probation. N.J.S.A. 2C:35-14(l) provides that if the defendant "has made exemplary progress in the course of treatment, the court may, upon recommendation of the person's supervising probation officer or on the court's own motion, and upon notice to the prosecutor, grant early discharge from a term of special probation provided that the person: (1) has satisfactorily completed the treatment program ordered by the court; (2) has served at least two years of special probation; (3) did not commit a substantial violation of any term or condition of special probation, including but not limited to a positive urine test, within the preceding 12 months; and (4) is not likely to relapse or commit an offense if probation supervision and related services are discontinued."

13. Refusal to Give a Urine Sample. If the defendant refuses to undergo urine testing for drug or alcohol usage the court

shall permanently revoke special probation unless the court imposes a brief jail term followed by continued special probation, pursuant to N.J.S.A. 2C:35-14(g). N.J.S.A. 2C:35-14(f)(6).

14. Failure to Complete or Comply With a Treatment Program. "Failure to complete successfully the required treatment program shall constitute a violation of the person's special probation." N.J.S.A. 2C:35-14(f)(7).

15. Escape From Inpatient Treatment. If the defendant commits an act that would constitute an escape from a residential treatment facility "the court shall forthwith permanently revoke the person's special probation." N.J.S.A. 2C:35-14(f)(6).

16. Violation of Special Probation. In the event the defendant violates a term of special probation, a probation officer or prosecutor may bring an action to revoke special probation, or the court may initiate the action on its own. N.J.S.A. 2C:35-14(f)(7). In deciding whether to revoke special probation the court "shall consider the nature and seriousness of the present infraction and any past infractions in relation to the person's overall progress in the course of treatment, and shall also consider the recommendations of the treatment provider," giving "added weight" to the provider's opinion that the defendant is not amenable to treatment, is unlikely to successfully complete treatment, or should be resentenced to punishment other than special probation. N.J.S.A. 2C:35-14(f)(3).

> **(a) First Violation.** The court may revoke special probation upon a first violation of any term. N.J.S.A. 2C:35-14(f)(1).
>
> **(b) Subsequent Violation.** The court shall revoke special probation upon a second or subsequent violation unless the court (1) imposes a brief term of incarceration, pursuant to N.J.S.A. 2C:35-14(g), or (2) "the court finds on the record that there is a substantial likelihood that the person will successfully complete the treatment program if permitted to continue . . . and the court is clearly convinced, considering the nature and seriousness of the violations, that no danger to the community will result." N.J.S.A. 2C:35-14(f)(2). The prosecutor may appeal a decision to allow the defendant to continue special probation. Ibid.

(c) Brief Incarceration in Lieu of Revocation. When the defendant is subject to the presumption of revocation on a second or subsequent violation (N.J.S.A. 2C:35-14(f)(2)), "or when the person refuses to undergo drug or alcohol testing" (N.J.S.A. 2C:35-14(f)(6)), "the court may, in lieu of permanently revoking the person's special probation, impose a term of incarceration for a period of not less than 30 days nor more than six months," followed by continued special probation. N.J.S.A. 2C:35-14(g). "[T]he court shall consider the recommendations of the treatment provider with respect to the likelihood that such confinement would serve to motivate the person to make satisfactory progress in treatment once special probation is reinstated." Ibid. The court may impose a brief term of imprisonment in lieu of revocation only once, "unless the court is clearly convinced that there are compelling and extraordinary reasons to justify reimposing this disposition." The prosecutor may appeal the decision to impose a subsequent term of imprisonment in lieu of revocation. N.J.S.A. 2C:35-14(g).

(d) Additional Terms of Special Probation In Lieu of Revocation. In the event the court continues special probation after a violation, the court "shall order the person to comply with such additional terms and conditions, including but not limited to more frequent drug or alcohol testing, as are necessary to deter and promptly detect any further violation." N.J.S.A. 2C:35-14(f)(5).

17. Resentencing on the Original Offense After Revocation of Special Probation. If the court revokes special probation, the court shall "conduct a de novo review of any aggravating and mitigating factors present at the time of both original sentencing and resentencing," and "impose any sentence that might have been imposed, or that would have been required to be imposed, originally for the offense." N.J.S.A. 2C:35-14(f)(4). In the event the court imposes incarceration, the defendant shall receive credit for time served in custody or in a residential treatment facility. N.J.S.A. 2C:35-14(f)(4). A defendant who is sentenced to imprisonment for failure to comply with the terms of special probation shall be ineligible for transfer to the Intensive Supervision Program (N.J.S.A. 2C:43-11). N.J.S.A. 2C:35-14(f)(7).

B. Special Probation and Drug Court: Case Law

1. Purpose of Special Probation. "Special probation is designed to divert otherwise prison-bound offenders into an intensive and highly specialized form of probation designed to 'address in a new and innovative way the problem of drug-dependent offenders caught in a never-ending cycle of involvement in the criminal justice system.'" State v. Bishop, 429 N.J. Super. 533, 540 (App. Div.) (quoting State v. Meyer, 192 N.J. 421, 434-35 (2007)), aff'd o.b., 223 N.J. 290 (2015).

2. Drug Court Described. Drug courts are "a highly specialized team process that function within the existing Superior Court structure to address non-violent drug-related cases." Admin. Office of the Courts, Manual for Operation of Adult Drug Courts In New Jersey, Directive #2-02, at 3 (July 2002) (Drug Court Manual), http://www.judiciary.state.nj.us/directive/criminal/dir_02_02.pdf. The team comprises drug court judges, prosecutors, defense attorneys and drug treatment professionals who closely monitor drug-dependent offenders sentenced to special probation or to regular probation with mandatory drug treatment. Ibid.

Drug courts are not creatures of statute and are not mentioned in Title 2C. State v. Meyer, 192 N.J. 421, 434-35 (2007).
" Although Drug Courts are involved in the implementation of the 'special probation' disposition contained in N.J.S.A. 2C:35-14, they are primarily the creation of our Supreme Court under the Court's 'ultimate constitutional authority to administer our court system, including the drug court program,' and are governed by the Drug Court Manual." State v. Stalter, 440 N.J. Super. 548, 554 (App. Div.) (quoting State v. Meyer, 192 N.J. 421, 424 (2007)), certif. denied, 223 N.J. 355 (2015).

"What distinguishes Drug Courts from other courts is the 'oversight and personal involvement of the drug court judge in the treatment process.' A team approach is a distinctive feature of Drug Court. The judge leads court staff, probation officers, treatment counselors, substance abuse evaluators, and the prosecutor and defense attorney to monitor a participant's recovery." State v. Meyer, 192 N.J. 421, 428 (2007) (quoting Drug Court Manual at 3).

3. Drug Court Tracks. The Drug Court Manual provides for two tracks.

(a) Track One. The first track encompasses defendants who are subject to a presumption of imprisonment and are sentenced to special probation. State v. Stalter, 440 N.J. Super. 548, 554 (App. Div.), certif. denied, 223 N.J. 355 (2015); Drug Court Manual at 16.

(b) Track Two. The second track covers drug-dependent nonviolent offenders who do not qualify for special probation but would likely benefit from participation in drug court. Drug Court Manual at 16. Offenders within the second track are sentenced to regular probation with the condition that they participate in drug treatment. Id. at 16-17.

Note: The Drug Court Manual has not been amended to reflect the L. 2012, c. 23, changes to N.J.S.A. 2C:35-14(b). State v. Maurer, 438 N.J. Super. 402, 414 (App. Div. 2014). Those changes removed from the list of offenses that rendered a defendant ineligible for special probation the crimes of second degree burglary (N.J.S.A. 2C:18-2) and robbery (N.J.S.A. 2C:15-1). L. 2012, c. 23.

4. Drug Dependency at Sentencing Not Required. To be eligible for admission to drug court, a defendant need not be dependent on drugs at the time of sentencing. State v. Clarke, 203 N.J. 166, 181 (2010).

5. Drug Court Statute and Manual, De Novo Review. "[A] trial court's application of the Drug Court Statute and Manual . . . involves a question of law," and thus is subject to de novo review. State v. Maurer, 438 N.J. Super. 402, 411 (App. Div. 2014).

6. Merged Offenses and Drug Court Eligibility. An offense that precludes a sentence of special probation, pursuant to N.J.S.A. 2C:35-14(b), survives merger and renders a defendant ineligible for special probation. State v. Ancrum, ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 18-19) (reversing a sentence of special probation because the defendant committed an aggravated assault). The merged offense is not extinguished for purposes of determining special-probation eligibility. Ibid.

7. Violation of Drug Court and Jail Credits. Pursuant to N.J.S.A. 2C:35-14(f)(4), a defendant who violated a term of special probation is entitled to receive jail credit against the violation of special probation sentence for the time the

defendant spent in compliance with the residential treatment program. State v. Stalter, 440 N.J. Super. 548, 554 (App. Div.), certif. denied, 223 N.J. 355 (2015). The same is not true for a defendant who violated a term of regulation probation under Track Two of Drug Court because the treatment that a defendant receives under Track Two is not custodial for purposes of jail credits. Ibid.

8. Resentencing the Original Charge Following Revocation of Special Probation.

(a) Mandatory Terms Applicable to Original Charge. In the event the court permanently revokes special probation, "mandatory periods of parole ineligibility and mandatory extended term provisions that existed at the time of original sentencing survive during the term of special probation and remain applicable at the time of resentencing" on the parole violation. State v. Bishop, 429 N.J. Super. 533, 536 (App. Div.), aff'd o.b., 223 N.J. 290 (2015).

(b) De Novo Review of Aggravating and Mitigating Factors. Pursuant to N.J.S.A. 2C:35-14(f), in resentencing after a violation of special probation, the court conducts a de novo review of the aggravating and mitigating factors, which is different from the Baylass standard applicable to violations of regular probation. State v. Bishop, 429 N.J. Super. 533, 546 (App. Div.), aff'd o.b., 223 N.J. 290 (2015). See the chapter on probation for a discussion of the Baylass standard.

C. Fines Specific to Drug Offenses: Statutory Provisions

The following statutes provide specific fines for certain drug offenses. The fines apply to all drug offender sentences, including special probation. N.J.S.A. 2C:35-14(i).

1. Leader of Narcotics Trafficking Network. N.J.S.A. 2C:35-3 provides that the court may "impose a fine not to exceed $750,000 or five times the street value of the controlled dangerous substance, controlled substance analog, gamma hydroxybutyrate or flunitrazepam involved, whichever is greater."

2. Maintaining or Operating a Drug Production Facility. N.J.S.A. 2C:35-4 allows "a fine not to exceed $750,000 or five times the street value of all controlled dangerous substances, controlled substance analogs, gamma hydroxybutyrate or flunitrazepam at any time manufactured or stored at such premises, place or facility, whichever is greater."

3. Manufacturing and Distributing a Controlled Dangerous Substance. N.J.S.A. 2C:35-5(b) authorizes a fine up to $300,000 or $500,000, depending on the offense, for first degree drug manufacturing and distribution; $25,000 or $75,000 for a third degree crime (depending on the offense); and $25,000 for certain fourth degree crimes.

4. Manufacturing and Dispensing Gamma Hydroxybutyrate. N.J.S.A. 2C:35-5.2(b) authorizes a fine up to $150,000 for manufacturing and dispensing gamma hydroxybutyrate.

5. Manufacturing and Dispensing Flunitrazepam. N.J.S.A. 2C:35-5.3(b) and (c) allows a fine not to exceed $250,000 for first degree manufacturing and dispensing flunitrazepam, and $150,000 for a second degree offense.

6. Employing a Juvenile in a Drug Distribution Scheme. N.J.S.A. 2C:35-6 allows "a fine not to exceed $500,000 or five times the street value of the controlled dangerous substance or controlled substance analog involved, whichever is greater," for employing a juvenile in a drug distribution scheme.

7. Manufacturing, or Dispensing Drugs on or Near School Property. N.J.S.A. 2C:35-7(a) authorizes a fine not to exceed $150,000 for manufacturing and distributing drugs on or near school property.

8. Drug Distribution to a Minor or a Pregnant Female. N.J.S.A. 2C:35-8 requires the court to impose, upon application of the prosecutor, "twice the term of imprisonment, fine and penalty, including twice the term of parole ineligibility, if any." If the defendant is convicted of more than one offense, the court must impose one enhanced sentence on the most serious offense. Ibid. The prosecutor must establish the basis for the enhanced sentence by a preponderance of the evidence, and the court must hold a hearing on the matter. Ibid.

Note: The enhanced sentencing provisions of N.J.S.A. 2C:35-8 are subject to waiver under N.J.S.A. 2C:35-12. See section J of this chapter for discussion on the waiver provisions.

9. Possession of a Controlled Dangerous Substance or Analog. N.J.S.A. 2C:35-10(a)(1) to (3) authorize a fine not to exceed $35,000 for third degree drug possession, and $15,000, or $25,000 for a fourth degree crime, depending on the circumstances.

10. Possession of Gamma Hydroxybutyrate. N.J.S.A. 2C:35-10.2(b) authorizes a fine up to $100,000 for possession of gamma hydroxybutyrate.

11. Possession of Flunitrazepam. N.J.S.A. 2C:35-10.3(b) allows a fine up to $100,000 for possession of flunitrazepam.

12. Distribution of a Prescription Legend Drug. N.J.S.A. 2C:35-10.5(a)(3) and (4) authorize a fine of up to $200,000 or $300,000, depending on the circumstances, for distribution of a prescription legend drug.

13. Possession or Distribution of an Imitation Controlled Dangerous Substance. N.J.S.A. 2C:35-11(d) authorizes a fine not to exceed $200,000 for possession or distribution of an imitation drug.

14. Obtaining a Controlled Dangerous Substance by Fraud. N.J.S.A. 2C:35-13 allows a fine up to $50,000 for fraudulently obtaining a drug.

D. Penalties, Fees and Assessments Specific to Drug Offenses: Statutory Provisions

The following penalties, fees and assessments apply to all drug offender sentences, including special probation. N.J.S.A. 2C:35-14(i).

1. Drug Offender Restraining Orders. N.J.S.A. 2C:35-5.7(h) provides: " When a person is convicted of or adjudicated delinquent for any criminal offense, the court, upon application of a law enforcement officer or prosecuting attorney pursuant to N.J.S.A. 2C:35-5.9 [certification of offense location] and except as provided in subsection e. of this section, shall, by

separate order or within the judgment of conviction, issue an order prohibiting the person from entering" the place where the offense occurred.

(a) Exception. N.J.S.A. 2C:35-5.7(e) provides: "The court may forego issuing a restraining order . . . only if the defendant establishes by clear and convincing evidence that":

(1) "the defendant lawfully resides at or has legitimate business on or near the place, or otherwise legitimately needs to enter the place. In such an event, the court shall not issue" a restraining order "unless the court is clearly convinced that the need to bar the person from the place in order to protect the public safety and the rights, safety and health of the residents and persons working in the place outweighs the person's interest in returning to the place." The court may also impose an order permitting entry with conditions; or

(2) imposition of a restraining order "would cause undue hardship to innocent persons and would constitute a serious injustice which overrides the need to protect the rights, safety and health of persons residing in or having business in the place."

(b) Appeal by the State. If the court denies a request to impose a restraining order, the sentence shall not be final for ten days to allow the State time to file an appeal. N.J.S.A. 2C:35-5.7(k).

2. Drug Enforcement and Demand Reduction Penalty for Certain Offenses. N.J.S.A. 2C:35-5.11 provides: "Any person who possesses, distributes, dispenses or has under his control with intent to distribute or dispense 3,4-methylenedioxymeth-amphetamine, 3,4-methylenedioxyamphetamine, gammabutyrolactone, gamma hydroxybutyrate or flunitrazepam, or a controlled substance analog of any of these substances, shall, . . . be subject to a drug enforcement and demand reduction penalty of twice the amount otherwise applicable to the offense."

3. Drug Distribution to a Minor or a Pregnant Female. N.J.S.A. 2C:35-8 requires the court to impose, upon application of the prosecutor, "twice the term of imprisonment, fine and penalty, including twice the term of parole ineligibility, if

any, authorized or required to be imposed by" N.J.S.A. 2C:35-5(b) (drug distribution) or N.J.S.A. 2C:35-7 (distribution within a school zone) "or any other provision of this title." If the defendant is convicted of more than one offense, the court must impose one enhanced sentence on the most serious offense. Ibid. The prosecutor must establish the basis for the enhanced sentence by a preponderance of the evidence, and the court must hold a hearing on the matter. Ibid.

Note: The enhanced sentencing provisions of N.J.S.A. 2C:35-8 are subject to waiver under N.J.S.A. 2C:35-12. See section J of this chapter for a discussion of the waiver provisions.

4. Possession of a Controlled Dangerous Substance or Analog. N.J.S.A. 2C:35-10(a) requires the defendant to "perform not less than 100 hours of community service" if the court does not impose a prison term and the defendant committed the crime while inside a school bus or within 1000 feet of school property.

5. Drug Enforcement and Demand Reduction Penalty. N.J.S.A. 2C:35-15(a)(1) requires the court to impose the following drug enforcement and demand reduction (DEDR) penalties on anyone convicted of a Chapter 35 or 36 drug offense:

- $3000 for a first degree crime;
- $2000 for a second degree crime;
- $1000 for a third degree crime;
- $750 for a fourth degree crime; and
- $500 for a disorderly persons or petty disorderly persons offense.

(a) Multiple Offenses. N.J.S.A. 2C:35-15(a)(2)(a) and (b) provide that the court may, in its discretion, impose one penalty based on the highest degree offense if: (1) the defendant was not placed in supervisory treatment or ordered to perform reformative service; (2) "multiple penalties would constitute a serious hardship that outweighs the need to deter the defendant from future criminal activity"; and (3) "imposition of a single penalty would foster the defendant's rehabilitation."

(b) Treatment Program in Lieu of Payment. N.J.S.A. 2C:35-15(e) authorizes the court to suspend collection of the penalty "provided the person is ordered by the court to participate in a drug or alcohol rehabilitation program," and the defendant "agrees to pay for all or some portion of the costs associated with the rehabilitation." Upon proof of successful completion of the program the defendant may request the court reduce the penalty by any amount the defendant paid for participation in the program. Ibid.

(c) Service in Lieu of Payment. N.J.S.A. 2C:35-15(f) provides that the defendant "may propose to the court and the prosecutor a plan to perform reformative service in lieu of payment of up to one-half of the penalty amount imposed."

6. Drug Offenses and License Forfeiture. N.J.S.A. 2C:35-16(a) requires forfeiture of a defendant's driver's license for a period between six months and two years absent compelling circumstances and upon conviction of a drug offense under Chapter 35 or 36 of Title 2C. "[C]ompelling circumstances warranting an exception exist if the forfeiture . . . will result in extreme hardship and alternative means of transportation are not available."

Post-Sentencing Motion to Revoke the License Suspension. N.J.S.A. 2C:35-16(d) allows the defendant to request the court revoke a remaining license suspension term based on compelling circumstances.

7. Controlled Dangerous Substance Lab Fee. N.J.S.A. 2C:35-20(a) and (b) require that: a $50 criminal laboratory analysis fee be imposed on anyone convicted of a Chapter 35 drug offense; a $50 criminal laboratory fee be imposed on anyone placed in supervisory treatment pursuant to N.J.S.A. 2C:36A-1 or N.J.S.A. 2C:43-12; and a $25 laboratory analysis fee be imposed on anyone adjudicated delinquent for a Chapter 35 offense.

8. Anti-Drug Profiteering Penalty. N.J.S.A. 2C:35A-3 provides that where a person has been convicted of a Chapter 35 or 36 drug crime, any street gang crime, as defined by N.J.S.A. 2C:44-3(h), "or an attempt or conspiracy to commit such a crime, the court shall, upon the application of the prosecutor, sentence the person to pay a monetary penalty" "provided the court finds at a hearing, which may occur at the time of sentencing, that

the prosecutor has established by a preponderance of the evidence one or more of" the following grounds:

- The defendant was convicted of violating N.J.S.A. 2C:35-3 (leader of a narcotics trafficking network), N.J.S.A. 2C:5-2(g) (leader of organized crime), or a Chapter 41 racketeering offense that involved the manufacture, distribution, possession with intent to distribute, or transportation of any controlled dangerous substance or analog, N.J.S.A. 2C:35A-(b)(1); or

- "A defendant is a drug profiteer when the conduct constituting the crime shows that the person has knowingly engaged in the illegal manufacture, distribution or transportation of any controlled dangerous substance, controlled substance analog or drug paraphernalia as a substantial source of livelihood," N.J.S.A. 2C:35A-3(b)(2); or

- "A defendant is a wholesale drug distributor when the conduct constituting the crime involves the manufacture, distribution or intended or attempted distribution of a controlled dangerous substance or controlled substance analog to any other person for pecuniary gain, knowing, believing, or under circumstances where it reasonably could be assumed that such other person would in turn distribute the substance to another or others for pecuniary gain." N.J.S.A. 2C:35A-3(b)(3)(a). If the sole basis for the penalty is the defendant's status as a wholesale distributor, the court shall not impose the penalty "if the defendant establishes by a preponderance of the evidence . . . that his participation in the conduct constituting the crime was limited solely to operating a conveyance used to transport a controlled dangerous substance or controlled substance analog, or loading or unloading the substance into such a conveyance or storage facility," N.J.S.A. 2C:35A-3(b)(3)(b); or

- "The defendant is a professional drug distributor," N.J.S.A. 2C:35A-3(b)(4); or

- "The defendant was involved in criminal street gang related activity," N.J.S.A. 2C:35A-3(b)(5).

Penalty Amounts. N.J.S.A. 2C:35A-4 provides the following penalty amounts, which may be paid in installments, N.J.S.A. 2C:35A-6:

- $200,000 (first degree crime); $100,000 (second degree crime); $50,000 (third degree crime); $25,000 (fourth degree crime); or

- "[T]hree times the street value of all controlled dangerous substances or controlled substance analogs involved, or three times the market value of all drug paraphernalia involved, if this amount is greater than that provided" above; or

- "[A]n amount equal to three times the value of any benefit illegally obtained by the actor for himself or another, or any injury to or benefit deprived of another."

Note: This statute is subject to the N.J.S.A. 2C:35-12 waiver provision, discussed further in section J of this chapter.

9. Drug Abuse Education Assessment. N.J.S.A. 2C:43-3.5(a) requires the court to impose a $50 assessment for each drug offense under Chapter 35 or 36 of Title 2C.

E. Merger of Certain Drug Offenses: Statutory Provisions

The following statutes prohibit certain drug offenses from merging into other offenses. For purposes of special probation, the court need not determine whether offenses merge because eligibility is based on the defendant's conviction and substance abuse.

1. Leader of a Narcotics Trafficking Network. N.J.S.A. 2C:35-3 precludes merger with any offense that is the object of the conspiracy.

2. Booby Traps in the Manufacturing or Distribution of Drugs. N.J.S.A. 2C:35-4.1(e) prohibits the conviction from merging with a conviction for any offense in Chapter 35, or for a conspiracy or attempt to commit an offense under Chapter 35.

3. Employing a Juvenile in a Drug Distribution Scheme. N.J.S.A. 2C:35-6 provides that the conviction shall not merge with a conviction for a violation of N.J.S.A. 2C:35-3 (leader of narcotics trafficking network), N.J.S.A. 2C:35-4 (maintaining or operating a CDS production facility), N.J.S.A. 2C:35-5 (manufacturing, distributing or dispensing), or N.J.S.A. 2C:35-9 (strict liability for drug induced death).

4. Manufacturing, Distributing or Dispensing a Controlled Dangerous Substance on School Property. N.J.S.A. 2C:35-7(c) precludes the conviction from merging with a conviction under N.J.S.A. 2C:35-5 (manufacturing, distributing or dispensing) or N.J.S.A. 2C:35-6 (employing a juvenile in a drug distribution scheme).

5. Drug Distribution Within 500 Feet of Public Property. N.J.S.A. 2C:35-7.1(c) precludes merger with a conviction under N.J.S.A. 2C:35-5 (manufacturing, distributing or dispensing), or N.J.S.A. 2C:35-6 (employing a juvenile in a drug distribution scheme).

6. Drug Induced Death. N.J.S.A. 2C:35-9(d) precludes merger "with a conviction for leader of narcotics trafficking network, maintaining or operating a controlled dangerous substance production facility, or for unlawfully manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense the controlled dangerous substance or controlled substance analog which resulted in the death."

7. Possession of a Weapon During a Drug or Bias Crime. N.J.S.A. 2C:39-4.1(d) prohibits merger with any of the following offenses:

- Leader of a narcotics trafficking network (N.J.S.A. 2C:35-3);
- Maintaining or operating a drug production facility (N.J.S.A. 2C:35-4);
- Manufacturing or distributing drugs (N.J.S.A. 2C:35-5);
- Manufacturing and dispensing Gamma Hydroxybutyrate (N.J.S.A. 2C:35-5.2);

- Manufacturing and dispensing Flunitrazepam (N.J.S.A. 2C:35-5.3);

- Employing a juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6);

- Possession of drugs on or near school property (N.J.S.A. 2C:35-7);

- Distribution or possession of drugs on public property (N.J.S.A. 2C:35-7.1);

- Possession, distribution or manufacturing imitation drugs (N.J.S.A. 2C:35-11); and

- Bias intimidation (N.J.S.A. 2C:16-1).

F. Standards Relating to Imprisonment: Statutory Provisions

1. Presumption of Non-Imprisonment Inapplicable to Distribution to a Minor or Pregnant Female. While third degree crimes are usually subject to the presumption of non-imprisonment, N.J.S.A. 2C:44-1(e), the crime of drug distribution to a minor or a pregnant female is not subject to the presumption of non-imprisonment. N.J.S.A. 2C:35-8.

2. Enhanced Ordinary Terms for Certain Offenses. The following offenses require enhanced ordinary terms.

(a) Leader of a Narcotics Trafficking Network: life imprisonment with a twenty-five-year period of parole ineligibility. N.J.S.A. 2C:35-3.

Note: Pursuant to N.J.S.A. 2C:35-12, the State may waive this enhanced term. See section J of this chapter for a discussion of the waiver provision.

(b) Drug Distribution to a Minor or a Pregnant Female: "twice the term of imprisonment, fine and penalty . . . authorized or required to be imposed by" any provision of Title 2. N.J.S.A. 2C:35-8.

Note: Pursuant to N.J.S.A. 2C:35-12, the State may waive this enhanced term. See section J of this chapter for a discussion of the waiver provision.

G. Parole Ineligibility: Statutory Provisions

The following statutes mandate parole disqualifiers for certain drug offenses. Parole ineligibility applies to terms of imprisonment, not to special probation.

Note: All of the following statutes, except the No Early Release Act (N.J.S.A. 2C:43-7.2), are subject to the N.J.S.A. 2C:35-12 waiver provisions discussed in section J of this chapter.

1. Leader of a Narcotics Trafficking Network. N.J.S.A. 2C:35-3 requires the court to impose a life sentence with a twenty-five-year period of parole ineligibility.

2. Maintaining or Operating a Controlled Dangerous Substance Production Facility. N.J.S.A. 2C:35-4 requires a period of parole ineligibility between one-third and one-half of the sentence imposed.

3. First Degree Manufacturing, Distributing or Dispensing Certain Controlled Dangerous Substances. N.J.S.A. 2C:35-5(b)(1) and (6) require a period of parole ineligibility between one-third and one-half of the sentence imposed.

4. Employing a Juvenile in a Drug Distribution Scheme. N.J.S.A. 2C:35-6 mandates a period of parole ineligibility at or between one-third and one-half of the sentence imposed, or five years, whichever is greater.

5. Manufacturing, Distributing or Dispensing a Controlled Dangerous Substance on or Near School Property. N.J.S.A. 2C:35-7(a) provides that if the offense involved less than one ounce of marijuana, the period of parole ineligibility must be between one-third and one-half of the sentence imposed, or one year, whichever is greater, and in all other cases the period of parole ineligibility must be at or between one-third and one-half of the sentence imposed, or three years, whichever is greater.

(a) Waiver of the Minimum Term Permitted. N.J.S.A. 2C:35-7(b)(1) allows the court to waive the mandatory minimum term after considering the defendant's prior record, seriousness of the offense, location of the offense in relation to the school and children, and whether school was in session when the defendant committed the offense. N.J.S.A. 2C:35-7(b)(2), however, does not permit waiver if the defendant used or threatened violence, possessed a firearm, or committed the offense on a school bus or property owned by an elementary or secondary school, or by a school board.

(b) State Appeal. If the court does not impose a minimum term, the sentence shall not be final for ten days to allow the State time to appeal the sentence. N.J.S.A. 2C:35-7(b)(2)(b). "The Attorney General shall develop guidelines to ensure the uniform exercise of discretion in making determinations regarding whether to appeal" a sentence imposed pursuant to N.J.S.A. 2C:35-7(b)(1).

6. Drug Distribution to a Minor or a Pregnant Female. N.J.S.A. 2C:35-8 requires the court to impose "twice the term of parole ineligibility, if any, authorized or required to be imposed by" N.J.S.A. 2C:35-5(b) (drug distribution) or N.J.S.A. 2C:35-7 (distribution within a school zone) "or any other provision of this title," upon application of the prosecutor. If the defendant is convicted of more than one offense, the court must impose one enhanced sentence on the most serious offense. Ibid. The prosecutor must establish the basis for the enhanced sentence by a preponderance of the evidence, and the court must hold a hearing on the matter. Ibid.

7. The No Early Release Act. N.J.S.A. 2C:43-7.2 requires the court to fix "a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole," and impose a five-year term of parole supervision (first degree crime), or a three-year term of parole supervision (second degree crime) for the following first and second degree drug crimes:

- Booby traps in manufacturing or distributing a controlled dangerous substance (N.J.S.A. 2C:35-4.1(b)); and

- Drug induced deaths (N.J.S.A. 2C:35-9).

H. Extended Terms: Statutory Provisions

The following offenses mandate extended terms for certain drug offenses. Extended terms are inapplicable to special probation, which may not exceed five years. N.J.S.A. 2C:35-14(a).

Note: The following statutes are subject to the N.J.S.A. 2C:35-12 waiver provisions discussed in section J of this chapter.

1. Drug Distribution to a Minor or a Pregnant Female. N.J.S.A. 2C:35-8 requires the court to impose, upon application of the prosecutor, "twice the term of imprisonment, fine and penalty, including twice the term of parole ineligibility, if any, authorized or required to be imposed by" N.J.S.A. 2C:35-5(b) (drug distribution) or N.J.S.A. 2C:35-7 (distribution within a school zone) "or any other provision of this title." If the defendant is convicted of more than one offense, the court shall impose one enhanced sentence on the most serious offense. Ibid. The prosecutor must establish the basis for the enhanced sentence by a preponderance of the evidence, and the court must hold a hearing on the matter. Ibid.

2. Repeat Drug Offender. N.J.S.A. 2C:43-6(f) provides that upon application of the prosecutor, the court must impose an extended term with a parole disqualifier against anyone convicted of the following crimes if the defendant also has a prior conviction of "manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog":

- Manufacturing, distributing, dispensing or possessing with intent to distribute any dangerous substance or controlled substance analog (N.J.S.A. 2C:35-5);

- Maintaining or operating a controlled dangerous substance production facility (N.J.S.A. 2C:35-4);

- Employing a juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6);

- Being a leader of a narcotics trafficking network (N.J.S.A. 2C:35-3); or

- Distributing, dispensing or possessing with intent to distribute within a school zone (N.J.S.A. 2C:35-7).

(a) Parole Disqualifier. Pursuant to N.J.S.A. 2C:35-6(f), the parole disqualifier "shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, not less than seven years if the person is convicted of a violation of N.J.S.A. 2C:35-6 [employing a juvenile in drug distribution], or 18 months in the case of a fourth degree crime."

(b) Hearing. The prosecutor must establish the ground for imposing sentence pursuant to N.J.S.A. 2C:35-6(f) at a hearing, which may occur at the time of sentencing. N.J.S.A. 2C:35-6(f).

(c) Separation of Powers. As written, N.J.S.A. 2C:43-6(f) violates the doctrine of separation of powers by giving unfettered power to prosecutors in the sentencing determination. State v. Lagares, 127 N.J. 20, 31 (1992). Hence, our Court has interpreted the statute as requiring guidelines to assist prosecutorial decision-making, while reflecting the legislative intent that extended sentences for repeat drug offenders should not be the exception. State v. Lagares, 127 N.J. 20, 32 (1992).

(d) Guidelines. For the guidelines effective May 20, 1998, see Attorney General Directive 1998-1, incorporating by reference Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12. They are found at www.nj.gov/oag/dcj (click on "Directives/Guidelines," then "Directives"). For a discussion of the statewide guidelines issued in response to Lagares, see State v. Kirk, 145 N.J. 159, 168-69 (1996).

Effective for offenses committed on or after September 15, 2004, the Attorney General promulgated revised guidelines. They are found at www.nj.gov/oag/dcj (click on "Directives/Guidelines," then "Guidelines," then "Brimage Guidelines 2").

I. Consecutive Terms: Statutory Provisions

The following statutes mandate consecutive prison terms for certain drug offenses.

1. Booby Traps in the Manufacturing or Distribution of Drugs. N.J.S.A. 2C:35-4.1(e) requires the sentence be served consecutively to the sentence for a conviction of any offense in Chapter 35, or a conspiracy or attempt to commit an offense under Chapter 35, "unless the court, in consideration of the character and circumstances of the defendant, finds that imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others. If the court does not impose a consecutive sentence, the sentence shall not become final for 10 days in order to permit the appeal of such sentence by the prosecution."

2. Possession of a Weapon During a Drug or Bias Crime. N.J.S.A. 2C:39-4.1(d) requires the sentence run consecutively to the sentence for any of the following offenses:

- Leader of a narcotics trafficking network (N.J.S.A. 2C:35-3);
- Maintaining or operating a drug production facility (N.J.S.A. 2C:35-4);
- Manufacturing or distributing drugs (N.J.S.A. 2C:35-5);
- Manufacturing and dispensing Gamma Hydroxybutyrate (N.J.S.A. 2C:35-5.2);
- Manufacturing and dispensing Flunitrazepam (N.J.S.A. 2C:35-5.3);
- Employing a juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6);
- Possession of drugs on or near school property (N.J.S.A. 2C:35-7);
- Distribution or possession of drugs on public property (N.J.S.A. 2C:35-7.1);
- Possession, distribution or manufacturing imitation drugs (N.J.S.A. 2C:35-11); and
- Bias intimidation (N.J.S.A. 2C:16-1).

J. N.J.S.A. 2C:35-12 Waiver of Drug Offender Sentencing Enhancements: Statutory Provisions

The N.J.S.A. 2C:35-12 waiver provisions apply to certain mandatory parole disqualifiers, extended terms and drug offense penalties.

1. Statutory Authority. N.J.S.A. 2C:35-12 provides that when an offense in Chapter 35 of Title 2C (drug offenses) imposes a mandatory term of parole ineligibility, a mandatory extended term that includes a period of parole ineligibility, or an anti-drug profiteering penalty pursuant to Chapter 35A of Title 2C, the court "shall impose the mandatory sentence or anti-drug profiteering penalty unless the defendant has pleaded guilty pursuant to a negotiated agreement or, in cases resulting in trial, the defendant and the prosecution have entered into a post-conviction agreement, which provides for a lesser sentence, period of parole ineligibility or anti-drug profiteering penalty" (emphasis added). The agreement "may provide for a specified term of imprisonment within the range of ordinary or extended sentences authorized by law, a specified period of parole ineligibility, a specified fine, a specified anti-drug profiteering penalty, or other disposition." Ibid. The court may not impose a lesser sentence than the one agreed to by the State and the defendant. Ibid.

2. Constitutionality of N.J.S.A. 2C:35-12 and the Brimage Guidelines. To effectuate judicial review and avoid arbitrary and capricious decisions, the prosecutor must make N.J.S.A. 2C:35-12 decisions based on written standards. State v. Vasquez, 129 N.J. 189, 195-96 (1992). The Brimage guidelines contain a "Table of Authorized Plea Offers," which "sets forth presumptive plea offers based on a defendant's offense, his prior criminal history, and the timing of the plea offer." State v. Fowlkes, 169 N.J. 387, 394 (2001).

The Brimage guidelines in effect as of September 15, 2004 are available online at www.nj.gov/oag/dcj. Click on "Directives/Guidelines," then "Guidelines," then "Brimage Guidelines 2."

For the Brimage guidelines in effect prior to September 15, 2004, click on "Directives/Guidelines," then "Directives."

K. Drug Offender Sentencing Enhancements: Case Law

1. Drug Offense Penalties.

(a) Conspiracy. "[T]he mere conviction under N.J.S.A. 2C:5-2 for the 'ordinary' crime of conspiracy, does not render a person subject to the mandatory penalties of the Comprehensive Drug Reform Act, even if the object of that conspiracy constitutes a Chapter 35 offense." State in the Interest of W.M., 237 N.J. Super. 111, 118 (App. Div. 1989).

(b) Accomplices. A defendant convicted of a drug offense as an accomplice is subject to the mandatory drug offense penalties. State v. Bram, 246 N.J. Super. 200, 208 (Law Div. 1990).

2. Drug Offender Restraining Orders.

Where the court denies a N.J.S.A. 2C:35-5.7(h) request to impose a drug offender restraining order, N.J.S.A. 2C:35-5.7(k) imposes a ten-day limitation period on the State's right to appeal. State v. Fitzpatrick, 443 N.J. Super. 316, 320 (App. Div. 2015).

3. Drug Offense License Suspension.

(a) Multiple Offenses. Where a court imposes sentence for multiple drug offenses subject to the mandatory forfeitures of one's driver's license, pursuant to N.J.S.A. 2C:35-16, the license suspension terms must run concurrently. State in the Interest of T.B., 134 N.J. 382, 387 (1993).

(b) Timing. License suspension under N.J.S.A. 2C:35-16(a) begins on the day of sentencing; the court has no discretion to postpone or delay it. State v. Hudson, 286 N.J. Super. 149, 154-55 (App. Div. 1995). In the case of a juvenile, license suspension begins the day after the defendant's seventeenth birthday. State in the Interest of T.B., 134 N.J. 382, 388 (1993); State in the Interest of J.R., 244 N.J. Super. 630, 641 (App. Div. 1990). If the defendant's license is under suspension at the time of sentencing, then the new license suspension will begin on the final day of the current suspension. State in the Interest of T.B., 134 N.J. 382, 388 (1993).

(c) License Forfeiture Exception. In determining whether compelling circumstance exist to justify not revoking a defendant's driving privileges under N.J.S.A. 2C:35-16(a), the court should consider whether revocation will result in the defendant's loss of employment or extreme hardship. State v. Bendix, 396 N.J. Super. 91, 95-96 (App. Div. 2007). Where a defendant "has occasioned the loss of his employment through his unauthorized and criminal use of his employer's vehicle," the court should find no compelling circumstances to justify not revoking the defendant's license. State v. Carrero, 399 N.J. Super. 419, 425-26 (Law Div. 2007).

4. The Drug Enforcement and Demand Reduction (DEDR) Penalty.

(a) Policy. "As its name suggests, the penalty is designed to reduce the demand for drugs by providing a source for helping convicted defendants to reduce their demand for illegal substances." State v. Monzon, 300 N.J. Super. 173, 177 (App. Div. 1997).

(b) Treatment Program in Lieu of Payment and Wages. In reducing a penalty pursuant to N.J.S.A. 2C:35-15(e) by the amount actually paid for participation in a treatment program, the court should consider the amount withheld from a defendant's pay for work completed at the treatment program. State v. Monzon, 300 N.J. Super. 173, 177-78 (App. Div. 1997).

(c) Constitutionality. The drug enforcement and demand reduction penalty does not constitute cruel and unusual punishment under the Federal or State Constitution, and does not violate the equal protection clauses, substantive or procedural due process rights, or the State constitutional prohibition against amendment by reference. State v. Lagares, 127 N.J. 20, 36-37 (1992); State in the Interest of L.M., 229 N.J. Super. 88, 94-102 (App. Div. 1988), certif. denied, 114 N.J. 485 (1989).

(d) Merger and Conspiracy. "Since the principle of merger involves the avoidance of double penalties for the same crime, Chapter 35 DEDR penalties may not be imposed on a conviction for both conspiracy to possess a controlled dangerous substance, N.J.S.A. 2C:5-2, and for the actual possession under N.J.S.A. 2C:35-10." State in the Interest of M.A., 227 N.J. Super. 393, 395 (Ch. Div. 1988).

(e) Pretrial Intervention Program. The court may impose a drug enforcement and demand reduction penalty as a condition of entry into a pretrial intervention program. State v. Bulu, 234 N.J. Super. 331, 342, 346-48 (App. Div. 1989).

(f) The DEDR Penalty Is Mandatory. The DEDR penalty is mandatory and must be set in accordance with the degree of crime of which the defendant was convicted. State v. Malia, 287 N.J. Super. 198, 208 (App. Div. 1996); State v. Williams, 225 N.J. Super. 462, 464 (Law Div. 1988). The court may not revoke the penalty after sentencing. State v. Gardner, 252 N.J. Super. 462, 465-66 (Law Div. 1991).

5. Drug Offender Fines.

(a) Drug-Buy Money. The court may consider money the defendant received in selling drugs when determining the defendant's ability to pay a fine. State v. Newman, 132 N.J. 159, 177-79 (1993).

(b) Order of Payment. A defendant convicted of a drug offense must pay the Victims of Crime Compensation Board assessment (N.J.S.A. 2C:43-3.1), laboratory fee (N.J.S.A. 2C:35-20), and the drug enforcement and demand reduction penalty (N.J.S.A. 2C:35-15) before paying a fine. State v. Newman, 132 N.J. 159, 178 (1993).

6. Merger

(a) Drug Distribution and Distribution in a School Zone. While N.J.S.A. 2C:35-7(c) precludes merger of distribution-within-a-school-zone with a N.J.S.A. 2C:35-5 distribution conviction, subjecting a defendant to punishment under both statutes would violate principles of double jeopardy because N.J.S.A. 2C:35-5 does not require proof of any additional element. State v. Dillihay, 127 N.J. 42, 45, 51 (1992); State v. Brana, 127 N.J. 64, 67 (1992). To comply with double jeopardy principles, a N.J.S.A. 2C:35-7 conviction must merge with a N.J.S.A. 2C:35-5 distribution conviction, but the N.J.S.A. 2C:35-7 period of parole ineligibility survives the merger. State v. Dillihay, 127 N.J. 42, 54 (1992); State v. Brana, 127 N.J. 64, 67 (1992).

(b) Drug Distribution and Distribution on Public Property. The same rationale applies to the anti-merger provision of N.J.S.A. 2C:35-7.1(c) (precluding merger of a conviction for distributing within 500 feet of a public housing facility, public park, or public building with a conviction under N.J.S.A. 2C:35-5 (drug distribution), or N.J.S.A. 2C:35-6 (employing a juvenile to distribute drugs)). State v. Gregory, 336 N.J. Super. 601, 607 (App. Div. 2001) (merging a third degree conviction under N.J.S.A. 2C:35-5 into a second degree conviction under N.J.S.A. 2C:35-7.1); State v. Parker, 335 N.J. Super. 415, 420 (App. Div. 2000) (holding that a "third degree conviction under N.J.S.A. 2C:35-7 should have merged into" the defendant's N.J.S.A. 2C:35-7.1 second degree conviction, with the mandatory minimum term's surviving merger).

(c) Drug Induced Death and Drug Distribution. Although the anti-merger provision of N.J.S.A. 2C:35-9(d) (drug induced death) explicitly prohibits merger into a conviction under N.J.S.A. 2C:35-5(a) (drug distribution), a Section 5 offense will merge into a Section 9 offense if the crimes arise out of the same transaction. State v. Maldonado, 137 N.J. 536, 583 (1994).

(d) Constitutional Rights and Merger of Use of Booby Traps During Drug Distribution or Manufacturing. N.J.S.A. 2C:35-4.1(e) (precluding merger of a conviction for using booby traps in connection with drug manufacturing or distribution with a drug offense) does not violate a defendant's right to due process or to protection against double jeopardy under either the federal or State Constitution. State v. Walker, 385 N.J. Super. 388, 408-11 (App. Div.), certif. denied, 187 N.J. 83 (2006).

7. Constitutionality of the Enhanced Ordinary Term for Leader of a Drug Trafficking Network. The requirement that a leader of a narcotics trafficking network serve an ordinary term of life imprisonment with twenty-five years of parole ineligibility (N.J.S.A. 2C:35-3) does not constitute cruel and unusual punishment. State v. Kadonsky, 288 N.J. Super. 41, 45 (App. Div.), certif. denied, 144 N.J. 589 (1996).

8. Parole Ineligibility.

(a) Transfer to a Drug Treatment Program. A defendant serving a term that includes a period of parole

ineligibility pursuant to N.J.S.A. 2C:35-7 (drug distribution within a school zone) may not obtain transfer to a drug treatment program until he or she completes the mandatory parole ineligibility period. State v. Diggs, 333 N.J. Super. 7, 10-11 (App. Div.), certif. denied, 165 N.J. 678 (2000). Similarly, a defendant cannot obtain a transfer to a drug treatment program until any Graves Act mandatory term has been served. State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986).

(b) Day Care Facility Not "School" Under Statute on Drug Distribution Within a School Zone. "The plain legislative intent [of N.J.S.A. 2C:35-7] to exclude day care providers, nursery schools, and preschool programs suggests that the statute was not meant to apply to a facility such as the Goddard School, a licensed day care provider," even though the Goddard School teaches a kindergarten class. State v. Shelley, 205 N.J. 320, 328-30 (2011).

(c) Indeterminate Terms in Young Adult Offender Drug Cases. A defendant subject to the mandatory parole ineligibility provisions of N.J.S.A. 2C:35-5(b)(1) (drug distribution) and N.J.S.A. 2C:35-7 (distribution within a school zone) may not be sentenced to an indeterminate term as a young adult offender pursuant to N.J.S.A. 2C:43-5. State v. Luna, 278 N.J. Super. 433, 437-38 (App. Div. 1995).

9. Repeat Drug Offender Extended Term With Parole Ineligibility.

(a) Arbitrary and Capricious Challenge. Prosecutors must state on the record their reasons for seeking an extended term with a parole disqualifier pursuant to N.J.S.A. 2C:43-6(f), and the court may deny the request where a defendant clearly and convincingly establishes that the prosecutor's decision was arbitrary and capricious. State v. Lagares, 127 N.J. 20, 32-33 (1992).

(b) Sixth Amendment. The requirement that the court make findings on which to base a mandatory extended term with parole disqualifier falls within the "prior conviction" exception of Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403, 412 (2004), and thus does not offend the Sixth Amendment requirement that a jury

make such findings. State v. Thomas, 188 N.J. 137, 149-52 (2006).

(c) Chronology of Offenses and Convictions. The chronological sequence of the offenses and convictions is irrelevant for purposes of N.J.S.A. 2C:43-6(f). State v. Hill, 327 N.J. Super. 33, 41-42 (App. Div. 1999), certif. denied, 164 N.J. 188 (2000). The only requirement is that there be a previous conviction "at any time." Ibid. But where a defendant enters guilty pleas to two different charges on the same day, in the same proceeding, pursuant to one agreement, then N.J.S.A. 43-6(f) will not be applicable. State v. Owens, 381 N.J. Super. 503, 512-13 (App. Div. 2005).

(d) The Dunbar Factors. The factors set forth in State v. Dunbar, 108 N.J. 80 (1987), as modified in State v. Jefimowicz, 119 N.J. 152 (1990), for setting an extended term apply when imposing a mandatory extended term with parole ineligibility under N.J.S.A. 2C:43-6(f). State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005); State v. Williams, 310 N.J. Super. 92, 98-99 (App. Div.), certif. denied, 156 N.J. 426 (1998).

10. Museum as Public Property for Drug Distribution. A museum qualifies as a public building under N.J.S.A. 2C:35-7.1 (prohibiting drug distribution on public property), even if it does not have regular and consistent hours and is open to the public only upon request. State v. Chambers, 396 N.J. Super. 259, 263-66 (App. Div. 2007), certif. denied, 193 N.J. 586 (2008).

11. The N.J.S.A. 2C:35-12 Provision Allowing Waiver of Certain Drug Offender Sentencing Enhancements.

(a) Constitutionality of the N.J.S.A. 2C:35-12 Waiver Provision. Although N.J.S.A. 2C:35-12 vests sentencing discretion in the prosecutor, the statute does not violate separation of powers principles. State v. Vasquez, 129 N.J. 189, 195-97 (1992). To allow judicial oversight and to protect against arbitrary and capricious decisions, "the prosecutor should state on the record the reasons for the decision to waive or the refusal to waive the parole disqualifier" or extended term. Id. at 196. Accord State v. Murray, 338 N.J. Super. 80, 90 (App. Div.), certif. denied, 169 N.J. 608 (2001); State v. Powell, 294 N.J.

Super. 557, 568 (App. Div. 1996); State v. Leslie, 269 N.J. Super. 78, 83 (App. Div. 1993), certif. denied, 136 N.J. 29 (1994).

(b) Imposing Sentence After a N.J.S.A. 2C:35-12 Waiver. If the court accepts a plea agreement pursuant to N.J.S.A. 2C:35-12, the court must impose the negotiated sentence. State v. Thomas, 392 N.J. Super. 169, 180 (App. Div.), certif. denied, 192 N.J. 597 (2007); State v. Lebra, 357 N.J. Super. 500, 512 (App. Div. 2003). The court "has no discretion to lower the custodial part of a section 12 plea agreement." State v. Thomas, 392 N.J. Super. 169, 180 (App. Div.), certif. denied, 192 N.J. 597 (2007) (discussing the holding in State v. Bridges, 131 N.J. 402, 408-09 (1993)). If the court is inclined to impose a lesser sentence, then it must reject the plea. State v. Thomas, 392 N.J. Super. 169, 180 (App. Div.), certif. denied, 192 N.J. 597 (2007). Note that if the plea agreement does not provide for a lesser sentence than one mandated by the drug laws, N.J.S.A. 2C:35-12 does not apply, and the court is free to impose a lesser prison term or period of parole ineligibility than that contemplated by the plea agreement. State v. Thomas, 253 N.J. Super. 368, 374-75 (App. Div. 1992).

(c) Illegal Sentence and N.J.S.A. 2C:35-12. "The parties cannot negotiate an illegal sentence, and N.J.S.A. 2C:35-12 does not suggest otherwise in providing that a negotiated sentence must be imposed in lieu of the otherwise mandatory sentence." State v. Smith, 372 N.J. Super. 539, 542 (App. Div. 2004), certif. denied, 182 N.J. 428 (2005). See also State v. Thomas, 392 N.J. Super. 169, 183 (App. Div.) (explaining that an agreement to forego filing a motion to suppress does not render a sentence illegal), certif. denied, 192 N.J. 597 (2007).

(d) Defendant's Absence From Sentencing as Part of a Plea Agreement. A plea agreement may be valid and enforceable even though it allows a court to increase a defendant's sentence in the event he or she fails to appear for sentencing. State v. Shaw, 131 N.J. 1, 15 (1993) (allowing the State to condition waiver of a minimum term in a drug case on the defendant's appearance at sentencing). But see State v. Wilson, 206 N.J. Super. 182, 184 (App. Div. 1985) (extended sentence based entirely upon nonappearance is

illegal because it is unrelated to any of the sentencing criteria set forth in the Code).

If the defendant violates a N.J.S.A. 2C:35-12 agreement that contained a promise to appear at sentencing, the judge should not automatically void the waiver agreement, but rather, should determine whether the failure to appear was "material to the plea agreement and warrants revocation of the waiver." State v. Diggs, 333 N.J. Super. 7, 11 (App. Div. 2000) (discussing State v. Shaw, 131 N.J. 1, 17 (1993)). See also State v. Rolex, 329 N.J. Super. 220, 226 (App. Div. 2000), aff'd o.b., 167 N.J. 447 (2001).

(e) N.J.S.A. 2C:35-12 Waiver Survives a Probation Violation. Where the court imposed a term of probation after the State waived a minimum term pursuant to N.J.S.A. 2C:35-12, and the defendant violated probation, the waiver will survive the probation violation. State v. Vasquez, 129 N.J. 189, 201-02 (1992). A prosecutor cannot overcome this rule by including in the plea agreement a term that if the defendant violates probation, the sentence will include a period of parole ineligibility. Id. at 208. However, the sentence for the probation violation may exceed the sentence initially imposed pursuant to the plea agreement. State v. Ervin, 241 N.J. Super. 458, 469 (App. Div. 1989), certif. denied, 121 N.J. 634 (1990).

12. The Brimage Guidelines.

(a) Sixth Amendment and the Brimage Guidelines. The Brimage guidelines do not violate the Sixth Amendment principles established in Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403, 412 (2004), because the guidelines do not result in a sentence above the statutory maximum and because a defendant who negotiates a sentence waives the right to have a jury find the facts necessary to support the sentence. State v. Thomas, 392 N.J. Super. 169, 186-87 (App. Div.), certif. denied, 192 N.J. 597 (2007).

(b) Motion to Suppress and Increased Punishment. The guidelines do not impermissibly burden a defendant's right to file a motion to suppress even though they provide for increased punishment if the defendant pleads guilty after filing a motion to suppress. State v. Thomas, 392 N.J.

Super. 169, 179 (App. Div.), certif. denied, 192 N.J. 597 (2007).

(c) Post-Conviction Agreements and Plea Offers. The Brimage guidelines apply to post-conviction sentencing agreements in addition to plea offers. State v. Castaing, 321 N.J. Super. 292, 296 (App. Div. 1999).

(d) Objections on the Record. To provide an adequate record for review, a defendant should raise objections at the trial level. State v. Coulter, 326 N.J. Super. 584, 589 (App. Div. 1999). "Where a defendant objects to a prosecutor's assignment of certain aggravating factors to the plea offer, or the prosecutor's failure to credit a defendant with a mitigating factor," the court should hold a "non-plenary type hearing" where the prosecutor must "show that the decision being challenged was made on a 'good faith basis' and 'based upon the information available to the prosecutor and reasonable inferences that can be drawn from such information.'" Ibid. (quoting State v. Brimage, 153 N.J. 1, 5 (1998)).

(e) State's Mistake Regarding the Brimage Guidelines. "[I]f a judge is satisfied that the State has made an honest mistake in determining the terms of a plea offer" pursuant to the Brimage Guidelines, the State should be allowed to withdraw the offer before the date of sentence. State v. Veney, 327 N.J. Super. 458, 461 (App. Div. 2000).

(f) Standard of Review. The Brimage guidelines anticipate review under the "gross and patent abuse of prosecutorial discretion" standard. State v. Coulter, 326 N.J. Super. 584, 588-89 (App. Div. 1999). If the prosecutor failed to consider the guidelines in negotiating a plea, the defendant is entitled to a remand. State v. Hammer, 346 N.J. Super. 359, 371-72 (App. Div. 2001).

13. Cruel and Unusual Punishment.

(a) Drug Crimes Penalties. The mandatory drug enforcement and demand reduction (DEDR) penalties of the Comprehensive Drug Reform Act do not constitute cruel and unusual punishment. State v. Lagares, 127 N.J. 20, 36-37 (1992).

(b) Leader of a Drug Trafficking Network Life Imprisonment. The requirement that a leader of a narcotics trafficking network serve an ordinary term of life imprisonment with twenty-five years of parole ineligibility (N.J.S.A. 2C:35-3) does not constitute cruel and unusual punishment even when the drug involved is marijuana, as opposed to heroin or cocaine. State v. Kadonsky, 288 N.J. Super. 41, 45 (App. Div.), certif. denied, 144 N.J. 589 (1996).

(c) Drug Induced Death, Strict Liability. The statute imposing strict liability for a drug induced death (N.J.S.A. 2C:35-9) does not violate the Federal or State constitutional prohibitions against cruel and unusual punishment. State v. Maldonado, 137 N.J. 536, 556-60 (1994).

XV. SEX OFFENDER SENTENCING

This chapter discusses the Title 2C provisions that provide for or require enhanced sentencing for sex crimes and offenses that often accompany sex crimes (see Sections A, B, and E through I). In some cases, the court may not impose a sentence of probation and must impose parole supervision for life (see sections C and D). Depending on the nature of the defendant's conduct and ability to be rehabilitated, the court may require the defendant to receive inpatient or outpatient sex offender treatment (see section J). Following completion of the sentence, the defendant will be subject to reporting requirements and may be civilly committed for treatment (see Section I). Section K discusses case law on sex offender sentencing.

A. Merger of Certain Offenses Prohibited: Statutory Provisions

1. Luring or Enticing a Child. N.J.S.A. 2C:13-6(f) precludes merger "with any other criminal offense."

2. Luring or Enticing an Adult. N.J.S.A. 2C:13-7(f) precludes merger "with any other criminal offense."

3. Third Degree Recording and Third Degree Disclosing Images of Sexual Contact. N.J.S.A. 2C:14-9(h) precludes one offense from merger into the other.

B. Enhanced Ordinary Terms of Imprisonment for Certain Offenses: Statutory Provisions

The ordinary terms of imprisonment for the following offenses exceed the generally applicable ordinary terms set forth in N.J.S.A. 2C:43-6(a) (i.e., ten to twenty years for a first degree crime, five to ten years for a second degree crime, three to five years for a third degree crime, and a period not to exceed eighteen months for a fourth degree crime).

1. Kidnapping in the First Degree:

(a) Victim Is Sixteen Years of Age or Older: between fifteen and thirty years. N.J.S.A. 2C:13-1(c)(1).

(b) Victim Is Less Than Sixteen Years Old: twenty-five years without parole eligibility, or a term between twenty-five years and life imprisonment with a parole ineligibility period of twenty-five years, if: (a) the defendant subjected the victim to a sexual assault (N.J.S.A. 2C:14-2), a criminal sexual contact (N.J.S.A. 2C:14-3), or endangerment (N.J.S.A. 2C:24-4) or (b) the defendant sold or delivered the victim for pecuniary gain, and the sale did not lead to the victim's return to a parent or guardian. N.J.S.A. 2C:13-1(c)(2).

2. Human Trafficking: twenty years without parole eligibility, or a prison term between twenty years and life with a parole ineligibility period of twenty years. N.J.S.A. 2C:13-8(d).

C. Restrictions on Noncustodial Terms: Statutory Provisions

1. Probation Prohibited. N.J.S.A. 2C:43-2(g) instructs that the court may not sentence a defendant to probation for any of the following offenses, which require a special sentence of parole supervision for life:

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-2(b) or (c));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Kidnapping (N.J.S.A. 2C:13-1(c)(2));
- Endangering the welfare of a child by engaging in sexual conduct that impairs or debauches the morals of the child (N.J.S.A. 2C:24-4(a));
- Endangering the welfare of a child by way of child pornography (N.J.S.A. 2C:24-4(b)(3));
- Luring (N.J.S.A. 2C:13-6); and
- A violation of a special sentence of community supervision for life (N.J.S.A. 2C:43-6.4(d)).

2. Offenses That Preclude Suspension of Sentence and Noncustodial Terms.

(a) Luring or Enticing a Child (Repeat Offender). N.J.S.A. 2C:13-6(d) prohibits the court from suspending a sentence and from imposing a noncustodial term against anyone convicted of a second or subsequent offense of luring or enticing a child.

(b) Luring an Adult. N.J.S.A. 2C:13-7(f) prohibits the court from suspending a sentence and from imposing a noncustodial term for luring an adult.

(c) Sexual Assault or Criminal Sexual Contact. N.J.S.A. 2C:14-6 prohibits the court from suspending a sentence and imposing a noncustodial term if the defendant has a prior conviction for sexual assault or criminal sexual contact.

(d) Possession of 100 or More Items Depicting the Sexual Exploitation or Abuse of a Child. N.J.S.A. 2C:24-4(b)(5)(b) requires the court impose a term of imprisonment if the defendant possessed 100 or more items depicting the sexual exploitation or abuse of a child " unless, having regard to the character and condition of the defendant, it is of the opinion that imprisonment would be a serious injustice which overrides the need to deter such conduct by others."

D. Parole Supervision for Life: Statutory Provisions

1. Statutory Authority for Mandatory Parole Supervision for Life. N.J.S.A. 2C:43-6.4(a) requires the court impose a sentence of parole supervision for life, in addition to any other sentence authorized by Title 2C, for the following offenses, or an attempt to commit any of the following offenses:

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-2(b) or (c));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Kidnapping (N.J.S.A. 2C:13-1(c)(2));

- Endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child (N.J.S.A. 2C:24-4(a));

- Endangering the welfare of a child by way of child pornography (N.J.S.A. 2C:24-4(b)(3));

- Luring (N.J.S.A. 2C:13-6); and

- A violation of a condition of a special sentence of community supervision for life pursuant to N.J.S.A. 2C:43-6.4(d).

Note: Prior to 2003, N.J.S.A. 2C:43-6.4 spoke only of community supervision for life. In passing L. 2003, c. 267, § 1, the Legislature amended N.J.S.A. 2C:43-6.4 to replace community supervision for life with the harsher sentence of parole supervision for life. For a discussion of the ways in which the two special sentences differ see State v. Perez, 220 N.J. 423, 436-42 (2015).

2. Parole Supervision for Life Upon Motion by the Prosecutor. If the defendant is convicted of second degree child pornography (N.J.S.A. 2C:24-4(b)(4) or (5)), or an attempt to commit the offense, the court shall impose a sentence of parole supervision for life if the prosecutor so requests, unless the court finds that the sentence "is not needed to protect the community or deter the defendant." N.J.S.A. 2C:43-6.4(a).

3. Conditions of Parole Supervision for Life. Both the parole board and the court may impose conditions of parole that are "appropriate to protect the public and foster rehabilitation." N.J.S.A. 2C:43-6.4(b). Conditions may include restrictions on internet access, as stated in N.J.S.A. 2C:43-6.4(f).

4. Timing of Parole Supervision for Life. Parole supervision for life commences immediately upon the defendant's release from incarceration for any offense. N.J.S.A. 2C:43-6.4(b).

5. Suspended Sentence and Parole Supervision for Life. If the court suspends the imposition of sentence on a defendant who is convicted of any offense subject to parole supervision for life, the parole supervision for life will begin immediately. N.J.S.A. 2C:43-6.4(b).

6. Custody of the Defendant While Serving Parole Supervision for Life. Defendants serving the special sentence of parole supervision for life remain in the legal custody of the Commissioner of Corrections. N.J.S.A. 2C:43-6.4(b). They are supervised by the Division of Parole, subject to the provisions and conditions set forth in the statutes governing parole, and "subject to conditions appropriate to protect the public and foster rehabilitation." N.J.S.A. 2C:43-6.4(b).

7. Request to Terminate Parole Supervision for Life. The court may grant a release from parole supervision for life upon proof by clear and convincing evidence that the defendant has not committed a crime in fifteen years since the last conviction or release from incarceration, whichever is later, and that the defendant does not pose a threat to others. N.J.S.A. 2C:43-6.4(c).

8. Violation of Parole Supervision for Life (Third Degree Crime). A violation of parole supervision for life without good cause is a third degree offense. N.J.S.A. 2C:43-6.4(d). The person shall be sentenced to a term of imprisonment "unless the court is clearly convinced that the interests of justice so far outweigh the need to deter this conduct and the interest in public safety that a sentence to imprisonment would be a manifest injustice." Ibid.

9. Violation of Parole Supervision for Life (Extended Term Without Parole). N.J.S.A. 2C:43-6.4(e) provides that if the defendant committed any of the following offenses while serving parole supervision for life, the court must impose an extended term pursuant to N.J.S.A. 2C:43-7, and the defendant must serve the entire term before returning to parole supervision for life:

- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Death by auto or vessel (N.J.S.A. 2C:11-5);
- Aggravated assault (N.J.S.A. 2C:12-1(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Luring a child (N.J.S.A. 2C:13-6);

- Sexual assault (N.J.S.A. 2C:14-2);
- Criminal sexual contact (N.J.S.A. 2C:14-3);
- Endangering the welfare of a child (N.J.S.A. 2C:24-4);
- Second degree burglary (N.J.S.A. 2C:18-2); or
- Possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4(a)).

E. Parole Ineligibility: Statutory Provisions

1. Kidnapping of a Minor. N.J.S.A. 2C:13-1(c)(2) requires the court to impose a term between twenty-five years and life imprisonment with a parole ineligibility period of twenty-five years when (a) the victim was less than sixteen years old and was subjected to a sexual assault (N.J.S.A. 2C:14-2), a criminal sexual contact (N.J.S.A. 2C:14-3), or endangerment (N.J.S.A. 2C:24-4); or (b) the defendant sold or delivered the victim for pecuniary gain, and the sale did not lead to the victim's return to a parent or guardian. The court must merge the underlying offenses into the kidnapping conviction. N.J.S.A. 2C:13-1(c)(2).

2. Luring or Enticing a Child (Repeat Offenders). N.J.S.A. 2C:13-6(d) requires a parole disqualifier of one-third to one-half of the sentence imposed, or three years, whichever is greater for a second or subsequent offense of luring or enticing a child into a motor vehicle, structure or isolated area with the purpose to commit a criminal offense with or against the child. If the court imposes an extended term, the term of parole ineligibility must be one-third to one-half of the sentence imposed, or five years, whichever is greater. N.J.S.A. 2C:13-6(d).

3. Luring or Enticing a Child (Certain Persons). N.J.S.A. 2C:13-6(e) requires a five-year parole ineligibility term for the crime of luring or enticing a child (N.J.S.A. 2C:13-6) when the defendant has a prior conviction for a violation of N.J.S.A. 2C:14-2 (sexual assault), N.J.S.A. 2C:14-3(a) (aggravated criminal sexual contact), or N.J.S.A. 2C:24-4 (endangering the welfare of a child). If the court imposes an extended term,

then the parole disqualifier provision is inapplicable. N.J.S.A. 2C:13-6(e).

4. Luring or Enticing an Adult (Repeat Offenders). N.J.S.A. 2C:13-7(d) mandates a parole ineligibility period of one-third to one-half the sentence imposed, or one year, whichever is greater, for a second or subsequent offense of luring or enticing a person into a motor vehicle, structure or isolated area with the purpose to commit a criminal offense with or against the person or any other person. If the defendant is sentenced to an extended term, the period of parole ineligibility shall be one-third to one-half the sentence imposed, or five years, whichever is greater. N.J.S.A. 2C:13-7(d).

5. Luring or Enticing an Adult (Certain Persons). N.J.S.A. 2C:13-7(e) requires a parole ineligibility period of three years for luring or enticing an adult if the defendant has a prior conviction for a violation of N.J.S.A. 2C:14-2 (sexual assault), N.J.S.A. 2C:14-3(a) (aggravated criminal sexual contact), or N.J.S.A. 2C:24-4 (endangering the welfare of a child). If the court imposes an extended term, then the parole ineligibility provision is inapplicable. N.J.S.A. 2C:13-7(e).

6. Human Trafficking. N.J.S.A. 2C:13-8(d) mandates a twenty-year term of parole ineligibility.

7. Assisting in Human Trafficking. N.J.S.A. 2C:13-9(c)(1) requires a period of parole ineligibility of one-third to one-half of the term of imprisonment, or three years, whichever is greater.

8. Aggravated Sexual Assault of a Child. N.J.S.A. 2C:14-2(a)(7) requires a twenty-five-year period of parole ineligibility be imposed on a defendant convicted of aggravated sexual assault of a child under age thirteen. However, N.J.S.A. 2C:14-2(d) allows the prosecutor to negotiate a fifteen-year sentence with no possibility of parole. N.J.S.A. 2C:14-2.1 provides that "the victim of the sexual assault shall be provided an opportunity to consult with the prosecuting authority prior to the conclusion of any plea negotiations."

9. Sexual Assault or Aggravated Criminal Sexual Contact (Repeat Offender). N.J.S.A. 2C:14-6 requires the court impose on a second or subsequent offender of N.J.S.A. 2C:14-2 (sexual assault) or N.J.S.A. 2C:14-3(a) (aggravated criminal sexual

contact), a minimum period of parole ineligibility of at least five years on an ordinary sentence (i.e., a non-extended term sentence).

10. Endangering the Welfare of a Child (Computer Related Sex Offense). N.J.S.A. 2C:24-4(b)(5)(a) requires a parole disqualifier of one-third to one-half of the sentence imposed, or five years, whichever is greater, for distributing, possessing, storing or maintaining by way of a file-share program, twenty-five or more items depicting the sexual exploitation or abuse of a child.

11. The No Early Release Act. N.J.S.A. 2C:43-7.2 requires the court fix "a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole," and impose a five-year term of parole supervision (first degree crime), or a three-year term of parole supervision (second degree crime) for the following first and second degree sex crimes:

- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-2(b) and (c)(1)); and
- Endangering the welfare of a child by way of child pornography (N.J.S.A. 2C:24-4(b)(3)).

F. Mandatory Extended Terms: Statutory Provisions

1. Second Degree Sexual Acts With a Child and Child Pornography. N.J.S.A. 2C:24-4(b)(5)(a) requires the court to impose an extended term on a person convicted of a second or subsequent offense of second degree (1) engaging in sexual acts with a child or the simulation of such acts knowing or intending that the act may be photographed, filmed or reproduced; or (2) filming, photographing or reproducing the image of a child in a sex act; or (3) distributing, possessing or sharing an item depicting the sexual exploitation or abuse of a child.

2. Third Degree Sexual Acts With a Child and Child Pornography. N.J.S.A. 2C:24-4(b)(5)(b) provides that a person convicted of a second or subsequent offense of third degree

knowingly possessing, receiving, viewing or having under his or her control an item depicting the sexual exploitation or abuse of a child shall be sentenced to an extended term of imprisonment.

3. Sex Offender Violation of Parole Supervision for Life. N.J.S.A. 2C:43-6.4(e) provides that if a defendant commits any of the following offenses while serving parole supervision for life the court must impose an extended term, and the defendant must serve the entire term before returning to parole supervision for life:

- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Death by auto or vessel (N.J.S.A. 2C:11-5);
- Aggravated assault (N.J.S.A. 2C:12-1(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Luring a child (N.J.S.A. 2C:13-6);
- Sexual assault (N.J.S.A. 2C:14-2);
- Criminal sexual contact (N.J.S.A. 2C:14-3);
- Endangering the welfare of a child (N.J.S.A. 2C:24-4);
- Second degree burglary (N.J.S.A. 2C:18-2); or
- Possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4(a)).

4. Persistent Violent Offenders (also known as the "Persistent Offenders Accountability Act" and the "Three Strikes and You're In" Law). N.J.S.A. 2C:43-7.1 requires the court to impose either a life sentence without parole or an extended term, depending on the crime committed and after a hearing.

(a) Life Without Parole. N.J.S.A. 2C:43-7.1(a) provides that a person convicted of any of the following crimes, or their substantial equivalent under any similar statute,

"who has been convicted of two or more crimes that were committed on prior and separate occasions, regardless of the dates of the convictions," shall be sentenced to a term of life imprisonment without parole:

- Murder (N.J.S.A. 2C:11-3);
- Aggravated manslaughter (N.J.S.A. 2C:11-4(a));
- First degree kidnapping (N.J.S.A. 2C:13-1);
- Sexual assault (N.J.S.A. 2C:14-2(a)(3) to (6));
- First degree robbery (N.J.S.A. 2C:15-1); or
- Carjacking (N.J.S.A. 2C:15-2).

Note: Pursuant to N.J.S.A. 2C:43-7.1(e), a defendant sentenced to life without parole under section N.J.S.A. 2C:43-7.1(a) may be released on parole if the defendant "is at least 70 years of age" and "has served at least 35 years in prison pursuant to" N.J.S.A. 2C:43-7.1, and "the full Parole Board determines that the defendant is not a danger to the safety of any other person or the community."

(b) Extended Term. N.J.S.A. 2C:43-7.1(b) requires the court to impose an extended term if the circumstances in subsection (1) or (2) exist:

(1) the defendant is being sentenced for any of the following crimes and has two or more convictions for any of those crimes or the crimes enumerated in N.J.S.A. 2C:43-7.1(a), "regardless of the dates of the convictions":

- Second degree manslaughter (N.J.S.A. 2C:11-4);
- Second or third degree assault (N.J.S.A. 2C:12-1(b));
- Second degree kidnapping (N.J.S.A. 2C:13-1);
- Aggravated criminal sexual contact under any circumstances set forth in N.J.S.A. 2C:14-2(a)(3) to (6) (N.J.S.A. 2C:14-3);

- Second degree robbery (N.J.S.A. 2C:15-1);

- Second degree burglary (N.J.S.A. 2C:18-2); or

- Second degree possession of weapons for an unlawful purposes (N.J.S.A. 2C:39-4).

OR

(2) The defendant: (1) is convicted of a crime enumerated in N.J.S.A. 2C:43-7.1(a); (2) "does not have two or more prior convictions that require sentencing under" N.J.S.A. 2C:43-7.1(a); and (3) has two or more prior convictions that would require sentencing under" N.J.S.A. 2C:43-7.1(b)(1) if the defendant "had been convicted of a crime enumerated in" N.J.S.A. 2C:43-7.1(b)(1).

(c) Timing of Convictions. N.J.S.A. 2C:43-7.1(c) provides: "The provisions of this section shall not apply unless the prior convictions are for crimes committed on separate occasions and unless the crime for which the defendant is being sentenced was committed either within 10 years of the date of the defendant's last release from confinement for commission of any crime or within 10 years of the date of the commission of the most recent of the crimes for which the defendant has a prior conviction."

(d) Notice and Hearing. Within fourteen days of entry of a guilty plea or return of a verdict, the State must serve notice upon defendant of the intention to impose sentence pursuant to N.J.S.A. 2C:43-7.1(d). See also R. 3:21-4(f). The court may not impose a sentence pursuant to N.J.S.A. 2C:43-7.1 unless the ground for the sentence has been established at a hearing.

5. Sexual Assault or Aggravated Criminal Sexual Contact Against Minors. N.J.S.A. 2C:44-3(g) requires that a defendant convicted of sexual assault (N.J.S.A. 2C:14-2) or criminal sexual contact (N.J.S.A. 2C:14-3) be sentenced to an extended term of imprisonment upon application of the prosecutor, if the crime involved violence or the threat of violence and the victim was sixteen years of age or less.

G. Fines Authorized, or Required, by Law: Statutory Provisions

1. Human Trafficking. N.J.S.A. 2C:13-8(d) requires a fine not less than $25,000 for a first degree crime. N.J.S.A. 2C:13-9(c)(1) requires a fine not less than $15,000 for a second degree crime.

2. Assisting in Human Trafficking. N.J.S.A. 2C:13-9(c)(1) mandates a fine of at least $15,000.

3. Commercial Sexual Abuse of a Minor. N.J.S.A. 2C:13-10(c) provides that a person who commits the offense of advertising commercial sexual abuse of a minor, contrary to N.J.S.A. 2C:13-10(b), shall be ordered to pay a fine of at least $25,000, which shall be deposited in the Human Trafficking Survivor's Assistance Fund.

4. Pornography. N.J.S.A. 2C:14-9(c) authorizes "a fine not to exceed $30,000" for a third degree pornography offense.

H. Restitution: Statutory Provisions

Human Trafficking. N.J.S.A. 2C:13-8(e)(1) and (2) require the court to award the victim restitution which is the greater of (1) "the gross income or value to the defendant of the victim's labor or services," or (2) "the value of the victim's labor or services as determined by" law.

I. Registrations, Penalties, Fees, Assessments, Reporting and Monitoring Requirements, and Civil Commitment: Statutory Provisions

1. Megan's Law Registration Requirements. N.J.S.A. 2C:7-1 to -23 sets forth registration and public notification requirements for a person who committed a "sex offense." Pursuant to N.J.S.A. 2C:7-2(b), a sex offense includes the following crimes:

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-1));

- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a);

- Kidnapping (N.J.S.A. 2C:13-1(c)(2));

- Endangering the welfare of a child by engaging in sexual conduct that would impair or debauch the morals of the child (N.J.S.A. 2C:24-4(a));

- Endangering the welfare of a child (N.J.S.A. 2C:24-4(b)(3) or (4) or (5)(a));

- Luring or enticing a child (N.J.S.A. 2C:13-6);

- Criminal sexual contact of a minor (N.J.S.A. 2C:14-3(b);

- Kidnapping (N.J.S.A. 2C:13-1);

- Criminal restraint (N.J.S.A. 2C:13-2);

- False imprisonment "if the victim is a minor and the offender is not the parent of the victim" (N.J.S.A. 2C:13-3; and

- Knowingly promoting prostitution of a child (N.J.S.A. 2C:34-1(b)(3) or (4)).

Failure to comply with Megan's Law registration requirements is a third degree crime. N.J.S.A. 2C:7-2(d).

2. Megan's Law Penalties. N.J.S.A. 2C:14-10(a) provides that in addition to any other fine, fee, assessment or penalty authorized by Title 2C, a person convicted of a sex offense, as defined by N.J.S.A. 2C:7-2(b), "shall be assessed a penalty for each such offense not to exceed:"

- $2000 for a first degree crime;

- $1000 for a second degree crime;

- $750 for a third degree crime; and

- $500 for a fourth degree crime.

3. Assisting in Human Trafficking Business License Revocation. N.J.S.A. 2C:13-9(c)(2) provides that "the court shall direct any issuing State, county, or municipal governmental agency to revoke any license, permit, certificate, approval, registration, charter, or similar form of business or professional authorization required by law concerning the operation of that person's business or profession, if that business or profession was used in the course of the crime."

4. Serological Testing. N.J.S.A. 2C:43-2.2(a) requires a defendant convicted of aggravated sexual assault or sexual assault (N.J.S.A. 2C:14-2) "submit to an approved serological test for acquired immune deficiency syndrome (AIDS) or infection with the human immunodeficiency virus (HIV) or any other related virus identified as a probable causative agent of AIDS," upon request by the victim and prosecutor. The court may require the defendant to pay the cost of the test. N.J.S.A. 2C:43-2.3(c).

5. Sexual Assault Nurse Examiner Program Assessment. N.J.S.A. 2C:43-3.6(a) requires an $800 assessment for any sex offense defined in N.J.S.A. 2C:7-2.

6. Surcharge for Certain Sex Offenders. N.J.S.A. 2C:43-3.7 requires any person convicted of aggravated sexual assault (N.J.S.A. 2C:14-2(a)), sexual assault (N.J.S.A. 2C:14-2(b)), aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a)), or criminal sexual contact (N.J.S.A. 2C:14-3(b)), to pay a $100 surcharge to fund programs and grants for the prevention of violence against women.

7. Restricted Internet Access. N.J.S.A. 2C:43-6.6(a)(1) to (4) provides that any person who (1) committed a sex offense as defined in N.J.S.A. 2C:7-2(b) and is required to register under Megan's Law (N.J.S.A. 2C:7-2); or (2) is serving a special sentence of parole supervision under N.J.S.A. 2C:43-6.4, or has been convicted of promoting or providing obscene materials to a minor (N.J.S.A. 2C:34-3), "shall" be subject to the following Internet access conditions "where the trier of fact makes a finding that a computer or any other device with Internet capability was used to facilitate the commission of the crime":

> (1) Prohibited access of "a computer or any other device with Internet capability without the prior written approval of the court," with the exception that a person on probation or parole "may use a computer or any other device with Internet capability in connection with that person's

employment" or to "search for employment with the prior approval of the person's probation or parole officer"; and

(2) "[P]eriodic unannounced examinations of the person's computer . . . including the retrieval and copying of all data . . . and removal of such information, equipment or device to conduct a more thorough inspection"; and

(3) Installation, "at the person's expense, [of] one or more hardware or software systems to monitor the Internet use"; and

(4) "[A]ny other appropriate restrictions concerning the person's use or access of a computer or any other device with Internet capability."

A violation of the Internet access restrictions constitutes a fourth degree crime. N.J.S.A. 2C:43-6.6(b).

8. Sex Offender Restraining Order. N.J.S.A. 2C:44-8 authorizes the court to enter an order restraining a sex offender from contact with the victim or the victim's family and from entering certain locations.

9. Involuntary Civil Commitment Upon Completion of Sentence (the Sexually Violent Predator Act). N.J.S.A. 30:4-27.24 to -27.38 (the Sexually Violent Predator Act) provides for the civil commitment for specialized treatment of sex offenders who "suffer from a mental abnormality or personality disorder," which renders the person "likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment." N.J.S.A. 30:4-27.26. The court may impose commitment over the defendant's objection if it finds "by clear and convincing evidence that the patient needs continued involuntary commitment to treatment." N.J.S.A. 30:4-27.32(a).

10. The Sex Offender Monitoring Act. N.J.S.A. 30:4-123.89 to 4-123.95 requires continuous satellite monitoring of sex offenders after release from prison. N.J.S.A. 30:4-123.92. A violation of a monitoring condition is a third degree crime. N.J.S.A. 30:4-123.94.

J. Sex Offender Treatment: Statutory Provisions

1. Statutory Authority for Sex Offender Treatment. Pursuant to N.J.S.A. 2C:47-1, a defendant convicted of any of the following offenses, or an attempt to commit any of the following offenses, may be eligible for sex offender treatment, so long as the court does not impose a sentence of life imprisonment without the possibility of parole:

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-2(b), (c));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3);
- Kidnapping (N.J.S.A. 2C:13-1(c)(2));
- Endangering the welfare of a child by engaging in sexual conduct (N.J.S.A. 2C:24-4(a)); or
- Endangering the welfare of a child by recording the child in a sex act (N.J.S.A. 2C:24-4(b)(4)).

2. Psychological Examination. N.J.S.A. 2C:47-1 provides that if a defendant is eligible for sex offender treatment the court must order the Department of Corrections to conduct a psychological examination of the defendant to determine whether the defendant's conduct was characterized by a pattern of repetitive, compulsive behavior and, if it was, whether the defendant is amenable to sex offender treatment and is willing to participate in the treatment. The Department of Corrections must conduct the examination within thirty days. N.J.S.A. 2C:47-2.

3. Judicial Findings Regarding the Psychological Examination. If the examination report concludes that the defendant's conduct was characterized by a pattern of repetitive, compulsive behavior, and that the defendant is amenable to sex offender treatment and is willing to participate in treatment, then the court must state on the judgment of conviction whether it agrees with these conclusions, and it must explain its basis for the findings. N.J.S.A. 2C:47-3(a).

4. Circumstances That Require Sex Offender Treatment. The court shall sentence a defendant to sex offender treatment if: (1) the psychological examination report concludes that the defendant's conduct was characterized by a pattern of

repetitive, compulsive behavior, and that the defendant is amenable to sex offender treatment and is willing to participate in such treatment; (2) the Department of Corrections recommends the defendant receive sex offender treatment; and (3) the court makes its own findings that the defendant's conduct was characterized by a pattern of repetitive, compulsive behavior, and that the defendant is amenable to sex offender treatment and is willing to participate in such treatment. N.J.S.A. 2C:47-3(a) and (b).

(a) Inpatient Treatment. The court shall require the defendant to receive sex offender treatment at the Adult Diagnostic and Treatment Center for sex offender (ADTC or Avenel) if the court imposes a term of incarceration. N.J.S.A. 2C:47-3(b). If the term of incarceration is seven years or less, the defendant shall be detained in the Adult Diagnostic and Treatment Center, not in a prison. N.J.S.A. 2C:47-3(h)(1). If the sentence is greater than seven years, or if the sentence includes a period of parole ineligibility that is seven years or greater, the defendant shall be detained in a facility designated by the Commissioner of the Department of Corrections until the last five years of the sentence, at which time the defendant must be transferred to the Adult Diagnostic and Treatment Center, so long as the defendant still is amenable to sex offender treatment and is willing to comply with treatment. N.J.S.A. 2C:47-3(h)(2) and (3).

(b) Outpatient Treatment. If the court imposes probation and sex offender treatment is warranted, the court shall require the defendant to receive outpatient treatment as a condition of probation. N.J.S.A. 2C:47-3(b).

5. Cases in Which the Court May Not Impose Sex Offender Treatment. The court shall not impose sex offender treatment if:

- The defendant's conduct was not repetitive and compulsive, N.J.S.A. 2C:47-3(d); or

- The defendant is not amenable to sex offender treatment, N.J.S.A. 2C:47-3(d); or

- The defendant's conduct was repetitive and compulsive and the defendant is amenable to sex offender treatment, but

the defendant is not willing to participate in sex offender treatment, N.J.S.A. 2C:47-3(f); or

- The court imposes a term of life imprisonment without the possibility of parole. N.J.S.A. 2C:47-3(j).

6. Place of Incarceration of a Defendant Who Is Unwilling to Participate in Sex Offender Treatment. If the defendant's conduct was repetitive and compulsive and the defendant is amenable to sex offender treatment but unwilling to participate in sex offender treatment, then the defendant shall be detained at a facility designated by the Commissioner.

(a) Parole. After serving any mandatory minimum term of imprisonment, the defendant shall be eligible for parole in accordance with N.J.S.A. 2C:47-5. N.J.S.A. 2C:47-3(f).

(b) Request for Transfer to Inpatient Treatment. On a biennial basis the defendant may request transfer to the Adult Diagnostic and Treatment Center. N.J.S.A. 2C:47-3(f). The Commissioner shall grant the request if a psychological evaluation reveals that the defendant is amenable to treatment and is willing to comply with its terms. Ibid.

7. Transfer Out of Inpatient Treatment. N.J.S.A. 2C:47-4.1(a) requires the Commissioner to transfer a defendant out of sex offender treatment if the defendant is (1) serving a life sentence without the possibility of parole, (2) not complying with the terms of treatment, or (3) no longer amenable to treatment.

8. Request for Return to Inpatient Treatment. On a biennial basis the defendant may request a transfer back to the Adult Diagnostic and Treatment Center. N.J.S.A. 2C:47-4.1(b). If a psychological examination concludes that the defendant is amenable to treatment and is willing to cooperate with the terms of treatment, the Commissioner shall grant the request. Ibid.

9. Credits Conditioned Upon Compliance With Inpatient Treatment. The sentence shall not be reduced by good behavior or work credits for any period that the defendant was not amenable to treatment, was unwilling to comply with treatment, or was detained at a facility other than the Adult Diagnostic and Treatment Center. N.J.S.A. 2C:47-3(d), (i), (g); N.J.S.A. 2C:47-4.1(c).

10. Parole. A sex offender confined under Chapter 47 may not be paroled unless a special classification review board finds that the defendant has achieved a satisfactory level of progress in sex offender treatment. N.J.S.A. 2C:47-5(a). Upon recommendation from the special classification review board, the State Parole Board should release the defendant unless it concludes, by a preponderance of the evidence, that the defendant failed to cooperate in rehabilitation or that there is a reasonable expectation that the defendant will violate conditions of parole. Ibid.

11. Notice of a Defendant's Release After the Defendant Was Denied Parole. The Attorney General and local prosecutor must receive at least ninety days' notice of the defendant's release and must be advised as to whether the defendant may be "in need of involuntary commitment" or may be a "sexually violent predator," as those terms are defined in the Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -27.38. N.J.S.A. 2C:47-5(d). (The Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -27.38, provides for the civil commitment for specialized treatment of sex offenders who "suffer from a mental abnormality or personality disorder," which renders the person "likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment." N.J.S.A. 30:4-27.26.)

12. Parole Revocation and Psychological Examination. In the event a sex offender's parole is revoked, the Department of Corrections shall, within ninety days of revocation, complete a psychological examination of the offender to determine whether the parole violation "reflects emotional or behavioral problems as a sex offender that cause the offender to be incapable of making any acceptable social adjustment in the community," and whether the offender is amenable to and willing to participate in sex offender treatment. N.J.S.A. 2C:47-5.1(a).

> **(a) Sentence to Inpatient Treatment.** If the report concludes that the parole violation "reflects emotional or behavioral problems as a sex offender that cause the offender to be incapable of making any acceptable social adjustment in the community and further reveals that the offender is amenable to sex offender treatment and is willing to participate in such treatment," then the defendant shall be confined in the Adult Diagnostic and

Treatment Center and shall be eligible for parole pursuant to N.J.S.A. 2C:47-5. N.J.S.A. 2C:47-5.1(b).

(b) Sentence to a Facility Designated by the Commissioner (Unwillingness to Comply). The defendant shall be detained in a facility designated by the Commissioner if a psychological examination report concludes that the defendant suffers from emotional or behavioral problems as a sex offender that cause him or her to be incapable of making any acceptable social adjustment in the community and that the defendant is amenable to treatment but not willing to participate in sex offender treatment. N.J.S.A. 2C:47-5.1(c). The defendant shall be eligible for parole in accordance with N.J.S.A. 2C:47-5. N.J.S.A. 2C:47-5.1(c). However, the sentence may not be reduced by work credits. N.J.S.A. 2C:47-5.1(e).

(c) Sentence to a Facility Designated by the Commissioner (No Emotional or Behavioral Problem as a Sex Offender). The defendant shall be confined in a facility designated by the Commissioner if the examination report concludes that the parole violation "does not reflect emotional or behavioral problems as a sex offender." N.J.S.A. 2C:47-5.1(d)(1)(a). The defendant shall be eligible for parole in accordance with Title 30, but the parole eligibility date shall not be reduced by work or good behavior credits. N.J.S.A. 2C:47-5.1(d)(2).

(d) Sentence to a Facility Designated by the Commissioner (Not Amenable to Treatment). The defendant shall be confined in a facility designated by the Commissioner if the offender's parole violation "reflects emotional or behavioral problems as a sex offender that cause the offender to be incapable of making any acceptable social adjustment in the community and further reveals that the offender is not amenable to sex offender treatment." N.J.S.A. 2C:47-5.1(d)(1)(b). The defendant shall be eligible for parole in accordance with Title 30, but the parole eligibility date shall not be reduced by work or good behavior credit. N.J.S.A. 2C:47-5.1(d)(2).

(e) Request for Transfer to Inpatient Treatment. A defendant may request transfer to the Adult Diagnostic and Treatment Center on a biennial basis. N.J.S.A. 2C:47-5.1(f). If a psychological evaluation reveals that the defendant is amenable to treatment and is willing to comply

with treatment, the Commissioner shall grant the request. Ibid. The defendant will be eligible for parole pursuant to N.J.S.A. 2C:47-5, and will earn work and good behavior credits. N.J.S.A. 2C:47-5.1(e).

K. Sex Offender Sentencing: Case Law

1. Notice and Plea Agreements. When a defendant pleads guilty to a sex offense, the court must notify the defendant of the parole consequences and potential sex offender treatment consequences of the guilty plea, State v. Luckey, 366 N.J. Super. 79, 89-90 (App. Div. 2004), as well as the requirement of parole supervision for life. State v. Jamgochian, 363 N.J. Super. 220, 224 (App. Div. 2003).

2. Plea Agreements and Involuntary Confinement. In negotiating a plea, the prosecutor may not bargain away the State's right to seek, upon completion of sentence, involuntary civil commitment under the Sexually Violent Predator Act. In re Commitment of P.C., 349 N.J. Super. 569, 572 (App. Div. 2002).

3. Sex Crime Victims Treatment Penalty. The sex offender penalty amounts listed in N.J.S.A. 2C:14-10(a) are the maximum penalties the court may impose. State v. Bolvito, 217 N.J. 221, 224 (2014). In fixing the penalty amount, the court should consider the nature of the offense and the defendant's ability to pay. Id. at 233-35.

4. Megan's Law Offenses. While Megan's Law requires registration for "sex offenses," the N.J.S.A. 2C:7-2(b) offenses that define a sex offense encompass more than just sex offenses; they include non-sex crimes against children. In re T.T., 188 N.J. 321, 333 (2006).

5. Sex Offender Treatment Examination and the Privilege Against Self-Incrimination. The court may delay the N.J.S.A. 2C:47-1 psychological exam for sex offender treatment to protect the defendant's privilege against self-incrimination. State v. Marrero, 239 N.J. Super. 119, 122-23 (Law Div. 1989). The privilege continues until the defendant has exhausted all direct appellate remedies. Lewis v. Dep't of Corr., 365 N.J. Super. 503, 506 (App. Div. 2004).

6. Good Time Credits and the Privilege Against Self-Incrimination. A defendant has a liberty interest in good time

credits. Bender v. N.J. Dep't of Corr., 356 N.J. Super. 432, 443-44 (App. Div. 2003). Thus, good time credits cannot be denied when the defendant refuses to discuss conduct pursuant to the privilege against self-incrimination. Id. at 444.

7. "Repetitive" and "Compulsive" Behavior Defined. The Legislature did not define "repetitive" and "compulsive" in N.J.S.A. 2C:47-1 to -10. State v. N.G., 381 N.J. Super. 352, 361 (App. Div. 2005). Since they are words of common understanding, they should be given their ordinary and well-understood meanings. Ibid. "Repetitive" means "to do, experience, or produce again." Ibid. "Compulsive" means "caused by obsession or compulsion," with "compulsion" meaning "an irresistible impulse to act irrationally." Id. at 361-62.

(a) Constitutionality. "Because these definitions are not abstract and may be understood by a citizen of average intelligence, the statute is not unconstitutionally vague." Id. at 362.

(b) Thoughts as Behavior. "Repetitive" and "compulsive" behavior is not limited to repetitive physical sexual acts or physical urges, but includes psychological conduct and urges, such as sexual fantasies or thoughts. State v. Hass, 237 N.J. Super. 79, 85-86 (Law Div. 1988) (finding repetitive and compulsive behavior based on thought patterns).

8. Setting the Length of the Sentence. In sentencing a sex offender the court must weigh the aggravating and mitigating factors and may impose a period of parole ineligibility, an extended term, and consecutive terms. Gerald v. Comm'r, N.J. Dep't of Corr., 102 N.J. 435, 438 (1986); State v. Chapman, 95 N.J. 582, 593 (1984). The court must impose a fixed term of years to the Adult Diagnostic Treatment Center. State v. Dittmar, 188 N.J. Super. 364, 366-67 (App. Div. 1982), certif. denied, 97 N.J. 678 (1984).

9. Sex Offender Treatment Required Only at the Adult Diagnostic Treatment Center. Pursuant to N.J.S.A. 2C:47-3(k), the Commissioner is not required to provide for the treatment of a sex offender who is not incarcerated in the Adult Diagnostic Treatment Center. In re Civil Commitment of W.X.C., 407 N.J. Super. 619, 636-38 (App. Div.), aff'd on other grounds, 204 N.J. 179 (2010), cert. denied, 562 U.S. 1297, 131 S. Ct. 1702, 179 L. Ed. 2d 635 (2011). However, the defendant may qualify for

mental health treatment pursuant to Department of Corrections regulations. Ibid.

10. Transfer to the Adult Diagnostic Treatment Center. In order to transfer an offender to the ADTC, the Commissioner must show that: (1) the offender's conduct was characterized by a pattern of repetitive and compulsive behavior; (2) the offender is amenable to treatment; and (3) the offender is willing to participate in the treatment. Williams v. N.J. Dep't of Corr., 423 N.J. Super. 176, 182-86 (App. Div. 2011). "[T]he Commissioner does not have the discretion [under N.J.S.A. 30:4-91.2] to assign offenders to the ADTC whom the Legislature has determined should not be treated there." See also W.B. v. N.J. Dep't of Corr., 434 N.J. Super. 340, 347-48 (App. Div. 2014) (holding that the Williams rationale applies to an inmate convicted in another state and transferred to a New Jersey prison).

11. Liberty Interest and Sex Offender Treatment. "[T]he actions of the trial court in sentencing the defendant to Avenel implicate a liberty interest," which "arise[s] from the expectation that ADTC parole standards and rehabilitative procedures will not be applied absent a finding of 'repetitive' and 'compulsive behavior.'" State v. Howard, 110 N.J. 113, 127-29 (1988) (quoting N.J.S.A. 2C:47-3(a)). Additionally, the liberty interest arises from the stigma created by classification as a repetitive and compulsive sex offender. Id. at 129.

12. Delay in Sex Offender Treatment and Cruel and Unusual Punishment. A nine-month delay in transferring a sex offender to the Adult Diagnostic Treatment Center, during which time the defendant was incarcerated in county jail, did not constitute cruel and unusual punishment. State v. Howard, 110 N.J. 113, 132-33 (1988).

13. Judicial Findings and Sex Offender Treatment. The prerequisite findings resulting in commitment to the Adult Diagnostic Treatment Center are made by a judge by a preponderance of the evidence. State v. Howard, 110 N.J. 113, 131 (1988); State v. Luckey, 366 N.J. Super. 79, 90-91 (App. Div. 2004).

14. Concurrent Terms and Sex Offender Treatment. When a defendant receives concurrent sentences to prison and the Adult Diagnostic Treatment Center, and the prison sentence is longer

than the ADTC sentence, the defendant may be transferred to prison to serve the remainder of the sentence after completion of the ADTC term. State v. Chapman, 95 N.J. 582, 592 (1984).

15. Consecutive Terms and Sex Offender Treatment. The Code permits a sex offender to be sentenced to consecutive ADTC and prison terms for sex- and non-sex related offenses arising from one incident. State v. Chapman, 95 N.J. 582, 592 (1984).

16. Presumption of Imprisonment. When the N.J.S.A. 2C:47-1 examination report recommends probation with outpatient treatment for a first or second degree offense, the court must consider that recommendation in light of the presumption of imprisonment applicable to first and second degree crimes. State v. Hamm, 207 N.J. Super. 40, 44-45 (App. Div. 1986).

17. Parole Ineligibility. The parole disqualifier set forth in N.J.S.A. 2C:14-6 (applicable to a second or subsequent conviction for sexual assault or aggravated criminal sexual contact) applies to defendants sentenced to jail terms and to sex offender treatment. State v. Chapman, 95 N.J. 582, 588-89 (1984).

18. NERA and Sexual Assault. NERA applies to a sexual assault conviction under N.J.S.A. 2C:14-2(b) or (c)(1). State v. Drake, 444 N.J. Super. 265, 283, certif. denied, 226 N.J. 213 (2016).

19. Megan's Law, Civil Regulatory Scheme. The Megan's Law registration and notification requirements create a civil regulatory scheme that does not amount to punishment. Doe v. Poritz, 142 N.J. 1, 73 (1995).

20. Megan's Law Constitutionality. Our Court has generally upheld as constitutional the Megan's Law registration and notification requirements. Doe v. Poritz, 142 N.J. 1, 73-111 (1995). See also In re C.A., 146 N.J. 71, 80-110 (1996) (discussing Attorney General guidelines on community notification and due process).

21. Sex Offender Monitoring Act (SOMA), Penal in Nature. While the Legislature likely intended to create a civil, regulatory scheme in passing the SOMA, it created a form of punishment similar to parole. Riley v. N.J. State Parole Bd., 219 N.J. 270, 294-97 (2014) (comparing SOMA to the civil regulatory scheme of Megan's Law).

22. Sex Offender Monitoring Act (SOMA), Ex Post Facto. Because the SOMA monitoring provisions are penal, the Ex Post Facto Clauses of the New Jersey and United States Constitutions prohibit their application to a sex offender who completed his or her sentence prior to the adoption of the SOMA. Riley v. N.J. State Parole Bd., 219 N.J. 270, 297 (2014).

23. Parole Supervision for Life and Ex Post Facto Concerns. Parole supervision for life (PSL) is a harsher sentence than community supervision for life (CSL) (the sentence in effect until 2003 when the Legislature replaced it with parole supervision for life). L. 2003, c. 267, § 1. State v. Perez, 220 N.J. 423, 436-42 (2015). Unlike CSL, PSL mandates an extended term without the possibility of parole if the defendant has committed an offense listed in N.J.S.A. 2C:43-6.4(e). State v. Perez, 220 N.J. 423, 442 (2015). Because the consequences of PSL are harsher than those of CSL, a defendant who commits an offense listed in N.J.S.A. 2C:43-6.4(e) while serving CSL may not be sentenced to an extended term without the possibility of parole (the sentence required if the defendant committed the offense while on PSL). State v. Perez, 220 N.J. 423, 442 (2015). See also State v. Hester, ___ N.J. Super. ___, ___ (2017) (slip. op. at 3) ("the commission of the predicate crime, for which defendants received the special sentence of CSL, is the operative 'crime' for determining whether the 2014 amended law violates the Ex Post Facto Clauses.").

24. Parole Supervision for Life and Double Jeopardy. Parole supervision for life is a penal consequence; thus, if the court omitted it from a sentence, double jeopardy protections preclude it from being added after the defendant has completed the sentence. State v. Schubert, 212 N.J. 295, 305-08 (2012).

25. Parole Supervision for Life and Guilty Pleas. Defense counsel must advise the defendant that a guilty plea will result in parole supervision for life, as the term is penal. State v. Smullen, 437 N.J. Super. 102, 110 (App. Div. 2014). Defense counsel's failure to do so may form the basis of an ineffective assistance of counsel claim. Ibid.

26. Parole Supervision for Life, Vagueness and Separation of Powers. Because N.J.S.A. 2C:43-6.4(b) provides sufficient notice of illegal conduct, it is not unconstitutionally vague and does not violate the separation of powers doctrine. State v. Bond, 365 N.J. Super. 430, 438-43 (App. Div. 2003).

27. Constitutionality of Internet Restrictions. Restrictions on access to the internet does not, on its face, violate the Federal and State constitutional rights to free speech, free association, and due process of law. J.B. v. N.J. Parole Bd., 433 N.J. Super. 327, 344 (App. Div. 2013) (J.B. I), certif. denied, 217 N.J. 296 (2014). However, an offender has due process rights to challenge the restrictions. J.I. v. N.J. Parole Bd., ___ N.J. ___, ___ (2017) (slip op. at 43-47). The restrictions must be "reasonably tailored to advance the goals of rehabilitation or public safety." Id. at ___ (slip op. at 41). "The parole authorities do not have unbridled discretion to impose unnecessary or oppressive Internet conditions that do not advance a rational penological policy." Id. at ___ (slip op. at 42).

28. Constitutionality of Polygraph Examinations. The Parole Board may use "'instant offense' and 'maintenance' polygraph examinations for therapeutic purposes in the treatment of sex offenders on PSL [parole supervision for life] or CSL [community supervision for life]. The Parole Board may also use the substantive assertions made by such polygraphed offenders for both therapeutic and evidential purposes." J.B. v. N.J. State Parole Bd., 444 N.J. Super. 115, 157 (App. Div.), certif. granted, 226 N.J. 213-14 (2016) (J.B. II). It may not use "technical polygraph results in any evidential manner when making decisions to penalize PSL or CSL offenders or to curtail their activities." Ibid.

XVI. JAIL AND GAP-TIME CREDITS

A defendant is entitled to receive credit for any time served in jail between arrest and the time of sentencing (see sections A and C). This is known as "jail credit." Richardson v. Nickolopoulos, 110 N.J. 241, 242 (1988) (Richardson II). A defendant is also entitled to receive credit against a subsequent sentence for time spent incarcerated on a prior sentence (see sections B and D). This is known as "gap-time credit." Id. at 242.

A. Jail Credit: Court Rules and Statutory Provisions

1. Court Rule Authorizing Jail Credit. Rule 3:21-8 provides: "The defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence."

2. Jail Credits Included in the Judgment of Conviction. Rule 3:21-5(b) requires the court include in the judgment of conviction a statement of the jail credits awarded to the defendant.

3. Jail Credit Explained to the Defendant. N.J.S.A. 2C:43-2(f)(2) instructs the court to explain to the defendant the jail credits that apply to the sentence.

B. Gap-Time Credit: Statutory Provisions

Statutory Authority for Gap-Time Credit. N.J.S.A. 2C:44-5(b)(2) provides that when a defendant, previously sentenced to imprisonment, is subsequently sentenced to another term for an offense committed prior to the former sentence (other than for an offense committed while in custody), the defendant shall be credited with time served on the prior sentence "in determining the permissible aggregate length of the term or terms remaining to be served." These gap-time credits apply regardless of whether the court imposes concurrent or consecutive terms. N.J.S.A. 2C:44-5(b)(2).

C. Jail Credit: Case Law

1. Policy. "Jail credits were conceived as a matter of equal protection or fundamental fairness and a means of avoiding the double punishment that would result if no such credits were granted." State v. Hernandez, 208 N.J. 24, 36 (2011). Jail credits eliminate disparate treatment to poor and presumably innocent persons who cannot make bail. Ibid.

2. Jail Credits Are Mandatory. The court must award jail credits for time served in custody prior to sentencing. State v. Hernandez, 208 N.J. 24, 37 (2011).

3. Credits Explained. A sentencing judge should give a statement of reasons explaining the basis for an award of jail credits, particularly when the issue is in dispute. State v. Alevras, 213 N.J. Super. 331, 339 (App. Div. 1986).

4. Day-for-Day Award. Jail credits are "day-for-day" credits, subtracted from the front end of the sentence. Buncie v. Dep't of Corr., 382 N.J. Super. 214, 217 (App. Div. 2005), certif. denied, 186 N.J. 606 (2006). "The practical effect of that allocation is that jail credits will 'reduce a[] [parole] ineligibility term as well as the sentence imposed.'" State v. Hernandez, 208 N.J. 24, 37 (2011) (quoting State v. Mastapeter, 290 N.J. Super. 56, 64, (App. Div.), certif. denied, 146 N.J. 569 (1996)). This approach is different from the one used to compute gap-time credits. State v. Hernandez, 208 N.J. 24, 38 (2011). Gap-time credits are subtracted from the back end of a sentence; thus, they do not reduce a parole ineligibility period. Id. at 38-39.

5. Credits Are Based on Time Incarcerated. An award of jail credit is not dependent upon the date the State files a formal accusation or indictment, but rather, is based on the time spent confined while serving no valid sentence. State v. Garland, 226 N.J. Super. 356, 362 (App. Div.), certif. denied, 114 N.J. 288 (1988).

6. Jail Credit and Commutation Credit. For a discussion of jail credits in relation to commutation credits awarded during incarceration, see Buncie v. Dep't of Corr., 382 N.J. Super. 214, 218 (App. Div. 2005), certif. denied, 186 N.J. 606 (2006).

7. "Custody" Defined. Custody under Rule 3:21-8 signifies an involuntary confinement imposed by the court in a penal or medical facility. State v. Towey, 114 N.J. 69, 86 (1989).

(a) Violations of Drug Court and Probation. Special probation pursuant to Track One of Drug Court is custodial for purposes of the jail credit rule because a defendant who leaves the facility without authorization is subject to prosecution for escape. State v. Stalter, 440 N.J. Super. 548, 554 (App. Div.), certif. denied, 223 N.J. 355 (2015). Id. at 556. The same is not true for a defendant who violates a term of regular probation under Track Two of Drug Court. Id. at 555. Generally, probation is not custodial for purposes of jail credit. Ibid.; State v. Evers, 368 N.J. Super. 159, 172-73 (App. Div. 2004).

(b) Bail Release. A defendant is not entitled to jail credit for time spent released on bail. State in the Interest of I.C., 447 N.J. Super. 247, 255 (App. Div. 2016); State v. Boykins, 447 N.J. Super. 213, 220 (App. Div. 2016), certif. denied, ___ N.J. ___ (2017).

(c) Voluntary Admission to a Hospital. Voluntary confinement in a psychiatric hospital is not custodial for purposes of jail credit, even if the confinement is a condition of bail. State v. Towey, 114 N.J. 69, 85-86 (1989).

(d) Sex Offender Diagnostic Treatment Center. Confinement in a diagnostic treatment center for sex offenders is custodial for purposes of jail credits. State v. Lee, 60 N.J. 53, 58 (1972).

(e) Religious Convent. Time spent in a religious convent awaiting trial need not be credited where the restrictions on liberty are not so severe as to be the equivalent of jail or a state hospital, even if residence at the covenant was a condition of bail. State v. Mirakaj, 268 N.J. Super. 48, 52-53 (App. Div. 1993).

(f) Electronic Monitoring Program. A defendant is not entitled to jail credit for time spent participating in an electronic monitoring wristlet program as a condition of pretrial release. State v. Mastapeter, 290 N.J. Super. 56, 62-63 (App. Div.), certif. denied, 146 N.J. 569 (1996).

(g) Intensive Supervision Program. Participation in the Intensive Supervision Program (ISP) is not custodial for purposes of computing jail credit. State v. Adams, 436 N.J. Super. 106, 113-15, certif. denied, 220 N.J. 101 (2014).

(h) Juvenile Community Home Program. Placement in a juvenile community home program as a condition of probation is not custodial for purposes of determining jail credits. State in the Interest of I.C., 447 N.J. Super. 247, 258 (App. Div. 2016).

(i) Juvenile Intensive Supervision Program. The Juvenile Intensive Supervision Program is not the equivalent of detention; thus, jail credits may not be awarded for time spent in the program. State in the Interest of I.C., 447 N.J. Super. 247, 258 (App. Div. 2016).

8. Multiple New Jersey Charges. When a defendant is facing (1) charges in more than one county, (2) multiple charges in more than one indictment, or (3) multiple charges in one indictment for crimes committed during multiple criminal episodes, the defendant is entitled to receive jail credit against each sentence for the time he or she was detained or arrested until the time that the first sentence is imposed. State v. Hernandez, 208 N.J. 24, 47-48 (2011); State v. Rippy, 431 N.J. Super. 338, 353-54 (App. Div. 2013), certif. denied, 217 N.J. 284 (2014). This holding is different from prior decisions that limited jail credits to the particular offense for which confinement was directly attributed. State v. Hernandez, 208 N.J. 24, 43 (2011) (discussing State v. Black, 153 N.J. 438, 456 (1998)).

9. Consecutive Terms and Multiple Indictments. Where the defendant was convicted of charges in two separate indictments and, at a joint sentencing hearing, the court orders the sentences for the crimes charged in indictment one to run consecutive to the sentence for crimes charged in indictment two, jail credits apply to the front end of the aggregate term. State v. C.H., ___ N.J. ___, ___ (2017) (slip op. at 20-21). To award jail credits against the sentence resulting from indictment one and the sentence resulting from indictment two would provide a defendant a "double award." Id. at ___ (slip op. at 22-23).

10. Confinement in Another Jurisdiction. A defendant is entitled to jail credit for time incarcerated in a foreign jurisdiction only if the incarceration was due solely to the New Jersey charge. State v. Joe, ___ N.J. ___, ___ (2017) (slip op. at 20); State v. Hemphill, 391 N.J. Super. 67, 71 (App. Div. 2007); State v. Beatty, 128 N.J. Super. 488, 490-91 (App. Div. 1974).

11. Offense Committed While Released on Bail. Where a defendant is arrested for a crime, is released on bail, is arrested on unrelated charges, and serves 155 days in jail before pleading guilty to the first crime (in exchange for dismissal of the charges on the second offense), the defendant is entitled to receive 155 days jail credit against the sentence on the first crime. State v. Rawls, 219 N.J. 185, 197-98 (2014) (applying the holding in State v. Hernandez, 208 N.J. 24, 47-48 (2011)).

12. Probation Violation. Serving an incarcerated defendant with a violation of probation (VOP) statement of charges for a first, second, third or fourth degree offense is the equivalent of arresting the defendant for purposes of jail credits, and thus "triggers the award of jail credits for the period of pre-adjudication confinement against the VOP sentence and the sentence for the new offense." State v. DiAngelo, 434 N.J. Super. 443, 461 (App. Div. 2014). Jail credits accrue as of the date the statement of charges was issued and apply to any custodial term imposed for the VOP and the offense committed while on probation. Id. at 447, 462 (extending the holding in State v. Hernandez, 208 N.J. 24, 47-48 (2011), to VOP cases).

13. Reversal of a Conviction on Appeal. When a defendant is incarcerated awaiting retrial after successfully challenging a conviction, and the defendant is not serving time for any other valid conviction, the court must award jail credit for time spent incarceration from the date of reversal to the date of resentencing. State v. Rippy, 431 N.J. Super. 338, 350-51 (App. Div. 2013), certif. denied, 217 N.J. 284 (2014). North Carolina v. Pearce, 395 U.S. 711, 718-19, 89 S. Ct. 2072, 2077, 23 L. Ed. 2d 656, 665-66 (1969); State v. DeRosa, 332 N.J. Super. 426, 433-35 (App. Div. 2000). The defendant is also entitled to day-for-day credit for the time served on the reversed conviction (commonly called prior service credit). North Carolina v. Pearce, 395 U.S. 711, 718-19, 89 S. Ct. 2072, 2077, 23 L. Ed. 2d 656, 666 (1969); State v. Sanders, 107 N.J. 609, 621 (1987); State v. Rippy, 431 N.J. Super. 338, 355 (App. Div. 2013),

certif. denied, 217 N.J. 284 (2014). For additional discussion of prior service credit, see Chapter XVIII, Direct Appeal by a Defendant.

14. State Appeal of Jail Credits. "[T]he State may appeal an award of jail credits on the ground that they are not authorized by Rule 3:21-8." State v. Rippy, 431 N.J. Super. 338, 343 (App. Div. 2013), certif. denied, 217 N.J. 284 (2014).

15. Incarceration as a Condition of Probation. Time spent in jail awaiting sentencing must be applied to reduce a term of imprisonment imposed as a condition of probation. State v. Carlough, 183 N.J. Super. 234, 235-36 (App. Div. 1982).

16. Intensive Supervision Program Violation. A defendant who committed a crime while participating in the Intensive Supervision Program (N.J.S.A. 2C:43-11) is entitled to jail credits for any time between the date of arrest and either the date of sentencing for the offense or the date of sentencing for the violation of the Intensive Supervision Program. State v. Adams, 436 N.J. Super. 106, 113-15, certif. denied, 220 N.J. 101 (2014).

D. Gap-Time Credit: Case Law

1. Gap-Time Credit Described. "The credit awarded under N.J.S.A. 2C:44-5(b) is referred to as 'gap-time credit' because it awards a defendant who is given two separate sentences on two different dates credit toward the second sentence for the time spent in custody since he or she began serving the first sentence." State v. Hernandez, 208 N.J. 24, 38 (2011). The "credits apply towards the defendant's aggregate sentence, which is calculated as the length of the defendant's longest term when he or she is ordered to serve multiple sentences concurrently and is equal to the sum of all terms when he or she is ordered to serve multiple sentences consecutively." Ibid. (internal quotations omitted).

2. Gap-Time Credits Reduce the "Back End" of a Sentence. "Unlike jail credits, gap-time credits are applied to the 'back end' of a sentence." State v. Hernandez, 208 N.J. 24, 38 (2011). If the court did not impose a parole ineligibility term, "gap-time credits will advance the date on which a defendant first becomes eligible for parole." State v. Rippy, 431 N.J. Super. 338, 348 (App. Div. 2013) (quoting State v.

Hernandez, 208 N.J. 24, 38-39 (2011)), certif. denied, 217 N.J. 284 (2014). While the rule may result in a windfall to defendants in some cases, the gap-time statute provides a uniform, bright-line rule that avoids the need to explain any delay or the parties' motives. State v. Franklin, 175 N.J. 456, 463-64 (2003).

3. Policy of Gap-Time Credit. Gap-time credits counteract any dilatory tactics of the prosecutor in pursuing a conviction of an earlier offense after the defendant has been sentenced on another offense. State v. Hernandez, 208 N.J. 24, 37-38 (2011). The purpose is to avoid manipulation of trial dates to the disadvantage of defendants and to put defendants in the same position as if the two offenses had been tried at the same time. State v. Franklin, 175 N.J. 456, 462 (2003); State v. Carreker, 172 N.J. 100, 105 (2002). Additionally, the gap-time statute is intended to limit the accumulation of consecutive sentences. State v. L.H., 206 N.J. 528, 546 (2011) (Rivera-Soto, J., concurring with the per curiam decision and quoting Richardson v. Nickolopoulos, 110 N.J. 241, 243 (1988) (Richardson II) and Booker v. N.J. State Parole Bd., 136 N.J. 257, 260 (1994)).

4. Gap-Time Credits Are Mandatory. If the three elements of the gap-time statute are met (i.e., the defendant has been sentenced to prison, the defendant is subsequently sentenced to another prison term, and the subsequent sentence is for an offense that occurred prior to the imposition of the first sentence and not while in custody) then the court must award gap-time credits for the time the defendant spent incarcerated from imposition of the first sentence until imposition of the subsequent sentence. State v. Franklin, 175 N.J. 456, 462 (2003); State v. Carreker, 172 N.J. 100, 105 (2002). "The only exceptions have been cases in which . . . there was little or no risk of manipulation by the prosecutor." State v. L.H., 206 N.J. 528, 532 (2011) (Long, J., concurring with the per curiam decision denying the defendant gap-time credit and explaining that "manipulation by the prosecutor was a veritable impossibility" because DNA testing that was not available until ten years after the crime showed that L.H.'s DNA matched DNA from the crime).

5. Jail Credit Is No Substitute for Gap-Time Credit. "[W]here gap-time credits are applicable, the judge has no discretion to award jail credits instead." State v. Rippy, 431 N.J. Super. 338 (App. Div. 2013) (citing to State v. Hernandez, 208 N.J. 24, 48-49 (2011)), certif. denied, 217 N.J. 284 (2014). See also

State v. Edwards, 263 N.J. Super. 256, 258 (App. Div. 1993) (explaining that gap-time credits include only the period of incarceration between imposition of the first and second sentence, not time spent in jail pending imposition of the earlier sentence).

6. Consecutive Terms. Gap-time credits "reduce the aggregate of consecutive sentences" and concurrent sentences. Booker v. N.J. State Parole Bd., 136 N.J. 257, 266 (1994).

7. Parole Ineligibility Period Unaffected by Gap-Time Credit. Gap-time credits do not reduce a parole bar. State v. Hernandez, 208 N.J. 24, 39 (2011); Booker v. N.J. State Parole Bd., 136 N.J. 257, 263 (1994). This rule applies to the 85% period of parole ineligibility mandated by the No Early Release Act (NERA). State v. Hernandez, 208 N.J. 24, 38-39 (2011); Meyer v. N.J. State Parole Bd., 345 N.J. Super. 424, 429-30 (App. Div. 2001), certif. denied, 171 N.J. 339 (2002).

> **Equal Protection.** This rule may result in similarly situated defendants reaching parole eligibility dates at different times. Richardson v. Nickolopoulos, 110 N.J. 241, 250-52 (1988) (Richardson II). But the rule does not violate a defendant's equal protection rights. Lorenzo v. Edmiston, 705 F. Supp. 209, 215 (D.N.J.), aff'd, 882 F.2d 511 (3d Cir. 1989).

8. First Sentence Complete. The plain language of the gap-time statute (N.J.S.A. 2C:44-5(b)(2)) does not require "that [a] defendant be serving the original sentence when the later sentence is imposed." State v. L.H., 206 N.J. 528, 530-31 (Long, J., concurring). The majority of decisions have held that gap-time credit applies even when the defendant has completed the first sentence. State v. L.H., 206 N.J. 528, 530-31 (Long, J., concurring and referring to State v. Lawlor, 222 N.J. Super. 241, 245 (App. Div. 1988), State v. Ruiz, 355 N.J. Super. 237, 242 (Law Div. 2002), and State v. French, 313 N.J. Super. 457, 463 n.7 (Law Div. 1997)). But see State v. Garland, 226 N.J. Super. 356, 361 (App. Div. 1988) (stating in dictum that gap-time credit "relates to time spent in imprisonment as a result of a sentence previously imposed and has no application unless defendant, while incarcerated, is sentenced for an offense occurring before the prior sentence").

9. Violation of Probation. A defendant is entitled to gap-time credit when the offense for which sentence is imposed was a

violation of probation that the defendant committed prior to the imposition of sentence on another violation of probation. State v. Oqletree, 435 N.J. Super. 11, 15-16 (App. Div.), certif. denied, 220 N.J. 40 (2014); State v. Guaman, 271 N.J. Super. 130, 131 (App. Div. 1994).

10. Violation of Parole. A defendant is entitled to gap-time credit for the period served in custody following an arrest for a violation of parole until sentencing on the original underlying offense. State v. Franklin, 175 N.J. 456, 471-72 (2003). However, the defendant may not receive gap-time credit for any new offense committed while on parole. Ibid.; State v. Hunt, 272 N.J. Super. 182, 185 (App. Div.), certif. denied, 137 N.J. 307 (1994).

11. Non-Indictable Offenses. Gap-time credit may be awarded for time served in State prison as a result of a sentence imposed by a municipal court on non-indictable offenses. State v. French, 313 N.J. Super. 457, 463-67 (Law Div. 1997).

12. Incarceration Due to a Motor Vehicle Violation. Gap-time credit applies when the first incarceration was the result of a Title 39 driving while intoxicated violation. State v. Walters, 445 N.J. Super. 596, 600-02 (App. Div. 2016), ___ certif. denied, ___ (2017). The incarceration need not be the result of a Title 2 crime to entitle the defendant to a gap-time credit award. Ibid.

13. Actual Incarceration. Gap-time credits are not due where the defendant commits the second offense prior to the start of the defendant's actual incarceration. State v. Hall, 206 N.J. Super. 547, 550-51 (App. Div. 1985) (denying credit where the defendant committed the second offense while on bail during the pendency of an appeal challenging the conviction for the first offense).

14. Sentences in Foreign Jurisdictions. The gap-time provision does not apply to time served on a foreign sentence because the gap-time statute is directed at New Jersey sentencing authorities who have no jurisdiction to aggregate out-of-state sentences. State v. Carreker, 172 N.J. 100, 114 (2002). Further, the Interstate Agreement on Detainers protects defendants serving out-of-state sentences from prosecutorial delay. Ibid.

15. Young Adult Offender. When a young adult offender is sentenced to an indeterminate term pursuant to N.J.S.A. 2C:43-5, gap-time credit will reduce the maximum length of the aggregate indeterminate term. Mitnaul v. N.J. Parole Bd., 280 N.J. Super. 164, 166 (App. Div. 1995).

16. Credits Determined by the Court. As with other types of sentencing credits, gap-time credits must be awarded by the court at sentencing. The Parole Board is not responsible for awarding these credits; it computes the parole eligibility date on the basis of the reduced aggregate sentence. Booker v. N.J. State Parole Bd., 136 N.J. 257, 265-66 (1994).

XVII. MOTION TO CHANGE A SENTENCE

Within sixty days of the judgment of conviction the defendant may request the sentencing court to change the sentence imposed. After the sixty-day period has expired, the defendant may file a motion to change a sentence for limited reasons. Section A discusses court rules regarding a motion to change a sentence, and section B discusses relevant case law.

A. Motion to Change a Sentence: Court Rules

1. Court Rule Authorizing a Motion to Change a Sentence Within Sixty Days. Rule 3:21-10(a) provides that "a motion to reduce or change a sentence shall be filed not later than 60 days after the date of the judgment of conviction. The court may reduce or change a sentence, either on motion or on its own initiative, by order entered within 75 days from the date of the judgment of conviction and not thereafter."

2. Court Rule Authorizing a Motion to Change a Sentence at Any Time. Rule 3:21-10(b) provides that the trial court may hear a motion at any time to:

(1) Permit entry of an incarcerated defendant "into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse";

(2) Permit the release of an incarcerated defendant "because of illness or infirmity of the defendant";

(3) Change a sentence "for good cause shown upon the joint application of the defendant and prosecuting attorney";

(4) Change a sentence "as authorized by the Code of Criminal Justice";

(5) Correct a sentence "not authorized by law";

(6) Permit an incarcerated defendant to enter the Intensive Supervision Program (N.J.S.A. 2C:43-11); or

(7) Change or reduce "a sentence when a prior conviction has been reversed on appeal or vacated by collateral attack."

Hearing Generally Not Required. The court need not hold a hearing on a motion to change a sentence pursuant to Rule 3:21-10(b) unless the "interest of justice" requires otherwise. R. 3:21-10(c). If the court holds a hearing, the defendant need not be present. R. 3:16(b).

3. Pending Appeal Does Not Preclude a Motion to Change a Sentence. Upon notice to the Appellate Division, the trial court may consider a motion to change a sentence while an appeal is pending. R. 3:21-10(d).

4. Sentence Changes Must Be Placed on the Record. "All changes of sentence shall be made in open court upon notice to the defendant and the prosecutor. An appropriate order setting forth the revised sentence and specifying the change made and the reasons therefor shall be entered on the record." R. 3:21-10(c).

B. Motion to Change a Sentence: Case Law

1. Double Jeopardy. Rule 3:21-10(b) authorizes a change in sentence "at any time." The Rule does not negate, however, the double jeopardy prohibition against adding a punitive term to a sentence that the defendant has completed. State v. Schubert, 212 N.J. 295, 309-10 (2012).

2. Transfer to a Drug or Alcohol Treatment Program. To obtain transfer to a treatment program pursuant to Rule 3:21-10(b)(1), the defendant must establish present addiction. State v. Davis, 68 N.J. 69, 85-86 (1975). The court must then determine whether the purposes of a custodial sentence "outweigh the interests sought to be served by transfer to" a treatment program. Ibid. Accord State v. McKinney, 140 N.J. Super. 160, 163 (App. Div. 1976); State v. Williams, 139 N.J. Super. 290, 299 (App. Div. 1976), aff'd o.b., 75 N.J. 1 (1977). The court should consider: "(a) the involved crime, its seriousness and attendant circumstances; (b) defendant's prior record -- criminal and addictive; (c) potential threat posed to society by defendant's release; (d) the bona fides of the application; (e) the likelihood or probability of successful treatment; (f) prior treatment record, and (g) the failure or success of prior

treatment." State v. Williams, 139 N.J. Super. 290, 299-300 (App. Div. 1976), aff'd o.b., 75 N.J. 1 (1977).

(a) Minimum Terms and Transfer to a Treatment Program. The court may not consider a request to transfer to a drug or alcohol treatment facility prior to the expiration of a parole ineligibility term mandated by statute, but the court may consider an application prior to the expiration of a parole ineligibility term that was imposed at the sentencing court's discretion. State v. Brown, 384 N.J. Super. 191, 194-96 (App. Div. 2006); State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986).

(b) Violation of Terms of a Treatment Program. If after transfer to a noncustodial treatment center the defendant violates a term of treatment, the court may reinstate the original sentence. State v. Williams, 299 N.J. Super. 264, 270 (App. Div. 1997).

3. Changed Circumstances. To obtain a transfer to a drug or alcohol treatment program pursuant to Rule 3:21-10(b)(1), or to obtain a change in sentence due to illness pursuant to Rule 3:21-10(b)(2), the defendant must show that there has been a change in circumstances since the date of sentencing. State v. Kent, 212 N.J. Super. 635, 641 (App. Div.), certif. denied, 107 N.J. 65 (1986).

4. Change Authorized by the Code. Rule 3:21-10(b)(4), which allows a change of sentence "as authorized by the Code," does not apply where the Legislature creates a new offense with a more lenient sentence provision than the one the defendant was sentenced under. State v. James, 343 N.J. Super. 143, 147-48 (App. Div. 2001).

XVIII. DIRECT APPEAL BY A DEFENDANT

A criminal defendant may challenge the sentence on direct appeal (see sections A and D). Claims fall into two general categories: those that challenge the sentence as excessive and those that challenge the sentence as illegal (see sections B and C). If the defendant succeeds on appeal, principles of double jeopardy prohibit a court from imposing a harsher sentence on remand than the court initially imposed, unless the defendant had no expectation of finality in the initial sentence (see section E).

A. Direct Appeal by a Defendant of a Sentence: Court Rules and Statutory Provisions

1. Court Rule Authorizing Direct Appeal by a Criminal Defendant. Rule 2:3-2 provides: "In any criminal action, any defendant, the defendant's legal representative, or other person aggrieved by the final judgment of conviction entered by the Superior Court, including a judgment imposing a suspended sentence, . . . may appeal or, where appropriate, seek leave to appeal, to the appropriate appellate court."

2. Statutory Authority for the Appellate Division to Hear Appeals. N.J.S.A. 2C:44-7 vests the appellate courts with authority to review "[a]ny action taken by the court in imposing sentence." "The [appellate] court shall specifically have the authority to review findings of fact by the sentencing court in support of its finding of aggravating and mitigating circumstances and to modify the defendant's sentence upon his [or her] application where such findings are not fairly supported on the record." N.J.S.A. 2C:44-7.

3. Court Rule Regarding Remand and Original Jurisdiction. Rule 2:10-3 provides: "If a judgment of conviction is reversed for error in or for excessiveness or leniency of the sentence, the appellate court may impose such sentence as should have been imposed or may remand the matter to the trial court for proper sentencing."

B. Excessive Sentence Challenges: Case Law

Excessive Sentence Challenges Described. An excessive sentence claim challenges the harshness of a sentence that is "within the range permitted by the verdict or plea." State v. Hess, 207 N.J. 123, 145 (2011). An excessive sentence challenge must be asserted on direct appeal; it will not be heard in a post-conviction relief petition. Ibid.

C. Illegal Sentence Challenges: Case Law

1. Illegal Sentence Challenges Described. "There are two categories of illegal sentences: (1) those that exceed the penalties authorized by statute for a particular offense and (2) those that are not in accordance with the law, or stated differently, those that include a disposition that is not authorized by our criminal code." State v. Schubert, 212 N.J. 295, 308 (2012) (citing State v. Murray, 162 N.J. 240, 246-47 (2000)). Accord State v. Acevedo, 205 N.J. 40, 45 (2011) (quoting State v. Murray, 162 N.J. 240, 247 (2000)). An illegal sentence may be corrected at any time. State v. Tavares, 286 N.J. Super. 610, 619 (App. Div.), certif. denied, 144 N.J. 376 (1996). A challenge that attacks the court's exercise of discretion does not fall within the illegal-sentence category and must be asserted on direct appeal. State v. Ellis, 346 N.J. Super. 583, 588 (App. Div.), aff'd o.b., 174 N.J. 535, 536 (2002).

2. Time in Which to File an Illegal Sentence Challenge. A defendant may file a petition to correct an illegal sentence at any time before the defendant completes the sentence. R. 3:21-10(b)(5); State v. Schubert, 212 N.J. 295, 313 (2012); State v. Crawford, 379 N.J. Super. 250, 257 (App. Div. 2005).

3. Illegal Sentence May Not Be Ignored. "[A] reviewing court is not free to ignore an illegal sentence." State v. Moore, 377 N.J. Super. 445 (App. Div. 2005). "[S]o long as the issue of defendant's sentence is properly before the court, the court may correct an illegal sentence, even by increasing the term." State v. Kirk, 243 N.J. Super. 636, 643 (App. Div. 1990). Accord State v. Tavares, 286 N.J. Super. 610, 619 (App. Div.), certif. denied, 144 N.J. 376 (1996).

4. Merger Is a Matter of Legality. Failure to merge offenses results in an illegal sentence. State v. Romero, 191 N.J. 59, 80 (2007).

5. Legality of Sentence Based on an Unclear Verdict. Where the facts support a conviction for a third and second degree offense, and the verdict does not state which one the jury convicted the defendant of violating, it is a question of legality whether the court erred in imposing sentence for a second degree crime. State v. Eure, 304 N.J. Super. 469, 473 (App. Div.), certif. denied, 152 N.J. 193 (1997).

6. Illegal Sentence Based on Considerations Beyond the Code. A sentence based on a fact unrelated to the Code's sentencing criteria is illegal. State v. Wilson, 206 N.J. Super. 182, 184 (App. Div. 1985) (finding illegal a sentence based "entirely" on the defendant's failure to appear at the sentencing hearing).

7. Failure to Provide a Rationale Does Not Make the Term Illegal. The court's failure to provide its rationale for a sentence does not render the sentence illegal. State v. Acevedo, 205 N.J. 40, 45-47 (2011).

8. A Plea Agreement May Not Provide for an Illegal Sentence. The court may not enforce a plea agreement that results in an illegal sentence. State v. Manzie, 335 N.J. Super. 267, 278 (App. Div. 2000); State v. Nemeth, 214 N.J. Super. 324, 327 (App. Div. 1986).

9. Lack of Factual Basis for a Plea Does Not Make a Sentence Illegal. "As long as a guilty plea is knowing and voluntary, . . . a court's failure to elicit a factual basis for the plea is not necessarily of constitutional dimension and thus does not render illegal a sentence imposed without such a basis. A factual basis is constitutionally required only when there are indicia, such as a contemporaneous claim of innocence, that the defendant does not understand enough about the nature of the law as it applies to the facts of the case to make a truly 'voluntary' decision on his [or her] own." State v. Mitchell, 126 N.J. 565, 577-78 (1992).

10. Failure to Advise a Sex Offender of a Parole Consequence Does Not Render a Sentence Illegal. Failure to inform a sex offender of the parole consequences of a sentence to the Adult

Diagnostic and Treatment Center does not result in an illegal sentence. State v. Lark, 117 N.J. 331, 341 (1989).

11. An Indeterminate Term Is Generally Illegal. "Except for young adult offenders, who may be sentenced to an indeterminate term, N.J.S.A. 2C:43-5, and except for sentences of life imprisonment, Chapters 43 and 44 [of Title 2C] require that a specific term of years be fixed for custodial sentences." State v. Dittmar, 188 N.J. Super. 364, 366-67 (App. Div. 1982). Thus, a sentence that requires sex offender treatment at the Adult Diagnostic and Treatment Center "for an indeterminate term not to exceed ten years" is an illegal sentence. Id. at 365.

12. Lawful and Unlawful Basis for a Sentence. If the court imposed an extended term on two alternative grounds, the extended term will not be vacated on appeal so long as one basis was lawful. State v. Guzman, 313 N.J. Super. 363, 384-85 (App. Div.), certif. denied, 156 N.J. 424 (1998) (affirming an extended term based on the court's discretionary authority, even though the sentencing court erred in finding that the Graves Act mandated an extended term).

13. Order in Which Sentences Must Be Served Is Not a Matter of Legality. "Although specification that the less restrictive sentence be served prior to the more restrictive sentence is not illegal, it may, on a particular occasion, constitute an abuse of discretion." State v. Ellis, 346 N.J. Super. 583, 597 (App. Div.), aff'd o.b., 174 N.J. 535, 536 (2002) (noting that "[i]n a very real sense, directing that a less restrictive sentence be served prior to the more restrictive sentence is akin to the discretionary imposition of an additional period of parole ineligibility").

14. Consecutive Term Challenges Do Not Relate to Legality of the Sentence. The claim that consecutive sentences are inconsistent with the Yarbough guidelines is a challenge to the court's exercise of discretion, not to the legality of the sentences. State v. Ellis, 346 N.J. Super. 583, 596 (App. Div.), aff'd o.b., 174 N.J. 535, 536 (2002).

15. Sentence for a Violation of Probation May Be Illegal. A sentence that does not comply with the requirements set forth in Baylass and Molina, is a sentence not authorized by law. State v. Ervin, 241 N.J. Super. 458, 474-75 (App. Div. 1989), certif. denied, 121 N.J. 634 (1990). See State v. Molina, 114 N.J. 181, 182-83 (1989), and State v. Baylass, 114 N.J. 169, 170-71 (1989)

(holding that when resentencing after a violation of probation (VOP), the court may not consider the VOP as an aggravating factor, but rather, must assess how the VOP affects the weight accorded to the mitigating factors identified at the initial sentencing hearing).

16. Denial of Gap-Time Credits Renders a Sentence Illegal. Challenges to gap-time credits "pertain to the legality of the sentence imposed." State v. Shabazz, 263 N.J. Super. 246, 251 (App. Div.), certif. denied, 133 N.J. 444 (1993).

17. Conflict of Interest Is Not a Matter of Sentence Legality. "[A] potential conflict of interest by a defense attorney does not affect the legality of a sentence." State v. Murray, 162 N.J. 240, 243 (2000).

18. Creation of a New Offense Does Not Render Illegal the Sentence Imposed. Where the Legislature creates a new offense similar to the one that the defendant violated, but with a more lenient sentence, the defendant's harsher sentence is not rendered illegal. State v. James, 343 N.J. Super. 143, 147-48 (App. Div. 2001).

19. Enhanced DWI Sentence Based on a Prior Uncounseled Guilty Plea Is Erroneous, But Not Illegal. Under State constitutional law, and "[i]n the context of repeat DWI offenses, . . . the enhanced administrative penalties and fines may constitutionally be imposed but . . . the actual period of incarceration imposed may not exceed that for any counseled DWI convictions." State v. Hrycak, 184 N.J. 351, 362 (2005) (quoting and reaffirming State v. Laurick, 120 N.J. 1, 16, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990); State v. Thomas, 401 N.J. Super. 180, 184 (Law Div. 2007). An enhanced jail term based on an uncounseled prior conviction is not an illegal sentence, however. State v. Bringhurst, 401 N.J. Super. 421, 431 (App. Div. 2008).

20. A Sentence Is Illegal if Based on an Erroneous Predicate Finding. Where the court errs in imposing a sentence that does not comply with the statutory mandates for a repeat DWI offender, a later court sentencing on a subsequent drunk driving offense must consider the sentence that the prior court should have imposed, not the erroneous sentence that the court actually imposed. State v. Nicolai, 287 N.J. Super. 528, 531-32 (App. Div. 1996). To find otherwise would result in another illegal sentence. Ibid.

21. Cruel and Unusual Punishment. The Eighth Amendment of the United States Constitution circumscribes the criminal process in three ways: "it limits the kind of punishment that may be imposed on those convicted of crimes, . . . proscribes punishment that is grossly disproportionate to the severity of the crime," and "imposes substantive limits on what may be made criminal and punished as such." Ingraham v. Wright, 430 U.S. 651, 667, 97 S. Ct. 1401, 1410, 51 L. Ed. 2d 711, 727-28 (1977).

22. Cruel and Unusual Punishment, Federal Gross Disproportionality Test. In determining whether a sentence for a term of years violates the Eighth Amendment, the United States Supreme Court has "not established a clear or consistent path for courts to follow." Lockyer v. Andrade, 538 U.S. 63, 72, 123 S. Ct. 1166, 1173, 155 L. Ed. 2d 144, 155 (2003). However, the one governing legal principle has been that a "gross disproportionality" standard applies to such a sentence. 538 U.S. at 72, 123 S. Ct. at 1173, 155 L. Ed. 2d at 156. But see Harmelin v. Michigan, 501 U.S. 957, 965, 111 S. Ct. 2680, 2686, 115 L. Ed. 2d 836, 846 (1991) (Scalia, J., with Rehnquist, C.J., joining) (stating that the Eighth Amendment contains no proportionality guarantee).

> **Factors Relating to Gross Disproportionality.** The Court has "exhibit[ed] a lack of clarity regarding what factors may indicate gross disproportionality." Lockyer v. Andrade, 538 U.S. at 72, 123 S. Ct. at 1173, 155 L. Ed. 2d at 156. In Solem v. Helm, 463 U.S. 277, 290-91, 103 S. Ct. 3001, 3010, 77 L. Ed. 2d 637, 649-50 (1983), the Court proposed a three-prong analysis that requires a court to compare: (1) the gravity of the offense committed to the sentence imposed; (2) the sentence imposed to those imposed for similar offenses in the same jurisdiction; and (3) the sentence imposed to those imposed for similar offenses in other jurisdictions. But see Harmelin v. Michigan, 501 U.S. at 1005, 111 S. Ct. at 2707, 115 L. Ed. 2d at 871-72 (Kennedy, J., with O'Connor, J., and Souter, J.J., joining) (stating that only the second and third Solem factors need be applied, and only in the rare case when there may be a gross disproportionality between the crime committed and the sentence imposed); Ewing v. California, 538 U.S. 11, 23-24, 123 S. Ct. 1179, 1186-87, 155 L. Ed. 2d 108, 119 (2003) (plurality opinion) (applying the proportionality principles distilled in Justice Kennedy's concurrence in

Harmelin to a sentence imposed under a state's "Three Strikes" law).

24. Cruel and Unusual Punishment, New Jersey Three-Part Test. New Jersey courts consider the following three factors in assessing a claim of cruel and unusual punishment: "first, whether the punishment conforms with contemporary standards of decency; second, whether the punishment is grossly disproportionate to the offense; and third, whether the punishment goes beyond what is necessary to accomplish any legitimate penological objective." State v. Johnson, 166 N.J. 523, 548 (2001) (citing State v. Maldonado, 137 N.J. 536, 556-57 (1994)).

D. Standards Relating to Direct Appeal of a Sentence: Case Law

1. Standard of Review. In reviewing a sentence, the appellate court must make sure the lower court followed the sentencing guidelines and made findings consistent with the evidence. State v. Roth, 95 N.J. 334, 363-65 (1984). The reviewing court should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014); State v. Gerstofer, 191 N.J. Super. 542, 545 (App. Div. 1983) (holding that the appellate court defers to the trial court's findings of fact regardless of which party files the appeal), certif. denied, 96 N.J. 310 (1984). If the sentencing court "follow[ed] the Code and the basic precepts that channel sentencing discretion," the reviewing court should affirm the sentence, so long as the sentence does not "shock the judicial conscience." State v. Case, 220 N.J. 49, 65 (2014). Accord State v. Lawless, 214 N.J. 594, 606 (2013); State v. Cassady, 198 N.J. 165, 180 (2009); State v. Roach, 146 N.J. 208, 230, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996); State v. Roth, 95 N.J. 334, 363-65 (1984).

2. Aggregate Term. A reviewing court may find that while the sentence on each count standing alone was justified, the aggregate term of incarceration shocks the judicial conscience and requires a reversal. State v. Candelaria, 311 N.J. Super. 437, 454-55 (App. Div.), certif. denied, 155 N.J. 587 (1998) (finding that an extended term of life imprisonment with a twenty-five-year parole disqualifier and six consecutive terms was excessive in the aggregate).

3. Real-Time Consequences and Parole Ineligibility. In reviewing a sentence, the court should consider the real-time consequence of a parole disqualifier. State v. Lee, 411 N.J. Super. 349, 351 (App. Div. 2010).

4. Original Jurisdiction. The appellate court's jurisdiction to review sentences includes the power to make new findings of fact, to reach independent determinations of the facts, and to supplement the record on appeal. State v. Jarbath, 114 N.J. 394, 412 (1989); R. 2:10-3. However, the court should "frugally" exercise this power and must explain its reason for doing so and its basis for the newly imposed sentence. State v. Jarbath, 114 N.J. 394, 412 (1989).

5. Remand Is Preferred. "[T]he exercise of appellate original jurisdiction over sentencing should not occur regularly or routinely; . . . a remand to the trial court for resentencing is strongly to be preferred." State v. Jarbath, 114 N.J. 394, 411 (1989). Accord State v. Thomas, 195 N.J. 431, 437 (2008); State v. Abrams, 256 N.J. Super. 390, 403-04 (App. Div.), certif. denied, 130 N.J. 395 (1992). When "a remand will work an injustice by continuing" the defendant's incarceration, then it is appropriate for an appellate court to exercise original jurisdiction and resentence the defendant. State v. L.V., 410 N.J. Super. 90, 113 (App. Div. 2009), certif. denied, 201 N.J. 156 (2010).

6. Absence of a Verbatim Record. The absence of a verbatim sentencing transcript does not, by itself, prohibit meaningful appellate review or require a remand for reconstruction of the record. State v. Vasquez, 265 N.J. Super. 528, 561 (App. Div.), certif. denied, 134 N.J. 480 (1993).

7. Challenge to the Factual Basis of a Plea on Direct Appeal. "Challenges to the sufficiency of the factual basis for a guilty plea are most commonly brought by way of a motion to the trial court to withdraw that plea." State v. Urbina, 221 N.J. 509, 527 (2015). However, "a defendant may also challenge the sufficiency of the factual basis for his guilty plea on direct appeal." Id. at 527-28.

8. Rejected Pleas Are Irrelevant in Sentencing. "[T]he pre-trial plea proposal offered to, and rejected by, [a] defendant does not impugn the post-trial sentences. Rejected plea offers may not be considered as a factor in determining whether a

sentence is excessive." State v. Pennington, 154 N.J. 344, 362-63 (1998).

9. Appeal by a Co-Defendant.

(a) The Law-of-the-Case Doctrine. Where a co-defendant files a separate appeal first, the law-of-the-case doctrine does not preclude the appellate panel from hearing the second appeal. State v. K.P.S., 221 N.J. 266, 270 (2015). The doctrine "was not intended to deny a defendant the opportunity to be heard on his separate appeal, even if the co-defendant unsuccessfully raised the same issue on the same record." Ibid.

(b) Real-Time Consequences and Disparity Claim. In considering a co-defendant's claim that the court imposed disparate sentences, the reviewing court must consider the real-time consequences of the sentences. State v. Bessix, 309 N.J. Super. 126, 130-31 (App. Div. 1998); State v. Salentre, 275 N.J. Super. 410, 425 (App. Div.), certif. denied, 138 N.J. 269 (1994).

(c) Unequal Sentences Among Co-Defendants. When a comparison of co-defendant's sentences reveals "grievous inequities," the greater sentence may be deemed excessive. State v. Roach, 167 N.J. 565, 570 (2001) (Roach II); State v. Hicks, 54 N.J. 390, 391-92 (1969). A disparate sentence based solely on the reason that the defendants did not deserve similar sentences, even though the defendants were similar for sentencing purposes, is insufficient to justify disparate terms. State v. Roach, 146 N.J. 208, 232-33, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996).

(d) Cooperation of One Defendant. A co-defendant's cooperation with law enforcement may explain a sentencing disparity. State v. Williams, 317 N.J. Super. 149, 159 (App. Div. 1998), certif. denied, 157 N.J. 647 (1999); State v. Gonzalez, 223 N.J. Super. 377, 393 (App. Div.), certif. denied, 111 N.J. 589 (1988).

10. Conditional Plea. When a defendant enters a guilty plea and intends to appeal an issue, other than a search and seizure issue, the defendant must enter a conditional plea with the court's approval and consent of the prosecutor. State v. Benjamin, 442 N.J. Super. 258, 263 (App. Div. 2015) (explaining

that "[o]rdinarily, the failure to enter a conditional plea would bar appellate review of other than search and seizure issues"), affirmed as modified, ___ N.J. ___ (2017). If the defendant failed to enter a conditional plea, the court may hear the appeal to avoid an injustice. Id. at 263-64.

E. Double Jeopardy Concerns on Remand: Case Law

1. Double Jeopardy General Rule. "The double jeopardy provisions of both the United States and New Jersey Constitutions protect against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." State v. Eigenmann, 280 N.J. Super. 331, 336-37 (App. Div. 1995); United States v. DiFrancesco, 449 U.S. 117, 129, 101 S. Ct. 426, 433, 66 L. Ed. 2d 328, 340 (1980). See also N.J.S.A. 2C:1-9 to -12. For purposes of sentencing, double jeopardy generally "attaches once a defendant begins to serve a prison term or the sentence is partially executed." State v. Young, 379 N.J. Super. 498, 505 (App. Div. 2005), (referring to State v. Ryan, 86 N.J. 1 (1981), remanded on other grounds, 188 N.J. 349 (2006)).

2. No Expectation of Finality Rule. Double jeopardy does not prohibit a court from imposing a harsher sentence on remand when the defendant did not have an expectation of finality in the sentence originally imposed. State v. Roth, 95 N.J. 334, 344 (1984) (adopting the test in United States v. DiFrancesco, 449 U.S. 117, 133, 101 S. Ct. 426, 435, 66 L. Ed. 2d 328, 343 (1980)). Accord State v. Sanders, 107 N.J. 609, 18-20 (1987); State v. Young, 379 N.J. Super. 498, 505 (App. Div. 2005), remanded on other grounds, 188 N.J. 349 (2006).

3. Examples of No Expectation of Finality. The following cases discuss situations in which the defendant does not have an expectation of finality in the sentence:

> **(a) Appeal of Conviction and Sentence.** "[A] defendant who appeals his substantive conviction along with the corresponding sentence has no legitimate expectation of finality in either the underlying conviction or the corresponding sentence." State v. Haliski, 140 N.J. 1, 21 (1995).

(b) State's Right to Appeal. A defendant cannot expect a sentence to be final when pronounced if the State has a statutory right to appeal the sentence, as in the case of a term imposed pursuant to N.J.S.A. 2C:44-1(f)(2) (downgrading and lenient sentences). State v. Sanders, 107 N.J. 609, 619 (1987). If the State succeeds on appeal of a downgraded sentence, the court on remand may impose a sentence one degree higher than originally imposed without offending double jeopardy principles. Ibid.

(c) Illegal Sentence. "An illegal sentence that has not been completely served may be corrected at any time without impinging upon double-jeopardy principles." State v. Austin, 335 N.J. Super. 486, 494 (App. Div. 2000), certif. denied, 168 N.J. 294 (2001). A sentence that does not include a parole ineligibility term mandated by statute is an illegal sentence. Ibid. (finding error in a Graves Act sentence that did not include a mandatory parole ineligibility term). Accord State v. Robinson, 253 N.J. Super. 346, 358-59 (App. Div.), certif. denied, 130 N.J. 6 (1992).

(d) State Appeal of a Judgment Notwithstanding the Verdict. A defendant has no expectation of finality in the sentence imposed when the State appeals the entry of judgment notwithstanding the verdict pursuant to Rule 2:3-1(b)(3). State v. Cetnar, 341 N.J. Super. 257, 265 (App. Div.), certif. denied, 170 N.J. 89 (2001).

4. Harsher Sentence on Remand. The court may not impose a "substantially harsher" sentence on remand if the increased sentence is not required by law or is not supported by "any evidence of intervening conduct or prior oversight to justify the new sentence." State v. Heisler, 192 N.J. Super. 586, 592-93 (App. Div. 1984). Accord State v. Pindale, 279 N.J. Super. 123, 128-30 (App. Div.) (discussing North Carolina v. Pearce, 395 U.S. 711, 723, 89 S. Ct. 2072, 2079, 23 L. Ed. 2d 656, 668 (1969)), certif. denied, 142 N.J. 449 (1995)). To hold otherwise would effectively penalize a defendant for successfully challenging an illegal sentence. State v. Heisler, 192 N.J. Super. 586, 593 (App. Div. 1984). See also State v. Eigenmann, 280 N.J. Super. 331, 341 (App. Div. 1995) (holding that the court could not increase the part of a sentence based on a lawful, though mistaken, declaration that the defendant was a young adult offender, as that part of the sentence was not illegal). The court must specifically explain its rationale for

imposing a harsher sentence. State v. Pindale, 279 N.J. Super. 123, 129-30 (App. Div.), certif. denied, 142 N.J. 449 (1995).

5. Credits Due After a Successful Appel.

Prior Service Credit. When a court reverses a conviction for which the defendant endured imprisonment, the Fifth Amendment prohibition against double jeopardy requires a court to award the defendant day-for-day credit against the new sentence for the time served on the reversed conviction. North Carolina v. Pearce, 395 U.S. 711, 718-19, 89 S. Ct. 2072, 2077, 23 L. Ed. 2d 656, 665-66 (1969). This is commonly called prior service credit. State v. Rippy, 431 N.J. Super. 338, 354 (App. Div. 2013), certif. denied, 217 N.J. 284 (2014). Like jail credit, prior service credit is subtracted from the front end of a sentence. Id. at 355. Denial of prior service credit would effectively and erroneously penalize a defendant for exercising the State constitutional right to appeal. State v. DeRosa, 332 N.J. Super. 426, 432 (App. Div. 2000); Curry v. N.J. State Parole Bd., 309 N.J. Super. 66, 72 (App. Div. 1998).

Jail Credits. If the defendant remained incarcerated after successfully challenging a conviction, and was not serving time for any other valid conviction, then the defendant must be awarded jail credit for time served between reversal of the conviction and imposition of a new sentence. State v. Rippy, 431 N.J. Super. 338, 354 (App. Div. 2013), certif. denied, 217 N.J. 284 (2014). See Chapter XVI for further discuss on jail credits.

Gap-Time Credits. If the defendant served time on a successfully challenged conviction, and during that term of incarceration had charges pending for another offense (second offense) that was committed prior to imposition of the sentence that was later reversed, then the defendant would receive against the sentence for the second offense gap-time credit for time served on the reversed conviction. State v. Rippy, 431 N.J. Super. 338, 351 (App. Div. 2013), certif. denied, 217 N.J. 284 (2014). See Chapter XVI for further discuss on gap-time credits.

6. Restructuring the Sentence on Remand and Parole Ineligibility. Because "the basic sentencing issue is always the real time defendant must serve," on resentencing the court

may not restructure a sentence to impose a greater period of parole ineligibility than it imposed in the initial sentence. State v. Cooper, 402 N.J. Super. 110, 116-17 (App. Div. 2008) (quoting State v. Mosley, 335 N.J. Super. 144, 157 (App. Div. 2000), certif. denied, 167 N.J. 633, 772 (2001)). See also State v. Towey (II), 244 N.J. Super. 582, 598 (App. Div.) (explaining that where a defendant successfully challenges only the excessiveness of a parole disqualifier, the court on remand may not increase the base term), certif. denied, 122 N.J. 159 (1990).

7. Unmerged Offenses and the Aggregate Term. Where an appellate court finds that the sentencing court erroneously merged offenses, the court on remand may impose consecutive terms on the unmerged convictions, so long as the new sentence, in the aggregate, does not exceed the original aggregate term. State v. Crouch, 225 N.J. Super. 100, 107-08 (App. Div. 1988). But see State v. Loftin, 287 N.J. Super. 76, 113 (App. Div.) (explaining that the defendant might face a longer aggregate term on remand because the sentencing court had erroneously merged a first degree robbery conviction into a murder conviction, and on remand, the court had to impose sentence for the robbery conviction), certif. denied, 144 N.J. 175 (1996).

8. Merger and Reversal of the Greater Offense. "Because merger does not extinguish the merged offense, it follows that if the conviction on the greater offense is reversed and defendant is not retried on that offense, the State may request the trial court to unmerge the prior conviction of defendant on the lesser offense and proceed to sentence thereon." State v. Becheam, 399 N.J. Super. 268, 275 (Law Div. 2007). Accord State v. Harrington, 310 N.J. Super. 272, 280-81 (App. Div.), certif. denied, 156 N.J. 387 (1998). This principle also applies where the State retries the defendant on the greater offense and the jury acquits the defendant of that offense. State v. Becheam, 399 N.J. Super. 268, 275-76 (Law Div. 2007).

9. Considerations at Resentencing. Unless the remand order specifies otherwise, the trial court should consider the defendant as he or she stands on the day of resentencing. State v. Jaffe, 220 N.J. 114, 116 (2014); State v. Randolph, 210 N.J. 330, 354 (2012). Thus, the court may consider an updated presentence report, a current institutional report if the defendant is in custody, and any changed circumstances that occurred between the time of the initial sentencing and the resentencing. State v. Randolph, 210 N.J. 330, 354 (2012);

State v. Tavares, 286 N.J. Super. 610, 616 (App. Div.), certif. denied, 144 N.J. 376 (1996).

10. A Completed Sentence May Not Be Increased. The court may not add a punitive term to a sentence that the defendant has completed, even if the punitive term was mandated by statute and absence of it rendered the sentence illegal. State v. Schubert, 212 N.J. 295, 311-12 (2012) (holding that the court could not correct a sentence that did not include community supervision for life by imposing that term on a defendant who had completed his sentence, even though the Violent Predator Incapacitation Act, N.J.S.A. 2C:43-6.4, required that term be included in a sentence).

11. Restitution. A restitution award may be increased on resentencing without offending double jeopardy principles. State v. Rhoda, 206 N.J. Super. 584, 590 (App. Div.), certif. denied, 105 N.J. 524 (1986).

12. Discrepancy Between the Sentencing Transcript and Judgment of Conviction. Where a defendant challenges a judgment of conviction as including a period of parole ineligibility that the sentencing court did not verbally impose at the sentencing hearing, the matter may be remanded without offending principles of double jeopardy to correct the judgment if "the record sufficiently indicates an expression of" the sentencing court's "intent to have imposed a discretionary parole ineligibility term at the time of sentencing." State v. Womack, 206 N.J. Super. 564, 571 (App. Div. 1985), certif. denied, 103 N.J. 482 (1986).

XIX. APPEAL BY THE STATE IN CRIMINAL CASES

Double jeopardy principles restrict the State's ability to challenge a defendant's sentence (see sections C and D). The State may file an appeal of a sentence in limited situations set forth in court rules and statutes (see sections A and B). If the State successfully challenges a sentence, double jeopardy principles will likely prohibit a court from imposing a harsher sentence on remand than the court initially imposed, unless the defendant had no expectation of finality in the initial sentence (see section D).

A. Appeal by the State: Court Rules

1. Court Rule Regarding State Appeals in a Criminal Case. Rule 2:3-1(b) authorizes the State to file an appeal "to the appropriate appellate court from" the following:

> (1) A judgment "dismiss[ing] an indictment, accusation or complaint, where not precluded by the constitution of the United States or of New Jersey";
>
> (2) A pretrial order entered in accordance with Rule 3:5 (search warrants);
>
> (3) A judgment of acquittal pursuant to Rule 3:18-2 following a guilty verdict;
>
> (4) "[A] judgment in a post-conviction proceeding collaterally attacking a conviction or sentence";
>
> (5) "[A]n interlocutory order entered before, during or after trial"; or
>
> (6) "[A]s otherwise provided by law."

2. Court Rule Authorizing Appeals to the Supreme Court. Rule 2:3-1(a) provides that the State may appeal "to the Supreme Court from a final judgment or from an order of the Appellate Division, pursuant to Rule 2:2-2 (b) [appeals the Supreme Court from interlocutory orders] or 2:2-3 [appeals to the Appellate Division from final judgments]."

B. Appeal by the State: Statutory Provisions

1. Statutes Authorizing Appeal by the State. The following statutes grant the State permission to appeal a sentence.

(a) Booby Traps in the Manufacturing or Distribution of Drugs. N.J.S.A. 2C:35-4.1(e) provides that if the court does not require the sentence for booby traps in the manufacturing or distribution of drugs to be served consecutive to a sentence for any drug offense in Chapter 35, or a conspiracy or attempt to commit an offense under Chapter 35, then the State may appeal the sentence within ten days.

(b) Manufacturing, Distributing or Dispensing a Controlled Dangerous Substance on or Near School Property. N.J.S.A. 2C:35-7(b)(2)(b) provides that within ten days the State may appeal the sentence for manufacturing, distributing or dispensing drugs on school property if the court did not impose a period of parole ineligibility pursuant to N.J.S.A. 2C:35-7(b)(1). See Chapter XIV on drug offender sentencing for further discussion.

(c) Violation of Special Probation in a Drug Case, or Drug Court. Where the defendant commits a second or subsequent violation of special probation, the prosecutor may appeal the court's decision to (i) continue special probation, N.J.S.A. 2C:35-14(f)(2); or (ii) impose a brief period of imprisonment followed by continued special probation, N.J.S.A. 2C:35-14(g). See Chapter XIV on drug offender sentencing for further discussion.

(d) Non-Residential Treatment for Certain Drug Offenders. N.J.S.A. 2C:35-14(j) provides that if the court finds that a defendant qualifies for residential drug treatment, the court may impose a term of non-residential treatment under certain circumstances. If the prosecutor objects to the sentence, the sentence shall not become final for ten days to permit the State to file an appeal. Ibid. See Chapter XIV on drug offender sentencing for further discussion.

(e) Mandatory Special Probation for Certain Drug Offenders. If the court imposes a sentence of regular probation instead of special probation on certain drug

dependent defendants, the sentence shall not be final for ten days to allow the prosecutor time to file an appeal. N.J.S.A. 2C:35-14.2(d). See Chapter XIV on drug offender sentencing for further discussion.

(f) Public Officers Convicted of Certain Crimes. N.J.S.A. 2C:43-6.5(c)(3) allows the State ten days to appeal a sentence imposed on certain public officers if the court did not include a period of parole ineligibility or if the court imposed a reduced period of parole ineligibility pursuant to N.J.S.A. 2C:43-6.5(c)(1) or (2).

(g) Downgraded or Lenient Sentence for a First or Second Degree Crime. Pursuant to N.J.S.A. 2C:44-1(f)(2), the State may challenge a sentence for a first or second degree crime if the court imposed a term appropriate for one degree lower than the conviction, or if it imposed a noncustodial or probationary sentence. The State has ten days to file the appeal. N.J.S.A. 2C:44-1(f)(2).

Stay Pending Appeal. Unless the defendant elects to begin a downgraded or lenient sentence imposed pursuant to N.J.S.A. 2C:44-1(f)(2) while the State's appeal is pending, "execution of sentence shall be stayed," and the court shall set bail. R. 2:9-3(d). If the defendant waives the stay pending appeal, and on remand the court imposes a harsher sentence, the defendant may not challenge the new sentence on double jeopardy grounds. Ibid.

C. Appeal by the State: Case Law

1. Double Jeopardy. Double jeopardy principles restrict a State's ability to file an appeal in a criminal action. State v. Lefkowitz, 335 N.J. Super. 352, 357 (App. Div. 2000), certif. denied, 167 N.J. 637 (2001); State v. Veney, 327 N.J. Super. 458, 461 (App. Div. 2000). "[A]bsent explicit statutory authority, the State has no right to appeal a criminal sentence." State v. Veney, 327 N.J. Super. 458, 460 (App. Div. 2000).

2. Deference to Factual Findings. The appellate court defers to the trial court's findings of fact in reviewing a sentence, regardless of which party files the appeal. State v. Gerstofer,

191 N.J. Super. 542, 545 (App. Div. 1983), certif. denied, 96 N.J. 310 (1984).

3. Transfer to a Drug or Alcohol Treatment Program. The State may file an appeal challenging the trial court's grant of an application authorizing transfer from a custodial institution to a drug or alcohol treatment program pursuant to Rule 3:21-10(b)(1). State v. Williams, 139 N.J. Super. 290, 296 (App. Div. 1976), aff'd o.b., 75 N.J. 1 (1977).

4. Challenge to Jail Credits. "[T]he State may appeal an award of jail credits on the ground that they are not authorized by Rule 3:21-8." State v. Rippy, 431 N.J. Super. 338, 343 (App. Div. 2013), certif. denied, 217 N.J. 284 (2014).

5. Mandatory Terms. The State may appeal a sentencing court's refusal to impose a Graves Act mandatory extended term based on a finding that the proof did not establish the requisite prior offenses. State v. Robinson, 253 N.J. Super. 346, 358-59 (App. Div.), certif. denied, 130 N.J. 6 (1992).

6. Verdict on a Lesser Charge. Where a judge declines to accept a guilty verdict, and the jury re-deliberates and returns a verdict on a lesser charge, the State may not appeal the sentence imposed on the lesser charge. State v. Lefkowitz, 335 N.J. Super. 352, 358 (App. Div. 2000), certif. denied, 167 N.J. 637 (2001). Instructing the jury to continue deliberations did not equate to rejecting a verdict. Ibid.

7. Transfer to a Drug or Alcohol Treatment Program. The State may file an appeal challenging the trial court's grant of an application authorizing transfer from a custodial institution to a drug or alcohol treatment program pursuant to Rule 3:21-10(b)(1). State v. Williams, 139 N.J. Super. 290, 296 (App. Div. 1976), aff'd o.b., 75 N.J. 1 (1977).

8. Lenient Sentence for a First or Second Degree Crime. Pursuant to N.J.S.A. 2C:44-1(f)(2), the State may appeal a sentence for a term one degree lower on a first or second degree offense. State v. Roth, 95 N.J. 334, 360 (1984).

> **(a) Double Jeopardy.** Until the ten-day period ends, the defendant has no expectation of finality in the sentence, and double jeopardy protections do not attach. State v. Ryan, 86 N.J. 1, 10, cert. denied, 454 U.S. 880, 102 S. Ct. 363, 70 L. Ed. 2d 190 (1981); State v. Johnson, 376 N.J.

Super. 163, 171-72 (App. Div.), certif. denied, 183 N.J. 592 (2005); State v. Evers, 368 N.J. Super. 159, 169 (App. Div. 2004).

(b) Computing the Ten-Day Period. The ten-day period begins the day after sentence is pronounced. State v. Johnson, 376 N.J. Super. 163, 173 (App. Div.), certif. denied, 183 N.J. 592 (2005); R. 1:3-1; R. 3:21-4(i). "[F]ailure to perfect an appeal within the ten-day period will result in dismissal of the State's appeal." State v. Johnson, 376 N.J. Super. 163, 170 (App. Div.), certif. denied, 183 N.J. 592 (2005) (quoting State v. Sanders, 107 N.J. 609, 616 (1987)).

(c) Noncustodial Term. Any sentence other than imprisonment satisfies the "noncustodial" aspect of N.J.S.A. 2C:44-1(f)(2), including suspended sentences and probation. State v. Cannon, 128 N.J. 546, 567 (1992).

(d) Plea Bargain and the State's Silence. If pursuant to a plea agreement the State remains silent at sentencing and does not object to the court's imposing a noncustodial term on a conviction for a second degree crime, the State may not challenge the sentence on appeal. State v. Paterna, 195 N.J. Super. 124, 126 (App. Div. 1984).

9. State May Challenge an Illegal Sentence. "[T]he State may appeal an illegal sentence without express authorization in the criminal code or rules of court." State v. Chambers, 377 N.J. Super. 365, 370 (App. Div. 2005) (quoting State v. Parolin, 339 N.J. Super. 10, 13-14 (App. Div. 2001), rev'd on other grounds, 171 N.J. 223 (2002)).

(a) Illegal Sentence Defined. "There are two categories of illegal sentences: (1) those that exceed the penalties authorized by statute for a particular offense and (2) those that are not in accordance with the law, or stated differently, those that include a disposition that is not authorized by our criminal code." State v. Schubert, 212 N.J. 295, 308 (2012) (citing State v. Murray, 162 N.J. 240, 246-47 (2000)). Accord State v. Acevedo, 205 N.J. 40, 45 (2011) (quoting State v. Murray, 162 N.J. 240, 247 (2000)). An illegal sentence may be corrected at any time prior to the completion of the sentence. State v. Tavares, 286 N.J. Super. 610, 619 (App. Div.), certif. denied, 144 N.J. 376 (1996).

(b) Illegal Sentence May Not Be Ignored. "[A] reviewing court is not free to ignore an illegal sentence." State v. Moore, 377 N.J. Super. 445 (App. Div. 2005). "[S]o long as the issue of defendant's sentence is properly before the court, the court may correct an illegal sentence, even by increasing the term." State v. Kirk, 243 N.J. Super. 636, 643 (App. Div. 1990). Accord State v. Tavares, 286 N.J. Super. 610, 619 (App. Div.), certif. denied, 144 N.J. 376 (1996).

(c) Time in Which to File an Illegal Sentence Challenge. The State may file a petition to correct an illegal sentence at any time before the defendant completes the sentence. R. 3:21-10(b); State v. Schubert, 212 N.J. 295, 313 (2012); State v. Crawford, 379 N.J. Super. 250, 257 (App. Div. 2005). "While an 'illegal' sentence is 'correctable at any time,' the State has an obligation to move quickly when asserting an 'illegality' because the defendant has an expectation of finality of a sentence within the parameters of statutory limits (at least in the absence of some appeal or post-conviction proceeding pending on his or her application)." State v. Tavares, 286 N.J. Super. 610, 619 (App. Div.), certif. denied, 144 N.J. 376 (1996).

D. Double Jeopardy Concerns on Remand: Case Law

1. Double Jeopardy General Rule. "The double jeopardy provisions of both the United States and New Jersey Constitutions protect against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." State v. Eigenmann, 280 N.J. Super. 331, 336-37 (App. Div. 1995); United States v. DiFrancesco, 449 U.S. 117, 129, 101 S. Ct. 426, 433, 66 L. Ed. 2d 328, 340 (1980). See also N.J.S.A. 2C:1-9 to -12. For purposes of sentencing, double jeopardy generally "attaches once a defendant begins to serve a prison term or the sentence is partially executed." State v. Young, 379 N.J. Super. 498, 505 (App. Div. 2005), (referring to State v. Ryan, 86 N.J. 1 (1981)), remanded on other grounds, 188 N.J. 349 (2006)).

2. No Expectation of Finality Rule. Double jeopardy does not prohibit a court from imposing a harsher sentence on remand when

the defendant did not have an expectation of finality in the sentence originally imposed. State v. Roth, 95 N.J. 334, 344 (1984) (adopting the test set forth in United States v. DiFrancesco, 449 U.S. 117, 133, 101 S. Ct. 426, 435, 66 L. Ed. 2d 328, 343 (1980)). Accord State v. Sanders, 107 N.J. 609, 18-20 (1987); State v. Young, 379 N.J. Super. 498, 505 (App. Div. 2005), remanded on other grounds, 188 N.J. 349 (2006).

3. Examples of No Expectation of Finality. The following cases discuss situations in which the defendant does not have an expectation of finality in the sentence:

(a) Appeal of Conviction and Sentence. "[A] defendant who appeals his substantive conviction along with the corresponding sentence has no legitimate expectation of finality in either the underlying conviction or the corresponding sentence." State v. Haliski, 140 N.J. 1, 21 (1995).

(b) State's Right to Appeal. A defendant cannot expect a sentence to be final when pronounced if the State has a statutory right to appeal the sentence, as in the case of a term imposed pursuant to N.J.S.A. 2C:44-1(f)(2) (leniency in sentencing a first or second degree crime). State v. Sanders, 107 N.J. 609, 619 (1987). If the State succeeds on appeal, on remand the court may impose a sentence one degree higher than originally imposed without offending double jeopardy principles. Ibid.

(c) Illegal Sentence. "An illegal sentence that has not been completely served may be corrected at any time without impinging upon double-jeopardy principles." State v. Austin, 335 N.J. Super. 486, 494 (App. Div. 2000), certif. denied, 168 N.J. 294 (2001). A sentence that does not include a parole ineligibility term mandated by statute is an illegal sentence. Ibid. (finding error in a Graves Act sentence without a mandatory parole ineligibility term). Accord State v. Robinson, 253 N.J. Super. 346, 358-59 (App. Div.), certif. denied, 130 N.J. 6 (1992).

(d) State Appeal of a Judgment Notwithstanding the Verdict. A defendant has no expectation of finality in the sentence imposed when the State appeals the entry of judgment notwithstanding the verdict pursuant to Rule 2:3-1(b)(3). State v. Cetnar, 341 N.J. Super. 257, 265 (App. Div.), certif. denied, 170 N.J. 89 (2001).

4. Harsher Sentence on Remand. The court may not impose a "substantially harsher" sentence on remand if the increased sentence is not required by law or supported by "any evidence of intervening conduct or prior oversight to justify the new sentence." State v. Heisler, 192 N.J. Super. 586, 592-93 (App. Div. 1984). Accord State v. Pindale, 279 N.J. Super. 123, 128-30 (App. Div.) (discussing North Carolina v. Pearce, 395 U.S. 711, 723, 89 S. Ct. 2072, 2079, 23 L. Ed. 2d 656, 668 (1969)), certif. denied, 142 N.J. 449 (1995). To hold otherwise would effectively penalize a defendant for successfully challenging an illegal sentence. State v. Heisler, 192 N.J. Super. 586, 593 (App. Div. 1984). See also State v. Eigenmann, 280 N.J. Super. 331, 341 (App. Div. 1995) (holding that the court could not increase the part of a sentence based on a lawful, though mistaken, declaration that the defendant was a young adult offender, as that part of the sentence was not illegal). The court must specifically explain its reasons for imposing a harsher sentence. State v. Pindale, 279 N.J. Super. 123, 129-30 (App. Div.), certif. denied, 142 N.J. 449 (1995).

5. Restructuring the Sentence on Remand and Parole Ineligibility. Because "the basic sentencing issue is always the real time defendant must serve," on resentencing the court may not restructure a sentence to impose a greater period of parole ineligibility than it imposed in the initial sentencing. State v. Cooper, 402 N.J. Super. 110, 116-17 (App. Div. 2008) (quoting State v. Mosley, 335 N.J. Super. 144, 157 (App. Div. 2000), certif. denied, 167 N.J. 633, 772 (2001)). See also State v. Towey (II), 244 N.J. Super. 582, 598 (App. Div.) (explaining that where a defendant successfully challenges only the excessiveness of a parole disqualifier, the court on remand may not increase the base term), certif. denied, 122 N.J. 159 (1990).

6. Restitution. A restitution award may be increased on resentencing after remand without offending double jeopardy principles. State v. Rhoda, 206 N.J. Super. 584, 590 (App. Div.), certif. denied, 105 N.J. 524 (1986).

7. Unmerged Offenses and the Aggregate Term. In resentencing, the court may impose consecutive terms on "unmerged" convictions, so long as the new sentence, in the aggregate, does not exceed the original aggregate term. State v. Crouch, 225 N.J. Super. 100, 107-08 (App. Div. 1988). But see State v. Loftin, 287 N.J. Super. 76, 113 (App. Div.) (explaining that the

defendant might face a longer aggregate term on remand because the sentencing court erroneously merged a first degree robbery conviction into a murder conviction, and on remand, the court had to impose a sentence for the robbery conviction), certif. denied, 144 N.J. 175 (1996).

8. Completed Sentence May Not Be Increased. The court may not add a punitive term to a sentence that the defendant has completed, even if the punitive term was mandated by statute and absence of it rendered the sentence illegal. State v. Schubert, 212 N.J. 295, 311-12 (2012) (holding that the court could not correct a sentence that did not include community supervision for life by imposing that term on a defendant who had completed his sentence, even though the Violent Predator Incapacitation Act, N.J.S.A. 2C:43-6.4, required that term be included in the sentence).

XX. POST-CONVICTION RELIEF

In limited situations, and after exhausting direct appeals, a defendant may challenge his or her sentence by way of a petition for post-conviction relief (see sections A and B).

A. Post-Conviction Relief: Court Rules

1. Court Rule Authorizing a First Petition for Post-Conviction Relief. Rule 3:22-2(c) allows a defendant to file a petition for post-conviction relief challenging his or her sentence on the ground that the sentence is "in excess of or otherwise not in accordance with the sentence authorized by law if raised together with other grounds cognizable under" subparts (a), (b) or (d) of Rule 3:22-2. Those grounds are: the defendant suffered a "substantial denial of a right" under the United States Constitution or New Jersey Constitution or laws; the court lacked jurisdiction; and any other ground "available as a basis for collateral attack upon a conviction by habeas corpus or any other common-law or statutory remedy." R. 3:22-2(a), (b) and (d). See Rule 3:22-12(a)(1) for time limitation for filing. See Rule 7:10-2 for post-conviction relief petitions in municipal court.

2. Subsequent Petitions for Post-Conviction Relief. Rule 3:22-4(a) limits the filing of a subsequent petition for post-conviction relief to claims that (1) "could not reasonably have been raised in any prior proceeding," (2) "result in fundamental injustice," or (3) implicate a new or existing constitutional right. Rule 3:22-12(a)(2) sets forth the time limitations for a subsequent petition for post-conviction relief.

3. Appeal of a Denial for Post-Conviction Relief. Rule 2:3-2 provides: "In any criminal action, any defendant, the defendant's legal representative, or other person aggrieved by . . . an adverse judgment in a post-conviction proceeding attacking a conviction or sentence . . . may appeal or, where appropriate, seek leave to appeal, to the appropriate appellate court."

B. Post-Conviction Relief: Case Law

1. Post-Conviction Relief Is Not a Substitute for a Direct Appeal. A petition for post-conviction relief is not a substitute for a direct appeal. State v. Mitchell, 126 N.J. 565, 583 (1992). A defendant may not raise in a post-conviction relief proceeding any issue that might reasonably have been raised in a direct appeal unless denial of the petition would be contrary to constitutional law or would result in fundamental injustice. Id. at 584; State v. Laurick, 120 N.J. 1, 10, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990).

2. Excessive Sentence Challenges Prohibited. An excessive sentence claim challenges the harshness of a sentence that is "within the range permitted by the verdict or plea." State v. Hess, 207 N.J. 123, 145 (2011). It must be asserted on direct appeal; it will not be heard in a post-conviction relief petition. Ibid. Only illegal sentences may be challenged on post-conviction relief. State v. Acevedo, 205 N.J. 40, 46-47 (2011).

3. Illegal Sentence Challenges Allowed. A defendant may file a petition to correct an illegal sentence at any time before the defendant completes the sentence. State v. Schubert, 212 N.J. 295, 313 (2012); State v. Crawford, 379 N.J. Super. 250, 257 (App. Div. 2005). The claim may be asserted in a petition for post-conviction relief, even if the claim could have been presented on direct appeal. State v. Levine, 253 N.J. Super. 149, 156 (App. Div. 1992).

4. Plea Withdrawal Based on Misinformation. A defendant may be able to retract a guilty plea by way of a petition for post-conviction relief if he or she was misinformed about the consequences of the plea. State v. Jamqochian, 363 N.J. Super. 220, 225 (App. Div. 2003) (reversing the denial of a petition for post-conviction relief and remanding for a hearing to determine whether the incorrect information regarding community supervision for life of a sex offender rendered the plea uninformed).

5. Challenge to Gap-Time Credits. Gap-time credit claims "pertain to the legality of the sentence imposed and may be raised in a petition for post-conviction relief." State v. Shabazz, 263 N.J. Super. 246, 251 (App. Div.), certif. denied, 133 N.J. 444 (1993).

6. Enhanced Sentence Based on a Prior Uncounseled Guilty Plea.

Under state constitutional law, the court may not impose an enhanced term of incarceration based on a prior uncounseled guilty plea without waiver of the right to counsel. State v. Hrycak, 184 N.J. 351, 362-63 (2005); State v. Laurick, 120 N.J. 1, 16, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990); State v. Thomas, 401 N.J. Super. 180, 184 (Law Div. 2007). An enhanced jail term based on an uncounseled prior conviction is not an illegal sentence, however. State v. Bringhurst, 401 N.J. Super. 421, 431 (App. Div. 2008). Thus, a challenge to it should be asserted on direct appeal. Id. at 428-37.