
Supreme Court of New Jersey

DOCKET NO. 089188

STATE OF NEW JERSEY,	:	<u>Criminal Action</u>
Plaintiff-Respondent,	:	On Certification Granted to the Superior Court of New Jersey, Appellate Division.
v.	:	Sat Below:
ZAIRE J. CROMEDY,	:	Hon. Jack M. Sabatino, P.J.A.D.
Defendant-Appellant.	:	Hon. Hany Mawla, P.J.A.D.
	:	Hon. Joseph L. Marczyk, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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PRELIMINARY STATEMENT

The question before this Court is straightforward: Did the Legislature intend to insulate defendants with prior No Early Release Act (NERA) convictions—like manslaughter—from Graves Act mandatory-minimum sentencing when they continue to flout the law by unlawfully possessing firearms? After a careful analysis of the relevant statutory provisions and legislative history, the Appellate Division correctly determined that the Legislature did not intend this absurd result. This Court should reach the same conclusion and affirm defendant’s sentence.

In 2013, the Legislature amended the unlawful-possession-of-weapons and Graves Act statutes. As part of those amendments, the Legislature added subsection (j) to N.J.S.A. 2C:39-5. Subsection (j) provides that “[a] violation of subsection a., b., c. or f. of this section by a person who has a prior conviction of” a crime enumerated in NERA “is a first-degree crime.” Defendant, who was previously convicted of reckless manslaughter, pleaded guilty to first-degree unlawful possession of a handgun. The State agreed to recommend ten years in prison, with five years of parole ineligibility, under the Graves Act, N.J.S.A. 2C:43-6(c). Defendant reserved the right to argue that the Graves Act did not require a mandatory-minimum sentence. Both the trial court and the Appellate Division rejected defendant’s argument and concluded that the Graves Act

applies to first-degree unlawful possession of a weapon under subsection (j).

As the Appellate Division correctly concluded in its well-reasoned decision, subsection (j) is a sentencing enhancement rather than a separate substantive offense. And given that subsection (j) requires a conviction for an enumerated Graves Act offense—under subsection (a), (b), (c), or (f)—it was not necessary for the Legislature to also specifically enumerate subsection (j) as requiring a mandatory-minimum sentence. Were there any doubt, the Legislature easily could have but did not include subsection (j) in the list of Graves Act exclusions.

While subsection (j) did not need to be separately enumerated in the Graves Act because it necessarily requires a conviction for a Graves Act offense, any purported ambiguity is resolved by the legislative intent. The Legislature expressly intended to “upgrade” the offense of unlawful possession of a firearm by a defendant with a prior NERA conviction. It would make no sense to simultaneously insulate these same recidivist offenders from any mandatory period of parole ineligibility, potentially resulting in them serving less real time in prison than second-degree offenders without prior qualifying convictions. Where the Legislature’s intent is readily apparent—to more harshly punish defendants with serious prior convictions who unlawfully possess firearms—the rule of lenity does not apply.

Alternatively, even if this Court were to rule that subsection (j) operates as a substantive offense, defendant is not entitled to a flat sentence without any period of parole ineligibility. Rather, the mandatory period of parole ineligibility that applies to the second-degree conviction under N.J.S.A. 2C:39-5(b)(1)—for which defendant was indicted, and to which he necessarily admitted at the plea hearing—is unquestionably required by the Graves Act and thus survives the merger of that offense with the first-degree offense.

The State urges this Court to hold that Graves Act mandatory-minimum sentencing applies to first-degree unlawful possession of a weapon under subsection (j) of N.J.S.A. 2C:39-5. As a result, this Court should affirm defendant's ten-year sentence with a five-year parole disqualifier. Alternatively, this Court should hold that, at a minimum, the mandatory period of parole ineligibility applicable to the underlying weapons offense must survive.

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS¹

On October 26, 2021, a Middlesex County Grand Jury returned Indictment No. 21-10-01004 charging defendant with second-degree eluding, contrary to N.J.S.A. 2C:29-2(b) (count one); and first-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(b)(1) and N.J.S.A. 2C:39-5(j) (count two). (Dsa1). The Grand Jury also returned Indictment No. 21-10-01003 charging defendant with one count of second-degree certain persons not to possess a weapon, contrary to N.J.S.A. 2C:39-7(b). (Dsa2).

On June 7, 2022, defendant pleaded guilty before the Honorable Joseph Paone, J.S.C., to first-degree unlawful possession of a weapon (count two of Indictment No. 21-10-01004). The State agreed to recommend a ten-year prison sentence with a five-year period of parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6(c). (Dsa3 to 8; 1T4-1 to 6-4). The plea form and the plea colloquy reflect that defendant would argue at sentencing the Graves Act does not apply to his conviction under count two. (Dsa8; 1T10-25 to 13-16).² Under

¹ The counterstatements of procedural history and facts are closely related and are presented together for the Court's convenience.

² Defendant also answered "yes" to question 6 on the plea form: "Do you understand that **the court could**, in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentence imposed?" (Dsa5).

the plea agreement, the State also agreed to dismiss the eluding charge and the certain-persons indictment. (Dsa6; 1T4-16 to 21).

In providing a factual basis for his guilty plea, defendant admitted that on August 6, 2021, in the Township of South Brunswick, he possessed a 9-millimeter handgun. He did not have a permit to have that handgun. In addition, he admitted he was previously convicted of reckless manslaughter, a crime that qualified for sentencing under the No Early Release Act (NERA). (1T9-6 to 10-23).

On November 4, 2022, defendant appeared before Judge Paone for sentencing. Defendant argued that there was a “drafting gap” in the Graves Act, and that its mandatory-minimum sentencing provision did not apply to his conviction. (2T3-20 to 7-16). The State argued that N.J.S.A. 2C:39-5(j) is a “grading statute” that incorporates the offense under N.J.S.A. 2C:39-5(b), and defendant’s argument could not be harmonized with the legislative intent behind the Graves Act. (2T9-23 to 10-6). The State further argued that even if the Graves Act did not apply, defendant should be sentenced to a period of parole ineligibility under N.J.S.A. 2C:43-6(b) because the aggravating factors substantially outweigh the mitigating factors. (2T11-10 to 12-13).

Judge Paone noted that defendant was thirty years old and had a “significant criminal history that began when he was 10 years old and he was

charged with a simple assault.” (2T12-15 to 19). He had four juvenile adjudications, “including an aggravated assault in violation of probation as a juvenile.” (2T12-19 to 21). He was waived to adult court “on a similar offense, handgun charge, terroristic threat which he plead guilty as an adult.” (2T12-23 to 13-1). Although he received the benefit of probation, he was eventually terminated without improvement. (2T13-1 to 4). As an adult, he pleaded guilty to a prohibited weapon charge, resulting in a sentence of time served (923 days). (2T13-4 to 7). And in 2017, he pleaded guilty to reckless manslaughter (downgraded from murder), resulting in a six-year prison sentence. (2T10-7 to 11-9; 2T13-7 to 9). And since then, there have been “seven pending charges in Municipal Court that remain unresolved, mostly for criminal trespass.” (2T13-10 to 14).

Based on these facts, Judge Paone found aggravating factor three, the risk that defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3); aggravating factor six, the extent and seriousness of his prior record, N.J.S.A. 2C:44-1(a)(6); and aggravating factor nine, the need for deterring defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). He found no mitigating factors. Defendant was sentenced in accordance with the negotiated plea agreement to ten years in prison, with five years of parole ineligibility. (Dsa10 to 12; 2T13-24 to 14-10).

Defendant appealed. The matter was initially heard on the Appellate Division's Sentencing Oral Argument calendar. (3T). The Appellate Division then transferred the matter to be heard with briefing on the plenary calendar. (Dsa16). On March 4, 2024, the Appellate Division issued a published decision affirming defendant's sentence. State v. Cromedy, 478 N.J. Super. 157 (App. Div. 2024); (Dsa13 to 29). The court held "N.J.S.A. 2C:39-5(j) is a grading statute that enhances the degree of the offense and subjects those with a prior conviction under NERA who are later convicted of a firearms offense under N.J.S.A. 2C:39-5(a), (b), (c), or (f), to enhanced sentencing under the Graves Act." (Dsa14).

On August 3, 2024, defendant filed an amended petition for certification, presenting one question: "Is N.J.S.A. 2C:39-5(j) a substantive first-degree crime not subject to the Graves Act, or is it a grading statute?" On November 1, 2024, this Court granted defendant's petition for certification. State v. Cromedy, 258 N.J. 576 (2024).

LEGAL ARGUMENT

POINT I

GRAVES ACT MANDATORY-MINIMUM
SENTENCING APPLIES TO FIRST-DEGREE
UNLAWFUL POSSESSION OF A WEAPON.

The question before this Court is one of statutory interpretation: Does the Graves Act require mandatory-minimum sentencing for defendants with prior No Early Release Act (NERA) convictions, who go on to commit an enumerated Graves Act offense? The answer is yes. The plain text and statutory structure establish that N.J.S.A. 2C:39-5(j) (subsection (j)) is a sentencing enhancement, which the Legislature could have but did not exclude from Graves Act sentencing under N.J.S.A. 2C:43-6(d)(2). (Subpoint A). Regardless of any ambiguity that may exist, the Legislature clearly intended to make it a more serious crime for defendants with prior NERA convictions to unlawfully possess firearms. It would be an absurd result to simultaneously insulate these same recidivist defendants from mandatory periods of parole ineligibility, potentially resulting in them serving less real time in prison than second-degree offenders without prior qualifying convictions. (Subpoint B).

Alternatively, even if this Court were to find that subsection (j) creates a separate substantive offense, defendant is not entitled to a flat sentence without any period of parole ineligibility. Instead, the mandatory period of parole ineligibility that applies to a conviction under N.J.S.A. 2C:39-5(b)(1)—which

is unquestionably enumerated in the Graves Act—for which defendant was indicted and to which he necessarily admitted to at the plea hearing, must survive. (Subpoint C).

A. Subsection (j) is a sentencing enhancement that necessarily requires a conviction for an enumerated Graves Act offense.

Defendant was indicted for, and pleaded guilty to, first-degree unlawful possession of a firearm, contrary to N.J.S.A. 2C:39-5(b)(1) and N.J.S.A. 2C:39-5(j). (Dsa1; Dsa10). N.J.S.A. 2C:39-5(b)(1) provides that “[a]ny person who knowingly has in his possession any handgun, including any antique handgun, without having obtained a permit to carry the same as provided in N.J.S. 2C:58-4, is guilty of a crime of the second-degree.” But subsection (j) upgrades that crime to one of the first-degree when the person has a prior conviction for a crime enumerated in NERA: “A violation of subsection a., b., c. or f. of this section by a person who has a prior conviction of any of the crimes enumerated in subsection d. of section 2 of P.L. 1997, c.117 (C.2C:43-7.2) is a first-degree crime.” N.J.S.A. 2C:39-5(j).

This plain text thus makes clear that for subsection (j) to even apply, there must be “[a] violation of subsection a., b., c., or f.” When such violation is committed “by a person who has a prior conviction of” a crime enumerated in NERA, the crime is upgraded to one of the first-degree. There is nothing in this language suggesting that the Legislature intended subsection (j) to operate as an

offense separate from the incorporated subsections (a), (b), (c), and (f).

Indeed, subsection (j) is clearly distinguishable from the certain-persons statute, N.J.S.A. 2C:39-7(b)(1), which does operate as a separate and distinct offense from second-degree unlawful possession of a weapon under N.J.S.A. 2C:39-5(b). Unlike subsection (j), the certain-persons offense is in a separate statutory section, does not cross-reference N.J.S.A. 2C:39-5, includes its own mandatory period of parole ineligibility, and creates another second-degree offense rather than a higher-graded offense.

Also unlike subsection (j), the conduct captured by the certain-persons statute—possession of a weapon—is not necessarily independently unlawful, in the absence of the recidivism. This is significant because, as the United States Supreme Court has explained, prior commission of a serious crime “is as typical a sentencing factor as one might imagine.” Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998). “Perhaps reflecting this fact, the lower courts have almost uniformly interpreted statutes (that authorize higher sentences for recidivists) as setting forth sentencing factors, not as creating new crimes (at least where the conduct, in the absence of the recidivism, is independently unlawful).” Ibid. So while possessing a weapon is not per se unlawful in the absence of the recidivism, possession of a weapon contrary to the provisions of N.J.S.A. 2C:39-5 is independently unlawful. Under these circumstances,

subsection (j) should be regarded as a sentencing enhancement based on recidivism. See also United States v. O'Brien, 560 U.S. 218, 227 (2010) (explaining that “[s]entencing factors traditionally involve characteristics of the offender--such as recidivism[,]” while “[c]haracteristics of the offense itself are traditionally treated as elements”).

The State acknowledges that, under New Jersey law, subsection (j) should be included in the indictment, so the defendant is given fair notice of the first-degree charge and sentencing exposure. See State v. Dorn, 233 N.J. 81, 93-94 (2018) (under Article I, Paragraph 8 of state constitution, indictment must “inform[] the defendant of the offense charged against him”). Indeed, that was done here. (Dsa1). Similarly, the State is not asking this Court to hold that the first-degree offense need not be presented to the petit jury in a bifurcated proceeding (or admitted to during a guilty plea).³ Again, that was done here when defendant admitted that he had a prior conviction for reckless manslaughter. (2T10-7 to 11-9; 2T13-7 to 9).

³ As a matter of federal constitutional law, a sentencing enhancement based solely on the fact of a prior conviction need not be included in an indictment or found by a jury. See Almendarez-Torres, 523 U.S. at 226-27, 234-35. See also Erlinger v. United States, 602 U.S. 821, 836-38 (2024) (discussing prior-conviction exception recognized in Almendarez-Torres); State v. Thomas, 188 N.J. 137, 151-52 (2006) (applying prior-conviction exception to mandatory extended term). But given that subsection (j) upgrades the degree of the crime itself, the State acknowledges that under our state constitution, it should be included in the indictment.

Instead, the State’s sole argument here is that, for purposes of sentencing, the Legislature did not intend to create an entirely separate offense that needed to be specifically enumerated in the Graves Act. “The Graves Act, N.J.S.A. 2C:43-6(c), imposes a mandatory minimum term of incarceration on an offender who uses or possesses a firearm while committing, attempting to commit, or fleeing after the commission of certain designated crimes.” State v. Nance, 228 N.J. 378, 384 (2017) (internal quotations and citations omitted). Specifically, that statute provides in relevant part as follows:

A person who has been convicted under . . . subsection a., b., c., or f. of N.J.S. 2C:39-5, . . . who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in 2C:39-1f., shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater . . . during which the defendant shall be ineligible for parole.

[N.J.S.A. 2C:43-6(c) (emphasis added).]

Under this plain text, there was no need to enumerated subsection (j). It already incorporates its underlying offenses, since a defendant who qualifies for enhanced sentencing under subsection (j) must have committed a “violation of subsection a., b., c., or f.” N.J.S.A. 2C:39-5(j).

And as the Appellate Division recognized, if the Legislature intended to

carve out subsection (j) from Graves Act mandatory-minimum sentencing, it easily could have said so. (Dsa21 to 22). In fact, the Legislature specifically “set[] forth the offenses [it] exempted from the Graves Act, namely, convictions for unlawful possession of a BB gun, air gun, or spring guns, and those convicted of the unlawful possession of an unloaded rifle or shotgun.” (Dsa22). As N.J.S.A. 2C:43-6(d)(2) provides, the court

shall not impose a mandatory sentence pursuant to subsection c. of this section for a violation of paragraph 2. of subsection b of N.J.S.2C:39-5; a violation of paragraph (2) of subsection c. of N.J.S.2C:39-5, if that rifle or shotgun is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person; or a violation of paragraph (1) of subsection c. of N.J.S.2C:39-5. (emphasis added).

“If the Legislature wanted to exempt first-degree unlawful weapons offenses [under subsection (j)] from the Graves Act, it would have said so.” (Dsa22). See Zabilowicz v. Kelsey, 200 N.J. 507, 517 (2009) (“The Legislature knows how to draft a statute to achieve [a] result when it wishes to do so.”).

Instead, “[b]y virtue of upgrading an unlawful weapons offense where a defendant had a prior NERA conviction, the Legislature intended that first-degree offenses become subject to the Graves Act.” (Dsa24). And based on the

first-degree sentencing range, the mandatory period of parole ineligibility under the Graves Act would be one-half of the sentence imposed. See N.J.S.A. 2C:43-6(a)(1) (first-degree sentencing range is “between 10 years and 20 years”); N.J.S.A. 2C:43-6(c) (“minimum term shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater”) (emphasis added).

That specified period of parole ineligibility distinguishes this case from State v. Olsvary, 357 N.J. Super. 206 (App. Div.), certif. denied, 177 N.J. 222 (2003), a case relied on by defendant. In that case, the defendant pleaded guilty to fourth-degree criminal sexual contact and fourth-degree violation of a prior sentence of community supervision for life (CSL) and was sentenced to an extended term of three years on the violation of CSL conviction. Id. at 207-09. The parties agreed that N.J.S.A. 2C:43-6.4(e)(1) mandates an “extended term of imprisonment” for persons who have previously been sentenced to CSL for certain sexual crimes, and who thereafter commit certain specific crimes, including fourth-degree criminal sexual contact. Id. at 208. But the Code provision that establishes the parameters to guide sentencing judges on extended terms of imprisonment, N.J.S.A. 2C:43-7(a), and that makes reference to the cases designated in N.J.S.A. 2C:43-6.4, “does not establish any parameters for a N.J.S.A. 2C:43-6.4e(1) mandated extended term.” Ibid.

In reversing Olsvary’s extended-term three-year sentence, the Appellate

Division explained “the difficulty here is that the Legislature has specified only half a penalty where a defendant has committed an offense that subjects him or her to an extended term under N.J.S.A. 2C:43-6.4e(1).” Id. at 211. “That is to say, it has mandated that the sentence to be imposed must be ‘extended.’ But ‘extended’ to what?” Ibid. Because the extended-term range “is not provided for an N.J.S.A. 2C:43-6.4d fourth degree offense,” the Appellate Division found that “[a] sentencing judge’s discretion then, is, literally, unbridled.” Ibid. The court was “loath to frustrate the plain intent of N.J.S.A. 2C:43-6.4e(1),” but found that “omission of the parameters within which a sentencing judge may impose such an extended term is fatal.” Id. at 214. “Without the parameters, the sentencing judge’s discretion becomes unfettered, a result that is not countenanced.” Ibid.

Unlike Olsvary, there is no unfettered discretion in applying the Graves Act to subsection (j). To the contrary, the Graves Act specifically provides that “[t]he minimum term shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater[.]” N.J.S.A. 2C:43-6(c). Once the judge sets the base term of the sentence, the mandatory period of parole ineligibility follows per the statute. In this case, for example, given the ten-year base term, the mandatory period of parole ineligibility is five years.

Defendant’s reliance on State v. Staten, 327 N.J. Super. 349 (App. Div.),

certif. denied, 164 N.J. 561 (2000), is also misplaced. That case involved an earlier version of NERA, which applied if the crime was a “violent crime.” Id. at 356. A “violent crime” was statutorily defined in relevant part as “[a]ny crime in which the actor causes death, causes serious bodily injury as defined in subsection b of N.J.S. 2C:11-1, or uses or threatens the immediate use of a deadly weapon.” Ibid. The Appellate Division concluded that “a mere attempt to cause serious bodily injury, without more, does not subject a first- or second-degree offender to NERA[,]” a point the State conceded. Id. at 355. The court explained that the Legislature’s omission of the word “attempt,” which it “carefully employed” in other statutes, “is strongly indicative of the Legislature’s intention that NERA does not apply to a mere attempt, without more, to cause serious bodily injury.” Id. at 354-55.

Staten is readily distinguishable. In Staten, the word “attempt” was omitted from the NERA statute but used in other statutes. Here, there was no need for subsection (j) to be enumerated in the Graves Act because the Legislature did not intend to create an entirely new offense. Instead, subsection (j) is a sentencing enhancement that is triggered only when the qualifying defendant is convicted of one of four enumerated Graves Act offenses.⁴

⁴ Defendant also cites extensively to two unpublished cases: State v. Mack, No. A-3423-16T1 (App. Div. Oct. 11, 2017) (Dsa36-39), and State v. Canadas, No.

Similarly, defendant’s reliance on N.J.S.A. 2C:39-5(h) is unavailing. Subsection (h) provides in pertinent part: “A person who is convicted of a crime under subsection a., b., f. or j. of this section shall be ineligible for participation in any program of intensive supervision[.]” Defendant essentially contends that because subsection (j) is mentioned here, its omission from the Graves Act is somehow dispositive. Not so.

The inclusion of subsection (j) was necessary in subsection (h) to clarify the Legislature’s intent that, with the exception of “an air gun, spring gun or pistol or other weapon of a similar nature[.]” all first-degree unlawful weapons possessors—including those who possessed rifles and shotguns under subsection (c)—are ineligible for intensive supervision. In other words, the inclusion of subsection (j) was not redundant because it added the exclusion of

A-4486-15T2 (App. Div. July 11, 2018) (Dsa47-58), certif. denied, 236 N.J. 604 (2019). The State relies on its discussion of these cases in its Appellate Division brief (Pb11) and its opposition to defendant’s petition for certification (PCr2-3), highlighting the following. The Mack panel did not even address sentencing because it only ruled that the subsection (j) prosecution could proceed. And the Canadas panel specifically addressed extended-term sentences, not whether an ordinary first-degree sentence under subsection (j) is subject to a parole disqualifier. The State also notes that two other unpublished opinions are consistent with the published opinion in Cromedy. See State v. Sumler, No. A-4289-19 (App. Div. June 14, 2022) (Pa1 to 18) (upholding ten-year sentence, with five-year parole disqualifier, for first-degree unlawful possession of a handgun); State v. Rustin et al., Nos. A-2241-18T2, A-2270-18T2, A-2311-18T2 (App. Div. Feb. 13, 2020) (Pa19 to 44) (ruling subsection (j) “enhances the penalty for the offense, but does not create a separate offense”).

subsection (c) violations by individuals with prior NERA offenses under subsection (j). On the other hand, the Legislature did not need to enumerate subsection (j) in N.J.S.A. 2C:43-6(c) because it already made clear that all of subsection (j)'s underlying offenses—subsections (a), (b), (c), and (f)—are qualifying convictions, subject only to the exceptions set forth in N.J.S.A. 2C:43-6(d)(2).

In sum, the Appellate Division correctly held that subsection (j) is a sentencing enhancement. As a recidivist sentencing enhancement, it was not necessary for the Legislature to specifically enumerate subsection (j) in the list of convictions requiring mandatory-minimum sentences under the Graves Act. Were there any doubt, the Legislature easily could have, but had not, included subsection (j) in the list of Graves Act exclusions. For all these reasons, defendant's ten-year sentence properly includes a mandatory five-year parole disqualifier.

B. The Legislature intended to “upgrade” the punishment for those with serious prior convictions who unlawfully possess firearms.

While subsection (j) did not need to be separately enumerated in the Graves Act because it necessarily requires a conviction for a Graves Act offense, any purported ambiguity is resolved by the legislative intent. As the Appellate Division recognized, the Legislature intended to “upgrade” certain weapons-possession offenses when committed by a person with a prior NERA offense. It

would make no sense to “upgrade” the offense, while simultaneously insulating these same recidivist offenders from any mandatory parole disqualifier. The Appellate Division correctly declined to interpret the statute to lead to this absurd result. This Court should do the same.

It is axiomatic that the fundamental goal of statutory interpretation “is to give effect to the intent of the Legislature.” State v. Harper, 229 N.J. 228, 237 (2017) (quoting State v. Morrison, 227 N.J. 295, 308 (2016)). See also State v. Smith, 197 N.J. 325, 332 (2009); State v. Lewis, 185 N.J. 363, 369 (2005). To that end, courts should read statutes “in the way that is most consistent with overall legislative intent.” State v. Toth, 354 N.J. Super. 13, 22 (App. Div. 2002) (quoting Fiore v. Consol. Freightways, 140 N.J. 452, 466 (1995)).

Further, “it is a general principal of statutory construction that ‘statutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as consonant to reason and good discretion.’” Parker v. Esposito, 291 N.J. Super. 560, 566 (App. Div.) (citation omitted), certif. denied, 146 N.J. 566 (1996). A sensible reading of a statute is one that furthers “the underlying legislative purpose.” The Thomas Group, Inc. v. Wharton Senior Citizen Housing, Inc., 163 N.J. 507, 517 (2000) (citation omitted). See also Cesare v. Cesare, 154 N.J. 394, 405 (1998) (statutes are to be read “sensibly rather than literally, with the purpose and reason for the legislation controlling”).

Where a law is part of a broader statutory framework, it “should not be read in isolation” but instead must be considered “in relation to other constituent parts so that a sensible meaning may be given to the whole of the legislative scheme.” Harper, 229 N.J. at 237-238 (quoting Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012)).

Statutory constructions “calling for unreasonable results will be avoided where reasonable results consistent with the indicated purpose of the act as a whole are equally possible.” Elizabeth Fed. Sav. & Loan Ass’n v. Howell, 24 N.J. 488, 508 (1957). See also Harper, 229 N.J. at 237 (“It is axiomatic that a statute will not be construed to lead to absurd results”) (quoting State v. Provenzano, 34 N.J. 318, 322 (1961)); N.J. Builders, Owners and Managers Ass’n v. Blair, 60 N.J. 330, 338 (1972) (“[w]here a literal rendering [of a statute] will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter”).

At all times, courts must “assume that the Legislature intended a reasonable approach, and the statute should be construed to effect” such an approach. Parker, 291 N.J. Super. at 566; accord Roman v. Sharper, 53 N.J. 338, 341 (1969); see also The Jersey City Chapter of the Property Owner’s Protective Ass’n v. City Council of Jersey City, 55 N.J. 86, 100 (1969) (“When all is said and done, the matter of statutory construction . . . will not justly turn

on literalisms, technisms or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation.”).

Here, if the plain language of N.J.S.A. 2C:39-5(j) and the “commonsense of the situation” were not enough, legislative history confirms that the Legislature’s goal was to “upgrade” unlawful possession of a weapon to a more serious offense for defendants with prior NERA convictions. In 2013, subsection (j) was added to N.J.S.A. 2C:39-5, as part of L. 2013, c. 113, which amended the unlawful-possession-of-weapons and Graves Act statutes.⁵ In relevant part, the statement in support of the amendment explained the purpose of subsection (j) was to “upgrade[] the crime of unlawful possession of a firearm to a first degree crime in certain circumstances.” (Pa45). The Legislature thus sought to enhance the seriousness of unlawful possession of a firearm when it is committed by a person with a prior conviction for a NERA crime. Nothing in the history suggests the Legislature intended subsection (j) to operate as an offense separate from the incorporated subsections (a), (b), (c), and (f). Moreover, the amendment occurred at the same time the Legislature sought to

⁵ The bill also added unlawful possession of an assault firearm, N.J.S.A. 2C:39-5(f), to the list of crimes for which Graves Act sentencing applies. As noted, that offense is one of four enumerated crimes subject to enhanced sentencing under subsection (j) under appropriate circumstances.

strengthen the Graves Act penalties by increasing “the mandatory minimum period of parole ineligibility from three years to 42 months.” (Pa45).

Defendant’s proposed statutory construction would frustrate, rather than further, the “underlying legislative purpose” to make it a more serious crime for defendants with certain prior convictions to unlawfully possess firearms. See The Thomas Group, Inc., 163 N.J. at 517. Instead, the statute must be read sensibly, “with the purpose and reason for the legislation controlling.” Cesare, 154 N.J. at 405. And it must be considered in the context of the entire legislative scheme of which it is a part. See Harper, 229 N.J. at 237-38. Where the Legislature sought to “upgrade” unlawful possession of a firearm by defendants with prior convictions for NERA offenses, it could not have simultaneously intended to insulate these same recidivist defendants from mandatory periods of parole ineligibility. Rather, as the Appellate Division succinctly put it: “Defendant’s prior conviction for a NERA offense upgrades defendant’s offense to a first-degree offense—and with it the punishment.” (Dsa27).

Any other interpretation would effectively gut the Legislature’s goal in enacting subsection (j): to more harshly punish defendants with serious prior convictions who unlawfully possess firearms. Indeed, in many cases the State would better achieve the legislative goal of harsher punishment by completely ignoring subsection (j) and instead charging offenders under subsections (a), (b),

(c), or (f), only. That is because without applying the Graves Act to subsection (j), there would be no mandatory period of parole ineligibility. Therefore, a person convicted of a first-degree offense under subsection (j) who gets a ten-year sentence may end up serving less real time in prison than someone convicted of a second-degree crime under subsections (a), (b), (c), or (f) who is sentenced to a mid-range seven-year sentence with the Graves Act mandatory forty-two-month parole disqualifier. See N.J.S.A. 2C:43-6(c).⁶ The Appellate Division “decline[d] to interpret N.J.S.A. 2C:43-6(c) and N.J.S.A. 2C:39-5(j) in such a fashion, because it would lead to an absurd result.” (Dsa23). This Court should do the same. See Elizabeth Fed. Sav. & Loan Ass’n, 24 N.J. at 508 (recognizing statutory constructions “calling for unreasonable results will be avoided where reasonable results consistent with the indicated purpose of the act as a whole are equally possible.”).

Even though the Legislature’s intent is to more harshly punish defendants with serious prior convictions who unlawfully possess firearms, defendant

⁶ The Parole Board has promulgated a document entitled “Parole Eligibility – Basic Calculations,” which is available at: <https://www.state.nj.us/parole/docs/ParoleCalc.pdf> (last visited February 13, 2025). According to Appendix B, a defendant sentenced to a ten-year flat sentence, with maximum credits applied, would be first eligible for parole after one year, eleven months, and five days. Latest eligibility (including commutation credits, but no work credits or minimum custody credits) would be after serving two years, six months, and twenty-one days. Both are substantially less than forty-two months.

paradoxically contends that the rule of lenity requires this Court to hold that these recidivist offenders are not subject to any mandatory period of parole ineligibility under subsection (j). This Court should reject defendant's reliance on the rule of lenity for three main reasons: (1) there is no ambiguity; (2) legislative intent resolves any purported ambiguity; and (3) lenity would frustrate the legislature's intent.

First, the rule of lenity applies only "if a statute is ambiguous." State v. Regis, 208 N.J. 439, 452 (2011); see also State v. Rodriguez, 238 N.J. 105, 114 (2019) (same). While defendant relies on unpublished caselaw that reached a different result from the published decision here, this Court recently reiterated that the rule of lenity "does not apply 'simply because there are competing judicial interpretations of the statutory language[.]'" State v. O'Donnell, 255 N.J. 60, 81 (2023) (citing Regis, 208 N.J. at 452). Nor does defendant's reliance on the Model Jury Charge for subsection (j), or charging decisions by prosecutors in prior cases, require a different result. After all, it is the job of the judiciary to interpret the law. See O'Donnell, 255 N.J. at 79 (declining to "give weight to model jury charges[.]" which "are not binding statements of law"). And the Model Jury Charge does not address the sentencing consequences of subsection (j), which is ultimately the issue before this Court.

Second, the rule of lenity applies only if the search for legislative intent

via traditional statutory tools, including extrinsic evidence, is “fruitless, and the ambiguity remains.” State v. D.A., 191 N.J. 158, 165 (2007). See also Rodriguez, 238 N.J. at 114 (stating that “only when a statutory ambiguity cannot be resolved by analysis of the relevant text and the use of extrinsic aids does the rule of lenity require . . . that the ambiguity be resolved in favor of the defendant”); Harper, 229 N.J. at 244 (same). Here, any purported ambiguity is resolved by the Legislature’s expressly stated intent to “upgrade” unlawful possession of firearms by defendants with prior NERA convictions. It would make no sense to “upgrade” the offense, while simultaneously removing any mandatory period of parole ineligibility.

Third, the rule of lenity “does not prevent a court from reading the statute in relation to the mischief and evil sought to be suppressed.” D.A., 191 N.J. at 164. The Legislature determined there was a need for harsher punishment for individuals with serious prior convictions who continue to recidivate by unlawfully possessing firearms. The rule of lenity does not prevent this Court from effectuating that intent. To the contrary, accepting defendant’s cramped interpretation of the Graves Act would effectively gut the Legislature’s goal.

And there is nothing unfair about applying the Graves Act to subsection (j) offenders like this defendant. Read together, subsection (j) and the Graves Act “made it reasonably clear” that mandatory-minimum sentencing would

apply. See United States v. Lanier, 520 U.S. 259, 267 (1997). The plain text of subsection (j) establishes that there must be a “violation of subsection a., b., c. or f. of [N.J.S.A. 2C:39-5.]” And the plain text of the Graves Act, N.J.S.A. 2C:43-6(c), provides that “[a] person who has been convicted under . . . subsection a., b., c., or f. of N.J.S. 2C:39-5” is subject to mandatory-minimum sentencing. In other words, a defendant who qualifies for enhanced sentencing under subsection (j) is, by definition, convicted of an enumerated Graves Act offense. The statutory scheme thus gave fair warning that the Graves Act would apply to anyone with a prior NERA crime who continued to flout the law by unlawfully possessing a firearm.

The Appellate Division’s ruling properly effectuates this legislative intent, rather than causing supposed “upheaval” that was not intended. (Dsb45 to 48). Defendant claims that the Appellate Division’s ruling removes prosecutorial charging discretion. But the Attorney General’s Graves Act Directive already channels prosecutorial discretion. See Attorney General Directive to Ensure Uniform Enforcement of the “Graves Act” (Oct. 23, 2008, as corrected Nov. 25, 2008). It requires prosecutors to charge Graves Act offenses and pursue the mandatory penalties when there is a lawful basis to do so. Id. at 5. The Directive does have exceptions, allowing for dismissal or downgrade of a Graves Act offense when there is insufficient evidence, the

defendant will otherwise be serving a sentence at least equal to the required Graves Act sentence, or the defendant is cooperating with the prosecution of another. Id. at 5-6. While subsection (j) may not have existed when this Directive was promulgated, the Attorney General has not issued any new Directive suggesting that subsection (j) should be treated any differently in terms of required charging of Graves Act offenses.⁷

Nor does the Appellate Division's ruling "put the legality of existing second- and third-degree N.J.S.A. 2C:39-5 convictions in doubt[.]" (Dsb47 to 48). If the State did not prove the existence of a prior qualifying conviction (or defendant did not admit the existence of such a conviction), then it is unclear why the second-degree or third-degree sentence would now need to be vacated. After all, as noted, the Directive has exceptions allowing for the dismissal or downgrade of a Graves Act offense.

In sum, the goal of statutory interpretation is to determine and effectuate the Legislature's intent, considering the entire statutory scheme. Here, the

⁷ Indeed, defendant's citation to the unpublished opinion in State v. Neal, Docket No. A-0232-19 (App. Div. March 17, 2022) (Dsa112 to 116), appears to prove this point rather than support defendant's position. According to the opinion in Neal, the defendant originally pleaded guilty to first-degree unlawful possession of a weapon under subsection (j). The parties later jointly moved to vacate that plea and allow Neal to plead guilty to second-degree unlawful possession of a handgun under subsection (b) "based on [Neal's] cooperation with the State." (Dsa116, n. 1).

Legislature expressly stated its intent to “upgrade” unlawful possession of a firearm to a more serious offense for defendants with prior NERA convictions. The Legislature could not have intended to paradoxically insulate these same dangerous offenders from any mandatory parole disqualifier, which would effectively gut the goal of more serious punishment. This Court should thus affirm the Appellate Division’s decision holding that the Legislature intended for Graves Act mandatory-minimum sentencing to apply to subsection (j).

C. At a minimum, the mandatory period of parole ineligibility applicable to the underlying weapons offense must survive.

Even if this Court were to find that subsection (j) operates as a separate substantive offense, defendant is not entitled to a sentence without any mandatory minimum. Rather, the Graves Act mandatory penalties still apply because a conviction under subsection (j) requires the defendant to admit, or the jury to find, that the defendant knowingly possessed a handgun without a permit—which establishes the subsection (b) offense. See Model Jury Charges (Criminal), “Unlawful Possession of a Handgun Prior NERA Conviction (First Degree) (N.J.S.A. 2C:39-5(j))” (approved June 2018). And that is exactly what occurred here: defendant necessarily pleaded guilty to the subsection (b)(1) offense—which was charged in the indictment—when he admitted he possessed a handgun without a permit. Based on his admission that he was previously convicted of reckless manslaughter, a crime enumerated in NERA, he was also guilty under subsection (j).

Where the defendant is convicted (either by guilty plea or at trial) of both offenses, the lesser offense (subsection (a), (b), (c), or (f)) will be subsumed into the greater offense (subsection (j)). See State v. Hammond, 231 N.J. Super. 535, 545 (App. Div.) (“No crime of greater degree or culpability can merge into one of lesser degree or culpability.”), certif. denied, 117 N.J. 636 (1989). Subsections (a), (b), (c), and (f) are either second-degree or third-degree crimes, and the Graves Act unquestionably applies to those convictions, subject only to the exceptions set forth in N.J.S.A. 2C:43-6(d)(2).⁸

As the Appellate Division has found in an analogous context, mandatory Graves Act penalties cannot simply be “forgotten” through merger. See State v. Connell, 208 N.J. Super. 688, 696-97 (App. Div. 1986) (finding that “Legislature did not intend to eliminate mandatory Graves Act sentences through merger” of Graves Act offenses with non-Graves Act offenses). Defendant appears to acknowledge this principle (see Dsb34, citing Connell), which is consistent with other precedent from this Court and the Appellate Division on mandatory sentencing provisions. See State v. Dillihay, 127 N.J. 42, 44-45 (1992) (recognizing third-degree school-zone offenses must merge

⁸ Defendant’s offense does not fall within one of these exceptions. He was indicted for, and pleaded guilty to, unlawful possession of a handgun under subsection (b)(1) of N.J.S.A. 2C:39-5. N.J.S.A. 2C:43-6(d)(2) only exempts subsection (b)(2) of N.J.S.A. 2C:39-5, pertaining to unlawful possession of “an air gun, spring gun or pistol or other weapon of a similar nature[.]”

into related first- or second-degree offenses, but “mandatory minimum sentence no less severe than that required by the school-zone statute” must be imposed); State v. Robinson, 439 N.J. Super. 196 (App. Div. 2014) (noting where plea agreement contemplated higher maximum prison term for second-degree weapons offense, and lower maximum prison term but higher statutory period of parole ineligibility for second-degree burglary to be sentenced in third-degree range, “the more severe aspects of each sentence should survive merger”), certif. denied, 221 N.J. 492 (2015).

Under these circumstances, if this Court determines that subsection (j) operates as a separate substantive offense not subject to the Graves Act, the matter should be remanded for the court to impose a sentence for the N.J.S.A. 2C:39-5(b)(1) violation and the N.J.S.A. 2C:39-5(j) violation—both of which he admitted to during his guilty plea. The convictions would merge. But the Graves Act sentence on the subsection (b)(1) violation—one-half of the sentence imposed or 42 months, whichever is greater—would survive the merger.⁹

⁹ In the Appellate Division, the State also argued that if the matter was remanded for resentencing, the sentencing judge should have the opportunity to rule on the State’s request for a discretionary parole disqualifier under N.J.S.A. 2C:43-6(b). The Appellate Division did not reach this issue, presumably because it ruled that the Graves Act mandatory parole disqualifier applies. In any event, defendant agrees that if a resentencing is required, the sentencing court may consider the State’s motion under N.J.S.A. 2C:43-6(b). (Dsb48 to 50).

CONCLUSION

For the foregoing reasons, the State urges this Court to hold that Graves Act mandatory-minimum sentencing applies to first-degree unlawful possession of a weapon under subsection (j) of N.J.S.A. 2C:39-5. As a result, this Court should affirm defendant's ten-year sentence with a five-year parole disqualifier. Alternatively, this Court should hold that, at a minimum, the mandatory period of parole ineligibility applicable to the underlying weapons offense must survive.

Respectfully submitted,

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