

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089386
APP. DIV. NO. A-3359-21

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Certification from a Judgment of
v.	:	the Superior Court of New Jersey,
	:	Appellate Division
DELSHON J. TAYLOR JR.,	:	Indictment No. 18-07-0257-I
a/k/a TAYLOR DELSHON,	:	
and DJ,	:	Sat Below:
Defendant-Appellant.	:	Hon. Heidi Willis Currier, P.J.A.D.
	:	Hon. Ronald Susswein, J.A.D.
	:	Hon. Christine M. Vanek, J.A.D.
	:	Hon. Linda L. Lawhun, P.J.Cr.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	<u>PAGE NOS.</u>	
<u>PROCEDURAL HISTORY</u>	1	
<u>STATEMENT OF FACTS</u>	6	
<u>LEGAL ARGUMENT</u>	12	
 <u>POINT I</u>		
 BECAUSE THE PRESIDING JUDGE FAILED TO APPLY THE CORRECT STANDARD OF REVIEW FOR DENIALS OF GRAVES ACT WAIVERS—ORDINARY ABUSE OF DISCRETION—THIS COURT SHOULD REVERSE AND REMAND FOR RECONSIDERATION UNDER THE CORRECT STANDARD.		12
 A. Judicial Review Of The Prosecutor’s Decision Whether To Waive The Graves Act Mandatory Minimum Is Necessary To Prevent N.J.S.A. 2C:43- 6.2 From Violating The Separation Of Powers Doctrine.		15
 B. A Prosecutor’s Decision To Refuse A Graves Act Waiver Should Be Reviewed Under The Same Standard As Every Other Prosecutorial Decision Impacting Sentencing—Ordinary Abuse Of Discretion.		25
 C. Because The Motion Court In This Case Erroneously Reviewed The Prosecutor’s Waiver Denial For Patent And Gross Abuse Of Discretion, This Court Should Reverse And Remand For Consideration Under The Ordinary Abuse Of Discretion Standard.		40

TABLE OF CONTENTS (CONT'D)

	<u>PAGE NOS.</u>
D. This Court Should Provide Guidance On What Constitutes An Abuse Of Discretion In The Context Of Graves Act Waiver Denials.	42
<u>CONCLUSION</u>	49

TABLE OF AUTHORITIES

Cases

Achacoso-Sanchez v. Immigration and Naturalization Service,
779 F.2d 1260 (7th Cir. 1985)26

Berta v. New Jersey State Parole Bd., 473 N.J. Super. 284
(App. Div. 2022)..... 45, 47

David v. Vesta Co., 45 N.J. 301 (1965)..... 22, 25

Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561 (2002) passim

State in re V.A., 212 N.J. 1 (2012) passim

State v. A.T.C., 239 N.J. 450 (2019) passim

State v. Alvarez, 246 N.J. Super. 137 (App. Div. 1991)..... passim

State v. Andrews, 464 N.J. Super. 111 (App. Div. 2020)44

State v. Bender, 80 N.J. 84 (1979) 26, 28

State v. Benjamin, 224 N.J. 119 (2016)..... 25, 37

State v. Benjamin, 228 N.J. 358 (2017)..... passim

State v. Benjamin, 442 N.J. Super. 258 (App. Div. 2015).....38

State v. Brimage, 153 N.J. 1 (1998).....43

State v. Case, 220 N.J. 49 (2014).....46

State v. Cengiz, 241 N.J. Super. 482 (App. Div. 1990) 34, 35

State v. Dalglish, 86 N.J. 503 (1981).....29

State v. Hess, 207 N.J. 123 (2011).....29

State v. Howard, 110 N.J. 113 (1988)29

TABLE OF AUTHORITIES (CONT'D)

State v. Hyland, 238 N.J. 135 (2019).....33

State v. K.S., 220 N.J. 190 (2015) 46, 48

State v. Kraft, 265 N.J. Super. 106 (1993) 26, 29

State v. Lagares, 127 N.J. 20 (1992)..... passim

State v. Lazarchick, 314 N.J. Super. 500 (App. Div. 1998)32

State v. Leonardis, 73 N.J. 360 (1977) 27, 28, 29, 33

State v. Nance, 228 N.J. 378 (2017) 18, 19, 44

State v. Nwobu, 139 N.J. 236 (1995)..... 26, 29

State v. Rodriguez, 466 N.J. Super. 71 (App. Div. 2021)..... passim

State v. Roth, 95 N.J. 334 (1984)..... 21, 22

State v. Taylor, 259 N.J. 365 (2024).....5

State v. Taylor, No. A-3303-18 (App. Div. Aug. 28, 2019)2

State v. Taylor, No. A-3359-21 (App. Div. Apr. 24, 2024).....4

State v. Todd, 238 N.J. Super. 445 (App. Div. 1990) 34, 35

State v. Vasquez, 129 N.J. 189 (1992) passim

State v. Wallace, 146 N.J. 576 (1996) 26, 28

State v. Warren, 115 N.J. 433 (1989) 20, 21, 30

State v. Watson, 346 N.J. Super. 521 (App. Div. 2002)36

State v. Williams, 192 N.J. 1 (2007).....2

TABLE OF AUTHORITIES (CONT'D)

Statutes

L. 1981, c.3115

L. 1989, c. 5316

L. 2007, c. 28416

L. 2007, c. 34116

L. 2013, c. 11317

N.J.S.A. 2C:14-2..... 19, 20

N.J.S.A. 2C:28-6.....1

N.J.S.A. 2C:29-1.....1

N.J.S.A. 2C:35-12..... passim

N.J.S.A. 2C:35-14.....33

N.J.S.A. 2C:39-10.....16

N.J.S.A. 2C:39-3.....1

N.J.S.A. 2C:39-4..... 1, 15

N.J.S.A. 2C:39-5..... 1, 3, 16, 17

N.J.S.A. 2C:43-2.....18

N.J.S.A. 2C:43-6.2 passim

N.J.S.A. 2C:43-6c..... 12, 15, 17

N.J.S.A. 2C:43-6f passim

N.J.S.A. 2C:44-1.....18

TABLE OF AUTHORITIES (CONT'D)

N.J.S.A. 2C:51-2..... 19, 20, 31

Court Rules

R. 1:33-6.....18

R. 1:6-2.....18

Constitutional Provisions

N.J. Const. art. III, ¶ 1.....22

Other Authorities

Administrative Office of the Courts, Memorandum, Motions in Graves Act Cases—Delegable by Assignment Judge to Criminal Presiding Judge (Nov. 21, 2008).....18

Attorney General Directive to Ensure Uniform Enforcement of the “Graves Act” (Oct. 23, 2008, as corrected Nov. 25, 2008) passim

Notice to the Bar, Mandatory Electronic Filing in Criminal Matters - eCourts Criminal (Dec. 5, 2016), available at <https://www.njcourts.gov/notices/2016/n161207a.pdf>18

TABLE OF JUDGMENTS, ORDERS AND RULINGS APPEALED

Decision Denying Defendant’s Motion to Override
the Prosecutor’s Denial of a Graves Act Waiver8T24-15 to 43-22

Judgment of ConvictionDa103-106

Appellate Division Opinion Pa1-25

PROCEDURAL HISTORY

On June 18, 2018, a Salem County grand jury returned Indictment Number 18-07-0257-I against defendant-appellant Delshon J. Taylor, charging him with: second-degree unlawful possession of a handgun, contrary to N.J.S.A. 2C:39-5b(1) (count one); second-degree possession of a handgun for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a(1) (count two); fourth-degree obstructing the administration of law, contrary to N.J.S.A. 2C:29-1a (count three); fourth-degree tampering with physical evidence, contrary to N.J.S.A. 2C:28-6(1) (count four); and fourth-degree possession of hollow point bullets, contrary to N.J.S.A. 2C:39-3f(1) (count five). (Da1-2)¹

Assistant Prosecutor Michael Mestern was assigned the case and upon reviewing it decided not to file a motion for a waiver of the Graves Act parole

¹ The following abbreviations will be used:

Pa – Defendant’s Petition Appendix

Db – Defendant’s Appellate Division Brief (filed Nov. 16, 2022)

Da – Defendant-Appellant’s Appendix (filed Nov. 16, 2022)

Dca – Defendant-Appellant’s Confidential Appendix (filed Oct 5, 2022)

1T – Oct. 12, 2018 (evidentiary hearing on suppression motion)

2T – Nov. 2, 2018 (initial decision on suppression motion)

3T – Feb. 8, 2019 (motion for reconsideration)

4T – Oct. 10, 2019 (decision on remand from Appellate Division)

5T – Apr. 26, 2021 (plea)

6T – July 16, 2021 (adjournment of sentencing)

7T – July 23, 2021 (motion to override Graves Act waiver denial)

8T – June 24, 2022 (sentencing)

PSR – Presentence Report (submitted under separate cover)

disqualifier. (8T21-15 to 17) He did not provide a written statement of reasons to Mr. Taylor or otherwise explain why Mr. Taylor’s case warranted a departure from the presumption of a waiver set forth in the Attorney General Directive to Ensure Uniform Enforcement of the “Graves Act” (Oct. 23, 2008, as corrected Nov. 25, 2008) (“the Directive”). (Da34-36)

After winning—and then losing after a remand from the Appellate Division—a motion to suppress physical evidence,² Mr. Taylor renewed his request for a Graves Act waiver. (Da34) On February 12, 2020, A.P. Mestern sent a letter denying the request. (Da34-36) The letter stated:

Counsel representing your client in this matter, prior to you being assigned this case, requested a waiver of the mandatory minimum sentence required by the Graves Act. This request was then discussed with the First Assistant Prosecutor and it was decided that the State’s offer will remain the mandatory minimum five years prison with a 42-month parole disqualifier. There has not been a change in circumstances that would warrant a change in that decision.

[(Da34)]

² The motion court entered an order suppressing the handgun on February 11, 2019. (Da15-22) On the State’s motion for leave to appeal the Appellate Division ordered “a remand for further consideration” to allow “the motion judge to apply the three factors cited in [State v. Williams, 192 N.J. 1 (2007),] to the facts of this case.” State v. Taylor, No. A-3303-18 (App. Div. Aug. 28, 2019) (slip op. at 9). (Da32) On October 10, 2019, the motion court entered an order denying the motion to suppress. (4T18 15 to 23-21; Da33)

On April 26, 2021, Defendant entered a plea of guilty to count one of Indictment 18-07-257-I, second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5b, in exchange for dismissal of the remaining counts of the indictment and a recommended sentence of five years with three-and-a-half years of parole ineligibility pursuant to the Graves Act. (Da37-41; 5T) On June 4, 2021, Defendant pled guilty to a fourth degree resisting arrest charge in a separate indictment in exchange for a recommendation of a concurrent eighteen-month sentence. (Da44)

On July 16, 2021, the scheduled sentencing date, the Honorable Judge Linda L. Lawhun, P.J.Cr., asked why a Graves Act waiver was never offered and expressed concern that a waiver to a one-year parole disqualifier would be more appropriate than the otherwise mandatory forty-two-month parole disqualifier. (6T7-13 to 9-6; 8T27-22 to 24) Because the prosecutor of record, Mr. Mestern, was not present, the court adjourned the sentencing to July 23, 2021, to hear from Mr. Mestern regarding the State's decision not to seek a Graves Act waiver. (6T9-7 to 12) On July 23, 2021, Defendant filed a motion to override the State's denial of a waiver of the Graves Act parole disqualifier. (7T5-15 to 17; Da42-48) After the State responded to Defendant's motion, Judge Lawhun found that Defendant had established a prima facie case that the prosecutor's denial was arbitrary and capricious and requested the State

explain why Defendant was denied a waiver when compared to a list of defendants who had been granted a waiver the Judge had identified. (8T3-11 to 19) After the State responded, Judge Lawhun issued her decision on June 24, 2022, finding that a parole disqualifier of three-and-a-half years would be “the wrong sentence for this defendant” and that a one-year parole disqualifier would be a more appropriate sentence, but ultimately denying Defendant’s motion to override the prosecutor’s refusal to consent to a waiver after applying the “patent and gross abuse of discretion” standard of review. (8T40-9 to 43-17) The court then sentenced Defendant to five years in prison subject to a forty-two-month parole disqualifier. (8T44-1 to 3; Da103)

Mr. Taylor appealed, challenging both the denial of his motion to suppress as well as the prosecutor’s refusal to consent to a Graves Act waiver. (Db) In challenging the Graves Act waiver denial, Mr. Taylor argued that the patent and gross abuse of discretion standard of review articulated in State v. Rodriguez, 466 N.J. Super. 71 (App. Div. 2021) was erroneous. (Db44-48, Drb1-12) The Appellate Division rejected all of Mr. Taylor’s arguments and affirmed his conviction and sentence in an unpublished opinion. State v. Taylor, No. A-3359-21 (App. Div. Apr. 24, 2024). (Pa1-25) Mr. Taylor petitioned to this Court, and this Court granted certification to consider “the

standard of review for denials of Graves Act Waivers.” State v. Taylor, 259 N.J. 365, 366 (2024).

STATEMENT OF FACTS

On November 15, 2017, at 9:26:59 PM, Penns Grove Police Department Patrolman Travis Paul radioed that he heard shots fired in the area of South Broad Street. Paul was patrolling the Penns Grove Gardens apartment complex off South Broad Street. (1T33-5 to 15, 19-13 to 20-4; Da3) He turned onto South Broad Street but saw no one. (1T33-18 to 34-3) Paul then responded to South Smith Street to assist Patrolman Joseph Johnson, who had stopped two men in response to Paul's report of shots fired. (1T34-4 to 35-4) Johnson "frisked" the two men, during which he pulled the waistband of one man's pants away from his waist and shined a flashlight into his pants. (Da6³ 21:31:08 to 21:31:36; 1T48-7 to 49-7)

Meanwhile, Penns Grove Police Department Sergeant Carmen Hernandez began driving her marked police SUV down South Broad Street in response to the call of shots fired. (1T8-22 to 9-4) Hernandez saw two men walking down the sidewalk, saw a third man approach them, and saw a truck pulled up near them; she acknowledged they were not engaging in any suspicious behavior. (1T8-22 to 9-13, 20-23 to 23-20) Hernandez exited her vehicle and told the men there were shots fired in the area and that the men

³ Da6 is a video recording from Patrolman Joseph Johnson's Body-Worn Camera.

were being detained. (1T9-22 to 10-18) One of the three men was Delshon Mr. Mr. Taylor. (1T27-12 to 16) The men responded that they, too, heard the shots, which they believed were fired in the nearby Penn Village Apartments. (1T10-14 to 22; Da4 21:32:00 to 21:32:10) One of the men responded that it was “bullshit” that they were being stopped. (Da4 21:32:12 to 21:32:14) Mr. Taylor said he wanted to go home, but Hernandez told him he was not allowed to go and had to stay. (1T28-23 to 29-1)

Paul arrived on scene to help Hernandez at 9:33 p.m. followed by Carneys Point Patrolman Timothy Haslett. (1T12-1 to 17, 34-15 to 19; Da5⁴ 21:33:30) Hernandez’s attention was directed to Zaire Robinson—the male who had originally been in the driver’s side of the vehicle and kept trying to walk away—while Paul and Haslett spoke to the other two males. (1T12-9 to 20) The truck started to drive away, at which point Hernandez directed a sheriff’s officer who had just arrived on the scene to stop the truck. (1T10-10 to 13, 11-24 to 12-1, 35-25 to 36-3; Da4 21:33:05 to 33:20)

Hernandez began patting down Robinson, who asked her, “What are you patting me down for?” (1T13-13 to 15; Da4 21:33:54 to 34:07) Haslett was speaking to the second male, Corey Mills, Jr., so Paul approached Mr. Taylor. (1T12-9 to 20, 36-11 to 25, 60-23 to 61-3) Mr. Taylor walked toward Paul and

⁴ Da5 is a video recording from Patrolman Paul’s Body-Worn Camera.

said to him, “I didn’t even do nothing, Bro, I’m going home.” (1T36-6 to 8, 38-1 to 3; Da5 21:33:30 to :35) Paul told Mr. Taylor he was going to pat him down, Mr. Taylor responded, “Nah, Bro,” and Paul said, “I got you, just put your hands on the car.” (1T38-5 to 9; Da5 21:33:40 to 33:44) Mr. Taylor responded, “No, cause y’all not bout to pat me down, Bro. And I didn’t do nothing.” (Da5 21:33:44 to 33:49) Paul replied, “I know you, I know you, I got you, but I have to pat you down for my safety, Bro.” (Da5 21:33:49 to 33:56) Mr. Taylor again said, “I don’t have nothing,” and Paul replied, “I have to pat you down.” (Da5 21:33:56 to 34:00) At that moment, Mr. Taylor took off running. (1T38-12 to 15; Da5 21:34:00 to 02) Paul and Haslett chased after Mr. Taylor. (1T38-16 to 19, 63-9 to 20)

As Haslett and Paul were chasing Mr. Taylor, Haslett tried to grab Mr. Taylor, and both officers saw Mr. Taylor throw a handgun to the curb on Willis Street. (1T38-16 to 39-12, 63-24 to 64-3) Haslett recovered the gun while Paul caught up to Mr. Taylor and arrested him. (1T39-6 to 14, 63-14 to 64-6)

Prior to his arrest in this case, Mr. Taylor had just one conviction for a single disorderly persons offense (simple assault), but no prior indictable convictions or adjudications of juvenile delinquency. (PSR8-9) This was still the entirety of Mr. Taylor’s record when the case was indicted on July 18,

2018, at which point Assistant Prosecutor Michael Mestern “considered everything in front of [him] and based on that [he] did not seek a Graves Act waiver.” (8T21-15 to 17) However, Mr. Mestern did not issue a written statement of reasons for the refusal until February 12, 2020. (Da34) At the time of that letter, Mr. Taylor had incurred a second, minor offense on his record—a municipal ordinance violation from Carneys Point for “Refusal to Assist Township Officer.” (PSR9) Mr. Mestern’s letter did not assess the aggravating and mitigating factors, nor did it reference the mandate created by the Directive that the State “shall agree” to move for a waiver unless one of the four exceptions applies. (Da34-36) The State’s reasons for refusing to approve a waiver focused entirely on the facts of the offense, including that Mr. Taylor “was in public with a concealed semi-automatic handgun that was loaded with hollow point bullets,” that Mr. Taylor “was noncompliant and ran from the officers” when they “tried to conduct a safety pat-down,” and Mr. Taylor then threw the handgun while he was running. (Da35-36)

While this case was pending, from 2019 to 2021, Mr. Taylor was employed by Accu Staffing at the Goya factory in Pedricktown. (PSR13) During the fall of 2020, Mr. Taylor worked nights and missed a court date. (Da44) When he received the notice about the bench warrant, he immediately contacted his attorney, who was able to get the warrant cleared. (Da44)

However, because he had recently moved and only informed pretrial services about his new address—and not the court—he did not receive the notice for the rescheduled date, missed this date, and a second bench warrant was issued.

(Da44) “On November 20, 2020, police attempted to stop Mr. Taylor for the warrant,” at which point “Mr. Taylor ran a short distance” before two officers grabbed him and subsequently charged him with resisting arrest. (Da44)

After Judge Lawhun reviewed Mr. Taylor’s presentence report (PSR) for the scheduled sentencing date on July 16, 2021, the court “had in mind” that a sentence with the Graves Act parole disqualifier waived to one year would be the appropriate sentence and inquired why a Graves Act waiver had not been requested. (8T27-17 to 24, 43-16 to 18) On August 10, 2021, in response to Mr. Taylor’s motion to override the prosecutor’s denial of a Graves Act waiver, the State reiterated its reasons for denying the waiver based on the facts of the case, adding one additional assertion: Defendant’s proximity to the location where shots were fired and the fact that shell casings found matched the caliber of Defendant’s handgun—though ballistics analysis was not able to match the casings to the gun—constituted “strong circumstantial evidence that [the shots] were fired from the handgun the Defendant had on his person.” (Da54-55; 8T29-13 to 30-3) The State asserted that aggravating factors three,

six, and nine applied, while mitigating factors eight and fourteen applied.

(Da55-57)

Judge Lawhun found that Mr. Taylor had established a prima facie case that the prosecutor's denial was arbitrary and capricious and requested the State explain why Defendant was denied a waiver when compared to a list of fourteen defendants the court had identified who had been granted a waiver.

(8T3-11 to 19, 33-1 to 4)

On September 11, 2021, Mr. Taylor was brought to an emergency room of a Delaware hospital with multiple gunshot wounds. (Dca1-23) He had to receive surgery to repair a fracture to his jaw from one of the gunshots and to repair damage to his kidney, ureter, and colon from another gunshot. (Dca1-23)

In the court's ultimate assessment of the State's denial of a Graves Act waiver for Mr. Taylor, Presiding Judge Lawhun found: the State had granted a Graves Act waiver to five defendants whose cases were distinctly worse than Mr. Taylor's (8T34-19 to 21); the mitigating factors outweighed the aggravating factors (finding aggravating factors three and nine but rejecting aggravating factor six, while finding mitigating factors two, seven, eight, nine, ten, and fourteen) (8T37-21 to 40-13); a parole disqualifier of three-and-a-half years would be "the wrong sentence for this defendant" and that a one-year

parole disqualifier would be a more appropriate sentence (8T40-9 to 43-17); but that she did not find “that [the State’s] abuse of discretion was patent and gross.” (8T43-20 to 21)

LEGAL ARGUMENT

POINT I

BECAUSE THE PRESIDING JUDGE FAILED TO APPLY THE CORRECT STANDARD OF REVIEW FOR DENIALS OF GRAVES ACT WAIVERS—ORDINARY ABUSE OF DISCRETION—THIS COURT SHOULD REVERSE AND REMAND FOR RECONSIDERATION UNDER THE CORRECT STANDARD.

While the Graves Act (N.J.S.A. 2C:43-6c) mandates a parole disqualifier of forty-two months for many firearms offenses, the prosecutor can file a motion with the assignment judge or her designee to waive the parole disqualifier pursuant to N.J.S.A. 2C:43-6.2, which then allows the assignment or presiding judge to waive the mandatory parole disqualifier and instead choose between a prison sentence with a one-year disqualifier or a sentence of probation. This is an extraordinary grant of authority to the prosecutor over sentencing, which is traditionally and quintessentially a judicial function. This grant of authority triggers separation of powers concerns, and judicial review of the prosecutor’s decision whether to waive the Graves Act parole

disqualifier is thus necessary to preserve the constitutionality of N.J.S.A.

2C:43-6.2. (**Part A**)

In allowing for judicial review of various prosecutorial decisions in criminal cases, this Court has distinguished between review for ordinary abuse of discretion (i.e. the “arbitrary and capricious” standard) and review for “patent and gross abuse of discretion.” A decision reviewed for patent and gross abuse of discretion is entitled to extreme deference and will rarely be overturned. Because a prosecutor’s decision whether to admit a defendant to the Pretrial Intervention Program (PTI) is a quintessentially prosecutorial function, judicial review of such decisions is limited to the extremely deferential patent and gross abuse of discretion standard. In contrast, because sentencing is quintessentially a judicial function, and because judicial review of a prosecutor’s decision whether to waive a mandatory term of a sentence is necessary to comport with separation of powers, such decisions are reviewed under the ordinary abuse of discretion standard. (**Part B**)

Prior to the last three decades of case law setting forth these principles, the Appellate Division held that the standard of review for a Graves Act waiver denial was neither the ordinary or patent and gross abuse of discretion standard but rather required assessing “whether the prosecutor arbitrarily or unconstitutionally discriminated against a defendant.” State v. Alvarez, 246

N.J. Super. 137, 147 (App. Div. 1991). In State v. Benjamin, 228 N.J. 358, 372 (2017), this Court quoted the Alvarez standard without considering whether the Alvarez standard, the ordinary abuse of discretion standard, or the patent and gross abuse of discretion standard was most appropriate for judicial review of Graves Act waiver denials. After Benjamin, the Appellate Division in State v. Rodriguez, 466 N.J. Super. 71, 97 (App. Div. 2021), erroneously held that Alvarez and Benjamin “adopted the patent and gross abuse of discretion standard.” This Court should abrogate Rodriguez and hold that the standard of review for a Graves Act waiver denial is the same as the standard of review for all other prosecutorial decisions whether to waive mandatory sentencing provisions—ordinary abuse of discretion. (**Part B**)

Because the motion court in this case erroneously reviewed the prosecutor’s waiver denial for patent and gross abuse of discretion, this Court should reverse and remand for consideration under the ordinary abuse of discretion standard. (**Part C**) Additionally, this Court should provide guidance to assignment judges on what exactly constitutes an abuse of discretion in the context of a Graves Act waiver denial. (**Part D**)

A. Judicial Review Of The Prosecutor’s Decision Whether To Waive The Graves Act Mandatory Minimum Is Necessary To Prevent N.J.S.A. 2C:43-6.2 From Violating The Separation Of Powers Doctrine.

Enacted in 1981, the “Graves Act”⁵ added subsection (c) to N.J.S.A. 2C:43-6, mandating a term of incarceration that included a period of parole ineligibility (a “parole disqualifier”) of “between one-third and one-half of the sentence imposed . . . or 3 years, whichever is greater”⁶ upon conviction for possession of a firearm for an unlawful purpose (2C:39-4a) or for other enumerated offenses when committed while in possession of a firearm.⁷ L. 1981, c.31, § 1. In 1989, the Legislature enacted a provision allowing the assignment judge to waive the mandatory parole disqualifier upon motion of the prosecutor, which read as follows:

On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment under subsection c. of N.J.S.2C:43-6 for a defendant who has not previously been convicted of an offense under that subsection does not serve the interests of justice, the assignment judge shall place the defendant on probation pursuant to paragraph (2) of subsection b. of N.J.S.2C:43-2 or reduce to one year the

⁵ Named for its sponsor, Senator Francis X. Graves.

⁶ In the case of a fourth-degree offense, the Graves Act provides for a mandatory term of eighteen months. L. 1981, c.31, § 1.

⁷ Not relevant here, the Act also created a mandatory extended term when a defendant previously convicted of one of the enumerated offenses with a firearm is subsequently convicted of an enumerated offense. L. 1981, c.31, § 3.

mandatory minimum term of imprisonment during which the defendant will be ineligible for parole. The sentencing court may also refer a case of a defendant who has not previously been convicted of an offense under that subsection to the assignment judge, with the approval of the prosecutor, if the sentencing court believes that the interests of justice would not be served by the imposition of a mandatory minimum term.

[L. 1989, c. 53, codified as N.J.S.A. 2C:43-6.2.]

This language of the waiver statute, which is the language relevant to this appeal, remains the same today.⁸

In 2008, the Graves Act was amended to expand the list of enumerated offenses subject to the mandatory parole disqualifier to encompass numerous offenses in Chapter 39, including possession of a handgun without a permit under N.J.S.A. 2C:39-5b. L. 2007, c. 341, § 5, eff. Jan. 13, 2008. The Legislature simultaneously upgraded possession of a handgun without a permit from a third-degree to a second-degree offense. L. 2007, c. 284, § 1, eff. Jan. 13, 2008. This “significant expansion of the Graves Act” to encompass simple possession of firearms “prompted the Attorney General to issue a statewide directive . . . ‘[t]o ensure statewide uniformity in the enforcement of the Graves Act, and to provide reasonable incentives for guilty defendants to

⁸ The waiver statute was amended once, in 1993, to allow for a waiver of the parole disqualifier contained in N.J.S.A. 2C:39-10(e), the offense of giving a firearm to a minor.

accept responsibility by pleading guilty in a timely manner.” Rodriguez, 466 N.J. Super. at 98-99 (quoting Directive at 4). The Directive requires prosecutors to tender an initial offer agree to waive the Graves Act parole disqualifier to one year ““unless the prosecuting agency determines that the aggravating factors applicable to the offense conduct and offender outweigh any applicable mitigating circumstances,’ or ‘unless the prosecuting agency determines that a sentence reduction to a one-year term of parole ineligibility would undermine the investigation or prosecution of another.’” Id. at 99 (quoting Directive at 4).

In 2013, the parole disqualifier mandated by the Graves Act was amended from “between one-third and one-half of the sentence imposed . . . or three years, whichever is greater,” to “one-half of the sentence imposed . . . or 42 months, whichever is greater.” L. 2013, c. 113, § 2, eff. Aug. 8, 2013.

Thus, under current sentencing law, defendants charged with possession of a handgun without a permit under N.J.S.A. 2C:39-5b—the offense for which Mr. Taylor was convicted—face a sentence of five to ten years in prison with a mandatory minimum parole disqualifier of forty-two months under N.J.S.A. 2C:43-6c unless the prosecutor agrees to waive the parole disqualifier pursuant to N.J.S.A. 2C:43-6.2. If the prosecutor agrees to waive the mandatory

minimum, the prosecutor must file a motion⁹ with the assignment judge or the presiding judge of the Criminal Part if the assignment judge has designated her authority under section 6.2 to the presiding judge.¹⁰ The assignment or presiding judge then must “determine whether the defendant will be sentenced to a probationary term pursuant to N.J.S.A. 2C:43-2, or a term of incarceration with a one-year period of parole ineligibility.” State v. Nance, 228 N.J. 378, 397 (2017). If the prosecutor’s waiver motion specifically recommends either a one-year parole disqualifier or probation, “the assignment judge or designee may accept the prosecutor's recommendation as to the appropriate sentence, but is not bound by that recommendation.” Ibid. If the defendant is convicted of a second-degree offense, such as possession of a handgun without a permit, the assignment or presiding judge “must consider the presumption of incarceration set forth in N.J.S.A. 2C:44-1(d)” before deciding whether to waive the parole disqualifier to a probationary term. Ibid. The assignment or presiding judge may then either decide the remaining terms and directly

⁹ Under our court rules, the motion must be in writing, filed on eCourts, and must state “the grounds upon which it is made.” R. 1:6-2(a); Notice to the Bar, Mandatory Electronic Filing in Criminal Matters - eCourts Criminal (Dec. 5, 2016), available at <https://www.njcourts.gov/notices/2016/n161207a.pdf>.

¹⁰ See Administrative Office of the Courts, Memorandum, Motions in Graves Act Cases—Delegable by Assignment Judge to Criminal Presiding Judge (Nov. 21, 2008); see also R. 1:33-6(a) (authorizing delegation of assignment judge's authority under court rules to presiding judge).

impose the sentence, see N.J.S.A. 2C:43-6.2, or may send the case to an ordinary Criminal Division judge to determine the remaining terms and impose the sentence. Nance, 228 N.J. at 397.

The power that N.J.S.A. 2C:43-6.2 delegates to the prosecutor—the power to decide whether “to mandate a minimum prison term”—has been described by this Court as “extraordinary.” State v. Vasquez, 129 N.J. 189, 204 (1992). The Legislature has delegated to the prosecutor the extraordinary power to decide whether to waive an otherwise mandatory component of a sentence only in four other circumstances: (1) whether to move for a mandatory extended term under N.J.S.A. 2C:43-6f for repeat offenders under the Comprehensive Drug Reform Act (CDRA); (2) whether, pursuant to N.J.S.A. 2C:35-12, to waive the mandatory minimums, mandatory extended terms, or an anti-drug profiteering penalty of Chapter 35 offenses; (3) whether, pursuant to N.J.S.A. 2C:14-2(d), to waive the twenty-five year mandatory minimum sentence mandated by the Jessica Lunsford Act; and (4) whether, pursuant to N.J.S.A. 2C:51-2, to seek a waiver of forfeiture of public employment.

Because sentencing is quintessentially a judicial function, each of these “extraordinary” grants of prosecutorial authority to constrain judicial discretion in sentencing has been subject to constitutional challenges under the

separation of powers doctrine. In each case, this Court has held that judicial review of the prosecutor's decision is necessary to "preserve the separation of powers." State v. Lagares, 127 N.J. 20, 33 (1992) (requiring judicial review of a prosecutor's decision whether to move for a mandatory extended term under N.J.S.A. 2C:43-6f for repeat offenders under the CDRA); Vasquez, 129 N.J. 189 (requiring judicial review of a prosecutor's decision whether to waive the mandatory minimums, mandatory extended terms, or an anti-drug profiteering penalty pursuant to N.J.S.A. 2C:35-12); Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 570 (2002) (deciding standard of review for a prosecutor's decision whether to seek a waiver of forfeiture of public employment pursuant to N.J.S.A. 2C:51-2); State v. A.T.C., 239 N.J. 450, 474 (2019) (requiring judicial review of a prosecutor's decision whether to waive the twenty-five year mandatory minimum sentence mandated by the Jessica Lunsford Act pursuant to N.J.S.A. 2C:14-2(d)).

While Lagares was the first case to consider the separation of powers implications of unchecked prosecutorial authority to constrain judicial discretion in sentencing, Lagares began its analysis with the principles this Court articulated in State v. Warren, 115 N.J. 433 (1989). Lagares, 127 N.J. at 30. In Warren, this Court prohibited the use of plea agreements in which the prosecutor reserved the right to withdraw from a plea agreement if the court

imposed a more lenient sentence than that recommended by the prosecutor. 115 N.J. at 437, 449. Citing State v. Roth, 95 N.J. 334 (1984), this Court reasoned that “the determination of 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” and that a sentencing court’s “discretion should not by implication be encumbered by augmenting the prosecutor's influence on the sentencing determination.” Id. at 447-48. The Court also cautioned:

Individual prosecutors with distinctive perceptions of the gravity of particular offenses and offenders, and responsive to a very different constituency from that of the judiciary, would add undue variability, inevitable inconsistency, and greater disparity to the sentencing process. Hence, separate prosecutorial discretion cannot be superimposed on the court's sentencing discretion.

[Id. at 449.]

This Court in Lagares expanded upon those concerns in the context of N.J.S.A. 2C:43-6f, which gives the prosecutor discretion to decide whether or not to move for imposition of a mandatory extended term. 127 N.J. at 30-31. The Court noted that while a sentencing court faced with the type of plea agreement invalidated in Warren would have remained “free to reject the plea agreement in its entirety,” “once a prosecutor applies for an extended sentence under Section 6f and establishes a prior conviction, the sentencing judge has

no discretion to reject the enhanced sentence.” Id. at 31. The Court held that “such unfettered discretion exceeds the permitted ‘prosecutorial influence on the sentencing determination’ that we addressed in Warren.” Ibid.

Citing the separation powers provision of Article III of the New Jersey Constitution, the Court noted that separation of powers “was designed to ‘maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of unchecked power in the hands of any one branch.’” Id. at 26 (emphasis in original) (quoting David v. Vesta Co., 45 N.J. 301, 326 (1965)). The Court held:

Without standards the prosecutorial decision-making process remains unguided, and the danger of uneven application of enhanced sentences increases significantly. Such results upset the principal goal of the Code of Criminal Justice to insure sentencing uniformity. See Roth, 95 N.J. at 365. As currently written, therefore, Section 6f, with its lack of any guidelines and absence of any avenue for effective judicial review, would be unconstitutional.

[Id. at 31.]

Thus, this Court articulated three requirements in order for Section 6f to comport with the constitutional requirement of separation of powers and the Criminal Code’s overarching goal of uniformity: (1) “that guidelines be adopted to assist prosecutorial decision-making with respect to applications for

enhanced sentences under N.J.S.A. 2C:43-6f;” (2) that prosecutors “state on the trial court record the reasons for seeking an extended sentence” to “provide for effective judicial review and . . . help to insure that prosecutors follow the guidelines in each case;” and (3) that the sentencing judge has the authority to review the prosecutor’s decision and deny the prosecutor’s motion for an extended term “where defendant has established that the prosecutor's decision to seek the enhanced sentence was an arbitrary and capricious exercise of prosecutorial discretion.” Id. at 32-33. The Court held that “the articulation of guidelines by the State and by the preservation of adequate judicial review of prosecutorial decisions” was necessary to check “the risk of the prosecutor's arbitrary application of the sentencing provision.” Id. at 33.

Following Lagares, this Court held in Vasquez that these same three protections were required to preserve the constitutionality of the prosecutor’s authority to waive mandatory minimums or mandatory extended terms under N.J.S.A. 2C:35-12. 129 N.J. at 196. And following Vasquez, this Court in A.T.C. applied the same three requirements to preserve the constitutionality of the prosecutor’s authority to waive the twenty-five-year mandatory sentence under the Jessica Lunsford Act:

First, the Attorney General must promulgate uniform statewide guidelines designed to channel that discretion and minimize sentencing disparity between counties,

taking into account the legislative objective in the sentencing statute. . . .

Second, in order to facilitate effective judicial review, the prosecutor must provide a written statement of reasons for his or her exercise of prosecutorial discretion. . . .

Third, the sentencing court maintains oversight to ensure that prosecutorial discretion is not exercised in an arbitrary and capricious manner.

[239 N.J. at 473-74.]

In Benjamin, although not explicitly in reference to separation of powers concerns, this Court “consider[ed] whether the Graves Act provides the procedural safeguards required by this Court in Lagares and Vasquez.” 228 N.J. at 371. The Court concluded that in light of the Attorney General’s Directive, the Graves Act affords meaningful judicial review of a prosecutor’s decision to deny a Graves Act waiver” based on the following observations: (1) the “Directive instructs prosecutors how to uniformly apply the Graves Act and section 6.2;” (2) “the Directive requires prosecutors to ‘document in the case file [their] analysis of all the relevant aggravating and mitigating circumstances,’” and, as interpreted by the Court to “provide defendant with written reasons for withholding consent to a waiver;” and (3) defendants may “seek judicial review of prosecutors’ waiver decisions . . . by motion to the assignment judge.” Id. at 372.

Although this Court in Benjamin did not explicitly ground these requirements in the constitutional doctrine of separation of powers,¹¹ it is clear that these requirements are constitutionally mandated by the separation of powers doctrine. In the same manner as for all other grants of prosecutorial authority to decide whether to waive mandatory sentencing provisions, separation of powers requires judicial review of a prosecutor's decision whether or not to waive the Graves Act parole disqualifier under N.J.S.A 2C:43-6.2 “to prevent the concentration of unchecked power in the hands of” the prosecutor, Lagares, 127 N.J. at 26 (emphasis in original) (quoting David, 45 N.J. at 326), and to preserve the judiciary's ultimate authority to determine the sentence. Id. at 27-28.

B. A Prosecutor's Decision To Refuse A Graves Act Waiver Should Be Reviewed Under The Same Standard As Every Other Prosecutorial Decision Impacting Sentencing—Ordinary Abuse Of Discretion.

In allowing for judicial review of various prosecutorial decisions that impact the outcome of a criminal case, this Court has distinguished between two standards of review: (1) ordinary abuse of discretion, also referred to as

¹¹ The Court in Benjamin granted the State's petition for certification limited to the issue of “whether a defendant seeking a waiver of a mandatory sentence under the Graves Act has the right to discovery of the prosecutor's files on previous applications for Graves Act waivers.” State v. Benjamin, 224 N.J. 119 (2016). It thus did not have a constitutional challenge before it.

“the arbitrary and capricious” standard, and (2) “patent and gross” abuse of discretion. State in re V.A., 212 N.J. 1, 21-23 (2012).

As this Court noted in Flagg, “[a]lthough the ordinary ‘abuse of discretion’ standard defies precise definition,” it occurs when “‘a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment.’” 171 N.J. at 571 (originally quoting State v. Bender, 80 N.J. 84, 93 (1979)). In other words, “it arises when a decision . . . ‘inexplicably departed from established policies.’” Ibid. (quoting Achacoso-Sanchez v. Immigration and Naturalization Service, 779 F.2d 1260, 1265 (7th Cir. 1985)). “In contrast, a ‘patent and gross abuse of discretion is more than just an abuse of discretion . . . ; it is a prosecutorial decision that has gone so wide of the mark sought to be accomplished . . . that fundamental fairness and justice require judicial intervention.’” Id. at 572 (quoting State v. Wallace, 146 N.J. 576, 582-83 (1996)).

While both standards are somewhat deferential, a decision reviewed for patent and gross abuse of discretion is entitled to “extreme deference,” State v. Nwobu, 139 N.J. 236, 246 (1995) (quoting State v. Kraft, 265 N.J. Super. 106, 111-12 (1993)), whereas review under ordinary “abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular

decision at issue.” Flagg, 171 N.J. at 571. A decision reviewed for patent and gross abuse of discretion “rarely will be overturned” on appeal. Kraft, 265 N.J. Super. at 111 (quoting State v. Leonardis, 73 N.J. 360, 380 n.10 (1977) (Leonardis II)). In contrast, a judge can override decisions subject to review under the ordinary abuse of discretion standard. See, e.g., Flagg, 171 N.J. at 577, 580; Lagares, 127 N.J. at 33.

This Court has applied the ordinary abuse of discretion standard to judicial review of prosecutorial decisions that impact a judge’s sentencing options and has only applied the patent and gross abuse of discretion standard to judicial review of a prosecutor’s decision to deny a defendant admission into PTI. V.A., 212 N.J. at 21. The reason for different standards in each of these contexts is because: (1) the decision whether to prosecute or defer prosecution by admitting a defendant to PTI is quintessentially a prosecutorial function while sentencing is quintessentially a judicial function; and (2) separation of powers counsels limited judicial review of a quintessentially prosecutorial function whereas separation of powers requires a more searching review of a prosecutor’s decision that impacts a quintessentially judicial function.

Regarding judicial review of a prosecutor’s PTI decision, this Court has held that “[w]hile judicial review is consistent with applicable principles under

the separation of powers doctrine, . . . the scope of such review should be limited.” Leonardis II, 73 N.J. at 381. The Court reasoned:

We are mindful of the prosecutor's duty to enforce the law and of the Legislature's authority to proscribe certain conduct and fix penalties for violations. Accordingly, great deference should be given to the prosecutor's determination not to consent to diversion. Except where there is such a showing of patent and gross abuse of discretion by the prosecutor, the designated judge is authorized under R. 3:28 to postpone proceedings against a defendant only where the defendant has been recommended for the program by the program director and with the consent of the prosecutor.

[Ibid. (emphasis added).]

It was directly due to this “separation of powers concerns” that this Court “severely limited the scope of [judicial] review” by articulating the patent and gross abuse of discretion standard. Bender, 80 N.J. at 89 (1979).

As Leonardis II marked this Court’s first use of the phrase “patent and gross abuse of discretion,” from its inception this standard of review has been tied “to the fact that diversion is a quintessentially prosecutorial function.” Wallace, 146 N.J. at 582. “[F]undamentally, . . . the charging process generally, and at work in a PTI determination, is an inherently prosecutorial function and is the reason for greater deference.” V.A., 212 N.J. at 22. “The reason for this elevated standard of review stems from ‘[t]he need to preserve prosecutorial discretion in deciding whether to divert a particular defendant

from the ordinary criminal process.” Kraft, 265 N.J. Super. at 111 (quoting State v. Dalglish, 86 N.J. 503, 509 (1981)). “Prosecutorial discretion in [the PTI] context is critical for two reasons. First, because it is the fundamental responsibility of the prosecutor to decide whom to prosecute, and second, because it is a primary purpose of PTI to augment, not diminish, a prosecutor's options.” Nwobu, 139 N.J. at 246 (quoting Kraft, 265 N.J. Super. at 111).

In practical terms, “[t]he extreme deference which a prosecutor's decision is entitled to in this context translates into a heavy burden which must be borne by a defendant when seeking to overcome a prosecutorial veto of his admission into PTI.” Ibid. (quoting Kraft, 265 N.J. Super. at 112) (emphasis added). Judicial intervention is appropriate for “only the most egregious examples of injustice and unfairness.” Leonardis II, 73 N.J. at 384.

These observations contrast starkly with a prosecutor’s decision that constrains a judge’s sentencing options, as “the determination of ‘[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.’” A.T.C., 239 N.J. at 468 (quoting State v. Hess, 207 N.J. 123, 151 (2011)); see also Leonardis II, 73 N.J. at 369 n.5 (“it has been repeatedly stated that sentencing is a judicial function.”); State v. Howard, 110 N.J. 113, 123 (1988) (“Sentencing remains a judicial function, and a sentencing court,

notwithstanding the agreement of the parties, may refuse to accept any of the terms and conditions of a plea agreement.”).

Because sentencing is quintessentially a judicial function, statutes that delegate authority to the prosecutor to decide whether to waive a mandatory parole disqualifier or extended term “would be unconstitutional” in the “absence of any avenue for effective judicial review.” Lagares, 127 N.J. at 31. “Such unfettered discretion [would] exceed[] the permitted ‘prosecutorial influence on the sentencing determination’” and would thus violate separation of powers. Ibid. (quoting Warren, 115 N.J. at 448). Accordingly, to ensure effective judicial review of a prosecutor’s decision impacting the quintessentially judicial function of sentencing:

The abuse of discretion standard has been applied to review of a prosecutor’s decision to seek a mandatory extended-term sentence, State v. Lagares, 127 N.J. 20, 33 (1992); a prosecutor’s determination on whether to waive a mandatory parole-ineligibility term, State v. Vasquez, 129 N.J. 189, 195-96 (1992); and a prosecutor's decision to seek a forfeiture of public employment based on a disorderly person offense, Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002).

[V.A., 212 N.J. at 22.¹²]

¹² The Court in Lagares held that “an extended term [under N.J.S.A. 2C:43-6f] may be denied or vacated where defendant has established that the prosecutor's decision to seek the enhanced sentence was an arbitrary and capricious exercise of prosecutorial discretion.” 127 N.J. at 33 (emphasis added). Likewise, in Vasquez, the Court held that “[a] defendant who shows clearly

Additionally, subsequent to Lagares, Vasquez, Flagg, and V.A., this Court in A.T.C. held that the sentencing court “reviews the prosecutor's exercise of discretion [to deny a departure from the mandatory minimum under the Jessica Lunsford Act] to determine whether it was arbitrary and capricious.” 239 N.J. at 476 (emphasis added).

This Court’s decision in Flagg emphasizes the Court’s distinction between a prosecutor’s decision to waive a mandatory sentence and a prosecutor’s PTI decision and explains the corresponding distinction in standards of review. There, the Court was specifically asked to decide “the appropriate standard for determining whether the Attorney General or a county prosecutor has properly declined to seek a waiver of forfeiture of public employment pursuant to N.J.S.A. 2C:51-2 based on a conviction for a disorderly or petty disorderly persons offense.” 171 N.J. at 565. A prior Appellate Division opinion had held that a prosecutor’s denial of a waiver request should be reviewed under the patent and gross abuse of discretion standard because this waiver decision is “less clearly related to traditional

and convincingly that the exercise of discretion [not to waive the mandatory parole disqualifier or extended term under N.J.S.A. 2C:35-12] was arbitrary and capricious would be entitled to relief.” 129 N.J. at 196 (emphasis added). In Flagg, the Court held that “the appropriate standard [of review of a prosecutor’s decision whether to seek forfeiture of future public employment] is simply abuse of discretion.” 171 N.J. at, 565, 572.

judicial powers such as sentencing, and more clearly akin to other governmental exercises involving law enforcement (executive branch) prerogatives, such as determining eligibility for pre-trial intervention.” State v. Lazarchick, 314 N.J. Super. 500, 530-33 (App. Div. 1998).

This Court agreed with Lazarchick’s dichotomy but disagreed with where Lazarchick located waivers of forfeiture of public employment along this dichotomy: “the discretionary decision whether or not to seek a waiver is dissimilar to those determinations typically made by prosecutors in their law enforcement capacity and is more akin to prosecutorial discretion in sentencing-related determinations.” Flagg, 171 N.J. at 571. Thus, the Court held that “an abuse of discretion would be the more appropriate standard.” Ibid.

The Court in V.A. agreed with the explanation for applying the patent and gross abuse of discretion standard only to PTI determinations: “the charging process generally, and at work in a PTI determination, is an inherently prosecutorial function and is the reason for greater deference.” 212 N.J. at 22. A prosecutor’s PTI determination remains the only context in which

this Court has explicitly held that the patent and gross abuse of discretion standard applies.¹³

As noted, separation of powers concerns are present both in the context of judicial review of a prosecutor's decision whether to admit a defendant to PTI as well as in the context of a prosecutor's exercise of discretion impacting the authorized sentencing range, but they cut in opposite directions. In the context of a prosecutor's PTI decision, the force of separation of powers principles pushes back against judicial review, requiring that "the scope of such review . . . be limited" to ensure that such review "is consistent with applicable principles under the separation of powers doctrine;" thus, the extremely deferential patent and gross abuse of discretion standard must be applied to PTI decisions. Leonardis II, 73 N.J. at 381. Conversely, for a prosecutor's discretionary decision whether to waive a mandatory sentencing provision, the force of separation of powers principles pushes toward judicial

¹³ The only other context outside of PTI in which review for patent and gross abuse of discretion was previously applied was to a prosecutor's objection to a defendant's admission to special probation under N.J.S.A. 2C:35-14. State v. Hyland, 238 N.J. 135, 144 (2019). In that context, the patent and gross abuse of discretion standard had been mandated by a statutory enactment of the Legislature rather than by judicial determination. Ibid. However, the Legislature repealed the prosecutor's right to object to a defendant's admission (and thus also repealed the patent and gross review of such objections) in 2012. Id. at 145.

review, requiring judicial “oversight to ensure that prosecutorial discretion is not exercised in an arbitrary and capricious manner.” A.T.C., 239 N.J. at 474.

Since a prosecutor’s decision whether to waive the Graves Act mandatory parole disqualifier clearly constrains a judge’s sentencing discretion—a quintessentially judicial function—and all other decisions whether to waive mandatory sentencing provisions are scrutinized under the ordinary abuse of discretion standard, a rather obvious question arises: why are Graves Act waivers the sole sentencing determinations that are reviewed for patent and gross abuse of discretion? The answer appears to be simply the following: Alvarez was decided before Lagares, Vasquez, and Flagg, and no court since Alvarez—until this case—has been squarely asked to revisit and decide the appropriate standard.

Because the Appellate Division decided Alvarez without having the benefit of Lagares, Vasquez, and Flagg, it drew instead from two earlier Appellate Division opinions, State v. Todd, 238 N.J. Super. 445 (App. Div. 1990) and State v. Cengiz, 241 N.J. Super. 482 (App. Div. 1990). Alvarez, 246 N.J. Super. at 145-147. Both cases addressed separation of powers challenges to the prosecutor’s authority to waive mandatory sentences pursuant to N.J.S.A. 2C:35-12. Todd, 238 N.J. Super. at 450; Cengiz, 241 N.J. Super. at 486. The Court in Todd held that “a court may review for the patent and gross

abuse of the exercise of the prosecutor's discretion in the first instance if convinced that the interests of justice will not be served.” 238 N.J. Super. at 462 (emphasis added). In Cengiz, Judge Shebell wrote in his dissent that “a defendant aggrieved by a prosecutorial decision not to recommend deviation under section 12 . . . may move before the assignment judge or designated judge of the vicinage for a Leonardis-type hearing as to whether the prosecutor's rejection or refusal is grossly arbitrary or capricious or a patent abuse of discretion. 241 N.J. Super. at 497-98 (Shebell, J., dissenting). Of course, this Court in Vasquez did not apply that patent and gross standard of review suggested in Todd and Cengiz to a prosecutor’s decision under N.J.S.A. 2C:35-12; rather this Court held that “[a] defendant who shows clearly and convincingly that the exercise of discretion was arbitrary and capricious would be entitled to relief.” 129 N.J. at 196 (emphasis added). Thus, the “patent and gross” standard articulated in Todd and Cengiz was abrogated by Vasquez.

It would perhaps be simple enough to correct Alvarez’s mistake if Alvarez had merely adopted the standard of Todd and Cengiz—subsequent courts could have pointed out that the standard relied on by Alvarez had been abrogated by Vasquez. But rather than adopt the patent and gross abuse of discretion standard to apply to Graves Act waiver denials, Alvarez articulated a standard that appears in no other context: “the Assignment Judge has the

ultimate authority to decide whether the prosecutor arbitrarily or unconstitutionally discriminated against a defendant in determining whether the ‘interests of justice’ warrant reference to the Assignment Judge.” 246 N.J. Super. at 147 (emphasis added). The Court subsequently articulated the standard in slightly different terms: “the defendant . . . must make a showing of arbitrariness constituting an unconstitutional discrimination or denial of equal protection constituting a ‘manifest injustice.’”¹⁴ Id. at 148 (emphasis added). But it is difficult to understand why judicial review for “unconstitutional discrimination” or “denial of equal protection” was the Court’s solution to the separation of powers concern, as “unconstitutional discrimination” or “denial of equal protection” by the prosecutor would violate the equal protection clause independently irrespective of the separation of powers doctrine.

Subsequent to Alvarez, the Appellate Division in State v. Watson, 346 N.J. Super. 521, 535 (App. Div. 2002), stated that a defendant may challenge a prosecutor’s refusal to move for a Graves Act waiver “by arguing to the

¹⁴ The Court made clear that this articulation of the standard should be applied to a defendant convicted at trial seeking to challenge a prosecutor’s refusal to consent to refer his case to the assignment judge for consideration of a waiver. 246 N.J. Super. at 148. However, it is unclear whether this was intended to be a more arduous standard than the standard articulated earlier, or whether the two formulations were intended to be different wordings of the same standard.

Assignment Judge that the prosecutor's refusal is a patent and gross abuse of discretion” and “must show that . . . the decision was arbitrary and amounted to unconstitutional discrimination or denial of equal protection.” This Court in Benjamin also quoted the Alvarez standard, stating that defendants may “seek judicial review of prosecutors' waiver decisions” by “demonstrat[ing] ‘arbitrariness constituting an unconstitutional discrimination or denial of equal protection’ in the prosecutor's decision.” 228 N.J. at 372 (quoting Alvarez, 228 N.J. Super. at 148). Although Benjamin quoted the Alvarez standard, this Court in Benjamin had not granted certification to decide the standard of review; it granted certification limited to the issue of “whether a defendant seeking a waiver of a mandatory sentence under the Graves Act has the right to discovery of the prosecutor's files on previous applications for Graves Act waivers.” State v. Benjamin, 224 N.J. 119 (2016).¹⁵

Subsequent to Benjamin, the Appellate Division in Rodriguez claimed that “Alvarez adopted the patent and gross abuse of discretion standard of

¹⁵ Moreover, although the Attorney General nonetheless asked this Court to decide the standard of review in Benjamin, Justice Patterson emphasized that the Court only had the case on a limited grant of certification limited to the discovery issue and expressed concern that no party to the case had anticipated the Court addressing the standard of review. Oral Argument Video for A-43-15, State v. Benjamin (Nov. 7, 2016) at 1:32:30 to 1:34:08, available at https://njj-aocmedia-prod-general-purpose.s3.amazonaws.com/watch/supreme-court/2016/11/a-43-15.mp4?VersionId=_fox_i1CUUGCEr7CDp8_HMl75zMnGZ7z.

judicial review that applies to the review of a prosecutor's decision to admit a defendant to pretrial intervention (PTI)” and that this Court in Benjamin “confirmed that a prosecutor’s decision under N.J.S.A. 2C:43-6.2 is reviewed under this highly deferential standard.” 466 N.J. Super. at 97 (citing Alvarez, 246 N.J. Super. at 147-48; Benjamin, 228 N.J. at 364). However, page 364 of Benjamin, cited by Rodriguez, merely recited the procedural history and recounted the Appellate Division’s disposition of the case: “The panel remanded the case for proceedings consistent with State v. Alvarez, 246 N.J. Super. 137, 146-49 (App. Div. 1991), which allows defendants to appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor.” Benjamin, 228 N.J. at 364 (citing State v. Benjamin, 442 N.J. Super. 258, 264-67 (App. Div. 2015)). This passing reference clearly does not represent a reasoned decision, a holding, or even an implicit adoption of the patent and gross standard of review by this Court. Additionally, as discussed above, Alvarez did not adopt the patent and gross abuse discretion standard of review.

This case thus comes to this Court not only with a standard of review distinct from the standard of review of all other prosecutorial decisions whether to waive a mandatory sentencing provision, but also with confusion as to whether the current standard of review of Graves Act waiver decisions

requires showing that the prosecutor’s waiver denial was “arbitrar[y] constituting an unconstitutional discrimination or denial of equal protection,” see Benjamin, 228 N.J. at 372 and Alvarez, 228 N.J. Super. at 148, or “patent and gross abuse of discretion,” see Rodriguez, 466 N.J. Super. at 97. Because this Court has “not squarely addressed this question before,” V.A., 212 N.J. at 21, Mr. Taylor urges this Court to consider the question from a fresh perspective in light of the separation of powers concerns articulated in Lagares, Vasquez, and A.T.C., as well as the reasoned basis for distinguishing between sentencing decisions and PTI articulated in Flagg.

Considered without the baggage of Alvarez and Rodriguez, it is clear that a prosecutor’s decision to grant or deny waiver of the Graves Act parole disqualifier under N.J.S.A. 2C:43-6.2 is in the same category as its decision to move for a mandatory extended term for repeat drug offenders, to waive the parole disqualifiers or extended terms under N.J.S.A. 2C:35-12, to waive the mandatory twenty-five year term under the Jessica Lunsford Act, and to waive the forfeiture of public employment. These are all decisions constraining the sentencing court’s authority to set terms of the sentence—a quintessentially judicial function. Because judicial review of a prosecutor’s decision in this area is necessary to comport with separation of powers, the ordinary abuse of discretion standard is the appropriate standard of review.

C. Because The Motion Court In This Case Erroneously Reviewed The Prosecutor's Waiver Denial For Patent And Gross Abuse Of Discretion, This Court Should Reverse And Remand For Consideration Under The Ordinary Abuse Of Discretion Standard.

When Presiding Judge Lawhun, acting as the sentencing judge, first read Mr. Taylor's presentence report, she concluded that a sentence with a one-year parole disqualifier would be the appropriate sentence for Mr. Taylor and that a three-and-a-half year parole disqualifier was "the wrong sentence" for Mr. Taylor—in other words, that the interests of justice would not be served by the imposition of a mandatory minimum term of three and a half years. (8T43-10 to 18) When the prosecutor refused to consent to Judge Lawhun's desire to consider waiving the Grave Act parole disqualifier to one year, Mr. Taylor filed a motion arguing that this refusal was an abuse of discretion.

After reviewing the parties' submissions—in which the State, for the first time, addressed the aggravating and mitigating factors—Judge Lawhun found that Defendant had established "a prima facie case" and requested the State explain why Defendant was denied a waiver when compared to a list of cases the court had identified of defendants who had been granted a waiver. (8T3-11 to 19, 10-21 to 11-1, 33-1 to 4) After reviewing the State's submission purporting to distinguish Mr. Taylor from these fourteen defendants, the court highlighted five of the fourteen cases, which, in the

court's view, "on their face were worse than the case involving Mr. Taylor." (8T34-4 to 21) The court also found that, contrary to the State's assertion, the mitigating factors outweighed the aggravating factors. (8T20-8 to 11, 40-9 to 13)

The distinction between the two standards of review—ordinary abuse of discretion and patent and gross abuse of discretion—made all the difference in this case. Judge Lawhun believed a parole disqualifier of three-and-a-half years would be "the wrong sentence for this defendant" and that a one-year parole disqualifier would be a more appropriate sentence. (8T40-9 to 43-17) However, Judge Lawhun believed she was limited to reviewing the State's denial for "a patent and gross abuse of discretion," requiring the court "to view the Prosecutor's decision through the filter of the highly deferential standard of review" and prohibiting the court from "substitut[ing] its judgment for that of the Prosecutor." (8T37-15 to 20) Applying that standard, the court held that it did not "find that [the State's] abuse of discretion was patent and gross," suggesting that the court believed the State had abused its discretion albeit not to the extent that would allow intervention by the court. (8T43-20 to 21) Despite the fact that the Presiding Judge said her conscience told her that a forty-two-month parole disqualifier was "the wrong sentence for this defendant," Judge Lawhun found that she was constrained by the patent and

gross abuse of discretion standard and thus could not depart from the prosecutor's decision to deny a Graves Act mandatory parole disqualifier.

(8T43-20 to 21)

Because the Presiding Judge applied the wrong legal standard—reviewing the prosecutor's waiver decision under the patent and gross abuse of discretion standard instead of the ordinary abuse of discretion standard, this Court should reverse the sentence and remand for reconsideration of the waiver issue under the correct standard.

D. This Court Should Provide Guidance On What Constitutes An Abuse Of Discretion In The Context Of Graves Act Waiver Denials.

Although the arguments set forth in Parts A through C, supra, are sufficient for this Court to decide in Mr. Taylor's favor, this Court should also provide guidance to assignment and presiding judges going forward on what constitutes an abuse of discretion in the context of a prosecutor's decision to deny a Graves Act waiver. As noted by the Court in Flagg, an abuse of discretion occurs when “a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment.” 171 N.J. at 571 (internal quotation marks omitted). Stated

differently, “it arises when a decision . . . inexplicably departed from established policies.” Ibid. (internal quotation marks omitted).

In reviewing denials of Graves Act waivers, the assignment judge’s analysis should focus on whether the prosecutor’s decision complied with the Attorney General’s 2008 Directive. The Directive is a “procedural safeguard[] required by this Court in Lagares and Vasquez”¹⁶ to “promote uniformity and provide a means for prosecutors to avoid arbitrary or abusive exercises of discretionary power.” Lagares, 127 N.J. at 32. The Directive “instructs prosecutors how to uniformly apply the Graves Act and section 6.2” by “requiring all prosecutors to consider the same factors and adhere to the same plea procedures.” Benjamin, 228 N.J. at 372. To survive “judicial review for arbitrary and capricious action,” “prosecutors must adhere to written guidelines.” State v. Brimage, 153 N.J. 1, 3 (1998) (citing Vasquez, 129 N.J. at 195-96). Accordingly, “arbitrariness can be demonstrated” when the prosecutor’s decision is “outside the bounds set by the Guidelines,” V.A., 212 N.J. at 28, as such a decision would be a “depart[ure] from established policies.” Flagg, 171 N.J. at 571.

The 2008 Directive created a presumption in favor of a Graves Act waiver to a one-year parole disqualifier by “instruct[ing] prosecutors to tender

¹⁶ Benjamin, 228 N.J. at 371.

an initial standardized plea offer pursuant to N.J.S.A. 2C:43-6.2 that will in typical cases result in the defendant serving a State Prison term of one year without possibility of parole.” Directive at 4 (quoted by Nance, 228 N.J. at 392). The Directive states, “The prosecuting agency as part of the State’s initial plea offer shall agree to move pursuant to N.J.S.A. 2C:43-6.2 for a reduction to a one-year term of parole ineligibility,” Directive at 13 (emphasis added), unless one of the following four exceptions applies:

- (1) the defendant is ineligible for a waiver due to a prior conviction for a Graves Act offense,
- (2) there is a “substantial likelihood that the defendant is involved in organized criminal activity,”
- (3) “the aggravating factors applicable to the offense conduct and offender outweigh any applicable mitigating circumstances,” or
- (4) “a sentence reduction to a one-year term of parole ineligibility would undermine the investigation or prosecution of another.”

[State v. Andrews, 464 N.J. Super. 111, 121 (App. Div. 2020) (citing Directive at 7-14).]

See also Rodriguez, 466 N.J. Super. at 99 (under the Directive, unless one of these exceptions applies, “the ‘standardized’ plea offer that invokes N.J.S.A. 2C:43-6.2 to reduce the term of parole ineligibility to one year . . . must be tendered”).

Thus, a defendant can demonstrate the prosecutor abused his discretion in denying a Graves Act waiver request where the prosecutor denied a waiver

without (1) citing the Directive, (2) citing one of the four authorized bases for denying a waiver under the Directive, or (3) evaluating the aggravating and mitigating factors. A question arises regarding how to assess a prosecutor's denial when, as in this case, the prosecutor in his original denial letter did not reference the Directive, evaluate the aggravating and mitigating factors, or explain under which of the four exceptions the prosecutor sought to justify its waiver denial, but only does so in a subsequent writing after the defendant has challenged the denial. (Da34-36, 55-57) In such cases, the assignment judge should carefully scrutinize the prosecutor's subsequent writing to determine whether it was merely a "post-hoc justification" for the waiver denial—"that is, a reason devised to justify a decision that was already made as a fait accompli for other . . . reasons." Berta v. New Jersey State Parole Bd., 473 N.J. Super. 284, 303 (App. Div. 2022).

If the prosecutor's denial letter does reference the Directive and justifies the denial based on the conclusion that "the aggravating factors applicable to the offense conduct and offender outweigh any applicable mitigating circumstances," Directive at 13, the assignment judge may review for abuse of discretion the prosecutor's finding and weighing of aggravating and mitigating factors. Appellate Courts, reviewing a sentencing court's decision under the abuse of discretion standard, must evaluate whether the aggravating and

mitigating factors found by the sentencing court were “supported by competent, credible evidence in the record.” State v. Case, 220 N.J. 49, 64, (2014). Likewise, the assignment judge is empowered to review the prosecutor’s findings of aggravating and mitigating factors to determine whether they are supported by competent, credible evidence in the record. The assignment judge can find the prosecutor abused her discretion if the prosecutor relied on aggravating factors not supported by competent, credible evidence in the record. See id. at 67-68. The assignment judge should also evaluate whether the prosecutor’s finding and weighing of aggravating and mitigating factors “was based upon a consideration of irrelevant or inappropriate factors.” Flagg, 171 N.J. at 571. For example, it would be inappropriate to base the finding of an aggravating factor on a prior dismissed charge, as “prior dismissed charges may not be considered for any purpose.” State v. K.S., 220 N.J. 190, 199 (2015).

While this Court need not apply this analysis to Mr. Taylor’s case in order to grant his requested remedy of a remand for reconsideration of his motion under the ordinary abuse of discretion standard, it is clear from the record that under this standard the prosecutor’s refusal to grant Mr. Taylor a Graves Act waiver was an abuse of discretion. First, the State’s original February 2020 waiver denial letter failed to adhere to the Directive because it

did not reference the Directive's presumption of a waiver or ground its reason for denying a waiver in any of the four permissible bases to depart from the Directive's presumption. (Da34-36) Instead, the letter only referenced the Directive's "strict presumption against agreeing to a probationary term," which is distinct from the Directive's presumption in favor of a waiver. (Da35) The prosecutor's failure to follow the Directive and failure to evaluate the aggravating and mitigating factors in its original waiver denial suggests that its later evaluation of the aggravating and mitigating factors in response to Mr. Taylor's motion to override the waiver denial was merely a "post-hoc justification" for the waiver denial—"that is, a reason devised to justify a decision that was already made as a fait accompli." Berta, 473 N.J. Super. at 303.

Furthermore, the Presiding Judge correctly found that the State's assessment of aggravating and mitigating factors was erroneous. The State's August 2021 letter asserted that aggravating factors three, six, and nine applied, while mitigating factors eight and fourteen applied. (Da55-57) In contrast, the Presiding Judge found that the mitigating factors outweighed the aggravating factors, finding aggravating factors three and nine (but rejecting aggravating factor six) and mitigating factors two, seven, eight, nine, ten, and fourteen. (8T37-21 to 40-13) The Presiding Judge properly rejected the

prosecutor's finding of aggravating factor six, as the prosecutor's finding violated K.S.; the prosecutor based aggravating factor six on Mr. Taylor's "three contacts with the juvenile justice system and three contacts with the criminal justice system as an adult" despite the fact that all three juvenile cases and one of the adult cases were dismissed. (Da55-56; PSR8-9) Especially light of this impermissible consideration underlying the State's analysis, the Presiding Judge's contrary finding that the mitigating factors actually outweighed the aggravating factors was not just a difference of opinion but was evidence that the State's waiver denial was arbitrary and an abuse of discretion. (8T40-9 to 11)

Despite the Presiding Judge's favorable findings, she felt that the extremely deferential patent and gross abuse of discretion standard prevented her from overriding the prosecutor's waiver denial. (8T43-20 to 21) Because the correct standard of review is ordinary abuse of discretion, this Court should reverse and remand for the Presiding Judge to reconsider Mr. Taylor's motion to override the prosecutor's waiver denial under the ordinary abuse of discretion standard.

CONCLUSION

For the foregoing reasons, this Court should hold that the correct standard of review for Graves Act waiver denials is ordinary abuse of discretion, and remand to the Presiding Judge for reconsideration of Mr. Taylor's motion to override the prosecutor's denial of his request for a Graves Act waiver.

Respectfully submitted,

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