

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

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

DELSHON J. TAYLOR JR.,
a/k/a TAYLOR DELSHON,
and DJ,

Defendant-Appellant.

: CRIMINAL ACTION
:
:
: On Certification from a Judgement of
:
: the Superior Court of New Jersey
:
: Appellate Division
:
:
: Indictment No. 18-07-0257-I
:
:
: Sat below:
:
: 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 THE STATE OF NEW JERSEY-
RESPONDENT

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DEFENDANT IS CONFINED
Dated: March 24, 2025

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PRELIMINARY STATEMENT

It has long been established that the appropriate standard of review when courts review a prosecutorial decision on granting a waiver to the mandatory minimum parole ineligibility under the Graves Act is the “patent and gross abuse of discretion standard”. That standard of review has been applied by trial courts, like the one in the present matter, for decades. There is no reason to disturb this settled law now.

Additionally, applying the patent and gross abuse of discretion standard to the present matter reveals that the State did not commit a patent or gross abuse of discretion in refusing to file a motion to reduce the defendant’s parole ineligibility term to one year.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On July 18, 2018, Salem County Indictment No. 18-07-0257-I charged defendant, Delshon J. Taylor, with (Count One) second-degree unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5b(1); (Count Two) second-degree possession of a handgun for an unlawful purpose, in violation of N.J.S.A. 2C:39-4a(1); (Count Three) fourth-degree obstructing the administration of law or other government function, in violation of N.J.S.A. 2C:29-1a; (Count Four) fourth-degree tampering with physical evidence, in

violation of N.J.S.A. 2C:28-6(1); and (Count Five) fourth-degree possession of hollow point bullets, in violation of N.J.S.A. 2C:39-3f(1). (Da1 to 2).¹

On October 12, 2018, the trial court, initially denied the defendant's motion to suppress. (2T; Da8 to 14). However, following a motion for reconsideration, the court granted the reconsideration motion and suppressed the handgun seized. (3T; Da15-22).

On leave granted, the State appealed the reconsideration motion to the Appellate Division who reversed and remanded the matter to the trial court with instructions to apply the factors set forth in State v. Williams, 192 N.J. 1 (2007). Following the remand hearing, the court denied the motion to suppress. (4T; Da33).

At the conclusion of the court's October 10, 2019, oral ruling denying defendant's motion, defense counsel mentioned his "hopes that there might be some sort of resolution related to a Graves Act waiver" and indicated his

¹ 1T refers to October 12, 2018 transcript of suppression hearing.
2T refers to November 2, 2018 transcript of suppression-motion decision.
3T refers to February 8, 2019 transcript of motion for reconsideration.
4T refers to October 10, 2019 transcript of decision on remand.
5T refers to April 26, 2021 transcript of plea.
6T refers to July 16, 2021 transcript of sentencing adjournment.
7T refers to July 23, 2021 transcript of hearing on Graves Act waiver.
8T refers to June 24, 2022 transcript of sentencing.
PSR refers to presentence report.
Da refers to defendant's appendix.
Dca refers to defendant's confidential appendix.

intention to discuss the issue with the assistant prosecutor. (4T24-1 to 25).

On February 12, 2020, the assistant prosecutor drafted an initial letter denying the Graves Act Waiver indicating that, “The factors in your client’s case weigh against the State agreeing to a waiver...” (Da34-36).

Subsequently, on April 26, 2021, the defendant pled guilty to Count One of the indictment. (5T7-9 to 11; 5T8-15 to 25; Da103; PSR1). The defendant also agreed to pay restitution in the amount of \$561.97, (5T3-20 to 4-11), as well as to forfeiture of the handgun seized by police. (5T16-9 to 16; Da103). In exchange for defendant’s guilty plea, the State agreed to recommend that defendant be sentenced to five years in State prison with three and one-half years’ parole ineligibility, and to dismiss the remaining counts of the indictment. (5T7-11 to 16; Da20; PSR1; PSR5). The State also agreed that defendant’s sentence would run concurrently with the sentence to be imposed on a separate charge for which defendant had just been arraigned, namely, fourth-degree resisting arrest under Indictment No. 21-03-00208-I. (5T7-17 to 20; PSR1; PSR5; Da41). After ascertaining that the defendant knowingly and voluntarily was entering his plea (5T8-3 to 14-11) and that the plea was grounded in a sufficient factual basis (5T14-9 to 25), the trial court accepted defendant’s guilty plea. (5T15-4 to 6).

On July 16, 2021, the defendant appeared for sentencing, after confirming

the proposed sentence from the plea agreement, the court conducted its sentencing analysis. The court gave “slight” weight to aggravating factor three and “moderate” weight to aggravating factor nine. The court gave “slight” weight to mitigating factors two and seven and “moderate” weight to mitigating factor 14. The court concluded that the aggravating factors and mitigating factors were in equipoise. (6T6-6 to 7-12). Next, the court confirmed that the prosecutor’s office had not agreed to a waiver of the Graves Act mandatory minimum sentence. (6T7-13 to 8-14). Since a different assistant prosecutor appeared on July 16, the judge postponed defendant’s sentencing to allow defense counsel to speak with the assistant prosecutor who originally had handled defendant’s case. (6T8-15 to 9-21). On July 23, 2021, defendant’s next court appearance, the trial court again postponed the case to allow the original assistant prosecutor to file a written response to defendant’s motion to override the State’s February 12, 2020, decision not to seek a Graves Act waiver. (7T4-15 to 9-4; Da34 to 36; Da43 to 48). On August 10, 2021, the prosecutor’s office filed a response, asking that defendant’s motion be denied. (Da49 to 61).

During the interim, the defendant was involved in a shooting incident in the State of Delaware where he was armed with a handgun and sustained multiple gunshot wounds. (Da68; Da82-Da84)

Both parties subsequently filed supplemental written submissions in

support of their positions (August 19, 2021, defense letter (Da66 to 81); March 3, 2022, State's letter (Da82 to 85)). On June 15, 2022, the prosecutor's office filed a letter addressing the judge's concern comparing defendant's case to other cases in the county in which the State had agreed to Graves Act waivers. (8T3-15 to 19; Da95 to 102).

On June 24, 2022, the trial court (in her capacity as the judge designated by the Assignment Judge to hear Graves Act waiver applications (7T8-6 to 24)) heard oral argument on defendant's motion. (8T3-11 to 24-14). The judge then issued a ruling upholding the State's decision not to file a waiver. (8T24-15 to 43-23).

On June 24, 2022, the trial court sentenced defendant in accordance with the plea agreement: five years in State prison with a three-and-one-half-year period of parole ineligibility. (8T43-23 to 44-3; Da103). The court also sentenced defendant to a concurrent eighteen-month term on the charge emanating from a separate indictment (Indictment No. 21-3-208, resisting arrest). (8T44-13 to 15; PSR9). The court dismissed the remaining counts of the indictment. (Da103).

In determining the appropriate sentence, the court again weighed the aggravating and mitigating factors. On this occasion, the trial court found that mitigating factor two should be given "moderate" weight when the court

previously gave the factor “slight” weight. The court found mitigating factor eight and gave it “moderate” weight. This factor was not previously found by the court. The basis of this determination was that the defendant had subsequently been the victim of a shooting. The court found mitigating factor nine and gave it “slight” weight. Like mitigating factor eight this factor was not previously found by the court. While admitting that it did not know much about the defendant as he was quiet in the courtroom, the court nevertheless found this mitigating factor. The court also found mitigating factor ten for the first time and gave that factor “slight” weight. (8T37-20 to 40-8).

The defendant appealed the denial of the suppression motion and denial of the Graves Act waiver to the Appellate Division. On April 24, 2024, the Appellate Division affirmed the trial court on both the denial of the suppression motion and the refusal to grant the Graves Act waiver over the State’s objection. (Pa1-25).

The defendant petitioned this court for review and certification was granted on the appropriate standard of review to be used by a trial court when reviewing the prosecutor’s refusal to grant a waiver pursuant to the Graves Act. State v. Taylor, 259 N.J. 365 (2024).

COUNTER STATEMENT OF FACTS

In his plea colloquy, the defendant admitted that on November 15, 2017, while in the Borough of Penns Grove, he knowingly possessed a handgun without having a permit to carry this weapon. (5T14-9 to 15-16).

On November 15, 2017, Sergeant Carmen Hernandez of the Penns Grove Police Department was working the night shift in the borough. (1T3-20 to 25; 1T6-12 to 16). Hernandez was in uniform and driving a marked police car. (1T6-17 to 7-2). Penns Grove patrolmen Travis Paul and Joe Johnson also were working the night shift. (1T7-1 to 5).

At about 9:26 pm, Sergeant Hernandez received a radio report of “shots fired” near South Broad Street from Officer Paul, who indicated he was patrolling the Penns Grove Gardens apartment complex. (1T7-6 to 14; 1T8-7 to 9; 1T21-23 to 22-1; 1T33-2 to 4; 1T19-14 to 22). Officer Paul identified the shots he heard as gunshots based on his experience as a police officer who had dealt with prior incidents involving gunshots. (1T44-24 to 45-1). A few minutes later, the Salem County dispatch center issued a 911 call to all police agencies sharing the same channel (Borough of Penns Grove, Township of Pennsville and Township of Carney’s Point), regarding shots fired in the area of South Broad Street. (1T57-20 to 59-10). Patrolman Paul, upon making the radio call and alerting other officers to canvass the area, headed from inside the apartment

complex to South Broad Street, the area from which he had heard the shots. (1T33-18 to 34-1).

Patrolman Paul heard Sergeant Hernandez radio that she was on South Broad Street and was “out with three individuals.” (1T35-1 to 4). Paul immediately broke off from his separate assistance of Patrolman Johnson regarding two other individuals on South Smith Street, and drove to South Broad Street to assist Hernandez. (1T34-6 to 35-7). Between three and five minutes elapsed from when Officer Paul heard the gun shots to his arrival at Sergeant Hernandez’s location. (1T35-8 to 22).

Sergeant Hernandez had driven down South Broad Street to the location given in the radio report. (1T8-13 to 21). Between one and five minutes had elapsed between Hernandez hearing the radio report and arriving at the scene. (1T9-14 to 17; 1T22-11 to 21). Penns Grove is less than a square mile in size. (1T4-21 to 5-4). The location of Sergeant Hernandez’s encounter with the three individuals was only two blocks away from the Penns Grove Gardens apartment complex where Patrolman Paul had heard the gunshots. (1T54-8 to 12).

When Hernandez arrived, she saw three males, two standing near the sidewalk of the area to which she was called, and a third walking toward them. (1T8-22 to 9-4). At first, the sergeant drove past the males, then, noticing that they were the only persons in the area identified in the radio report, turned back,

parked across the street from the males and walked up to them. (1T9-5 to 23).

Hernandez approached the three males stating “don’t leave yet,” and indicated that they were being detained because police had received a report of shots fired in the area and these individuals were the only persons at that location. (1T10-14 to 18; 1T11-19 to 23; 1T24-23 to 25-2). It was dark outside. (1T25-10 to 11). Since she was the lone police officer on the scene, her purpose in interacting with them was to “keep them with [her] attention so that they would stay there long enough for . . . [her] backup to arrive.” (1T17-21 to 18-2). Sergeant Hernandez and the three males knew each other from prior contact, “several times” with the defendant in particular, and she believed that, based on that mutual familiarity, they “would have the confidence to kind of stay there with [her].” (1T27-7 to 11; 1T27-15 to 16). “Two of the men remained at the scene without much complaint.” (Da11). “Defendant on the other hand did not want to remain at the scene, moved around a lot, and said repeatedly that he was going to go home.” (Da11). The males indicated that they had heard the shots, which sounded like they came from Penns Village, a few blocks away. (1T10-20 to 22).

As Hernandez initially approached the three males, a vehicle had pulled up as well. (1T8-24 to 9-4; 1T10-1 to 13). Hernandez noticed one of the men (Zaire Robinson) go to the driver’s side and one (Corey Mills) to the passenger

side, and radioed for backup. (1T10-3 to 13; 1T12-18 to 20; 1T26-15 to 17). The sergeant observed that Zaire Robinson kept reaching into the vehicle, and, given her experience, became suspicious as to whether “anything had been passed on” between Robinson and the vehicle’s occupants. (1T10-3 to 13; 1T18-12 to 17). Upon Hernandez’s arrival, Robinson was trying to walk away. (1T12-9 to 13). The vehicle drove off and the sergeant advised a sheriff’s officer, who had arrived as backup, to stop the vehicle because she was uncertain as to what had transpired. (1T11-11 to 12-6; 1T35-25 to 36-6). Hernandez noticed that defendant, who had been at the passenger side of the vehicle with Corey Mills, was walking away from the car with “kind of like his fingers or something” by his pocket. (1T26-10 to 20). The item in defendant’s hand was a cigarette. (1T28-13 to 21). Defendant stated that he wanted to go home, but Hernandez told him he was not allowed to leave. (1T28-24 to 29-6).

Hernandez directed her attention to Zaire Robinson. (1T12-9 to 20). Hernandez began to pat Robinson down and again advised the three men that they were being detained, and patted down, due to the report of gunshots fired. (1T13-22 to 14-1; 1T29-21 to 30-4). Her specific reason for patting down Robinson was three-fold: the report of shots fired, he was trying to walk away, and he had been reaching into the vehicle that left the scene. (1T18-8 to 20).

Carney’s Point Patrolman Timothy Haslett, then Patrolman Paul,

separately arrived at the scene as the unknown vehicle was pulling away, exited their patrol cars and stood next to the two other males. (1T12-1 to 13-17; 1T35-23 to 36-6; 1T60-8 to 14; 1T63-2 to 3). Patrolman Haslett approached one of the other individuals, whom he recognized from “previous dealings” as Corey Mills, Jr. (1T60-17 to 61-3; 1T61-24 to 62-3). Haslett asked Mills if he had heard anything and where he was coming from. (1T62-3 to 5). Mills told Haslett that he did not know “this guy next to [him]” (meaning defendant) and defendant had “just walked up on” Mills and Robinson. (1T62-7 to 10). Haslett told Mills that he was going to pat him down for weapons, and asked whether Mills had “anything on [him] that [Haslett] should be concerned with,” to which Mills responded “no.” (1T63-3 to 6).

Patrolman Paul noticed defendant attempting to walk away from the other officers as Sergeant Hernandez was ordering people to stop moving and to remove their hands from their pockets. (1T36-6 to 10; 1T37-18 to 19; 1T63-11 to 14). Paul began to speak with defendant, who, in addition to walking away from the officers, was pacing back and forth, which made Paul nervous knowing that shots had been fired and that this trio were the only individuals in the reported area. (1T36-20 to 37-25; 1T63-7 to 8). Upon the officer’s approach, defendant started saying “I didn’t do anything” and “I don’t have anything on me,” which raised Paul’s concerns for his safety and, as a result, he told

defendant that he would have to pat him down. (1T38-1 to 7). Defendant continued pacing, at which the patrolman told him to calm down and once or twice more repeated that he would have to pat defendant down for the officers' safety. (1T38-8 to 14). Paul told the defendant to go toward the police vehicle and put his hands up. (1T52-13 to 18). Defendant momentarily seemed as if he would comply, then suddenly fled the scene running, ignoring Patrolman Paul, who had exclaimed "don't run." (1T38-14 to 15; 1T14-1 to 21).

Patrolmen Paul and Haslett gave chase on foot. (1T14-4 to 8; 1T63-14 to 21). During the pursuit, the officers observed the defendant reach for his waistband, pull out a handgun and throw it to the ground, causing sparks, while defendant continued to run. (1T38-21 to 24; 1T39-6 to 8; 1T63-19 to 23). Patrolman Paul ran right past the gun, looked directly at it and screamed "gun, gun, gun." (1T39-3 to 10; 1T64-1 to 4). At this point, Patrolman Haslett reached out in an attempt to grab defendant, lost his footing and fell to the pavement while Patrolman Paul continued the chase. (1T38-24 to 39-12; 1T63-24 to 64-1). Shortly thereafter, Paul apprehended defendant, with the entire episode from the time he had heard "shots fired" to his apprehending defendant taking about ten minutes. (1T39-13 to 19; 1T64-7 to 8; 1T66-10 to 16). Patrolman Haslett, who had retrieved the gun that defendant threw away during the pursuit, assisted Paul in handcuffing defendant. (1T64-4 to 6; 1T65-8 to 11; 1T67-21 to 68-4).

Sergeant Hernandez, Patrolman Paul and Patrolman Haslett all were equipped with body-worn cameras that day, which they activated at the scene. The videos of their encounters with defendant and the other individuals were played at the suppression hearing, and marked into evidence as Exhibits S-1, S-2, and S-3. (1T16-14 to 17-19; 1T42-5 to 15; 1T65-17 to 66-8).

LEGAL ARGUMENT

Defendant was sentenced to a Graves Act parole disqualifier of forty-two months, which was the statutorily mandated sentence when there is no waiver of the mandatory minimum sentence. Defendant argues that the trial court “applied the wrong standard of review” in denying his motion to override the prosecutor’s Graves Act waiver denial when the assistant prosecutor declined to agree to lower the parole ineligibility term to one year. Defendant asserts that the proper standard is “an ordinary abuse of discretion” and requests a remand for reconsideration of his motion utilizing the “correct” standard of review. Defendant’s claim is contradicted by long-standing legal precedent that the standard of judicial review is the “patent and gross abuse of discretion standard.” A standard that was appropriately applied by the trial court and affirmed by the Appellate Division.

A. The State Does Not Dispute that the Prosecutor’s Decision on Whether to Grant a Waiver of the Graves Act’s Parole Ineligibility Term is Subject to Judicial Review

It has long been established in this State that prosecutorial decisions in relation to sentencing issues are subject to judicial review and the ultimate determination as to the terms of sentencing rests with the court. The issue before the Court is not whether judicial review is permissible, but what is the appropriate standard of review. It is the State’s position that this Court should

uphold the patent and gross abuse of discretion standard of review that courts have been following in the State for decades.

And while the State agrees that judicial review is appropriate as the courts are the authority that would impose sentence on a defendant, even the court's discretion is not unfettered but is bound by the "standards prescribed by the Code of Criminal Justice." State v. Warren, 115 N.J. 433, 447 (1989)(quoting State v. Roth, 95 N.J. 334 (1984)). Therefore, in situations where the Code confers decision making authority on the prosecutor, the courts cannot simply supplant their judgement for that of the prosecutor merely because they would have reached a different conclusion. Instead, the courts, while maintaining the ultimate authority to impose sentence, must show deference to the decision making utilized by the prosecutor so long as the prosecutor's decision stays within permissible bounds. Under either the current patent and gross abuse of discretion standard or the standard being proposed by the defendant, the review by the court must be highly deferential to the position taken by the assistant prosecutor, as the prosecutor is the entity designated in the Code with the decision-making authority. The court should not, under either standard, merely supplant its view over the position taken by the prosecutor absent some clear error made by the State in the analysis conducted by the assistant prosecutor.

The position of the Legislature is clear. The decision-making authority

rests with the prosecutor. As the plain language of N.J.S.A. 2C:43-6.2 grants the authority to the prosecutor, the courts must grant deference to that decision-making authority that the Legislature specifically vested in the prosecutor. Otherwise, courts could merely supplant their decision for that of the prosecutor thus rendering the plain language of the statute meaningless. Therefore, while judicial review is appropriate, it must be highly deferential to the decision made by the assistant prosecutor as this is what was intended by the Legislature when it granted the authority to move for a waiver with the prosecutor.

B. In the Context of Graves Act Waiver Jurisprudence, Our Courts Have Consistently Held that the Standard of Review is the “Patent and Gross Abuse of Discretion Standard”

Courts in this State have consistently applied the “patent and gross abuse of discretion” standard to evaluate Graves Act waiver cases. State v. Alvarez, 246 N.J. Super. 137, 148 (App. Div. 1991) (a defendant “must make a showing of arbitrariness constituting an unconstitutional discrimination or denial of equal protection constituting a ‘manifest injustice,’”); State v. Watson, 346 N.J. Super. 521, 535 (App. Div. 2002) (“If the prosecutor does not so move or consent, the defendant may seek application by arguing to the Assignment Judge that the prosecutor's refusal is a patent and gross abuse of discretion. More specifically, the defendant must show that in refusing to move or consent to make such an

application to the trial court, the decision was arbitrary and amounted to unconstitutional discrimination or denial of equal protection”), certif. denied, 176 N.J. 278 (2003) (citations omitted); State v. Benjamin, 442 N.J. Super. 258, 264-65 (App. Div. 2015) (“We have previously held that, if the prosecutor does not consent to a defendant's request to be sentenced pursuant to the escape valve provision of N.J.S.A. 2C:43–6.2, ‘the defendant may [appeal the denial of the waiver] by arguing to the Assignment Judge that the prosecutor's refusal is a patent and gross abuse of discretion.’”), aff'd as modified, 228 N.J. 358, 364 (2017) (a defendant may “appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor”); State v. Andrews, 464 N.J. Super. 111, 120 (App. Div. 2020) (“In accordance with Alvarez, defendants may “appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor”); State v. Rodriguez, 466 N.J. Super. 71, 87 (App. Div. 2021) (vacating Graves Act waiver because “defendant failed to establish that the prosecutor's rejection of his request for a Graves Act waiver constituted a patent and gross abuse of discretion”); Id. at 105 (“we emphasize the comparative analysis methodology serves as a ‘judicial backstop’ to guard against prosecutorial arbitrariness, vindictiveness, or discrimination”). This Court has “defined the ‘patent and gross abuse of discretion’ standard” as requiring a party to “show that the

prosecutor's decision failed to consider all relevant factors, was based on irrelevant or inappropriate factors, or constituted a 'clear error in judgment.'" State v. Nwobu, 139 N.J. 236, 247 (1995) (quoting State v. Bender, 80 N.J. 84 (1979)). These factors are the same as an abuse of discretion. To rise to a "patent and gross of abuse of discretion", there must be a further showing that the prosecutorial error "will clearly subvert the goals underlying" the statute (in the case of Nwobu and Bender, Pretrial Intervention). Ibid.

The defendant cites to various cases that were not addressing a waiver of a mandatory minimum sentence under the Graves Act and alleges that there is "confusion" as to the appropriate standard of review. (Db38). This argument ignores that all of the cases considering the Graves Act waiver have reached a similar conclusion and applied the patent and gross abuse of discretion standard. The Appellate Division in Alvarez made clear, the defendant, "must make a showing of arbitrariness constituting an unconstitutional discrimination or denial of equal protection constituting a 'manifest injustice,'" Alvarez 246 N.J.Super. at 148. The fact that the defendant must show that the State's refusal to move for a waiver amounted to an unconstitutional discrimination or denial of equal protection was restated in Watson, Andrews and Rodriguez.

Further, the defendant's argument ignores this Court's opinion in State v. Benjamin, 228 N.J. 358 (2017), in that Benjamin was decided after and

references many of the cases cited by the defendant to support his claim of confusion. Nevertheless, despite this Court being aware of the cases cited by the defendant, it pointed to the patent and gross abuse of discretion standard as the appropriate standard when reviewing prosecutorial decisions to denial a Graves Act waiver. This decision, in turn, has been pointed to and relied upon by trial courts and the Appellate Division in cases ever since.

The decision to apply the patent and gross abuse of discretion standard was appropriate in light of the Legislature's clear intent that the Graves Act be a deterrent as opposed to a rehabilitative statute that was enacted in response to the increase in gun violence in this State. State v. Des Martes, 92 N.J. 62, 68 (1983). The Legislature, by enacting (and subsequently amending) the Graves Act intended that gun crimes be treated differently, that the mandatory minimum sentence be a deterrent and that the mandatory minimum be enforced in all but some limited exceptions. As set out in Alvarez, decided shortly after the amendment adding N.J.S.A. 2C:43-6.2, this "escape valve" from the mandatory minimum was meant for "extraordinary cases". Alvarez 246 N.J. Super. at 145. As this "escape valve" was meant to be reserved for exceptional cases, the more highly deferential patent and gross abuse of discretion standard was appropriately adopted by the courts.

Defendant's assertions to the contrary notwithstanding, there is no valid

reason to abandon the Court's decades-long practice now.

C. The Trial Court Applied the Appropriate Standard of Review and Correctly Denied a Waiver of the Graves Act Mandatory Minimum Sentence

Applying the patent and gross abuse of discretion standard of review to the present matter makes it clear that the trial court was correct in determining that granting a waiver of the mandatory minimum sentence over the assistant prosecutor's objection was inappropriate. The assistant prosecutor provided written and oral submissions thoroughly explaining how he weighed the aggravating and mitigating factors and why he did not apply for a Graves Act waiver in this case. When further queried by the court concerning other cases where the State had moved for a waiver, the assistant prosecutor gave detailed explanations how those cases differed from the current matter. Among his reasons: a large majority of the other cases were constructive possession cases which are more difficult to prove, while here the defendant actually possessed the gun; the large majority also did not involve hollow point bullets like defendant's case; the other cases did not involve a defendant who incurred additional charges like defendant in this case, and many of the other cases presented issues of proof. (8T4-14 to 5-9; Da35 to 36; Da 49 to 61; Da82 to 85; Da95 to 102). Based on these distinctions, the trial court found that the prosecutor's decision did not constitute a patent and gross abuse of discretion.

(8T43-19 to 22). Indeed, as the trial court correctly recognized, “a patent and gross abuse of discretion is not automatically established by finding one or two cases where similarly situated defendants were granted a waiver.” (8T41-14 to 17) (quoting Rodriguez, 466 N.J. Super. at 111).

Among several other factors considered, the prosecutor acted within his discretion in considering the strength of this case (in which defendant actually possessed the gun and was seen tossing it during a foot pursuit with police) relative to other cases in which the Prosecutor’s Office has agreed to a waiver. Rodriguez, 466 N.J. Super. at 112 (“The Attorney General Directive expressly allows a prosecutor to consider “the likelihood of obtaining a conviction at trial” in deciding whether to grant a Graves Act waiver.”) (quoting Attorney General Directive to Ensure Uniform Enforcement of the “Graves Act”, at 12 (Oct. 23, 2008, as corrected Nov. 25, 2008) (“Directive”)); see also id. at 103 (“likelihood of obtaining a conviction” is a pertinent factor under the Directive in distinguishing other cases from the present one). Moreover, “under the patent and gross abuse of discretion standard, a reviewing court should not substitute its judgment for the prosecutor’s assessment of the relative strengths and weaknesses of the State’s trial proofs.” Id. at 113. Thus, the trial court properly deferred to the prosecutor’s assessment of the relative strengths and weaknesses of the State’s trial proof. (8T41-22 to 25).

In his brief, the defendant indicates that the trial court found that the “interests of justice” would not be served by the imposition of the statutorily prescribed mandatory minimum. (Db40). The trial court never made such a finding. While the court did indicate that in her opinion the 42-month parole disqualifier was the “wrong” sentence and a one-year period of parole was more appropriate, she correctly recognized that she could not simply substitute her opinion for that of the prosecutor when the Code specifically vested the discretion in the assistant prosecutor. Just because there was a divergence between what mandatory minimum the court and the State thought was appropriate does not mean that either sentence was not in the interests of justice.

Additionally, as the defendant points out, the trial court, after the motion hearing, indicated that the mitigating factors outweighed the aggravating factors. However, it needs to be restated that upon her initial review, the trial court indicated that the factors were in equipoise. (6T7-11 to 12). Therefore, it must be reasoned that if the Court found that the mitigating factors did preponderate, then it was not by much as she had previously found, when reviewing the same pre-sentence report, that the aggravating and mitigating factors were balanced.

Further, the defendant highlights that court felt constrained by the more deferential patent and gross abuse of discretion standard. (Db41). There are

multiple issues with his reasoning on this point. First, the defendant seems to imply that had the court not followed the patent and gross abuse of discretion standard that it could simply, “substitute its judgment for that of the Prosecutor.” (Db41 quoting 8T37-15 to 20). Of course, the court cannot just substitute its judgment for that of the prosecutor under the patent and gross abuse of discretion standard nor under the regular abuse of discretion standard. Both standards require some form of an abuse by the prosecutor. While one standard is, to a certain extent, more deferential; neither standard allows for the court to supplant the decision of the prosecutor on the sole basis that the court would have reached a different conclusion.

Second, the defendant is asking this court to infer that the trial court found that the assistant prosecutor abused his discretion because the court stated that it did not “find that their abuse of discretion was patent and gross.” (8T43-19 to 21). This statement is merely a finding that the defendant had not met the appropriate legal standard and does not represent an affirmative finding of an abuse of discretion. Further, the defendant’s argument ignores the trial court’s very next statement, “It’s simply their analysis of the facts and how important those things are versus mine.” (8T43-21 to 22). This statement would support the inference that the court found that the State did conduct an appropriate analysis and simply reached a different conclusion than the court.

It is the State's position that the trial court utilized the correct standard of review, namely the patent and gross abuse of discretion standard. However, even assuming *arguendo* that this Court determines that the plain abuse of discretion standard is applicable, the decision of the trial court must nevertheless be affirmed as the assistant prosecutor did not abuse his discretion under either standard when he declined to file a motion for a Graves Act waiver.

Even under the abuse of discretion standard, the prosecutor's decision must be affirmed so long as the assistant prosecutor considered the appropriate factors, did not rely on impermissible factors and does not represent a clear error in judgment. Bender, 80 N.J. at 93, citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

Here, the assistant prosecutor considered the seriousness of the charges in that they constituted more than just a simple possession. The defendant's semi-automatic firearm was loaded with prohibited hollow point bullets and the defendant attempted to flee from police and discarded the handgun. An officer was injured in the pursuit. All of these additional factors were appropriate considerations and elevated the seriousness of the crime.

The assistant prosecutor also specifically noted that the defendant did not have an adult criminal record. (Da35). And while the assistant prosecutor's initial response may have been inartful, it was clear to the defendant's trial

attorney that, even though she disagreed with the assistant prosecutor's analysis, the assistant prosecutor had weighed the aggravating and mitigating factors in reaching his determination that a waiver to a one-year period of parole ineligibility was inappropriate. (Da47)(7T5-11 to 15).

Further, while the initial decision was based largely on the facts and strength of the case, the defendant incurred new charges during the pendency of the case as was highlighted in the State's supplemental letter filed August 10, 2021. This resisting arrest charge was resolved as part of the plea agreement.

The letter of August 10, 2021, also made clear that the assistant prosecutor had weighed the aggravating and mitigating factors. He placed "significant" weight on aggravating factor three—the risk that the defendant would commit another offense; "some" weight on aggravating factor six—the defendant's criminal record; indicating that the defendant's contact with the criminal justice system was limited; and "significant" weight to aggravating factor nine—the need to deter. The need to deter was the main legislative intent in drafting the Graves Act. "These disturbing statistics (contained in the Uniform Crime Report) confirm the obvious intent of the Graves Act to deter the use and possession of firearms...It is clear that the Legislature had in mind very specific means to carry out its intent. It sought to deter the use of firearms by establishing mandatory minimum terms of imprisonment to insure certainty of

punishment.” Des Marets, 92 N.J. at 73. It was appropriate that aggravating factor nine be given “significant” weight. The assistant prosecutor also gave “some” weight to mitigating factor 14—age of the defendant and “slight” weight to mitigating factor eight—circumstances unlikely to reoccur.

While the trial court may, and did, weigh the aggravating and mitigating factors differently, that does not mean that the assistant prosecutor abused his discretion when he conducted the same analysis. In fact, the trial court, reviewing the same pre-sentence report and the same defendant found and weighed the factors differently between the first sentencing hearing and the final sentencing hearing. (6T5-16 to 7-12; 8T37-21 to 40-13).² In so doing, the trial court found three additional mitigating factors that it did not find when it first reviewed the pre-sentence report and was preparing to sentence the defendant.

A review of the aggravating and mitigating factors, as well as the strength of the State’s case, reveal that the assistant prosecutor considered the appropriate factors in his analysis and his findings have a rational basis in the facts of the case and the history and character of the defendant.

² Of note, the intervening incident between the two sentencing decisions by the trial court was that the defendant while armed with a handgun had been shot multiple times in the State of Delaware. The Court indicated that it would not consider the intervening incident, where the defendant was armed in its analysis of whether the assistant prosecutor abused his discretion, (8T36-8 to 37-10) however, did use the fact that the defendant had been shot as a mitigating factor in its sentencing analysis. (8T39-8 to 17).

Aggravating Factor Three-The Risk of Re-offense

Both the assistant prosecutor and the court found that this factor was present. While the State found that this factor should be given significant weight (Da55) and the court only found moderate weight. (8T37-25 to 38-4). The finding of this factor was appropriate. The defendant had already incurred new charges after the gun event and was being sentenced for the new charge concurrently with the Graves Act sentence. There was a rational basis in the record for the State to weight this factor as significant.

Aggravating Factor Six-Extent of Prior Criminal Record

The State found that some weight should be given to this factor, (Da55), while the sentencing court gave no weight. (8T38-5 to 10). The State would submit that there was a rational basis for the assistant prosecutor to find this factor as the defendant, did in fact, have convictions as an adult. While they were for a disorderly persons offense and a local ordinance violation, the fact remains that the defendant does have an adult criminal record. Additionally, the defendant's conduct has escalated to the current Graves Act offense. This escalation in conduct rightfully causes concern. In any event, there was support in the record for the assistant prosecutor to give this factor some weight.

Aggravating Factor Nine-The Need to Deter

Both the State and the court found that this factor was present. However,

the State weighed the factor as significant (Da56) and the court weighed the factor as moderate. (8T38-11 to 15). As highlighted above, the Legislature intended the Graves Act to be a deterrent as opposed to a rehabilitative statute. It was the Legislature's intent to take a strong stand against gun crimes. In addition to the overall need to deter gun crimes, the facts of this particular case show the need to deter this defendant particularly. It should be restated that the defendant ignored police instructions and actively fled from police creating a danger to himself, the police officers and the general public. In fact, a police officer was injured in the pursuit. Further, the defendant discarded a firearm, loaded with hollow point bullets, in a public area in attempt to escape his apprehension and subsequently being charged with possessing the semi-automatic handgun. If the police had not observed him discard the weapon it could have been recovered by anyone. There is a clear public policy to deter this type of conduct with a firearm both to the general public and this particular defendant. There is clear support in the record for this aggravating factor and for it to receive significant weight.

Mitigating Factor Two-Defendant Did Not Contemplate Serious Harm

The State did not find that this factor was present (Da56) while the sentencing court gave this factor moderate weight. (8T38-17 to 19). This was an increase from the trial court's previous sentencing analysis where the court

found only slight weight was present. (6T6-23 to 7-4). It is unclear what caused the court to increase the weight it afforded this factor and the court gave no explanation as to why it found this factor to be present. Nevertheless, there is ample support for the State's rejection of this factor. The defendant consciously possessed a deadly weapon, a handgun. He further consciously loaded the handgun with prohibited ammunition. Ammunition that is designed to cause greater injury upon impact. Then, when confronted by police, the defendant chose to discard the firearm on a public street. These facts all support the assistant prosecutor's decision not to apply this factor.

Mitigating Factor Seven-No History of Criminal Activity

The State did not find this factor (Da57) while the court gave the factor slight weight. (8T38-25 to 39-7). When finding this factor, the court acknowledged the disorderly person conviction and local ordinance violation, but found the convictions from 2014 and 2018 to be too remote.³ The fact that the convictions do exist, gives support to the assistant prosecutor's determination that this factor is inapplicable.

Mitigating Factor Eight-Conduct Unlikely to Reoccur

³ The State would note that both convictions were within the previous ten years and close in time to the offense date for the current matter. See N.J.R.E. 609 (for the proposition that convictions occurring within the previous ten years are generally admissible for impeachment purposes).

The Court found this factor and gave it moderate weight. (8T39-8 to 17). The court did not find this factor at the initial sentencing date and it was given slight weight by the State. (Da56). The court found this factor because in the interim the defendant, while apparently armed with a gun, was shot multiple times. The court reasoned, “if getting shot multiple times, and I assume nearly dying because of those injuries, doesn’t change somebody’s behavior then there’s nothing that’s going to change that person’s behavior.” (8T39-10 to 15). The court found this in a general sense and there is no evidence in the record that this defendant had in fact changed his behavior. Further, the court refused to consider the fact that the defendant was armed with a gun when he was shot as an aggravating factor but nevertheless used the fact that he was shot as a mitigating factor.

Regardless, the assistant prosecutor did not commit any abuse in only giving this factor slight weight. The defendant had already been charged and pled guilty to fleeing from police a second time. The only difference was this time he did not have a gun. (Da52). Further, the fact that the sentencing court itself did not initially find this factor supports the conclusion that there was a rational basis for the assistant prosecutor to only give slight weight to the factor.

Mitigating Factor Nine-Character of the Defendant

The court found this factor and gave it slight weight. (8T39-18 to 24). It

did not previously find this factor, nor was it given any weight by the assistant prosecutor. (Da57). As the court itself did not find this factor on its first review of the pre-sentence report indicates that there was a valid basis for the assistant prosecutor to also not find that the factor was applicable. Once again, the State would note the intervening arrest for fleeing from the police demonstrates the defendant's character and supports the conclusion that this factor was not present.

Mitigating Factor Ten-Likely to Respond to Probation

This factor was also found by the court having not found the factor to be present previously. (8T39-25 to 40-5). The State did not find that this factor was present and notably, it was not even requested by the defendant. There was certainly a rational basis for the State to not find this factor when the defendant and State had entered into a negotiated plea agreement that contained a recommendation of a term of incarceration in the state prison system.

Mitigating Factor Fourteen-Under the Age of 26

This factor was found and applied by both the State and the court. (Da56; 8T40-6 to 8). The State applied some weight and the court applied moderate weight.

No analysis will be the same, the question is whether the assistant prosecutor considered the appropriate factors in his analysis and whether his

conclusion finds sufficient support in the record. If he did, as he did here, then his decision must be given deference and upheld even under the regular abuse of discretion standard. This is true even if the court may have reached a different conclusion, so long as the findings made by the assistant prosecutor are objective reasonable and based on the appropriate factors.

Further, as the assistant prosecutor's analysis was not an abuse of discretion under the regular abuse of discretion standard, the denial of the waiver was correctly upheld under the more deferential patent and gross abuse of discretion standard that was appropriately applied here.

D. There is No Need for Further Guidance on the Review of Graves Act Waiver Cases

The Courts have been consistently applying the patent and gross abuse of discretion standard in case after case involving Graves Act waivers. There is no indication that there is any confusion within the courts or that they are misapplying the law as set out in cases that go back decades. This court would only need to provide new guidance if it was to accept the defendant's argument and reject long standing precedence that the correct standard of review is the patent and gross abuse of discretion standard. The State urges this court to not take the drastic step of altering decades long jurisprudence that the courts of this state have been faithfully applying without issue.

In the current matter, while not specifically indicating in his letter that he was conducting the weighing of the aggravating and mitigating factors, it is clear that the assistant prosecutor did in fact weigh the aggravating and mitigating factors. This was understood by defense counsel. In her July 23, 2021, motion brief, defense counsel reviewing the State's initial denial, argues, "the State somehow concluded that the aggravating factors outweighed the mitigating factors." (Da47). Later that day, on the record addressing the State filing a brief in response to her motion, defense counsel indicates. "One, there wouldn't be an argument for mitigating and aggravating factors. It was, apparently, considered by the State when they did their denial of the Graves Act Waiver." (7T5-12 to 15). So while defense counsel did not agree with the result of the analysis, she did recognize that it had been conducted by the State.

Further, while the February 12, 2020, denial letter by the State (Da34-36) does not go through the aggravating and mitigating factors in a specific way and enumerate them point by point; it does show that the analysis was conducted and was sufficient to put the defense on notice of the reasons for the denial—which she acknowledged was based on the weighing of the aggravating and mitigating factors. The letter states, "the factors in your client's case weigh against the State agreeing to a waiver..." (Da35). And while the State would concede that the initial letter did not specifically enumerate the factors, in its narrative of the

facts of the case and characteristics of the defendant, it did weigh aggravating factors such as the need to deter and the facts of the case demonstrating that the defendant had hollow point bullets, resisted, fled an officer was injured with mitigating factors such as the lack of a criminal record. (Da35-36). The letter provided the defendant with a sufficient explanation so that he could file a motion to override the denial by the State and argue that the State misapplied the aggravating and mitigating factors.⁴

The State would submit that substance is more important than form and so long as the defendant is on notice as to the basis of the denial than the State's reasons letter is sufficient to allow judicial review of the decision. There is no need for a formalistic requirement that the prosecutor cite to the Attorney General Directive or go through the aggravating and mitigating factors one by one so long as the defendant and the court are on notice as to the basis of the denial so that the defendant can argue, and the court can adjudicate, whether a patent and gross abuse of discretion occurred.

⁴ Additionally, the defendant's implication that the assistant prosecutor engaged in "post-hoc justification" is belied by the contents of the two letters. While the second letter certainly goes into more detail, the two letters advance the same arguments and the second letter is merely an amplification of the first and would not have come as a surprise to the defendant. The fact that the prosecutor filed an amplification following a motion being filed by the defendant is not unique. A similar procedure was followed in Rodriguez. See Rodriguez 466 N.J.Super. at 90.

Here, the defendant was placed on notice and was able to argue the motion as to how the State committed a patent and gross abuse of discretion. The court was able to review the reasoning of the State in how it found and weighed the aggravating and mitigating factors and the court challenged the State on why this case was different than other cases where waiver motions were filed. The assistant prosecutor was rigorously challenged, by both the defendant and the court, on the his decision making process and the court was satisfied that the assistant prosecutor did not commit a patent and gross abuse of discretion. As such, the safeguards of the judicial backstop were followed.

Conclusion

For the reasons stated above, the State respectfully urges this court to Affirm the decision of the Appellate Division and reiterate the long-standing principle that the review of prosecutor decisions to seek a waiver of the Graves Act mandatory minimum sentence is subject to the patent and gross abuse of discretion standard. Further, in relation to the present matter, the State respectfully requests that the decision of the Appellate Division affirming the Law Division order denying the Motion to Override the State's Refusal to Seek a Graves Act Waiver be Affirmed.

Respectfully submitted,

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March 24, 2025