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TO: Judges

FROM: Cornelius P. Sullivan, J.S.C., Chairman
Task Force on Reduction of Undue Sentencing
Disparity & Improved Sentencing Procedures

SUBJECT: SENTENCING MANUAL

This manual contains a concise but accurate collation of case law and statutes pertaining to sentencing. It also includes a discussion of sentencing procedures and some suggestions on the conduct of sentencing hearings. The authors are particularly proud of the sections dealing with unresolved issues and problems. Although the manual does not resolve these open issues, their identification can be valuable to persons who deal with sentencing on a day-to-day basis. The judicial authors endeavored not only to set out the law, but also to share their courtroom experience to the greatest extent possible.

This edition draws heavily upon the 1979 version of the Sentencing Manual which was offered in large part by Hon. Edwin H. Stern. The drafting of the new version was done under the leadership of John P. McCarthy, Jr., Assistant Director for Criminal Practice. Beverly Tannenhaus, former Legal Assistant, devoted nearly one year to the project and drafted much of the manual. Deborah Collins, Assistant Chief, and Nina Rossi, Legal Assistant, succeeded Ms. Tannenhaus and took responsibility for expanding the manual and bringing it to completion. Joseph J. Barraco, Chief of Criminal Court Services, provided thoughtful guidance and drafting assistance.

Hon. Rudolph J. Rossetti, Hon. Thomas F. Shebell, Jr., Hon. Edwin H. Stern, Hon. Judith A. Yaskin, and Professor Milton Heumann were especially active in the creation of the manual. All of the Task Force members reviewed and refined the manual.

The manual is the result of a truly collegial enterprise; interaction between the Task Force members, and the staff of the Administrative Office of the Courts was vigorous and creative. Cynthia L. Samuels, former Assistant Chief of Criminal Court Services, shepherded the diverse efforts of the authors and editors. She channelled the contributions of AOC staff members, Colleen Jones, Robin Messing and Joseph Skinner. Invaluable assistance in completing the Manual was provided by Mary Ann Poole, Technical Assistant, and Donna Sommer, Paralegal Assistant, and Barbara Moore and Sue McKinney, Principal Clerk Typists.

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PART I OVERVIEW

1.1 Scope of Manual

This Sentencing Manual ("Manual") updates its predecessor published on November 28, 1979. The Manual has been revised extensively to reflect changes in the New Jersey Code of Criminal Justice ("the code"), effective September 1, 1979. In addition, it includes discussions of the wide body of case law evolved since publication of its predecessor. The format of the manual in use prior to the effective date of the code has been retained where feasible.

This Manual contains a narrative description of statutory provisions and relevant case law, of relevant court rules, and of pre-code case law where applicable. It attempts to flag unresolved legal issues to the attention of the courts so that judges will be aware of a split in or lack of authority in making sentencing decisions. It does not attempt to resolve these legal issues.

This Manual is designed as a ready reference for sentencing judges as well as an orientation to new sentencing judges. It attempts to state existing New Jersey law in such a way that a busy judge will be free to use it as an aid with respect to day-to-day sentencing problems. However, this Manual is not designed to replace actual examination of cases, statutes and rules. Moreover, decisional case law and statutory provisions must be consulted in order to determine changes since

publication on July 1, 1988. Of course, disposition must be based upon the law governing at the time of the offense.

The Manual is limited to problems arising under the criminal law in New Jersey. Therefore, it does not, except tangentially, deal with courts of limited jurisdiction, i.e., municipal courts, county district courts, or family courts.

1.2 Historical Background of Code 1968-1979

A. Legislative Evolution of Title 2C

The code (N.J.S.A. 2C:1-1 et seq.) became effective on September 1, 1979. It represents the first codification, reorganization, and modernization of New Jersey's criminal law. Allen, "Legislative History of the New Jersey Code of Criminal Justice (Title 2C)," 7 Criminal Justice Q. 31 (Summer 1979). Much of the language of the code was adopted during a legislative process that spanned eight years. Id. at 29.

In 1968 the Joint Legislative Committee to Study Crime and the System of Criminal Justice in New Jersey issued a report and proposal to establish a commission to codify the criminal law. Knowlton, "Comments Upon the New Jersey Penal Code," 32 Rutgers L. Rev. 1 (1979). The Legislature approved the proposal in 1968. The Criminal Law Revision Commission was organized in 1969. Allen, supra, 7 Criminal Justice Q. at 33.

More than a year later, in October 1971, the commission issued its final report in two volumes. The first constituted the proposed code and the second embodied the commission's commentary. The commission principally relied on the Model Penal Code for its proposed codification of New Jersey's criminal law. Variations from other states that had already adopted penal codes formed other sources of legislative intent. Id. at 37.

The commission's draft of the code was reviewed and revised for years until it was finally enacted in 1978 as Title 2C. Knowlton, supra, 32 Rutgers L. Rev. 1.

B. Philosophical Contrast Between Titles 2C and 2A

The code radically transformed the sentencing philosophy of prior law. The shift is now on the gravity of the offense rather than on the character of the offender. Punishment for the offense prevails over the offender's capacity for rehabilitation. "Under prior law, sentencing theory reflected the viewpoint that reformation and rehabilitation of offenders was a major goal of criminal sentencing." State v. Yarbough, 100 N.J. 627, 637 (1985), cert. den. 475 U.S. 1014 (1986). The code, as interpreted by the Supreme Court, shifted focus for those convicted of first and second degree crimes from the blameworthiness of the offender to the gravity of the offense in the context of presumptive imprisonment.[1] State v. Roth, 95 N.J. 334, 355 (1984).

This philosophical change results in great practical differences in sentencing. See Worthington v. Fauver, 88 N.J. 183, 189 n.2 (1982). Philosophically, the code reflects a model for sentencing based on notions of proportionality and desert. State v. Yarbough, supra, 100 N.J. at 635; State v. Roth, supra, 95 N.J. at 355. This model is predicated on two main features:

> ... [F]irst, the primary criterion for the severity of punishment is the gravity of the defendant's crime; second, sentencing discretion is regulated through

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1 The Court alluded to but did not discuss the codification of legislative intent with regard to sentencing in 2C:1-2, which includes the express commitment "[t]o promote the correction and rehabilitation of offenders" (2C:1-2b(2)) in articulating its construction of the sentencing model prescribed by the code. See State v. Hodge, 95 N.J. 369, 379 (1984).

> standards that prescribe the quantum of punishment for different species of criminal conduct. [Yarbough, supra, 100 N.J. at 636]

Traditionally, the theory of just deserts is based on the philosophy that a person should be punished when he deserves it and because he deserves it, the degree of punishment being determined by the gravity of the offense. A. von Hirsch, Doing Justice 6 (1976). The theory of proportionality demands that crimes be punished proportionately to each other. Id. at 67. The Legislature has classified offenses based upon its determination of the gravity of the offense.

The code combines the desert model with proportionality:

> ...The Code's sentencing provisions thus attempt to tailor criminal sanctions to the offense committed rather than to the characteristics of the offenders. Although the Code's presumptive sentences are based on the gravity of the criminal conduct involved, they do allow for modest deviations based on an examination and weighing of aggravating and mitigating factors. This "modified deserts" model synthesizes just deserts and preventive considerations while retaining its primary focus on the severity of the crime.
> [Mac Phee, "Sentencing -- New Jersey Criminal Justice Code Requires that Punishment Fit Crime, Not Criminal," 15 Seton Hall L. Rev. 372, 392-393 (1985); footnotes omitted]

This offense-oriented analysis of the code also signaled a shift from the original legislative history embodied in the commission's 1971 commentary. At that stage in the legislative process, the drafters of the code expressly subscribed to the sentencing model enunciated in State v. Ivan, 33 N.J. 197 (1960), which acknowledged the goal of rehabilitation. II Final Report of the New Jersey Criminal Law Revision Commission: Commentary (1971) at 2-4 ("Commentary"). The Commentary

explicitly recognized the Ivan court's focus on the offender in determining sentence:

> Expressed in other terms, the prevailing theme is that punishment should fit the offender as well as the offense. **** Except where the Legislature has decreed a mandatory sentence, thereby determining the punishment should fit the offense without regard to the circumstances of the offender, the problem devolves upon the sentencing judge. Our Legislature has not stated the aims to be achieved by punishment. Indeed few legislatures have, and where they have, the statement has been 'too general to be of service.' [Commentary at 3, citing Ivan, supra, 33 N.J. at 200]

Indeed, the Commentary recognized that "[t]he correction and rehabilitation of offenders is a social value in itself, as well as a preventive instrument," and refused to state a fixed priority among the traditional approaches to sentencing. Commentary at 2.

1. State v. Roth and State v. Hodge

In State v. Roth, 95 N.J. 334 (1984), and State v. Hodge, 95 N.J. 369 (1984), the Supreme Court first prescribed the standards under the code for sentencing courts and for appellate review. Roth and Hodge involved defendants convicted of first degree offenses. The Court reversed the sentences imposed below in each case as not adequately reflecting the severity of punishment contemplated by the new code. The gravity of the offense in each case had been erroneously circumscribed by consideration of defendant's background.

In Roth, the Court delineated the "entirely new sentencing process" established under the code. 95 N.J. at 340. The Court, as did the commission in 1971, acknowledged the sentencing model in State v. Ivan, supra, 33 N.J. 197. This model,

like the Model Penal Code, had rejected retribution as a primary goal in favor of reformation and rehabilitation. Roth, supra, 95 N.J. at 346. "The individualized focus upon the capacity of an offender to be rehabilitated was an essential part of that analysis." Id. at 367.

Departing from the 1971 position of the commission, the Roth Court rejected the Ivan sentencing philosophy as antithetical to the code as finally enacted in 1978. According to the Court, the Legislature had re-structured the code to reflect the dramatically changed perceptions of the criminal justice system in the seven-year period between issuance of the commission's final report and passage of the code. Id. at 353. The then-prevailing theory of rehabilitation was abandoned after clinical evidence found that it did not work.[2] Id. at 348. The Court identified "the overall thrust of the new code with its focus upon the gravity of the offense and not the blameworthiness of the offender." Id. at 355.

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[2] As authority for this proposition, the Roth Court cited Martinson, "What Works? -- Questions and Answers About Prison Reform," 35 Pub. Interest 22 (1974). 95 N.J. at 348. The Court did not cite Martinson's subsequent repudiation of his position in "New Findings, New Views: A Note of Caution Regarding Sentencing Reform," 7 Hofstra L. Rev. 243, 254 (1979). Martinson acknowledged that sometimes rehabilitation does work: "And, contrary to my previous position, some treatment programs do have an appreciable effect on recidivism. Some programs are indeed beneficial: of equal or greater significance, some programs are harmful." 7 Hofstra L. Rev. at 244 [emphasis in original].

The "enormous range of sentencing discretion" under pre-code law was "channeled" through the code's classification of offenses and its establishment of sentencing presumptions for each class and presumptions of imprisonment under certain circumstances. See id. at 362, discussing State v. Leggeadrini, 75 N.J. 150, 157 (1977). These strict statutory sentencing guidelines fostered the uniformity intended by the Legislature:[3]

> ... The central theme of the Code's sentencing reforms is the replacement of the unfettered sentencing discretion of prior law with a structured discretion designed to foster less arbitrary and more equal sentences.[4]
> [Roth, supra, 95 N.J. at 345]

The Court admitted that its construction of the code had not been heretofore "starkly evident." Id. at 369. It

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[3] Before the code's passage, the judiciary had attempted to set up guidelines to counter undue disparity under pre-code law. See Report of the Sentencing Guidelines Project to the Administrative Director of the Courts (1979).

[4] It is noteworthy that, under the code, judges have the power to effect a net increase in real time served by exercising such options as imposing a period of parole ineligibility or imposing an extended term. See Worthington v. Fauver, supra, 88 N.J. 183, 189 n.2, citing Report of the Governor's Task Force on Prison Overcrowding, 12-3-81 (certain provisions, including discretionary imposition of parole ineligibility, will result in further increase in number of defendants imprisoned and average length of sentence); State v. Maguire, 84 N.J. 508, 530 (1980); Thompson v. New Jersey State Parole Bd., 210 N.J. Super. 107 (App. Div. 1986) (code gave sentencing courts ability and thus responsibility to sentence in such a way as to assure that punitive purposes of sentence would be served by time prisoner became eligible for parole).

justified its conclusions on specific sentencing provisions and express legislative intent:

> ... The paramount goal of sentencing reform was greater uniformity. To that end, the Code channels discretion. Uniformity could not be achieved within the framework of pre-Code sentencing processes. We have repeatedly emphasized that the New Jersey Criminal Code represents a "clean break with the past." State v. Butler, 89 N.J. 220, 226 (1982). The philosophies and processes of the past cannot co-exist with the Code.
> [Id. at 369]

The Court attributed to the Legislature the "dramatically changed perceptions of the criminal justice system" (id. at 353) noted in legal periodicals in the period between the commission's final report favoring rehabilitation as a sentencing goal and the passage of the code downplaying this focus. The Court found evidence of this "get tough" approach in the legislative evolution of the presumption of imprisonment. The Senate Judiciary Committee had changed the basic sentencing presumption of non-imprisonment in earlier code drafts to a presumption of imprisonment in the 1981 version for convicted offenders of a first or second degree crime. Id. at 353-354. Moreover, in Hodge the Court noted that the crafting and grading of offenses in the code indicated legislative intent to focus judicial discretion on the offense rather than the offender. 95 N.J. at 375.

The Hodge Court acknowledged that "[i]n various places, the Code itself gives conflicting signals about the philosophical justification for punishment," citing 2C:1-2b. Id. at 379. This provision expressed the general purposes of the sentencing provisions, and included rehabilitation as a goal. Ibid. Nonetheless, the Court maintained its position that the single

most important factor in the sentencing process was the crime itself. Id. at 378.

(a) Third and Fourth Degree Crimes

Roth and Hodge involved defendants convicted of first degree offenses. However, it is clear that the offense-oriented sentencing philosophy that evolved in these cases is equally applicable to defendants convicted of third and fourth degree crimes. In State v. Baylass, 114 N.J. 169, 172 (1989), the defendant was convicted of three (3) fourth degree offenses and, later, of a violation of probation. The Court said that the offense-oriented principle of Hodge applied at defendant's initial sentencing and at his resentencing for violation of probation. The Court also criticized the trial court's consideration of the potential rehabilitative effect of jail on defendant's drug habit, saying that the court had departed from "the Code's mandate to forego defendant's capacity for rehabilitation and to concentrate on fitting the penalty to the crime". Id. at 179.

In addition to the change in sentencing philosophy, the code reflects other departures from prior law.

2. Culpability

The code provides for minimum levels of culpability:

> ... [A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or

> negligently, as the law may require, with respect to each material element of the offense.
> [2C:2-2a; emphasis added]

The Model Penal Code provided the source for the statutory definitions of these four kinds of culpability, as recommended by the commission. Knowlton, supra, 32 Rutgers L. Rev. at 2 n.12. Prior to the code, principles of liability, responsibility, justification, and excuse were embodied in case law. I Final Report of the New Jersey Criminal Law Revision Commission: Report and Penal Code (1971) at viii ("Final Report").

The precise delineation of culpability reflected legislative intent to increase individual justice:

> A second goal of a new code is to achieve greater individual justice through a closer relation between guilt and culpability, requiring workable definitions of the various culpability factors.
> [Knowlton, supra, 32 Rutgers L. Rev. at 2]

In this way, the Legislature hoped

> ... to dispel the obscurity with which the culpability requirement is often treated when concepts such as 'general criminal intent,' 'mens rea,' 'presumed intent,' 'malice,' 'willfulness,' 'scienter' and the like are used.
> [Commentary at 41]

See State v. Cameron, 104 N.J. 42, 48 (1986)(historically, distinction between "specific" and "general" intent crimes was elusive, particularly as that distinction determined what role voluntary intoxication played in a criminal prosecution).

The code makes a major distinction between conduct undertaken "purposely" or "knowingly" and conduct undertaken "recklessly." State v. Martin, 213 N.J. Super. 426, 435 (App. Div. 1986); see 2C:2-2b. In State v. Murphy, 185 N.J. Super. 72,

75 (Law Div. 1982), the Court noted that even if defendant's beliefs about the use of force at the time were unreasonable, they could still negate a purposeful or knowing culpability requirement, but not one that required recklessness or negligence.

Thus, the code preserves the common law distinction between "specific intent" (now termed as purposeful or knowing conduct) and "general intent" (now termed as recklessness and criminal negligence). State v. Warren, 104 N.J. 571, 575 (1986). This distinction has an impact upon the availability of intoxication as a criminal defense.

3. Gambling

The code preserved the primary thrust of the sentencing format for gambling offenders under prior law. Historically, the philosophy of sentencing in gambling cases differed from the pre-code model that punishment should fit the offender as well as the offense. State v. Hartye, 208 N.J. Super. 319, 324 (App. Div. 1986), aff'd 105 N.J. 411 (1987), citing State v. Ivan, supra, 33 N.J. 197.

The code consolidated and revised pre-code statutes proscribing most forms of gambling in New Jersey. 2C:37-1 et seq. The most significant departure from prior law was the availability, in a prosecution for gambling, of the defense that a person is merely a player in a "social game of chance," without the intent to either provide material assistance for gambling activities or to receive profits therefrom in addition to his or her personal winnings. Division of Criminal Justice, The Criminal Law Digest at 328. A person may also establish a

defense if his or her conduct "was within a customary license or tolerance neither expressly negated by the person whose interest was infringed nor inconsistent with the law defining the offense." State v. Nevens, 197 N.J. Super. 531, 538 (Law Div. 1984), citing 2C:2-11a.

4. Sex Offenses

N.J.S.A. 2C:14-1 et seq. criminalized all types of nonconsensual sexual assaults on both males and females and between spouses. These provisions supersede pre-code statutes on rape, sodomy, and incest. The code combined these offenses under the term "sexual assault" and "sexual contact." The Criminal Law Digest, supra, at 714. Consensual sex acts between adults performed in private were excluded from criminal conduct. Knowlton, supra, 32 Rutgers L. Rev. at 11. The code downgraded the offense of lewdness to a disorderly persons offense. Under prior law it had been classified as a misdemeanor. 33 N.J. Practice (Miller, Criminal Law) (1982), §126 at 140.

5. Discrete Degrees of Crime

Under the code, offenses are broken down and graded. Such a structure reflects the code's "fundamental sentencing guideline that the punishment fit the crime, not the criminal." State v. Hodge, supra, 95 N.J. at 376. The crafting and grading of code offenses served to channel the wide judicial discretion that existed under prior law. Id. at 375. The code continued to reject the term "felony" and abandon the term "misdemeanor" used under prior law. In order to permit the gradation of

lesser offenses, a new category of "petty disorderly persons violations" was created. Commentary at 10.

1.3 Summary of Title 2C Sentencing Provisions

A. Classes of Offense[1]

A crime is an offense[2] defined by the code or by any other New Jersey statute for which a sentence of imprisonment in excess of six months is authorized. N.J.S.A. 2C:1-4a. The code classifies the crimes it statutorily defines into four degrees for purposes of sentencing: crimes of the first degree, second degree, third degree, and fourth degree. N.J.S.A. 2C:43-1a. When the degree of a code offense, declared to be a crime, is not specified, it is a crime of the fourth degree. N.J.S.A. 2C:43-1a. Crimes defined by non-code law and designated as high misdemeanors are crimes of the third degree. Those designated as misdemeanors are fourth degree crimes. N.J.S.A. 2C:43-1b.

Separate sentencing terms apply to murder and kidnapping. State v. Roth, 95 N.J. 334, 356 n.4 (1984), citing N.J.S.A. 2C:11-3(b) and 2C:13-1(c). The capital punishment scheme is set out at 2C:11-3(c) to (e) and 2C:49-1 to -12. Ibid.

There are, in addition, disorderly persons and petty disorderly persons offenses, which are not crimes within the

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1 Controlled Dangerous Substance offenses occurring prior to the operative date of the Comprehensive Drug Reform Act of 1986 (i.e., July 9, 1987) are governed by the New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1 et seq. N.J.S.A. 2C:35-23a; see chart, this section; N.J.S.A. 2C:1-5b; 2C:43-1b.

2 As set forth in the general definitional section of the code, unless a different meaning is plainly required, "'[o]ffense' means a crime, a disorderly persons offense or a petty disorderly persons offense unless a particular section in this code is intended to apply to less than all three." N.J.S.A. 2C:1-14k.

meaning of the state constitution and for which there is no right to an indictment by a grand jury or right to a trial by jury. N.J.S.A. 2C:1-4b. An offense constitutes a disorderly persons offense or a petty disorderly persons offense if it is designated as such in the code or in a statute outside the code. N.J.S.A. 2C:1-4b.

B. Classes and Penalties of Non-code Offenses; Title 24 Drug Offenses Committed Before the Effective Date of the Comprehensive Drug Reform Act of 1986

An offense defined by any New Jersey statute other than the code is to be classified as provided in N.J.S.A. 2C:1-4 or N.J.S.A. 2C:43-1. Subject to the exceptions set forth in N.J.S.A. 2C:1-5b and in chapter 43, the code governs sentencing for such provisions. N.J.S.A. 2C:1-4c.

When a statute outside the code defines an offense as a misdemeanor and provides a specific maximum penalty of six months imprisonment or less, whether or not in combination with a fine, such offense constitutes a disorderly persons offense. N.J.S.A. 2C:1-4c.

N.J.S.A. 2C:1-5b provides that the provisions of subtitle 1 (General Provisions) are applicable to offenses defined by other statutes. The provisions of subtitle 3 (Sentencing) are applicable to offenses defined by statutes outside the code. However, if the statute defining such offenses specifically provides for a maximum penalty, such maximum shall govern, rather than the code, subject to the exception that if the non-code offense is a misdemeanor with a maximum penalty that exceeds 18 months imprisonment, N.J.S.A. 2C:43-1b shall apply.

That is, a misdemeanor outside the code having a specific maximum penalty above 18 months of imprisonment or having no specific maximum penalty constitutes a crime of the fourth degree. Misdemeanors with specific maxima greater than 6 months and not more than 18 months retain their specific maxima.

Notwithstanding any other provision of law, a crime designated as a high misdemeanor by a New Jersey statute other than the code constitutes a crime of the third degree for the purpose of sentencing. N.J.S.A. 2C:43-1b. Except as provided in N.J.S.A. 2C:1-4c (misdemeanors outside the code with specific maxima of 6 months imprisonment or less constitute disorderly persons offenses) and N.J.S.A. 2C:1-5b (misdemeanors with specific maxima of greater than 6 months and not more than 18 months retain their specific maxima; those with specific maxima above 18 months constitute fourth degree crimes), and notwithstanding any other provision of law, a crime designated as a misdemeanor by any statute other than the code constitutes a crime of the fourth degree for sentencing purposes. N.J.S.A. 2C:43-1b.

With respect to the classification of non-code offenses, for sentencing purposes the code provisions may be summarized as follows:

NON-CODE OFFENSE	CLASSIFICATION AND MAXIMUM PENALTY UNDER THE CODE
Non-indictables	Retain their specific non-code maxima; if no specific penalty provided, code penalties prevail, i.e., DP - 6 months and/or $1000; PDP - 30 days and/or $500. (N.J.S.A. 2C:1-5b; N.J.S.A. 2C:43-3; N.J.S.A. 2C:43-8)
Misdemeanors with specific maxima of six months or less whether or not in combination with a fine	Processed as disorderly persons offense but retain non-code maxima. (N.J.S.A. 2C:1-4c; 2C:1-5b; 2C:43-1). Where specific non-code fine is provided, such fine prevails, if higher. If no specific fine, subject to DP fine provided in code, i.e., $1000. Id.; N.J.S.A. 2C:43-3.
Misdeameanors with specific maxima of greater than six and not more than 18 months	Retain their specific non-code maxima (N.J.S.A. 2C:1-5b). If no specific fine is provided for non-code misdeameanor with custodial maxima above six months, fourth degree fine provided in code prevails, i.e., $7500. Id.; N.J.S.A. 2C:43-3.
Misdemeanors with no specific maxima or with specific maxima above 18 months	Become fourth degree crimes with 18 months maxima and/or $7500 fine (N.J.S.A. 2C:1-5b; 2C:43-1; 2C:43-3).
High misdemeanors	Become third degree crimes with specific ordinary term between 3 and 5 years (N.J.S.A. 2C:43-1) and/or $7500 fine (N.J.S.A. 2C:43-3); may be subject to a fixed extended term of imprisonment between 5 and 10 years and to a fixed period of parole ineligibility (N.J.S.A. 2C:44-3; 2C:43-7).

1. Comprehensive Drug Reform Act of 1986

Effective July 9 or 10, 1987[3] the "Comprehensive Drug Reform Act of 1986" (P.L. 106) ("drug act") amended the code by adding chapters 35 ("Controlled Dangerous Substances"), 36 ("Drug Paraphernalia"), and 36A ("Conditional Discharge for Certain Offenders"). These chapters effectively transferred into the penal code offenses formerly governed by the New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1 et seq. N.J.S.A. 2C:35-1.[4] Persons who committed drug offenses prior to the effective date of the new drug act will be governed by prior law.[5] N.J.S.A. 2C:35-23a; 2C:36-9. See discussion at §1-3B(2), supra; §5.2, infra.

2. Title 24 Offenders

With respect to a sentence imposed upon violation of the New Jersey Controlled Dangerous Substances Act, the maximum sentence authorized for the relevant offense under that act is to govern, if specifically provided therein. N.J.S.A. 2C:43-1b. If no specific penalty is provided in that act (1) misdemeanors or other indictable offenses are punishable by imprisonment for not more than three years or a fine of not more than $1,000, or both, and (2) non-indictable

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3 The effective date of the drug act is in question. Legislation was signed at 5:08 P.M. on July 9. It is unclear whether this date or the following day will govern drug violators.

4 The new drug act will be discussed in greater detail at §5.3, infra.

5 If defendant consents, the court may impose sentence under chapter 35. N.J.S.A. 2C:35-23c(2).

offenses are punishable by imprisonment for not more than six months or a fine of not more than $500, or both. N.J.S.A. 2C:43-1.

While Title 24 offenses are not subject to the classification provisions of the code by which degrees of crime are created for purposes of sentencing, the sentencing provisions of subtitle 3 of the code generally apply. State v. Sainz, 107 N.J. 283, 287-289 (1987); State v. Flippen, 208 N.J. Super. 573, 576 (App. Div. 1986), citing N.J.S.A. 2C:1-5b and 2C:43-1b; State v. Sobel, 183 N.J. Super. 473, 476 (App. Div. 1982). The only sentencing provisions of the code that are inapplicable to Title 24 offenses are those provisions that are specifically and expressly applicable solely to degree-classified offenses and those provisions that prescribe specific terms of imprisonment, such as extended terms. Flippen, supra, 208 N.J. Super. at 576. Thus, for example, N.J.S.A. 2C:43-6b governing parole eligibility applies to sentencing under Title 24 and a parole ineligibility term for a Title 24 offense is legal. State v. Reevey, 213 N.J. Super. 37, 41-42 (App. Div. 1986).

The sentences applicable to Title 24 offenses committed prior to the effective date of the new drug act may be summarized in this matter:

TITLE 24 OFFENSE	MAXIMUM SENTENCE
Offenses for which a specific maximum penalty is provided in the New Jersey Controlled Dangerous Substances Act	Retain their specific maxima (N.J.S.A. 2C:43-1)
Misdemeanors with no specific maxima (See, e.g., N.J.S.A. 24:21-23)	Three years or $1000, or both (N.J.S.A. 2C:43-1).

Non-indictable offenses with no specific maxima (N.J.S.A. 2C:1-4b)	Six months or $500, or both (N.J.S.A. 2C:43-1).

Subject, for example, to the code provisions concerning indeterminate terms for young adult offenders (N.J.S.A. 2C:43-5), probation (N.J.S.A. 2C:45-1 et seq.), and specific terms, as indicated by the phrase "governed by this subtitle" in N.J.S.A. 2C:43-1b.

C. Summary of Sentencing Options

1. Authorized Dispositions Under N.J.S.A. 2C:43-2

Every person convicted of an offense must be sentenced in accordance with the code. N.J.S.A. 2C:43-2a.

Exclusive of capital punishment, there are nine possible authorized dispositions available to the sentencing court, as well as certain additional penalties, depending on the circumstances of the offense and the offender. The court may sentence defendant as follows:

(1) suspend the imposition of sentence (N.J.S.A. 2C:43-2b); or

(2) to pay a fine or restitution authorized by 2C:43-3 (N.J.S.A. 2C:43-2b(1)); or

(3) place defendant on probation, including the imposition as a condition of probation of a fixed term of imprisonment not to exceed 364 days for a criminal conviction, or not to exceed 90 days for a disorderly persons offense (N.J.S.A. 2C:43-2b(2)); or

(4) to a term of imprisonment as authorized by 2C:11-3, 2C:43-5, -6, -7 and -8, or 2C:44-5 [i.e., imposition of an ordinary term, extended term, or term of parole ineligibility] (N.J.S.A. 2C:43-2b(3)); or

(5) to pay a fine, restitution and probation, or to pay a fine, restitution and imprisonment (N.J.S.A. 2C:43-2b(4)); or

(6) to release under supervision in the community or require the performance of community-related service (N.J.S.A. 2C:43-2b(5)); or

(7) to a halfway house or other residential facility in the community, including agencies not operated by the Department of Human Services (N.J.S.A. 2C:43-2b(6)); or

(8) to imprisonment at night or on weekends with liberty to work or to participate in training or educational programs (N.J.S.A. 2C:43-2b(7)); or

(9) postpone, suspend, or revoke for a period not to exceed two years, the driver's license, registration certificate, or both, of any person convicted of a crime, disorderly persons offense or petty disorderly persons offense involving the use of a motor vehicle (N.J.S.A. 2C:43-2c).[6]

2. Additional Penalties

a. Drug Act Offenses

N.J.S.A. 2C:43-3 has been amended, operative July 9, 1987, to authorize violators of N.J.S.A. 2C:35-1 et seq. ("Controlled Dangerous Substances") to pay a fine or make restitution as set forth therein. See §5.3, infra, for fuller discussion of fines and restitution imposed for drug offenses; §4.9, infra, for restitution and fines in general.

b. Offense Involving Motor Vehicles

Additionally, the court must order a person convicted of an offense involving the theft or unlawful taking of a motor vehicle to make restitution to the owner in the amount of the expenses incurred by the owner in recovering the motor vehicle and for any damage to the motor vehicle prior to its recovery by the owner, as determined by the court. N.J.S.A. 2C:43-2.1.

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6 The Comprehensive Drug Reform Act of 1986 provides for the mandatory forfeiture or postponement of driving privileges under conditions delineated at N.J.S.A. 2C:35-16.

c. Violent Crimes

In addition to any authorized disposition under N.J.S.A. 2C:43-2, any person convicted of a violent crime resulting in the injury or death of another person shall also pay a penalty between $30 and $10,000 for each such crime for which defendant was convicted. N.J.S.A. 2C:43-3.1a(1).

d. Other

Moreover, any person convicted of any disorderly persons offense, any petty disorderly persons offense, or any crime not resulting in the injury or death of any other person, shall be assessed a penalty of $30 for each sum offense or crime for which defendant was convicted. N.J.S.A. 2C:43-3.1a(2)(a). Any juvenile adjudicated delinquent shall be assessed a penalty of at least $15 for each such adjudication, but shall not exceed the amount that could be assessed if the offense was committed by an adult. N.J.S.A. 2C:43-3.1a(2)(b).

All penalties provided for in N.J.S.A. 2C:43-3.1 shall be forwarded to the Violent Crimes Compensation Board. N.J.S.A. 2C:43-1a(3).

3. Corporate Defendant

If a defendant is a corporation, the court may (1) suspend the imposition of sentence, (2) order restitution to be made pursuant to N.J.S.A. 2C:43-3, or (3) impose payment of a fine of up to three times the fine provided for in N.J.S.A. 2C:43-3. N.J.S.A. 2C:43-4a. Moreover, if the corporation or its statutorily defined high managerial agent is convicted of an offense committed in conducting corporate affairs, the court may

request the Attorney General to institute appropriate proceedings to (1) dissolve the corporation, (2) forfeit its charter, (3) revoke any franchises held by it, or (4) remove the certificate authorizing the corporation to conduct business in this State. N.J.S.A. 2C:43-4b.

PART II PRELIMINARY PROCEDURES

2.1 Entry of Plea

A. Plea Agreements

1. Generally

"The prosecutor and defense counsel may engage in discussions relating to pleas and sentences." R. 3:9-3(a); cf. State v. Thomas, 61 N.J. 314 (1972); State v. Taylor, 49 N.J. 440 (1967). An agreement as to the offense or offenses to which the defendant will plead on condition that other charges pending against that defendant will be dismissed, or an agreement concerning the sentence that the prosecutor will recommend, must be placed on the record in open court at the time the plea is entered. R. 3:9-3(b).

The plea bargain system is based on the "mutuality of advantage" available to both defendant and the State. State v. Taylor, 80 N.J. 353, 361 (1979).

> ... The system enables a defendant to reduce his penal exposure and avoid the stress of trial while assuring the State that the wrongdoer will be punished and that scarce and vital judicial and prosecutorial resources will be conserved through a speedy resolution of the controversy. [Ibid.]

Usually judges will not involve themselves in plea discussions. R. 3:9-3(a). However, upon the parties' request, judges have the discretion to permit the disclosure to them of the tentative agreement reached by defense counsel and the prosecutor prior to the tender of the plea or, if no agreement has been reached, the status of negotiations. R. 3:9-3(c). Judges may then indicate to the prosecutor and defense counsel

whether they (judges) will concur in the tentative agreement or, if no agreement has been reached and with the consent of both counsel, the maximum sentence they would impose if defendant were to plead guilty, assuming that the information in the presentence report is as has been represented to them and supports their determination that the interests of justice would be served thereby. R. 3:9-3(c). Whether or not the agreement is reached with judicial participation, the entire plea agreement, including the judge's concurrence and indication concerning sentence, if any, must be placed on the record in open court when the plea is entered. R. 3:9-3(c).

2. Enforcement

A negotiated plea is predicated on a defendant's voluntary and informed waiver of his or her right to a trial in return for the reduction or dismissal of certain charges, recommendations as to sentence, and so forth. All terms of a negotiated plea must be met fully in order to satisfy defendant's constitutional rights. State v. Davis, 175 N.J. Super. 130, 140 (App. Div. 1980), certif. den. 85 N.J. 136 (1980). In order to secure the benefit of the plea agreement, a defendant must meticulously satisfy the conditions of the plea. State v. Fort, 101 N.J. 123, 131 (1985). In return, his or her reasonable expectations must be fulfilled. State v. Kovack, 91 N.J. 476, 483 (1982).

Once a defendant formally pleads guilty, the trial judge may reject a request to retract the guilty plea. A defendant's claim to be relieved of the consequences of the plea must be balanced against the strong interest of the State in its

finality. State v. Heitzman, 209 N.J. Super. 617, 621 (App. Div. 1986), aff'd 107 N.J. 603 (1987). By pleading guilty, a defendant waives any non-jurisdictional constitutional challenge. State v. DeLane, 207 N.J. Super. 45, 48 (App. Div. 1986), citing Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

The sentencing court is not bound by a plea agreement between the State and defendant:

> ... Neither party can bind the court; neither has an absolute right to have the sentence conform to the specific terms of the agreement. State v. Davis, 175 N.J. Super. 130, 140 (App. Div.), certif. den., 85 N.J. 136 (1980). Even though the parties express their satisfaction with the agreed upon sentence, a sentencing court can, within its broad discretion, refuse to accept any of the terms and conditions of a plea agreement, in which event a defendant is entitled to replead. See, e.g., Santobello v. New York, 404 U.S. 257, 264, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); State v. Spinks, 66 N.J. 568, 574 (1975).
> [State v. Kovack, supra, 91 N.J. at 484-485]

The determination of a criminal sentence is always and solely committed to the discretion of the court to be exercised within the standards prescribed by the code. State v. Warren, 115 N.J. 433, 447 (1989). The court may not simply accept the terms of a plea bargain. Ibid. The court must always consider the aggravating and mitigating factors and other code considerations in determining whether to follow a recommended sentence that is proffered as part of a plea bargain. Ibid. See also State v. Johnson, 230 N.J. Super 583, 591 (App. Div. 1989).

A court may not relax the sentencing guidelines of the code to benefit either a defendant or the State merely because the

parties had consented to do so in their plea agreement. State v. Sainz, 210 N.J. Super. 17, 27 (App. Div. 1986), aff'd 107 N.J. 283 (1987). See, e.g., State v. O'Connor, 105 N.J. 399, 405 (1987) (presumption of incarceration applies to defendant who pleads guilty to second degree crime, notwithstanding terms of plea agreement); State v. Nemeth, 214 N.J. Super. 324, 327 (App. Div. 1986) (defendant's plea-bargained sentence vacated because of its fatal inconsistency with sentencing mandate of code); State v. Wilson, 206 N.J. Super. 182, 183-184 (App. Div. 1985) (defendant's plea-bargained sentence vacated because it was based entirely upon a factor unrelated to sentencing criteria in code, but see State v. Subin, 222 N.J. Super. 227, 240 (App. Div. 1988) certif. den. 111 N.J. 580 (1988)); cf. N.J.S.A. 2C:44-1c(1) (plea of guilty by defendant or failure to so plead shall not be considered in withholding or imposing a sentence of imprisonment); State v. Wright, 196 N.J. Super. 516, 523-524 (Law Div. 1984) (plea agreement that eliminates possible death penalty in return for guilty plea for life sentence was unconstitutional and violated sentencing guidelines in code).

Generally, a Graves Act crime cannot be dismissed under a plea agreement unless the prison sentence for committing the non-Graves Act crime is "at least equal in length to that which would have been required for the [Graves Act] offense being dismissed." State v. Connell, 208 N.J. Super. 688, 696 (App. Div. 1986), citing N.J.S.A. 2C:43-6; Supreme Court Memorandum, April 27, 1981-Plea Bargaining.

3. Rejection by Court

If the court rejects a plea agreement, defendant should be allowed to renegotiate the plea agreement if the State is willing to do so, or to withdraw the guilty plea subject to reinstatement of the dismissed counts and proceed to trial. Kovack, supra, 91 N.J. at 485. See R. 3:9-3(e).

4. Withdrawal of Plea

Independent of a rejected recommendation, defendant may be allowed to withdraw a plea of guilty to preserve basic fairness. State v. Howard, 213 N.J. Super. 587, 591 (App. Div. 1986), rev'd on other grounds 110 N.J. 113 (1988). There is no reciprocal right of the prosecutor to rescind a plea bargain if the sentence imposed is more lenient than that recommended by the prosecutor. State v. Warren, supra, 115 N.J. at 444.

Rule 3:21-1 provides that a defendant's "motion to withdraw a plea of guilty *** shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice." See R.3:9-3(e) (if, at time of sentencing, court determines that interests of justice would not be served by effectuating agreement reached by prosecutor and defense counsel or by imposing sentence in accordance with court's previous indications of sentence, court may vacate the plea or defendant shall be permitted to withdraw the plea).

Pertinent factors to the determination of whether defendant may withdraw a guilty plea include the materiality of the mistake or omission as to the penal consequences of the plea, the resulting prejudice to defendant, the guilt of defendant,

and the manner of entry of the plea. State v. Chung, 210 N.J. Super. 427, 431 (App. Div. 1986). To vacate a plea, defendant must show not only that he or she was misinformed of the terms of the agreement or that the sentence violated his or her reasonable expectations, but also that he or she is prejudiced by enforcement of the agreement. State v. Garland 226 N.J. Super. 356, 364 (App. Div. 1988), certif. den. 114 N.J. 288 (1988). Hence, the plea will not be vacated if knowledge of the consequences would not have made any difference in defendant's decision to plead. Ibid.

For example, if it appears from an objective standpoint that there is a significant possibility that misinformation imparted to the defendant could have directly induced him to enter the plea, he should be allowed to withdraw from the bargain. State v. Taylor, supra, 80 N.J. at 365. In State v. O'Connor, supra, 105 N.J. at 411, the Court allowed defendant to withdraw from a plea agreement which may have been predicated on his mistaken assumption that the presumption of non-incarceration was applicable to his sentence. In the event defendant chose not to withdraw from the above plea agreement, the trial court was to reconsider whether the presumption of incarceration had been overcome in defendant's case. Ibid. Compare State v. Nichols, 71 N.J. 358, 361 (1976) (defendant permitted to withdraw plea entered into after receiving improper advice that failed to disclose that charged offenses would merge upon conviction) with State v. Taylor, supra, 80 N.J. at 366 (defendant's negotiated plea upheld in case factually

distinguishable from State v. Nichols, supra, where failure to disclose marginal differences in lengths of sentences in event of merger not deemed material misrepresentation). See also Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

On the other hand, in State v. Heitzman, supra, 107 N.J. at 604, the Court upheld a guilty plea of a state employee. As a result of his plea, defendant lost his job pursuant to N.J.S.A. 2C:51-2, which mandates the forfeiture of public office or position of any person convicted of a crime of the third degree or above. The Court upheld the Appellate Division's decision that forfeiture of employment was not a penal consequence requiring notice to defendant before acceptance of his plea. Rather, the loss of public or private employment was deemed a collateral consequence, as was the effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, etc. Although the absence of such notice will not result in vacation of the plea, the Court advised trial courts to inform defendants of any known collateral consequences. Ibid. This preferred practice should be followed.

5. Appeal

A defendant is not bound by any plea agreement to waive an appeal if the plea agreement is accepted, and must be so advised by the court. R.3:9-3(d); State v. Sainz, supra, 107 N.J. at 294; see also State v. Butler, 89 N.J. 220, 225 (1982) (even though sentence imposed falls within terms of plea bargain, it

does not act as bar to defendant's right to challenge his conviction as first degree offender or excessiveness of sentence). (However, if as part of the plea bargain defendant has waived any claim based on merger, he or she "will not be heard to complain on appeal." State v. Truglia, 97 N.J. 513, 524 (1984). See §2.1D, infra, for further discussion on merger.)

The court must further advise defendant that if, despite a waiver of appeal at the time the plea was entered, he or she later decides to appeal, the plea agreement may be annulled at the option of the prosecutor. R. 3:9-3(d). (The prosecutor must move to annul the plea agreement "within a reasonable time after the appeal is filed." State v. Johnson, 230 N.J Super. 583, 590 (App. Div. 1989), quoting J. Schreiber's concurring opinion in State v. Gibson, 68 N.J. 499, 517 (1975).) In that event all charges, including those in which convictions were entered against him or her, shall be restored to the same status as immediately before the entry of the plea. R. 3:9-3(d); State v. Truglia, supra, 97 N.J. at 524; State v. Gibson, supra, 68 N.J. at 511-512 (on appeal initiated by defendant who waived right to appeal, State would be free to reinstate charges dropped as part of plea bargain). In any event, a "waiver [of appeal] should rarely be needed, given the presumption of reasonableness that attaches to criminal sentences imposed on plea bargain defendants." Sainz, supra, 107 N.J. at 294. See State v. Spinks, 66 N.J. 568, 573 (1975).

A defendant may enter a conditional plea of guilty, reserving the right to appeal from the adverse determination of any specified pretrial motion, with the approval of the court and the consent of the prosecutor. R.3:9-3(f). Defendant may withdraw the plea if he or she prevails on appeal. Defendant's right of appeal provided for in R.3:5-7(d) (motions to suppress) is in no way limited by R. 3:9-3(f). The purpose of R.3:9-3(f) is "to provide a technique for avoiding trial where the defendant's willingness to plead guilty is dependent solely upon the disposition and opportunity for appellate review of separable issues determinable on a pretrial basis." Pressler, Current N.J. Court Rules, Comment R. 3:9-3 (1989) at 536-537.

B. Plea Agreement Form (CPO114, formerly LR-27)

Rule 3:9-2 provides that the court, before its acceptance of a plea, shall require the defendant to complete, insofar as applicable, and sign the appropriate form prescribed by the Administrative Director of the Courts. After the defendant has signed that form, it must be filed with the clerk of the applicable court. Form CPO114 (formerly LR-27) directs the court to inform defendant of the applicable maximum sentence, any mandatory penalty, parole ineligibility, or extended term, the possibility of merger, and whether restitution is likely to be a sentencing condition. (There are also two separate supplemental plea forms for the special requirements of drug offenses and sex offenses.) "As a matter of standard procedure the court should question defendant in haec verba [in the same words], rather than simply by reference to whether the demand of [any particular paragraph] has been met." State v. Kovack, supra, 91 N.J. at 485 n.1.

C. Plea Hearing Proceeding

1. Pleas of Guilty

When arraignment constitutes defendant's first court confrontation in respect of the charge, the arraigning judge should follow the procedures of R. 3:4-2 and should routinely decline to take a guilty plea from an unrepresented defendant who has not waived the right to counsel. State v. Melendez, 165 N.J. Super. 182 (App. Div. 1979).

Otherwise, the entry of guilty pleas is governed by R. 3:9-2. This rule provides that a court may refuse to accept any plea of guilty. The court must not accept a plea of guilty unless it first addresses defendant personally and determines by inquiry of defendant and others, in the court's discretion, that (1) there is a factual basis for the plea, (2) the plea is made voluntarily and not as a result of any threats or promises or inducements which are not disclosed on the record, and (3) the plea is made with defendant's understanding of the nature of the charge and the consequences of the plea. See State v. Howard, supra, 110 N.J. at 123; State v. Sainz, supra, 107 N.J. at 293.

Assistance of counsel is important to making an intelligent plea. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). As to the mental capacity to plead guilty with understanding, see, e.g., State v. Norton, 167 N.J. Super. 229 (App. Div. 1979). Furthermore, the terms of the agreement must be clear and unequivocal and fully understood by defendant

-- otherwise there is no agreement. Where defendant's understanding of the relevant law is incorrect, the plea of guilty may be set aside. Cf. State v. Garoniak, 164 N.J. Super. 344 (App. Div. 1978), certif. den. 79 N.J. 481 (1979) (relief from guilty plea, which was entered as part of plea agreement, was not warranted by claimed deprivation of constitutional right, such as denial of right to speedy trial occurring prior to entry of guilty plea, merely because later judicial decision showed that reasonable competent advice of counsel prior to or at time of plea may have been wrong).

However, if the not guilty plea is reinstated, any indictment dismissed as a part of the agreement will also be reinstated. State v. Rhein, 117 N.J. Super. 112 (App. Div. 1971). An agreement by the prosecutor to make "no recommendation" shall be understood to mean just that -- no recommendation whatsoever. State v. Brown, 71 N.J. 578 (1976).

The determination of the factual basis for the plea and the voluntariness of the plea "is left to the judge's discretion." State v. Nolan, 205 N.J. Super. 1, 5 (App. Div. 1985). Usually, factual statements at the time of the entry of the guilty plea are quite terse and only adequate to establish the elements of the offense.

> ... The factual basis for a guilty plea must obviously include defendant's admission of guilt of the crime or the acknowledgment of facts constituting the essential elements of the crime. However, the defendant's admission or acknowledgment may be understood in light of all surrounding circumstances.
> [State v. Sainz, supra, 107 N.J. at 293; citations omitted]

The court may go beyond defendant's admission or factual version in determining sentence. Ibid. In that event, it is important that the court not sentence defendant for a crime that is not fairly embraced by the guilty plea. Ibid.

The determination of whether defendant fully understands the nature of the charge and the consequences of the plea "is best accomplished by the court satisfying itself, through specific questions and answers." Kovack, supra, 91 N.J. at 484; cf. §3.3A, infra, ("Sentencing Proceeding -- Hearing"). To facilitate this determination and to comply with R. 3:9-2, Form CPO114 (formerly LR-27) has been prescribed. See §2.1B, supra.

A guilty plea is acceptable even though the result of "promises" or "inducements made by the prosecutor" if it is voluntary. In order to be voluntary a plea agreement must be made intelligently. It "is crucial *** that the plea bargain has been fairly reached and that defendant's reasonable expectations drawn from the terms of the bargain have been fulfilled." State v. Taylor, supra, 80 N.J. at 364. Such "reasonable expectations" include any likely period of parole ineligibility:

> ... whereas a trial court need not explain to a defendant what the parole opportunities are in general, the court must make certain that defendant has been made aware of any loss of parole opportunities that may be a component of the sentence.*** "When one enters a plea of guilty, [one] should be told what is the worst to expect." [Kovack, supra, 91 N.J. at 483, quoting Berry v. United States, 412 F.2d 189, 192 (3 Cir. 1969); emphasis in original]

The court must advise defendant of a period of parole ineligibility at the time of the plea; otherwise the court is

barred from imposing such a sentence because it lay beyond defendant's reasonable expectations. The court, not defense counsel, must assure itself that defendant appreciates the possibility that a parole ineligibility period can be imposed. Kovack, supra, 91 N.J. at 485 n.1.

Likewise, the court must inform a sex offender of the possibility that he or she may be sentenced to the ADTC and thus be subject to a period of parole eligibility radically different from that accorded state prison inmates. State v. Howard, supra, 110 N.J. at 125. "In addition to stating the minimum and maximum terms of the offense, the court should advise the defendant of the standard for parole eligibility with an ADTC sentence." Ibid.

Moreover, an extended term cannot be imposed unless defendant is specifically apprised by the court at the time of the plea of the potential number of years to which he is exposed. State v. Cartier, 210 N.J. Super. 379, 381-382 (App. Div. 1986) [emphasis added]. A guilty plea also cannot be accepted unless defendant has been advised that he or she is facing a mandatory custodial term, State v. Regan, 209 N.J. Super. 596, 607 (App. Div. 1986), including any mandatory parole ineligibility term required by N.J.S.A. 2C:43-6c (the Graves Act). State v. Bailey, 226 N.J. Super. 559, 567-568 (App. Div. 1988).

Defendant's "reasonable expectations" also encompass knowledge of the maximum sentence:

> ... When a plea is being negotiated, knowledge of one's ineligibility for parole is as necessary to an

> understanding of a plea as is knowledge of the maximum sentence possible.
> [State v. Davis, supra, 175 N.J. Super. at 148]

A negotiated guilty plea based on defendant's misunderstanding of credits may fail to satisfy the constitutional requirement that a plea be voluntarily, intelligently, and knowingly entered. State v. Alevras, 213 N.J. Super. 331, 338-39 (App. Div. 1986).

> ... [T]he denial of the expected credits results in the imposition of a sentence longer in duration than the maximum contemplated. Cf. State v. Kovack, 91 N.J. 476 (1982); State v. Jones, 184 N.J. Super. 626 (Law Div. 1982). This would be particularly true if a misunderstanding not clarified during the plea colloquy had an impact on [defendant's] decision to enter the guilty plea. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).
> [Ibid.]

A restitution obligation of $15,000 was held to be beyond a defendant's reasonable expectations when no reference to such was made at the entry of the plea, although the possible fines, custodial sentences and penalties were meticulously explained. State v. Saperstein, 202 N.J. Super. 478, 482-483 (App. Div. 1985).

Defendant need be informed only of the penal consequences of his or her plea and not the collateral consequences, such as loss of public or private employment, effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, and so forth. State v. Heitzman, supra, 209 N.J. Super. at 622.

The court must, of course, take care in the wording of all its statements to the defendant at the plea stage. Promises that seem to have been made by the court, on which a defendant

reasonably relied and which induced a guilty plea, must be honored. Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). An agreement to accept such a plea is generally enforceable against the State where equitable considerations require recognition of the bargain. See State v. Thomas, 61 N.J. 314 (1972).

2. Unresolved Issues

a. Parole or Probation Status

It is appropriate for the court to advise defendant with respect to the impact of a guilty plea on his or her current parole or probation status. Otherwise, defendant may have agreed to a plea ignorant of the fact that such a plea will result in an additional term of imprisonment for parole or probation violation. CPO114 (formerly LR-27) (Plea Agreement Form) does not address parole or probation consequences, other than to note that a guilty plea may result in a violation of parole or probation. See ¶9. The judge should question defendant about his or her probation or parole status and advise defendant of the sentencing consequences. But see State v. Garland, 226 N.J. Super. 356, 365 (App. Div. 1988), certif. den. 114 N.J. 288 (1988) (trial court not required to inform defendant that a court may impose a consecutive term for a conviction on a violation of probation charge, if such charge is filed as a result of defendant's plea); cf. State v. Cullars, 224 N.J. Super. 32, 40-41 (App. Div. 1988), certif. den. 111 N.J. 605 (1988) (preferable practice is to inform defendant of possibility that sentence will be consecutive to sentence imposed on other charges).

b. Lack of Parameters in Fact-Finding Beyond Guilty Plea

According to Sainz, supra, 107 N.J. at 293, the court must sentence defendant for only those crimes that are fairly embraced by the guilty plea. Sainz allows the sentencing court to go beyond defendant's admission or factual version to other evidence in the record. Ibid. The court, however, should clearly state on the record -- and allow defendant the opportunity to contest -- any facts that will be relied upon in imposing sentence. Cf. §3.3E(2), infra ("Unresolved Issues -- Consideration of 'Whole Person'"); §4.3C(2), infra ("Unresolved Issues -- Defendant's Prior Record As Aggravating Factor").

c. Judicial Modification versus Acceptance or Rejection of Plea Agreement

As discussed in §2.1A(2), a court is not bound by a plea agreement between the State and defendant. That is, a court may accept or reject a plea. However, it is unclear whether a court may "modify" a plea agreement without improperly disappointing the expectations of the State or defendant. But see State v. Barboza, 115 N.J. 415, 422 (1989), which suggests that courts may not "modify" the terms of a plea agreement.

d. Sentencing Consequences of Violation of Probation

Where there is a possibility that defendant will be sentenced to probation, it is appropriate for the court to advise defendant at the plea hearing that, upon a violation of probation, he or she can be sentenced to the maximum term applicable to the offense for which he or she was convicted. It is also appropriate for the court, at the time of sentence, to so advise a defendant who is sentenced to probation.

D. Merger Issues

1. Generally

Form CPO114 (formerly LR-27) (Plea Agreement Form) directs the court to determine whether defendant's attorney has discussed the likelihood of merger with defendant. See ¶17. The concept of merger serves to protect defendant from multiple punishment for a single offense. "Whether that prohibition finds its roots in principles of double jeopardy, substantive due process, or some other legal tenet is an open question for this Court." State v. Truglia, supra, 97 N.J. at 522, citing State v. Best, 70 N.J. 56, 61 (1976), and State v. Davis, 68 N.J. 69, 77 (1975).

The trial court is entitled to review a plea to multiple offenses in the light most favorable to the State. 97 N.J. at 521-522. No crime of greater degree or culpability can merge into one of lesser degree or culpability. State v. Hammond, 231 N.J. Super. 535, 545 (App. Div. 1989).

2. Blockburger/Code Test

The code has codified the required judicial analysis in merger issues. It provides that a defendant

> ... may not be convicted of two offenses if one is a lesser included offense of the other. N.J.S.A. 2C:1-8 a(1). See State v. Mirault, 92 N.J. 492, 502 n. 10 (1983). The focus under this analysis is on the statutory elements. Illinois v. Vitale, 447 U.S. 410, 416, 100 S.Ct. 2260, 2265, 65 L.Ed.2d 228 (1980); Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). If each statute requires proof of a fact which is not required by the other, then the offenses are not the same and there is no merger. Blockburger v. United States, supra. [State v. Johnson, 203 N.J. Super. 127, 134-135 (App. Div. 1985), certif den. 102 N.J. 312 (1985)]

Thus, under the Blockburger test, if the same conduct violates two provisions of the criminal law, a defendant can be convicted and sentenced for both if each requires proof of a fact that the other does not. State v. Alevras, supra, 213 N.J. Super. at 340. See State v. Fraction, 206 N.J. Super. 532, 536-540 (App. Div. 1985), certif. den. 104 N.J. 434 (1986). The Blockburger test governs merger for purposes of the federal constitution. Alevras, supra, 213 N.J. Super. at 341 n.3.

N.J.S.A. 2C:1-8(d)(1) appears to codify the Blockburger test. See discussion in The Criminal Law Digest, supra, at 461. However, our Supreme Court has declined to hold that the Blockburger test controls the issue of merger in New Jersey. Alevras, supra, 213 N.J. Super. at 340 and 341 n.3, citing State v. Truglia, 97 N.J. 513, 520 (1984). Our Supreme Court has not interpreted our constitution to be coextensive with Blockburger because the state constitution may implicate other values beyond those of the federal constitution inhering in the Blockburger analysis. Alevras, supra, 213 N.J. Super. at 341 n.3.

Moreover, the Truglia Court found the Blockburger test "a more mechanical approach to merger than the flexible course formulated" in certain pre-code cases and their progeny. 97 N.J. at 520. The Supreme Court observed that it had "found it more comfortable in recent years to eschew the 'mechanical application of formulas' to resolve merger questions," and to maintain the flexible approach of State v. Davis, 68 N.J. 69, 81 (1975)." Truglia, supra, 97 N.J. at 521.

3. Davis Test

State v. Davis, supra, 68 N.J. 69, and its progeny focus on the episodic fragments of the events. Truglia, supra, 97 N.J. at 521. These cases advocate use of a two-pronged test to determine whether convictions should be merged:

> ... [F]irst it must be ascertained whether the legislature has in fact undertaken to create separate offenses; and, if so, it must then be determined whether those separate offenses have been established under the proofs."
> [State v. Allison, 208 N.J. Super. 9, 22-23 (App. Div. 1985), quoting State v. Valentine, 69 N.J. 205, 209 (1976)]

With respect to the test's second prong, the Davis Court explained:

> ... Such an approach would entail analysis of the evidence in terms of, among other things, the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.
> [Davis, supra, 68 N.J. at 81]

See also State v. D.R. 109 N.J. 348, 377-378 (1988); State v. Best, 70 N.J. 56 (1976); State v. Jester, 68 N.J. 87 (1975); State v. Ruiz, 68 N.J. 54 (1975); State v. Anderson, 198 N.J. Super. 340, 357-358 (App. Div. 1985), certif. den. 101 N.J. 283 (1985); State v. Jones, 213 N.J. Super. 562, 567-568 (App. Div. 1986); State v. Ramos, 217 N.J. Super. 530, 538-540 (App. Div. 1987).

Accordingly, merger issues are resolved by focusing on the specific facts of each case. State v. Miller, 108 N.J. 112, 117 (1987). However, even where a single course of conduct

constitutes a violation of two different criminal statutes, merger may be improper. Id. at 118. When different statutes were violated by the exact same conduct, the Miller Court held that defendant's convictions did not merge since each statute protected different interests. Ibid. The status of the victim is a factor in determining merger. Id. at 119.

4. Waiver

Defendant may challenge a sentence imposed pursuant to a plea agreement on the basis of merger.[1] In general when a defendant simultaneously enters a guilty plea to more than one offense, the issue of merger is waived unless, in response to a question by the court or otherwise, the issue of merger is preserved. State v. Alevras, supra, 213 N.J. Super. at 339,

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[1] Often a defendant will claim that his rights to due process and against double jeopardy, and the principles of res judicata, collateral estoppel, and fair play preclude his conviction and sentence on a particular charge when he has been convicted or acquitted of a similar charge at a prior trial. Discussion of the many cases in that area as well as cases such as State v. Gregory, 66 N.J. 510 (1975), and its progeny dealing with mandatory joinder is beyond the scope of this Manual. See also R. 3:7-6 and R. 3:15 and the comments thereto with respect to joinder. See State v. Muscia, 206 N.J. Super. 551, 555 (App. Div. 1985) (court urged Supreme Court Committee on Criminal Practice to consider recommending amendment to R. 3:15-1 to accord with ABA standard that defendant's failure to move for joinder constitutes waiver of any right of joinder as to "same conduct" or "single criminal episode" offenses which defendant knew had been charged). As to the applicable code provisions, see, e.g., N.J.S.A. 2C:1-8b (limitation on separate trials for multiple offenses); 2C:1-8c (authority of court to order separate trials). See also, N.J.S.A. 2C:1-9 to -12, concerning the issue of when former prosecution constitutes a bar to subsequent prosecution, codifying principles of double jeopardy and collateral estoppel; State v. DeLuca, 108 N.J. 98 (1987), cert. den. ___ U.S. ___, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987).

citing N.J.S.A. 2C:1-8. If the question of merger is first raised on appeal, defendant must bear the burden of proof of the above:

> We conclude that a holding of non-waiver of a claim of merger following guilty pleas is more consistent with our notions of fairness, limited however to the situation in which there has been no consideration given at the plea or sentencing hearing to the potential for merger of any of the offenses. As we have said, when, as in this case, the question of merger is first raised on appeal, not having been adverted to below or subject to a specific waiver, defendant must establish the merger. [Truglia, supra, 97 N.J. at 523-524; emphasis added]

Thus, in order to avoid a subsequent claim of non-merger on appeal, the trial court should identify the issue at the plea proceedings and

> ... [be] alert to the potential for merger of the various charges to which a defendant may plead. The trial court may cover the merger situation by specific questions, and a defendant may be called upon, as part of a bargained-for plea, to waive any claim based on merger. Needless to say, should that occur, a defendant will not be heard to complain on appeal. [Id. at 524]

5. Post-Merger Sentences

If a defendant succeeds on arguments of merger and non-waiver, defendant may be resentenced by the trial court, even if defendant had already begun serving the original, illegal sentence:

> ... The appeal of defendant's underlying convictions resulting in a merger removed any legitimate expectation of finality with respect to his original sentence. Indeed, defendant's appeal grounded on merger presupposed that the two offenses constituted a whole, evidencing an expectation that an appropriate sentence could be imposed. Consequently, he may be resentenced without offending constitutional principals of double jeopardy, notwithstanding his initial commencement of the sentencing term,

> providing that any new sentence is in accordance with the substantive punishment standards under the Code and not in excess of the sentence originally imposed. [State v. Rodriguez, 97 N.J. 263, 277 (1984); emphasis added]

Thus, such a case may be remanded to the trial court to permit the State to move to vacate the illegal convictions and sentences and to move for enhancement of the sentence on the remaining, merged conviction. Truglia, supra, 97 N.J. at 525.

Alternatively, the Appellate Division may decide that the merger has altered the original plea agreement to such an extent that the parties should be returned to the status quo ante. State v. Roddy, 210 N.J. Super. 62, 65 (App. Div. 1986). In Roddy, the merger reduced by one-half the maximum sentence permitted by the plea agreement, i.e., a custodial term of 24 years with 12 years of parole ineligibility. Id. at 65. Thus, the State's reasonable expectations were destroyed:

> We are completely satisfied that the State's reasonable expectations under the plea agreement would be defeated following the merger if defendant's sentence exposure is limited to 12 years with six years of parole ineligibility as he contends. See State v. Lightner, 99 N.J. 313 (1985). On the other hand, defendant should not be placed in any worse position than he was at the time of the plea bargain. State v. Thomas, 61 N.J. 314, 322 (1972). Nor should he be permitted to fortuitously improve his position by virtue of the merger. State v.Truglia, supra, 97 N.J. at 524-525; State v. Rodriguez, supra. [State v. Roddy, supra, 210 N.J. Super. at 66]

In order to avoid having merger become the functional equivalent to an automatic reduction of sentence pursuant to R. 3:21-10(a), the Appellate Division remanded the matter to the trial court with the following instructions. Defendant should be permitted to withdraw his guilty pleas and to renegotiate the

plea agreement, or to withdraw his guilty pleas and proceed to trial, unless the State was willing to consent to the reduction of sentence resulting from the merger. If defendant failed to pursue either remedy within 30 days of the Appellate Division decision, he would be deemed to have waived any objection to the enhanced sentence [previously granted to the State and in violation of the plea agreement] as being violative of the plea agreement. Id. at 67.

2.2 Pretrial Diversion Programs

A. Pretrial Intervention Program

1. Background

Pretrial Intervention ("PTI") is a program whose "chief aim is that of diverting individuals with high rehabilitative prospects from the traditional channels of the criminal process. .... [T]he project provides alternatives to prosecution and conviction where the latter course would be counterproductive, ineffective or unwarranted." State v. Bender, 80 N.J. 84, 88 (1979). "The PTI Program makes creative use of a broad range of treatments and conditions. It requires counseling, restitution, community service and other appropriate responses." State v. Ridgway, 208 N.J. Super. 118, 128 (Law Div. 1985). The supervisory treatment programs and the program directors are approved by the Supreme Court (with the consent of the county Assignment Judge and prosecutor). N.J.S.A. 2C:43-12i.

In New Jersey, PTI officially commenced in 1970 with the promulgation of R. 3:28, then entitled "Defendant's Employment Program." This rule created the authority for the establishment of a Newark-based vocational services program to benefit participants whose joblessness was considered to be causally related to the crime of which they were accused. See Editorial, "A Right to Rehabilitation," 93 N.J.L.J. 792 (1970). In 1973, the rule was amended ("Defendant's Diversionary Program") to encourage the development of more comprehensive programs, specifically offering drug and alcohol detoxification

opportunities. "Report of the Supreme Court Committee on Criminal Procedure," 96 N.J.L.J. 449, 462 (1973).

Rule 3:28 was extensively modified in 1974 ("Pretrial Intervention Program") to provide greater flexibility for the disposition and supervision of the accused. Pressler, Current New Jersey Court Rules, Comment R. 3:28 (1989) at 665-666. By 1979, court-approved programs were operational in every county, and the rule was again amended to establish a Statewide Pretrial Intervention Registry. R. 3:28(e). In that same year the Legislature incorporated a statewide PTI program into the code, N.J.S.A. 2C:43-12 to -22, which "largely [mirrored] the guidelines and procedures of R. 3:28." State v. Collins, 180 N.J. Super. 190, 197 (App. Div. 1981), aff'd 90 N.J. 449 (1982); see R. Coughlin, "PTI: The Formative Years," 8 Crim. Justice Q. 112, 124, 126 (1983); State v. Dalglish, 86 N.J. 503 (1981). The statutory provisions and court rules were both meant to be assimilated into one program. State v. Collins, supra, 180 N.J. Super. at 203. The rule was most recently amended in 1982 to incorporate recommendations suggested by the Supreme Court Committee on Pretrial Intervention ("Pashman Committee"), which included the establishment of means by which the admission decision may be appealed. R. 3:28(f),(g); see "Report of the Supreme Court Committee on Pretrial Intervention," dated June 19, 1981.

In the landmark case of State v. Leonardis, 71 N.J. 85 (1976) ("Leonardis I"), the Supreme Court addressed the issue of program eligibility standards and promulgated statewide

guidelines, which are now appended to R. 3:28. Subsequent amendments to the guidelines have clarified the PTI eligibility standards. For example, rebuttable presumptions were created against admission for certain categories of offenders. Guideline 3(i).

2. Leonardis II: Standard of Review of Prosecutor Decision

After considering the validity of PTI programs and requiring formal, uniform guidelines in Leonardis I, the Supreme Court returned to PTI issues that remained unanswered, in State v. Leonardis, 73 N.J. 360 (1977) ("Leonardis II"). The Court held in Leonardis II that while judicial review of a decision to divert or not divert into PTI is consistent with the applicable principles under the separation of powers doctrine, great deference should be paid to the prosecutor's and program director's decisions. The scope of review should be limited only to those instances where there has been a "patent and gross abuse of discretion." Leonardis II, 73 N.J. at 381. See further discussion in §2.2A(9), infra.

3. Purpose

The purposes of the pretrial intervention programs as envisioned by the Supreme Court are set forth in R. 3:28, Guideline 1(a)-(e), and repeated in N.J.S.A. 2C:43-12a(1)-(5):

> (a) To provide defendants with opportunities to avoid ordinary prosecution by receiving early rehabilitative services, when such services can reasonably be expected to deter future criminal behavior by the defendant, and when there is an apparent causal connection between the offense charged and the rehabilitative need, without which cause both the alleged offense and the need to prosecute might

not have occurred;

(b) To provide an alternative to prosecution for defendants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanction to deter criminal conduct;

(c) To provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with "victimless" offenses;

(d) To assist in the relief of presently overburdened criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems;

(e) To deter future criminal or disorderly behavior by a defendant/participant in pretrial intervention.

It is not necessary for all the purposes to be met in order for the applicant to be admitted into a PTI program. See, e.g., State v. Ridgway, supra, 208 N.J. Super. at 130 (applicant met three of the five purposes of pretrial intervention and was admitted to the program). However, admission to PTI should further the program's goals and policy concerns. See State v. Bender, supra, 80 N.J. at 93. "To use PTI as a form of penal sanction subverts the laudatory goals of pretrial intervention, which surely are not to provide alternative punishment but to rehabilitate worthy persons." State v. DeMarco, 107 N.J. 562, 578-579 (1987) (Handler, J., dissenting). The aim of PTI programs is to augment the prosecutor's options, not to diminish them. State v. Dalglish, supra, 86 N.J. at 509.

As originally proposed and discussed by the Court in Leonardis I, supra, 71 N.J. at 98, the rehabilitative and deterrent functions of the program were central; the goal of expeditious disposition was regarded as a welcome by-product of

the process. See R. Coughlin, supra, 8 Crim. Justice Q. at 113. However, all goals are now given essentially equivalent weights. See ibid; also State v. Raupp, 160 N.J. Super. 315, 320-321 (App. Div. 1978); State v. Wilson, 183 N.J. Super. 86, 92 (Law Div. 1981).

4. Qualifications

a. Eligibility

Applicants must pay a $45 application fee, waivable for reasons of poverty. N.J.S.A. 2C:43-13(c); R. 1:13-2(a). Any person charged with a criminal or penal offense is eligible for admission to PTI and deserves to have his or her application carefully considered on an individualized basis. R. 3:28, Guideline 3(c) and (i); N.J.S.A. 2C:43-12f; State v. Sutton, 80 N.J. 110, 119 (1979); see Leonardis II, supra, 73 N.J. at 382. "The mere fact that a defendant may be eligible for [consideration for enrollment], however, does not automatically entitle the individual to an order granting diversion." State v. Gray, 215 N.J. Super. 286, 291 (App. Div. 1987). Admission to PTI is not a matter of right but a privilege. State v. Atley, 157 N.J. Super. 157, 164 (App. Div. 1978); State v. Spann, 160 N.J. Super. 167, 170 (Law Div. 1978).

A defendant may be diverted into a supervisory treatment program under N.J.S.A. 2C:43-12 or under the repealed Section 27 (see §2.2B, infra, "Conditional Discharge") only once. N.J.S.A. 2C:43-12g; R. 3:28, Guideline 3(g). PTI is not limited to first time offenders but, ordinarily, applicants who have been previously convicted should be excluded. R. 3:28, Guideline

3(e). Additionally, defendants accused only of minor violations, including ordinance, health code or motor vehicle offenses, should not be eligible for enrollment since diversion would not be appropriate in cases which do not involve "a potential sentence of consequence." R. 3:28, Guideline 3(d) and comment thereto; see State v. Raupp, supra, 160 N.J. Super. 315 (no due process violation in not allowing motor vehicle offenders PTI admission).

The general measures to be considered are the applicant's "amenability to correction, responsiveness to rehabilitation, and the nature of the offense." N.J.S.A. 2C:43-12b. Certain offenses create a rebuttable presumption against enrollment, including first and second degree crimes and serious narcotics offenses by persons not drug dependent; however, the applicant may be accepted if he or she can satisfy the heavy burden of showing compelling reasons supporting admission and can establish that a decision against enrollment would be "arbitrary and unreasonable." R. 3:28, Guideline 3(i). Similarly, individuals accused of crimes involving organized criminal activity, continuing criminal enterprise, deliberate violence or threat thereof against another, or breach of public trust will ordinarily be denied enrollment. R. 3:28, Guideline 3(i); see, e.g., State v. Marie, 200 N.J. Super. 424 (Law Div. 1984) (discussion and definition of "continuing criminal activity"); State v. Barrett, 157 N.J. Super. 96 (App. Div. 1978) (concerning "organized criminal activity"); State v. Bender, supra, 80 N.J. 84 (breach of public trust).

The specific statutory criteria required to be considered in evaluating an application can be found in N.J.S.A.

2C:43-12e(1)-(17). Rule 3:28, Guideline 3(a)-(k) contains supplemental and explanatory factors.

b. Consideration of Applicant

Consideration of the defendant as a unique individual is a central requirement of the PTI program. State v. Sutton, supra, 80 N.J. at 119. No single factor may be dispositive in the evaluation. "Any automatic exclusion, whatever the basis, is arbitrary" and "contrary to the purpose and philosophy [of the program]. The Supreme Court in [Leonardis I and II] has expressed a broad, liberal view as to the criteria to be utilized for admission to a PTI program." State v. Catlin, 215 N.J. Super. 471, 474 (Law Div. 1987); accord State v. Lamphere, 159 N.J. Super. 562, 565 (App. Div. 1978); see State v. Poinsett, 206 N.J. Super. 307 (Law Div. 1984). Particularly, denial cannot be predicated on an admission of guilt. R. 3:28, Guideline 4. "A PTI applicant is not required to admit guilt and such an admission may be considered only when addressing the applicant's potential for rehabilitation." State v. Catlin, supra, 215 N.J. Super. at 474; R. 3:28, Guideline 4; see also State v. Smith, 92 N.J. 143 (1983); State v. Maddocks, 80 N.J. 98, 108 (1979).

In order to ensure that the prosecutor and program director have taken into account "the total panorama of the applicant's background and history" and applied the criteria "conscientiously and articulately," an applicant must be provided with a written statement particularizing the reasons for rejection from PTI. R. 3:28, Guideline 8; N.J.S.A. 2C:43-12; State v. Ridgway,

supra, 208 N.J. Super. at 125. "[A] purported statement of reasons which ... does no more than parrot, in purely conclusionary terms, the language of the Guidelines, is no statement at all ... [Defendant is] entitled to full and careful consideration of his application and to the assurance" that his application has received that consideration. State v. Atley, supra, 157 N.J. Super. at 164. See State v. Cucinotta, 206 N.J. Super. 261, 267-268 (Law Div. 1984) (for "parade of cases" concerning adequate statement of reasons).

5. Time for Application

At defendant's first court appearance, the judge must inform him or her of the existence of the county's PTI program, the director's name, and the location where application for enrollment can be made. R. 3:4-2. The Assignment Judge designates one or more judges for each vicinage to hear all PTI-related matters; however, the Assignment Judge retains responsibility for matters involving murder, kidnapping, manslaughter, sexual assault, aggravated criminal sexual contact, robbery, or sale or dispensing of narcotics by persons not drug dependant. R. 3:28(a).

Early application allows the expedient use of the appropriate rehabilitative measures and relieves the defendants from the anxiety of facing prosecution. R. 3:28, Guideline 6 and comment thereto. Thus, for indictable offenses, program applications should be made no later than seven days after the original plea to the indictment. R. 3:28, Guideline 6.

An application made after an indictment should be evaluated by the PTI program within 25 days of filing. The prosecutor should complete his or her review within ten days thereafter and then so advise defendant. R. 3:28, Guideline 6. However, when application is made in an indictable offense, "the prosecutor may withhold action on the application until the matter has been presented to a grand jury." R. 3:28, Guideline 7. In no situation should a defendant be compelled to stand trial before his application is acted on. State v. Marrero, 155 N.J. Super. 567 (App. Div. 1978). "The time guidelines will and should be observed in all cases unless clear injustice would result through no fault of defendant." State v. Davis, 154 N.J. Super. 506, 511 (App. Div. 1977).

6. Postponement Period

When an applicant is recommended by the program director with the consent of the prosecutor for PTI enrollment, the designated judge postpones all further criminal proceedings for up to six months at a time, not to exceed three years.[1] R. 3:28(b); N.J.S.A. 2C:43-13b and c. Once admitted into the program, the terms and duration of treatment are to be set forth in writing and agreed to and signed by the participant, counsel (if represented) and the prosecutor. N.J.S.A. 2C:43-13a and c. Those individuals charged with offenses under N.J.S.A. 2C:35 ("Controlled Dangerous Substances") or N.J.S.A. 2C:36 ("Drug

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1 Prior to June 28, 1988 (the effective date of L. 1988, c. 44), the period of supervisory treatment could not exceed one year. See N.J.S.A. 2C:43-13(c).

Paraphernalia") are to be held accountable for mandatory penalties imposed pursuant to the schedule set forth in N.J.S.A. 2C:35-15; however, only one penalty, for the most serious offense charged, may be levied. N.J.S.A. 2C:35-15. Applicants must also pay the forensic laboratory analysis fee detailed in N.J.S.A. 2C:35-20, even if they are admitted to and successfully complete PTI.[2]

It is discretionary with the court whether to suspend the driving privileges of persons entering PTI who have been charged under chapters 35 and 36 of Title 2C. N.J.S.A. 2C:35-16 (as amended, L. 1988, c. 44, effective June 28, 1988). The license suspension shall commence on the day the sentence is imposed. If a person's license is presently suspended, suspension will start when the previous suspension is up. The court shall collect the driver's license and forward it with information about the person and suspension to the DMV, if the court cannot collect the license, the court shall report the conviction or adjudication to DMV. The report to DMV shall include the defendant's name, address, date of birth, eye color, sex and the first and last day of suspension or postponement. Oral and written notification shall be given to the person of the penalties of driving on the revoked list.

The court shall notify DMV, who will notify other states, when an out-of-state driver is penalized in New Jersey and the

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2 This practice raises some concern over the possible denial of equal protection to the less affluent applicant. See §11c, infra, "Unresolved Issues," for further discussion.

court suspends the non-resident's New Jersey driving privileges. Suspension prohibits the operation of motorized bicycles. For persons under age 17, the suspension starts on the day of the sentence and runs until six months to two years after the 17th birthday. The underage suspension does not commence until the person reaches age 17. N.J.S.A. 2C:35-16.

Following the initial postponement, the judge, on the recommendation of the director and with the consent of the prosecutor and defendant, either 1) grants a further six month postponement, 2) dismisses the matter, or 3) orders the prosecution of the defendant to proceed in the ordinary course. R. 3:28(c)(1)-(3). The court must place on the record the reasons supporting its decision on an application for PTI diversion. R. 3:29.

The aggregate of postponement periods may not exceed three years, R. 3:28(d); N.J.S.A. 2C:43-13c (as amended L. 1988, c. 44, effective June 28, 1988) in order "to insure that ... defendants who do not achieve requisite rehabilitation during [the duration of] their program participation [do not have] the ultimate trial of the charges ... unduly delayed." State v. Von Smith, 177 N.J. Super. 203, 210 (App. Div. 1980).

Defendants who fully and satisfactorily complete the terms and conditions of PTI are entitled to expect the end of prosecution from their criminal episode. Id. at 208-210; State v. Singleton, 143 N.J. Super. 65, 68 (Law Div. 1976). The dismissal of the charges with prejudice, N.J.S.A. 2C:43-13d, results in an end to the criminal proceedings, but does not for

all purposes constitute a favorable termination since innocence, or guilt, was never pleaded or established. Thomas v. N.J. Inst. of Technology, 178 N.J. Super. 60, 63 (Law Div. 1981); Lindes v. Sutter, 621 F. Supp. 1197, 1200-1201 (D.N.J 1985) (disposition of a case through PTI is not a favorable termination on which the accused can base a claim for malicious prosecution).

7. Termination

If defendant violates the conditions of PTI, the designated judge, at a summary hearing, determines whether the conditions should be modified or whether defendant's participation in the program should be terminated. N.J.S.A. 2C:43-13e. The recommendation to terminate may come from the program director, the prosecutor or on the court's own motion. R. 3:28(c)(3). Such person must provide the defendant with a written copy of the recommendation and advise him or her of the opportunity to be heard. R. 3:28(c)(3). Termination from the program subjects the defendant to reactivation of the criminal charges and processes against him or her. N.J.S.A. 2C:43-13e; State v. Wilson, supra, 183 N.J. Super. at 95. A condition of PTI that rearrest is grounds for termination from PTI is not enforceable. State v. Fenton, 221 N.J. Super. 16, 24-26 (Law Div. 1987).

"[T]he procedure on a termination hearing need not follow all the formalities of a criminal trial nor be limited by the strict rules of evidence," State v. Devatt, 173 N.J. Super. 188, 194 (App. Div. 1980), because the PTI termination process is not

a part of the criminal prosecution, and does not implicate the full panoply of due process rights. State v. Lebbing, 158 N.J. Super. 209, 216 (Law Div. 1978) (cites omitted). However, the minimal requisites of due process dictate that defendant has a right to counsel, State v. Fenton, supra, 221 N.J. Super. at 22, that the hearing "be held at a meaningful time and in a meaningful manner," ibid., and that defendant be afforded the "opportunity to be confronted with evidence in support of or to present evidence against the conclusion that mere noncompliance with a condition justifies withdrawal of the diversionary privilege." State v. Devatt, supra, 173 N.J. Super. at 194.

The alleged PTI violation need not be established beyond a reasonable doubt; "reason to believe" that the charges are true is sufficient. Lebbing, supra, 158 N.J. Super. at 218. The judge must exercise sound discretion, "[taking] into account the particular circumstances of the individuals in deciding their fitness to continue within the diversionary program." Devatt, supra, 173 N.J. Super. at 195; State v. Wilson, supra, 183 N.J. Super. at 97. Termination of PTI must be immediately reported to the Assignment Judge, who in turn will forward the information to the Administrative Director of the Courts. N.J.S.A. 2C:43-12h.

8. Confidentiality

When the defendant has been returned to the ordinary course of prosecution, none of the information, statements or disclosures made by or about the defendant during program participation may be used as evidence against the defendant in

any subsequent civil or criminal proceeding. R. 3:28(c)(4); N.J.S.A. 2C:43-13f; see also R. 1:38. Further, the particular judge who issued the order returning defendant to the ordinary course of prosecution may not conduct any further hearings concerning that defendant. R. 3:28(c)(4).

An individual diverted into PTI may petition the court for expungement of the record of arrest no sooner than six months after the order of dismissal granted for successfully completing the program. N.J.S.A. 2C:52-6b. However, an order to expunge will not effect the retention of material and information in the Pretrial Intervention Registry. R. 3:28(e); N.J.S.A. 2C:43-12d.

9. Appeal

If a defendant wishes to challenge a decision of the program director or the prosecutor denying enrollment, a motion must be filed before the designated judge for a hearing. R. 3:28(a), Guideline 8; N.J.S.A. 2C:43-12d. Concurrently, it is the duty of the applicant to allege and present any further facts and materials to the program director for reconsideration by the director and the prosecutor showing compelling reasons justifying admission and establishing that a decision against enrollment would be arbitrary and unreasonable. R. 3:28, Guideline 2 and comment thereto. Defendant's challenge must be brought within seven days of the rejection notice, and the enrollment status should be determined before or at the pretrial conference (which itself must be conducted within 60 days after arraignment, see R. 3:13-1). R. 3:28, Guideline 6 and comment. After the trial court denies or permits enrollment, thereby

affirming or reversing the director's and prosecutor's decision, leave to appeal may be sought by either the defendant or the prosecutor. R. 3:28; Guideline 8.

Rule 2:2-4 precludes a rejected applicant's interlocutory appeal to the Appellate Division, but allows prosecutors the right to immediately appeal the designated judge's decision to reverse and order enrollment. R. 3:28(f); see State v. Garrison, 232 N.J. Super. 443, 446 (App. Div. 1989). The defendant may seek appellate review only following entry of a judgment of conviction, even if following a guilty plea. R. 3:28(g), Guideline 8.

The record considered in a PTI appeal consists only of copies of the documents contained in the director's files, although under certain circumstances supplemental affidavits are permissible. State v. Wood, 211 N.J. Super. 110, 113 (Law Div. 1986). "To hear additional material or evidence would constitute a trial de novo, not a review of the action of the director." State v. White, 145 N.J. Super. 257, 260 (Law Div. 1976). Oral argument must be permitted when requested by either defense counsel or the prosecuter. State v. Vazquez, 214 N.J. Super. 192, 194 (App. Div. 1986).

10. Standard of Judicial Review

The Court has "long held that judicial intervention in the course of a court proceeding is permissible where such intervention is necessary to preserve the integrity of that hearing. ... A judge is not required to sit idly by if he believes that a litigant is being unfairly deprived of his rights." State v. Sutton, supra, 80 N.J. at 121. However, "the

decision to divert is primarily entrusted to the prosecutor's discretion subject to only limited judicial review." State v. Bender, supra, 80 N.J. at 97. "[A] prosecutor is vested with broad discretionary powers in the discharge of the manifold responsibilities of his office." State v. Hermann, 80 N.J. 122, 127 (1979).

Therefore, "a trial judge does not have the authority in PTI matters to substitute his discretion for that of the prosecutor, and it is only when the trial judge is satisfied that the discretion has been grossly and patiently (sic) abused that he may overrule the prosecutorial decision." State v. Von Smith, supra, 177 N.J. Super. at 208; see State v. Hess, 198 N.J. Super. 322 (App. Div. 1984), disapproved on other grounds State v. Hartye, 105 N.J. 411 (1987).

In State v. DeMarco, supra, 107 N.J. at 566-567, the Court noted that:

> ... Judicial review is "available to check only the most egregious example of injustice and unfairness." Leonardis II, supra, 73 N.J. at 384. Our scrutiny is limited to reviewing the reasons given by the prosecutor for his or her decision. State v. Dalglish, supra, 86 N.J. at 509. It is not sufficient to reverse that we find a decision to be harsh. For a court to reverse a prosecutor's decision, the defendant must "clearly and convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of discretion." Leonardis II, supra, 73 N.J. at 382. Abuse of prosecutorial discretion results from a consideration of irrelevant or inappropriate factors, or from a clear error in judgment. State v. Bender, 80 N.J. 84, 93 (1979). The prosecutor's error must be one that will "clearly subvert the goals underlying Pretrial Intervention." Id. Whether the prosecutor has based his or her decision on an appropriate factor, however, is akin to a question of law, a matter on which an appellate court may supplant the prosecutor's decision. State v. Maddocks, 80 N.J. 98, 104-105 (1979).

An abuse of discretion is manifest if defendant can show that 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. State v. Bender, supra, 80 N.J. at 93. A manifest abuse of discretion by the prosecutor or program director necessitates a remand for reexamination of the application. State v. Ridgway, supra, 208 N.J. Super. at 121. "The reconsideration is to be approached as though the [application has] been filed for the first time. No bias may attach from the fact of earlier denials." State v. Cucinotta, supra, 206 N.J. Super. at 261.

A remand is inappropriate where it will serve no useful purpose, as when the prosecutor is unlikely to reconsider his or her position. A court may give an order overruling the admission decision where there was patent and gross abuse of discretion that would undermine the goals of PTI. State v. Dalglish, supra, 86 N.J. at 511-515. The courts have interpreted "patent and gross abuse of discretion" to mean "when the result reached has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require court intervention." State v. Maguire, 168 N.J. Super. 109, 115 n.1 (App. Div. 1979), certif. den. 81 N.J. 408 (1979).

11. Unresolved Issues

a. Participation for Persons Charged with Non-indictable Offenses

In the pre-code case of State v. Senno, 79 N.J. 216 (1979), the Supreme Court held that while the county programs "need not"

make provision for persons accused of non-indictable offenses, they "may nevertheless do so." Id. at 224; emphasis added. The statutory provision governing program referral states that application should be made after "the filing of a criminal complaint or the filing of an accusation or the return of an indictment." N.J.S.A. 2C:43-12e. The guidelines use ambiguous terms such as "offense" (Guideline 1), "criminal or penal offense" (Guideline 3(c)) and "violation" (Guideline 3(d)), indicating non-indictables as well as indictables. However, N.J.S.A. 2C:43-12e(5), (6), (8), (10), (14) and (15) (the statutory provisions governing PTI) suggest limitations on program participation to persons charged with crimes only (i.e, indictables). It is possible that the language of the guidelines has not been amended since the statute was enacted, and thus the disparity.

In any event, at the current time none of the county programs in New Jersey accept applications from persons charged with non-indictable offenses.

b. Participation of Corporate Entities

In the past several years, questions have arisen when corporations and their officers have been separately indicted and made application to PTI. Following the tragic fire in the Haunted House at the Six Flags Great Adventure Theme Park in 1984, two corporate executives charged with manslaughter were permitted to enroll. The corporations, also indicted for manslaughter, were denied admission. The attention focused on the Great Adventure PTI applications raised several issues not heretofore addressed: to wit, the method by which the eligibility standards may be applied to corporate entities, and

the manner in which a corporation may be required to make restitution as a necessary condition to acceptance of its executives for PTI diversion.

c. Mandatory Penalties for CDS Offenders

The mandatory nature of the penalties described above for CDS offenders may serve to make PTI a less desirable avenue than before. An indigent defendant may decide not to opt for diversion because of his or her inability to pay the mandatory penalty prescribed by law. See, e.g., State v. Rock, 228 N.J. Super. 577, 579 (Law Div. 1988). Instead, an indigent defendant may risk reduction of the charge and consequent reduction of the penalty pursuant to a plea agreement, or acquittal following trial, thereby owing no penalty. Defendants with few financial resources may be unfortunately and disproportionately deterred from seeking PTI admission, even if they are otherwise eligible candidates, thereby raising some serious equal protection issues. See State v. Spann, 160 N.J. Super. 167 (Law Div. 1978) (constitutionality of conditioning PTI enrollment on making restitution while maintaining plea of innocence); State v. Devatt, 173 N.J. Super. 188 (App. Div. 1980) (ability to pay restitution as an appropriate condition of PTI termination).

d. Participation of Graves Act Offenders

The Supreme Court has expressly declined to decide whether the Graves Act has expressly implied a repeal of PTI as applied to those charged with Graves Act offenses. The issue remains unresolved by legislation in its present form. State v. Hadfield, 92 N.J. 421 (1983).

B. Conditional Discharge

1. Overview

The conditional discharge program for certain CDS offenders is not entirely dissimilar to PTI. Both allow postponement of proceedings while the defendant is diverted into court-approved supervisory treatment programs. Upon successful completion of the terms and conditions of the program, as in PTI, a defendant is entitled to dismissal of the charges. If participation is terminated due to a violation of the terms or conditions, the criminal proceedings will resume from the point at which they were left off.

The statutory provision for conditional discharges is found in the new drug law at N.J.S.A. 2C:36A-1, operative July 9, 1987. The previous statute, N.J.S.A. 24:21-27, has been repealed and is applicable only to those persons who had already applied or are already undergoing supervisory treatment under its auspices.

N.J.S.A. 2C:36A-1 severely restricts participation to first-time offenders charged with or convicted of any disorderly person or petty disorderly persons offense under chapter 35 or 36. The class of eligible defendants is further limited by requiring that the court must first conclude that:

(1) the defendant's continued presence in the community, or in a civil treatment center or program, will not pose a danger to the community; or

(2) that the terms and conditions of supervisory treatment will be adequate to protect the public and will benefit the defendant by serving to correct any dependence on or use of controlled substances which he may manifest; and

(3) the person has not previously received supervisory treatment under N.J.S.A. 24:21-27, N.J.S.A. 2C:43-12, or the provisions of this chapter. [N.J.S.A. 2C:36A-1c]

The court may divert an eligible defendant into a supervisory treatment program "upon reasonable terms and conditions as it may require" on motion of defendant and upon notice to the prosecutor. In a departure from PTI procedure, diversion under this statute may be allowed between the time of a plea or finding of guilt and the time when the judgment of conviction is entered, as well as before any trial commences. Before a defendant is admitted into a supervisory treatment program, reference must be made to the State Bureau of Identification criminal history record files.

The duration of a supervisory treatment program must be less than three years, and, if referred to a residential treatment facility, the duration must not exceed the maximum period of confinement prescribed by law for the alleged offense. Supervisory treatment may occur only once for any defendant, and participation will not be deemed a conviction for purposes of determining whether a second or subsequent offense occurred under any state law. Participation in supervisory treatment and subsequent termination and dismissal is without court adjudication of guilt. It must, however, be reported by the clerk of the court to the State Bureau of Identification criminal history record information files. See generally, §§5.3E(2) and 5.2C(13), infra.

PART III SENTENCING PROCESS

3.1 The Judge

Normally, the trial judge imposes the sentence.[1] If she or he is unable to do so, the Chief Justice or Assignment Judge may appoint a replacement from in or out of the county. R. 1:12-3.

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1 The Manual does not deal with involuntary commitments of persons who have been acquitted by reason of insanity. See State v. Krol, 68 N.J. 236 (1975), and its progeny; N.J.S.A. 2C:4-1 et seq.; R. 3:12, R. 3:19-2, and R. 4:74-7.

3.2 Presentence Report

A. Mandatory and Discretionary Content

Before imposing sentence or granting probation, a court must order a presentence investigation and report from the probation service of the court.[1] R. 3:21-2. See §3.2B ("Simultaneous Sentencing"), infra; State v. Roth, 95 N.J. 334, 357 (1984); N.J.S.A. 2C:44-6. The probation department is an arm of the court. Its investigation is conducted impartially and its report gives the judge a reliable source of the facts needed for sentencing without resort to an adversary proceeding to establish them.

N.J.S.A. 2C:44-6b governs the parameters of the presentence investigation and report:

> The presentence investigation shall include an analysis of the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, family situation, personal habits, the disposition of any charge made against any codefendants and may include a report on his physical and mental condition and any other matters that the probation officer deems relevant or that the court directs to be included. The presentence report may also include a statement by the victim of the offense for which the defendant is being sentenced. The statement may include the nature and extent of any physical harm or physiological or emotional harm or trauma suffered by the victim and the effect of the crime upon the victim's family.

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1 State v. Alvarado, 51 N.J. 375, 376 (1968), held that in the context of a non-indictable offense, whether to call for a presentence report is discretionary with the court, be it the municipal court or Superior Court on a trial de novo. See also State v. Wall, 126 N.J. Super. 594, 595 (App. Div. 1974). However, presentence investigation required by court rule is a mandatory and non-waivable procedure following conviction of an indictable offense, irrespective of the court in which defendant is tried. Alvarado, supra, 51 N.J. at 376.

The presentence report must include a specific assessment of

> ... the gravity and seriousness of harm inflicted on the victim including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance. [N.J.S.A. 2C:44-6b.]

The probation department must notify the victim of his or her right to make a statement for inclusion in the presentence report. Such a statement must be made within 20 days of notification. N.J.S.A. 2C:44-6b.

Although the code does not so expressly provide, it is presumed that the presentence report supplies the information from which the sentencing judge bases his or her evaluation of the enumerated aggravating factors and mitigating factors in N.J.S.A. 2C:44-1a and b, which are used to determine the range of sentence, parole disqualifier, or extended term. It is unclear whether the sentencing judge may consider unlisted aggravating and mitigating factors. See §4.3C(3), infra.

The sentencing judge may consider material otherwise inadmissible under conventional evidentiary standards. See, e.g., State v. Carey, 232 N.J. Super. 553, 555 (App. Div. 1989) (computer printout). In fostering the far-ranging discretion to be exercised by the sentencing judge

> ... the sentencing process should embrace an evidential inquiry "broad in scope largely unlimited either as to the kind of information that may be considered, or the source from which it may come." [State v. Davis, 96 N.J. 611, 620 (1984), citing United States v. Tucker 404 U.S. 443, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972)]

In imposing sentence pursuant to a guilty plea, a court is not restricted to defendant's admissions or factual version of the offense, as long as the court does not sentence defendant to a crime beyond the plea. State v. Sainz, 107 N.J. 283, 293 (1987). Accord State v. Stewart, 96 N.J. 596, 606 (1984) (court free to consider all relevant material, not merely that admissible at trial or considered by jury in imposing sentence under code's discretionary sentencing provisions); cf. State v. Reyes, 207 N.J. Super. 126, 138 (App. Div. 1986), certif. den. 103 N.J. 499 (1986) (although there is no constitutional bar to admission and consideration of demonstrably reliable hearsay evidence, finding of violation may not be bottomed on unreliable evidence).

In fashioning an appropriate sentence, the defendant's entire background should be considered as opposed to "censored versions of his personal history or selected facts of his character." State v. Marzolf, 79 N.J. 167, 180 (1979); accord State v. Sainz, supra, 107 N.J. at 293; State v. Kates, 185 N.J. Super. 226, 228 (Law Div. 1982). "[N]either the defendant nor his offense should be fictionalized for the purpose of sentence." Marzolf, supra, 79 N.J. at 180.

Finally, public opinion of the defendant should not be a factor: "[t]here is no room for trial or appellate courts to consider the public perceptions of sentences." Roth, supra, 95 N.J. at 365.

1. Arrest Record

In order to contribute to the picture of defendant as a "whole person," the sentencing judge may consider prior arrests and juvenile offenses not followed by convictions as well as drug offenses that resulted in supervision and discharge. State v. Phillips, 176 N.J. Super. 495, 502 (App. Div. 1980), citing Marzolf, supra, 79 N.J. at 177. The sentencing judge, however, may not infer guilt from mere arrests. Marzolf, supra, 79 N.J. at 177. As expressed in State v. Green, 62 N.J. 547, 563 (1973):

> A basic principle of our jurisprudence, one perhaps best known to the sentencing judge, is that such thought, reflection or deliberation, in connection with the contents of a presentence report, must exclude any inference of guilt to be drawn from an arrest not followed by conviction; that type of consideration is clearly impermissible.

However, an arrest record contributes toward the picture of the "whole person" needed for rational sentencing, and might be relevant for various reasons:

> One is that it may lead to factual material which the defendant does not contest and which may bear upon the character of the sentence... [e.g., an offense which] was disposed of without further action as part of a plea bargain involving other offenses. Again, the sentencing judge might find it significant that a defendant who experienced an unwarranted arrest was not deterred by the fact from committing a crime thereafter. There may be still other reasons depending upon the total circumstances which could warrant at least consideration of the fact of an arrest. We need not try to anticipate all situations. The important limitation, of course, is that the sentencing judge shall not infer guilt as to any underlying charge with respect to which the defendant does not admit his guilt.
> [Id. at 571]

Accord State v. Tirone, 64 N.J. 222, 229 (1974); see also State v. Stackhouse, 194 N.J. Super. 371, 375 (App. Div. 1984)

(expunged convictions, arrest record, and record of dismissed charges are appropriate for consideration in sentencing).

A complete presentence investigation must be made, regardless of the degree of cooperation received from the defendant. Refusal of the defendant to talk with an investigator means that other sources of information must be used (family, friends, business, and so forth). State v. Richardson, 117 N.J. Super. 502 (App. Div. 1971).

2. Extraneous Information

As delineated in case law predating the code, the sentencing judge may not rely upon factual background concerning defendant unless it is in the presentence report.[2] State v. Gattling, 95 N.J. Super. 103 (App. Div. 1967), certif. den. 50 N.J. 91 (1967); State v. Leckis, 79 N.J. Super. 479 (App. Div. 1963). The sentencing court should take care to prevent extraneous material from seeping into the process, even if it is a matter of personal knowledge. State v. Humphreys, 89 N.J. 4, 14 (1982). If any factual information in the report is ambiguous, the sentencing judge should ask the case supervisor to resolve the ambiguity, and such additional facts should be added to the report.

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[2] Query: Should the presentence report be amended to include testimony at the sentencing hearing? If the presentence report is amended before or at the hearing, should the sentencing judge ensure that such changes are memorialized in a revised presentence report? Should this amended report be forwarded to the appropriate entity, whether it be the probation officer, Department of Corrections, or parole board?

3. Polygraph Report

The sentencing judge may admit for presentence consideration a polygraph report "on behalf of a defendant who voluntarily takes a test, to show facts not decided by the trial jury or material to their deliberations--for example, to show his attitude, obedience to instructions of the court, and to disprove accusations that he has not been tried for...." State v. Watson, 115 N.J. Super. 213, 218 (Cty. Ct. 1971).

4. Juvenile Adjudications

Juvenile adjudications may also be considered by the sentencing judge. State v. Taylor, 226 N.J. Super. 441, 453-454 (App. Div. 1988); State v. Ebron, 122 N.J. Super. 552 (App. Div. 1973), certif. den. 63 N.J. 250 (1973); State v. McBride, 127 N.J. Super. 399 (App. Div. 1974), aff'd 66 N.J. 577 (1975).

5. Evidence Seized Unlawfully

The sentencing judge may also consider evidence seized unlawfully in violation of the Fourth Amendment. State v. Banks, 157 N.J. Super. 442 (Law Div. 1978).

6. Graves Act Offense

For Graves Act defendants, the presentence report must include a statement that a mandatory minimum term of imprisonment is required under L.1981, c.31 [N.J.S.A. 2C:43-6] for offenses occurring on or after February 12, 1981. Memorandum to Chief Probation Officers, 4/27/81. See §5.6, infra.

Repeat offenders may be subject to mandatory as well as discretionary sentences based on prior convictions. The presentence report must include a detailed description of relevant

facts, such as whether a prior conviction carried Graves Act consequences and such other facts as affect subsequent sentencing. Pressler, Current N.J. Court Rules, Comment R. 3:21-2 (1989). If the record is unclear whether defendant has been convicted previously of a Graves Act offense, and this information is unavailable from prior judgments or investigation, the presentence report should so note. The prosecutor can further investigate the matter. State v. Martin, 209 N.J. Super. 473, 481 (App. Div. 1986), rev'd on other grounds 110 N.J. 10 (1988), citing N.J.S.A. 2C:44-4.

7. Defendant's Condition

A report on defendant's physical and mental condition, along with other matters deemed relevant by the probation officer or directed by the court to be included, may be part of the report. N.J.S.A. 2C:44-6b. Prior to imposing sentence, a judge desiring further information in addition to the presentence report may order a medical or mental examination of the defendant.[3] N.J.S.A. 2C:44-6c; R. 3:21-2(b). A defendant may not, however, be committed to an institution for such purpose. N.J.S.A. 2C:44-6c; R. 3:21-2(b). In the case of a person convicted of the offense or the attempt to commit an aggravated sexual assault, sexual assault, or aggravated criminal sexual contact, the judge shall order that a physical and psychological examination be completed by the Adult Diagnostic and Treatment Center. N.J.S.A. 2C:47-1. A written

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3 N.J.S.A. 2A:164-1 authorizes the judiciary to organize clinics to provide presentencing mental and physical examinations of defendants.

report of the results of such examination shall be sent to the court. N.J.S.A. 2C:47-2.

In the event that a custodial sentence is imposed, the probation service of the court shall, within 15 days thereafter, transmit a copy of the presentence report and the examination report, if any, to the person in charge of the institution to which the defendant is committed. R. 3:21-2(c). See also N.J.S.A. 2C:43-10e; AOC Directive No.12-78 (6/28/79). Additionally, the probation service must forward copies of the presentence report and judgments of conviction to the parole board. For procedure, see N.J.S.A.. 30:4-123.50(b); Memorandum to Chief Probation Officers, 11/30/83.

B. Simultaneous Sentencing

It should be noted that "simultaneous sentencing" is a post-indictment innovation initiated in 1984 in Middlesex County. "Simultaneous sentencing" reduces the time-lag between conviction and sentencing necessitated by preparation of the presentence report. See Statewide Speedy Trial Reform, Report prepared by Paul B. Wice, Drew University (1985) at 81-98 ("Wice Report"); Report of the Supreme Court Task Force on Speedy Trial, 1980-1986 (June 1986) at 41-44 ("Task Force Report").

Under certain circumstances, the judge may impose sentence immediately after a defendant pleads guilty, providing that both the prosecutor and defendant and his or her counsel consent. Id. at 43. The judge substitutes for a traditional presentence report a comprehensive (omnibus) data collection form designated

as a Uniform Defendant Intake and Reporting System ("U.D.I.R."). The U.D.I.R. form is available prior to the pretrial conference and includes "all of the information necessary for a sentence." Ibid. Moreover, background information relevant to bail determinations, as well as information applicable to screening individuals for pretrial diversion programs, has also been compiled. Id. at 42-43. It has been recommended that "simultaneous sentencing" be considered for defendants pleading guilty to third and fourth degree victimless crimes and welfare fraud cases in counties that provide certain administrative services that can produce the functional equivalent of the traditional presentence report prior to the plea hearing. Id. at 44.

C. Format of Presentence Report

A short form of the presentence report is recommended for use in cases involving crimes of the fourth degree, disorderly persons offenses or petty disorderly offense. See New Jersey Probation Practices Manual, §1307.3 (1975) ("Probation Manual"). Where such a form has been used and the judge feels more information is necessary, he or she should immediately request a more detailed investigation and report from the case manager. Ibid.

In 1985 the Conference of Criminal Presiding Judges adopted the U.D.I.R., an omnibus data collection and report system used for bail, pretrial intervention, and presentence investigation. See Task Force Report, supra, at 42-43. This form "is the functional equivalent of the pre-existing pre-sentence reports."

Wice Report, supra, at 84. It is completed early, at an intake interview, and is used for each subsequent stage in order to conserve resources. The U.D.I.R. has been adopted by most counties. Memorandum from John P. McCarthy, Jr. to Conference of Criminal Presiding Judges, March 26, 1987, at 2.

Projected use of the form has generated issues of confidentiality. In the spring of 1986, a tentative agreement was reached, subject to review by the Conference of Criminal Presiding Judges, to restrict at the intake stage certain potentially incriminating uncounseled statements. Drug abuse or mental health information, absent waiver, could be based only upon observation or court records. The Speedy Trial Task Force has called for promulgation of an ominibus form approved by the Supreme Court. The Task Force also recommended that any of defendant's pretrial statements made during an intake or bail interview, regarding guilt, drug abuse, or mental health, receive the same privilege as information contained in a P.T.I. application. Id. at 3.

A subcommittee of the Criminal Practice Committee decided that the form that had been reviewed by the Criminal Presiding Judges should be submitted to the Supreme Court for approval. The subcommittee also agreed that there should be an accompanying directive indicating that the information contained on the form was confidential and was not to be used substantively or to impeach a defendant at a subsequent hearing. Ibid.

The issues of whether the U.D.I.R. should be discoverable by the State or is protected by any privilege is before the Law

Division. At the same time, the Criminal Presiding Judges are considering whether the U.D.I.R. gives rise to a privilege similar to that of PTI applications. Absent such a privilege, defendants may need to be warned that statements may be used against them; absent counsel, information elicited for the form should be limited to observation with respect to such sensitive areas as prior drug abuse. Id. at 3-4.

D. Disclosure

1. To Defendant

Disclosure of the presentence investigation or psychiatric examination report when required by law and court rule is mandated by the code. N.J.S.A. 2C:44-6d. The code provision was intended as a legislative enactment of the rule in State v. Kunz, 55 N.J. 128, 144-145 (1969), and the procedure that was established under that case. Kunz contemplated

> ... (1) review by the court of the presentence report, (2) deletion therefrom of any materials which are not to be disclosed to the defendant and (3) non-consideration by the court of deleted materials. Nothing hidden from the defendant may be considered in sentencing.
> [Thompson v. N.J. State Parole Bd., 210 N.J. Super. 107, 117 (App. Div. 1986)]

Cf. State v. Tucker, 169 N.J. Super. 334 (App. Div. 1979), certif. den. 84 N.J. 427 (1980) (requiring disclosure of Diagnostic Center Report to defendant prior to sentencing whether or not defendant is sentenced under Sex Offender Act).

Under the court rules, the defendant and the prosecuting attorney are entitled to a version of the presentence report containing all presentence material having any bearing whatever

on the sentence. R.3:21-2(a). Irrelevant and diagnostic matters and confidential information, revelation of which would be harmful to rehabilitation, may be deleted before disclosure unless they bear directly on sentencing, in which case they must be disclosed. State v. Kunz, supra, 55 N.J. at 144-145; see R.3:21-2(a);[4] also AOC Directives Nos. 17-69, 24B-69, and 12-78.

2. To Others

R. 1:38(b)("Confidentiality of Court Records") appears to protect presentence reports from public scrutiny as "[c]ounty probation department records pertaining to investigations and reports made for a court." As confidential documents, presentence reports generally are available only to the court, defendant, and prosecutor. See State v. Kunz, supra, 55 N.J. at 144-145 (copies of presentence report must be given to defendant and prosecutor but otherwise kept confidential); State v. DeGeorge, 113 N.J. Super. 542, 544 (App. Div. 1971) ("presentence reports are clearly not public records" and should be treated as confidential documents).

An exception to the general rule of confidentiality of the presentence report was carved out by the Appellate Division in State v. Blue, 124 N.J. Super. 276, 282-283 (App. Div. 1973). While the court recognized that presentence reports are not a matter of public record, it nonetheless ruled that the testimony

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4 The viability of R. 3:21-2 is questioned inasmuch as it allows a judge to review and delete material in the presentence report without notification to defendant's counsel.

of a probation officer concerning a conversation with a principal witness that occurred during the preparation of the presentence report may be heard by the trial court. Id. at 283. The trial court in Blue had refused to hear the testimony, ruling that "the probation file is privileged." Id. at 282. The Appellate Division concluded that the confidentiality of a presentence report must yield to the right of a defendant to produce testimony bearing directly on the case. Id. at 283.

According to AOC Probation Services, once a presentence report is completed and forwarded to the court, it is in the control of the sentencing judge. An unenunciated good-cause standard is used by the judge to determine whether a presentence report may be distributed to those not designated by law. Presentence reports are routinely provided to other departments in cases involving repeat offenders convicted in a different county from where a previous conviction occurred. Very often researchers are allowed access to presentence reports. However, conditions to protect confidentiality may be imposed, such as blacking out names and addresses in the presentence reports.

E. Effect of Error in Presentence Report

If the presentence report contains erroneous statements or is interpreted erroneously, and it can be shown that the error was relied upon by the trial judge to the detriment of the person being sentenced, the sentence is illegal. State v. Pohlabel, 61 N.J. Super. 242 (App. Div. 1960); State v. Barbato, 89 N.J. Super. 400 (Cty. Ct. 1965); cf. State v. Gattling, supra, 95 N.J. Super. at 111 (matter remanded

for imposition of new sentence because court relied on facts unrecorded in presentence report). In State v. Wall, supra, 126 N.J. Super. at 595-596, the Appellate Division held that there was no necessity for obtaining an updated presentence report pursuant to R.3:21-2 where the same judge handled the defendant's case from the original trial through sentencing for a third probation violation and where the defendant did not deny having violated probation and did not allege changed circumstances which would bear upon an updated report. Reversal is indicated for failure to disclose material in the presentence report only where the failure has been prejudicial to the defendant. State v. Marvel, 55 N.J. 83 (1969).

3.3 Sentencing Proceeding

A. Hearing

Every defendant before sentencing is entitled to see the presentence report and to be heard on any adverse materials in it relative to sentencing. State v. Kunz, 55 N.J. 128, 144 (1969). Before or at the time of sentencing, defendant's counsel (or the defendant, if unrepresented by counsel), and the prosecutor may make known to the sentencing judge any inaccuracies or deficiencies in the report. New Jersey Probation Manual, §1301.3 (1975) at 36 ("Probation Manual").

The sentencing hearing is a fact-finding hearing. The judge should put on the record the operative facts on which the sentence is based. Defendant should acknowledge agreement with the facts in the police report, and other supporting records. Cf. State v. Sainz, 210 N.J. Super. 17, 25 (App. Div. 1986), aff'd 107 N.J. 283 (1987) (in sentence pursuant to plea bargain defendant must acknowledge having had role in crime commensurate with recommended punishment).

Defendant should have every opportunity to contest information before the sentencing court, including information with respect to imposition of a mandatory extended term. State v. Martin, 209 N.J. Super. 473, 480 (App. Div. 1986), rev'd on other grounds 110 N.J. 10 (1988). The State is required to prove that a mandatory sentence is required. Ibid.

Under the Graves Act, which requires a minimum term of imprisonment for certain offenders who used or possessed a firearm (N.J.S.A. 2C:43-6c), such proof consists of, among other

things, a preponderance of the evidence that the weapon used or possessed was in fact a firearm. N.J.S.A. 2C:43-6d. In making its finding, the sentencing court must consider, among other things, the presentence report. N.J.S.A. 2C:43-6d. See State v. Martin, supra, 110 N.J. at 14 (written notice to defendant and a hearing are required before a mandatory extended sentence pursuant to 2C:43-6c may be imposed). See §5.6, infra, for further discussion.

When the challenged material in the presentence report is critical to the sentencing process, "the risk of injustice is far too great to proceed without proof." Kunz, supra, 55 N.J. at 146. See AOC Directive No. 17-69 ("Directive"). Challenges to matters of insufficient importance do not warrant the taking of proof. Kunz, supra, 55 N.J. at 145. Cf. State v. Pych, 213 N.J. Super. 446, 464 (App. Div. 1986) (sentencing court's reliance on sentencing memorandum prepared by State upheld when defendant's counsel had made no objection to contents of memorandum during oral argument at sentencing hearing). The judge must note on the record at the time of sentencing that he or she has not considered disputed portions of the presentence report unresolved by a hearing to establish the facts. Directive, supra, No. 17-69.

B. Right to Counsel

Under the state constitution, a criminal defendant is entitled to the assistance of reasonably competent counsel. State v. Fritz, 105 N.J. 42, 58 (1987). More particularly, a convicted person has a right under the New Jersey Constitution

to counsel at sentencing. State v. Jenkins, 32 N.J. 109 (1960); State v. Giorgianni, 189 N.J. Super. 220, 230 (App. Div. 1983), certif. den. 94 N.J. 569 (1983) (sentencing and resentencing hearings as they exist under New Jersey rules are critical stages of trial for which counsel must be available); see also N.J.S.A. 2A:158A-1 et seq., the Public Defender Act; R. 3:27-1 (indigent persons shall be represented by the Office of the Public Defender for indictable offenses, including post-conviction proceedings); R. 3:27-2 (indigent persons shall be represented by assigned counsel through sentencing); cf. Argersinger v. Hamlin, 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (absent knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial); Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) (federal constitution requires only that no indigent criminal defendant be sentenced to term of imprisonment unless State has afforded him right to assistance of appointed counsel in his defense).

A convicted person is entitled to counsel at re-sentencing incident to revocation of a suspended sentence, revocation of probation, or deletion, addition, or modification of the conditions of probation. See N.J.S.A. 2C:45-4; State v. Seymour, 98 N.J. Super. 526, 529 (App. Div. 1968); State v. Reyes, 207 N.J. Super. 126, 134 (App. Div. 1986), certif. den. 103 N.J. 499 (1986). See also Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); Mempa v. Rhay, 389 U.S.

128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) (counsel required at probation revocation hearings). Prejudice need not be shown if there is no waiver and no counsel present at sentencing. State v. Kramer, 98 N.J. Super. 539, 553 (Law Div. 1967).

Each trial judge should, before sentencing an unrepresented defendant, ask him or her specifically whether he or she desires the assistance of counsel at sentencing on indictable offenses and where the assistance of counsel is required on non-indictable offenses. See R. 3:27-2; Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971) (with respect to disorderly persons and motor vehicle offenses, as matter of simple justice, no indigent defendant should be subjected to conviction entailing imprisonment in fact or other consequence of magnitude [including substantial loss of driving privileges] without first having had due and fair opportunity to have counsel assigned without cost); cf. State v. Gonzalez, 186 N.J. Super. 609, 612 (Law Div. 1982) (although motor vehicle violations are generally not regarded as crimes in this State, charges of driving while under influence of alcohol considered to bear such "consequences of magnitude" as to entitle accused to assigned counsel when warranted).

It should be noted, however, that although N.J.S.A. 2A:158A-5.2 requires the public defender to provide legal representation to those indigent defendants who are charged with non-indictable offenses that subject them to possible imprisonment or other consequences of magnitude, no funds have been appropriated by the Legislature to enable this mandatory duty to

be implemented. See the discussion of this anomaly in In re Spann Contempt, 183 N.J. Super. 62, 68 (App. Div. 1982).

C. Right of Allocution

Before imposing sentence, the sentencing judge must ask the defendant personally "if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment." R. 3:21-4(b). The rule provides that the answer may be by the defendant or his lawyer, but the defendant must be addressed personally. State v. Laird, 85 N.J. Super. 170, 178-179 (App. Div. 1964); State v. Barbato, 89 N.J. Super. 400 (Cty. Ct. 1965). If only counsel speaks for defendant, the record should be unmistakably clear that defendant had made that choice after being informed by the judge that defendant had the right to make a personal statement in addition to that of counsel. Laird, supra, 85 N.J. Super. at 179. Failure to strictly adhere to the rule invalidates the sentence and the sentence will be set aside on appeal. Id. at 178-179. However, a sentence given without these safeguards is not "illegal" and thus not a valid ground for post-conviction relief. R. 3:22-2; State v. Cerce, 46 N.J. 387, 396 (1966).

D. Advice to Defendant of Right to Appeal

R. 3:21-4(f) provides:

> ... After imposing sentence, whether following the defendant's plea of guilty or a finding of guilty after trial, the court shall advise the defendant of his right to appeal and, if he is indigent, of his right to appeal as an indigent.

The rule is designed to insure that a convicted defendant be advised precisely of his rights by the trial judge.

State v. Fletcher, 174 N.J. Super. 609, 613 (App. Div. 1980). "Strict compliance with the rule by the trial judge will tend to discourage untimely appeals as well as post-conviction relief applications of this nature." Ibid.

The mandatory time limit for taking an appeal does not begin to run until a defendant is advised by the trial judge of his rights in accordance with R. 3:21-4(f). Id. at 614; see State v. Williams, 203 N.J. Super. 513, 518 (App. Div. 1985) (requiring court to advise defendant sentenced pursuant to N.J.S.A 2C:44-1f(2) of election and waiver provisions of R. 2:9-3(d) at the same time defendant is advised of his right to appeal as required by R. 3:21-4(f)); see also State v. Sanders, 107 N.J. 609, 616-617 (1987).

Moreover, if the sentence is being imposed following acceptance of a plea agreement involving waiver of the right to appeal, the defendant should be advised that he nevertheless has the right to take a timely appeal. However, if he does so, at the option of the prosecutor, the plea agreement may be annulled. The prosecutor must move to vacate the plea agreement within a reasonable time of the filing of a notice of appeal. State v. Johnson, 230 N.J. Super. 583, 590 (App. Div. 1989). In that event, all charges involved in the agreement may be restored to the same status as immediately before the entry of the plea. R. 3:9-3(d); State v. Gibson, 68 N.J. 499, 513 (1975); State v. Sainz, supra, 210 N.J. Super. at 28-29.

E. Unresolved Issues

1. Reliance on Facts Outside the Presentence Report

The sentencing judge is limited to the factual background concerning defendant contained in the presentence report. However, the judge is aware also of the facts revealed at trial, defendant's statements pursuant to the right of allocution, and verbal recommendations from case supervisors. If the judge relied on any of these sources, the better practice is that the statement of reasons reflect reliance upon such additional information.

Should the practice of accepting recommendations from probation officers be allowed? If so, should the presentence report be amended to reflect such additional facts considered?

2. Consideration of "Whole Person"

As discussed in §3.2, supra, the sentencing judge must consider defendant as a "whole person." The judge may consider prior arrests, dismissed charges, juvenile offenses not followed by conviction, drug offenses that resulted in supervision and discharge, and expunged convictions. It is unclear how much weight should be accorded to this prior history. Cf. §4.3C(2), infra ("Unresolved Issue -- Defendant's Prior Record As Aggravating Factor"); §2.1C(2), supra, ("Unresolved Issues -- "Lack of Parameters in Fact-Finding Beyond Guilty Plea").

3.4 Judgment of Conviction and Order of Commitment

A. Format and Effect

The judgment of conviction is signed by the judge and provides finality to the sentence. State v. Womack, 206 N.J. Super. 564, 570 (App. Div. 1985), certif. den. 103 N.J. 482 (1986). Specifically, it must set forth:

> ... the plea, the verdict of findings, the adjudication and sentence, a statement of the reasons for such sentence, and a statement of credits received pursuant to R. 3:21-8.
> [R. 3:21-5]

See State v. Womack, supra, 206 N.J. Super. at 570 (judgment of conviction embodies determinations and reasons therefor made at time of sentencing); Memorandum to Assignment Judges, 1/28/85 and 3/16/82 (judgment of conviction should indicate both amount of restitution to be made, terms of payment, and parties to whom restitution is made); Memorandum to Assignment Judges, 7/29/82 (judgment of conviction must be submitted with all key dates filled in so as not to impair evaluation of speedy trial and other critical research).

A judge cannot increase a sentence after signing the judgment of conviction except to correct legal or clerical errors. State v. Moore, 178 N.J. Super. 417, 428 (App. Div. 1981), certif. den. 87 N.J. 406 (1981). However, a judge may clarify whether separate sentences are to run concurrently or consecutively prior to defendant leaving the courthouse and before the judgment of conviction is signed. Ibid. The judgment of conviction may be corrected or amended to correct

technical errors or clerical mistakes. E.g., Womack, supra, 206 N.J. Super. at 570.

B. Multiple Counts

1. Individual Counts

A separate sentence should be imposed for each count or charge upon which the defendant is convicted.[1] State v. Cianci, 18 N.J. 191, 194 (1955), cert. den. 350 U.S. 1000 (1956) and 353 U.S. 940 (1957); State v. Jones, 213 N.J. Super. 562, 571 (App. Div. 1986). In the Jones case, the trial court had imposed the minimum parole ineligibility term on the aggregate sentence rather than on a specific sentence or specific count of the indictment. 213 N.J. Super. at 571. This constituted error which had to be corrected by the lower court. Ibid. See also State v. Alevras, 213 N.J. Super. 331 (App. Div. 1986).

2. Multiple Extended Terms Limitation

However, the trial judge cannot properly impose more than one discretionary extended term, regardless of the number of individual sentences imposed upon a defendant. State v. Cito, 213 N.J. Super. 296, 304 (App. Div. 1986), certif. den. 107 N.J. 141 (1987), citing State v. Latimore, 197 N.J. Super. 197, 223 (App. Div. 1984), certif. den. 101 N.J. 328 (1985), and N.J.S.A. 2C:44-5a(2). This limitation on judicial discretion with

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1 The code's guiding standards for imposing sentences of imprisonment for more than one offense lack precision. Yarbough, 100 N.J. 627, 636 (1985), cert. den. 475 U.S. 1014 (1986). See § 4.1C, infra, for discussion of concurrent and consecutive sentences.

respect to extended prison terms embodied in N.J.S.A. 2C:44-5a(2) is distinguished from sentences for Graves Act crimes. "When multiple Graves Act prison sentences are imposed on a second Graves Act offender, the sentence for each Graves Act crime must lie within the extended prison sentence range." State v. Connell, 208 N.J. Super. 688, 691 (App. Div. 1986) (emphasis added). See also N.J.S.A. 2C:43-6f (mandatory extended terms for certain drug offenses under N.J.S.A. 2C:35-1 et seq.).

Likewise, N.J.S.A. 2C:44-5a(2) limiting discretionary imposition of extended sentences does not apply to drug offenses under Title 24, N.J.S.A. 24:1-1 et seq. State v. Flippen, 208 N.J. Super. 573, 576 (App. Div. 1986). Thus, there is no bar to imposition of multiple extended terms under N.J.S.A. 24:21-29 for drug offenses under Title 24. Ibid.

3. Concurrent or Consecutive Sentence

The sentencing judge should clearly specify whether sentences are to be served concurrently or consecutively. See State v. Braeunig, 122 N.J. Super. 319, 334 (App. Div. 1973), certif. den. 66 N.J. 325 (1974). Generally, the rule is that separate sentences imposed by a single New Jersey court or by more than one New Jersey court at separate times, will run concurrently unless the sentencing judge clearly directs that they be served consecutively. State v. Moore, supra, 178 N.J. Super. at 427; cf. N.J.S.A. 2C:44-5c (sentence of imprisonment for an offense committed while on parole and any reimprisonment imposed by parole board upon revocation of parole

shall run consecutively unless court orders them to run concurrently); N.J.S.A. 2C:44-5h (defendant who commits offense while released pending disposition of prior offense must be sentenced consecutively, unless court orders sentence to run concurrently). If the sentence is ambiguous, the sentence will be either concurrent or consecutive depending upon the intent of the sentencing judge. State v. Heslip, 99 N.J. Super. 97 (App. Div. 1968), certif. den. 51 N.J. 570 (1968), cert. den. 393 U.S. 928 (1968). See §4.1C, infra, for further discussion.

C. Statement of Reasons for Sentence Imposed

The sentencing court must clearly state on the record its reasons for imposing sentence, including its consideration of defendant's parole eligibility and the balance of aggravating and mitigating factors. N.J.S.A. 2C:43-2e; R. 3:21-4; State v. Ghertler, 114 N.J. 383, 389 (1989); State v.Hartye, 105 N.J. 411, 421 (1987). The reasons for sentence must explain why an offender is placed on probation, State v. Baylass, 114 N.J. 169, 181 (1989), or why he is sentenced to a term of years. State v. Sainz, supra, 107 N.J. at 290.

The code requires that the court's statement include

> ... its findings pursuant to the criteria for withholding or imposing imprisonment or fines under sections 2C:44-1 to 2C:44-3, where imprisonment is imposed, consideration of the defendant's eligibility for release under the law governing parole and the factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence.
> [N.J.S.A. 2C:43-2e]

See State v. Kruse, 105 N.J. 354 (1987) (trial court should identify aggravating and mitigating factors, describe balance of those factors, and explain how it determines defendant's

sentence); State v. Womack, supra, 206 N.J. Super. at 570 (when imposing sentence, trial court obligated to consider parole consequences and express them on record). Should the sentencing court determine that a sentence of imprisonment under N.J.S.A. 2C:43-2b(3) is required, it must include in its statement of reasons

> ... its finding that the presumption against incarceration has been overcome, and must memorialize in that statement the aggravating and mitigating factors it considered in determining defendant's sentence. N.J.S.A. 2C:44-1a, -1b; see State v. Kruse, 105 N.J. 354, 360 (1986). [Hartye, supra, 105 N.J. at 421]

A court imposing an enhanced punishment must state the reasons for doing so. State v. Martelli, 201 N.J. Super. 378, 383 (App. Div. 1985), citing R. 3:21-4(e). E.g., N.J.S.A. 2C:43-6d (requires that trial court establish at a hearing ground for imposing mandatory extended term under subsection c); State v. Mangrella, 214 N.J. Super. 437 (App. Div. 1986), certif. den. 107 N.J. 127 (1987) (pursuant to N.J.S.A. 2C:44-3a, court must state reasons for imposing extended term, including consideration of chronology of events and impact of prior convictions involving offenses that occurred after one before the court or judgments entered after offense before court for sentencing). See Pressler, Current N.J. Court Rules, Comment R.3:21-4 (1989), for further discussion, including citation of cases; Criminal Law Digest, supra, at 704.

The reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision. State v. Yarbough, supra, 100 N.J. at 643 and 644; see State v.

Mosch, 214 N.J. Super. 457 (App. Div. 1986), certif. den. 107 N.J. 131 (1987). Trial judges must articulate the relative weight they assign to the aggravating and mitigating factors in order to assure the appellate court that they followed statutory guidelines. State v. McBride, 211 N.J. Super. 699, 705 (App. Div. 1986).

The sentence will not stand if the trial court fails to set forth on the record a full and explicit statement of the reasons for its sentence pursuant to N.J.S.A. 2C:43-2 and, as a result, a higher court is unable to glean that the sentence was imposed properly. See, e.g., State v. Ingenito, 169 N.J. Super. 524, 532 (App. Div. 1979), rev'd on other grounds 87 N.J. 204 (1981) (sentences vacated and matters remanded for resentencing where trial judge did not state his reasons for imposing sentences in his pronouncement of sentence or in written judgments); State v. Vitale, 102 N.J. 350, 351 (1985)(where sentencing transcript did not reveal articulation and balancing of aggravating and mitigating factors required to establish base or parole ineligibility terms under N.J.S.A. 2C:43-6 and 2C:44-1f, matter summarily remanded for resentencing and for judge to set forth on record factual basis for determining defendant's role in crime and to articulate balancing of aggravating and mitigating factors thus determined in accordance with code); see also State v. Dunbar, 108 N.J. 80, 96 (1987) (trial court's combined analysis allowed Appellate Division to uphold sentence as properly imposed).

The reasons for imposition of sentence must be articulated adequately. In State v. Latimore, supra, 197 N.J. Super. at 224, the Appellate Division rejected the following reasons for punishment as improperly truncated: "Defendant committed serious crimes and must be removed from society for an extended period" and "Defendant has a record resulting in part from his drug addiction. A custodial sentence is mandatory and punitive."

Similarly, in State v. Martelli, supra, 201 N.J. Super. at 385-386, the Appellate Division vacated sentences imposing greater punishment than the statutory presumption and remanded to the trial court. The record of reasons was defective for the following reasons:

> In this case, the court discussed aggravating circumstances, but we have no way to tell what mitigating circumstances the court considered. We can not tell if the court considered defendant's previously good record, his employment history, his new wife and infant child and the unlikelihood of repetition. We do not know how the court weighed those circumstances against the aggravating circumstances it found to exist. We do not even know, because the court did not say so, if the court was "clearly convinced that the aggravating factors substantially outweigh the mitigating factors." [Id. at 385]

The court concluded that it was insufficient to point to the common factors that make the prohibited conduct criminal and determine its place in the hierarchy of punishments. Id. at 386.

In State v. Kruse, supra, 105 N.J. at 363, the Court remanded the case to the trial court for resentencing in the absence of an explanation of the trial court's deviation from

the norm by imposing a period of parole ineligibility without increasing the presumptive term:

> Here, the trial court started down the right road by determining that imprisonment was required and by considering the aggravating factors (the nature of the crime, the defenseless state of the victim, and the use of a weapon against an unarmed person) and the mitigating factors (defendant's youth and lack of prior record, as well as the unusual circumstances of the crime). Unfortunately, the court did not explain how it arrived at the conclusion that the mitigating factors "are not even close to the aggravating factors that exist in this case." Merely enumerating those factors does not provide any insight into the sentencing decision, which follows not from a quantitative, but from a qualitative, analysis. State v. Morgan, 196 N.J. Super. 1, 5 (App. Div.), certif. den. 99 N.J. 175 (1984).
> [105 N.J. at 362-363]

Appellate review of the adequacy of reasons justifying sentence preceded and continued after passage of the code. See, e.g., State v. Roth, 95 N.J. 334, 364 (1984); State v. Whitaker, 79 N.J. 503, 508 (1979); State v. Knight, 72 N.J. 193, 195 (1976).

In language similar to N.J.S.A. 2C:43-2, R. 3:21-4(e) mandates the inclusion of reasons for sentence. The primary purpose of this rule

> ... was not only to provide assistance to prison administrative personnel, as would be the case where reasons for custodial sentences are stated, but also to induce greater uniformity in all sentencing and to provide a better basis for appellate review of the alleged excessiveness of all sentences.
> [Pressler, Current N.J. Court Rules, Comment R. 3:21-2 (1989) at 590-591]

See Ghertler, supra, 114 N.J. at 389; Kruse, supra, 105 N.J. at 354.

A clear and complete statement from the trial court is necessary for the appellate court to determine if the sentence met the criteria articulated in Roth, supra, 95 N.J. at 364-365, establishing the parameters of appellate review. Martelli, supra, 201 N.J. Super. at 384-385; Latimore, supra, 197 N.J. Super. at 224. Thus, appellate review of sentencing is dependent on the record of the trial court's reasons in order to:

> (a) review sentences to determine if the legislative policies, here the sentencing guidelines, were violated; (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record; and (c) determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of the guidelines to the facts of this case makes the sentence clearly unreasonable so as to shock the judicial conscience.
> [Roth, supra, 95 N.J. at 364-365]

PART IV AUTHORIZED DISPOSITIONS

4.1 Summary of Custodial Sentencing Options

A. Overview of Dispositions

The defendant is to be sentenced to a specific term of years which is fixed by the court and is between the limits specified in the code. N.J.S.A. 2C:43-6. Presumptive and ordinary terms of imprisonment for each degree of crime are set forth in the code, as are extended terms for crimes of the first, second and third degrees, and certain fourth degree offenses involving firearms and drugs. N.J.S.A. 2C:44-1f; 2C:43-6 to 2C:43-8.

The presumptive term of imprisonment should be imposed (except for the crime of murder) when the court determines that confinement is warranted, unless the preponderance of aggravating or mitigating factors enumerated in the code indicate that the term of imprisonment should be otherwise adjusted within the statutorily prescribed limits for ordinary terms of imprisonment. N.J.S.A. 2C:44-1f(1). Additionally, under certain circumstances, the court may sentence a person convicted of a first or second degree crime to a term appropriate for a crime of one degree lower than that of the crime for which he or she was convicted. N.J.S.A. 2C:44-1f(2). The sentencing judge has the discretion to impose a period of

parole ineligibility.[1] N.J.S.A. 2C:43-6b; see §4.5, infra. The judge also may impose an extended term of imprisonment (N.J.S.A. 2C:44-3; §44-6; §43-7). See §4.4, infra.

A few mandatory punishments are also dictated. The Graves Act (N.J.S.A 2C:43-6c) requires certain enhanced punishment for offenses committed with a firearm. First offenders must be sentenced to a term of imprisonment that includes a minimum term fixed at between one-third and one-half of the sentence or three years, whichever is greater ("mandated term of parole ineligibility"). For a fourth degree crime, the mandated term of parole ineligibility is 18 months. Second offenders must be sentenced to extended prison terms. N.J.S.A. 2C:43-6c; 44-3d. The range of sentences for mandatory extended terms are set forth in N.J.S.A. 2C:43-7c.

Additionally, an extended term with a mandated term of parole ineligibility is imposed on certain repeat sex offenders pursuant to N.J.S.A. 2C:14-6. See State v. Chapman, 95 N.J. 582, 589 (1984).

The presumptive, ordinary, extended and mandatory minimum terms of imprisonment for each degree of crime as provided in the code are represented by the following chart. Note that a number of sections of the code provide for special sentencing

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1 Such parole ineligibility is designated in the code as a "minimum term" (N.J.S.A. 2C:43-6b). It is also variously referred to by judges as "parole stipulation," "parole ineligibility," and "parole disqualifier." In this manual such a term is designated as a "discretionary term of parole ineligibility" as distinguished from a statutorily "mandated term of parole ineligibility." See §5.6 ("Graves Act"), infra, for further discussion.

ranges and enhanced penalties. These are not reflected on the chart, but will be discussed in Part V, infra.

DEGREE OF CRIME	ORDINARY TERM	PRESUMPTIVE SENTENCE (2C:44-1f(1))	PAROLE INELIGIBILITY[1]	EXTENDED TERM[2] (2C:43-7a)
First	For a specific term between 10 and 20 years. 2C:43-6a(1)	15 years	Not to exceed ½ of the term imposed. 2C:43-6b OR First-time Graves Act offender, at or between 1/3 & 1/2 of the term imposed or 3 years, whichever is greater. 2C:43-6c	For a specific term between 20 years and life. Presumptive term: 50 yrs 2C:44-1f(1) Parole Ineligibility: Not to exceed ½ of the term imposed. 2C:43-7b OR 25 yrs. where sentence imposed is life. 2C:43-7c OR For 2nd-time Graves Act offender, at or between 1/3 & 1/2 of the term imposed or 5 yrs., whichever is greater. 2C:43-7c
Second	For a specific term between 5 and 10 years. 2C:43-6a(2)	7 years	Not to exceed ½ of the term imposed. 2C:43-7b OR For 1st-time Graves Act offender, at or between 1/3 & 1/2 of the term imposed or 3 years, whichever is greater. 2C:43-6c	Between 10 and 20 years Presumptive term: 15 years. 2C:44-1f(1) Parole ineligibility: Not to exceed ½ of the term imposed. 2C:43-7b OR For 2nd-time Graves Act offender, at or between 1/3 & 1/2 of the term imposed or 5 years, whichever is greater. 2C:43-7c

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1 The code imposes a mandated term of parole ineligibility for certain offenses under particular circumstances, in addition to Graves Act offenses, discussed more fully under §4.4C.

2 Extended prison terms as designated under 2C:43-7 also serve as the mandatory sentence for defendant who has committed any of the crimes enumerated in 2C:44-3d (Graves Act crimes) in the course of which defendant used or possessed a firearm, if a second time Graves Act offender.

DEGREE OF CRIME	ORDINARY TERM	PRESUMPTIVE SENTENCE (2C:44-1f(1))	PAROLE INELIGIBILITY[1]	EXTENDED TERM[2] (2C:43-7a)
Third	For a specific term between 3 and 5 years 2C:43-6a(3)	4 years	Not to exceed ½ of the term imposed. 2C:43-6b OR For 1st-time Graves Act offender, at or between 1/3 & 1/2 of the term imposed or 3 years, whichever is greater. 2C:43-6C	Between 5 and 10 years Presumptive term: 7 years 2C:44-1f(1) Parole Ineligibility: Not to exceed ½ of the term imposed. 2C:43-7c OR For 2nd-time Graves Act offender, at or between 1/3 & 1/2 of the term imposed or 5 years, whichever is greater. 2C:43-7c
Fourth	For a specific term not to exceed 18 months 2C:43-6a(4)	9 months	Not to exceed ½ of the term imposed. 2C:43-6b OR For 1st-time Graves Act offender, 18 months. 2C:43-6c	For 2nd Graves Act offender, 5 years. Parole Ineligibility: For 2nd-time Graves Act offender, at or between 1/3 & 1/2 of the term imposed or 5 years, whichever is greater. 2C:43-7c
Disorderly Persons	For a definite term not to exceed 6 months 2C:43-8	Does not apply 2C:43-6b	Does not apply 2C:43-6b	Does not apply
Petty Disorderly Persons	For a definite term not to exceed 30 days 2C:43-8	Does not apply 2c:43-6b	Does not apply 2C:43-6b	Does not apply

A person convicted of murder, a crime of the first degree, must be sentenced to (1) a term of 30 years without parole; or (2) a specific term of years between 30 years and life imprisonment without parole for 30 years (N.J.S.A. 2C:11-3b); or (3) death (N.J.S.A. 2C:11-3c).[2]

A more severe penalty is also provided for kidnapping. Kidnapping is a first degree crime subject to a specific ordinary term or imprisonment between 15 and 30 years, notwithstanding the provisions of N.J.S.A. 2C:43-6a, which sets forth an ordinary term between ten years and 20 years for a crime of the first degree. N.J.S.A. 2C:13-1c. The presumptive term for kidnapping is 20 years when the offense constitutes a crime of the first degree. N.J.S.A. 2C:44-1f(1). If, however, the actor releases the victim unharmed and in a safe place prior to apprehension, kidnapping is a second degree crime. N.J.S.A. 2C:13-1c(1). Second degree kidnapping is punishable by a term of imprisonment between five and ten years. N.J.S.A. 2C:43-6a(2).

As a first degree crime, the ordinary sentence for kidnapping is 15 to 30 years. N.J.S.A. 2C:13-1c. However, if the criteria specified in N.J.S.A. 2C:13-1c(2) are met, defendant must be sentenced to either 25 years without parole or a specific term of imprisonment between 25 years and life with a

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2 Murder, as well as kidnapping, is also subject to the enhanced penalties required by the Graves Act, in the event that defendant used or possessed a firearm. See N.J.S.A. 2C:43-6c and d; 2C:43-7c; 2C:44-3d.

mandated term of parole ineligibility of 25 years. The criteria are met if the victim was under 16 years old and during the kidnapping was subjected to a sexual assault (N.J.S.A. 2C:14-2) or criminal sexual contact (N.J.S.A. 2C:14-3), or if defendant violated N.J.S.A. 2C:24-4 ("Endangering Welfare of Children"), or if defendant sold or delivered the victim to another person for money independent of the victim's safe return for ransom.

The court may also impose an extended term between 30 years and life imprisonment in the case of kidnapping classified as a first degree crime, N.J.S.A. 2C:43-7a(1), or between ten and 20 years when kidnapping is a second degree crime, N.J.S.A. 2C:43-7a(3). Such an extended term may be imposed if one or more of the criteria of N.J.S.A. 2C:44-3 are met (i.e., persistent offender, professional criminal, crime for hire, second offender with a firearm).

In addition to murder, kidnapping and sex offenses, certain other offenses provide for special sentencing ranges or enhanced penalties. They include N.J.S.A. 2C:11-4 (aggravated manslaughter), N.J.S.A. 2C:11-5 (death by auto), N.J.S.A. 2C:12-2b(2) (recklessly endangering another person), N.J.S.A. 2C:29-6a (implements for escape), N.J.S.A. 2C:35-3 (leader of narcotics trafficking network), N.J.S.A. 2C:35-4 (maintaining or operating a controlled dangerous substance facility), N.J.S.A. 2C:35-5b(1) and (6) (manufacturing, distributing or dispensing controlled dangerous substances), N.J.S.A. 2C:35-6 (employing a juvenile in a drug distribution scheme), N.J.S.A. 2C:35-7

(distribution on school premises or bus), and N.J.S.A. 2C:43-6e (state tax law violations).

B. Place of Confinement[3]

Terms of one year (365 days) or longer must result in commitment of defendant to the custody of the Commissioner of the Department of Corrections ("commissioner"). Exceptions are youthful offenders (N.J.S.A. 2C:43-5), i.e., defendants less than 26 years of age at the time of sentencing who have been convicted of a crime other than a Graves Act offense, and defendants sentenced to imprisonment for up to 18 months in a county in which a county penitentiary or county workhouse is located (N.J.S.A. 2C:43-10a). At the court's discretion, the latter category of defendants may be sentenced to the county facility (N.J.S.A. 2C:43-10b); the former category of defendants may be sentenced to an indeterminate term, men to the Youth Correctional Institution Complex, women to the Correctional Institution for Women (N.J.S.A. 2C:43-5).

A person sentenced to imprisonment for a term of less than one year, i.e., 364 days or less, must be committed either to common jail of the county, the county workhouse (in Mercer or Middlesex Counties only), or the county penitentiary. However, in counties of the first class having a workhouse or penitentiary, no sentence exceeding six months shall be to the

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3 The code provides for the removal and transfer of prisoners. See N.J.S.A. 2C:43-10e, -10f, -10g; N.J.S.A. 47-4b; N.J.S.A. 30:4-85.1; Worthington v. Fauver, 88 N.J. 183, 188 (1982).

common jail. N.J.S.A. 2C:43-10c. See Part VII ("Place of Imprisonment"), infra, for fuller discussion of the topic.

A term of imprisonment served in a county jail, as opposed to a state correctional facility, does not satisfy the presumption of imprisonment under the code. State v. O'Connor, 105 N.J. 399, 409 (1987). Thus, a so-called "split sentence," or term of imprisonment in a county jail imposed as a condition of probation under N.J.S.A. 2C:43-2b(2), does not satisfy the presumption of imprisonment for first and second degree offenders in N.J.S.A. 2C:44-1d. Id. at 410. A term of imprisonment up to 364 days in county jail as a condition of probation may be imposed even when the presumption of non-imprisonment under N.J.S.A. 2C:44-1e applies. State v. Hartye, 105 N.J. 411, 420 (1987). See §4.2, infra.

Terms of consecutive sentences are aggregated for the purpose of determining the place of imprisonment. N.J.S.A. 2C:43-10d. Thus, if defendant's aggregate sentence is greater than 364 days, defendant shall be committed to the custody of the commissioner.

C. Concurrent or Consecutive Terms

1. Generally

The trial court must state a separate sentence for each crime for which a person is convicted. State v. Cianci, 18 N.J. 191, 194 (1955), cert. den. 350 U.S. 1000 (1956) and 353 U.S. 940 (1957); State v. Jones, 213 N.J. Super. 562, 571 (App. Div. 1986).

Unless N.J.S.A. 2C:44-5 expressly provides otherwise, the judge has the discretion to impose multiple sentences concurrently or consecutively. See N.J.S.A. 2C:44-5. The sentencing judge should clearly specify whether sentences are to be served concurrently or consecutively. See State v. Braeunig, 122 N.J. Super. 319, 334 (App. Div. 1973), certif. den. 66 N.J. 325 (1974). The court must clearly state its reasoning in the event that it imposes a consecutive sentence. State v. Yarbough, 100 N.J. 627, 643 (1985), cert. den. 475 U.S. 1014 (1986); State v. King, 215 N.J. Super. 504, 522 (App. Div. 1987); State v. Mosch, 214 N.J. Super. 457, 465 (App. Div. 1986), certif. den. 107 N.J. 131 (1987).

Generally, separate sentences imposed by a single New Jersey court or by more than one New Jersey court at separate times will run concurrently, unless the sentencing judge clearly directs that they be served consecutively. State v. Moore, 178 N.J. Super. 417, 427 (App. Div. 1981), certif. den. 87 N.J. 406 (1981).

Note, however, if defendant is on parole when he or she committed the offense for which he or she is being sentenced to imprisonment, such term of imprisonment and any re-imprisonment required by the parole board must run consecutively unless the court orders otherwise. N.J.S.A. 2C:44-5c. When defendant has been released, with or without bail, pending disposition of a prior offense, sentencing for a subsequent offense must run consecutively unless the court orders otherwise. N.J.S.A. 2C:44-5h. See §2.1 ("Entry of Plea"), supra.

2. Criteria for Imposing Consecutive Sentences

The code does not provide specific criteria to guide sentencing courts in imposing sentences of imprisonment for more than one offense. Yarbough, supra, 100 N.J. at 636. Accordingly, the Yarbough Court fashioned "standards for discretion that [would] best further the purposes of the Code" (ibid.), i.e., proportionality, just desert, and uniformity of sentencing.

In determining whether to impose concurrent or consecutive sentences when pronouncing sentence "on one occasion on an offender who has engaged in a pattern of behavior constituting a series of separate offenses or committed multiple offenses in separate, unrelated episodes," the trial court must consider the criteria articulated in Yarbough, including the following:

> ... (1) There can be no free crimes in a system for which the punishment shall fit the crime; * * * (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and (6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.
> [100 N.J. at 644]

Additionally, before imposing a consecutive sentence, the trial court must consider the relevance of the following possibilities:

(a) the crimes and their objectives were predominantly independent of each other;
(b) the crimes involved separate acts of violence or threats of violence;
(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous.

[Ibid.; (footnote omitted]

See State v. Ghertler, 114 N.J. 383, 391 (1989); King, supra, 215 N.J. Super. at 521. These criteria center on the circumstances surrounding the offense, not the offender. State v. Baylass, 114 N.J. 169, 180 (1989).

Should the trial court determine that consecutive sentences are appropriate, it generally must conform to certain principles:

> ... Those separate, consecutive punishments would ordinarily not be graded at the maximum range; they would typically not exceed in aggregate duration, except for an habitual offender, the longest term for the two most serious offenses. In fashioning such a sentence, the court will be conscious that "though a defendant's conduct may have constituted multiple offenses, the sentencing phase concerns the disposition of a single, not a multiple, human being." State v. Cloutier, 286 Or. 579, 591, 596 P. 2d 1278, 1284 (1979). Thus, in molding that consecutive sentence, the court will normally make an overall evaluation of the punishment for the several offenses involved, State v. Rodriguez, 97 N.J. 263, 274 (1984), reflecting that its goal is not an exercise "whose object is to find the maximum possible period of incarceration for a convicted defendant." People v. Price, supra, 151 Cal. App. 3d at 822, 199 Cal.Rptr. at 109.
> [Yarbough, supra, 100 N.J. at 646]

"In sum, a sentencing court ordinarily is limited to the two longest and strongest sentences." State v. Baylass, supra, 114 N.J. at 180.

The sentencing court should record in detail its reasoning for imposing consecutive sentences. State v. Miller, 108 N.J. 112, 122 (1987). Consecutive sentences should not be imposed if the decision to sentence consecutively is based on the same factors used to impose the maximum term for each conviction.

State v. Ghertler, supra, 114 N.J. at 392; Miller, supra, 108 N.J. at 122. In fact, where the offenses are closely related, defendant should not be sentenced to the maximum term for each offense and also be sentenced consecutively, especially if the second offense did not put the victim at further risk. Miller, supra, 108 N.J. at 122. However, where the offenses are separate, committed at different times and places and involved different victims, consecutive terms are warranted. Ghertler, supra, 114 N.J. at 392.

Only one discretionary extended term can be imposed in a multiple-sentencing proceeding. N.J.S.A. 2C:44-5a(2); Yarbough, supra, 100 N.J. at 644; State v. Chavies, 185 N.J. Super. 429, 431 (App. Div. 1982)). However, when multiple Graves Act prison sentences are imposed on a second-time Graves Act offender, the sentence for each Graves Act crime must lie within the extended prison sentence range. State v. Connell, 208 N.J. Super. 688, 691 (App. Div. 1986). See §5.6 ("Graves Act"), infra. The aggregate of consecutive terms to a county institution must not exceed 18 months. N.J.S.A. 2C:44-5a(1).

The above rules are likewise applicable so far as possible when a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for an offense committed prior to the former sentence, but not committed while in custody. N.J.S.A. 2C:44-5b(1). In such instances, regardless of whether the terms are to run concurrently or consecutively, the defendant is to be credited with time served in imprisonment on the previous sentence in determining the

permissible aggregate length of the term or terms remaining to be served. N.J.S.A. 2C:44-5b(2). See Richardson v. Nickolopoulos, 110 N.J. 241 (1988) (N.J.S.A. 2C:44-5b(2) will not reduce a parole ineligibility term of a sentence imposed consecutively to a prior sentence); cf. State v. Lawlor, 222 N.J. Super. 241 (App. Div. 1988) (when current term is concurrent to previous term, time served on previous term is credited against current term; when current term is consecutive to the previous term, time served on previous term is not credited against the current term); State v. Benedetto, 221 N.J. Super. 573 (App. Div. 1987), certif. den. 111 N.J. 559 (1988) (N.J.S.A. 2C:44-5b(2) does not require that time served on the previous term be credited when the current term is concurrent to the previous term).

Moreover, when a new sentence is imposed on a prisoner who is on parole, the balance of the parole term on the prior sentence is not to run during the period of the new imprisonment. N.J.S.A. 2C:44-5b(3).

D. Structure of Imprisonment for Disorderly Persons and Petty Disorderly Persons Offenses

A disorderly persons offender or a petty disorderly persons offender may be sentenced to a maximum term of imprisonment of six months and 30 days, respectively. N.J.S.A. 2C:43-8. Such a term must be definite regardless of the offender's age. N.J.S.A. 2C:43-8.

The court has the discretion to impose consecutive or concurrent sentences for multiple disorderly or petty disorderly persons offenses. N.J.S.A. 2C:44-5a. However, the aggregate of consecutive terms to a county institution must not exceed 364

days, except when the aggregate sentence is to be served in a county workhouse for up to 18 months. N.J.S.A. 2C:44-5a(1). Where factually related petty offenses are tried together, whose maximum sentences total more than six months, and defendant is not offered a jury trial, the sentences may not total more than six months. State v. Linnehan, 197 N.J. Super. 41, 43 (App. Div. 1984), certif. den. 99 N.J. 236 (1985), citing State v. Owens, 54 N.J. 153 (1969), cert. den. 396 U.S. 1021 (1970). Under such circumstances, concurrent jail sentences, each of which does not exceed six months, are permissible. Ibid. If disorderly persons offenses aggregate to more than one year, such a sentence constitutes a term of imprisonment for purposes of parole.

The code provides that neither the right to indictment by grand jury nor the right to jury trial attaches to an offense with a maximum of less than six months. N.J.S.A. 2C:1-4a, -b. See State v. Stern, 197 N.J. Super. 49, 54 (App. Div. 1984) (no right to jury trial for disorderly persons offense; municipal court had jurisdiction). The six-month period of confinement and the absence of the right to a jury trial for disorderly persons offenses is in accordance with Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970), which held that a maximum authorized penalty of six months is short enough to permit classification of an offense as "petty" and to permit non-jury adjudication.

The absence of a jury trial and the relatively inconsequential nature of disorderly persons offenses and petty disorderly offenses also provide the rationale for the fact that extended terms of imprisonment are not provided by the code for such offenses. See II Final Report of the New Jersey Criminal Law Revision Commission: Commentary (1971) at 319.

4.2 Criteria for Determining Whether to Impose Sentence of Imprisonment

A. Introduction

The code provides for presumptions of imprisonment and non-imprisonment, presumptive terms for various offenses, and presumptive ranges within which a limited amount of sentencing discretion may be exercised. These provisions are designed to channel the discretion of sentencing judges. State v. Jarbath, 114 N.J. 394, 400 (1989); State v. O'Connor, 105 N.J. 399, 406 (1987), citing State v. Yarbough, 100 N.J. 627, 635 (1985), cert. den. 475 U.S. 1014 (1986); State v. Roth, 95 N.J. 334, 357-359 (1984)).

B. Presumption of Imprisonment -- First or Second Degree Offenses

N.J.S.A. 2C:44-1d provides a presumption of imprisonment for first and second degree offenders:

> ... The court shall deal with a person who has been convicted of a crime of the first or second degree by imposing a sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that this imprisonment would be a serious injustice which overrides the need to deter such conduct by others.

The effective date of this provision is September 24, 1981. There is no presumption of incarceration for first or second degree crimes committed prior to this date. State v. Morgan, 196 N.J. Super. 1, 4 (App. Div. 1984), certif. den. 99 N.J. 175 (1984).

According to the Roth Court, §44-1d reserves a residuum of power in the sentencing court to avoid the presumption of

imprisonment in those few truly extraordinary and unanticipated circumstances where the human cost would be too great. 95 N.J. at 358. Thus, "the judge need not be a computer automatically imposing a custodial sentence" for first or second degree offenders. State v. Daniels, 195 N.J. Super. 584, 589 (App. Div. 1984). However, absent a proper determination of a "serious injustice" in regard to the character and conditions of defendant as compelled by statute, the trial court must impose a custodial sentence. Roth, supra, 95 N.J. at 358-359.

The determination of such a "serious injustice" sufficient to overcome the presumption of imprisonment cannot be reached by a simple preponderance of either aggravating or mitigating factors, or a quantitative analysis of the number of factors to be balanced. Roth, supra, 95 N.J. at 368. Conceptually, this determination is very close to the determination that "extreme mitigating factors" outweigh any aggravating factors. Jarbath, supra, 114 N.J. at 406. However, the standard is met only in "truly extraordinary and unanticipated circumstances" in which the human cost of deterrence by imprisonment is too great. Id. at 406-407; Roth, supra, 95 N.J. at 358. This standard has been iterated in subsequent cases:

> ... [T]he purpose in permitting consideration of the character and condition of the defendant under the Code would be to avoid imposition of a sentence that goes beyond the central Code purpose of imposing proportionate sentences, that is, sentences that fit the particular crime. A disproportionate sentence would be identified by a term of imprisonment that creates a "serious injustice" that overrides the needs of general deterrence.
> [Jarbath, supra, 114 N.J. at 408]

For example, a defendant's deficient mental and emotional condition, which prevented her from comprehending that she had committed a crime that deserved prison or that she could modify her behavior based on her imprisonment, and which caused her to suffer unusual hardship and privation in prison, warranted a finding of "serious injustice." Id. at 408-409.

Rehabilitation is not the goal to be achieved by a consideration of the character and condition of the defendant. Id. at 407. Neither the availability nor success of substance abuse programs for defendant is a sufficient basis by itself to overcome the presumption of imprisonment. State v. Kent, 212 N.J. Super. 635, 643 (App. Div. 1986), certif. den. 107 N.J. 65 (1986). Moreover, a defendant who formerly led a blameless life and who can show a broad range of community support does not meet the standard of exceptional circumstances necessary to overcome the presumption of imprisonment. Roth, supra, 95 N.J. at 368-369.

The presumption of imprisonment for first or second degree offenders cannot be modified through a plea agreement that provides for a sentence downgrade pursuant to N.J.S.A. 2C:44-1f(2). State v. O'Connor, supra, 105 N.J. at 404 n.2, citing State v. Hodge, 95 N.J. 369, 377 (1984); see State v. Williams, 225 N.J. Super. 462 (Law Div. 1988) (D.E.D.R. penalty). The degree of the crime of which defendant is convicted -- independent of any reduced sentence agreed to through a plea bargain -- should control which presumption will govern the legality of the sentence. Jarbath, supra,

114 N.J. at 413; O'Connor, supra, 105 N.J. at 405. Thus, the O'Connor Court rejected a sentence characterized as non-custodial for a second degree offender who had not overcome the presumption of imprisonment. Such a defendant could be sentenced as if a third degree offender to a presumptive sentence of four years (N.J.S.A. 2C:44-1f(1)) served in state prison. Id. at 407. See State v. Partusch, 214 N.J. Super. 473, 476 (App. Div. 1987) (presumption of non-imprisonment does not apply on reduction from second to third degree for sentencing purposes).

O'Connor further held that any term of imprisonment imposed as a condition of probation under N.J.S.A. 2C:43-2b(2), a so-called "split sentence," did not satisfy the presumption of imprisonment for first and second degree offenders. Id. at 410. Accordingly, O'Connor invalidated the split sentence of defendant who pled to a second degree crime. A "split sentence" is not available to a second degree offender who had not overcome the presumption of imprisonment, regardless of the reduction of his crimes to third degree. Id. at 410.

Based on legislative history and intent, the Court differentiated "imprisonment for a term" as a condition of probation from a sentence of imprisonment. Id. at 409. The Court noted that under N.J.S.A. 2C:43-2b(2) the term of imprisonment imposed as a condition of probation may not exceed 364 days. This "suggests a form of punishment qualitatively as well as quantitatively different from a term of imprisonment under N.J.S.A. 2C:43-2b(3)." 105 N.J. at 409. Otherwise, a second degree offender allowed to serve a split sentence might

be incarcerated for only one day, while another second degree offender might be sentenced at the high end of the presumptive range of ten years. The Court rejected this approach as re-introducing unfettered discretion into sentencing decisions. Id. at 408.

Moreover, imprisonment under a split sentence must be served in county jail as opposed to a state correctional facility, where the majority of sentences of imprisonment are served. Finally, imprisonment under a split sentence is subject to greater flexibility than a term of imprisonment: parole ineligibility may not be imposed, and the custodial element may commence, or be reduced, at any time during the probationary period. Ibid.; Hartye, 105 N.J. 411, 419 (1987); State v. Guzman, 199 N.J. Super. 346, 349 n.1 (Law Div. 1985).

C. Presumption of Non-imprisonment

1. Determination

There is a presumption against imprisonment for first-time offenders convicted of a third or fourth degree crime or of a disorderly persons offense. N.J.S.A. 2C:44-1e reads:

> The court shall deal with a person convicted of an offense other than a crime of the first or second degree, who has not previously been convicted of an offense, without imposing sentence of imprisonment unless, having regard for the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public under criteria set forth in subsection a.

A trial court is prevented from imprisoning such an offender unless, using the aggravating factors set forth in §44-1a as guidelines, the court concludes that imprisonment is necessary

to protect the public. State v. Roth, supra, 95 N.J. at 357. Before the presumption against imprisonment may be overcome, the court must be persuaded by a standard that is higher than "clear and convincing" evidence that incarceration is necessary. State v. Gardner, 113 N.J. 510, 517-518 (1989). General deterrance alone is not sufficient to overcome the presumption. Id. at 520.

The court must include in its statement of reasons its finding that the presumption against imprisonment has been overcome, and must memorialize in that statement the aggravating and mitigating factors it considered in determining defendant's sentence. State v. Hartye, 105 N.J. 411, 421 (1987). Similarly, when a defendant is not entitled to the presumption against imprisonment, the court must identify the aggravating and mitigating factors and "explain why the balance tips in favor of probation." State v. Baylass, 114 N.J. 169, 174 (1989).

A term of imprisonment as a condition of probation up to 364 days may be imposed where the presumption of non-imprisonment applies and is not overcome. Hartye, supra, 105 N.J. at 420. Where defendant has been convicted of a fourth degree offense, any term of imprisonment imposed as a condition of probation should not be in excess of the presumptive term for that offense. Id. at 420 n.3. The Hartye Court provided two alternative sentences for a defendant who has no prior convictions and who has been convicted of a third degree offense: (1) a term of imprisonment of up to 364 days as a condition of probation; or (2) if the presumption of non-

imprisonment has been overcome, a state prison term within the presumptive term for a third degree offense (three to five years). Id. at 421. Hartye relied on the rationale articulated in O'Connor, supra, 105 N.J. at 408-409, as previously discussed, in order to differentiate a sentence of imprisonment under N.J.S.A. 2C:43-2b(3) from a jail term imposed as a condition of probation under N.J.S.A. 2C:43-2b(2).

To summarize, in cases where the trial court finds that the presumption against incarceration has not been overcome, a defendant may nevertheless be sentenced to a "split sentence" as provided for in N.J.S.A. 2C:43-2b(2). Hartye, supra, 105 N.J. at 420-421.

2. Prior Conviction

In State v. Pineda, 227 N.J. Super. 245, 250 (App. Div. 1988), certif. granted 114 N.J. 508 (1989), the court held that the presumption against imprisonment is inapplicable if defendant has been convicted previously of a disorderly persons offense. Accord State v. Kates, 185 N.J. Super. 226, 228 (Law Div. 1982). Similarly, the presumption does not apply if defendant has been convicted previously of a petty disorderly persons offense. State v. Garcia, 186 N.J. Super. 386, 387 (Law Div. 1982). And, in State v. McBride, 211 N.J. Super. 699, 704-705 (App. Div. 1986), the Appellate Division characterized the defendant as a first offender, despite prior juvenile delinquency adjudications.

Generally the presumption against imprisonment is preserved in the case of an indigent defendant who was convicted for non-indictable offenses without the assistance of counsel.

Garcia, supra, 186 N.J. Super. at 389. Defendant has the burden of proof. Id. at 390. Presumably, a conviction in another jurisdiction is sufficient to make the presumption against imprisonment inapplicable. See N.J.S.A. 2C:44-4c.

A defendant is not deemed to be previously convicted of a crime, and thus ineligible for the presumption against imprisonment, before the time for appeal has expired or while a direct appeal is pending. N.J.S.A. 2C:44-4b; State v. Rodriguez, 202 N.J. Super. 543, 546-548 (Law Div. 1985). Prior verdicts and judgments concerning crimes still subject to a timely direct appeal, however, may be considered in evaluating whether the presumption against imprisonment is overcome "for the protection of the public" (§44-1e). Id. at 548.

A defendant who has a prior conviction of a disorderly persons offense appears to be ineligible for the presumption regardless of any appeal or time for appeal. N.J.S.A. 2C:44-4a.

D. Differentiation of Presumptions

When the presumption against imprisonment is inapplicable, i.e, when defendant is a repeat offender, defendant is not then subject automatically to a presumption of imprisonment. State v. Pineda, supra, 227 N.J. Super. at 250. "[A] sentence of 'imprisonment' does not necessarily have to be imposed whenever there is no presumption against imprisonment." State v. Powell, 218 N.J. Super. 444, 451 (App. Div. 1987). In State v. Baylass, supra, 114 N.J. at 173, the Court said that "[w]hen neither presumption applies, the court must weigh the aggravating and

mitigating factors... to determine whether a probationary or custodial sentence is appropriate."

Note that when the presumption of non-imprisonment is overcome according to the criteria set forth in N.J.S.A. 2C:44-1e, defendant must be sentenced within the presumptive range set forth in N.J.S.A. 2C:43-6a. Gardner, supra, 113 N.J. at 518; Hartye, supra, 105 N.J. at 417.

E. Unresolved Issues

1. Standards to Overcome Presumptions For and Against Imprisonment at N.J.S.A. 2C:44-1d and -1e

a. First and Second Degree Offenders

What circumstances amount to "serious injustice" for purposes of overcoming the first and second degree presumption of incarceration? See State v. Jarbath, supra, 114 N.J. at 406 (this determination is very close to, perhaps indistinguishable from, the determination that extreme mitigating factors outweigh any aggravating factors).

b. Third and Fourth Degree Offenders

Under N.J.S.A. 2C:44-1e the sentencing court may determine that the presumption of non-imprisonment has been overcome in the case of a third or fourth degree defendant who has no prior conviction. If so, the court is then bound to sentence defendant within the presumptive range for the degree of the relevant crime set forth in N.J.S.A. 2C:43-6a. Gardner, supra, 113 N.J. at 518; Hartye, supra, 105 N.J. at 417. It is unclear how the court should weigh the aggravating factors set forth in N.J.S.A. 2C:44-1a to determine that the presumption of non-imprisonment is overcome, i.e., that defendant's

imprisonment is necessary for the protection of the public in light of the aggravating factors (N.J.S.A. 2C:44-1e). See Gardner, supra, 113 N.J. at 517 (before presumption against imprisonment may be overcome, court must be persuaded by a standard higher than "clear and convincing" evidence that incarceration is necessary).

In the case of a third or fourth degree offender who has a prior conviction, the above presumption of non-imprisonment is inapplicable. It is unclear what standard governs the decision to impose a term of imprisonment (since, as Powell, supra, 218 N.J. Super. at 451, emphasized, the inapplicability of the presumption of non-imprisonment does not give rise to a presumption of imprisonment). See State v. Baylass, 114 N.J. 169, 173 (1989) (where no presumption applies, court must weigh aggravating and mitigating factors to determine whether a probationary or custodial sentence is appropriate).

It is also unclear what standard governs the term of imprisonment imposed: does the sentencing court start at zero years and work up, or at the presumptive term itself as if the presumption of non-imprisonment had been overcome through balancing the aggravating factors? Is it permissible to double-count aggravating factors to determine the "in-out" decision (regardless of whether the presumption of non-imprisonment is overcome or inapplicable) and to determine the term of sentence? See Baylass, supra, 114 N.J. at 173 (if court decides to incarcerate, the presumptive custodial sentences apply

"unless the preponderance of aggravating or mitigating factors weigh in favor of a higher or lower term).

(1) Standard for Imposing Split Sentence

What is the standard for imposing a split sentence, which is permissible when the presumption of non-imprisonment has not been overcome? The Hartye Court does not provide such a standard.

4.3 Criteria to Determine Term of Imprisonment

A. Presumptive Terms and Ranges

After determining that imprisonment is mandated, the sentencing judge must impose the statutorily correct sentence. State v. Roth, 95 N.J. 334, 359 (1984). The code sets forth presumptive sentences for each degree of crime, as follows:

1st degree -- 15 years
2nd degree -- 7 years
3rd degree -- 4 years
4th degree -- 9 months

N.J.S.A. 2C:44-1f(1). See chart and text at §4.1, supra, for expanded discussion.

The "presumptive" term allows the court the discretion to adjust defendant's sentence within certain strictures:

> ... [W]hen the court finds the aggravating and mitigating factors are in equipoise, it "shall" impose the presumptive sentence. When, however, either the mitigating or the aggravating factors preponderate, it "may" adjust the sentence within the guidelines set by N.J.S.A. 2C:43-6.
> [State v. Kruse, 105 N.J. 354, 358 (1987)]

The code sets forth presumptive or "ordinary" ranges for each class of offense, which ranges specify the permissible minimum and maximum sentence. N.J.S.A. 2C:43-6a allows a specific term of years within the ordinary terms for crimes as follows:

1st degree -- 10 to 20 years
2nd degree -- 5 to 10 years
3rd degree -- 3 to 5 years
4th degree -- up to 18 months.

> ... The court undertakes an examination and weighing of the aggravating and mitigating factors listed in 2C:44-1(a) and (b). If, on balance, there is a preponderance of aggravating factors, the court may impose sentence up to the maximum for the degree of the offense as provided in 2C:43-6(a); if a

> preponderance of mitigating factors, it may sentence down to the statutory minimum. For example, for a crime of the second degree the ordinary sentence is seven years. If there is a preponderance of aggravating factors, the court may sentence a defendant to a term of ten years; if there is a preponderance of mitigating factors, the sentence may be a term of five years.
> [Roth, supra, 95 N.J. at 359]

B. Aggravating and Mitigating Circumstances

1. Sentencing Function

N.J.S.A. 2C:44-1a and b, respectively, list aggravating and mitigating circumstances used by the court "to determine the range of the sentence, a parole disqualifier, or an extended term." State v. Yarbough, 100 N.J. 627, 636 (1985), cert. den. 475 U.S. 1014 (1986), citing N.J.S.A. 2C:43-6a and b, 2C:43-7 and 2C:44-1f. See State v. Kruse, 105 N.J. 354 (1987) (in determining appropriate sentence, court must decide whether there is preponderance of aggravating or mitigating factors; in determining parole ineligibility, court must be clearly convinced that aggravating factors substantially outweigh mitigating factors). See discussion §4.3C, infra ("Unresolved Issues").

Prior to 1983, N.J.S.A. 2C:44-1 provided that "the court may properly consider" the aggravating and mitigating circumstances enumerated under subsections a and b. In 1983 N.J.S.A. 2C:44-1a was amended to require that the court consider the aggravating circumstances set forth in the statute. The language "the court may properly consider" was changed to "the court shall consider" the enumerated aggravating factors. The

Legislature did not change the discretionary language in subsection b applicable to mitigating circumstances.

In State v. Sainz, 107 N.J. 283 (1987), the Court reiterated the Roth-Hodge sentencing philosophy that the code's primary focus is on the offense as opposed to the offender. "The degree of crime defines its gravity and is the most influential factor in dictating the appropriate sentence." 107 N.J. at 287 (citations omitted). However, Sainz emphasized that judicial balancing of the aggravating and mitigating factors determines whether the sentencing judge will follow or depart from the statutorily defined presumptive term. The aggravating and mitigating factors must be considered along with the degree of the crime. Ibid.

> ... Aggravating and mitigating factors are used to insure that sentencing is individualized without being arbitrary. The factors insure that the sentence imposed is tailored to the individual offender and to the particular crime he or she committed. [Ibid.]

See State v. Merlino, 208 N.J. Super. 247, 258 (Law Div. 1984) (fundamental sentencing guideline set forth in State v. Hodge, supra, 95 N.J. at 369 and 376, that punishment fit the crime, not the criminal, is not at all contravened by examination of background and personal circumstances of offender). In fact, Merlino noted that although five of the aggravating factors enumerated in the code specifically related to the offense (N.J.S.A. 2C:44-1a(1),(2),(4),(7), and (8)), several other aggravating factors focused directly on the offender and his or her background (N.J.S.A. 2C:44-1a(3), (6), and (9)). 208 N.J. Super. at 255.

2. Individual Aggravating and Mitigating Factors and Cases

The following is a recitation of the individual aggravating and mitigating factors as enumerated in N.J.S.A. 2C:44-1a and b with a non-inclusive list of relevant cases.

The aggravating circumstances that must be considered by the court under 2C:44-1a consist of the following:

> (1) The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner.

See State v. Pillot, 115 N.J. 558, 564 (1989) (where use of gun was the basis for elevating this robbery to first degree, court erred in concluding that crime was "particularly heinous because a gun was used to rob unsuspecting people"); State v. Jarbath, 114 N.J. 394 (1989) (trial court erred in concluding that second degree manslaughter was "especially heinous, cruel and depraved" where court had accepted defendant's version at plea hearing that she had accidentally dropped the baby); State v. McBride, 211 N.J. Super. 699, 704 (App. Div. 1986) (factor applied where defendant used excessive force to accomplish crime and inflicted gratuitous bodily injuries upon victim); State v. King, 215 N.J. Super. 504, 522 (App. Div. 1987) (defendant's crimes deemed particularly heinous and thus justified imposition of maximum sentence since shoot-out and chase occurred in highway traffic and could have endangered many lives).

> (2) The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill-health, or extreme youth, or was for any other

reason substantially incapable of exercising normal physical or mental power of resistance.

See Jarbath, supra, 114 N.J. at 404 (death of baby was an element of the crime of second-degree manslaughter, and could not be double-counted as an aggravating factor); State v. Taylor, 226 N.J. Super. 441, 453 (App. Div. 1988) (where defendant was convicted of "sexual contact with a victim who is less than 13 years old", extreme youth of 4-year-old victim properly considered); State v. Travers, 229 N.J. Super. 144, 154 (App. Div. 1988) (in death-by-auto case, trial court properly considered deaths of defendant's passengers (three) as an aggravating factor); McBride, supra, 211 N.J. Super. at 704 (defendant beat 56-year-old victim nearly senseless and broke one of his teeth); State v. Mosch, 214 N.J. Super. 457, 467 (App. Div. 1986), certif. den. 107 N.J. 131 (1987) (psychological and emotional trauma defendant inflicted upon victim in burglary and sexual assault caused much greater damage than physical injury).

(3) The risk that the defendant will commit another offense.

See State v. Travers, supra, 229 N.J. Super. at 154 (trial court properly applied this factor where presentence report indicated that defendant was still not cognizant of his drinking problem, therefore he would be likely to repeat drunk-driving); McBride, supra, 211 N.J. Super. at 704-705 (although 20-year-old defendant had no prior criminal convictions, his arrest and charge of crime while on bail, plus prior juvenile adjudications, supported finding of above factor).

(4) A lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of the public trust under chapters 27 and 30, or the defendant took advantage of a position of trust of confidence to commit the offense.

See Mosch, supra, 214 N.J. Super. at 463 (above factor inapplicable here where defendant was convicted of burglary and sexual contact with a stranger).

(5) There is a substantial likelihood that the defendant is involved in organized criminal activity.

See State v. Velez, 229 N.J. Super. 305, 317 (App. Div. 1988) (drug offense); Merlino, supra, 208 N.J. Super. at 259 (sentencing court may consider above factor even when defendant's conviction is unrelated to organized criminal activity; State bears burden of proving factor by clear and convincing evidence (id. at 262)); State v. Pych, 213 N.J. Super. 446, 463 (App. Div. 1986) (competent, credible evidence in record supporting application of above factor consisted of financial facts pertaining to bookmaking operation that defendant conspired to promote).

(6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted.

See §4.3C, infra, ("Unresolved Issues").

(7) The defendant committed the offense pursuant to an agreement that he either pay or be paid for the commission of the offense and the pecuniary incentive was beyond that inherent in the defense itself.

(8) The defendant committed the offense against a police or other law enforcement officer, correctional employee or fireman, acting in the performance of his duties while in uniform or exhibiting evidence of his authority, or the defendant committed the offense because of the status of the victim as a public servant.

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

See Jarbath, supra, 114 N.J. at 405 (where sentence would not serve as a personal or specific deterrent to defendant, any possible general deterrent effect on the public has relatively insignificant penal value); Travers, supra, 229 N.J. Super. at 154 (both specific and general deterrence cited where offense [death-by-auto] was caused by drunk-driving, where defendant had a drinking problem, and where strong public policy against drunk-driving exists); McBride, supra, 211 N.J. Super. at 705 (defendant's prior juvenile adjudications, post-bail arrest, and brazen daylight robbery in downtown Newark support need to deter others); Mosch, supra, 214 N.J. Super. at 466 (defendant himself admitted being capable of raping again).

> (10) The offense involved fraudulent or deceptive practices committed against any department of division of State government.
>
> (11) The imposition of a fine, penalty or order for restitution without also imposing a term of imprisonment would be perceived by the defendant or others merely as part of the cost of doing business, or as an acceptable contingent business or operating expense associated with the initial decision to resort to unlawful practices.

* * *

The mitigating circumstances that a court may properly consider in sentencing a defendant consist of the following:

> (1) The defendant's conduct neither caused nor threatened serious harm;
>
> (2) The defendant did not contemplate that his conduct would cause or threaten serious harm.

See Jarbath, supra, 114 N.J. at 403 and 404 (trial court applied this factor where mentally retarded defendant acidentally killed her baby; State v. Morgan, 196 N.J. Super. 1, 4-5 (App. Div. 1984), certif. den. 99 N.J. 175 (1984) (this factor applied

where defendant committed a robbery, threatening the use of a bomb, but defendant had no bomb or other explosives).

(3) The defendant acted under a strong provocation;

See State v. Teat, 233 N.J. Super. 368, 372 (App. Div. 1989) (provocation "relates to the conduct of the victim toward the actor," and is not available as a mitigating factor in passion/provocation murder).

> (4) There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense.

See Jarbath, supra, 114 N.J. at 403 and 414 (defendant's mental retardation); State v. Ghertler, 114 N.J. 383, 390 (1989) (defendant's drug dependency not a mitigating factor; one who steals to buy cocaine is not entitled to invoke this factor).

> (5) The victim of the defendant's conduct induced or facilitated its commission;
>
> (6) The defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained, or will participate in a program of community service;
>
> (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense.

See State v. Glover, 230 N.J. Super. 333, 344 (App. Div. 1988) (judge could give "little weight" to lack of formal convictions since, but for family relationships of defendant's prior victims, there would have been prior convictions); Velez, supra, 229 N.J. Super. at 315-316 (fact that defendant had received a previous conditional discharge made application of this factor "uncertain").

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

(9) The character and attitude of the defendant indicate that he is unlikely to commit another offense;

(10) The defendant is particularly likely to respond affirmatively to probationary treatment.

See Jarbath, supra, 114 N.J. at 415 (mentally retarded defendant needed "special habilitation program, available to her through probation); Merlino, supra, 208 N.J. Super. at 252 (defendant has stable family and employment background).

(11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents;

See Jarbath, supra, 114 N.J. at 398 and 409, (incarceration of mentally retarded defendant, who was severely abused daily by other inmates, beaten on one occasion, and who had attempted suicide, constituted "excessive hardship").

(12) The willingness of the defendant to cooperate with law enforcement authorities;

See Pillot, supra, 115 N.J. at 562 (trial court considered defendant's confession as triggering this factor); State v. Reed, 211 N.J. Super. 177, 189 n.2 (App. Div. 1986), certif. den. 110 N.J. 508 (1988) (court expressly left unanswered question whether confession or inculpatory statement involving defendant himself is or is not "cooperation" under this factor).

(13) The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant.

a. Miscellaneous

Defendant's refusal to acknowledge guilt following conviction is generally not a germane factor in the sentencing

decision. State v. Marks, 201 N.J. Super. 514, 540 (App. Div. 1985), citing N.J.S.A. 2C:44-1c(1). On the other hand, defendant's public stature may subject him or her to a higher degree of responsibility that impacts on sentencing. Merlino, supra, 208 N.J. Super. at 258, citing State v. Coruzzi, 189 N.J. Super. 273, 317 (App. Div. 1983), certif. den. 94 N.J. 531 (1983).

3. Double-Counting of Factors

a. Classic Cases

Under certain circumstances, the same fact relating to defendant's crime cannot be counted twice against him -- i.e., once in proving the statutorily-graded crime and again as an aggravating factor in enhancing his sentence:

> ... Where an essential element of a crime is a specific fact, here the police status of the victim, that element may not be used as an aggravating factor to impose a custodial sentence that is longer than the presumptive term or to impose a period of parole ineligibility. [State v. Link, 197 N.J. Super. 615, 620 (App. Div. 1984), certif. den. 101 N.J. 234 (1985)]

This conclusion was approved in State v. Yarbough, supra, 100 N.J. at 645. E.g., Yarbough, supra, 100 N.J. at 633 (age of victim and defendant's position of trust made crime first degree offense, and these factors may not be considered aggravating ones); State v. Gardner, 113 N.J. 510, 519 (1989) (defendant cannot be punished twice for same factor, first by standing convicted of offense graded by Legislature, and second by having his punishment enhanced on basis of same factor); State v. Pavin, 202 N.J. Super. 255, 266-267 (App. Div. 1985) (because death is element in death by auto charge, it cannot be used as aggravating factor justifying more significant

punishment or overcoming presumption of non-incarceration); State v. Sainz, 210 N.J. Super. 17, 24 (App. Div. 1986), aff'd, 107 N.J. 283 (1987); State v. Reed, supra, 211 N.J. Super. at 188 (since death is element of manslaughter, it may not be used as element for assessing sentence); State v. Hodge, 207 N.J. Super. 363, 367 (App. Div. 1986), certif. den. 105 N.J. 518 (1986) (age of victim and parental status are elements of offense and thus cannot be aggravating factors). Note that "[d]ouble counting mitigating factors distorts the sentencing guidelines as much as double counting aggravating factors." State v. Teat, 233 N.J. Super. 368, 372-373 (App. Div. 1989)

b. Distinguishable Cases

Link distinguished impermissible "double-counting" cases from those situations "where the Legislature established as an element of a crime a variety of alternative fact patterns each of which is aggravating to a different degree." 197 N.J. Super. at 620. For example, "felony murder" is predicated on the commission of any of several differently graded "felonies" listed in N.J.S.A. 2C:11-3a(3). The variations in the felony element of felony murder allow a sentencing judge "to consider the particular felony and the way it was committed as 'an aggravating circumstance, as well as an essential element of felony murder'***." Link, supra, 197 N.J. Super. at 621, quoting State v. Rodriguez, 97 N.J. 263, 275 (1984)). Thus, the bar to double-counting is inapplicable where an essential element of a crime is not a specific fact, but a general fact encompassing a variety of alternative fact patterns, each of

which is aggravating to a different degree. Sainz, supra, 210 N.J. Super. at 24-25, citing Link, 197 N.J. Super. at 620-621.

Specifically, in Sainz the defendant pled guilty to possession of cocaine with intent to distribute. The court pointed out that the elements of the crime existed regardless of the intent to casually share the drugs with a friend or to participate in a widespread network of illegal drug traffic. 210 N.J. Super. at 25. Thus, the sentencing court had to identify and weigh as aggravating factors the nature and circumstances of the offense and defendant's role therein. Ibid.

In State v. Reed [II], 215 N.J. Super. 105, 108 (App. Div. 1987), certif. den. 108 N.J. 667 (1987), the court "rejected the suggestion" that the factor requiring imposition of a legislatively mandated parole ineligibility term cannot be considered as a basis for increasing the specific term above the presumptive and the period of parole ineligibility based thereon. Ibid. In Reed, defendant was convicted of reckless manslaughter, a Graves Act offense. His use or possession of a firearm was neither an element of the reckless manslaughter charge nor a basis for the degree of the crime. Id. at 108 n.1. However, use or possession of a firearm must be proved in order to impose the enhanced penalties mandated by the Graves Act. The court allowed circumstances involving defendant's use or possession of a firearm (defendant was knowledgeable about firearms; victim was shot at close range) to count as aggravating factors justifying a sentence above the minimum statutorily prescribed for a Graves Act offense. Id. at 107,

108. See Pych, supra, 213 N.J. Super. at 461 (involvement in organized criminal activity was not constituent part of offense of conspiracy to promote gambling and, thus, could be considered as aggravating factor in sentencing).

C. Unresolved Issues

1. Double-Counting

Reed [II] held that the same facts that initially were used to impose Graves Act sanctions could be used also as aggravating factors to raise defendant's sentence above the Graves Act presumptive term and to impose a maximum period of parole ineligibility where the factor was neither an element of the offense or a basis for the degree of crime. 215 N.J. Super. at 108. May the same mitigating factor be used to lower defendant's conviction to a crime of one degree lower under N.J.S.A. 2C:44-1f(2), as well as to sentence defendant below the presumptive term? (Note that the presumption of imprisonment that attaches to first and second degree offenders is preserved even when such an offender's conviction is reduced to that of the third degree under §44-1f(2). State v. O'Connor, 105 N.J. 399 (1987).)

Moreover, may the court rely on the same facts to support multiple aggravating or mitigating factors? For example, if injury to the victim is considered under aggravating factor (1), can it be double-counted for purposes of factor (2); may the facts constituting aggravating factor (6) (extent of prior record) be counted again for factor (3) (risk of future offenses)? See State v. Bey [II], 112 N.J. 123, 176 (1988) (in

capital case, prosecutor may use the same evidence to prove more than one aggravating factor, provided jury is made aware of double-counting). In Pillot, supra, 115 N.J. at 565 (1989), the Court approved using the same fact to support aggravating factors (3) and (9).

2. Aggravating Factor N.J.S.A. 2C:44-1a(6)

The aggravating factor enunciated at N.J.S.A. 2C:44-1a(6) ("The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted") lacks clear parameters. There is no definitive construction of "prior criminal record" and "seriousness of the offenses ***." See State v. Rodriguez, 202 N.J. Super. 543, 548 n.2 (Law Div. 1985) (prior verdicts which, because appeal is pending or time for appeal has not expired, cannot be considered "prior convictions" under N.J.S.A. 2C:44-4b, can constitute part of "criminal record" under N.J.S.A. 2C:44-1a(6)); State v. Taylor, 226 N.J. Super. 441, 453-454 (App. Div. 1988) (trial court properly considered defendant's juvenile record and four municipal court convictions); Pillot, supra, 115 N.J. at 565 (1989) (conviction that was pending appeal constituted part of defendant's criminal record); State v. Dunbar, 108 N.J. 80, 95-96 (1987) (generally, violent crimes weighted more than property crimes).

To what extent do expunged convictions, arrest record and record of dismissed charges count as prior criminal record? Cf. State v. Stackhouse, 194 N.J. Super. 371, 375 (App. Div. 1984) (expunged convictions, arrest record, and record of dismissed

charges are appropriate for consideration in sentencing). Cf. §3.3E(2), supra.

3. Consideration of Factors Not Listed in Code

It is unclear whether a sentencing judge is restricted to consideration of the aggravating and mitigating circumstances expressly enumerated under N.J.S.A. 2C:44-1a and b, respectively, or whether the court is empowered to consider "other" circumstances not listed in the code. That is, did the Legislature intend, not only to require the court to consider each enumerated aggravating factor, but also to prohibit the court from considering additional unlisted factors? It is also unclear whether the discretionary phrasing preserved under subsection b allows a court to consider mitigating factors not expressly enumerated in the statute. That is, must the court review the enumerated aggravating factors and no others; must the court restrict its consideration of mitigating factors to the statutory list, even though it may choose not to consider each and every factor listed?

In State v.Taylor, 226 N.J. Super. 441,, 453-454 (App. Div. 1988), the Appellate Division held that the trial court had properly considered defendant's juvenile and municipal court record, noting that, even if these were not included under the definition of prior criminal record, N.J.S.A. 2C:44-1a(6), N.J.S.A. 2C:44-1a "does not limit a sentencing judge to the 13 specific factors which must be considered in each case."

In State v. Ghertler, 114 N.J. 383, 390 (1989), involving a 24-year-old defendant, the Court rejected defendant's youth as

a mitigating factor, stating simply, "defendant's age was not a statutory mitigating factor." This suggests that the Court may be unwilling to go beyond the statutorily enumerated factors. (The Court also rejected the argument that defendant's drug dependency was a mitigating factor under N.J.S.A. 2C:44-1b(4).)

In State v. Wilson, 206 N.J. Super. 182 (App. Div. 1985), defendant entered into a plea agreement that stipulated he would be sentenced to an extended term with a mandatory minimum if he failed to appear at the time of sentencing. The trial court imposed such a sentence despite defendant's assertion of illness at a second sentencing hearing. Id. at 183. The Appellate Division reversed since it found that a sentence based entirely upon nonappearance in court constituted an illegal sentence:

> ... What is improper is a sentence based upon a factor which is unrelated to the sentencing criteria set forth in the Code of Criminal Justice. N.J.S.A. 2C:1-1 et seq. Nowhere in the code is it suggested that defendant's appearance for sentence is one of those criteria. State v, Roth, 95 N.J. 334 (1984); State v. Hodge, 95 N.J. 369 (1984).
>
> We do not say that the reasons for defendant's failure to appear for sentence may not be considered. They must, however, be relevant to identified sentencing guidelines.
> [Id. at 184]

In State v. Subin, 222 N.J. Super. 227 (App. Div. 1988), certif. den. 111 N.J. 580 (1988), another panel of the Appellate Division took a contrary position regarding whether a sentencing court can consider a defendant's failure to appear at sentencing as an aggravating factor in determining the appropriate sentence. Specifically, the Subin court said:

> ... Defendant's failure to appear at sentencing was relevant to at least two of the aggravating factors

> discussed by the trial court and enumerated in N.J.S.A. 2C:44-1a, specifically "[t]he risk that defendant will commit another offense," N.J.S.A. 2C:44-1a(3), and "the need for deterring defendant and others from violating the law." N.J.S.A. 2C:44-1a(9). [Id. at 240]

It is unclear how closely related to "identified sentencing guidelines," such as those enumerated in §44-1a and b, a factor must be in order to be "relevant" and thus an appropriate focus for the sentencing judge. The breadth of certain enumerated circumstances might allow many other unlisted factors to be considered sufficiently "relevant" for the sentencing judge's review.

Arguments can be made on either side of the question (i.e., law dealing with presentence investigation mandates broad inquiry into defendant's background; Roth and Hodge militate against expanding judicial discretion). The Task Force on Undue Sentencing Disparity and Improved Sentencing Procedures considered this question but reached no definitive conclusion.

4. Judicial Bias in Determining and Balancing Aggravating and Mitigating Factors

The aggravating and mitigating circumstances must be (1) determined and (2) balanced in order to impose sentence. The Roth Court addressed the balancing of these factors, eschewing a quantitative analysis. 95 N.J. at 368. "The factors are not interchangeable on a one-to-one basis. The proper weight to be given to each is a function of its gravity in relation to the severity of the offense." See Kruse, supra, 105 N.J. at 363. Indeed, the same offense committed by people of divergent

backgrounds and experience justifiably may be the subject of disparate sentences. Merlino, supra, 208 N.J. Super. at 258.

The problem is the lack of guidance on how to characterize a fact as aggravating or mitigating and on how to weigh each factor once characterized. State v. Rosenberger, 207 N.J. Super. 350, 353 (Law Div. 1985), citing Report of the Sentencing Guidelines Project to the Administrative Director of the Courts for the State of New Jersey (November 1978) at 2. For example, in State v. Gardner, 215 N.J. Super. 84, 91, (App. Div. 1987), remanded 113 N.J. 510 (1989), the court regarded defendant's alcohol consumption prior to his act of arson as a mitigating factor. Other courts could have characterized the same as an aggravating factor.

In State v. Rosenberger, supra, 207 N.J. Super. 350, the court called attention to these pitfalls in the sentencing process:

> ... Bereft of guidelines and precedent a judge must perforce resort to his own predilections, experiences and personal value system. And it is obvious that such a system will necessarily result in sentencing disparity because judges are left "wandering in deserts of uncharged discretion" causing them to impose "their own value systems insofar as they think about the problems at all". Frankel, Criminal Sentences (1972) at 7-8.
> [Id. at 353-354]

Although this passage refers to the difficulty in how to emphasize individual factors vis-a-vis the others, it is equally applicable to the characterization of facts as aggravating or mitigating.

The problem is unresolved. However, judges should be aware that they bring their own divergent prejudices to the analysis

of aggravating and mitigating factors. See Pillot, supra, 115 N.J. at 577 (Court found that defendant had received disparate treatment in sentencings by two different judges "for very similar crimes committed within a relatively brief period of time," and noted that the "differing attitude of each judge toward the defendant and the circumstances of her crimes, not the qualitative difference in the respective sentencing records, appears to have played a major role in this difference").

4.4 Discretionary Extended Terms[1]

A. Eligibility

Under N.J.S.A. 2C:44-3 the sentencing judge has the discretion, upon application by the prosecutor, to extend the term of imprisonment of first, second, or third degree offenders who are (1) persistent offenders, (2) professional criminals, or (3) hired criminals. E.g., State v. Dunbar, 108 N.J. 80, 87-88 (1987). These enhancement criteria focus on offender-related characteristics. State v. Maguire, 84 N.J. 508, 517 (1980). They are used to enhance ordinary terms on the basis of past history of criminality rather than on predictions of future criminality. Dunbar, supra, 108 N.J. at 87.

1. Persistent Offender

N.J.S.A. 2C:44-3a defines a persistent offender as a defendant over 21 years old with at least two prior convictions for crimes committed at different times when defendant was at least 18 years old. Further, defendant's most recent prior conviction or most recent release from imprisonment must be within 10 years of the date of the crime for which defendant is being sentenced.

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[1] This section deals with discretionary not mandatory extended terms. For example, N.J.S.A. 2C:44-3d requires second Graves Act offenders to be sentenced to extended terms (with a mandated term of parole ineligibility as well under N.J.S.A. 2C:43-6c). For further discussion, see §5.6 ("Graves Act"), infra. The Comprehensive Drug Reform Act of 1986 ("drug act"), upon application of the prosecutor, mandates extended terms for defendants who have met the criteria set forth in N.J.S.A. 2C:43-6f. See §5.3, infra, for further discussion.

a. Protection of the Public

In the context of a persistent offender,[2] the Dunbar Court surmised that the Legislature intended that defendant's extended term be predicated on the need to protect the public. 108 N.J. at 90-91. Thus, the sentencing court must decide "in what way the interest of the public will best be served." Id. at 91, citing State v. Ivan, 33 N.J. 197, 200 (1960). The evaluation requires the judge to consider the doctrine of deterrence, i.e., the protection of society from future offenses by defendant and others through punishment. Ibid. "Serious, harmful, and calculated offenses" trigger deterrence. Ibid., quoting State in the Interest of C.A.H. & B.A.R., 89 N.J. 326, 337 n.2 (1982).

The sentencing judge may consider any judgment entered prior to sentencing, provided there is no pending appeal or right of direct appeal that has not yet expired. This is true even if such judgment was for a crime committed after the offense for which defendant is now being sentenced. State v. Mangrella, 214 N.J. Super. 437, 445 (App. Div. 1986), certif. den. 107 N.J. 127 (1987).

Defendant may be sentenced as a persistent offender for a code crime when his or her prior convictions were Title 24 drug offenses. State v. Garcia, 204 N.J. Super. 202, 205 (App. Div.

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2 Dunbar dealt with a defendant sentenced as a persistent offender. Arguably, Dunbar's rationale is equally applicable to a defendant sentenced as a professional or hired criminal.

1985), certif. den. 103 N.J. 449 (1986); cf. State v. Tremblay, 185 N.J. Super. 137 (Law Div. 1982) (defendant convicted of Title 24 drug offenses with two previous non-drug crimes not subject to persistent offender status under the code, but rather limited to Title 24 punishment).[3]

Defendant's persistent offender status may not be based upon a conviction subsequently set aside. State v. Stackhouse, 194 N.J. Super. 371, 375 (App. Div. 1984). However, a set-aside conviction, as well as an expunged conviction, may be considered in imposing sentence. Ibid. See §4.3C(2), supra.

2. Professional Criminal

N.J.S.A. 2C:44-3b defines a professional criminal as one who, in conjunction with two or more persons as part of a continuing criminal activity, has committed a crime that shows he has knowingly devoted himself to criminal activity as a major source of livelihood. Cf. State v. Merlino, 208 N.J. Super. 247, 262 (Law Div. 1984) (State must bear burden of establishing by clear and convincing evidence that there is substantial likelihood that defendant is involved with organized criminal activity for court's consideration of aggravating factor N.J.S.A. 2C:44-1a(5) in imposition of sentence).

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3 Note that under the new drug act offenders may be subject to discretionary extended terms under N.J.S.A. 2C:44-3.

3. Hired Criminal

N.J.S.A. 2C:44-3c defines a hired criminal as a defendant who committed the crime for valuable consideration, the amount of which was unrelated to the proceeds of the crime, or a defendant who procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

B. Hearings

In order to impose an extended term under N.J.S.A. 2C:44-3, the court must hold a post-conviction hearing in which the State has the burden of proof that defendant falls into an enhancement criteria under §44-3. Defendant has the right to present evidence and cross-examine witnesses. State v. Maguire, supra, 84 N.J. at 518; N.J.S.A. 2C:44-6e.

Defendant must be provided with written notice of the ground on which the State predicates the proposed extended term. §44-6e.

If the judge chooses to impose an extended term, she or he must state the reasons on the record. State v. Mangrella, supra, 214 N.J. Super. at 445, citing N.J.S.A. 2C:43-2e; R. 3:21-4(e).

> ... Those reasons should include consideration of the chronology of events, including the impact of prior convictions involving offenses which occurred chronologically after the one before the court or judgments entered after the offense then before the court for sentencing.
> [214 N.J. Super. at 445]

Cf. State v. Cartier, 210 N.J. Super. 379, 381-382 (App. Div. 1986) (extended term cannot be imposed unless defendant is specifically apprised at time of plea by judge of potential

number of years to which he is exposed under N.J.S.A. 2C:43-7). See §2.1C(1), supra.

C. Scheme

1. Range and Presumptive Terms

The range of extended sentences is set forth at N.J.S.A. 2C:43-7. The presumptive sentence for each extended term is prescribed at N.J.S.A. 2C:44-1f(1). See Dunbar, supra, 108 N.J. at 88. The following chart summarizes the possibilities:

Crime	Discretionary Extended Terms* Range (N.J.S.A. 2C:43-7)	Presumptive Term (N.J.S.A. 2C:44-1f)
Aggravated manslaughter under 2C:11-4c; or kidnapping under 2C:13-1c	30 years - life	Life imprisonment
All other 1st degree crimes except murder	20 years - life	50 years
Second degree crimes	10 - 20 years	15 years
Third degree crimes	5 - 10 years	7 years

* This chart does not include mandated extended terms, such as those required under the new drug act or the Graves Act.

The balance of aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1a and b determines whether the sentence imposed is higher or lower than the presumptive term. N.J.S.A. 2C:44-1f; Dunbar, supra, 108 N.J. at 88. See this section D, infra, for further discussion.

2. Parole Ineligibility

The judge may also impose a discretionary term of parole ineligibility on the extended term. N.J.S.A. 2C:43-7b. See §4.5 for further discussion.

3. Multiple Discretionary Terms

N.J.S.A. 2C:44-5a(2) limits the judge to the imposition of one extended term. State v. Connell, 208 N.J. Super. 688, 691 (App. Div. 1986), held that this provision restricted the judge's authority to impose discretionary extended terms. See State v. Cito, 213 N.J. Super. 296, 304 (App. Div. 1986), certif. den. 107 N.J. 141 (1987) (trial judge could not properly impose more than one sentence for extended term). However, Connell also held that the prohibition against multiple extended terms in N.J.S.A. 2C:44-5a(2) did not apply to mandated extended terms under the Graves Act. 208 N.J. Super. at 691. But see State v. Latimore, 197 N.J. Super. 197 (App. Div. 1984), certif. den. 101 N.J. 328 (1985) (multiple extended terms impermissible even for second Graves Act offenders); see §5.6E(3), infra, for further discussion.

D. Standard

In Dunbar, supra, 108 N.J. at 89, the Court described the multi-step process of the code's extended sentencing scheme:

> ... First, the sentencing court must determine whether the minimum statutory predicates for subjecting the defendant to an extended term have been met. Second, the court must determine whether to impose an extended term. Third, it must weigh the aggravating and mitigating circumstances to determine the base term of the extended sentence. Finally, it must determine whether to impose a period of parole ineligibility.

There is no explicit standard in the code for imposition of an extended term with respect to defendants who have met the enhancement criteria set forth in N.J.S.A. 2C:44-3a, b, or c. Dunbar, supra, 108 N.J. at 89. In making the second

determination, the court should focus on "what is required for the protection of the public." Id. at 90-91; see State v. Streater, 233 N.J. Super. 537, 545 (App. Div. 1989).

In making the third determination, the court's primary focus should be on the offense -- "on the conduct that occasions the sentence." Dunbar, supra, 108 N.J. at 91-92. Defendant's prior record is an appropriate consideration, provided it is not used to "double count," that is, the same record justifying the extended term may not also be regarded as an aggravating factor in fixing the quantum of the extended term. State v. Jefimowicz, 230 N.J. Super. 42, 53 (App. Div. 1989), discussing Dunbar, supra, 108 N.J. at 91-92. In Dunbar, defendant's prior record was used to determine his eligibility for an extended term and the length of that term. 108 N.J. at 92. In addition, factors independent of those establishing defendant's eligibility for an extended term, particularly those characterizing his response to prior incarceration, are fully relevant in adjusting the length of the extended term. Such factors may include (1) juvenile record, (2) parole or probation records, and (3) overall response to prior attempts at rehabilitation. Ibid.

For the fourth determination required in extended term sentencing (i.e., whether to impose a parole ineligibility term), see §4.5B(2), infra.

4.5 Discretionary Term of Parole Ineligibility[1]

A. Scheme

After determining defendant's base sentence when imprisonment is appropriate, the court must decide whether to impose a term of parole ineligibility. State v. Kruse, 105 N.J. 354, 359 (1987). N.J.S.A. 2C:43-6b provides for the discretionary imposition of a period of parole ineligibility:[2]

> As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsections a. and b. of 2C:44-1, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term set pursuant to a maximum period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

See State v. Martelli, 201 N.J. Super. 378, 382 (App. Div. 1985).

Thus, the judge may adjust defendant's sentence by increasing the "real time" served through imposition of a term during which defendant may not be considered for release from

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1 The code and case law refer to these discretionary terms as "minimum terms" or "mandatory minimums." In this manual, the discretionary imposition of a term of parole ineligibility is referred to as a "discretionary term of parole ineligibility," as distinguished from a "mandated term of ineligibility," which is statutorily required.

2 This section deals with discretionary not mandated terms of parole ineligibility. For mandated terms of parole ineligibility see, infra, §5.6 ("Graves Act"); §5.3 ("Comprehensive Drug Reform Act"); §5.4 ("Sex Offenders").

prison on parole. Such a consequence must be taken into consideration by the court in imposing sentence. See State v. Dunbar, 108 N.J. 80, 95 (1987); State v. Heisler, 192 N.J. Super. 586, 589 (App. Div. 1984); N.J.S.A. 2C:44-1c(2) (directing judicial consideration of parole law including Title 30). "[A]lthough fitness for parole remains a determination for parole authorities to make, *** setting the parole eligibility date has become a judicial responsibility to be exercised at the time of sentencing and within the bounds set by the Legislature." N.J. Parole Board v. Byrne, 93 N.J. 192, 205 (1983).

Imposition of a term of parole ineligibility is the exception and not the rule. Kruse, supra, 105 N.J. at 359, quoting Martelli, supra, 201 N.J Super. at 382-383. It may not be imposed when a defendant is sentenced to an indeterminate term at the Youth Correctional Institution Complex. State v. White, 186 N.J. Super. 15, 18 (Law Div. 1982); State v. Groce, 183 N.J. Super. 168, 171 (App. Div. 1982). However, the judge may recommend that a youthful offender convicted of a Graves Act offense (requiring a mandated term of parole ineligibility) be incarcerated at the Youth Correctional Institution Complex at the discretion of the Commissioner of Corrections pursuant to N.J.S.A. 2C:43-5.

A period of parole ineligibility may not be imposed on a county jail sentence imposed as a condition of probation. State v. Hartye, 105 N.J. 411, 419 (1987). However, a period of parole ineligibility may be imposed on a county jail

sentence imposed independently for a crime (i.e., fourth degree crime). State v. Guzman, 199 N.J. Super. 346 (Law Div. 1985).

The court may not sentence defendant to an aggregate term of parole ineligibility on multiple counts; rather, if appropriate, an individual parole ineligibility term should be imposed on each count or specific term sentenced. State v. Alevras, 213 N.J. Super. 331, 342 (App. Div. 1986).

B. Standard

1. Imposition on an Ordinary Sentence

If the court is "clearly convinced that the aggravating factors substantially outweigh the mitigating factors" listed in §44-1a and -b, a period of parole ineligibility may be imposed up to one-half of defendant's term of imprisonment. N.J.S.A. 2C:43-6b; Martelli, supra, 201 N.J. Super. at 382. The court relies on the same aggravating and mitigating factors to determine the base sentence and the terms of parole ineligibility. However, the standard for balancing the factors in imposing a term of parole ineligibility is harsher:

> In determining the appropriate sentence, the court must decide whether there is a preponderance of aggravating or mitigating factors. When determining parole ineligibility, by contrast, the court must be "clearly convinced that the aggravating factors substantially outweigh the mitigating" factors.
> [Kruse, supra, 105 N.J. at 359]

In rare cases a defendant sentenced to the presumptive term may also be sentenced to a term of parole ineligibility. Id. at 361-362. These circumstances are limited, however, because the aggravating factors must substantially outweigh the mitigating

factors to allow the imposition of parole ineligibility. If the aggravating factors outweigh the mitigating factors, then the sentencing judge normally would raise the presumptive term. See, e.g., State v. Bogus, 223 N.J. Super. 409 (App. Div. 1988), certif. den. 111 N.J. 567 (1988) (reversing sentence where trial court imposed period of parole ineligibility on a presumptive term); Alevras, supra, 213 N.J. Super. at 342 (in dicta court noted that imposition of sentence at bottom of range required factfinding inconsistent with that necessary for imposition of period of parole ineligibility); State v. Nemeth, 214 N.J. Super. 324 (App. Div. 1986) (judge cannot downgrade crime and also impose term of parole ineligibility since governing standards for each are incompatible); but see Martelli, supra, 201 N.J. Super. at 383 ("lengthening a sentence and imposing period of parole ineligibility are two separately available responses to excess of aggravating circumstances").

2. Imposition on Extended Term

N.J.S.A. 2C:43-7b provides for the imposition of a term of parole ineligibility pursuant to an extended term. Such a term may not exceed one-half of the authorized term or a term of 25 years where life imprisonment was imposed. N.J.S.A. 2C:43-7b contains no standard for the imposition of a term of parole ineligibility. In State v. Dunbar, 108 N.J. 80, 92-93 (1987), the Court held that the standard expressed in N.J.S.A. 2C:43-6b also governs 2C:43-7b. Thus, in order to impose a period of parole ineligibility on an extended term, the court must be

"clearly convinced that the aggravating factors substantially outweigh the mitigating factors."[3] 108 N.J. at 92. Unlike ordinary terms, it is appropriate to impose parole ineligibility terms on presumptive extended terms. Id. at 94.

a. Prior Record

In performing this balance of aggravating and mitigating factors, defendant's prior record is weighted differently in imposing the term of parole ineligibility as distinguished from the extended term:

> ... [P]rior offenses should not be considered (or at least not as much) in deciding whether the sentence should be increased above or decreased below the presumptive term but should be used in deciding on parole ineligibility. Supra at 91. A court that has decided to impose an extended term in the interest of public protection on the basis of defendant's prior offenses may conclude quite correctly that a presumptive extended term reflects the appropriate balance of other aggravating factors against mitigating, but that the totality of aggravating factors, including the prior record, clearly and substantially outweigh the mitigating factors and calls for a period of parole ineligibility.
> [108 N.J. at 94]

3. Double-Counting

It is impermissible for the judge to consider as an aggravating factor an essential element of a crime in the imposition of a period of parole ineligibility. State v. Link, 197 N.J Super. 615, 620 (App. Div. 1984), certif. den. 101 N.J. 234 (1985). See §4.3B(3) ("Aggravating and Mitigating

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3 This same standard was imposed when a Graves Act offender was sentenced to a mandated term of parole ineligibility above the statutory minimum. State v. Reed [II], 215 N.J. Super. 105, 107 (App. Div. 1987), certif. den. 108 N.J. 667 (1987); see §5.6 ("Graves Act"), infra.

Circumstances -- Double-Counting of Factors"), supra; cf. Reed [II], supra, 215 N.J. Super. at 108 (factor requiring imposition of legislatively mandated term of parole ineligibility may also be considered in sentencing above presumptive term and imposing maximum period of parole ineligibility based thereon).

C. On the Record

The court must specifically place on the record the basis for its imposition of a term of parole ineligibility.

> ... To provide an intelligible record for review, the trial court should identify the aggravating and mitigating factors, describe the balance of those factors, and explain how it determined defendant's sentence.
> [Kruse, supra, 105 N.J. at 360]

See N.J.S.A. 2C:43-2e; 2C:44-1f; R. 3:21-4(e); Martelli, supra, 201 N.J. Super. at 385 (court must state factors it considered and how it weighed those factors); State v. Guzman, 199 N.J. Super. 346, 351 (Law Div. 1985) (statement of reasons must indicate why aggravating factors substantially outweigh mitigating and why parole ineligibility terms imposed); Dunbar, supra, 108 N.J. at 97.

The court must also satisfy itself in the context of a plea bargain that defendant fully understands that a term of parole ineligibility can be made part of the sentence. State v. Kovack, 91 N.J. 476, 484 (1982). See §2.1C(1) ("Entry of Plea"), supra.

4.6 Degree Reduction in Sentencing

A. Scheme

N.J.S.A. 2C:44-1f(2) provides for the reduction of one degree for convictions of first or second degree crimes for sentencing purposes under certain circumstances:

> In cases of convictions for crimes of the first or second degree where the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands, the court may sentence the defendant to a term appropriate to a crime of one degree lower than that of the crime for which he was convicted. If the court does impose sentence pursuant to this paragraph, or if the court imposes a noncustodial or probationary sentence upon conviction for a crime of the first or second degree, such sentence shall not become final for 10 days in order to permit the appeal of such sentence by the prosecution.[1]

B. Standard

A judge may sentence defendant to a term appropriate for a crime one degree lower than that of the conviction if the judge is "clearly convinced that the mitigating factors substantially outweigh the aggravating factors" and the interest of justice so demands. N.J.S.A. 2C:44-1f(2); State v. Roth, 95 N.J. 334, 359 (1984); State v. O'Connor, 105 N.J. 399, 407 (1987). Thus, if the court determines that a defendant convicted of a second degree crime should be sentenced under §44-1f(2), that defendant could be sentenced to a four-year custodial term (the presumptive sentence for third degree offenses (see §44-1f(1)(d)), or to a sentence within the ordinary range of a

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[1] See Part VIII, infra, for discussion with respect to appeals.

third degree crime as set forth in §43-6a. See, e.g., State v. Partusch, 214 N.J. Super. 473, 476 (App. Div. 1987).

C. Applicability of Presumption of Imprisonment

If defendant's sentence has been reduced from second to third degree for sentencing under N.J.S.A. 2C:44-1f(2), defendant is not entitled to the benefit of the presumption against imprisonment for first-time offenders convicted of a third (or fourth) degree crime under N.J.S.A. 2C:44-1e. State v. Jarbath, 114 N.J. 394, 413 (1989). "Rather, the presumption of imprisonment embodied in N.J.S.A. 2C:44-1d applies because the defendant remains 'convicted' of a second degree crime when sentenced as a third degree offender under N.J.S.A. 2C:44-1f(2)." Partusch, supra, 214 N.J. Super. at 476. Accord O'Connor, supra, 105 N.J. at 407 (Court rejected plea-bargained sentence characterized as non-custodial for second-degree offender who had not overcome presumption of imprisonment); State v. Nemeth, supra, 214 N.J. Super. at 327 (since no plea bargain is permissible for illegal sentence, preponderance of aggravating factors should have precluded downgrade of crime); see also State v. Williams, 225 N.J. Super. 462 (Law Div. 1988); §4.2B ("Presumption of Imprisonment -- First or Second Degree Offenses"), supra, for further discussion.

4.7 Mandated Terms of Imprisonment and Parole Ineligibility

A judge must sentence certain offenders under the code to a term of imprisonment. The following is a list of offenses mandating incarceration. For further discussion, see Part V, infra.

GRAVES ACT - Persons convicted of possession of a firearm with intent to use it against the person of another or committing certain offenses while using or possessing a firearm.

Ordinary: Pursuant to N.J.S.A. 2C:43-6c: Minimum Parole Ineligibility Term (hereafter M.P.I.) 1/3 to 1/2 of sentence or 3 years, whichever is greater, or 18 months for a fourth degree crime.

Extended: Pursuant to N.J.S.A. 2C:43-7c: M.P.I. 1/3 to 1/2 of sentence or 5 years, whichever is greater. Where the sentence is life, the M.P.I. is 25 years, except where a life term is given for violating N.J.S.A. 2C:35-3, in which case the minimum term is 30 years.

As to plea bargaining on Graves Act cases, see Supreme Court Memorandum of April 27, 1981 (text follows N.J.S.A. 2C:43-6d).

MURDER - Persons convicted of N.J.S.A. 2C:11-3a(1),(2), or (3) where the death penalty is not imposed. Pursuant to N.J.S.A. 2C:11-3b: M.P.I. Term - 30 years.

KIDNAPPING - If victim is less than 16 and if (a) an aggravated sexual assault, sexual assault or aggravated criminal sexual contact was committed against the victim, (b) certain crimes under the endangering welfare of children statute (N.J.S.A. 2C:24-4b) were committed against the victim, or (c) actor sells or delivers victim to another for pecuniary gain where victim not returned to parent or guardian: M.P.I. Term - 25 years. N.J.S.A. 2C:13-1c(2).

DEATH BY AUTO - Persons convicted of death by auto who were under influence of liquor or certain drugs: M.P.I. Term - 270 days incarceration or 270 days community service. N.J.S.A. 2C:11-5.

RECKLESSLY ENDANGERING ANOTHER PERSON - Where offender purposely or knowingly gives harmful treat, candy, gift or food: M.P.I. Term - not less than 6 months. N.J.S.A. 2C:12-2b(2).

SEX OFFENDERS - Where a person convicted of second or subsequent offense (aggravated sexual assault, sexual assault, aggravated criminal sexual contact or similar statute): M.P.I. Term - not less than 5 years. N.J.S.A. 2C:14-6.

IMPLEMENTS FOR ESCAPE - Where offender knowingly or purposely introduces within an institution or detention facility or knowingly and unlawfully provides an inmate with a weapon, tool, instrument, document or other thing useful for escape: M.P.I. Term - not less than 3 years if the item was a weapon as defined in N.J.S.A. 2C:39-1r. N.J.S.A. 2C:29-6a(1). Similarly, where an inmate unlawfully procures, makes or otherwise provides self with, or possesses a weapon as defined in N.J.S.A. 2C:39-1r as an implement of escape: MPI term-not less than 3 years. N.J.S.A. 2C:29-6a(2).

STATE TAX LAW VIOLATIONS - Persons convicted of a third or subsequent offense involving state taxes shall be sentenced to a term of imprisonment. N.J.S.A. 2C:43-6e.

LEADERS OF NARCOTICS TRAFFICKING NETWORK - Where a person conspires with others as an organizer, supervisor, financier or manager, to engage for profit in a scheme to unlawfully manufacture, distribute, dispense, bring into or transport methamphetamine, LSD, phencyclidine or any CDS classified in Schedule I or II, or any analog thereof: M.P.I. Term - 25 years. (Note: If extended term ordered, M.P.I. Term - 30 years pursuant to N.J.S.A. 2C:43-7c.) N.J.S.A. 2C:35-3.

MAINTAINING OR OPERATING A CDS SUBSTANCE FACILITY - Where a person knowingly maintains or operates any premises, place or facility used for the manufacture of methamphetamine, LSD, phencyclidine or any substance classified as a narcotic drug in Schedule I or II, or the analog of any such substance, or a person who knowingly aids, promotes, finances, or otherwise participates in the maintenance of such a premises: M.P.I. Term - 1/3 to 1/2 of the sentence. N.J.S.A. 2C:35-4. (See N.J.S.A. 2C:43-6f for extended term M.P.I.)

MANUFACTURING, DISTRIBUTING OR DISPENSING HEROIN OR COCAINE - Persons who manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a CDS, a CDS analog or counterfeit CDS where the drug is heroin or cocaine, or compounds, derivative, etc., and where the quantity is 5 ounces or more: M.P.I. Term - 1/3 to 1/2 of the sentence. N.J.S.A. 2C:35-5b(1). (See N.J.S.A. 2C:43-6f for extended term M.P.I.)

MANUFACTURING, DISTRIBUTING OR DISPENSING LSD OR PHENCYCLIDINE - Persons who manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense CDS, a CDS analog or counterfeit CDS where the drug is LSD and where the quantity is 100 milligrams or more, or phencyclidine, 10 grams or more: M.P.I. Term - 1/3 to 1/2 of the sentence. N.J.S.A. 2C:35-5b(6). (See N.J.S.A. 2C:43-6f for extended term M.P.I.)

EMPLOYING A JUVENILE IN A DRUG DISTRIBUTION SCHEME - Any person who is at least 18 who knowingly uses, solicits, directs or hires a person 17 years of age or less to violate N.J.S.A. 2C:35-4 or N.J.S.A. 2C:35-5a: M.P.I. Term - 1/3 to 1/2 of the sentence or 5 years, whichever is greater. N.J.S.A. 2C:35-6. (See N.J.S.A. 2C:43-6f for extended term M.I.P.)

CONTROLLED DANGEROUS SUBSTANCE NEAR OR ON SCHOOL PROPERTY - Any person who distributes, dispenses or possesses with intent to distribute a CDS or CDS analog while on school property or school bus, or within 1000 feet thereof: if less than one ounce of marijuana, M.P.I. Term - 1/3 to 1/2 of sentence or 1 year, whichever is greater; if any other drug or larger amount of marijuana, M.P.I. Term - 1/3 to 1/2 of sentence or 3 years, whichever is greater. N.J.S.A. 2C:35-7. (See N.J.S.A. 2C:43-6f for extended term M.P.I.)

4.8 Suspension of Sentence or Probation

A. In General

The court is authorized to suspend the imposition of sentence (see N.J.S.A. 2C:43-2b, 2C:43-4a) or to sentence the offender to be placed on probation in most cases. A sentence of probation may be ordered either alone, (N.J.S.A. 2C:43-2b), or in conjunction with other sanctions such as a term of incarceration, (N.J.S.A. 2C:43-2b(2)), or payment of a fine or restitution, or both (N.J.S.A. 2C:43-2b(1)).

The court is also specifically authorized, where it orders probation or suspends the imposition of sentence, to order the postponement, suspension or revocation for a period of two years of the driver's license, registration certificate, or both, of persons convicted of a crime, disorderly persons or petty disorderly persons offense in the course of which a motor vehicle was used. N.J.S.A. 2C:43-2c. See State v. Gross, 225 N.J. Super. 28 (App. Div. 1988) (Title 2C license suspension provision does not apply to Title 39 motor vehicle offenses).

As to the suspension of imposition of sentence on a corporation, see N.J.S.A. 2C:43-4.

B. When Probation Is Not Authorized

The court is precluded from suspending the imposition of sentence or making any other noncustodial disposition of any person sentenced: (1) as a second or subsequent offender under N.J.S.A. 2C:14-2 (aggravated sexual assault and sexual assault), N.J.S.A. 2C:14-3a (aggravated criminal sexual contact), or any similar federal statute or statute of this or any other state

for a substantially similar offense, N.J.S.A. 2C:14-6; (2) for possession of a firearm with intent to use it against the person of another or committing certain offenses while using or possessing a firearm, N.J.S.A. 2C:43-6c, -7c[1]; (3) murder, where the death penalty is not imposed, N.J.S.A. 2C:11-3b; (4) kidnapping, under certain circumstances, N.J.S.A. 2C:13-1c(2); (5) death by auto, where 270 days community service not ordered, N.J.S.A. 2C:11-5; (6) recklessly endangering another person where the offender purposely or knowingly gives any harmful treat, candy, gift or food, N.J.S.A. 2C:12-2b(2); (7) implements for escape, where the offender brings a weapon as defined in N.J.S.A. 2C:39-1r into an institution or detention facility, or where an inmate possesses such a weapon, N.J.S.A. 2C:29-6; (8) persons convicted of a third or subsequent offense involving state taxes, N.J.S.A. 2C:43-6e; (9) being a leader of a narcotics network, N.J.S.A. 2C:35-3; (10) maintaining or operating a controlled dangerous substance facility, N.J.S.A. 2C:35-5b(1); (11) manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute or dispense a controlled dangerous substance or controlled dangerous substance analog where: (a) the drug involved is heroin, or cocaine and the quantity is five ounces or more, N.J.S.A. 2C:35-5b(1),

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[1] N.J.S.A. 2C:43-6.2 was enacted, effective April 14, 1989, to allow the assignment judge, only if the prosecutor approves, to place a first-time Graves Act offender on probation (or to reduce the minimum mandatory term to one year) if imposition of such a term would "not serve the interests of justice."

(b) the drug involved is LSD (100 milligrams or more) or phencyclidine (10 grams or more), N.J.S.A. 2C:35-5b(6); (12) employing a juvenile in a drug distribution scheme, N.J.S.A. 2C:35-6; or (13) distribution or possession with intent to distribute on school premises or bus, or within 1000 feet thereof, N.J.S.A. 2C:35-7.

As to the general presumptions of imprisonment and non-imprisonment in specified circumstances, see N.J.S.A. 2C:44-1d and e.

C. Conditions

When the court places an offender on probation or suspends imposition of sentence, it is required to attach such reasonable conditions as it deems necessary to insure that the offender will lead a law-abiding life or as likely to assist him to do so. N.J.S.A. 2C:45-1a. The conditions may be provided in a set of standardized conditions promulgated by the county probation department and approved by the court. See also R. 3:21-7a.

In N.J.S.A. 2C:45-1b, the code provides that the court may order the defendant to perform the following as a condition of its order of probation, or order suspending imposition of sentence:

(1) To support his dependents and meet his family responsibilities;

(2) To find and continue in gainful employment;

(3) To undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose;

(4) To pursue a prescribed secular course of study or vocational training;

(5) To attend or reside in a facility established for the instruction, recreation or residence of persons on probation;

(6) To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;

(7) Not to have in his possession any firearm or other dangerous weapon unless granted written permission;

(8) To make restitution of the fruits of his offense, in an amount he can afford to pay, for the loss or damage caused thereby;

(9) To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his address or his employment;

(10) To report as directed to the court or the probation officer, to permit the officer to visit his home, and to answer all reasonable inquiries by the probation officer;

(11) To pay a fine;

(12) To satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience;

(13) To require the performance of community-related service.

N.J.S.A. 2C:45-1b grants the authority to sentence an offender to a term of incarceration as a condition of probation. However, no mandatory minimum may be imposed to the term. State v. Hartye, 105 N.J. 411, 419 (1987). It is clear that under N.J.S.A. 2C:45-1b(12) other conditions of probation not specifically enumerated in the statute are permissible. Courts have upheld conditions of probation which have required defendants to: execute a waiver of his extradition rights, State v. Maglio, 189 N.J. Super. 257 (Law Div. 1983); allow a

search of his person and any places or things under his immediate control, State v. Bollinger, 169 N.J. Super. 553 (Law Div. 1979); refrain from sexual contact with other drug program participants, State v. Reyes, 207 N.J. Super. 126, certif. den. 103 N.J. 499 (1986); and suffer revocation of driving privileges, State in the Interest of R.H., 170 N.J. Super. 518 (J.&D.R.Ct. 1979). Both Bollinger and State in the Interest of R.H. are pre-code cases. An implied condition in all cases is that the probationer will not be convicted of another offense while on probation. See State v. Zachowski, 53 N.J. Super. 431 (App. Div. 1959).

The offender must be given a copy of both the terms of probation or suspension of imposition of sentence and of any requirements imposed pursuant to N.J.S.A. 2C:45-1. Such terms or requirements are to be stated with sufficient specificity so that the offender can be guided accordingly. The defendant must acknowledge receipt of these documents and consent to their terms in writing. N.J.S.A. 2C:45-1d. R. 3:21-7a further requires that a copy of the order for probation or suspension of imposition of sentence, together with the standard and special conditions, be explained to the offender by the probation officer and be signed by both.

D. Costs

There is no authority under the code to require the probationer to post a bond or pay the costs of prosecution. Such a requirement has limited rehabilitative value, discriminates against indigents, and burdens the right to trial.

II Final Report of the New Jersey Criminal Law Revision Commission: Commentary (1971) at 343-344. A court may not impose costs in excess of those authorized by the appropriate statutes as a condition of probation pursuant to now repealed N.J.S.A. 2A:168-2. State v. Mulvaney, 61 N.J. 202 (1972).

E. Appeal by the State from a Sentence of Probation or Suspension

N.J.S.A. 2C:44-1f(2) provides that the State may appeal where a defendant convicted of a first or second degree crime is sentenced to a term appropriate to a crime of one degree lower than that of the crime for which he was convicted, or where the court imposes a noncustodial or probationary sentence. In State v. Roth, 95 N.J. 334 (1984), the Court found that this provision was procedurally fair and that it did not offend constitutional principles. Id. at 345. Appeal by the State is discussed in greater detail in Part VIII, infra.

F. Duration of the Period of Suspension or Probation

1. Initial Period

The period of suspension of the imposition of sentence cannot exceed the statutory maximum for the offense or five years, whichever is less. N.J.S.A. 2C:45-2a. The duration of probationary sentences shall be for a period between one and five years. N.J.S.A 2C:45-2a. A person convicted of an offense carrying a statutory maximum of less than five years may nevertheless be placed on probation for up to five years. See State v. Dove, 202 N.J. Super. 540, 542 (Law Div. 1985).

2. Extension of Period of Suspension or Probation

If, upon termination of a period of suspension or probation, the defendant has failed to make restitution (N.J.S.A. 2C:45-1b(8)) or has failed to pay a fine imposed as a condition of the order (N.J.S.A. 2C:45-1b(1)), the court may extend the probationary period for an additional period not to exceed that authorized by N.J.S.A. 2C:45-2a. This extension may be entered by the court without the defendant's personal appearance upon consent. N.J.S.A. 2C:45-2c. Under pre-code law, such an extension was not authorized solely for the purpose of monitoring payment of restitution. See State v. Blassingale, 163 N.J. Super. 110 (App. Div. 1978), certif. dismissed as improvidently granted 81 N.J. 48 (1979).

3. Termination of Period of Suspension or Probation

The court may, on its own motion or on application of the probation officer or the defendant, discharge a defendant from suspension or probation before the completion of the term specified in the order. N.J.S.A. 2C:45-2b. Either early termination, or termination at the end of the period of suspension or probation, satisfies the sentence for the offense and relieves the defendant of any further obligation imposed by the court order. N.J.S.A. 2C:45-2c. Note, however, the exceptions to the general rule stated at §4.8F(2). See also §4.8G regarding procedures after revocation of probation or suspension of sentence.

G. Change in Conditions

The conditions imposed on a defendant may be modified or additional conditions, as authorized by N.J.S.A. 2C:45-1, may be imposed by the court during the period of suspension or probation, upon application of a probation officer or the defendant or upon the court's own motion. N.J.S.A. 2C:45-2b. The court is also empowered to eliminate any condition that imposes an unreasonable burden on the defendant. N.J.S.A. 2C:45-2b. However, the court is required, prior to deleting, adding or modifying conditions of probation, to hold a hearing upon written notice to the defendant of the grounds on which such action is proposed. At this hearing the defendant has the right to controvert evidence against him, to offer evidence in his defense and to be represented by counsel. N.J.S.A. 2C:45-4. See also §4.8G regarding procedures for revoking suspension or probation.

While the statute seems clear that a court may modify or add conditions at any time during the period of suspension or probation provided certain procedural guidelines are followed, at least one commentator has questioned whether the court may, absent a revocation situation, increase conditions without the probationer's consent once service of the term has begun, in light of State v. Ryan, 86 N.J. 1, 10-12 (1981), cert. den. 454 U.S. 880 (1981), and State v. Jones, 188 N.J. Super. 201, 206-207 (App. Div. 1983). See Cannel, Title 2C, Comment N.J.S.A. 2C:45-2 at 737-738 (1989). These concerns do not apply where the court is reducing conditions such as the custodial

aspect of probation, in whole or in part, at any time prior to or after commencement of the sentence. See State v. Postal, 204 N.J. Super. 94 (Law Div. 1985); see also State v. Robinson, 198 N.J. Super. 602 (Law Div. 1984).

H. Procedures for Revoking Suspension of Sentence or Probation

1. General

At any time prior to defendant's discharge from the period of probation or suspension, the court may require the defendant to appear by issuing a summons or an arrest warrant. N.J.S.A. 2C:45-3a(1). A defendant may also be arrested without a warrant by a probation officer or peace officer, on request of the chief probation officer, where there is probable cause to believe that the defendant has either failed to comply with a condition of the order or has committed another offense. N.J.S.A. 2C:45-3a(2).

2. Bail

If probable cause exists to believe the defendant has committed another offense or if the defendant has been held to answer therefore, the court may commit the defendant without bail pending the determination of the charge by the court having jurisdiction. N.J.S.A. 2C:45-3a(3). (Alternatively, the court may proceed with a probation revocation hearing. State v. Robinson, 232 N.J. Super. 21, 25 (App. Div. 1989).) See also R. 3:21-7b. This provision is not violative of N.J. Const. (1947), Art. I, §11, which provides that all persons are bailable before conviction. State v. Garcia, 193 N.J. Super.

334 (App. Div. 1984). In State v. Serio, 168 N.J. Super. 394 (Law Div. 1979), the court temporarily suspended the probation of a defendant indicted on one charge and pending indictment on others, and committed the defendant to the county jail until the charges were resolved, at which time a full hearing on probation revocation would be held.

3. Hearing Requirement

Prior to the revocation of suspension of sentence or probation, or the deletion, addition or modification of conditions of probation, the defendant must be provided with written notice of the grounds for the proposed action and shall be afforded a hearing at which he has the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel. N.J.S.A. 2C:45-4. In Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the Court held that a probationer is entitled to: (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finder as to the evidence relied on and the reasons for revoking [probation or] parole. 411 U.S.

at 786, quoting from Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); see also State v. Reyes, 207 N.J. Super. 126, 135 (App. Div. 1986), certif. den. 103 N.J. 499 (1986), citing with approval the pre-code cases of State v. Generoso, 156 N.J. Super. 540 (App. Div. 1978), State v. Johnson, 133 N.J. Super. 457 (App. Div. 1975), and State v. Zachowski, 53 N.J. Super. 431 (App. Div. 1959), which cases recognized that New Jersey has not imposed stricter constitutional standards on probation violations than the United States Constitution demands. New Jersey's statute embodies these rights and also provides for representation of counsel at a hearing on a revocation or modification of conditions of suspension or probation. N.J.S.A. 2C:45-4; Reyes, supra, 207 N.J. Super. at 134.

The violation of probation hearing is summary in nature. The Supreme Court has stressed the informal and flexible nature of revocation hearings and the lack of need or justification for the range of protections available to defendants in criminal trials. See Morrissey v. Brewer, supra, 408 U.S. at 499. Since the hearing is not a critical stage in the criminal process, the defendant's right to remain silent does not apply. State v. Reyes, supra, 207 N.J. Super. at 138, citing State v. Johnson, 186 N.J. Super. 423 (App. Div. 1982), and there is no constitutional bar to the admission and consideration of demonstratively reliable evidence such as affidavits, depositions, documentary evidence and even hearsay evidence. State v. Reyes, supra, 207 N.J. Super. at 138 and 139.

4. Standard for Finding Violation

The court may revoke probation or suspension upon a finding that defendant has inexcusably failed to comply with a substantial condition, or if defendant has been convicted of another offense. N.J.S.A. 2C:45-3a(4); N.J.S.A.2C:45-4; R. 3:21-7(d). Even if defendant has not been convicted, but only charged with a new offense, the court may revoke probation or suspension based upon defendant's failure to comply with the probation condition requiring law-abiding conduct. State v. Robinson, 232 N.J. Super. 21,25, (App. Div. 1989); State v. Wilkins, 230 N.J. Super. 261, 263 (App. Div. 1989).

Revocation of probation has resulted from failure to report and illegal drug use (State v. Baylass, 114 N.J. 169, 171 (1989)); failure to report, illegal drug use, and failure to perform community service (State v. Smith, 226 N.J. Super. 276, 279 (App. Div. 1988), certif. den. 114 N.J. 500 (1989)); failure to report, failure to keep drug evaluation appointments, and illegal drug use (State v. Wilson, 226 N.J. Super. 271, 274 (App. Div. 1988), certif. den. 114 N.J. 500 (1989)); and failure to make restitution payments (State v. Townsend, 222 N.J. Super. 273, 278 (App. Div. 1988)). Revocation of suspension or probation may not result, however, from the failure to pay a fine or to make restitution, unless the failure was willful. N.J.S.A. 2C:45-3a(4). Beardon v. Georgia, 461 U.S. 660, 672, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

In Reyes, supra, 207 N.J. Super. at 137, the court held that:

> ... [A] court may not find a violation of probation unless defendant has been convicted of another offense or the court is satisfied by a preponderance of the evidence that defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of probation.

However, State v. Garcia, 193 N.J. Super. 334, 338 (App. Div. 1984), cited pre-code cases that used a "reason to believe" standard as the standard of proof for finding a violation.

A defendant is not chargeable with a violation of probation after the term of that probation has ended, despite later conviction for a crime committed while he was on probation. State v. Gibson, 156 N.J. Super. 516, 531 (App. Div. 1978), certif. den. 78 N.J. 411 (1978).

I. Resentencing After Revocation

1. Authorized Disposition

Once the court determines to revoke probation and incarcerate defendant, it may impose any sentence that might have been imposed originally for the offense of conviction. N.J.S.A. 2C:45-3b.

In State v. Baylass, 114 N.J. 169, 175 (1989), the Court held that probation violations may be used in the "in-out" decision whether to revoke and incarcerate. State v. Molina, 114 N.J. 181, 182-183 (1989). It further held that a probation violation is neither an aggravating factor nor evidence of an aggravating factor; rather, it may be used to "diminish or negate any mitigating factors found to exist at the original sentencing," such as N.J.S.A. 2C:44-1b(7), (9) and (10). Baylass, supra, 114 N.J. at 177 and 179; Molina, supra, 114 N.J. at 183.

Thus, at the resentencing, the court must again weigh the aggravating and mitigating factors to determine whether to impose the presumptive sentence or one that is more appropriate. Baylass, supra, 114 N.J. at 176. "The only aggravating factors the court may consider are those that existed at the time of the intial sentencing." Ibid. The court must also consider whether the probation violation diminishes or negates any of the mitigating factors that existed at the time of the initial sentencing. Id. at 177.

Consequently, only in rare cases will the balance of the original aggravating factors and surviving mitigating factors weigh in favor of a term of imprisonment greater than the presumptive sentence or of a period of parole ineligibility. Id. at 178. This is because, at the original sentencing, the mitigating factors would have to have outweighed the aggravating factors, since defendant received probation. Ibid.

The Baylass Court said further:

> In the future, courts should set forth the reasons for initially granting probation to a defendant. At a probation violation hearing, the court should identify and weigh the original aggravating and surviving mitigating factors that lead them [sic] to deviate from the presumptive sentence. At that hearing, the court should relate the effect the violation to the weighing process conducted at the original sentencing. Furthermore, the court should state the reasons for revoking probation and imposing a custodial sentence.
> [114 N.J. at 181]

Where a defendant has served a term of imprisonment as a condition of probation, it has been held that there is no constitutional bar against imposition of a further term of

imprisonment upon resentence following a violation of probation. See State v. Ryan, 86 N.J. 1 (1981), cert. den. 454 U.S. 880 (1981). An additional term of imprisonment may be imposed after revocation, even where the defendant has fully served his term of imprisonment as a condition of probation. State v. Franklin, 198 N.J. Super. 407, 409-410 (App. Div. 1985); State v. Burke, 188 N.J. Super. 649 (Law Div. 1983).

2. Credits

A defendant is entitled to credit for time served in custody between arrest and resentencing. State v. Reyes, supra 207 N.J. Super. at 141; State v. Fischer, 115 N.J. Super. 373, 379 (App. Div. 1971); R. 3:21-8. A defendant generally is not entitled to receive credit upon resentencing for time spent in a drug program while on probation. Reyes, supra, 207 N.J. Super. at 142; State v. Braeunig, 135 N.J. Super. 89, 94 (Law Div. 1975), mod. on other grounds 140 N.J. Super. 245 (App. Div. 1976). However, a defendant sentenced to probation and a residential treatment facility pursuant to N.J.S.A. 2C:35-14 is entitled to credit for time spent in the treatment facility upon resentencing after revocation of probation. N.J.S.A. 2C:35-14d.

A defendant was given credit for time spent in a drug program where the court erred in ordering probation. State v. Williams, 81 N.J. 498 (1980); see Reyes, supra, 207 N.J. Super. at 141-142. It has been held that credit is not allowed for time spent in in-patient drug programs mandated as a condition of probation, State v. Ryan, supra, 86 N.J. 1, or

where such programs are a condition of pretrial bail, State v. Smeen, 147 N.J. Super. 229 (App. Div. 1977), certif. den. 74 N.J. 263 (1977). However, it has been suggested that where a residential program was so confining as to be substantially the equivalent to custody in jail or in a state hospital, a failure to give credit might create an invalid classification. Reyes, supra, 207 N.J. Super. at 143.

Where a term of imprisonment is a condition of probation and the defendant is thereafter sentenced to imprisonment upon revocation of probation, the prior term of imprisonment is to be credited toward the subsequent term. N.J.S.A. 2C:45-1c.

3. Right to Counsel

In Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971), the Court held that:

> ... [A]s a matter of simple justice, no indigent defendant shall be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.

Prior to Rodriguez, in State v. Seymour, 98 N.J. Super. 526 (App. Div. 1968), the court had applied the decision in Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), to require that counsel be afforded at a revocation of probation proceeding or at a deferred sentencing procedure. See also State v. Louis, 97 N.J. Super. 35 (App. Div. 1967), in which a defendant, whose probation was summarily revoked, was prejudiced by the absence of counsel at the hearing. Compare Gagnon v. Scarpelli, supra, 411 U.S. 778, decided after Mempa, (the State is not constitutionally required to provide counsel

for indigents at probation or parole revocation proceedings in all instances; the decision whether to provide counsel is to be determined on a case-by-case basis, but a presumption exists that counsel should be provided where counsel is requested based on a claim that the alleged violation has not been committed or a substantial reason exists indicating that revocation is inappropriate).

The presence of the defendant at the resentencing is required. R. 3:16. This is so because of the general proposition that any sentence imposed in the absence of the defendant is void. Compare N.J.S.A. 2C:45-2c (extension of a probationary period for a term authorized by the code upon defendant's failure to fulfill conditions of probation concerning restitution or fines may be entered by the court without defendant's personal appearance if defendant agrees to the extension).

J. Suspension of Sentence or Probation in Relation to Multiple Sentences

The code sets forth the following statutory rules concerning multiple sentences when a defendant is sentenced for more than one offense or a defendant already under sentence is sentenced for another offense which was committed prior to the sentence being served:

1. Probation may not be imposed by the court where a defendant is under sentence of imprisonment, except as provided by N.J.S.A. 2C:43-2b(2), which authorizes the imposition of a term of imprisonment as a condition of probation. N.J.S.A. 2C:44-5f(1).

2. Multiple periods of suspension or probation run consecutively, unless the court orders them to run concurrently, from the date of the first such disposition. N.J.S.A. 2C:44-5f(2).

3. The service of a sentence of imprisonment in excess of one year satisfies a suspended sentence on another count or prior suspended sentence or sentence to probation, unless the suspended sentence or probation has been violated, in which case any imprisonment for the violation shall run consecutively. N.J.S.A. 2C:44-5f(3).

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

4.9 Fines and Restitution

A. When Authorized

The court may sentence a defendant to pay a fine, make restitution, or both, subject to the maximum amounts set forth in N.J.S.A. 2C:43-3. A fine, restitution, or both, may be imposed independently, N.J.S.A. 2C:43-2b(1); or as a condition of imprisonment or probation, N.J.S.A. 2C:43-2b(4), 2C:45-1b; or as a condition of an order suspending the imposition of sentence, N.J.S.A. 2C:45-1.

B. Criteria for Imposing Fines and Restitution

A fine, restitution, or both, in addition to a sentence of imprisonment or probation, is appropriate if:

> (1) the defendant has derived a pecuniary gain from the offense;[1]
>
> or
>
> (2) if, in the court's opinion, a fine or restitution, or both, is "specially adapted" to deterring the type of offense involved or to correcting the offender.
>
> [N.J.S.A. 2C:44-2a(1) and (2)]

To ensure the appropriateness of the prescribed remuneration, the court is required to consider the financial

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[1] In the pre-code case of State v. Harris, 70 N.J. 586, 592-593 (1976), the Court recognized that restitution may be ordered for two reasons: (1) to repair harm done to the victim and (2) to rehabilitate defendant by acting as a compelling reminder of the wrong done. The criteria for imposing fines and restitution in N.J.S.A. 2C:44-2a(1) and (2) do not allude to the loss suffered by the victim. However, N.J.S.A. 2C:43-3e refers to the "loss to the victim caused by the conduct constituting the offense by the offender" in establishing the amount of the fine or restitution to be made. Thus, consideration of the victim's loss may be a valid criterion on which to impose a fine or restitution.

resources of the defendant and the nature o@ the burden of payment. The court must be satisfied that the defendant is able to pay the fine or restitution or, if given a fair opportunity to do so, will be able to pay the fine or restitution. N.J.S.A. 2C:44-2b. The court may not, however, impose a fine if payment will prevent the defendant from making restitution. In State v. Harris, supra, 70 N.J. at 598-599, the Court rejected the argument that the amount of damages for which restitution will be ordered be proven by a preponderance of the evidence. Absent an abuse of discretion, the factual basis supplied by the probation department investigation and compliance with the procedural safeguards outlined in State In the Interest of D.G.W., 70 N.J. 488, 503-506 (1976), satisfies the requirement of due process. Harris, supra, 70 N.J. at 598-599.

In D.G.W., the Supreme Court addressed the procedural requirements for judicial determination of the amount of restitution in the case of a juvenile offender who was ordered to make restitution as a condition of probation. The Court held that once the judge decides to impose restitution as a condition of probation, the probation department should be directed to conduct an investigation to determine the nature and extent of personal or property damage or other loss caused by the offender. The report shall include the method used for determining the value of any loss and the amount of money which the offender can or will be able to pay. The report shall be disclosed to the offender who, at the sentencing hearing, may

object to any material statement of fact contained therein. A defendant may be permitted to introduce evidence as the sentencing judge deems necessary to the proper resolution of the issue. See also State v. Rhoda, 206 N.J. Super. 584 (App. Div. 1986), certif. den. 105 N.J. 524 (1986), where the Appellate Division reviewed the procedural hearing conducted upon remand for a determination of restitution utilizing the procedures set forth in D.G.W. and Harris. The sentencing court's findings with respect to the criteria for withholding or imposing restitution or a fine, set forth in N.J.S.A. 2C:44-2, shall be stated on the record. N.J.S.A. 2C:43-2e; R. 3:21-4(e); Harris, supra, 70 N.J. at 599.

Where restitution is ordered following conviction on defendant's guilty plea, see State v. Saperstein, 202 N.J. Super. 478, 482 (App. Div. 1985) ($150,000 restitution order was beyond contemplation of plea agreement), and State v. Rhoda, supra, 206 N.J. Super. at 595-596 (although defendant was barred from raising issue, Appellate Division found that restitution was not beyond scope of plea agreement, and defendant had no reason to expect to retain fruits of illegal activity).

C. Authorized Amount of Fines and Restitution

1. In General

When a person is sentenced to pay a fine, the fine shall not exceed:

First or Second Degree Crime N.J.S.A. 2C:43-3a	$100,000.00
Third or Fourth Degree Crime N.J.S.A. 2C:43-3b	$ 7,500.00
Disorderly Persons Offense N.J.S.A. 2C:43-3c	$ 1,000.00
Petty Disorderly Persons Offense N.J.S.A. 2C:43-3d	$ 500.00

A higher amount may be imposed where authorized by the code or other statute, N.J.S.A. 2C:43-3f, or equal to double the pecuniary gain to the offender or loss to the victim caused by the proscribed conduct constituting the offense. N.J.S.A. 2C:43-3e. The code defines the term "gain" as the amount of money or value of property derived by the offender and "loss" as the amount of value separated from the victim. A finding as to the amount of gain or loss is required and a hearing may be held if the record does not contain sufficient evidence to support the court's conclusion as to the amount. N.J.S.A. 2C:43-3e.

In addition to any fine, restitution may be imposed pursuant to this section, and the restitution ordered shall never exceed the victim's actual loss. N.J.S.A. 2C:43-3b. Restitution must be limited by and directly related to the offense committed, i.e., losses directly resulting from the illegal conduct. State v. Insabella, 190 N.J. Super. 544, 552 (App. Div. 1983).

2. CDS Cases

a. Generally

Upon conviction for chapter 35 violations, notwithstanding the provisions of subsections a and b of N.J.S.A. 2C:43-3, the court is authorized to impose a fine equal to three times the

street value of the CDS or analog involved.[2] N.J.S.A. 2C:43-3h. However, when a specific fine has been determined as a component part of a negotiated plea agreement or post-conviction agreement between the defendant or the prosecution, the court at sentencing shall have no discretion to impose any lesser amount. N.J.S.A. 2C:35-12.

b. Specific Offenses

Chapter 35 of Title 2C provides the maxima for fines with respect to persons convicted of certain enumerated drug offenses. The provisions are summarized on the following chart.

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[2] Street value is based on the amount and purity of the substance at the time and place of the offense. The court determines street value at the time of sentencing and may rely on expert opinion in making its assessment. The court's finding will not be subject to appellate modification unless it is shown that "the finding was totally lacking in support on the record or was arbitrary or capricious." N.J.S.A. 2C:44-2e.

Statute	Offense	Fine Not to Exceed:*
2C:35-3	Leader of Narcotic Trafficking Network (first degree)	$500,000 or 5 times the street value of the substance involved, whichever is greater;
2C:35-4	Maintain/Operate CDS Production Facility (first degree)	$500,000 or 5 times the street value of the substance manufactured or stored at facilities, whichever is greater;
2C:35-5b	Manufacturing, Distributing or Dispensing	
	(1) 5 oz. or more - heroin, cocaine or analog (first degree)	$300,000;
	(3) less than ½ oz. - heroin, cocaine or analog (third degree)	50,000;
	(5) less than 1 oz. - other Schedule I or II narcotic drug or analog (third degree)	50,000;
	(6) 100 mg. or more - LSD or analog; 10 gms. or more - phencyclidine or analog (first degree)	300,000;
	(9) less than 1 oz. methamphetamine or analog (third degree)	50,000;
	(11) 1 oz. or more but less than 5 lb. marijuana or more than 5 gms. but less than 1 lb. hashish (third degree)	15,000;
	(13) any other Schedule I, II, III, or IV CDS or analog (third degree)	15,000;
	(14) any Schedule V substance or analog (fourth degree)	15,000;

*Notwithstanding these ordinary maximum fines, the court is authorized to impose a fine equal to three times the street value of the CDS or analog involved. N.J.S.A. 2C:43-3h.

Statute	Offense	Fine Not to Exceed:*
2C:35-6	Employing Juvenile in Drug Distribution (second degree)	$300,000 or five times the street value of the substance involved, whichever is greater;
2C:35-7	CDS Near or On School Property (third degree)	$100,000;
2C:35-8	Distribution to a Pregnant Female or Persons 17 yrs. or Younger (prosecutorial application and hearing required)	Mandatory enhanced penalty including twice the fine authorized or required by 2C:35-5b, 2C:35-7 or other provision.
2C:35-10	Possession, Use, Being Under the Influence (1) Schedule I, II, III, or IV CDS or analog other than specified (third degree)	25,000;
	(2) Schedule V CDS or analog (fourth degree)	15,000;
	(3) Possession more than 50 gms. marijuana or more than 5 gms. hashish (fourth degree)	15,000;
2C:35-11	Imitation CDS; Distribution, Possession, Manufacture, etc. (third degree)	100,000;
2C:35-13	Obtaining [CDS] by Fraud (third degree)	30,000;

*Notwithstanding these ordinary maximum fines, the court is authorized to impose a fine equal to three times the street value of the CDS or analog involved. N.J.S.A. 2C:43-3h.

c. Mandatory Penalties (N.J.S.A. 2C:35-15)

In addition to any other authorized disposition, every offender convicted of or adjudicated delinquent for a violation of a chapter 35 or chapter 36 offense, shall be assessed for each offense the following Drug Enforcement and Demand Reduction (D.E.D.R.) penalty:

$3,000 penalty for a first degree crime;
2,000 penalty for a second degree crime;
1,000 penalty for a third degree crime;
750 penalty for a fourth degree crime;
500 penalty for a disorderly persons or petty disorderly persons offense.

A defendant whose sentence is downgraded purusant to N.J.S.A. 2C:44-1f(2) remains liable for the D.E.D.R. penalty that corresponds to the degree of offense of which defendant was convicted. State v. Williams, 225 N.J. Super. 462 (Law Div. 1988).

Every offender placed in supervisory treatment pursuant to N.J.S.A. 2C:36A-1 or N.J.S.A. 2C:43-12 for a violation of a chapter 35 or 36 offense also shall be assessed the D.E.D.R. penalty prescribed in N.J.S.A. 2C:35-15a; however, only one such penalty shall be assessed -- the penalty corresponding to the most serious offense charged -- regardless of the number of offenses charged.[3]

The penalties are in addition to, and not in lieu of, any other fines authorized by law or required to be imposed pursuant to provisions of section 2C:35-12. N.J.S.A. 2C:35-15a.

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[3] This provision was added by L. 1988, c.44, effective June 28, 1988. It has been applied retroactively by at least one trial court. State v. Rock, 228 N.J. Super. 577, 580 (Law Div. 1988).

The court may suspend collection of the mandatory D.E.D.R. penalty if the defendant agrees to enter a court-approved residential drug rehabilitation program and agrees to pay all or some of the associated costs. N.J.S.A. 2C:35-15e. Following successful completion of the program, the court may reduce the penalty imposed by any amount actually paid by the defendant for treatment. If the defendant's program participation is terminated before successful completion, defendant will be liable for the entire penalty imposed. N.J.S.A. 2C:35-15e.

With respect to assessment of the mandatory penalty for individuals placed in a supervisory treatment program pursuant to N.J.S.A. 2C:43-12, see §2.2, supra, "Unresolved Issues" for discussion of equal protection issues involved.

For collection and disbursement procedures for mandatory penalties, see N.J.S.A. 2C:35-15b, -c, and -d.

d. Laboratory Fees (N.J.S.A. 2C:35-20)

In addition to dispositions authorized by N.J.S.A. 2C:43-2, persons convicted of a chapter 35 offense shall be assessed a criminal laboratory analysis fee of $50 for each offense for which the person was convicted. Persons placed in supervisory treatment pursuant to N.J.S.A. 2C:36A-1 or N.J.S.A. 2C:43-12 shall be assessed the $50 fee for each offense for which he or she was charged. See §2.2, supra, "Unresolved Issues," for discussion of equal protection issues.

A juvenile adjudicated delinquent for any violation of chapter 35 shall be assessed a laboratory analysis fee of $25 for each adjudication.

For collection and disbursement procedures, see N.J.S.A. 2C:35-20c, -d, -e, -f and -g.

e. Rehabilitation Costs

Offenders placed on probation subject to, among other things, entering a drug rehabilitation program, may be required to pay all or a portion of the costs associated with his or her participation in any rehabilitation or residential treatment program. Payment may be required only after consideration of the defendant's financial resources. N.J.S.A. 2C:35-14e; see also N.J.S.A. 2C:35-15e.

f. Driving Privileges (N.J.S.A. 2C:35-16)

Every person convicted of a chapter 35 or chapter 36 violation shall forthwith forfeit his or her driving privileges for a period to be fixed by the court at not less than six months or more than two years. The license suspension begins on the day of sentencing, unless the person's license is already suspended, in which case the suspension period starts when the previous suspension period is finished. N.J.S.A. 2C:35-16. If a person is less than 17 years of age at the time of sentencing, the suspension of driving privileges will begin on the day of sentence and continue for a period between six months and two years after the person reaches the age of 17, as fixed by the court.

The court before whom a person is convicted of a chapter 35 or chapter 36 offense must forward the license and a report

containing certain other information to the Division of Motor Vehicles. If the court cannot collect the person's driver's license, it must send a report of the conviction to the Division of Motor Vehicles. N.J.S.A. 2C:35-16.

The court may, in its discretion, suspend, revoke or postpone the driving privileges of a person admitted to supervisory treatment under N.J.S.A. 2C:36A-1 or N.J.S.A. 2C:43-12 who has not been convicted. N.J.S.A. 2C:35-16.

3. Gambling

Notwithstanding the provisions of N.J.S.A. 2C:43-3, persons convicted of certain enumerated gambling offenses shall be subject to a fine within the limits provided in chapter 37 of Title 2C. The provisions may be summarized as follows:

In the case of promoting gambling, contrary to N.J.S.A. 2C:37-2a, where the offender

(1) engaged in bookmaking to the extent he received or accepted in any 1 day more than five bets totaling more than $1,000,

or

(2) received in connection with a lottery or policy scheme or enterprise, money or written records from a person other than a player, or more than $100 in any 1 day of money played in such scheme or enterprise.

Third Degree Crime N.J.S.A. 2C:37-2b.	Fine not to exceed $25,000

In the case of promoting gambling contrary to the provisions of N.J.S.A. 2C:37-2a where the offender

(1) engaged in bookmaking to the extent he received or accepted 3 or more bets in any two-week period.

Fourth Degree Crime N.J.S.A. 2C:37-2b	Fine not to exceed $15,000

(2) all other violations of N.J.S.A. 2C:37-2a

Disorderly Persons Offense N.J.S.A. 2C:37-2b	Fine not to exceed $10,000

In the case of persons convicted of possession of gambling records (third degree), a fine not to exceed $25,000 may be imposed where the offender

(1) in a bookmaking scheme or enterprise, possessed any writing, paper, instrument or article reflecting or representing more than five bets totaling more than $1,000,

or

(2) in a lottery or policy scheme or enterprise, possessed any writing, paper, instrument or article reflecting more than one hundred plays or chances therein.

All other violations of N.J.S.A. 2C:37-3a, are punishable as a disorderly persons offense, subject to a fine not to exceed $10,000.

Persons convicted of maintaining a gambling resort (fourth degree) contrary to the provisions of N.J.S.A. 2C:37-4, are subject to a fine not to exceed $15,000.

4. Corporations

Where a corporation is convicted of an offense, the court may suspend the imposition of sentence, order restitution as authorized by section 2C:43-3 or impose a fine not to exceed three times that which may be imposed upon an individual pursuant to section 2C:43-3. (See also N.J.S.A. 2C:46-2a, imposing a duty upon the person(s) authorized to make disbursements from corporate assets to pay any fine, penalty or restitution imposed upon a corporation.)

The authorized maxima may be summarized as follows:

Offense Grade	Fine Not to Exceed
First or Second Degree Crime N.J.S.A. 2C:43-3; 2C:43-4a	$300,000
Third or Fourth Degree Crime N.J.S.A. 2C:43-3; 2C:43-4a	22,500
Disorderly Persons Offense N.J.S.A. 2C:43-3; 2C:43-4a	3,000
Petty Disorderly Persons Offense N.J.S.A. 2C:43-3; 2C:43-4a	1,500

Additionally, subsection b of section 2C:43-4 enables the court to request commencement of proceedings for corporate dissolution, forfeiture of its charter, revocation of franchises held by the corporation, or revocation of the corporate certificate authorizing business in this state.

D. Violent Crimes Compensation Board Penalty

N.J.S.A. 2C:43-3.1 requires assessment of a penalty upon defendants convicted of a crime of violence resulting in injury or death of another person. The penalty shall be at least $30 but shall not exceed $10,000 for each crime for which defendant was convicted. N.J.S.A. 2C:43-3.1a(1).

Where the offense at conviction is a disorderly or petty disorderly persons offense or a crime not resulting in injury or death, a $30 penalty for each such offense or crime shall be assessed. N.J.S.A. 2C:43-3.1a(2)(a). With respect to juvenile adjudications, the penalty shall be at least $15. N.J.S.A. 2C:43-3.1a(2)(b).

Personal injury is defined in N.J.S.A. 52:4B-1 et seq., and includes mental or nervous shock. See State v. Diaz, 188

N.J. Super. 504, 508 (App. Div. 1983) (menacing victim as if defendant had gun held sufficient to support conclusion of mental or nervous shock); but see State v. Thompson, 199 N.J. Super. 142 (App. Div. 1985). In determining the amount, the court shall consider factors such as (1) the severity of the crime, (2) defendant's criminal record, (3) defendant's ability to pay, and (4) the economic impact of the penalty on defendant's dependants. N.J.S.A. 2C:43-3.1a(1).

E. Other Penalties

1. Motor Vehicle Theft or Unlawful Taking

In addition to any other fine, penalty, or restitution authorized by law, a person convicted of an offense involving the theft or unlawful taking of a motor vehicle is liable for (1) reasonable and necessary expenses incurred by the owner in recovering the vehicle and (2) any damage to the vehicle prior to its return to the rightful owner. N.J.S.A. 2C:43-2.1. A finding of the amount of expenses and damages is required and may be supported by evidence contained in the record or, if not sufficient, at a hearing. Any resulting order for restitution is docketed with the clerk of the Superior Court and shall have the same force as a judgment. N.J.S.A. 2C:43-2.1.

2. Suspension, Postponement or Revocation of Driver's License/Registration

Any person convicted of a crime, disorderly or petty disorderly persons offense who used a motor vehicle in the course of committing the crime or offense may be subjected to postponement, suspension or revocation of his or her driver's license, registration certificate, or both, for a period not to

exceed two years. N.J.S.A. 2C:43-2c. See State v. Gross, 225 N.J. Super. 28 (App. Div. 1988) (Title 2C license suspension provision does to apply to Title 39 motor vehicle offenses). The court shall consider the severity of the offense and the potential effect of the loss of driving privileges on the person's ability to be rehabilitated. N.J.S.A. 2C:43-2c. The suspension period shall run consecutively with any custodial sentence. N.J.S.A. 2C:43-2c.

3. Purposeful Injury to Animals Used For Law Enforcement

An offender who violates the provisions of N.J.S.A. 2C:29-3.1 is subject to a sentence of imprisonment for six months, restitution, and a $1,000 fine.

4. Forfeiture

Prima facie contraband, property used or intended for use in furtherance of unlawful activity, property which has become or is intended to become an integral part of illegal activity, and proceeds of illegal activity are subject to forfeiture. N.J.S.A. 2C:64-1a; 2C:43-2d. See State v. One (1) 1979 Chevrolet Camaro Z-28, 202 N.J. Super. 222, 229-230 (App. Div. 1985), interpreting "unlawful activity".

Subject to the rights of owners and others having an interest in seized property, prima facie contraband is subject to automatic forfeiture. N.J.S.A. 2C:64-2. With respect to property other than prima facie contraband, civil forfeiture proceedings may be instituted pursuant to N.J.S.A. 2C:64-3. Chapter 64 should be reviewed in its entirety for specific procedural information. In cases prosecuted pursuant to the

provisions of chapter 41, "Racketeering", see N.J.S.A. 2C:41-3b, requiring forfeiture of certain interests.

F. Time and Method of Payment

A fine, restitution or penalty assessed pursuant to section 2C:43-3.1 is payable forthwith unless the court grants permission to pay within a specified period of time or in specified installments. N.J.S.A. 2C:46-1a.[4] Payment of installments may be made a condition of probation. N.J.S.A. 2C:46-1b.

G. Collection

1. Fine and Restitution

All fines and restitution imposed by a judge of the Superior Court or otherwise imposed at the county level, shall be paid through the county probation department, or, if the fine or restitution was imposed in conjunction with a custodial sentence to a State correctional facility, through the Department of Corrections. N.J.S.A. 2C:46-4a(1).

Fines and restitution imposed at the municipal court level shall be collected by the municipal court clerk, or, if ordered as a condition of probation, shall be collected by the county probation department. N.J.S.A. 2C:46-4a(2).

Distribution of the collected funds shall be in accordance with the provisions of N.J.S.A. 2C:46-4b and c.

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[4] The reader may wish to review State v. DeBonis, 58 N.J. 182 (1971), the pre-code case wherein the Supreme Court found that the equal protection clause requires an opportunity to pay in reasonable installments upon a showing of inability to pay. See also AOC Directive No. 10-70, issued April 1, 1971, and No.10A-70, issued April 8, 1971.

defendant's appearance. N.J.S.A. 2C:46-2a. After a hearing, the court may (1) reduce the fine, (2) suspend the fine, (3) modify the payment installment plan or the fine, restitution or penalty assessment, or (4) if none of these alternatives is warranted, the court may impose a term of imprisonment to achieve the objective of the fine. N.J.S.A. 2C:46-2a. In this state, however, an indigent defendant may not be jailed merely because he cannot pay a fine. See State v. DeBonis, supra, 58 N.J. 182, and N.J.S.A. 2C:46-1a, authorizing scheduled payment. See also, State v. Farfalla, 113 N.J. Super. 557 (App. Div. 1971) (DeBonis rule held inapplicable to defendant who failed to claim indigence as reason for non-payment); State v. O'Toole, 162 N.J. Super. 339 (App. Div. 1978) (requiring factual showing of inability to pay before application of DeBonis rule).

If imprisonment is warranted, the term of imprisonment shall not exceed one day for each $20 of the fine, 40 days for a disorderly persons offense, 25 days for a petty disorderly persons offense and one year in any other case, whichever is the shorter period. N.J.S.A. 2C:46-2a. In the case of a disorderly persons offense, the total period of imprisonment for both the sentence and the failure to pay shall not exceed six months. Additionally, summary collection proceedings are also available. N.J.S.A. 2C:46-2b, -c, -d.

The willful failure to pay a penalty assessment or restitution shall be contumacious. N.J.S.A. 2C:46-2a; see also N.J.S.A. 2C:43-3.1d, authorizing suspension of driver's license or non-resident reciprocity, or prohibiting receiving or

2. VCCB Penalty

All penalties collected pursuant to the provisions of N.J.S.A. 2C:43-3.1 shall be collected in accordance with section 2C:46-4 ("Collection of Fines and Restitution") and forwarded to the Violent Crimes Compensation Board. Such funds shall be distributed in accordance with N.J.S.A. 2C:43-3.1a(4).

3. Penalties Imposed Pursuant to Title 35

All D.E.D.R. penalties collected pursuant to N.J.S.A. 2C:35-15 shall be collected in accordance with the provisions of section 2C:46-4 for distribution to the Department of Law and Public Safety. N.J.S.A. 2C:35-15b and -c. For additional information with respect to application of funds in CDS cases, see N.J.S.A. 2C:35-15d.

H. Consequences of Non-Payment

1. In General

When a defendant is sentenced to pay a fine or make restitution, the court shall not at the same time impose an alternative sentence in the event of non-payment. N.J.S.A. 2C:44-2d. The consequences for non-payment shall be determined only after the defendant has not paid, as provided by N.J.S.A. 2C:46-2. N.J.S.A. 2C:44-2d.

In the event defendant defaults in payment of a fine, resitution or penalty assessment, the court, upon motion by the person entitled by law to collect payment, the prosecutor, a victim entitled to payment of restitution, the Violent Crimes Compensation Board, or upon its own motion, may (1) recall the defendant or (2) issue a summons or arrest warrant for

obtaining a license upon failure to pay the VCCB penalty assessment.

Similarly, failure by the person(s) authorized to make disbursements from corporate assets to pay a fine or restitution may be held to be contumacious. N.J.S.A. 2C:46-2.

2. Payment Imposed As A Condition of Suspension or Probation

In the event that a defendant fails to fulfill a condition of probation or suspension of sentence with respect to payment of restitution (N.J.S.A. 2C:45-1b(8)) or of a fine (N.J.S.A. 2C:45-1b(11)), the court may extend the probationary period within the boundaries set forth in N.J.S.A. 2C:45-2a. N.J.S.A. 2C:45-2c. See State v. Dove, 202 N.J. Super. 540 (Law Div. 1985), for further discussion of maxima for probation and suspension of sentence set forth in N.J.S.A. 2C:45-2a. Although revocation of probation or suspension and resentencing is available upon a finding of inexcusable failure to comply with requirements imposed as a condition thereof, the failure to pay a fine or make restitution must be willful in order to form the basis of such revocation. N.J.S.A. 2C:45-3a(4).

3. Revocation

A defendant sentenced to pay a fine may, at any time, petition the court for revocation of the fine or any unpaid portion thereof. N.J.S.A. 2C:46-3. The fine or unpaid portion may be completely or partially revoked, if the court is satisfied that the circumstances warranting imposition of the fine have changed or requiring payment would be unjust. N.J.S.A. 2C:46-3.

PART V ISSUES RELATING TO SPECIFIC OFFENSES

5.1 Capital Cases (2C:49-5; 2C:11-3(c))

Sentencing issues in capital cases are covered by a separate manual. Please refer to the Judge's Bench Manual for Capital Cases prepared by the Trial Judges' Committee on Capital Causes.

5.2 New Jersey Controlled Dangerous Substances Act

A. Generally

The sections of Title 24, Article 5 (N.J.S.A. 24:21-19 et seq.) dealing with drug offenses have been replaced and supplemented by chapters 35 and 36 of Title 2C. Since Title 24 still applies to drug offenses committed prior to July 9, 1987 (N.J.S.A. 2C:35-23; N.J.S.A. 2C:36-9), applicable provisions are included in this section. References to chapters 35 and 36 replacement provisions are provided.

B. Applicability of Title 2C Sentencing Provisions to Offenses Governed by Title 24

N.J.S.A. 2C:1-5(b) provides:

> The provisions of subtitle 3 [sentencing provisions] are applicable to offenses defined by other statutes but the maximum penalties applicable to such offenses, if specifically provided in the statute defining such offenses, shall be as provided therein, rather than as provided in this code, except that if the non-code offense is a misdemeanor with a maximum penalty of more than 18 months imprisonment, the provisions of section 2C:43-1b shall apply.

One of the major differences between sentencing under Title 24 and under Title 2C is that Title 2C crimes are classified by degree with attendant terms, fines and other consequences. Title 24 offenses are not classified by degree (except for drug paraphernalia offenses, see §5.2C (8) through (10), infra), but are labelled as high misdemeanors, misdemeanors or disorderly persons offenses and the penalties, in most cases, are set out in the section defining the offense. Title 24 penalties apply to all drug offenses committed prior to July 9, 1987. N.J.S.A. 2C:35-23; N.J.S.A. 2C:36-9.

N.J.S.A. 2C:1-5(b) provides that, while the sentencing provisions of Title 2C are generally applicable to Title 24 offenses, provisions specifically relating to the degree of the crime are inapplicable. State v. Sainz, 107 N.J. 283, 286-287 (1987); State v. Sobel, 183 N.J. Super. 473, 479 (App. Div. 1982).

> ... sentences for Title 24 convictions are to be imposed in the same manner as are sentences under the Code in regard to such aspects as the requirement of a finite term; the weighing of aggravating and mitigating circumstances; presumption of nonincarceration for certain offenders and the consequences of multiple sentences.
>
> [State v. Tremblay, 185 N.J. Super. 137, 140 (1982); footnotes omitted]
>
> ... such Code sentencing provisions as indeterminate sentences for young adult offenders (N.J.S.A. 2C:43-5), parole (N.J.S.A. 2C:43-9), place of imprisonment (N.J.S.A. 2C:43-10), presentence procedure (N.J.S.A. 2C:44-6), the consequences of multiple sentences (N.J.S.A. 2C:44-5), and suspension of sentence and probation (N.J.S.A. 2C:45-1 to 4), clearly apply to Title 24 offenses since their pre-Code analogues applied. Nor, for example, do we see any cogent reason for withholding from Title 24 offenses the provisions of subsections a, b and c of N.J.S.A. 2C:44-1 (sentencing criteria), or N.J.S.A. 2C:44-4 (definition of prior conviction).
>
> [State v. Sobel, supra, 183 N.J. Super. at 479; footnotes omitted]

See also State v. Flippen, 208 N.J. Super. 573, 576 (App. Div. 1984) (extended terms relate specifically to degree-classified offenses, so extended terms and the bar in Title 2C to the imposition of multiple extended terms are inapplicable to Title 24 offenses); State v. Dachielle, 195 N.J. Super. 40, 47 (Law Div. 1984) (presumption of imprisonment applies to first and second degree crimes, so does not apply to Title 24 offenses). See also State v. Roach, 222 N.J. Super. 122 (App. Div. 1987), certif. den. 110 N.J. 317 (1988).

Certain sections of Title 24 defining drug paraphernalia offenses (N.J.S.A. 24:21-48 through -50) clearly designate these offenses as third or fourth degree crimes and do not provide statutory penalties. Thus, these Title 24 offenses are governed by all Title 2C provisions.

C. Penalties for Specific Offenses Under Title 24

1. N.J.S.A. 24:21-19 Manufacturing, Distributing or Dispensing (Presently N.J.S.A. 2C:35-5. New classifications and penalties. See §5.3D(3), infra).

a. N.J.S.A. 24:21-19(b)(1):

Drug: Schedule I or II narcotic drug.
Quantity: Less than one ounce or more than one ounce with less than 3.5 grams pure free base.
Classification: High misdemeanor.
Term of Imprisonment: Not more than 12 years, or
Fine: Not more than $25,000, or both.

b. N.J.S.A. 24:21-19(b)(2):

Drug: Schedule I or II narcotic drug.
Quantity: One ounce or more with at least 3.5 grams free base.
Classification: High misdemeanor.
Terms of Imprisonment: Up to life, or
Fine: Not more than $25,000, or both.

c. N.J.S.A. 24:21-19(b)(3):

Drug: Any other CDS in Schedules I, II, III or IV.
Classification: High misdemeanor.
Term of Imprisonment: Up to five years, or
Fine: Not more than $15,000, or both.

d. N.J.S.A. 24:21-19(b)(4):

Drug: Schedule V CDS.
Classification: Misdemeanor.
Term of Imprisonment: Up to one year, or
Fine: Not more than $5,000, or both.

Merger: Possession of a CDS under 24:21-20 may merge with possession with intent to distribute under this section.

State v. Rechtschaffer, 70 N.J. 395, 411 (1976);

State v. Selvaggio, 206 N.J. Super. 328, 330 (App. Div. 1985);

State v. Wilkinson, 126 N.J. Super. 553, 556 (App. Div. 1973). However, factual patterns indicating separate offenses under the two sections may preclude merger. State v. Milligan, 71 N.J. 373, 395 (1976); State v. Land, 136 N.J. Super. 354, 359-360 (App. Div. 1975), rev'd on other grounds 73 N.J. 24 (1977).

2. N.J.S.A. 24:21-19.1 Imitation Controlled Dangerous Substances, Distribution, Possession (Presently N.J.S.A. 2C:35-11. Only penalties were changed. See §5.3D(9), infra).

a. N.J.S.A. 24:21-19.1(d):

Term of Imprisonment: Up to three years, or
Fine: Not more than $100,000.00, or both.

3. N.J.S.A. 24:21-20 Possession, Use or Being Under the Influence (Presently N.J.S.A. 2C:35-10. See §5.3D(8), infra. Changes in penalties and identification of drugs).

a. N.J.S.A. 24:21-20(a)(1):

Drug: Schedule I or II narcotic drug.
Quantity: Less than one ounce or one ounce or more including less than 3.5 grams pure free base.
Drug: Any other CDS in Schedule I, II, III or IV.
Classification: High misdemeanor.
Term of Imprisonment: Up to five years, or
Fine: Not more than $15,000, or both.

b. N.J.S.A. 24:21-20(a)(2):

Drug: Schedule I or II narcotic drug.
Quantity: One ounce or more including 3.5 grams pure free base.
Classification: High misdemeanor.
Term of Imprisonment: Up to seven years, or
Fine: Not more than $15,000, or both.

c. N.J.S.A. 24:21-20(a)(3):

Drug: Schedule V CDS.
Classification: Misdemeanor.
Term of Imprisonment: Up to one year, or
Fine: Up to $5,000, or both.

d. N.J.S.A. 24:21-20(a)(4):

Drug: Marijuana or Hashish.
Quantity: Marijuana: more than 25 grams.
Hashish: more than 5 grams.
Classification: High misdemeanor.
Term of Imprisonment: Up to five years, or
Fine: Not more than $15,000, or both.

Quantity: Marijuana: less than 25 grams.
Hashish: less than 5 grams.
Classification: Disorderly person.
Term of Imprisonment: Up to six months, or
Fine: Not more than $500, or both.

e. N.J.S.A. 24:21-20(b) Using or Being Under the Influence.

Drug: Any CDS.
Classification: Disorderly persons.
Term of Imprisonment: Up to six months, or
Fine: Up to $500, or both.

f. N.J.S.A. 24:21-20(c).

At the discretion of the sentencing judge any person adjudged a disorderly person pursuant to this subsection may lose his or her driver's license for not more than two years from the date of conviction. The license will not be restored until certification by a physician to the Director of the Division of Motor Vehicles indicates that such person is not drug dependent.

4. N.J.S.A. 24:21-22(a)(3) Fraud or Misrepresentation (Presently N.J.S.A. 2C:35-13. See §5.3D(11), infra).

Term of Imprisonment: Up to three years, or
Fine: Not more than $30,000, or both.

5. N.J.S.A. 24:21-24 Attempt, Endeavor and Conspiracy (Presently N.J.S.A. 2C:5-1 and 2C:5-2).

Imprisonment or fine, or both, not to exceed maximum prescribed for the underlying offense.

6. N.J.S.A. 24:21-26 Distribution to Persons Under Age 18 (Presently N.J.S.A. 2C:35-8. See §5.3D(6), infra).

a. Any person at least 18 years of age who violates 24:21-19(a)(1) by distributing a Schedule I or II narcotic drug to a person 17 years of age or younger, who is at least three years his junior, is punishable by a term of imprisonment of up to twice that authorized by 24:21-19(b)(1),

(3) or (4), or by the fine authorized by 24:21-19(b)(1), or both. (See §5.3C(1), supra).

b. Any person at least 18 years of age who violates 24:21-19(a)(1) by distributing any other CDS in Schedules I, II, III, IV or V to a person 17 years of age or younger, who is at least three years his junior, is punishable by a term of imprisonment up to twice that authorized by 24:21-19(b)(3) or (4), or by the fine authorized by 24:21-19(b)(3) or (4), or both. (See §5.3C(1), supra).

7. N.J.S.A. 24:21-47 Use or Possession of Drug Paraphernalia (Presently N.J.S.A. 2C:36-2. See §5.3D(12), infra).

Classification: Disorderly Persons.
Term of Imprisonment: Not more than six months.
Fine: Not more than $1,000.

8. N.J.S.A. 24:21-48 Distribute, Dispense, etc., Drug Paraphernalia (Presently N.J.S.A. 2C:36-3. See §5.3D(13), infra).

Classification: Fourth degree.
Term of Imprisonment: Not more than 18 months, or
Fine: Not more than $7500, or both.

9. N.J.S.A. 24:21-49 Advertising to Promote Sale of Paraphernalia (Presently N.J.S.A. 2C:36-4. See §5.3D(14), infra).

Classification: Fourth degree.
Term of Imprisonment: Not more than 18 months, or
Fine: Not more than $7500, or both.

10. N.J.S.A. 24:21-50 Delivering Drug Paraphernalia to Persons Under 18 Years of Age (Presently N.J.S.A. 2C:36-5. See §5.3D(15), infra).

Classification: Third degree.
Term of Imprisonment: Between three and five years, or
Fine: Not more than $7500, or both.

11. N.J.S.A. 24:21-51 Sale or Distribution of Hypodermic Syringe or Needle (Presently N.J.S.A. 2C:36-6. See §5.3D(16), infra).

Classification: Disorderly Person.
Term of Imprisonment: Not more than six months, or
Fine: Not more than $1000, or both.

12. N.J.S.A. 24:21-29 Second or Subsequent Offenses (No parallel provision in chapters 35 or 36, but see N.J.S.A. 2C:43-6(f) imposing mandatory extended term with mandatory minimum for specific subsequent drug offenses).

A second or subsequent offender shall receive up to twice the term of imprisonment and fine authorized, or both. This section does not apply to possessory and use offenses under 24:21-20(a)(3),(4) and (6).

13. N.J.S.A. 24:21-27 Conditional Discharge (Presently N.J.S.A. 2C:36A-1. See §5.3E(2), infra. Almost identical, except chapter 36A eliminates the reference to narcotic drugs in the third sentence and makes all persons charged with a disorderly or petty disorderly persons eligible, whereas this section is limited to those charged under N.J.S.A. 24:21-20. Finally, chapter 36A includes the addition of a paragraph c(3).)

a. Who is Eligible

Any person not previously convicted of a drug offense under Title 24 or of any law of any state, who is charged or convicted under N.J.S.A. 24:21-20, is eligible. N.J.S.A. 24:21-27(a). To be eligible the court must conclude that:

1) defendant's continued presence in the community or in the program is not a danger to the community; or

2) the supervisory treatment will be adequate to protect the public and will benefit the defendant. N.J.S.A. 24:21-27(c).

b. Procedure

Prior to a plea of guilty or a finding of guilt proceedings are suspended and the defendant is placed on supervisory treatment with reasonable terms and conditions. N.J.S.A.

24:21-27(a)(1). After a plea of guilty or a finding of guilt, without entering a judgment of conviction, the defendant is placed on supervisory treatment with reasonable terms and conditions. N.J.S.A. 24:21-27(a)(2).

If a term of the supervisory treatment is referral to a residential treatment facility, the length of the referral cannot exceed the statutory maximum for the offense. No term of supervisory treatment can exceed three years.

If a term or condition of treatment is violated, court proceedings resume. Upon fulfillment of the terms or conditions of treatment, the treatment is terminated and the charges are dismissed by the court.

A defendant may be considered for pre-trial diversion from criminal prosecution under the code or under Title 24, and the criteria to be used depend on the pretrial intervention authority invoked. State v. Collins, 180 N.J. Super. 190, 200 (App. Div. 1981), aff'd 90 N.J. 449 (1982). The legislative goal of seeking to deter and severely punish the more dangerous and insidious enterprises of selling and distributing narcotics is facilitated by permitting the suspension of proceedings when the charge is possession of CDS paraphernalia or obtaining CDS by means of forged prescription. State v. Sanders, 169 N.J. Super. 596, 599-600 (Law Div. 1979). See also State v. DiLuzio, 130 N.J. Super. 222, 230 (Law Div. 1974); but see State v. Chanly, 220 N.J. Super. 289 (Law Div. 1987) and State v. Telcher, 220 N.J. Super. 54 (Law Div. 1987).

Concrete proof of selling or distributing controlled substances bars application of the suspension provision of the

CDS Act. Even if a defendant who is charged with use and possession is not officially charged with a violation of the sale or distribution provisions, reliable evidence indicating that he is a seller of drugs can be considered by the court in application of its discretionary power to deny suspension. State v. DiLuzio, supra, 130 N.J. Super. at 230-231.

Juvenile drug-related offenses do not disqualify a defendant from relief under the conditional discharge provisions; however, facts surrounding a juvenile drug involvement may be considered in determining whether the defendant's presence in the community will constitute a danger and whether the terms of probation or supervisory treatment will both protect the public and benefit the defendant. State v. Teitelbaum, 160 N.J. Super. 430, 434 (Law Div. 1978); see also State v. Humphreys, 89 N.J. 4 (1982).

Criminal convictions occurring prior to the enactment of the CDS Act cannot be considered in determining first offender status under the act; in determining whether one has previously been convicted "under this Act" the effective date of the act is the chronological determinant in evaluating first offender status. State v. DiLuzio, supra, 130 N.J. Super. at 227-228.

Where a prosecutor declares his intention as part of a plea bargain to recommend dismissal of the separate charge of possession with intent to distribute, the fact that the charge is still technically open at the time of sentencing on the possession charge ordinarily should not render a defendant ineligible for supervisory treatment. State v. Reinhardt, 211 N.J. Super. 271, 274 (App. Div. 1986).

Where the sole objective in seizing evidence in good faith, but contrary to the dictates of the Fourth Amendment, is to obtain a criminal conviction, and use of evidence for that purpose has been suppressed, the policy behind the exclusionary rule has been fully satisfied, and such evidence may be considered on a motion pursuant to this section governing conditional discharge and expunging records of certain first drug offenders, and for sentencing purposes. State v. Banks, 157 N.J. Super. 442, 451 (Law Div. 1978).

The trial court should support its conclusion with a statement of reasons when denying an application for conditional discharge so that the exercise of the court's discretion may be subject to meaningful review on appeal. State v. Humphreys, supra, 89 N.J. at 11.

5.3 Comprehensive Drug Reform Act of 1986

A. Introduction

The Comprehensive Drug Reform Act (the act) (N.J.S.A. 2C:35-1 through -23 and 2C:36-1 through -9 and 2C:36A-1) replaces the provisions of N.J.S.A. 24:21-1 et seq. dealing with certain drug offenses. The act also creates new offenses and sentencing provisions not present under prior law. References to provisions of the act herein contain a cross-reference to the parallel provision under Title 24, should one exist.

B. Offenses Prior to the Effective Date of the Act

The operative date of the act is July 9, 1987. Any offenses committed prior to that date are governed by the prior law. N.J.S.A. 2C:35-23. An offense committed on or after the date of the act is governed by the act. An offense is considered committed after the effective date of the act if any of the elements of the offense occurred subsequent thereto. N.J.S.A. 2C:35-23(b).

The following provisions of the act apply to offenses committed prior to its effective date:

1. N.J.S.A. 2C:35-19: Laboratory Analysis Certificates

2. N.J.S.A. 2C:35-21: Seizure and Destruction of CDS

3 With defendant's consent, the court may sentence under the act. See State v. Matthews, 233 N.J. Super. 291, 298 (App. Div. 1989) (defendant has no right to be sentenced under the act; however, defendant's request should be granted absent a finding of "good cause "to deny the request).

4. If a defendant has not applied for a conditional discharge on the effective date of the act he is not eligible for supervisory treatment except pursuant to N.J.S.A 2C:43-12 (PTI) and N.J.S.A. 2C:36A-1.

[N.J.S.A. 2C:35-23]

C. Policy

The focus in the act is on the punishment and deterrence of serious and dangerous offenders. N.J.S.A. 2C:35-1.1(a). The intent of the Legislature is to incapacitate the most culpable drug offenders and to facilitate, where feasible, the rehabilitation of drug-dependent persons. N.J.S.A. 2C:35-1.1(c).

Because the current drug laws provide inadequate sentencing guidelines to identify the most serious offenders and guard against sentencing disparity, the law was re-written to protect the public interest and disrupt organized drug trafficking networks. N.J.S.A. 2C:35-1.1(d). Special protection is provided to children, schools and adjacent areas. N.J.S.A. 2C:35-1.1(c).

Amendments and additions to Title 24 are an indication of the goal of the Legislature. To promote uniform sentencing, offenses are classified by degree and, unless specifically provided by the act, sentences are determined according to the provision of Chapters 43 and 44 of Title 2C.

One focus of the act is to punish the more dangerous offenders. The creation of new offenses (leader of narcotics network, maintaining a CDS production facility, employing a juvenile, possessing CDS near or on school property) indicate the intent of the Legislature to identify and punish those involved in organized distribution of CDS and offenses involving children. N.J.S.A. 2C:35-1.2(c).

Distribution and child-related offenses (leader of narcotics network (N.J.S.A. 2C:35-3), maintaining a CDS production facility (N.J.S.A. 2C:35-4), distributing five ounces or more of cocaine or heroin (N.J.S.A. 2C:35-5(b)(1)), distributing 100 milligrams or more LSD or 10 grams or more phencyclidine (N.J.S.A. 2C:35-5(b)(6)), employing a juvenile (N.J.S.A. 2C:35-6), and possessing CDS near or on school property (N.J.S.A. 2C:35-7)), require the imposition of a term of imprisonment. Any mandatory term may be waived. N.J.S.A 2C:35-12. Similarly, limitations on merger are placed on these type offenses (leader of narcotics network (N.J.S.A. 2C:35-3), maintaining a CDS production facility (N.J.S.A. 2C:35-4), employing a juvenile (N.J.S.A. 2C:35-6), possessing CDS near or on school property (N.J.S.A. 2C:35-7), and strict liability for drug-induced death, (N.J.S.A. 2C:35-9)).

For many Chapter 35 and 36 offenses, the fines imposed are considerably higher than those set out in N.J.S.A. 2C:43-3. Additionally, when applicable, fines may be based on the street value of the CDS. N.J.S.A. 2C:35-3; 2C:35-4; 2C:35-6.

Finally, one of the goals of the act is the rehabilitation of less serious offenders. Penalties for possessory offenses have not been significantly increased and a rehabilitation provision has been added to the act. N.J.S.A. 2C:35-14.

D. Penalties for Specific Offenses

1. N.J.S.A. 2C:35-3 Leader of Narcotics Trafficking Network (New. No parallel Title 24 provision).

Classification: First degree.
Term: Mandatory life term with parole ineligibility of 25 years (mandatory term is waivable by agreement, N.J.S.A. 2C:35-12, see §5.3D(10), infra).

Fine: Not to exceed $500,000 or five times the street value of the CDS, whichever is greater.

Limitations on Merger: A conviction under this section does not preclude a conviction for:

N.J.S.A. 2C:5-2, (conspiracy)
The offense which was the object of the conspiracy
N.J.S.A. 2C:35-4 (maintaining or operating a drug facility)
N.J.S.A. 2C:35-5 (manufacturing, distributing or dispensing)
N.J.S.A. 2C:35-6 (employing a juvenile in a drug distribution scheme)
N.J.S.A. 2C:35-9 (strict liability for a drug-induced death)
N.J.S.A. 2C:41-2 (racketeering activities)
N.J.S.A. 2C:5-2(g) (leader of organized crime)

Extended Term: Nothing within this section shall prohibit the court from imposing an extended term pursuant to N.J.S.A. 2C:43-7 (extended terms for persistent offenders, professional criminals or paying for or receiving payment for crime). However, the extended term for first degree crimes is 20 years to life. N.J.S.A. 2C:43-7a(2). Since the penalty under this section is a life term with a mandatory parole ineligibility of 25 years, the extended term provision seems to be redundant. See, however, N.J.S.A. 2C:43-6(f), providing for mandatory extended terms, upon application of the prosecutor, for persons convicted under this section who have previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute. In these cases, where a term of life imprisonment is imposed on a person convicted under this section, the term of parole ineligibility is 30 years. N.J.S.A. 2C:43-7(c).

2. N.J.S.A. 2C:35-4 Maintaining or Operating a CDS Production Facility (New. Conduct previously covered by N.J.S.A. 24:21-19).

Classification: First degree.
Term of Imprisonment: 10 to 20 years. The court shall impose a term of imprisonment with a mandatory minimum term of between one-third and one-half of the sentence (waivable by agreement, N.J.S.A. 2C:35-12).
Fine: Not to exceed $500,000 or five times the street value of all CDS at any time manufactured or stored on the premises, whichever is greater.

Mandatory Extended Term: A person convicted under this section who has previously been convicted under N.J.S.A. 2C:35-3, -4, -5, -6, or -7 must, upon application of the prosecutor, be sentenced to an extended term of imprisonment. N.J.S.A. 2C:43-6(f). The term must contain a mandatory minimum term

of between one-third and one-half of the sentence or three years, whichever is greater. N.J.S.A. 2C:43-6(f).

3. N.J.S.A. 2C:35-5 Manufacturing, Distributing, Dispensing (Basically a re-enactment of N.J.S.A. 24:21-19. The penalties are new, with a more detailed classification by drug and amount. See §5.2C(1), supra).

a. N.J.S.A. 2C:35-5(b)(1):

Drug: Heroin, coca leaves, their derivatives and analogs.
Quantity: Five ounces or more, including any adulterants and dilutants.
Classification: First degree.
Term of Imprisonment: 10 to 20 years. This section provides that the court shall impose a term of imprisonment with a mandatory minimum term of between one-third and one-half of the sentence (waivable by agreement, N.J.S.A. 2C:35-12).
Fine: Up to $300,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

b. N.J.S.A. 2C:35-5(b)(2):

Drug: Heroin, coca leaves, their derivatives and analogs.
Quantity: One-half ounce or more but less than five ounces, including any adulterants and dilutants.
Classification: Second degree.
Term of Imprisonment: Five to ten years.
Fine: Up to $100,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

c. N.J.S.A. 2C:35-5(b)(3):

Drug: Heroin, coca leaves, their derivatives and analogs.
Quantity: Less than one-half ounce, including any adulterants and dilutants.
Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $50,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

d. N.J.S.A. 2C:35-5(b)(4):

Drug: A Schedule I or II narcotic drug or its analog not previously covered under §35-5b(1), (2) or (3).
Quantity: One ounce or more, including any adulterants and dilutants.
Classification: Second degree.
Term of Imprisonment: Five to ten years.
Fine: Up to $100,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

e. N.J.S.A. 2C:35-5(b)(5):

Drug: A Schedule I or II narcotic drug or its analog not previously covered under §35-5(b)(1), (2), (3) or (4).
Quantity: Less than one ounce, including any adulterants and dilutants.
Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $50,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

f. N.J.S.A. 2C:35-5(b)(6):

Drug: Lysergic acid diethylamide (LSD) or its analog, or phencyclidine or its analog.
Quantity: LSD: 100 milligrams or more, including any adulterants and dilutants.
Phencyclidine: ten grams or more, including any adulterants and dilutants.
Classification: First degree.
Term of Imprisonment: 10 to 20 years. N.J.S.A. 2C:35-5(b)(6) provides that for this offense the court shall

impose a term of imprisonment with a mandatory minimum term of between one-third and one-half of the sentence (waivable by agreement, N.J.S.A. 2C:35-12).
Fine: Up to $300,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

g. N.J.S.A. 2C:35-5(b)(7):

Drug: LSD or its analog, or phencyclidine or its analog.
Quantity: LSD: Less than 100 milligrams, including any adulterants and dilutants, or an undetermined amount.
Phencyclidine: Less than ten grams, including any adulterants and dilutants, or an undetermined amount.
Classification: Second degree.
Term of Imprisonment: Five to ten years.
Fine: Up to $100,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

h. N.J.S.A. 2C:35-5(b)(8):

Drug: Methamphetamine or its analog.
Quantity: One ounce or more, including any adulterants and dilutants.
Classification: Second degree.
Term of Imprisonment: Five to ten years.
Fine: Up to $100,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

i. N.J.S.A. 2C:35-5(b)(9)

Drug: Methamphetamine or its analog.
Quantity: Less than one ounce, including any adulterants and dilutants.

Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $50,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

j. N.J.S.A. 2C:35-5(b)(10):

Drug: Marijuana or Hashish.
Quantity: Marijuana: five pounds or more, including any adulterants and dilutants.
Hashish: one pound or more, including any adulterants and dilutants.
Classification: Second degree.
Term of Imprisonment: Five to ten years.
Fine: Up to $100,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

k. N.J.S.A. 2C:35-5(b)(11):

Drug: Marijuana or Hashish.
Quantity: Marijuana: one ounce or more but less than five pounds, including any adulterants and dilutants.
Hashish: five grams or more but less than one pound, including any adulterants and dilutants.
Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $15,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

l. N.J.S.A. 2C:35-5(b)(12):

Drug: Marijuana or Hashish.

Quantity: Marijuana: less than one ounce, including any adulterants and dilutants.
Hashish: less than five grams, including any adulterants and dilutants.
Classification: Fourth degree.
Term of Imprisonment: Not to exceed 18 months.
Fine: Up to $7500.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6 or -7 must, upon application of the prosecutor, be sentenced to an extended term of imprisonment between three and five years. N.J.S.A. 2C:43-6(f); N.J.S.A. 2C:43-7a(5). The term must contain a mandatory minimum term of 18 months. N.J.S.A. 2C:43-6(f).

m. N.J.S.A. 2C:35-5(b)(13):

Drug: Any other CDS classified in schedules I, II, III or IV.
Quantity: Not stated in statute.
Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $15,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

n. N.J.S.A 2C:35-5(b)(14):

Drug: Any Schedule V substance.
Quantity: Not stated in statute.
Classification: Fourth degree.
Term of Imprisonment: Not to exceed 18 months.
Fine: Up to $15,000.

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6 or -7 must, upon application of the prosecutor, be sentenced to an extended term of imprisonment between three and five years. N.J.S.A. 2C:43-6(f); N.J.S.A. 2C:43-7a(5). The term must contain a mandatory minimum term of 18 months. N.J.S.A. 2C:43-6(f).

o. The quantity of the substance involved is determined by the trier of fact. Where the indictment or accusation so provides, quantities involved in individual acts of manufacturing, distribution, dispensing or possessing with intent to distribute may be aggregated in determining the grade of the offense. N.J.S.A. 2C:35-5(c).

4. N.J.S.A. 2C:35-6 Employing a Juvenile in a Drug Distribution Scheme (New. No parallel Title 24 provision; appears to be derived from N.J.S.A. 2A:96-5 and -5.1. See §5.3E, infra).

Classification: Second degree.
Term of Imprisonment: Five to ten years.
The court shall impose a term of imprisonment with a mandatory minimum of between one-third and one-half of the sentence (waivable by agreement, N.J.S.A. 2C:35-12).
Fine: Not to exceed $300,000 or five times the street value of the CDS, whichever is greater.
Limitations on Merger: A conviction under this section shall not merge with a conviction for:

N.J.S.A. 2C:35-3 (leader narcotics network)
N.J.S.A. 2C:35-4 (operate CDS facility)
N.J.S.A. 2C:35-5 (manufacture, distribute, dispense)
N.J.S.A. 2C:35-9 (strict liability for drug-induced death)

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6 or -7 must, upon application of the prosecutor, be sentenced to an extended term of imprisonment. N.J.S.A. 2C:43-6(f). The term must contain a mandatory minimum term of not less than seven years. N.J.S.A. 2C:43-6(f) (as amended, L. 1988, c. 44, effective June 28, 1988).

5. N.J.S.A. 2C:35-7 CDS Near or On School Property (New. No parallel Title 24 provision).

Classification: Third degree.
Term of Imprisonment: Three to five years.
Person convicted shall receive a term of imprisonment and:

a. If one ounce or less of marijuana: a mandatory minimum of one-third and one-half sentence or one year, whichever is greater (waivable by agreement, N.J.S.A. 2C:35-12).

b. In all other cases, a mandatory minimum of one-third and one-half of sentence or three years, whichever is greater (waivable by agreement, N.J.S.A. 2C:35-12).

Fine: Up to $100,000.
Limitations on Merger: A conviction under this section shall not merge with a conviction for:

N.J.S.A. 2C:35-5 (manufacturing, distributing, dispensing)
N.J.S.A. 2C:35-6 (employing a juvenile)

Mandatory Extended Term: A person convicted under this section who has previously been convicted of N.J.S.A. 2C:35-3, -4, -5, -6, -7 or equivalent statute must, upon application

of the prosecutor, be sentenced to an extended term, with a mandatory parole ineligibility term of between 1/3 and 1/2 the term imposed or three years, whichever is greater. N.J.S.A. 2C:43-6f.

6. N.J.S.A. 2C:35-8 Distribution to Persons Under Age 18 (Based on N.J.S.A. 24:21-26. See §5.2C(6), supra).

Upon application of the prosecutor, any person at least 18 years of age convicted of:

N.J.S.A. 2C:35-5(a) (manufacturing, distributing, dispensing) or
N.J.S.A. 2C:35-7 (possessing CDS near or on school property)

by distributing a CDS or its analog to a pregnant female or a person 17 years of age or younger shall be subject to twice the term of imprisonment, fine or penalty, including twice the term of parole ineligibility, authorized or required by N.J.S.A. 2C:35-5(b) or N.J.S.A. 2C:35-7 or any other provision of this title. The presumption of non-imprisonment set forth in N.J.S.A. 2C:44-1(e) does not apply to persons subject to enhanced punishment under N.J.S.A. 2C:35-8.

The court shall not impose more than one enhanced sentence pursuant to N.J.S.A. 2C:35-8. If the defendant is convicted of more than one offense that is subject to enhanced punishment pursuant to this section, the court shall impose enhanced punishment based upon the most serious offense for which the defendant was convicted or the offense that mandates the longest period of parole ineligibility. Notwithstanding N.J.S.A. 2C:44-5(a)(2) (not more than one sentence for an extended term shall be imposed), the court may also impose an extended term pursuant to N.J.S.A. 2C:43-6(f) (mandatory extended terms for certain subsequent offenders). N.J.S.A. 2C:35-8.

At a hearing at the time of sentencing, the prosecution must establish the grounds for an enhanced sentence by a preponderance of the evidence. The court shall take judicial notice of any evidence adduced at trial or other court proceedings and shall also consider the presentence report and other relevant information. It is not relevant to the imposition of enhanced punishment that the defendant mistakenly believed the recipient to be 18 years or older or that the defendant did not know that the recipient was pregnant.

One authority has noted that this section seems not to define a separate crime but is patterned on Graves Act sentencing. Cannell, Title 2C, Comment N.J.S.A. 2C:35-8 at 559 (1989).

7. N.J.S.A. 2C:35-9 Strict Liability for Drug-Induced Deaths (New. No parallel Title 24 provision).

Classification: First degree.

Term of Imprisonment: 10 to 20 years
Fine: Up to $100,000.
Limitation on Merger: A conviction arising under this section shall not merge with a conviction for:

N.J.S.A. 2C:35-3 (leader of narcotics trafficking network)
N.J.S.A. 2C:35-4 (maintaining a CDS production facility)
N.J.S.A. 2C:35-5 (manufacture, distribute, dispense or possess with intent to distribute the CDS which resulted in death)

8. N.J.S.A. 2C:35-10 Possession, Use, Being Under the Influence, or Failure to Make Lawful Disposition (Derived from N.J.S.A. 24:21-20. Only significant change is in penalties. See §5.2C(3), supra).

a. N.J.S.A. 2C:35-10(a)(1):

Drug: Schedule I, II, III or IV CDS other than those specifically covered in this section.
Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $25,000.

b. N.J.S.A. 2C:35-10(a)(2):

Drug: Schedule V CDS.
Classification: Fourth degree.
Term of Imprisonment: Up to 18 months.
Fine: Up to $15,000.

c. N.J.S.A. 2C:35-10(a)(3):

Drug: Marijuana or Hashish
Quantity: Marijuana: more than 50 grams, including any adulterants and dilutants.
Hashish: more than five grams.
Classification: Fourth degree.
Term of Imprisonment: Up to 18 months.
Fine: Up to $15,000.

d. N.J.S.A. 2C:35-10(a)(4):

Drug: Marijuana or Hashish
Quantity: Marijuana: 50 grams or less, including any adulterants and dilutants.
Hashish: five grams or less.
Classification: Disorderly person.
Term of Imprisonment: Up to six months.
Fine: Up to $1000.

e. N.J.S.A. 2C:35-10(b). Use or being under the influence of a CDS or its analog:

Classification: Disorderly person.

Term of Imprisonment: Up to six months.
Fine: Up to $1000.

f. N.J.S.A. 2C:35-10(c). Obtaining or possessing CDS and failing to deliver to law enforcement:

Classification: Disorderly person.
Term of Imprisonment: Up to six months.
Fine: Up to $1000.

A person who violates (a), (b), or (c) above, while on school property or on a school bus or within 1000 feet of school property or a school bus, who is not sentenced to a term of imprisonment, shall, in addition to any other sentence which the court may impose, be required to perform not less than 100 hours of community service. N.J.S.A. 2C:35-10.

9. N.J.S.A. 2C:35-11 Imitation CDS, Distribution, Possession, Manufacture (Re-enactment of N.J.S.A. 24:21-19.1 and 24:21-19.2. Only the penalties are changed. See §5.2C(2), supra).

Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $100,000.

10. N.J.S.A. 2C:35-12 Waiver of Mandatory Minimum and Extended Terms (New. No parallel provision in Title 24).

When an offense under this chapter specifies a mandatory sentence of imprisonment that includes a period of parole ineligibility or a mandatory extended term that includes a period of parole ineligibility, upon conviction the court shall impose the mandatory sentence unless the defendant has pleaded guilty pursuant to a negotiated agreement or, in cases resulting in trial, the defendant and the prosecution have entered into a post-conviction agreement, which provides for a lesser sentence or period of parole ineligibility. The negotiated plea or post-conviction agreement may provide for a specified term of imprisonment within the range of ordinary or extended sentences authorized by law, a specified period of parole ineligibility, a specified fine, or other disposition. In that event, the court shall not impose a lesser term of imprisonment, period of parole ineligibility or fine than that expressly provided for under the terms of the plea or post-conviction agreement.

11. N.J.S.A. 2C:35-13 Obtaining CDS or Certificate of Destruction by Fraud (Derived from N.J.S.A. 24:21-22(a)(3). See §5.2C(4), supra).

Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $30,000.

12. N.J.S.A. 2C:36-2 Use or Possession with Intent to Use Drug Paraphernalia (Formerly N.J.S.A 24:21-47. See §5.2C(7), supra).

Classification: Disorderly person.
Term of Imprisonment: Up to six months.
Fine: Up to $1000.

13. N.J.S.A. 2C:36-3 Distribution or Possession with Intent to Distribute or Manufacture Drug Paraphernalia (Formerly N.J.S.A. 24:21-48. See §5.2C(8), supra).

Classification: Fourth degree.
Term of Imprisonment: Up to 18 months.
Fine: Up to $7500.

14. N.J.S.A. 2C:36-4 Advertising to Promote Sale of Drug Paraphernalia (Formerly N.J.S.A. 24:21-49. See §5.2C(9), supra).

Classification: Fourth degree.
Term of Imprisonment: Up to 18 months.
Fine: Up to $7500.

15. N.J.S.A. 2C:36-5 Delivering Drug Paraphernalia to Persons Under 18 Years of Age (Formerly N.J.S.A. 24:21-50. See §5.2C(10), supra).

Classification: Third degree.
Term of Imprisonment: Three to five years.
Fine: Up to $7500.

16. N.J.S.A. 2C:36-6 Possession or Distribution of Hypodermic Syringe or Needle (Formerly N.J.S.A. 24:21-50. See §5.2C(11), supra).

Classification: Disorderly person.
Term of Imprisonment: Up to six months.
Fine: Up to $1000.

E. Alternative Sentencing Provisions

1. N.J.S.A. 2C:35-14 Rehabilitation Program for Drug Dependent Persons (New. No parallel provision in Title 24).

Notwithstanding the presumption of incarceration, any drug dependent person convicted of:

N.J.S.A. 2C:35-5 (Manufacturing, distributing, dispensing);
N.J.S.A. 2C:35-6 (Employing juvenile in drug distribution);
N.J.S.A. 2C:35-7 (CDS near or on school property);
N.J.S.A. 2C:35-10 (Possession, use or being under the influence);
N.J.S.A. 2C:35-11 (Imitation CDS, distribution, etc.); or
N.J.S.A. 2C:35-13 (Obtaining by fraud), and

if the crime is other than a first degree crime, and the court finds: 1) no danger to the community will result, and 2) defendant will benefit, the court may place the defendant on probabtion for five years. A condition of probation will be that the defendant enter a drug rehabilitation program. N.J.S.A. 2C:35-14(a).

No person who has been convicted of employing a juvenile in CDS scheme or of distributing or possessing with intent to distribute CDS on or near school property, or who has previously been convicted of manufacturing, distributing or dispensing CDS is eligible for this alternative sentence, except upon joint application of the defense and the prosecutor. N.J.S.A. 2C:35-14(b).

Persons convicted of second degree crimes or of distributing or possessing with intent to distribute CDS on or near school property who is placed in a drug rehabilitation program shall be placed in a residential treatment facility for a minimum of six months or until successful completion of the program, whichever is later, but not for a period in excess of five years. N.J.S.A. 2C:35-14(c). Upon completion of the residential program defendant must complete the period of probation. N.J.S.A. 2C:35-14(c).

For a first violation of a condition of probation or of a condition of the drug rehabilitation program, the court may, and for a subsequent violation shall, revoke defendant's probation and impose any sentence which might originally have been imposed. N.J.S.A. 2C:35-14(d). A defendant who fails to comply with the terms of probation and who is then sentenced to a term of imprisonment is ineligible for entry into the Intensive Supervision Program. N.J.S.A. 2C:35-14(d).

The court may require the defendant to pay some or all of the costs of the residential drug rehabilitation program. N.J.S.A. 2C:35-14(e).

2. N.J.S.A. 2C:36A-1 Conditional Discharge
(Formerly N.J.S.A. 24:21-27. See §5.2C(13), supra. Almost identical, except chapter 36A eliminates the reference to narcotic drugs in the third sentence and makes all persons charged with a disorderly or petty disorderly persons offenses eligible, whereas N.J.S.A. 24:21-27 made eligible those charged under N.J.S.A. 24:21-20, including some indictable offenses. Finally, chapter 36A includes the addition of a paragraph c(3).)

a. Who is Eligible

Any person not previously convicted of a drug offense under Title 24, Title 2C, or of any law of any state, who is charged with or convicted of a disorderly or petty disorderly persons offense under chapters 35 or 36 of Title 2C, is eligible. N.J.S.A. 2C:36A-1(a). Applicants must pay a $45 application fee, waivable for reasons of poverty. N.J.S.A. 2C:36A-1(d); see R. 1:13-2(a).

To be eligible the court must conclude that:

1) defendant's continued presence in the community or in the program is not a danger to the community; or

2) the supervisory treatment will be adequate to protect the public and will benefit the defendant, and

3) the defendant has not previously received supervisory treatment under N.J.S.A. 24:21-27 or N.J.S.A. 2C:43-12.

b. Procedure

Prior to a plea of guilty or finding of guilt, proceedings are suspended and the defendant is placed on supervisory treatment with reasonable terms and conditions. N.J.S.A. 2C:36A-1(a)(1). After a plea of guilty or finding of guilt, and without entering a judgment of conviction, defendant is placed on supervisory treatment with reasonable terms and conditions. N.J.S.A. 2C:36A-1(a)(2). If a term or condition of treatment is violated, court proceedings resume. Upon fulfillment of the terms or conditions of treatment, the treatment is terminated and the charges are dismissed by the court. N.J.S.A. 2C:36A-1(b).

If a term of the supervisory treatment is referral to a residential treatment facility, the length of the referral cannot exceed the statutory maximum for the offense. No term of supervisory treatment may exceed three years.

License suspension of a person granted a conditional discharge without a plea of guilty is discretionary. If, at the time of placement on supervisory treatment under this section, a person is less than 17 years of age, the

driving-privileges suspension, including a suspension of the privilege of operating a motorized bicycle, shall begin on the day the person is placed on supervisory treatment and shall run for a period of not less than six months or more than two years after the day the person reaches the age of 17 years.

If the person's driving privileges are under revocation at the time of the person's placement in conditional discharge, the revocation imposed under N.J.S.A. 2C:36A-1 shall commence as of the date of the termination of the existing revocation. The court that places a person on supervisory treatment under this section shall collect and forward the person's driver's license to the Division of Motor Vehicles (DMV) and file an appropriate report with the DMV in accordance with the procedure set forth in N.J.S.A. 2C:35-16. The court shall also inform the person of the penalties for operating a motor vehicle during the period of license suspension or postponement. N.J.S.A. 2C:35-16.

A defendant may be considered for pre-trial diversion from criminal prosecution under the code or under Title 24, and the criteria to be used depend on the pretrial intervention authority invoked. State v. Collins, 180 N.J. Super. 190, 200 (App. Div. 1981), aff'd 90 N.J. 449 (1982). The legislative goal of seeking to deter and severely punish the more dangerous and insidious enterprises of selling and distributing narcotics is facilitated by permitting the suspension of proceedings when the charge is possession of CDS paraphernalia or obtaining CDS by means of forged prescription. State v. Sanders, 169

N.J. Super. 596, 599-600 (Law Div. 1979). See also State v. Diluzio, 130 N.J. Super. 222, 230 (Law Div. 1974). But see State v. Chanly, 220 N.J. Super. 289 (Law Div. 1987), and State v. Telcher, 220 N.J. Super. 54 (Law Div. 1987).

Concrete proof of selling or distributing controlled substances bars application of the suspension provision of the CDS Act. Even if a defendant who is charged with use and possession is not officially charged with a violation of the sale or distribution provisions, reliable evidence indicating that he is a seller of drugs can be considered by the court in application of its discretionary power to deny suspension. State v. DiLuzio, supra, 130 N.J. Super. at 230-231.

Juvenile drug-related offenses do not disqualify a defendant from relief under the conditional discharge provisions; however, facts surrounding a juvenile drug involvement may be considered in determining whether the defendant's presence in the community will constitute a danger and whether the terms of probation or supervisory treatment will both protect the public and benefit the defendant. State v. Teitelbaum, 160 N.J. Super. 430, 434 (Law Div. 1978); see also State v. Humphreys, 89 N.J. 4 (1982).

Where a prosecutor declares his intention as part of a plea bargain to recommend dismissal of the separate charge of possession with intent to distribute, the fact that the charge is still technically open at the time of sentencing on the possession charge ordinarily should not render a defendant ineligible for supervisory treatment. State v. Reinhardt, 211 N.J. Super. 271, 274 (App. Div. 1986).

Where the sole objective in seizing evidence in good faith, but contrary to the dictates of the Fourth Amendment, is to obtain a criminal conviction, and use of evidence for that purpose has been suppressed, the policy behind the exclusionary rule has been fully satisfied, and such evidence may be considered on a motion pursuant to this section governing conditional discharge and expunging records of certain first drug offenders, and for sentencing purposes. State v. Banks, 157 N.J. Super. 442, 451 (Law Div. 1978).

The trial court should support its conclusion with a statement of reasons when denying an application for conditional discharge so that the exercise of the court's discretion may be subject to meaningful review on appeal. State v. Humphreys, supra, 89 N.J. at 11.

F. Mandatory Additional Penalties

1. N.J.S.A 2C:35-15 Mandatory Drug Enforcement and Demand Reduction Penalties (New. No parallel Title 24 provision).

Every person convicted of or adjudicated delinquent for a violation of chapter 35 or chapter 36 shall be assessed for each offense a penalty of:

(1) $3,000 in the case of a crime of the first degree;
(2) $2,000 in the case of a crime of the second degree;
(3) $1,000 in the case of a crime of the third degree;
(4) $750 in the case of a crime of the fourth degree;
(5) $500 in the case of a disorderly persons or petty disorderly persons offense.

A person placed into PTI or granted a conditional discharge shall be assessed only one D.E.D.R. penalty, regardless of the number of offenses charged. The penalty imposed shall be that applicable to the highest degree offense for which the person is charged.

If the defendant agrees to enter a residential drug rehabilitation program and to pay for all or some of its costs the court may suspend collection of a penalty. Upon successful completion of the program, the defendant may apply to the court for a reduction of the penalty imposed by any amount paid by the defendant for participation in the program.

2. N.J.S.A. 2C:35-16 Mandatory Forfeiture or Postponement of Driving Priviliges (New. No parallel Title 24 section).

Every person convicted of or adjudicated delinquent for an offense in chapter 35 or chapter 36 shall lose his or her driving priviliges for between six months and two years. N.J.S.A. 2C:35-16. The license suspension shall commence on the day the sentence is imposed. If a person's license is presently suspended, suspension under this section will start when the previous suspension is up. The court shall collect the driver's license and forward it, with information about the person and suspension, to the DMV. If the court cannot collect the license, the court shall report the conviction or adjudication to the DMV. The report to the DMV shall include the defendant's name, address, date of birth, eye color, sex and the first and last day of suspension or postponement. Oral and written notification shall be given to the person of the penalties of driving on the revoked list. The court will notify the DMV, who will notify other states, when an out-of-state driver is penalized in New Jersey. The court will suspend the non-resident's New Jersey driving privileges. Suspension prohibits the operation of motorized bicycles. For persons under age 17, the suspension starts on the day of the sentence and runs between six months and two years after his or her 17th birthday. The court may suspend the drivers license of persons admitted to PTI or conditional discharge without a plea of guilty or finding of guilt.

3. N.J.S.A. 2C:35-20 Forensic Lab Fees (New. No parallel Title 24 section).

Every person convicted under chapter 35 must be assessed a criminal laboratory analysis fee of $50 for each offense for which he or she was convicted. N.J.S.A. 2C:35-20(a). Every person placed on supervisory treatment pursuant to N.J.S.A. 2C:43-12 (PTI) or 2C:36A-1 (conditional discharge) must be assessed a criminal laboratory analysis fee of $50 for each offense for which he or she was charged. N.J.S.A. 2C:35-20(a).

Any juvenile adjudicated delinquent for a violation of Chapter 35 must be assessed a criminal laboratory analysis fee of $25 for each adjudication.

G. Unresolved Issues
Continued Applicability of Title 2A Provisions

N.J.S.A. 2C:98-3 provides:

Pending enactment of acts to revise, repeal or to compile the same in Title 2C of the New Jersey Statutes, the following sections, acts or parts of acts, together with all amendments and supplements thereto, shall remain in full force and effect for use, administration and enforcement as heretofore:

1. N.J.S.A. 2A:96-5. Hiring, employing or using child under 18 in connection with drugs for unlawful purpose by addict.

2. N.J.S.A. 2A:96-5.1. Hiring, employing or using child under 18 in connection with drugs for unlawful purpose by non-addict.

3. N.J.S.A. 2A:170-25.1 Marihuana; growing or allowing to grow on one's land.

4. N.J.S.A. 2A:108-9. Narcotic drugs; persuading others to use.

5. N.J.S.A. 2A:170-25.17. Disposable or reusable hypodermic needle or syringe; discarding or abandoning without destruction; knowingly allowing to remain on premises by person in control.

6. N.J.S.A. 2A:170-77.8. Unlawful use, possession or control, or under influence of prescription legend drug or stramonium preparation.

7. N.J.S.A. 2A:170-77.9. Unlawful sale of prescription legend drug or stramonium preparation.

8. N.J.S.A. 2A:170-77.10. Exceptions to 2A:170-77.8, 2A:170-77.9.

9. N.J.S.A. 2A:170-77.11. Exceptions to 2A:170-77.8.

N.J.S.A. 2C:35-1.1 (a) provides that Title 2C reflects a "comprehensive consolidation" of criminal laws. It is unclear whether Title 2A provisions survive the enactment of chapters 35 and 36.

5.4 Sex Offenders-The Adult Diagnostic and Treatment Center

A. Procedures

Whenever a person is convicted of aggravated sexual assault, sexual assault, or aggravated criminal sexual contact, or an attempt to commit any such crime, the judge shall order that such person be referred to the Adult Diagnostic and Treatment Center (ADTC or "the center") for a period necessary to complete a physical and psychological examination, said period not to exceed 10 days. N.J.S.A. 2C:47-1. The referral order is required to contain a determination of the person's legal settlement.[1] Ibid.; see N.J.S.A. 30:4-49 et seq.

An essential prerequisite to sentencing an offender to the ADTC for a program of specialized treatment is that the examination reveal that the "offender's conduct was characterized by a pattern of repetitive and compulsive behavior." N.J.S.A. 2C:47-3(a). Upon such a finding the court may, upon the recommendation of the ADTC, sentence the offender to the center for a program of specialized treatment for his mental condition. Ibid. No person may be sentenced to the ADTC in the absence of a finding that his conduct was characterized by a pattern of repetitive, compulsive behavior. N.J.S.A. 2C:47-3(d).

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[1] The county in which the person has legal settlement is responsible for half the cost of examining and maintaining that person at the center. N.J.S.A. 2C:47-7. If the person has no legal settlement in any county, the entire cost is paid by the state.

The trial court is not bound by the recommendation of the ADTC that the sentence of a convicted sex offender be served there. Despite the ADTC's recommendation for treatment, the court may sentence the defendant to the custody of the Commissioner of the Department of Corrections (general state prison population), and it can impose a discretionary (2C:43-6(b)) or mandatory (2C:43-6(c), 2C:14-6) parole ineligibility term in conjunction with a sentence to the center. State v. Chapman, 95 N.J. 582, 588-589 (1984).

Where overcrowding precludes the admission of additional sex offenders to the ADTC, the commissioner has the authority to house individuals sentenced to the ADTC in county jails, pending the availability of space at the former facility. State v. Falcone, 211 N.J. Super. 685, 692 (App. Div. 1986), citing Worthington v. Fauver, 88 N.J. 183 (1982). There is no constitutional or statutory violation in the delay of treatment occasioned by temporary confinement in the county jail, although the delay may affect parole eligibility. State v. Howard, 110 N.J. 113, 132 (1988). However, the court must inform the defendant of the parole consequences of a sentence to the ADTC. Id. at 125.

A sentencing court does not have the authority to direct immediate admission of an offender to the center where the commissioner has determined that, due to spatial limitations, the defendant's admission would be out of sequence of his position on the waiting list. Such admission would be grossly unfair to other inmates who had been on the list for a longer period of time. State v. Falcone, supra, 211 N.J. Super. at

698. However, in the discretion of state officials, exceptions may be made from this admission scheme when

> (1) an inmate suffers from a serious medical problem which the county is unable to address, or
>
> (2) an inmate poses a management problem to the county, or
>
> (3) an inmate is in physical danger as a result of other inmates at the county facility.
> [Id. at 690]

B. Determinate Sentences

Under the pre-code act, a sentence to the ADTC was required to be indeterminate, subject to a maximum term not exceeding the maximum sentence imposable for the crime. Gerald v. Commissioner, N.J. Dept. of Corr., 201 N.J. Super. 438, 445 (App. Div. 1985), aff'd 102 N.J. 435 (1986). In contrast, the general sentencing provisions of Title 2C require the imposition of determinate sentences on sex offenders. N.J.S.A. 2C:47-3(b); State v. Chapman, supra, 95 N.J. at 592; Gerald v. Commissioner, N.J. Dept. of Corr., supra, 201 N.J. Super. at 446.

N.J.S.A. 2C:47-3(b) provides that sentences to the ADTC shall be set in accordance with Chapters 43 and 44 of the code, i.e., the determination that a term is or is not warranted is made according to the degree of crime, the presumptive term and the balance of aggravating and mitigating factors. Aggravating and mitigating factors applicable to the specific offense are weighed under N.J.S.A. 2C:44-1(a), (b) and (f) in order to arrive at an appropriate determinate sentence within the maximum-minimum range specified in N.J.S.A. 2C:43-6(a) for each degree of crime. State v. Yarbough, 100 N.J. 627, 633 (1985), cert. den. 475 U.S. 1014 (1986). When the court is

clearly convinced that the aggravating factors outweigh the mitigating factors, it may also impose a period of parole ineligibility pursuant to N.J.S.A. 2C:43-6(b). Id. at 634; see also State v. Roth, 95 N.J. 334 (1984).

C. Release

1. Probation

In lieu of incarceration, the court may, upon the written report and recommendation of the ADTC, place an offender on probation with the requirement, as a condition of such probation, that he must receive outpatient psychological treatment in a manner to be prescribed in each individual case. N.J.S.A. 2C:47-3(c). See State v. Hamm, 207 N.J. Super. 40 (App. Div. 1986).

2. Parole

The mechanism for determining primary parole eligibility for first-time sex offenders is N.J.S.A. 2C:47-5, not the general parole provisions of Title 30. N.J.S.A. 30:4-123.51(e). Prior to accepting a guilty plea, the sentencing court should inform the defendant of the different standard for parole eligibility under a sentence to the ADTC. State v. Howard, supra, 110 N.J. at 125. However, a recent appellate decision held that it is not necessary to explain to a defendant the parole consequences of waiting in county jail for a space at ADTC. State v. MacAlpin, 223 N.J. Super. 299 (App. Div. 1988).

A sex offender confined to the ADTC shall be released under parole supervision when the State Parole Board, upon the recommendation of a Special Classification Review Board (SCRB) appointed by the commissioner, concludes that the offender is

capable of making an acceptable social adjustment in the community. N.J.S.A. 2C:47-5. Written reports advising the SCRB of the offender's physical and psychological condition and making a recommendation as to the offender's continued confinement or consideration for parole release are to be provided by the Chief Executive Officer of the ADTC at least semi-annually. N.J.S.A. 2C:47-5. A person paroled pursuant to this section shall be subject to the provisions of Title 30 governing parole. N.J.S.A. 2C:47-5.

If, as part of his sentence to the ADTC, a defendant has received a mandatory minimum period of parole ineligibility pursuant to N.J.S.A. 2C:14-6, he must serve the minimum period. The SCRB may not recommend release pursuant to N.J.S.A. 2C:47-4(c) until the expiration of the mandatory period. N.J.S.A. 30:4-123.51(e); State v. Chapman, 95 N.J. 582, 593-594 (1984); see also State v. Hamm, supra, 207 N.J. Super. at 43 (interpreting Chapman to say that any parole ineligibility term mandated by statute (i.e., the Graves Act) cannot be relaxed). However, if the fixed period of parole ineligibility is discretionary pursuant to N.J.S.A 2C:43-6(b), and the SCRB determines that continued confinement is not necessary, and the commissioner is satisfied with that recommendation, the commissioner shall apply to the sentencing court for a modification of sentence. After the sentence is modified, the matter is submitted to the parole board. Chapman, supra, 95 N.J. at 594.

Under the old code, jurisdiction remained with the SCRB for parole purposes. N.J.S.A. 2A:164-1 (repealed). Now, sex

offenders transferred out of the ADTC are treated as ordinary offenders for parole purposes. The parole status of such inmates confined under Title 2C is determined under N.J.S.A. 30:4-123.51(a), rather than the procedure set forth in N.J.S.A. 2A:164-1 et seq. Artway v. Com'r, N.J. Dept. of Corr., 216 N.J. Super. 213, 215 (App. Div. 1987).

As long as a sex offender sentenced under Chapter 47 of Title 2C remains confined at the ADTC, his situation is substantially the same as a defendant sentenced under the former act, except that his maximum period of confinement is determined by the actual fixed term imposed rather than the maximum allowable for the crime. Gerald v. Commissioner, N.J. Dept. of Corr., supra, 201 N.J. Super. at 445-446.

Work and good behavior credits often determine parole eligibility. (See §6, infra). In pre-code cases, offenders sentenced to the ADTC were disqualified from receiving work and good behavior credits. N.J.S.A. 2A:164-10. The rationale was to assure a special confinement and treatment of the offenders for the protection of society, as well as for the offenders themselves, until satisfactory rehabilitation and social adjustment were established. See State v. Mickschutz, 101 N.J. Super. 315, 320 (App. Div. 1968), and Savad v. Corrections Dept., 178 N.J. Super. 386, 390 (App. Div. 1981), certif. den. 87 N.J. 389 (1981).

As of September 1, 1979 no statutory prohibition existed on the award of commutation time for good behavior and work performed in remission of a sentence imposed under Title 2C. State v. Fernandez, 209 N.J. Super. 37, 42 (App. Div. 1986).

Those sentenced under the code to the ADTC are immediately eligible for work and good behavior credits. Savad v. Corrections Dept., supra, 178 N.J. Super. at 392.

Title 2A offenders who are resentenced under Title 2C:1-1d(2) are eligible for work and good behavior credits calculated from the effective date of Title 2C. Id. at 393.

D. Concurrent or Consecutive Sentences

The code permits the sentencing of a sex offender to concurrent or consecutive ADTC and prison terms for sex-related and nonsex-related charges arising from a single incident. State v. Chapman, supra, 95 N.J. at 592. A defendant who receives concurrent ADTC and prison sentences, and who is released from the ADTC before the end of the prison term, can be required to serve the remainder of his concurrent term in prison. Ibid. Nothing in the sex offender act or in case law prohibits the imposition of an ADTC term to be served consecutively to a state prison sentence that a defendant is then serving. State v. Lewis, 182 N.J. Super. 405, 408 (App. Div. 1981).

In accordance with the code provisions concerning the imposition of multiple sentences, the determination whether a sentence for a separate penal offense should run concurrently with or consecutively to the sentence for treatment of repetitive, compulsive sexual behavior is generally within the discretion of the sentencing judge. N.J.S.A. 2C:44-5(a).

E. Procedural Safeguards

The code provisions concerning sentencing procedure provide that the court rules and case law are to control the disclosure

of any presentence investigation report or psychiatric examination report. N.J.S.A. 2C:44-6(d). R. 3:21-3 provides that the report of the ADTC must be made available to the defendant or his counsel, and the court must specifically advise defendant of his opportunity to be heard on the report and afford him a hearing. The ADTC report is confidential unless otherwise provided by rule or court order.

When a defendant is referred to the ADTC for evaluation prior to sentencing, the presentence report of the diagnostic center should be made available to the defendant, and he or she should be given an opportunity to review the report whether or not he or she is found to come under the purview of the sex offender act. State v. Tucker, 169 N.J. Super. 334, 337 (App. Div. 1979), certif. den. 84 N.J. 427 (1980). Where the contents of the report are challenged, the hearing to be afforded defendant is "a hearing in the traditional judicial sense with full opportunities of confrontation, cross-examination and defense." State v. Horne, 56 N.J. 372, 375 (1970); see also State v. Way, 131 N.J. Super. 422, 426 (App. Div. 1974).

F. Treatment Arrangement

An offender committed to the ADTC is under the jurisdiction of the Commissioner of the Department of Corrections. N.J.S.A. 2C:47-4(a). The commissioner shall provide treatment for the committed offender and may order transfer of such a person out of the ADTC. N.J.S.A. 2C:47-4(a) and (b). The provisions of chapter 47 of Title 2C shall no longer govern in the event of such a transfer. N.J.S.A. 2C:47-4(b).

The requirement of treatment at the ADTC is balanced with the discretionary power granted to the commissioner in N.J.S.A. 2C:47-4(b) to transfer the defendant out of the institution. State v. Falcone, supra, 211 N.J. Super. at 688. A sex offender sentenced under Title 2A to an indeterminate term at the ADTC, who is transferred to state prison, must be resentenced to a fixed term. Gerald v. Commissioner, N.J. Dept. of Corr., supra, 201 N.J. Super. at 451; see State v. Bowen, 224 N.J. Super. 263 (App. Div. 1988), certif. den. 113 N.J. 323 (1988).

G. Procedure If the Statute Does Not Apply

If it appears from the report of the ADTC that the offender's conduct was not characterized by a pattern of repetitive, compulsive behavior, commitment to the ADTC is not an available sentencing alternative and standard code provisions apply. N.J.S.A. 2C:47-3(d). The sentencing court must submit the report of the ADTC to the defendant whether or not the defendant is sentenced under the Sex Offender Act. State v. Tucker, supra, 169 N.J. Super. at 337. When the defendant challenges the conclusion by the ADTC as to his sex offender status he is entitled to a hearing in which the court must make an independent finding of compulsiveness and repetitiveness. The standard of proof is a preponderance of evidence. State v. Howard, supra, 110 N.J. at 131; see also State v. Horne, 56 N.J. 372 (1970).

5.5 Gambling

A. Directive

The Supreme Court by directive ordered that sentencing in all gambling cases be handled by the Assignment Judge in each county or by a judge designated by him for that purpose. AOC Directive No. 8-65, November 5, 1965. This order has been justified on the grounds that syndicated gambling is an area in which the characteristics of both the offense and offender are likely to be relatively uniform. The order is set forth verbatim in State v. DeStasio, 49 N.J. 247, 253 (1967), cert. den. 389 U.S. 830 (1967). The Court stated in DeStasio that

> ... the very uniformity of both the offense and the situation of the offenders tends to make disparate treatment unmistakable and thereby to label judges with respect to their attitude toward these offenses.
> [Id. at 255]

The Court's reasoning in DeStasio is expressed in more detail in the earlier case of State v. Ivan, 33 N.J. 197 (1960). The validity of the directive was upheld in State v. Pych, 213 N.J. Super. 446, 462 (App. Div. 1986), despite assertions by the defendant in that case that the directive was invalid in light of the sentencing provisions of the code, which were enacted to ensure uniformity of treatment. See also State v. Hartye, 208 N.J. Super. 319, 324-326 (App. Div. 1986), aff'd 105 N.J. 411 (1987) (gambling cases have always received special sentencing treatment to insure uniformity and to deter people from entering what is frequently an organized crime field).

B. Sentencing Procedures

The gambling offenses defined by the code are crimes of the third degree, crimes of the fourth degree, or disorderly persons offenses, depending upon the extent of the offender's involvement in gambling activity measured by the number of bets and their monetary value. N.J.S.A. 2C:37-2 through -4 and -7.

All gambling offenses, be they crimes or disorderly persons offenses, must be prosecuted in the Superior Court. N.J.S.A. 2C:37-8. State v. Tenriero, 183 N.J. Super. 519, 520 (Law Div. 1981). See also R. 3:1-6 as to the prosecution of non-indictable gambling offenses in Superior Court. However, in the case of a disorderly persons offense, no right to trial by jury arises even though gambling offenses are tried in the Superior Court rather than the municipal court. Tenriero, supra, 183 N.J Super. at 521-524.

The code sets forth special monetary limits with regard to maximum fines which are applicable to gambling offenses, rather than the fines authorized by the general sentencing provisions of the code. N.J.S.A. 2C:37-2b(2); 2C:37-3c; 2C:37-4a and b. (See §4.9C3, supra, for further discussion of fines relating to gambling offenses.)

Gambling offenses are also subject to any other appropriate disposition authorized by section 2C:43-2b of the code. See N.J.S.A. 2C:37-2b(2); 2C:37-3c; 2C:37-4a and b. Aggravating and mitigating factors play the same role in sentencing of gambling offenses as they do in sentencing under the code generally.

See State v. Pych, supra, 213 N.J. Super. at 460-461, where it was held proper to use involvement in organized crime as an aggravating factor in sentencing because such involvement was not an element of the offense of promoting gambling.

Custodial sentences have been held appropriate for gambling offenses. State v. Ivan, supra, 33 N.J. 197; State v. DeGeorge, 113 N.J. Super. 542, 544 (App. Div. 1971); State v. Hartye, supra, 208 N.J. Super. at 327. A custodial sentence may be imposed even when there is a presumption of non-imprisonment as set forth in N.J.S.A. 2C:44-1 et seq.

While custodial sentences have been held appropriate, it is not mandatory that a custodial term shall be imposed in all cases. In State v. Souss, 65 N.J. 453, 457 (1974), the Court emphasized that Ivan and DeStasio are not to "be read as standing for the proposition that a mandatory prison sentence follows from a gambling conviction and that the judge is thereby robbed of his discretion in the matter of sentencing." In State v. Hartye, supra, 208 N.J. Super. at 326, the court wrote that "... some period of imprisonment may be required...it does not necessarily follow that the presumptive sentence, or even the mandatory minimum set forth in the Code, should be imposed in all cases."

5.6 GRAVES ACT

A. Penalties

N.J.S.A. 2C:43-6c and d, enacted in 1981 and known as the Graves Act, mandates certain enhanced punishment for offenses committed with a firearm:

> The Graves Act ... provides generally that one who uses or possesses a "firearm" while committing, attempting to commit, or fleeing after committing certain enumerated serious offenses must be sentenced to imprisonment for a term that includes at least three years of parole ineligibility. N.J.S.A. 2C:43-6c. An exception is made in the case of a fourth-degree crime involving the use of a firearm, where the minimum term of parole disqualification is dropped to 18 months.
> [State v. Gantt, 101 N.J. 573, 579 (1986)]

The offenses enumerated under the act consist of possession of a firearm with intent to use it against the person of another (2C:39-4a), murder (2C:11-3), manslaughter (2C:11-4), aggravated assault (2C:12-1b), kidnapping (2C:13-1), aggravated sexual assault (2C:14-2a), aggravated criminal sexual contact (2C:14-3a), robbery (2C:15-1), burglary (2C:18-2), and escape (2C:29-5). N.J.S.A. 2C:43-6c.

In order to sentence a Graves Act defendant to a term in excess of the minimum mandated term of parole ineligibility,[1] the sentencing judge must find that the aggravating factors substantially outweigh the mitigating factors. State v. Reed

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[1] In this manual the term "mandated term of parole ineligibility" refers to required parole ineligibility under the Graves Act. The term "discretionary term of parole ineligibility" replaces the term "mandatory minimum," which refers to the judge's discretionary imposition of parole ineligibility under N.J.S.A. 2C:43-6b.

substantially outweigh the mitigating factors. State v. Reed [II], 215 N.J. Super. 105, 107 (App. Div. 1987), certif. den. 108 N.J. 667 (1987).

A defendant serving a mandated term of parole ineligibility under the Graves Act may not make an application under R. 3:21-10(b) for reduction or change of sentence. State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986). However, once defendant has served the minimum mandated term of parole ineligibility required by statute, an application under R. 3:21-10(b) may be considered. Id. at 113-114. Mendel did not "preclude timely application and consideration of motions under R. 3:21-10(a) for reduction of a sentence subject to the mandatory minimums required by law." Id. at 113 n.2.

N.J.S.A. 2C:43-6.2 was recently enacted (L. 1989, c. 53, effective April 14, 1989) to permit the assignment judge to reduce a Graves Act mandatory minimum term of imprisonment to one year, or to impose probation, for a defendant who has not previously been convicted Graves Act offense if the prosecutor agrees and if the court finds that "the interests of justice would not be served by the imposition of a mandatory minimum term." By the same legislation, N.J.S.A. 2C:43-6.3 was enacted to permit any first-time Graves Act inmate who is serving a Graves Act mandatory minimum term to "move to have his or her sentence reviewed by the sentencing court." If the prosecutor agrees that the sentence "does not serve the interests of justice," the court shall reduce the minimum mandatory term to one year or place defendant on probation.

B. Second Offenders

1. Definition

To promote "the deterrent impact on gun-related crimes sought by the Legislature," (State v. Des Marets, 92 N.J. 62, 65 (1983)), the Graves Act requires that second offenders with a firearm be sentenced to extended prison terms (N.J.S.A. 2C:43-6c., 2C:44-3d), regardless of the chronology of his convictions. State v. Hawks, 114 N.J. 359, 361 (1989).

For purposes of N.J.S.A. 2C:43-6c and N.J.S.A. 2C:44-3d, a previous conviction has to be a conviction for one of the enumerated code offenses or an equivalent offense under Title 2A. N.J.S.A. 2C:44-3d. The imposition of a mandatory extended term pursuant to §43-6c and §44-3d can not be based on a foreign conviction. State v. Copeman, 197 N.J. Super. 261, 265 (App. Div. 1984). The presentence report should include information regarding defendant's prior conviction. Pressler, Current N.J. Court Rules, Comment R. 3:21-2 (1989); State v. Martin, 209 N.J. Super. 473, 481 (App. Div. 1986), rev'd on other grounds 110 N.J. 10 (1988). Defendant must receive notice and a hearing prior to the imposition of an extended term under this section. Id., 110 N.J. at 14.

The extended term provision of the Graves Act must be imposed on entry of a second firearms conviction, regardless of the order in which the offenses occurred. Hawks, supra, 114 N.J. at 367. In Hawks, defendant committed two

Graves Act offenses on separate occasions, but he was convicted of the second offense before he was convicted of the first. Id. at 360-363. The Court held that, unlike the second-time sex offender provision (N.J.S.A. 2C:14-6) as interpreted in State v. Anderson, 186 N.J. Super. 174 (App Div. 1982), aff'd o.b. 93 N.J. 14 (1983),[2] the second-time Graves Act offender provision does not require chronologically sequential convictions. Hawks, supra, 114 N.J. at 365-367.

2. Multiple Extended Terms

State v. Connell, 208 N.J. Super. 688 (App. Div. 1986), distinguished between discretionary and mandatory extended terms. Thus, the court held that the statutory prohibition in N.J.S.A. 2C:44-5a(2) against multiple extended terms did not apply to mandatory extended terms under the Graves Act. Id. at 691. "When multiple Graves Act prison sentences are imposed on a second Graves Act offender, the sentence for each Graves Act crime must lie within the extended prison sentence range." Id. See State v. Hawks, 214 N.J. Super. 430 (App. Div. 1986), aff'd 114 N.J. 359 (1989) (upheld concurrent sentences of multiple extended terms for offenses with firearms); cf.

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[2] Anderson interpreted N.J.S.A. 2C:14-6, which mandates imprisonment and a 5-year parole ineligibility term upon conviction for a "second or subsequent [sex] offense." The Appellate Division concluded that N.J.S.A. 2C:14-6 applied only to chronologically sequential convictions, not simultaneous convictions. 186 N.J. Super. at 177. The court further concluded that N.J.S.A. 2C:14-6 requires that the "second or subsequent offense" be preceded by a conviction. Id. at 175. This latter interpretation has been called into question by the Supreme Court's opinion in Hawks, supra, 114 at 365.

State v. Latimore, 197 N.J. Super. 197, 223 (App. Div. 1984), certif. den. 101 N.J. 328 (1985) (court may not sentence defendant to discretionary extended term if defendant subject to mandatory extended term under Graves Act).

The range of sentences for a mandatory extended term is designated by 2C:43-7c. A second offender must serve such an extended term with a period of parole ineligibility of between one-third and one-half of the sentence imposed by the court or five years, whichever is greater. If defendant is sentenced to life imprisonment, the minimum mandated term of parole ineligibility is 25 years. N.J.S.A. 2C:43-7c.

C. Supreme Court Memorandum

The parole ineligibility and extended terms under the Graves Act are mandatory. The Supreme Court has promulgated a memorandum "prohibiting conventional plea bargaining of Graves Act offenses." Des Marets, supra, 92 N.J. at 66 n.3, citing Supreme Court Memorandum, April 27, 1981-Plea Bargaining ("Memorandum"). See State v. Connell, 208 N.J. Super. 688, 696 (App. Div. 1986).

> ... [T]he "interests of justice" cannot be served if judicial participation in plea bargaining or dismissals or downgrading amounts to circumventing the expressed legislative policy [given the legislative intent to mandate custodial terms]. Accordingly, no trial judge, at the time of disposition, may approve a negotiated plea which involves dismissal of an offense carrying a mandatory

> custodial term under [the Graves Act unless certain enumerated conditions exist].
> [Memorandum, supra]

The Court then designated certain circumstances in which it was permissible to approve a plea bargain that involved dismissal of an offense covered by the Graves Act. Such circumstances include (1) representation on the record by the prosecutor that a conviction is not warranted by the evidence or that the interests of justice warrant a dismissal, (2) despite dismissal of the Graves Act offense, defendant will be subject to an equal term of parole ineligibility, or (3) the prosecutor states on the record, in camera or in open court, that defendant's cooperation with the prosecution is predicated on the plea bargain. Memorandum, supra.

Additionally, a judge may deviate from the Memorandum for compelling reasons not anticipated by the Court, which must be stated on the record. Notice of such deviation should be given to the Chief Justice. Ibid.

A Graves Act offense cannot be merged into a non-Graves Act offense if the result is elimination of mandatory Graves Act sentences:

> ... [W]hen a Graves Act crime merges with a non-Graves Act crime, the sentence must be at least equal in length to the mandatory sentence required for the Graves Act crime. If the sentencing guidelines for the non-Graves Act crime do not permit that long a sentence, the Graves Act crime survives the merger
> [Connell, supra, 208 N.J. Super. at 696]

D. Constitutional Challenge

The Graves Act thus far has withstood constitutional challenge as applied. Des Marets, supra, 92 N.J. at 82 (given

magnitude and severity of problem of violent crime, defendant's sentence did not constitute cruel and unusual punishment under state constitution); State v. Muessing, 198 N.J. Super. 197 (App. Div. 1985), certif. den. 101 N.J. 234 (1985) (as applied, mandatory custodial sentence of Graves Act did not violate state or federal constitutions).

E. Youthful Offenders

A Graves Act mandatory sentence proscribes suspension of sentence and non-custodial dispositions. See Des Marets, supra, 92 N.J. 62. The statute further requires that the judge shall impose a mandated term of parole ineligibility. Accordingly, Des Marets held that defendant could not be sentenced as a youthful offender to an indeterminate term at the Youth Correctional Institution Complex. The purposes of indeterminate sentencing and the Graves Act are antithetical. The former "looks to rehabilitation through the promise of release [while] the Graves Act approach is deterrence through the promise of imprisonment." Id. at 71. However, a young adult offender convicted of a Graves Act offense may serve the mandatory minimum term at the Youth Correctional Institution Complex or the Correctional Institution for Women. The trial judge may recommend that defendant's Graves Act sentence be served at the Youth Correctional Institution Complex at the discretion of the Commissioner of Corrections. See N.J.S.A. 2C:43-5. For a discussion regarding indeterminate terms for offenses other than Graves Act offenses which carry mandatory minimum terms, see §7.3, infra.

F. Application of Act

1. Presence of a Firearm

Our Supreme Court has refined the construction of the Graves Act. In Des Marets, supra, 92 N.J. at 68, the Court held that the Graves Act sanctions apply upon a showing of possession of a firearm, without any need to demonstrate intent to use. "It is the mere presence of guns at the scene of crimes that this statute seeks to end." Id. at 70.

A year later in State v. Stewart, 96 N.J. 596, 604-605 (1984), the Supreme Court articulated the necessary proof for possession, which is not defined in the Graves Act:

> ... [W]e hold that possession of a firearm for purposes of the Graves Act includes not only actual possession but constructive possession that the defendant is able to convert practically immediately to actual possession.*** Under our holding today, a Graves Act sentence will be imposed only where defendant's ability to exercise actual control over the firearm is imminent.

State v. Gantt, 101 N.J. 573 (1986), held that the Graves Act incorporates the definition of "firearm" contained in our Gun Control Law at N.J.S.A. 2C:39-1f, centering on design as opposed to operability. A device is a firearm under the Graves Act if it was designed to fire a potentially deadly missile. The fact that the device is proven presently inoperable generally is irrelevant. Gantt, supra, 101 N.J. at 584-585. Weapons not readily recognizable as either handguns, rifles, or shotguns, but which are in fact designed to produce the same deadly results, are firearms under the Graves Act. See State v. Harmon, 203 N.J. Super. 216, 227 (App. Div. 1985), rev'd on other grounds 104 N.J. 189 (1986) (BB gun constitutes

firearm under Graves Act); accord State v. Mieles, 199 N.J. Super. 29 (App. Div. 1985), certif. den. 101 N.J. 265 (1985). The Gantt Court expressly approved the holding in State v. Ortiz, 187 N.J. Super. 44, 49-50 (App. Div. 1982), that a fake or toy gun is not a firearm under the Graves Act because of its design and not because of its present operability. 101 N.J. at 584. See State v. Williams, 232 N.J. Super. 414, 422 (App. Div. 1989) (starter pistol not a "firearm" for Graves Act purposes).

2. Accomplice Liability

Accomplice liability under the Graves Act was delineated by State v. White, 98 N.J. 122 (1984). An accomplice is subject to Graves Act penalties under the following circumstances: (1) if convicted of a Graves Act offense that was committed with a firearm, or (2) if convicted only of an unarmed offense, but the court finds that the defendant nonetheless knew or had reason to know that his or her cohort would use or be in possession of a firearm in the course of committing or attempting to commit the crime, including the immediate flight therefrom. Id. at 126. There is no liability under the Graves Act if the accomplice did not know or have reason to know beforehand that his or her partner would possess or use a firearm while the crime was being committed, or during the immediate flight thereafter. Id. at 131. See State v. Weeks, 107 N.J. 396, 410 (1987).

The jury need not be instructed that a guilty verdict will result in a mandatory minimum sentence under the Graves Act.

State v. Reed, 211 N.J. Super. 177, 186-187 (App. Div. 1986), certif den. 110 N.J. 508 (1988).

G. Hearings

Defendant may not be sentenced under the Graves Act to a mandatory minimum term of parole ineligibility, and, in the case of a second offender, to a mandatory extended term without a post-conviction hearing to determine culpability under the act. N.J.S.A. 2C:43-6d provides for such a hearing:

> The court shall not impose a mandatory sentence pusuant to subsection c. of this section, 2C:43-7c. or 2C:44-3d., unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish by a preponderance of the evidence that the weapon used or possessed was a firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing or other court proceedings and shall also consider the presentence report and any other relevant information.

Thus, the trial court is required to make an independent finding that (1) the device in question constitutes a "firearm" under the Graves Act, and that (2) defendant "used" or "possessed" such a firearm. State v. Stewart, 96 N.J. 596, 606 (1984). The court is not restricted to evidence admissible at trial or considered by the jury; all relevant material may be considered. Gantt, supra, 101 N.J. at 606. If relevant, the trial court also must establish defendant's liability for Graves Act sanctions as an accomplice according to the standards articulated in State v. White, supra, 98 N.J. 122. See discussion this section C2, supra.

The court is not limited by the jury's findings. Accordingly, the jury's verdict of acquittal is not irreconcilable

with a finding of possession under the Graves Act. Stewart, supra, 96 N.J. at 607. The jury's standard of proof is harsher (beyond a reasonable doubt) than that of the court (preponderance of the evidence). Moreover, defendant may have been acquitted on a possessory weapons charge that required proof of intent. No such proof is required for sentencing under the act. Id. at n.7.

At the post-conviction hearing, the court must determine whether the instrument was designed to deliver lethal force and thus is a "real" firearm under the Graves Act. In addition to the forms of proof designated in N.J.S.A. 2C:43-6d, an object's authentic design may be inferred from appearance or based on lay testimony. Proof of design is never dependent on empirical examination of the weapon. Gantt, supra, 101 N.J. at 589-590. In fact, the court properly may find that a handgun was used to perpetrate an offense covered by the Graves Act even if the gun itself was never recovered. State v. Hickman, 204 N.J. Super. 409, 415 (App. Div. 1985).

In Hickman, the witness observed that defendant's weapon was "nickle-plated, small caliber, short barrel, looked like about two inches." This testimony was sufficient to support the court's finding that a handgun was used in the commission of a robbery, thus triggering Graves Act sanctions despite the fact that the gun was not recovered. Cf. State v. Cole, 154 N.J. Super. 138, 146 (App. Div. 1977), certif. den. 78 N.J. 415 (1978) (when weapon was never recovered, testimony of witnesses furnished ample proof that weapon was "real" as against a

visible appearance of impotent or toy image of actual revolver); State v. Schultheis, 113 N.J. Super. 11, 14 (App. Div. 1971), certif. den. 58 N.J. 390 (1971) (testimony of witness observing physical characteristics of defendant's holstered gun was sufficient to support conviction based on proof of operability of "real" gun). For further examples of cases in which the authenticity of a weapon was inferred from appearance or from lay testimony, see Gantt, supra, 101 N.J. at 590 n.8.

Inquiries into a weapon's operability are inappropriate except under certain restricted circumstances. Evidence of inoperability are relevant only if and when substantial evidence is introduced that tends to show that (1) the device is of innocuous design or (2) the device has undergone such substantial alteration or mutilation that it has completely and permanently lost the characteristics of a real gun. 101 N.J. at 590. Although operability of the gun was not at issue in Gantt, the Court cited State v. Morgan, 121 N.J. Super. 217, 220 (App. Div. 1972), for the related proposition that a firearm is still a firearm if it is rendered temporarily inoperable by need of some minor repair or adjustment. 101 N.J. at 589.

H. Unresolved Issues

1. Prosecutorial Discretion

The Memorandum promulgated by the Supreme Court requires that when a prosecutor seeks to dismiss an offense covered under the Graves Act, the prosecutor must justify such a dismissal on the record. The prosecutor must represent that a conviction is unwarranted. The act and the Memorandum are silent regarding

the standard by which judges must determine that dismissal is warranted.

The Supreme Court Memorandum applies to plea bargains and not to convictions. If a prosecutor informs the judge that there is insufficient evidence to "seek" or to impose Graves Act sanctions on a defendant convicted of a covered offense, it is unclear whether the judge may make an independent determination.

Some prosecutors are negotiating pre-indictment plea agreements that dismiss Graves Act charges on original complaints. For example, an armed individual is known to be contemplating suicide. Police officers rush to the scene. The distraught individual turns the gun away from himself and points it at the police. The prosecutor allows him to avoid Graves Act consequences through a pre-indictment accusation. It is unclear whether the Memorandum pertains to both pre-indictment accusations and indictments.

2. Graves Act -- Impact on Pretrial Intervention

The Supreme Court has left open the question of whether the Graves Act impliedly repealed the Pretrial Intervention Program ("PTI") as applied to those charged with Graves Act offenses. State v. Hadfield, 92 N.J. 421 (1983). A Graves Act offender is subject to a mandatory term of imprisonment. N.J.S.A. 2C:43-6c. The Pretrial Intervention Program, on the other hand, focuses on rehabilitation in diverting qualified defendants from prosecution. State v. De Marco, 107 N.J. 562, 567 (1987), citing R. 3:28, Guideline 1; see State v. Pickett, 186

N.J. Super. 599, 603 (Law Div. 1982), citing State v. Leonardis, 71 N.J. 85, 96 (1976). Thus, PTI would provide an opportunity for defendant to avoid the incarceration mandated by the Graves Act.

PART VI PAROLE

6.1 Applicability of Code Parole Provisions

Title 2C states that its provisions governing the treatment and the release or discharge of prisoners, probationers and parolees shall apply to persons under sentence committed prior to the effective date of the code, September 1, 1979, except that the minimum or maximum period of their detention or supervision shall in no case be increased. N.J.S.A. 2C:1-1d(1).

In imposing a sentence of imprisonment, the court is required to consider defendant's eligibility for release under the law governing parole and to state its consideration on the record. N.J.S.A. 2C:44-1c(2); N.J.S.A. 2C:43-2e.

6.2 Credits

A. Jail Credits

New Jersey Court Rule 3:21-8 states "[t]he defendant shall receive credit on the term of a custodial sentence for any time he has served in custody in jail or in a state hospital between his arrest and imposition of sentence."

R. 3:21-8 recognizes the constitutional right of a defendant to receive credits for time spent in custody between arrest and imposition of sentence. State v. Jones, 184 N.J. Super. 626, 629 n.1 (Law Div. 1982). However, the presentence confinement must be "directly attributable" to the particular offense for which the credits apply. State v. Garland, 226 N.J. Super. 356, 361 (App. Div. 1988), certif. den. 114 N.J. 288 (1988); State v. Council, 137 N.J. Super. 306, 308 (App. Div. 1975); State v. Marnin, 108 N.J. Super. 442, 444 (App. Div. 1970), certif. den. 55 N.J. 598, cert. den. 400 U.S. 835 (1970); Jones, supra, 184 N.J. Super. at 629. For example, in State v. Beatty, 128 N.J. Super. 488, 491 (App. Div. 1974), defendant was entitled to credit against his New Jersey sentence for the time he was detained in a New York penal institution after his latest release date because the detention was caused by a detainer filed by the State of New Jersey. See also State v. Johnson, 167 N.J. Super. 64, 66 (App. Div. 1979).

B. Commutation Credits

Pursuant to N.J.S.A. 30:4-123.51(a) and N.J.S.A. 30:4-140, commutation credits (also known as good time credits, good behavior credits, and credits for continuous orderly deportment)

are awarded to state prison inmates on the balance of the parole eligibility term less presentence jail credits. The credits are allowed according to a schedule set forth in N.J.S.A. 30:4-140 (see also Appendix A, second page). They accrue on a progressive or accelerated basis, increasing in direct ratio to the length of sentence.

No commutation credits are calculated on presentence jail time. N.J.S.A. 30:4-140. This does not violate the equal protection clause of the Fourteenth Amendment. Torres v. Wagner, 121 N.J. Super. 457, 460 (App. Div. 1972).

Commutation credits do accrue during the service of a mandatory minimum term; however, pursuant to N.J.S.A. 30:4-123.51(a), these credits will not be awarded so as to reduce a mandatory minimum term (see Appendix A, fourth page). Karatz v. Scheidemantel, 226 N.J. Super. 468, 472 (App. Div. 1988), certif. den. 113 N.J. 384 (1988). Commutation credits accrued during the service of a mandatory minimum term will, however, be applied to reduce a consecutive term that does not include a mandatory minimum term (see January 19, 1988 memo, beginning on fifth page of Appendix A).

C. Work and Minimum Security Credits

N.J.S.A. 30:4-92 provides that "inmates of all correctional and charitable, hospital, relief and training institutions within the jurisdiction of the State Board shall be employed in such productive occupations as are consistent with their health, strength and mental capacity and shall receive such compensation as the State Board shall determine". Compensation for these

working inmates can be in the form of cash, or time credits, or both. Time credits compute to one day for each five days of productive occupation. N.J.S.A. 30:4-92.

In addition, all inmates classified as minimum security and who are considered sufficiently trustworthy to be employed in honor camps, farms or details shall receive further time credits at the rate of three days per month for the first year of such employment and five days per month for the second and each subsequent year of such employment. N.J.S.A. 30:4-92.

Work and minimum custody credits will not be awarded so as to reduce a mandatory minimum term. N.J.S.A. 30:4-123.51(a). Karatz v. Scheidemantel, supra, 226 N.J. Super. at 472. Therefore, work and minimum custody credits earned during the service of a mandatory minimum term will be applied only to reduce any consecutive term that does not include a mandatory minimum term (see January 19, 1988 memo, beginning on fifth page of Appendix A).

6.3 Eligibility for Release

A. State Prison Terms

An adult inmate sentenced to a specific term of years to the custody of the Commissioner of the Department of Corrections shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum parole ineligibility term, or one-third of the sentence where no such mandatory minimum term has been imposed, less commutation time for good behavior pursuant to N.J.S.A. 30:4-140 and credits for diligent application to work and other institutional assignments pursuant to N.J.S.A. 30:4-92. Consistent with the provisions of Title 2C (i.e., N.J.S.A. 2C:11-3, 2C:14-6, 2C:43-6, 2C:43-7), commutation and work credits shall in no way reduce any judicial or statutory minimum parole ineligible term and such credits accrued shall only be awarded subsequent to the expiration of such a term. N.J.S.A. 30:4-123.51(a). Karatz v. Scheidemantel, 226 N.J. Super. 468, 472 (App. Div. 1988), certif. den. 113 N.J. 384 (1988).

The former parole law, the Parole Act of 1948, authorized parole only if the board found that "there is a reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society." N.J.S.A. 30:4-123.14 (repealed). The Parole Act of 1979 sets forth a much narrower standard for determining a prisoner's fitness for parole: "[a]n adult inmate shall be released on parole at the time of parole eligibility,

unless [it is demonstrated]... by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released." N.J.S.A. 30:4-123.53(a); In re Trantino Parole Application, 89 N.J. 347, 355 (1982). Thus, the current act makes the likelihood of future criminal conduct the determinative test for parole eligibility and effectively establishes a presumption in favor of parole. Id. at 355-356.

Under the new sentencing structure initiated by Title 2C and the Parole Act of 1979, fitness for parole remains a determination for parole authorities, but parole eligibility is now a function of the sentence received. N.J. Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983). Setting the parole eligibility date has become a judicial responsibility to be exercised at the time of sentencing and within the bounds set by the Legislature. Ibid. The Legislature reduced the discretion involved in parole decisions in recognition of more definite and severe sentences provided by the code. Ibid. Thus, the longer sentences and mandatory minimum terms anticipated under the code are presumed to insure that the punitive aspects of the inmates sentence will be satisfied by the time the parole eligibility date arrives. Ibid.

There is no constitutional right to parole. The New Jersey Constitution guarantees only that "[a] system for granting of parole shall be provided by law." N.J. Const. (1947), Art. V, §II, par. 2. Thus, the issue that arises is whether parole eligibility is a "right" or a "privilege." In Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972),

Chief Justice Burger rejected the long discredited "right"--"privilege" distinction, and stated:

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment.

Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), rejected the claim that a protected interest arises whenever the state provides for the possibility of parole. "That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained .... a hope is not protected by due process." Id., 442 U.S. at 11. However, the Greenholtz Court found that the language of the Nebraska parole statute did create a "protected entitlement."

Following this rationale, the New Jersey Supreme Court held that the Parole Act creates "a sufficient expectancy of parole eligibility which entitles prisoners to some measure of constitutional protection." N.J. Parole Bd. v. Byrne, supra, 93 N.J. at 203; see also Vetek v. Jones, 445 U.S. 480, 489, 100 S.Ct. 1257, 63 L.Ed.2d 552 (1980).

B. County Jail

Each adult inmate of a county jail, work-house or penitentiary shall become primarily eligible for parole after having served 60 days of his aggregate sentence, or any mandatory minimum term, or one-third of his sentence less credits for commutation, work and minimum custody, whichever is greater. N.J.S.A. 30:4-123.51(a) and (g); see Appendix C for

parole eligibility dates. Whenever any such inmate's parole eligibility is within six months of the date of sentence, the judge shall state such eligibility on the record which shall satisfy all public and inmate notice requirements.

Commutation credits for county inmates are awarded at the rate of one day for every six days of the inmate's sentence. N.J.S.A. 2A:164-24. Work credits are awarded at the rate of one day for every five days of productive occupation. N.J.S.A. 30:8-28.4(a). County inmates classified as minimum security and who are employed in honor camps, farm details or public property details, shall receive additional credits at the rate of three days per month for each month of labor. N.J.S.A. 30:8-28.4(c).

C. Youthful Offenders

1. Juvenile Inmates

In accordance with N.J.S.A. 30:4-123.51(f), each juvenile inmate committed to an indeterminate term of incarceration shall be immediately eligible for parole. Release on parole is conditioned upon the appearance that the juvenile, if released, will not cause injury to persons or substantial injury to property. N.J.S.A. 30:4-123.53(b).

2. Young Adult Offenders

Adult inmates sentenced to an indeterminate term of years as a young adult offender pursuant to N.J.S.A. 2C:43-5 shall become primarily eligible for parole consideration pursuant to a schedule of primary eligibility dates (see Appendix B) developed by the board, less credit for program participation. In no case shall the schedule require that the primary parole eligibility

date for a young adult offender be greater than the primary eligibility date required for the presumptive term for the particular crime as set forth in N.J.S.A. 2C:44-1(f). N.J.S.A. 30:4-123.51(d).

D. Sex Offenders (See §5.4, supra)

1. Avenel Diagnostic Treatment Center

Parole eligibility for a sex offender confined in the Adult Diagnostic and Treatment Center (ADTC), Avenel, is a two-step process. First, he or she must be recommended for parole by the Special Classification Review Board. N.J.S.A. 2C:47-5; N.J.S.A. 30:4-123.51(e). Second, he or she must be approved for parole by the parole board. N.J.S.A. 2C:47-5. Parole is granted upon the board determining that the inmate is able to make an "acceptable social adjustment in the community" and that he or she is not substantially likely to commit a crime if released. Ibid.; N.J.S.A. 30:4-123.51(e). No sex offender shall become primarily eligible prior to the expiration of any mandatory or fixed minimum term imposed pursuant to N.J.S.A. 2C:43-6(b) or N.J.S.A. 2C:14-6. N.J.S.A. 30:4-123.51(e); State v. Chapman, 95 N.J. 582, 593 (1984); Karatz v. Scheidemantel, supra, 226 N.J. Super. at 472; see N.J.S.A. 2C:47-4(c) and §5.4, infra.

Sex offenders sentenced under Title 2A for offenses committed prior to the effective date of Title 2C, and sex offenders sentenced under Title 2C who are transferred out of the ADTC to a correctional facility, are no longer under the sex offender act and become eligible for parole consideration in the same manner as adult offenders committed under a prison term.

N.J.S.A. 2C:47-4; Gerald v. Commissioner, N.J. Dept. of Corr., 102 N.J. 435, 437 (1986).

2. Second and Subsequent Sex Offenders

A person convicted of a second or subsequent offense under N.J.S.A. 2C:14-2 (aggravated sexual assault, sexual assault) or N.J.S.A. 2C:14-3a (aggravated criminal sexual contact) shall be subject to a mandatory minimum parole inelibility term of not less than five years. N.J.S.A. 2C:14-6. If the overall sentence is ten years or less, the parole ineligibility period must be five years; however, if the sentence is greater than ten years, the parole ineligibility term must be at least five years but can be up to half the overall sentence. State v. Chapman, supra, 95 N.J. at 593.

An offense is deemed a second or subsequent offense if the actor has at any time been convicted under N.J.S.A. 2C:14-2 or 2C:14-3a of aggravated sexual assault, sexual assault or aggravated criminal sexual contact, or under any similar statute of the United States, this state or of any other state for an offense substantially equivalent to those in sections 2C:14-2 or 2C:14-3a. N.J.S.A. 2C:14-6. This provision has been interpreted to mean that the second or subsequent offense must have occurred after conviction for the first offense. State v. Anderson, 186 N.J. Super. 174, 175 (App. Div. 1982), aff'd o.b. 93 N.J. 14 (1983). This latter interpretation has been called into question by the Supreme Court's opinion in State v. Hawks, 114 N.J. 359, 365 (1989).

E. Murder

Murder is a crime of the first degree, but a person convicted of murder who is not sentenced to the death penalty must be sentenced to a term of 30 years without parole or to a specific term of years

between 30 years and life imprisonment of which the person shall serve at least 30 years without parole. N.J.S.A. 2C:11-3b (effective August 6, 1982). The mandatory minimum term of 30 years for murder does not violate constitutional prohibitions against cruel and unusual punishment because it is not grossly disproportionate or shocking to the general conscience. State v. Johnson, 206 N.J. Super. 341, 349 (App. Div. 1985), certif. den. 104 N.J. 382 (1986).

Prior to August 6, 1982, the sentencing scheme for murder was different. N.J.S.A. 2C:11-3b provided:

> Murder is a crime of the first degree but a person convicted of murder may be sentenced by the court (1) to a term of 30 years of which the person must serve 15 years before being eligible for parole, or (2) as in a crime of the first degree except that the maximum term for such a crime of the first degree shall be 30 years. Nothing contained in this subsection shall prohibit the court from imposing an extended term pursuant to 2C:43-7 for the crime of murder.

Extended terms for murder were governed by N.J.S.A. 2C:43-7, with subsection (a)(1) specifically providing that a murderer could be sentenced to a specific term of years between 30 years and life imprisonment. In addition, N.J.S.A. 2C:43-7b provided, as it still does:

> As part of a sentence for an extended term and notwithstanding the provisions of 2C:43-9, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a. during which the defendant shall not be eligibile for parole or a term of 25 years during which time the defendant shall not be eligible for parole where the sentence imposed was life imprisonment provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

Therefore, the maximum sentence that could be imposed for murder was life imprisonment with a 25-year period of parole ineligibility. State v. Kelly, 207 N.J. Super. 114, 124-125 (App. Div. 1986).

F. Ordinary Term of Imprisonment - Parole Ineligibility

Pursuant to N.J.S.A. 2C:43-6b, as part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors (see §§a and b of N.J.S.A. 2C:44-1), the court may fix a minimum term not to exceed one-half of the specific term of years imposed during which the defendant shall not be eligible for parole, provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

Imposition of such a period of parole ineligibility is the exception and not the rule. Once a court has determined the length of the sentence, it may then consider imposition of a period of parole ineligibility. State v. Kruse, 105 N.J. 354, 359 (1987). In order to make this decision, the court must consult the aggravating and mitigating factors set out in N.J.S.A. 2C:44-1a and b. If the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, it may impose a period of parole ineligibility. N.J.S.A. 2C:43-6b.

The length of the sentence and the period of parole ineligibility are separate facets of the sentencing decision. Kruse, supra, 105 N.J. at 362. The court may sentence a defendant to a presumptive term together with a period of parole ineligibility, but this should occur rarely. Ibid. If, however, the judge imposes a term less than the presumptive term, or where he imposes a sentence for a crime a degree lower

pursuant to N.J.S.A. 2C:44-1f(2), then the mitigating factors outweigh the aggravating factors and imposition of a period of parole ineligibility under section 2C:43-6b may be inappropriate. See State v. Nemeth, 214 N.J. Super. 324, 327 (App. Div. 1986); State v. Alevras, 213 N.J. Super. 331, 342 (App. Div. 1986).

G. Extended Term - Parole Ineligibility

Pursuant to N.J.S.A. 2C:43-7b, as part of a sentence for an extended term, the court may fix a minimum term not to exceed one-half of the specific term of years imposed during which the defendant shall not be eligible for parole, or a term of 25 years during which time the defendant shall not be eligible for parole where the sentence imposed was life imprisonment, provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole. See also N.J.S.A. 2C:43-6c, -6f, -7a, -7c.

N.J.S.A. 30:4-123.51(b) requires that an individual sentenced to life imprisonment be eligible for parole after having served a "statutory mandatory minimum term, or 25 years where no mandatory minimum term has been imposed". It further requires that when an inmate sentenced to a term of years is eligible for parole on a date later than the date upon which he would be eligible if a life sentence had been imposed, then he shall be eligible for parole after having served 25 years. Where a life sentence is imposed, the Parole Act of 1979 limits the maximum period of parole ineligibility to 25 years. State v. Kelly, 207 N.J. Super. 114 (App. Div. 1986). (See Appendix A).

6.4 Final Unconditional Release

An offender is considered for final release when the maximum parole term expires (whether being served on parole or in prison) or when the defendant is sooner discharged under the parole laws. N.J.S.A. 2C:43-9c.

The appropriate board panel may give any parolee a complete discharge from parole prior to the expiration of the full maximum term for which he was sentenced, provided that such parolee has made a satisfactory adjustment while an parole, provided that continued supervision is not required, and provided that the parolee has made full payment of any fine or restitution. N.J.S.A. 30:4-123.66.

6.5. Revocation of Parole

A parolee who has seriously or persistently violated the conditions of his parole may have his or her parole revoked and may be returned to custody pursuant to N.J.S.A. 30:4-123.62 and N.J.S.A. 30:4-123.63. N.J.S.A. 30:4-123.60(a). Any parolee who is convicted of a crime committed while on parole shall have his parole revoked and shall be returned to custody unless the parolee demonstrates by clear and convincing evidence that good cause exists why he should not be returned to confinement. N.J.S.A. 30:123.60(c).

At a parole revocation proceeding, the board is required to ensure that the parolee receives: (1) written notice of the claimed violations of parole; (2) disclosure of evidence against him; (3) opportunity to be heard and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing examiner specifically finds good cause for disallowing it); (5) a neutral and detached body, and (6) a written statement by the fact finders as to evidence relied upon and reasons for revoking parole. N.J.S.A. 30:4-123.63; Morrissey v. Brewer, 408 U.S. 471, 82 S.Ct. 2593, 33 L.Ed.2d 484 (1972); see also N.J. Parole Bd. v. Byrne, 93 N.J. 192, 209 (1983). (See Appendix D for future eligibility terms).

6.6 How to Compute Parole Eligibility

When computing parole eligibility for inmates sentenced under Title 2C, follow these steps:

Step #1: Begin the calculation of parole eligibility on the date of sentence.

Step #2: Add one-third of the maximum sentence if there is no mandatory minimum term, or 25 years if the sentence is life or, where there is a mandatory minimum term, add the mandatory minimum term.

Step #3: Subtract the presentence jail credits (i.e., credits given to an inmate for time served in jail prior to sentencing). (Flat Parole Eligibility Date).

Step #4: Award or deduct commutation credits (N.J.S.A. 30:4-123.51(a) and N.J.S.A. 30:4-140). These credits are awarded on the balance of the parole eligibility term less presentence jail credits. (Note: Commutation credits, work and minimum security credits shall in no way reduce any judicial or mandatory minimum term). (Book Parole Eligibility Date).

Step #5: Subtract work and minimum custody credits (For mandatory or judicial terms see note in Step #4). Work credits are earned by an inmate at a rate of one work credit per every five days worked. Minimum security credits are earned at a rate of three credits per month during the first 12 months of minimum security status and five credits per month thereafter. N.J.S.A. 30:4-92. (Actual Parole Eligibility Date).

When calculating parole eligibility for county jail sentences, keep in mind that no county inmate serving a Title 2C sentence can serve less than 60 days of his aggregate sentence before release on parole. Follow these steps:

Step #1: Begin the calculation on the date of sentence.

Step #2: Add one-third of the maximum sentence imposed or 60 days, whichever is greater.

Step #3: Subtract presentence jail credits.

Step #4: Award and deduct commutation credits.

Step #5: Subtract work and minimum security credits.

The final date is the actual parole eligibility date.

Examples of Computing Parole Eligibility Dates

1. A Title 2C state prison sentence (no mandatory minimum): one-third of the maximum or 25 years if the sentence is life, less presentence jail credits, less commutation credits and less work and minimum custody credits.

Example:
Date of sentence	:	1-4-86
Term	:	10 years
Jail Credit	:	60 days
Work Credit	:	26 as of 9-1-86
Minimum Credit	:	9 as of 9-1-86

Step #1: Begin the calculation on the date of sentence: 1-4-86

Step #2: Add 1/3 of the maximum sentence: +4 mos. 3 yrs.
5-4-1989

Step #3: Subtract the jail credits. - 60 Days
3-5-1989

Step #4: Award and deduct commutation credits on 3 yrs. 2 mos. (268 C.T.) which reflects the period from 1-4-86 to 3-5-89 or 3 yrs. 4 mos. less 60 days jail credit. -268 Days
6-10-1988

Step #5: Subtract work and minimum custody credits -26 work Credits
- 9 minimum credits
Actual parole eligibility date 5-12-1988

2. A Title 2C state prison sentence (with a mandatory minimum term): mandatory minimum term less jail credits.

Example:
Date of Sentence	:	1-4-84
Term	:	10 yrs (5 yrs mandatory minimum term)
Jail Credit	:	60 days
Work Credit	:	26 as of 9-1-84
Minimum Creidt	:	0 as of 9-1-84

Step #1: Begin the calculation on the date of sentence: 1-4-84

Step #2: Add the mandatory minimum term +5
1-4-1989

Step #3: Subtract the jail credits 1-4-1989
-60
Actual parole eligibility date 11-5-1988

3. A county jail sentence: one-third of the maximum, less presentence jail credits, less commutation credits, less work and minimum credits, or 60 days less presentence jail credits, whichever is greater.

Example: Date of Sentence: 9-4-86
Term : 240 days
Jail Credit : 15 days

Step #1: Begin the calculation on the date of sentence: 9-4-86

Step #2: Add 1/3 of the maximum sentence: +80 days
11-23-1986

Step #3: Subtract the jail credits: -15 jail credits
11-08-1986

Step #4: Award and deduct commutation credits on 65 days
(80 days less 15 days jail credits)
-11 commutation time
Parole eligibility date: 10-28-1986

Note: Normally inmates can reduce their parole eligibility date by working or maintaining reduced custody status. However, since all county inmates must serve at least 60 days, the inmate in the above example cannot reduce his parole eligibility date below 10-19-86, which represents the 60-day restriction added to the date of sentence (9-4-86) less 15 jail credits awarded by the court at sentencing.

Sixty-Day Restriction Calculation

9-4-86
+60 days (Restriction)
11-3-86
-15 jail credit
No earlier than 10-19-86 (60 days restriction)

Thus, because the 60-day restriction will not be satisfied until October 19, 1986, the inmate cannot be released prior to this date.

6.7 Unresolved Issues

The New Jersey State Parole Board has indicated that sentencing judges are failing to make certain specifications on the Judgment of Conviction and Order of Commitment. The board has requested that sentencing judges specify the degree of the crime on which the sentence imposed. This would enable the board to establish time goals in cases of young adult offenders. The specification would also help the board and its staff facilitate the processing of cases of inmates serving terms for crimes of the first and second degree.

Second, where the sentence involves the Graves Act, sentencing judges should specify the imposition of a mandatory minimum term on the commitment order. Although judges sometimes refer to the Graves Act in their statement of reasons, they often do not specify the mandatory minimum term as part of the sentence imposed. The Department of Corrections will then carry the sentence as a specific term without a mandatory minimum term. Specification of the mandatory minimum term will make the sentence less confusing for the inmates and will relieve the board's staff from the time-consuming task of sentence clarification.

Sentencing judges should also specify on the Judgment of Conviction and Order of Commitment the conditions of probation that were violated by the offender in cases of probation violation, as well as the basis for the imposition of any custodial term.

Finally, sentencing judges should sign the Order of Commitment. These orders are often received unsigned by municipal court judges.

VII PLACE OF IMPRISONMENT

7.1 State Prison

A. Meaning

N.J.S.A. 30:4-136 defines state prison as "the existing prison in Trenton or wherever it may hereafter be located, as well as all institutions, farms, camps, quarries and grounds designated by the State Board of Institutional Trustees where convicts sentenced to State Prison may from time to time be kept, housed or employed."

B. Requirements

Except as provided in N.J.S.A. 2C:43-5 (young adult offenders, see §7.3, infra) and N.J.S.A. 2C:43-10(b) (county facility, see §7.2, infra), when a person is sentenced to imprisonment for any term of one year or greater, the court shall commit him to the custody of the Commissioner of the Department of Corrections for the term of his sentence and until released in accordance with the law. N.J.S.A. 2C:43-10(a).

In all cases where the defendant, upon conviction, is sentenced by the court to imprisonment for any term of one year or greater, the sheriff of the county or his lawful deputy shall, within 15 days, transport him to state prison and deliver him into the custody of the commissioner, together with a certified copy of the sentence of the court ordering such imprisonment, a copy of the court's statement of reasons for the sentence and a copy of the presentence report or any presentence information used by the judge in determining sentence. N.J.S.A. 2C:43-10(e). In every case, at least 48 hours, exclusive of Sundays and legal

holidays, shall elapse between the time of sentence and removal to the state prison. Ibid. Note: The provisions of N.J.S.A. 2C:43-10(e) have been suspended by Executive Order since 1981 because of prison overcrowding. See State v. Falcone, 211 N.J. Super. 685 (App. Div. 1986).

C. Federal Prisoners

N.J.S.A. 30:4-123.6(s) and 2C:43-10, providing for the housing of prisoners sentenced to imprisonment for a term of one year or more, were not intended by the Legislature to govern the determination of suitable placement of persons already convicted of federal crimes and brought to the state pursuant to the Interstate Agreement on Detainers Act (2A:159A-1 et seq.) to answer an indictment returned by the state grand jury. State v. Coppolla, 182 N.J. Super. 230, 236 (App. Div. 1981).[1]

N.J.S.A. 30:4-136 and N.J.S.A. 2C:43-10 should not govern the determination of suitable placement of persons already convicted of federal crimes. The decision as to what is "suitable" is vested in the receiving state's custodial officer. That discretion requires the custodial officer of the receiving state to use reasonable judgment to determine whether a

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1 This case involved defendants who were brought to the State of New Jersey under the Interstate Agreement on Detainer Act to answer an indictment returned by the state grand jury. The defendants moved for an order transferring them from state prison to the Somerset county jail. The Superior Court held that the decision to house prisoners is discretionary and that the State did not abuse its discretion in placing the prisoners in state prison.

particular prisoner should be placed in a suitable jail or, in the alternative, an "other facility regularly used for persons awaiting prosecution." That administrative judgment calls for the exercise of the commissioner's expertise and involves weighing the type or security of the institutions available, the nature of the prisoner, the crime of which he was convicted, the length of the sentence being served, and the type of institution from which he was received. State v. Coppolla, supra, 182 N.J. Super. at 236.

7.2 County Jail, Penitentiary or Workhouse

Pursuant to N.J.S.A. 2C:43-10(b), in any county in which a county penitentiary or a county workhouse is located, a person sentenced to imprisonment for a term not exceeding 18 months may be committed to the penitentiary or workhouse of such county.

When a person is sentenced to imprisonment for a term of less than one year, the court shall commit him either to the county jail, the county workhouse or the county penitentiary for the term of his sentence and until released in accordance with the law. In counties of the first class that have a workhouse or penitentiary, however, persons sentenced to a term greater than six months shall not be sentenced to the common jail of the county, but shall be sentenced to the penitentiary or workhouse. N.J.S.A. 2C:43-10(c). Every person sentenced to the county workhouse or penitentiary shall be transferred to and confined therein within 10 days after the sentence. N.J.S.A 2C:43-10(f).

7.3 Youth Correctional Institution Complex

A. Defined

The Youth Correctional Institution Complex shall include the existing Garden State Reception and Youth Correctional Facility at Yardville, the Albert C. Wagner Youth Correctional Facility at Bordentown and the Mountainview Youth Correctional Facility at Annandale, and all new or additional institutions, farms, camps, quarries or grounds designated by the state board, where persons sentenced to the Youth Correctional Institution Complex may, from time to time, be kept housed or employed. N.J.S.A. 30:4-146.

B. Who May Be Sentenced

N.J.S.A. 2C:43-5 provides an alternative sentencing provision for youthful offenders. Instead of the sentences otherwise authorized by the code, any person who at the time of sentencing is less than 26 years of age may be sentenced to an indeterminate term at the Youth Correctional Institution Complex in the case of men and to the Correctional Institution for Women in the case of women.

This sentencing option does not apply to any person who qualifies for a mandatory minimum term of imprisonment without eligibility for parole pursuant to N.J.S.A. 2C:43-6(c) (Graves Act sentencing). In other words, those sentenced under the Graves Act must receive the minimum term for which they qualify. However, mandatory minimum terms imposed pursuant to the Graves Act may be served at the Youth Correctional Institution Complex or the Correctional Institution for Women. N.J.S.A. 2C:43-5.

Note that only persons who qualify for mandatory minimum sentences pursuant to the Graves Act are specifically precluded by the Legislature from being sentenced to an indeterminate term under 2C:43-5. (For treatment of persons convicted of offenses, other than Graves Act offenses, which carry a mandatory minimum, see §7.3D, infra.)

It is within the sentencing judge's discretion whether to sentence a youthful offender under N.J.S.A. 2C:43-5. Although the emphasis in sentencing has shifted from rehabilitation to punishment and from the character of the offender to the nature of the offense, the basic premise behind the youthful offender provision is rehabilitation of younger persons through the use of indeterminate sentencing. State v. O'Connor, 105 N.J. 409, 415-416 (1987); State v. Roth, 95 N.J. 334, 335, 357-359 (1984); State v. Des Marets, 92 N.J. 62, 70-71 (1983). The retention of the youthful offender provision in Title 2C indicates that a person's age remains an important factor in sentencing.

In State v. Nunez, 209 N.J. Super. 127, 134 (App. Div. 1986), the general rule is stated that the decision to sentence under this section is discretionary, and a court may choose to sentence under other chapters. Thus, in State v. Provet, 133 N.J. Super. 432 (App. Div. 1975), the trial court sentenced a 23-year-old defendant to state prison because it considered the defendant dangerous and capable of repeating the offense. In affirming the sentence the appellate court stated, "Although sentencing to the Youth Correctional Institution is generally

preferred for youthful offenders, the trial judge had good reason for the sentence imposed." Id. at 439.

It is important to note that even when the sentencing judge chooses not to sentence under N.J.S.A. 2C:43-5, any male person between the ages of 15 and 30 who is convicted of a crime punishable by a state prison term, who has not previously been sentenced to state prison, may be committed to the Youth Correctional Institution Complex by the Commissioner of the Department of Corrections. N.J.S.A. 30:4-147.

C. Permissible Sentences

Sentences pursuant to N.J.S.A. 2C:43-5 must be indeterminate, they cannot be fixed or limited. The total period of confinement or parole cannot exceed five years or the statutory maximum for the crime for which the prisoner was convicted, if that is less than five years. For good cause shown, the court may increase the five-year maximum indeterminate term, but only if the statutory maximum for the offense committed is above five years. In determining "good cause," the court should consider and refer to the statutory aggravating and mitigating factors. State v. Jarbath, 114 N.J. 394, 402 (1989). The limit of the indeterminate term can never exceed the statutory maximum for the offense. When the term is raised above five years, the commitment shall specify the maximum term. N.J.S.A. 30:4-148.

An indeterminate term to the Y.C.I.C. contains an automatic five-year maximum unless the statutory maximum is above five years and the indeterminate maximum is raised, for good cause shown, subject to the statutory maximum. If no

exception applies, the maximum is controlled by statute and should not be specified in a term of years within the sentence. State v. White, 186 N.J. Super. 15, 18 (Law Div. 1982).

When an offense carries a statutory maximum of five years or more, the statutory maximum, not the presumptive term defines the outer limit of an indeterminate term pursuant to this section. Courts have no power to limit the sentence to the presumptive term. Id. at 18.

Consecutive indeterminate sentences are not unlawful, but are undesirable. State v. Carroll, 66 N.J. 558 (1975).

D. Unresolved Issues

1. Sentencing, under 2C:43-5, of persons convicted of crimes, other than Graves Act offenses, which carry mandatory minimum penalties.

Under existing law, mandatory minimum terms are provided for the following offenses:

1. Murder: N.J.S.A. 2C:11-3b
2. Kidnapping: N.J.S.A. 2C:13-1b(2)
3. Repeat Sex Offenses: N.J.S.A. 2C:14-6
4. Implements for Escape: N.J.S.A. 2C:29-6a(1)
5. Certain Drug Offenses:

N.J.S.A. 2C:35-3
N.J.S.A. 2C:35-4
N.J.S.A. 2C:35-5b(1)
N.J.S.A. 2C:35-5b(6)
N.J.S.A. 2C:35-6
N.J.S.A. 2C:35-7

The second sentence of N.J.S.A. 2C:43-5, dealing with the exclusion of Graves Act offenders, was added and became effective in 1983. It appears that this amendment of the

statute was an attempt to resolve the conflict which had existed for years between statutory requirements of mandatory minimum terms and provisions allowing indeterminate terms for youthful offenders. Resolution of this issue had varied in the courts. State v. Des Marets, 92 N.J. 62 (1983); State v. Groce, 183 N.J. Super. 168 (App. Div. 1982); State v. Brozi, 125 N.J. Super. 485 (App. Div. 1973), certif. den. 64 N.J. 501 (1974); State v. Hopson, 60 N.J. 1 (1971), rev'g on dissent, 114 N.J. Super. 146, 148 (App. Div. 1971); State v. Pallitto, 107 N.J. Super. 96 (App. Div. 1969), certif. den. 55 N.J. 309 (1970); State v. Ammirata, 104 N.J. Super. 304 (App. Div. 1969).

Although strong language in Des Marets indicates that post-code law and philosophy will not allow sentencing alternatives that avoid statutorily imposed mandatory minimums, the Legislature chose only to disallow the sentencing judge discretion when the mandatory minimum was imposed pursuant to the Graves Act. This action by the Legislature seems to indicate that young adults convicted of offenses other than Graves Act offenses which carry mandatory minimum terms are eligible for N.J.S.A. 2C:43-5 indeterminate sentencing. No post-amendment cases have addressed the issue.

7.4 Correctional Institution For Women

The Correctional Institution for Women shall include the existing institution at Clinton (Edna Mahan Correctional Facility for Women) and all places where those sentenced to the Correctional Institution for Women may, from time to time, be kept, housed or employed. N.J.S.A. 30:4-153.

Any female above the age of 16 years, convicted of a crime which would be punishable by imprisonment in the state prison if she were a male, shall be committed to the Correctional Institution for Women, and any female above the age of 16 years, convicted of any offense punishable by imprisonment in any county penitentiary or workhouse, may be committed to the Correctional Institution for Women. No male person shall be so committed or there confined. N.J.S.A. 30:4-154.

7.5 The Adult Diagnostic Treatment Center

Whenever a person is convicted of aggravated sexual assault or attempt, sexual assault or attempt, aggravated criminal sexual contact or attempt (see §5.4, supra), it is mandatory that the judge refer the person to the Adult Diagnostic and Treatment Center (ADTC) for a physical and psychological examination. N.J.S.A. 2C:47-1. The referral may be for a period necessary to complete the examinations but cannot exceed ten days. Ibid. The referral order shall contain a determination of the person's legal settlement (county where settled) pursuant to N.J.S.A. 30:4-49. Ibid. Costs of treatment at the ADTC are divided between the county where the person is legally settled and the state. N.J.S.A. 2C:47-7.

Upon completion of the examination, but in no event later than 30 days after the date of the order of referral, a written report of the results of the examination shall be sent to the court. N.J.S.A. 2C:47-2. Before imposing sentence, the court shall make a copy of the report available to the defendant or his attorney and shall advise the defendant of his opportunity to be heard thereon and shall afford him such hearing. R. 3:21-3.

If the ADTC report finds that the offender's conduct is compulsive and repetitive, the court may sentence the offender to the center for a program of specialized treatment for his mental condition. If the ADTC does not make a finding that the conduct is compulsive and repetitive, then the court may not sentence that person to the ADTC. N.J.S.A. 2C:47-3a and d; State v. Horne, 56 N.J. 372, 376 (1970).

Under the present code, the trial court is not bound by the ADTC's recommendation that the defendant be sent to the center for specialized treatment. Despite the ADTC's recommendation for treatment, the trial court can impose a sentence to the custody of the Commissioner of the Department of Corrections (general prison population), or it can impose a discretionary (2C:43-6b) or mandatory (2C:43-6c; 2C:14-6) parole ineligibility term in conjunction with a sentence to the center. The code permits the sentencing of a sex offender to consecutive ADTC and prison terms for sex-related and nonsex-related charges arising from a single incident. State v. Chapman, 95 N.J. 582, 592 (1984). Additionally, under the philosophy of the code, a defendant who has received concurrent ADTC and prison sentences and who has been released from the ADTC before the end of the prison term can be required to serve the remainder of his concurrent term in prison. Ibid. Finally,

> ... [w]hen the defendant is a first sex offender and is sentenced to [the ADTC] with a minimum parole ineligibility term, the special classification review board may determine before expiration of the parole ineligibility term that "continued confinement is not necessary." N.J.S.A. 2C:47-4c. Similarly, when the defendant is a second or subsequent sex offender but is sentenced to [the ADTC] with a parole ineligibility term in excess of the five-year minimum, the special classification review board may recommend release before the end of the parole ineligibility term, though not before termination of the first five years. In either case, if the Commissioner is satisfied with the recommendation, the Commissioner shall apply to the sentencing court to modify the sentence imposed. After the sentence is modified, the matter would be submitted to the State Parole Board. [State v. Chapman, supra, 95 N.J. at 594]

A sex offender sentenced under Title 2A to an indeterminate term at the ADTC who is transferred to state prison must be re-sentenced to a fixed term. Gerald v. Commissioner, N.J. Dept. of Corr., 201 N.J. Super. 438, 451 (App. Div. 1985), aff'd 102 N.J. 435 (1986).

Resentencing shall be done in accordance with the substantive standards of the code applicable to sex offenders. factors. Id., 102 N.J. at 437. In lieu of incarceration, the court may, upon the recommendation of the ADTC, place such person on probation, a condition of probation being that he or she receive outpatient psychological treatment as prescribed. N.J.S.A. 2C:47-3(c).

When a defendant challenges the conclusion made by the ADTC as to his or her sex offender status, he or she will be entitled to a hearing in which the court must make an independent finding of compulsiveness and repetitiveness. State v. Horne, supra, 56 N.J. 372. The standard of proof at such a hearing is a preponderance of the evidence. State v. Howard, 110 N.J. 113, 126 (1988). Even if such a finding is made, the court may still refrain from sentencing defendant as a sex offender to the ADTC and may exercise its discretion by sentencing him or her to prison. State v. Chapman, supra, 95 N.J. at 588; State v. Hamm, 207 N.J. Super. 40 (App. Div. 1986).

The sentencing court does not have the authority to order a defendant's immediate transfer to the ADTC where the facility is

filled to capacity or where there is a waiting list for admission. If such a situation exists, the convicted sex offender may be incarcerated in the county jail pending availability of space at the ADTC. State v. Falcone, 211 N.J. Super. 685, 695-696 (App. Div. 1986). (See §5.4, supra). There is no constitutional or statutory violation in the delay of treatment occasioned by temporary confinement in the county jail while awaiting admission to the ADTC, although the delay may affect parole eligibility. State v. Howard, supra, 110 N.J. at 132.

7.6 Transfer; Removal

Every person sentenced to imprisonment in a county jail, penitentiary, or workhouse may, upon the application of the board of chosen freeholders of such county and by order of the Superior Court, be transferred from one of such county institutions to any other thereof. N.J.S.A. 2C:43-11g. No such transfer or retransfer shall in any way affect the term of the original sentence of the person so transferred or retransferred. N.J.S.A. 2C:43-11g.

Any inmate of any correctional institution may be transferred to any other correctional institution upon application of the chief executive officer or of the commissioner and by order of the commissioner. N.J.S.A. 30:4-85.

No inmate of the State Home for Boys or for Girls shall be transferred to the state prison. Any inmate of the State Home for Boys, who is at least 15 years of age, may be transferred to the reformatory at Annandale or, if over 16 years of age, to Bordentown. Any inmate of the State Home for Girls, who is over 16 years of age, may be transferred to Clinton. N.J.S.A. 30:4-85.

Any inmate of a correctional institution for males, who is at least 18 years old, may be transferred to the state prison if it appears to the satisfaction of the commissioner after recommendation by a special classification review board appointed by the state board, that the inmate cannot properly be confined in such institution and that his transfer will operate

for the general benefit and welfare of the inmate population of the institution from which he is to be transferred. N.J.S.A. 30:4-85.

Persons transferred shall be subject to the rules, regulations and discipline of the institution in which they are confined, except in so far as they conflict with the rules and regulations of the state board. N.J.S.A. 30:4-85.

Any inmate of any county jail, workhouse or penitentiary may be transferred to any appropriate existing correctional institution maintained by the state, except state prison. N.J.S.A. 30:4-85.1.

Under the regulations adopted by the Department of Corrections, the power to decide upon initial assignments and the subsequent transfer of inmates has been delegated to the Inter-Institutional Classification Committee (IICC), which consists of the Superintendents of the state prisons located in Trenton, Rahway and Leesburg (or their substitutes). Certain criteria are now set forth in the regulations upon the bases of which the IICC is directed to make its decisions. Standard 852 of the Regulations of the Department of Corrections, which became effective October 24, 1979; see Dozier v. Hilton, 507 F.Supp. 1299, 1306 (D.N.J. 1981).

The criteria stated under N.J.A.C. 10A:9-6.4 are:

(a) Upon referral from an Institutional Classification Committee (I.C.C), the Inter-Institutional Classification Committee (I.I.C.C.) shall make decisions on inmate requests for transfer to another correctional facility within the Prison Complex.

(b) The I.I.C.C. shall confirm all transfers of State sentenced inmates from the Prison and/or Youth Complex to county jails under contract to house them.

(c) The I.I.C.C. shall make decisions on referrals from an I.C.C. in cases where an inmate's correctional facility adjustment and/or custody status shall indicate that a transfer to another correctional facility is appropriate.

Transfers between institutions are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate. Meachum v. Fano, 427 U.S. 215, 225, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). An inmate's conduct, in general or in specific instances, may often be a major factor in the decision of prison officials to transfer him. A prisoner's past and anticipated future behavior will very likely be taken into account in selecting a prison in which he will be initially incarcerated or to which he will be transferred to best serve the state's penological goals. Id., 427 U.S. at 228.

The Supreme Court has held that the due process clause in and of itself does not protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Id. at 225. Unless a statute confers upon a prisoner the right to be incarcerated in a particular prison, the constitution does not require a hearing prior to a transfer. Ali v. Gibson, 631 F.2d 1126, 1134-1135 (3 Cir. 1980). In addition, a prisoner has no liberty interest in remaining at a particular prison. Meachum v. Fano, supra, 427 U.S. at 224-225. If the prisoner can be lawfully held in the facility to which he has been transferred, he cannot object to that

transfer, even if the transfer results in his being placed in a more restrictive or less accessible facility. Ali v. Gibson, supra, 631 F.2d at 1134-1135; see also Montanye v. Haynes, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976).

New Jersey has adopted procedures for the out-of-state transfers of inmates. It is a party to the Interstate Corrections Compact, which is designed to permit cooperative use of facilities and programs by the federal government and by the states that are parties to the compact. N.J.S.A. 30:7-1. The Department of Corrections has adopted detailed regulations implementing the compact and setting forth standards and procedures for transferring inmates to out-of-state institutions. N.J.A.C. 10A:9-7.6.

The regulations provide that one of the categories of inmates subject to transfer is comprised of "those whose behavior demonstrates that they constitute an exceptional threat to safety, security or orderly operation of any New Jersey correctional institution or those whose continual presence in a New Jersey correctional institution poses a substantial threat, for any reason, to the inmate himself." A request for a non-consensual interstate transfer of an inmate is initiated by the institution's superintendent for protective custody or any other special security requirements. N.J.A.C. 10A:9-7.6 and 10A:9-7.7. Dozier v. Hilton, supra, 507 F.Supp. at 1308. Procedures are set forth in the regulations for processing inmate requests for out-of-state transfers, and for processing non-consensual transfers where a hearing is required. Ibid.

8.2 Reduction or Change of Sentence Imposed in Accordance with the Sentence Authorized by Law (Legal Sentence)

A. R. 3:21-10(a) (Time)

A motion to reduce or change a sentence must be filed no later than 60 days after the date of the judgment of conviction. The court may reduce or change a sentence, either on motion or its own initiative, by order entered within 75 days from the date of the judgment of conviction, not thereafter. (Discussion of the exceptions to the time limitations follow in part B of this section.)

R. 1:3-4(c) states that "neither the parties nor the court may enlarge the time specified in .... R. 3:21-10(a)." It is clear that a motion made pursuant to R. 3:21-10 must be made within the 60-day period, and decided within 75 days of the judgment of conviction. State v. Kent, 212 N.J. Super. 635, 641-642 (App. Div. 1986), certif. den. 107 N.J. 65 (1986). The specific time limitations were provided in order to "insure prompt disposition by the sentencing judge." State v. Tully, 148 N.J. Super. 558, 562 (App. Div. 1977).

The court must set forth its reasons in ruling on a motion for a change or reduction of sentence. R. 3:29.

B. Pursuant to R. 3:21-10(b)

R. 3:21-10(b) enumerates the exceptions to the time limitations stated in subsection (a). The rule states that a motion may be filed and an order may be entered at any time (1) changing a custodial sentence to permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation

program for drug or alcohol abuse, or (2) amending a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant, or (3) changing a sentence for good cause shown upon the joint application of the defendant and the prosecuting attorney, or (4) changing a sentence as authorized by the Code of Criminal Justice, or (5) changing a custodial sentence to permit entry into the Intensive Supervision Program. R. 3:21-10(b).

In proposing the new paragraph (b), the Supreme Court Committee on Criminal Practice determined that "while the judiciary has not exercised the power in the past, the courts have the inherent power, subject to any specific time limitations set down by the Supreme Court, to reduce or change a sentence at any time." State v. Robinson, 148 N.J. Super. 278, 283 (App. Div. 1977).

In making an application for transfer to a narcotics treatment program under 3:21-10(b)(1), the burden rests with the applicant to establish that he is an appropriate candidate for such relief. The applicant is then obliged to establish such facts as would move the court to exercise its discretion favorably. State v. McKinney, 140 N.J. Super. 160, 163 (App. Div. 1976). The mere assertion or proof that the applicant

PART VIII POST SENTENCE

8.1 Who May Apply For Relief

A. The State

The general rule is that the government may not appeal an authorized sentence in a criminal case absent statutory authority. United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); State v. Roth, 95 N.J. 334, 343 (1984). However, it appears that the State may appeal an illegal sentence without explicit authorization. State v. Sheppard, 125 N.J. Super. 332, 336 (App. Div. 1973), certif. den. 64 N.J. 318 (1973).

Explicit provisions allowing the State's appeal of sentencing are: N.J.S.A. 2C:44-1(f)(2) (see §8.2D, infra), R. 2:3-1(b)(4) (see §8.2E, infra), and R. 1:13-1 (see §8.2C, infra). Additionally, N.J.S.A 2C:44-7 provides that any action taken by the court in imposing sentence shall be subject to review. Arguably, this section could be read as permitting the State's appeal of any sentence. However, the fact that the Legislature provided for a specific State appeal in N.J.S.A. 2C:44-1(f)(2) indicates that such expansive appellate review was not its intention.

B. The Defendant

The defendant's avenues for reconsideration of sentence are broader than those of the State. Defendant may move before the sentencing court for a reduction of sentence (R. 3:21-10, see §8.2A and B, infra), file a post-conviction petition with the Superior Court to change an illegal sentence (R. 3:22-1, see

§8.3A, infra), or file an appeal to challenge an excessive or illegal sentence. N.J.S.A. 2C:44-7; R. 2:3-2.

is willing to participate in extramural programs or that the institions offering such programs would accept him as a patient is insufficient. Ibid.

McKinney, supra, sets forth the responsibility of the judge when considering an application for transfer to a custodial or non-custodial treatment or rehabilitation program:

> "Assuming a bona fide motivation on the part of the applicant and a criminal record which does not militate against the granting of relief, the judge must conclude that if relief is granted there would be a reasonable probability that the applicant will successfully complete the program, will assume his proper place in society without violation of the law, and that his release is not incompatible with the welfare of society."
> [Id. at 164]

An application to transfer a defendant in custody into a custodial or non-custodial treatment or rehabilitation program must be accompanied by supporting affidavits and other documents and papers which set forth the basis for such relief. Ibid. The applicant shall be afforded a hearing only if the submitted material demonstrates that there is at least a prima facie showing of merit in the application. Ibid. Even if a hearing is conducted, the judge may reject the application upon weighing all the evidence. Ibid.; State v. Dachielle, 195 N.J. Super. 40, 46 (Law Div. 1984).

The trial court is empowered by R. 3:21-10(b)(2) to amend a custodial sentence to permit the release of a defendant because of illness or infirmity. It does not, however, authorize a reduction of a defendant's sentence for these reasons without the concurrence of the prosecutor. State v. Priester, 99 N.J. 123 (1985).

An essential predicate to the review of a custodial sentence pursuant to R. 3:21-10(b)(2) is that a change of circumstances must have occurred. Id. at 136. In addition to the requirement of a finding of a change of circumstances, the Priester Court deemed other factors relevant to the determination of a R. 3:21-10(b)(2) motion. These were the nature and severity of the crime, the severity of the sentence, the criminal record of the defendant, the risk to the public if the defendant is released, and the defendant's role in bringing about his current state of health. Ibid.

R. 3:21-10(b)(2) does not distinguish between mental and physical illness. A custodial sentence under appropriate circumstances may be amended to permit the release of a defendant because of a mental infirmity. State v. Verducci, 199 N.J. Super. 329, 334 (App. Div. 1985). In determining whether a defendant should be released because of mental infirmity,

> ... [t]he humane objective of providing appropriate care and treatment for the mentally impaired must be balanced against the demands of public security. In seeking to accommodate these often countervailing policies, the trial judge should carefully scrutinize the nature of the inmate's mental or emotional illness. Where the pathology from which the defendant suffers poses a serious risk to the public safety, the scale necessarily tips in favor of continued incarceration despite the possibility of adverse psychological effects that might well ensue. In that regard ... primary among the hierarchy of governmental objectives is the obligation to protect the citizen against criminal attack ... [P]ublic safety must be the paramount goal.
> [Id. at 334-335]

R. 3:21-10(b)(3) permits the trial judge to change a sentence for good cause shown upon joint application of the defendant and the prosecuting attorney. This provision makes it possible for a defendant to obtain a reduction of his

sentence provided he can convince both the prosecutor and the judge of the merit of his cause. Report of the Supreme Court Committee on Criminal Practice, 98 N.J.L.J. 343, 344 (1975). This section enables the prosecutor to recommend a sentence reduction for an inmate who decides to cooperate with the prosecution after the time limits set forth in R. 3:21-10(a) for modification of sentence have expired. R. 3:21-10(b)(3) requires active participation by the prosecution in a sentence reduction application, which limits the number of such motions. Ibid.

As to R. 3:21-10(b)(4), an application for resentencing pursuant to N.J.S.A. 2C:1-1(d)(2) continues as an available option for defendants sentenced prior to the code whose sentences are greater than those prescribed by the code for congruent offenses and who are able to show good cause for resentencing. See Pressler, Current N.J. Court Rules, Comment R. 3:21-10(b)(4)(1989).

R. 3:21-10(b)(5) allows a change in a custodial sentence to permit entry into the Intensive Supervision Program. Motions for a change of custodial sentence and entry into the Intensive Supervision Program are in the discretion of the three-judge panel assigned to hear them. No appellate review of the panel's decision is available. The three-judge panel has the authority to resentence offenders in the event they fail to perform satisfactorily following entry into the program. R. 3:21-10(e).

When a defendant is serving a period of parole ineligibility imposed as a matter of discretion, the court may consider an application under R. 3:21-10(b). State v. Farrington, 229 N.J. Super. 184, 186 (App. Div. 1988); State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986). However, where a parole ineligibility term is required or mandated by statute, an application may not be granted under R. 3:21-10(b) so as to change or reduce that sentence. Mendel, supra, 212 N.J. Super. at 113.

C. Pursuant to R. 1:13-1

Clerical Mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from an oversight and omission may at any time be corrected by the court on its own initiative or on the motion of any party, and on such notice and terms as the court directs, notwithstanding the pendency of an appeal. R. 1:13-1.

The fundamental rights of a defendant are not violated if an inadvertent clerical-type error is corrected and the defendant receives the sentence which the trial judge intended him to receive. The protection against double jeopardy bars double punishment for the same conviction but does not prevent correction of inadvertent errors in sentencing. State v. Matlack, 49 N.J. 491, 502 (1967), cert. den. 389 U.S. 1009 (1967); see also Bozza v. United States, 330 U.S. 160, 166-167, 67 S.Ct. 645, 91 L.Ed. 818, 822 (1947).

D. Appeal by State (N.J.S.A. 2C:44-1(f)(2)).

If the court sentences a defendant to a term appropriate to a crime one degree lower than that of the crime for which he was convicted, or if the court imposes a non-custodial or

probationary sentence upon conviction for a crime of the first or second degree, the State may appeal the sentence. N.J.S.A. 2C:44-1(f)(2). The sentence shall not become final for ten days in order to permit the appeal by the State. N.J.S.A. 2C:44-1(f)(2). Since the State's right of appeal is purely statutory, the ten-day requirement is jurisdictional and must be complied with strictly. State v. Watson, 183 N.J. Super. 481, 484 (App. Div. 1982). If a defendant starts serving his or her sentence before the State files an appeal, jeopardy may attach and the action cannot proceed. State v. Ryan, 86 N.J. 1, 10 (1981), cert. den. 454 U.S. 880 (1981). State v. Watson, supra, 183 N.J. Super. at 484; State v. Farr, 183 N.J. Super. 463, 471 (App. Div. 1982).

However, it does not violate principles of double jeopardy for a defendant to remain incarcerated before bail is set during the ten-day period while the State perfects its appeal. State v. Sanders, 107 N.J. 609, 621 (1987).

Although execution of a sentence must be stayed pending appeal by the State, a defendant may elect to begin serving the sentence but, in doing so, he waives his right to challenge an increase in sentence on the grounds that he has begun serving it. R. 2:9-3(d). The court should advise the defendant of the election and waiver provision of R. 2:9-3(d) at the same time that the defendant is advised of his right to appeal. State v. Williams, 203 N.J. Super. 513, 518 (App. Div. 1985).

Whether a sentence is custodial or non-custodial, bail pursuant to R. 2:9-4 shall be established as appropriate under the circumstances. R. 2:9-3(d). Pretrial bail is discharged upon pronouncement of sentence and cannot continue between the sentencing and appeal by the State. State v. Sanders, supra, 107 N.J. at 618 n.9. It is improper to admit a defendant to bail until the State has commenced its appeal; however, bail must be established within a reasonable period of time after the State's appeal is taken. Id. at 617 and 621.

The right of appeal pursuant to N.J.S.A. 2C:44-1(f)(2) does not create a right to appeal to the Supreme Court from an Appellate Division revision of a sentence. State v. Hodge, 104 N.J. 386, 386-387 (1986).

If the State agrees to remain silent at the time of the sentencing, it may not subsequently appeal the sentence. State v. Ferrara, 197 N.J. Super. 1 (App. Div. 1984).

The State may not appeal a juvenile sentence pursuant to N.J.S.A. 2C:44-1(f)(2). State in the Interest of R.P., 198 N.J. Super. 105, 107 (App. Div. 1984).

E. Appeal by State (R. 2:3-1b(4)).

R. 2:3-1b(4) authorizes the State to appeal "a judgment in a post-conviction proceeding collaterally attacking a conviction or sentence." See, e.g., State v. Cruz, 232 N.J. Super. 294, 297 (App. Div. 1989) (State allowed to appeal from a resentencing under Gerald v. Comm'r, N.J. Dept. of Corr., 102 N.J. 435 (1986), that it deems too lenient).

8.3 Correction of Illegal Sentence

A. By Post-Conviction Petition

Defendant may file a post-conviction petition challenging an illegal sentence in the county where the conviction was had. R. 3:22-1; 3:22-12. An illegal sentence is one "in excess of or otherwise not in accordance with the sentence authorized by law." R. 3:22-2(c). For example, a failure to merge offenses for sentencing purposes produces an illegal sentence, cognizable in a post-conviction relief proceeding. State v. Adams, 227 N.J. Super. 51, 57 (App. Div. 1988), certif. den. 113 N.J. 642 (1988). Excessiveness of a sentence otherwise within authorized limits is not an appropriate ground for relief under this section and can only be raised by a motion pursuant to R. 3:21-10 (reduction of sentence) or by direct appeal. State v. Clark, 65 N.J. 426, 437 (1974); State v. Pierce, 115 N.J. Super. 347 (App. Div. 1971), certif. den. 59 N.J. 362 (1971). This rule may be relaxed in egregious circumstances. State v. Clark, supra, 65 N.J. at 437.

There are no time limitations on the filing of a petition under this section; an illegal sentence is correctable at any time. R. 3:22-12; State v. Paladino, 203 N.J. Super. 537, 549-550 (App. Div. 1982). A court may correct an illegal sentence sua sponte. A motion for a new trial which points out illegality in the plea and sentence may be regarded as a motion to correct the sentence. Ibid.

However, a motion under this section may not be filed while appellate review is available. R. 3:22-3. A sentencing issue considered on appeal or other post-conviction proceeding cannot

be raised again by post-conviction petition. R. 3:22-5; State v. Bass, 141 N.J. Super. 170, 171 (App. Div. 1976). A sentencing issue not raised in a prior proceeding under this rule, in the proceedings resulting in the conviction, in other post-conviction proceedings, or in an appeal, which addressed the merits of the issue, may not be raised under this section. R. 3:22-4; State v. Odom, 113 N.J. Super. 186, 189 (App. Div. 1971). However, if the court finds that (1) the present issue could not reasonably have been raised in a prior proceeding (see, e.g., State v. Lark, 229 N.J. Super. 586, 592 (App. Div. 1989)), or (2) to enforce the bar would result in fundamental injustice, or (3) the denial of relief would be unconstitutional, the issue may be raised. R. 3:22-4. A second post-conviction petition may not be filed if a prior application was denied and not appealed. State v. Pierce, supra, 115 N.J. Super. at 347.

A defendant not represented by the public defender may submit an affidavit of indigency. If the assignment judge or other designated judge is satisfied that the defendant is indigent, he shall order the clerk to file the petition without payment of filing fees. R. 3:22-6(a). For a first petition filed under the section, unless the defendant states his intention to proceed pro se, the judge shall, for an indictable offense, refer the matter to the public defender. For a non-indictable offense the court shall assign counsel in accordance with R. 3:27-2. R. 3:22-6(a). In pro se cases where the defendant is indigent, and in assigned counsel cases, the court must grant an application for transcripts shown to be necessary. R. 3:22-6(c).

Unless the defendant shows good cause, the court shall not substitute new assigned counsel at the request of the defendant. R. 3:22-6(d). Counsel should include in the petition all grounds insisted upon by the defendant, even if counsel believes they are without merit, and counsel may not seek to withdraw from the case based on the lack of merit of the petition. R. 3:22-6(d).

Amendments of pleadings shall be liberally allowed. Assigned counsel may file an amended petition within 25 days after assignment. R. 3:22-9. Within 30 days after service of a copy of the petition, the prosecution shall file an answer or move for dismissal on ten days' notice. R. 3:22-9.

Proceedings under this section shall be given preference and determined promptly. R. 3:22-10. It is within the court's discretion whether a defendant in custody should be present in court; however, a defendant is entitled to be present when oral testimony on a material issue of fact within his personal knowledge is adduced. Ibid.

In making a final determination on a petition the court shall state its findings of fact and conclusions of law. R. 3:22-11. The court shall enter a judgment, including an appropriate order with respect to sentence and any appropriate provisions as to correction of sentence. R. 3:22-11.

B. By Appeal

Either the defendant or the State may appeal an illegal sentence. State v. Sheppard, supra, 125 N.J. Super. at 336.

In its review of allegedly excessive legal sentences, the appellate court will determine if the sentencing guidelines were violated. State v. Roth, supra, 95 N.J. at 364; N.J.S.A. 2C:44-7.

8.4 Limitations on Resentencing After Appeal

If a judgment of conviction is reversed for error in, or excessiveness or leniency of, the sentence, the appellate court may impose such sentence as should have been imposed, or it may remand the matter to the trial court for proper sentence. R. 2:10-3.

If the underlying convictions are successfully challenged on appeal there is no legitimate expectation of finality in the convictions or in the sentences attached to them; thus, the sentences may be increased on remand. United States v. DiFrancesco, 449 U.S. 117, 136, 101 S.Ct. 426, 66 L.Ed.2d 328 (1973); State v. Rodriquez, 97 N.J. 263, 271 (1984). In resentencing, the court may not give a harsher sentence than that originally imposed without specifying objective information relative to the defendant after the date of the original sentencing, which justifies the imposition of a harsher sentence. North Carolina v. Pearce, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969).

The court may vacate an illegal sentence and impose a sentence mandated by law, even when the mandatory sentence is more severe than the original sentence. State v. Heisler, 192 N.J. Super. 586, 592 (App. Div. 1984). But, if the increased sentence is not mandatory, the judge must articulate reasons justifying a substantial increase in sentence, i.e., intervening conduct, prior oversight. Id. at 593. Even if the defendant has commenced service of the sentence, if he successfully challenges his conviction on merger grounds and one of the convictions is set aside, the sentence on the remaining

conviction may also be set aside. The defendant can then be resentenced on the remaining conviction to a term greater than that originally imposed on that count, but not in excess of the total sentence originally imposed. State v. Rodriquez, supra, 97 N.J. at 273-276.

Absent a finding of merger, the court may not increase the sentence previously imposed on the remaining counts when the conviction or sentence on one or some of the counts is set aside. State v. Pratts, 145 N.J. Super. 79, 91-94 (App. Div. 1975).

The appellate function of the Law Division regarding a municipal court conviction and sentence is to hear the case de novo on the record and to exercise independent judgment in the matter of sentence. State v. States, 44 N.J. 285, 293 (1965); State v. Tehan, 190 N.J. Super. 348, 349 (Law Div. 1983). However, the Law Division cannot impose a higher penalty than that imposed in the municipal court. State v. DeBonis, 58 N.J. 182, 188-189 (1971).

APPENDIX A

APPENDIX A

ELIGIBILITY TERMS FOR 2C PENAL CODE CASES

AND 2A FIRST OFFENDER CASES

Use the accompanying chart to figure eligibility terms for 2C Penal Code Cases and 2A First Offender Cases.

1. First find your maximum sentence in Column A. Follow across to Column B which will show one-third of your maximum sentence.

2. Subtract any jail credits that you have from the one-third of your maximum sentence which you found in Column B. This is the new flat eligibility term. (Note: commutation credits will be given only on the portion that remains once the jail credits have been subtracted).

3. Follow the new flat eligibility term derived from Column B across to Column C. Column C shows the amount of commutation time granted toward your parole eligibility.

4. By continuing to follow across to Columns D and E, you will find the maximum number of work credits (Column D) and the maximum number of minimum credits (Column E) that you can earn. In order to receive this maximum number of credits, you would have to work seven days a week and be placed on minimum custody as soon as you are sentenced. It would be impractical to expect this to happen. Therefore, this section of the chart should only be used to estimate the credits you could earn.

5. Column F shows the earliest time you could be eligible for parole. This time period is based on the maximum amount of work and minimum credits and assumes that no commutation credits have been lost.

6. Column G shows the latest time you would be eligible for parole. This assumes that no commutation credits have been lost and that no work credits or minimum credits are earned.

7. Unless an inmate has lost commutation credits, the eligibility will fall between the amounts of time shown in Column F and Column G.

8. Remember, this chart does not apply to a 2C case if a mandatory minimum term has been imposed or a 2A case multiple offender.

9. For all 2C sentences, at least 9 months (less jail credits) must be served. This nine month restriction applies to all adult inmates sentenced to at least one year or more in a state institution. The nine month restriction does not apply to young adult inmates committed to serve indeterminate sentences.

APPENDIX A

STATE PAROLE BOARD

PAROLE ELIGIBILITY TABLE

PENAL CODE SENTENCES (Title 2C) AND 2A FIRST OFFENDER CASES

A	B	C	D	E	F	G
Maximum Sentence	Flat Eligibility (Where no man.min.)	Commutation Credits (Note: Based on 1/3 of max minus jail credits	Estimated Work Credits (Maximum possible)	Estimated Minimum Custody Credits (Maximum possible)	Earliest Eligibility Includes: 1.No lost C.T. 2.Max. w.c. 3.Max. m.c.	Latest Eligibility Includes: 1.No lost C.T. 2.No w.c. 3.No m.c.
Years	yrs.-mos.	days	days	days	yrs.-mos.-days	yrs.-mos.-days
1	0 - 4	24	19	8	0 - 9 - 0*	0 - 9 - 0*
2	0 - 8	48	38	16	0 - 9 - 0*	0 - 9 - 0*
3	1 - 0	72	47	24	0 - 9 - 0*	0 - 9 - 20
4	1 - 4	100	58	29	0 - 9 - 24	1 - 0 - 22
5	1 - 8	128	72	36	1 - 0 - 6	1 - 3 - 23
6	2 - 0	156	85	47	1 - 2 - 10	1 - 6 - 27
7	2 - 4	188	98	58	1 - 4 - 18	1 - 10 - 25
8	2 - 8	220	112	69	1 - 6 - 23	2 - 0 - 23
9	3 - 0	252	124	79	1 - 8 - 25	2 - 3 - 21
10	3 - 4	284	138	92	1 - 11 - 8	2 - 6 - 21
11	3 - 8	316	159	48	2 - 2 - 26	2 - 9 - 19
12	4 - 0	348	173	59	2 - 4 - 25	3 - 0 - 17
13	4 - 4	380	186	70	2 - 7 - 4	3 - 3 - 17
14	4 - 8	412	198	81	2 - 9 - 20	3 - 6 - 16
15	5 - 0	444	210	91	2 - 11 - 8	3 - 9 - 13
16	5 - 4	476	231	52	3 - 2 - 27	4 - 0 - 11
17	5 - 8	508	249	63	3 - 5 - 10	4 - 3 - 10
18	6 - 0	540	258	71	3 - 6 - 1	4 - 6 - 8
19	6 - 4	572	270	81	3 - 9 - 11	4 - 9 - 7
20	6 - 8	604	285	93	3 - 11 - 18	5 - 0 - 6
21	7 - 0	636	308	52	4 - 3 - 14	5 - 3 - 4
22	7 - 4	676	319	61	4 - 5 - 6	5 - 5 - 24
23	7 - 8	716	330	71	4 - 6 - 3	5 - 8 - 14
24	8 - 0	756	342	81	4 - 9 - 1	5 - 11 - 4
25	8 - 4	796	358	89	5 - 7 - 25	6 - 1 - 25
26	8 - 8	836	374	47	5 - 2 - 14	6 - 4 - 15
27	9 - 0	876	392	62	5 - 5 - 15	6 - 7 - 6
28	9 - 4	916	397	67	5 - 6 - 3	6 - 9 - 26
29	9 - 8	956	409	77	5 - 8 - 13	7 - 0 - 17
30	10 - 0	996	421	87	5 - 10 - 11	7 - 3 - 9
35	11 - 8	1196	488	83	6 - 9 - 18	8 - 4 - 20
40	13 - 4	1412	550	134	7 - 7 - 24	9 - 5 - 18
45	15 - 0	1632	593	170	8 - 2 - 25	10 - 6 - 12
50	16 - 8	1852	660	226	9 - 2 - 8	11 - 7 - 14
55	18 - 4	2088	712	269	9 - 10 - 21	12 - 7 - 12
60	20 - 0	2328	768	316	10 - 8 - 0	13 - 7 - 14
65	21 - 8	2568	795	348	11 - 2 - 21	14 - 7 - 18
70	23 - 4	2824	843	383	11 - 8 - 17	15 - 7 - 8
Life	25 - 0	3084	916	439	12 - 8 - 23	16 - 6 - 18

* Nine month restriction applies to all 2C cases only.

APPENDIX A

TWO SAMPLE CALCULATIONS OF ADULT INMATE PAROLE ELIGIBILITY DATES

FOR 2C PENAL CODE SENTENCES

EXAMPLE I: No Mandatory Minimum Term Imposed

A. An offender is sentenced to a six year sentence on January 1, 1986. The first step is to add two years, which is one-third (1/3) of six years, to the date of sentence.

January 1, 1986 + 2 years = January 1, 1988

B. The second step is to subtract jail credits. If the sentencing judge allowed 120 days of jail credit, then 120 days are subtracted from January 1, 1988.

January 1, 1988 - 120 days jail credit = September 3, 1987

C. The third step is to calculate commutation credits and to subtract them. (Note: commutation credits are given on 1/3 of the maximum sentence less jail credits.) For this example, 128 days commutation credit are allowed and are subtracted from September 3, 1987.

September 3, 1987 - 128 days commutation credit = April 28, 1987

This date is called the book parole eligibility date.

D. To reach an actual parole eligibility date, actual earned work credits and minimum custody credits must be subtracted from the book parole eligibility date. For this example, if the person has worked 150 days, he will receive 30 work credits (one-fifth of 150 days). If he has been in minimum custody for 4 months, he will also receive 12 minimum credits (3 credits per month for 4 months). These credits are subtracted from the book parole eligibility date of April 28, 1987.

April 28, 1987 - 42 days credit (30 days work + 12 days minimum) = March 17, 1987

The date of March 17, 1987 is called the actual parole eligibility date. Remember that for all 2C sentences, at least 9 months (less jail credits) must be served.

APPENDIX A

EXAMPLE II: Mandatory Minimum Term Imposed.

A. An offender is sentenced to a 10 year sentence with a 5 year mandatory - minimum term on January 1, 1986. The first step in this example is to add the mandatory - minimum term (5 years) to the date of sentence.

January 1, 1986 + 5 years = January 1, 1991

B. The second step is to subtract jail credits. If the judge has allowed 180 days of jail credit, 180 days are subtracted from January 1, 1991.

January 1, 1991 - 180 days jail credit = July 5, 1990

Remember that with mandatory minimum terms, no commutation, work or minimum credits can reduce the parole eligibility date. As a result, the date of July 5, 1990 will be the actual parole eligibility date.

APPENDIX A

APPLICATION OF ACCRUED CREDITS IN THE COMPUTATION OF PAROLE ELIGIBILITY

LOUIS NICKOLOPOULOS, CHAIRMAN

STATE PAROLE BOARD

JANUARY 19, 1988

APPENDIX A

In an opinion provided to the Parole Board by the Department of Law and Public Safety in August, 1981 concerning the aggregation of consecutive sentences, the Board was informed that commutation ("good time") credits awarded on a mandatory-minimum term should not be calculated into the determination of an aggregate parole eligibility date but rather credited against the total aggregated maximum term. Based on this advice, the Board did desist from applying commutation credits awarded on a mandatory-minimum term and work and minimum custody credits earned during the service of a mandatory-minimum term in the computation of an inmate's aggregate parole eligibility date which is based on the mandatory-minimum term and a consecutive non-mandatory minimum parole eligibility term. Thus, upon an inmate serving his mandatory-minimum term, he was required to revert to the service of the consecutive non-mandatory minimum parole eligibility term (assuming a mandatory-minimum term was not imposed on the consecutive sentence). The consecutive parole eligibility term would only be reduced by commutation credits awarded on the parole eligibility term itself and by work and minimum custody credits earned during the service of the parole eligibility term. Since the credits that were accrued during the service of the mandatory-minimum term were not applied to reduce the consecutive parole eligibility term, the inmate was required to serve a longer time period before being considered for parole release.

In October 1985, the Department of Law and Public Safety reviewed the issue of whether credits accrued during the service of a mandatory-minimum term should be applied to an aggregate parole eligibility term (such term consisting of a mandatory-minimum term and a consecutive parole eligibility term derived from a consecutive term of incarceration which does not include a mandatory-minimum term). The Department of Law and Public Safety determined that the advice given in August, 1981 did not properly interpret the governing statute (N.J.S.A. 30:4-123.51(a)) which provides, in part, the following:

> "Each adult inmate sentenced to a specific term of years....shall become primarily eligible for parole after having served any judicial or statutory mandatory-minimum term or one-third of the sentence imposed where no mandatory-minimum term has been imposed less commutation time for good behavior pursuant to R.S. 30:4-92. Consistent with the provisions of the New Jersey Code of Criminal Justice (N.J.S. 2C:11-3, 2C:14-6, 2C:43-6, 2C:43-7) commutation and work credits shall not in any way reduce any judicial or statutory mandatory-minimum term and such credits accrued shall only be awarded subsequent to the expiration of the term."

The Department informed the Parole Board that commutation, work and minimum custody credits accrued during the service of a mandatory-minimum term should be applied against an inmate's aggregate parole eligibility term as well as against the inmate's aggregate maximum term. Since the Board now applies credits accrued during the service of a mandatory-minimum term in the computation of an aggregate parole eligibility date, a consecutive non-mandatory parole eligibility term will, in effect, be substantially reduced or completely eliminated. Thus, an inmate will be eligible for parole consideration on a substantially earlier date though in no case would an inmate be eligible for parole on a date earlier then the expiration date of the mandatory-minimum term. The only exclusions to the

application of accrued credits are a future parole eligibility term imposed upon the denial of parole by the Board, an extension of the parole eligibility term by the Board for institutional misconduct and a future parole eligibility term established by the Board upon the revocation of parole.

Each custodial term imposed for an offense has a separate parole eligibility term and the Board is required to aggregate parole eligibility terms in order to compute a parole eligibility date on the inmate's aggregate sentence. N.J.S.A. 30:4-123.51(h). The opinion of the Department of Law and Public Safety has a significant affect on the computation of inmates' aggregate parole eligibility dates. A judge should, therefore, be cognizant of the opinion at the time a sentence is imposed in order for the judge to insure that the parole eligibility term derived from the sentence imposed will fulfill the punitive aspects of the sentence.

The following basic examples will illustrate the effect of the opinion of the Department of Law and Public Safety in the computation of an aggregate parole eligibility date.

APPENDIX A

EXAMPLE I

Date of Sentence:	01/04/88
Term:	4 yrs. (2 yrs. man.-min.) (Count #1) 4 yrs., consecutive (Count #2)
Total Term:	8 yrs.
Aggregate Parole Eligibility Term:	3yrs.4mos. (2 yrs.(mandatory-minimum) plus 16 months (1/3 of 4 yrs. c/s))

CALCULATION

D.O.S.:		01/04/88
Service Commenced:		01/04/88
Man.-Min. Term:	+	2yrs.
Mandatory-Minimum Expiration Date:		01/03/90
1/3 of 4 yrs. c/s term:	+	4mos. 1yr.
		05/03/91
Commutation Credits (Awarded on aggregate eligibility term of 3yrs. 4mos. at expiration of mandatory-minimum date):	-	276days
Aggregate Prole Eligibility Date:		07/31/90

Since the application of commutation credit did not reduce the aggregate parole eligibility date below the expiration date of the mandatory-minimum term, work and minimum custody credits earned and accrued during the service of the mandatory-minimum term would be applied in the calculation. Assuming a total of 156 days work and minimum custody credits as of 01/03/90, the aggregate parole eligibility date would be:

		07/31/90
Work/Minimum Custody Credits (As of 01/03/90):	-	156days
Actual Aggregate Parole Eligibility Date (as of 01/03/90):		02/25/90

Credits earned after 01/03/90, the mandatory-minimum expiration date, would continue to reduce the aggregate parole eligibility date.

In no case would the application of accrued credits reduce an actual aggregate parole eligibility date below the mandatory-minimum expiration date.

Please note that the above calculation would be the same if the consecutive term of 4 years had been imposed by another judge on the same or another date of sentence.

APPENDIX A

EXAMPLE II

Date of Sentence:	01/04/85
Term:	10 yrs. (5 yrs. man.-min.)
Date of Sentence:	11/01/85
Term:	4 yrs. consecutive
Total Term:	14 yrs.
Aggregate Parole Eligibility Term:	6yrs.4mos. (5 yrs. (mandatory-minimum) plus 16 mos. (1/3 of 4 yrs. c/s))

CALCULATION

D.O.S.:		01/04/85
Service Commenced:		01/04/85
Man.-Min. Term:	+	5yrs.
Mandatory-Minimum Expiration Date:		01/03/90
1/3 of 4 yrs. c/s term:	+	4mos. 1yr.
		05/03/91
Commutation Credits (Awarded on aggregate eligibility term of 6yrs.4mos.at expiration of mandatory-minimum term):	-	572days
		10/08/89
Aggregate Parole Eligibility Date:		01/03/90

The aggregate parole eligibility date would be January 3, 1990 since credits cannot reduce the inmate's parole eligibility date below the mandatory-minimum expiration date which is January 3, 1990.

In this example, the application of commutation credit reduces the aggregate parole eligibility date to the expiration date of the mandatory-minimum term. The inmate would, therefore, not serve any additional time on the consecutive 4 year term before being considered for parole release.

If commutation credit did not reduce the aggregate parole eligibility date below the mandatory-minimum expiration date, accrued work and minimum custody credits would be applied (See Example I).

Please note that the above calculation would be the same if the consecutive term of 4 years had been imposed by the same judge on the same date of sentence.

APPENDIX A

EXAMPLE III

This example illustrates the method of calculating an aggregate parole eligibility date when a specific term of years with a mandatory-minimum term is imposed consecutive to a specific term of years without a mandatory-minimum term.

Date of Sentence:	01/04/88
Term:	4 years (Count #1)
Term:	4 years (2 years mandatory-minimum), consecutive (Count #2))
Total Term:	8 years
Aggregate Parole Eligibility Term:	3yrs.4mos. (16 mos. (1/3 of 4yrs.) plus 2yrs. (mandatory-minimum c/s))
Date of Sentence:	01/04/88
Service Commenced:	01/04/88
1/3 of 4 years:	+ 04mos.0lyr.
	05/03/89
Commutation Credit (Awarded on 1yr.4mos.):	- 100days
	01/23/89
Work Credit (As of 11/30/88):	- 54days
	11/30/88
Minimum Credit (As of 11/30/88):	- Zero
	11/30/88
Mandatory-Minimum Term:	+ 2yrs.
Mandatory Minimum Expiration Date:	11/30/90
Actual Aggregate Parole Eligibility Date:	11/30/90

Commutation credits to be awarded on the mandatory-minimum term and work and minimum credits earned during the service of the mandatory-minimum term are not applied in the calculation of the aggregate parole eligibility date since said date is, in fact, the mandatory-minimum expiration date and since there is no consecutive non-mandatory minimum parole eligibility term to which the accrued credits may be applied.

In this example, the first component of the aggregate parole eligibility term is the one-third (1/3) of the first specific term of years. Since this component is not a mandatory-minimum term, commutation, work and minimum custody (zero in this example) credits are applied to reduce the 16 months parole eligibility term in order to determine the commencement and expiration dates of the mandatory-minimum term component of the aggregate parole eligibility term.

The above calculation would be the same if the consecutive term had been imposed by another judge on the same or another date of sentence.

NOTE:

The State Parole Board is authorized by statute to develop rules and regulations as may be necessary for the proper discharge of its responsibilities. Previously the Board had determined the aggregate parole eligibility term by grouping together all non-mandatory minimum and all mandatory-minimum terms. Since accrued credits were not previously applied in the computation of the aggregate parole eligibility date, the grouping of similar eligibility terms and modifying the order of service of said terms had no impact on parole eligibility. However, with accrued credits now being applied in the computation of the aggregate parole eligibility date, the Board recognized that non-mandatory minimum parole eligibility terms would be eliminated or substantially reduced. Since the punitive aspects of a sentence will be served by parole eligibility and since the establishment of the punitive aspect of a sentence is a judicial function, the Board did not wish to undermine the sentencing judge(s) by adopting administrative procedures which would in any way affect the punitive aspects of a sentence. Accordingly, the Board's administrative procedures provide that parole eligibility terms derived from the terms imposed will be aggregated in the order that the terms were imposed by the sentencing judge(s). In this way, the sentencing judge(s) continues to exercise the responsibility to establish the punitive aspects of the sentence imposed.

APPENDIX B

APPENDIX B

STATE PAROLE BOARD

PRIMARY PAROLE ELIGIBILITY TERMS

YOUNG ADULT OFFENDERS

A	B	C	D	E	F	G	H
Presumptive Eligibility Term	Maximum Estimated Program Participation Credits: Above Average Rating (15 days per month)	Maximum Estimated Program Participation Credits: Average Rating (10 days per month)	Maximum Estimated Program Participation Credits: Below Average Rating (5 days per month)	Earliest Eligibility Based on Above Average Program Participation Rating	Eligibility Based on Average Program Participation Rating	Eligibility Based on Below Average Program Participation Rating	Latest Eligibility Based on Poor Program Participation Rating (zero credits
months	days	days	days	yrs-mos-days	yrs-mos-days	yrs-mos-days	yrs-mos-days
8	30	20	10	0 - 7 - 0	0 - 7 - 10	0 - 7 - 20	0 - 8 - 0
10	60	40	20	0 - 8 - 0	0 - 8 - 20	0 - 9 - 10	0 - 10 - 0
12	90	60	30	0 - 9 - 0	0 - 10 - 0	0 - 11 - 0	1 - 0 - 0
14	120	80	40	0 - 10 - 0	0 - 11 - 10	1 - 0 - 20	1 - 2 - 0
16	150	100	50	0 - 11 - 0	1 - 0 - 20	1 - 2 - 10	1 - 4 - 0
18	180	120	60	1 - 0 - 0	1 - 2 - 0	1 - 4 - 0	1 - 6 - 0
20	210	140	70	1 - 1 - 0	1 - 3 - 10	1 - 5 - 20	1 - 8 - 0
22	240	160	80	1 - 2 - 0	1 - 4 - 20	1 - 7 - 10	1 - 10 - 0
24	270	180	90	1 - 3 - 0	1 - 6 - 0	1 - 9 - 0	2 - 0 - 0
26	300	200	100	1 - 4 - 0	1 - 7 - 10	1 - 10 - 20	2 - 2 - 0
28	330	220	110	1 - 5 - 0	1 - 8 - 20	2 - 0 - 10	2 - 4 - 0
30	360	240	120	1 - 6 - 0	1 - 10 - 0	2 - 2 - 0	2 - 6 - 0
32	390	260	130	1 - 7 - 0	1 - 11 - 10	2 - 3 - 20	2 - 8 - 0
36	450	300	150	1 - 9 - 0	2 - 2 - 0	2 - 7 - 0	3 - 0 - 0
40	510	340	170	1 - 11 - 0	2 - 4 - 20	2 - 10 - 10	3 - 4 - 0
44	570	380	190	2 - 1 - 0	2 - 7 - 10	3 - 1 - 20	3 - 8 - 0
48	630	420	210	2 - 3 - 0	2 - 10 - 0	3 - 5 - 0	4 - 0 - 0
52	690	460	230	2 - 5 - 0	3 - 0 - 20	3 - 8 - 10	4 - 4 - 0
56	750	500	250	2 - 7 - 0	3 - 3 - 10	3 - 11 - 20	4 - 8 - 0
74	1020	680	340	3 - 4 - 0	4 - 3 - 10	5 - 2 - 20	6 - 2 - 0
90	1260	840	420	4 - 0 - 0	5 - 2 - 0	6 - 4 - 0	7 - 6 - 0
106	1500	1000	500	4 - 8 - 0	6 - 0 - 20	7 - 5 - 10	8 - 10 - 0
120	1710	1140	570	5 - 3 - 0	6 - 10 - 0	8 - 5 - 0	10 - 0 - 0

NOTE: A young adult offender's actual parole eligibility date is computed by reducing the tentative parole eligibility date (based on the eligibility term/time goal minus jail credit) by program participation credits. These program credits are determined by the Board panel at each Annual Review Hearing and at the Mid-Goal Review Hearing.

Program credits are assigned on the basis of correctional time. No program participation credits may be earned during the first six months of correctional time. Correctional time is considered the eligibility term/time goal less jail credit.

APPENDIX B

TIME GOAL SCHEDULE FOR YOUNG ADULTS

(Applies to Offenses committed prior to May 6, 1985)

The schedule of presumptive parole eligibility terms shown below is used as a guide by the Board panel when time goals are set. In order to determine the presumptive eligibility term for an offense and sentence, you should follow the steps shown below.

PRESUMPTIVE PRIMARY ELIGIBILITY DATES (MONTHS)

	LENGTH OF INDETERMINATE TERM (Years)						
CRIME CATEGORY	0-4	5-9	10-14	15-19	20-24	25-29	30-Life
Category A		40	56	74	90	106	120
Category B	16	32	40	48	56	56	56
Category C	16	24	32	40	48		
Category D	14	16	24	32	40	40	40
Category E	12	12	16	19	19	19	19
Category F	10	10					
Category G	8						

A. Find the category of your crime in the chart below. If the sentence is for more than one crime, use the highest category.

Category A - Murder
Category B - Kidnapping, Aggravated Sexual Assault, Manslaughter, Arson
Category C - Armed Robbery
Category D - Robbery, Aggravated Assault, any second degree crime not listed.
Category E - Sale or Distribution of Narcotics
Category F - Possession of Narcotics, Burglary, Theft, Receiving Stolen Property, Possession of Stolen Property, Possession of a Weapon, Bribery, Forgery, Perjury, Terroristic Threats, any third degree crime not listed.
Category G - Escape, Non-Support, Death by Auto, any fourth degree crime not listed.

B. Identify the length of the indeterminate sentence on the top line of the schedule. Follow this column down to the appropriate category to determine the presumptive term for the crime and sentence.

C. It is important to remember that the actual time goal which a person received may be set above or below the presumptive term because of aggravating or mitigating factors of the case.

Example: An offender is sentenced to a 10 year indeterminate sentence for Aggravated Assault. Aggravated Assault is found in Category D. By following Category D across to the appropriate column for a 10 year indeterminate sentence (10-14 years), the presumptive parole term (time goal) for this offense and sentence can be located. In this example, the presumptive parole eligibility term would be 24 months.

APPENDIX B

TIME GOAL SCHEDULE FOR YOUNG ADULTS
(Applies to Offenses committed prior to May 6, 1985)

The schedule of presumptive parole eligibility terms shown below is used as a guide by the Board panel when time goals are set. In order to determine the presumptive eligibility term for an offense and sentence, you should follow the steps shown below.

PRESUMPTIVE PRIMARY ELIGIBILITY DATES (MONTHS)

	LENGTH OF INDETERMINATE TERM (Years)						
CRIME CATEGORY	0-4	5-9	10-14	15-19	20-24	25-29	30-Life
Category A		40	56	74	90	106	120
Category B	16	32	40	48	56	56	56
Category C	16	24	32	40	48		
Category D	14	16	24	32	40	40	40
Category E	12	12	16	19	19	19	19
Category F	10	10					
Category G	8						

A. Find the category of your crime in the chart below. If the sentence is for more than one crime, use the highest category.

Category A - Murder
Category B - Kidnapping, Aggravated Sexual Assault, Manslaughter, Arson
Category C - Armed Robbery
Category D - Robbery, Aggravated Assault, any second degree crime not listed.
Category E - Sale or Distribution of Narcotics
Category F - Possession of Narcotics, Burglary, Theft, Receiving Stolen Property, Possession of Stolen Property, Possession of a Weapon, Bribery, Forgery, Perjury, Terroristic Threats, any third degree crime not listed.
Category G - Escape, Non-Support, Death by Auto, any fourth degree crime not listed.

B. Identify the length of the indeterminate sentence on the top line of the schedule. Follow this column down to the appropriate category to determine the presumptive term for the crime and sentence.

C. It is important to remember that the actual time goal which a person received may be set above or below the presumptive term because of aggravating or mitigating factors of the case.

Example: An offender is sentenced to a 10 year indeterminate sentence for Aggravated Assault. Aggravated Assault is found in Category D. By following Category D across to the appropriate column for a 10 year indeterminate sentence (10-14 years), the presumptive parole term (time goal) for this offense and sentence can be located. In this example, the presumptive parole eligibility term would be 24 months.

APPENDIX B

COMPUTING ELIGIBILITY FOR A YOUNG ADULT INMATE (EXAMPLE)

A. An offender is sentenced to a ten year indeterminate sentence on January 1, 1986. His offense is Aggravated Assault. Thirty days of jail credit are allowed by the sentencing judge.

B. The Young Adult Panel will review this case shortly after the offender is received into the system in order to set a time goal.

C. A ten year indeterminate sentence for Aggravated Assault has a presumptive time goal of twenty-four months (see prior page(s) for computing time goals). Assuming no aggravating or mitigating circumstances in this case, the Young Adult Panel would establish a twenty-four month time goal.

D. The tentative release date is calculated by adding the time goal (24 months) to the date of sentence, and reducing this by jail credits. For this example, assume the sentencing judge allowed 30 days jail credit.

January 1, 1986 + 24 months = January 1, 1988
January 1, 1988 - 30 days jail credit = December 2, 1987

December 2, 1987 would be the tentative parole eligibility date.

E. A young adult inmate's actual parole eligibility release date is computed by reducing the tentative parole eligibility date by program participation credits. These program credits are determined by the Board panel during each Annual Review Hearing and at the mid-goal review (Questions 18 and 19). A mid-goal review hearing in this case would be conducted in December, 1986 and program participation credits assigned at that time.

F. Program credits are assigned on the basis of correctional time. Also, no program participation credits may be earned during the first six months of correctional time. The inmate's correctional time is his time goal (24 months) less jail credit (30 days) or a total of twenty-three months correctional time. Program credits may be allowed on the basis of seventeen months (23 months less the first 6 months).

G. Assuming "above average" credits were allowed to this inmate for program participation, the tentative eligibility date would be reduced by 255 days (15 credits per month for above average credits multiplied by 17 months). The new tentative release date would be reduced from December 2, 1987 to March 22, 1987.

H. The decision to grant reductions for program participation is a separate decision from whether parole release is approved. Although both of these decisions may be made during the mid-goal review, it is important to understand this difference.

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May 15, 1989

TO: All Recipients of the Sentencing Manual for Judges

FROM: John P. McCarthy, Jr.

SUBJECT: Sentencing Manual for Judges
(September 1988 Edition)

Attached is a corrected third page of Appendix B. Please substitute this page for the third and fourth pages of Appendix B that is in your manual now. The corrected page contains a chart, entitled "Time Goal Schedule for Young Adults (Applies to Offenses committed on or after May 6, 1985)," that was inadvertently omitted during printing.

Thank you.

/bam
Attachment

APPENDIX B

COMPUTING ELIGIBILITY FOR A YOUNG ADULT INMATE (EXAMPLE)

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H. The decision to grant reductions for program participation is a separate decision from whether parole release is approved. Although both of these decisions may be made during the mid-goal review, it is important to understand this difference.

APPENDIX B

TIME GOAL SCHEDULE FOR YOUNG ADULTS

(Applies to Offenses committed on or after May 6, 1985)

The schedule of presumptive parole eligibility terms shown below is used as a guide by the Board panel when time goals are set. In order to determine the presumptive eligibility term for an offense and sentence, you should follow the steps shown below.

PRESUMPTIVE PRIMARY ELIGIBILITY DATES (MONTHS)

	LENGTH OF INDETERMINATE TERM (Years)						
CRIME CATEGORY	0-4	5-9	10-14	15-19	20-24	25-29	30-Life
Category A		40	56	74	90	106	120
Category B	16	32	40	48	56	56	56
Category C	16	28	36	44	52		
Category D	14	20	28	36	44		
Category E	12	14	18	22	22		
Category F	10	10					
Category G	8						

A. Find the category of your crime in the chart below. If the sentence is for more than one crime, use the highest category.

Category A - Murder
Category B - Aggravated Manslaughter, Kidnapping first degree, Aggravated Sexual Assault, or any other first degree crime.
Category C - Robbery first degree
Category D - Manslaughter, Robbery second degree, Aggravated Assault second degree, Sexual Assault or any other second degree crime.
Category E - Sale or Distribution of Controlled Dangerous Substance and Possession of Controlled Dangerous Substance with Intent to Distribute
Category F - Burglary third degree, Possession of a Weapon for an Unlawful Purpose third degree, Unlawful Possession of a Weapon third degree, Terroristic Threats, Aggravated Assault third degree, Death by Auto, Endangering the Welfare of a Child third degree, any other third degree crime, or Possession of Controlled Dangerous Substance.
Category G - Criminal Sexual Contact, Forgery fourth degree, Possession of a Weapon fourth degree, or any other fourth degree crime.

B. Identify the length of the indeterminate sentence on the top line of the schedule. Follow this column down to the appropriate category to determine the presumptive term for the crime and sentence.

C. It is important to remember that the actual time goal which a person received may be set above or below the presumptive term because of aggravating or mitigating factors of the case.

APPENDIX C

APPENDIX C

PAROLE ELIGIBILITY TABLE

COUNTY JAIL INMATES

A	B	C	D	E	F	G
SENTENCE	FLAT ELIGIBILITY (1/3 of term or 60 days, whichever is greater)	COMMUTATION CREDIT	ESTIMATED WORK CREDIT (maximum possible)	ESTIMATED MINIMUM CUSTODY CREDIT (maximum possible)	EARLIEST ELIGIBILITY Includes: 1. No Loss of C.T. 2. Max W.C. 3. Max M.C.	LATEST ELIGIBILITY Includes: 1. No Loss of C.T. 2. No W.C. 3. No M.C.
Months	Months - Days	Days	Days	Days	Days	Days
1	-- - --	--	--	--	---	---
2	-- - --	--	--	--	---	---
3	00 - 60	--	--	--	60 *	60 *
4	00 - 60	--	--	--	60 *	60 *
5	00 - 60	--	--	--	60 *	60 *
6	00 - 60	--	--	--	60 *	60 *
7	02 - 10	12	9	5	60 *	60 *
8	02 - 20	13	10	5	60 *	67
9	03 - 00	15	11	6	60 *	75
10	03 - 10	17	12	6	65	83
11	03 - 20	18	14	7	71	92
12	04 - 00	20	15	8	77	100
13	04 - 10	22	16	8	84	108
14	04 - 20	23	18	9	90	117
15	05 - 00	25	19	10	96	125
16	05 - 10	27	20	10	103	133
17	05 - 20	28	22	10	110	142
18	06 - 00	30	23	11	116	150

* NOTE: Sixty day restriction applies.

NOTE: Chart based on (a) zero jail credit; and (b) no mandatory-minimum term.

APPENDIX D

APPENDIX D

REVOCATION ACTION
(Applies to Violations of Parole committed on or after May 6, 1985)

Future Parole Eligibility Dates

Technical Violations	State Prison (months)	Young Adult (months)
Absconding (Non-Reporting)	12±3	9±3
Possession of Firearm	12±3	9±3
Any Special Condition of Parole	12±3	9±3
Any other condition (including disorderly persons convictions)	8±3	6±2

Criminal Violations - State Prison

Offense	Range (months)	Presumptive Term (months)
Murder, Kidnapping	56 - 100	78
First Degree Offense	28 - 48	38
Second Degree Offense, Sale or Distribution of CDS or Possession of CDS with Intent to Distribute	16 - 28	22
Third Degree Offense or Possession of CDS	12 - 16	14
Fourth Degree Offense	8 - 12	10

Criminal Violations - Young Adult

Offense	Presumptive Term (months)
Murder, Kidnapping	30±10
First Degree Offense	24±8
Second Degree Offense, Sale or Distribution of CDS or Possession of CDS with Intent to Distribute	16±6
Third Degree Offense or Possession of CDS	10±4
Fourth Degree Offense	8±2

NOTE: Any State Prison parolee whose parole status is twice revoked subsequent to conviction on an indictable offense will be required to serve the balance of the remaining term.

In any instance where the presumptive future eligibility term is clearly inappropriate, a future eligibility term may be established outside of the guidelines. Notification of the intent to establish a future eligibility term outside of the guidelines will be provided to the inmate before the final decision is made.

APPENDIX D

(Applies to Offenses committed prior to May 6, 1985)

ORIGINAL OFFENSE:	Presumptive Term (if parole is denied)
For State Prison Sentences	
Murder, Rape, Kidnapping, or for offenses not mentioned with terms in excess of 14 years	27 months (± 9 months)
Armed Robbery, Robbery, or for offenses not mentioned with terms of 8 to 14 years	23 months (± 9 months)
Breaking and Entering, Narcotic Law Violations, Theft, Arson, Assault and Battery, or offenses not mentioned with at least 4 but less than 8 years	20 months (± 9 months)
Escape, Bribery, Conspiracy, Gambling, Possession of a Weapon or offenses not mentioned with terms less than 4 years	17 months (± 9 months)
For Young Adult Sentences	
Murder, Kidnapping, Aggravated Sexual Assault, Manslaughter, Arson, Armed Robbery	24 months (± 9 months)
Robbery, Aggravated Assault, any Second Degree crime not otherwise categorized	16 months (± 9 months)
Sale or Distribution of Narcotics, Burglary, Theft, Terroristic Threats, Possession of Stolen Property, Receiving Stolen Property, Possession of a Weapon, Bribery, Forgery, Possession of Narcotics, Perjury, any Third Degree crime not otherwise categorized	10 months (± 9 months)
Escape, Non-Support, Death by Auto, any Fourth Degree crime not otherwise categorized	8 months (± 9 months)

APPENDIX D

FUTURE ELIGIBILITY TERMS

If parole is denied, a new future eligibility term will be established. This term is added to the previous book eligibility date or, if this date has passed, to the date of the hearing to determine the inmate's new parole eligibility date. For state prison inmates, the eligibility date will be reduced by commutation, work, and minimum credits. For young adult inmates, the eligibility date will be reduced by credit for program participation.

The future eligibility schedules for state prison and young adult inmates follow. To use these tables, find the original crime in the list at the left and follow across to find the presumptive term. The presumptive term may be increased or decreased by 9 months for aggravating or mitigation circumstances. The three member Board panel or the full Board may, where deemed appropriate go outside of this range.

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December 1, 1989

TO: All Recipients of the Sentencing Manual for Judges

FROM: John P. McCarthy, Jr.

SUBJECT: Sentencing Manual for Judges
(September 1988 Edition)

This is the 1989 update to the Sentencing Manual for Judges. Please replace these old pages with these new pages, as follows:

Table of Contents

Replace pages i through xiii with new pages i through xiv.

Table of Citations - Table of Cases

Replace pages xiv through xxxii with new pages xv through xxxv.

Table of Other Authorities

Replace pages xxxiii and xxxiv with new pages xxxvi and xxxvii.

Part I:

Replace pages 9 and 10 with new pages 9 and 10.

Part II:

Replace pages 25 through 42 with new pages 25 through 42.
Replace pages 47 and 48 with new pages 47 and 48.
Replace pages 51 and 52 with new pages 51 and 52.
Replace pages 59 and 60 with new pages 59 and 60.
Replace pages 63 and 64 with new pages 63 and 64.

Part III:

Replace pages 69 and 70 with new pages 69 and 70.
Replace pages 73 and 74 with new pages 73 and 74.
Replace pages 87 and 88 with new pages 87 and 88.
Replace pages 91 through 96 with new pages 91 through 96.

Part IV:

Replace pages 100 through 103 with new pages 100 through 103, including two-page chart.
Replace pages 108 through 137 with new pages 108 through 137A.
Replace pages 142 through 191 with new pages 142 through 191.

Part V:

Replace pages 202 and 203 with new pages 202 and 203.
Replace pages 206 through 213 with new pages 206 through 213A.
Replace pages 230 and 231 with new pages 230 and 231.
Replace pages 236 through 248 with new pages 236 through 248.

Part VI:

Replace pages 249 through 254 with new pages 249 through 254.
Replace pages 257 through 262 with new pages 257 through 262.

Part VII:

Replace pages 273 through 278 with new pages 273 through 278.

Part VIII:

Replace pages 287 through 290 with new pages 287 through 290.
Replace pages 293 through 298 with new pages 293 through 298.

Appendix D:

Replace first two pages of Appendix D.

Thank you.

/bam117
Attachments