INTRODUCTION

The "Comprehensive Drug Reform Act of 1986" was signed into law on April 23, 1987. It was signed as chapter 106 of the laws of 1987 and had been Assembly Bill No. 3270 of 1986. This act took effect on the 60th day following its enactment but remained inoperative until the enactment into law of Assembly Bill No. 3209 of 1986, a bill which authorized a $198 million prison bond issue to be placed before the New Jersey voters in the November, 1987 election. The bond issue was signed into law on July 9, 1987 so the Drug Reform Act become operative on that July 9, 1987 date since the 60 days had already elapsed.

OVERVIEW OF THE ACT

The "Comprehensive Drug Reform Act of 1986" consists of 25 sections plus an effective date. The first three sections comprise three new chapters in Title 2C of the New Jersey Statutes: Chapter 35 "Controlled Dangerous Substances"; Chapter 36 "Drug Paraphernalia," and 36A "Conditional Discharge for Certain First Offenders."

Chapter 35 contains all of the major offenses which involve the use, possession or distribution of controlled dangerous substances. Some of the offenses codified in this chapter closely parallel the language from predecessor laws in Title 24; other offenses are patterned after preexisting law, and other offenses are new. Chapter 35 also contains procedural sections which govern, for example, the waiver of mandatory minimum terms of parole ineligibility, the imposition, collection and disposition of cash penalties and laboratory fees, the destruction of bulk seizures of controlled dangerous substances, and the use of sworn laboratory certificates designed to streamline the evidentiary process at trial.

Chapter 36 governs prosecutions for the illegal sale, possession, use etc. of drug paraphernalia. This chapter is taken nearly verbatim from the predecessor statutes found at N.J.S.A. 24:21-46 through 21-53.

Chapter 36A governs the conditional discharge of certain first-time drug offenders. The provisions of this new chapter were closely patterned after N.J.S.A. 24:21-27 (commonly referred to as "section 27") except that conditional discharge under the new act is not available to persons who have been charged with any indictable offense. This chapter applies only to persons charged with disorderly persons or petty disorderly persons offenses arising under chapters 35 or 36. Such offenses are ordinarily heard in municipal courts, and are prosecuted by municipal prosecutors. This act thus eliminates conditional discharge for drug offenders accused of indictable crimes, and provides instead that the diversion of all these criminal proceedings be accomplished through the pretrial intervention program set forth at N.J.S.A. 2C:43-12. It should also be noted that any person who, prior to the effective date of this new act, had applied for conditional discharge under prior law, or who was still undergoing supervisory treatment, will continue to be governed by the provisions of Title 24, and not under the provisions of the "Comprehensive Drug Reform Act of 1986".

Section 4 through 24 of the "Comprehensive Drug Reform Act of 1986" make various amendments to certain sections of Title 2A, Title 2C and Title 24. Some of these amendments are technical in nature to account for the transfer of major drug offenses from Title 24 into Title 2C. Other sections, especially those pertaining to the sentencing provisions of the penal code, are substantive in nature, and govern, for example, the length and criteria for imposing extended terms of imprisonment, and the calculation of the maximum fines which may be imposed upon a violation of the drug laws.

Finally, section 25 expressly repeals certain provisions of preexisting law found in Titles 24 and 2A. It should be noted that many of the provisions currently found in Title 24 deal with important regulatory matters which do not properly belong in a penal statute. For that reason, many provisions of Title 24 are not repealed by the "Comprehensive Drug Reform Act of 1986" but rather are left intact and will continue to be used to enforce these regulatory provisions.

SELECTED HIGHLIGHTS OF THE COMPREHENSIVE DRUG REFORM ACT OF 1986.

In addition to transferring all criminal drug offenses currently set forth in Title 24 into Title 2C, the Code of Criminal Justice, this act makes a sweeping revision of New Jersey's drug laws, creates several new offenses and adopts a number of innovative provisions designed not only to target the most dangerous offenders, but also to provide meaningful rehabilitative opportunities for certain other offenders. The "Comprehensive Drug Reform Act of 1986," for example, would do the following:

- Demonstrate the Legislature's recognition that drug offenders should be subject to strict, consistently imposed criminal sanctions. [See discussion of 2C:35-1.1];

- Incorporate controlled substance analogs, so-called "designer drugs," into the definition of controlled dangerous substances to close a loophole in current law and ensure that our laws will keep pace with advances in pharmacological technologies. [See discussion of 2C:35-2];

- Create a new offense, Leader of Narcotics Trafficking Network, which is patterned after New Jersey's current racketeering laws and which is designed to facilitate the investigation and prosecution of upper echelon drug distributors. [See discussion of 2C:35-3];

- Create a new offense, Maintaining or Operating a Controlled Dangerous Substance Production Facility, which is designed to provide harsh punishment for persons involved in the illegal manufacture of drugs. [See discussion of 2C:35-4];

- Create an offense, Employing a Juvenile in a Drug Distribution Scheme, which is designed to provide stern punishment for any adult who employs or uses a juvenile in furtherance of a drug distribution scheme. [See discussion of 2C:35-6];

- Provide for the doubling of the term of imprisonment, term of parole ineligibility, fine and penalty otherwise applicable to an adult who is convicted of distributing drugs to a minor or to a pregnant female. [See discussion of 2C:35-8];

- Create a new offense which makes drug distributors and manufacturers strictly liable for deaths which result from the injection, inhalation or ingestion of the substance. [See discussion of 2C:35-9];

- Provide for mandatory extended terms and periods of parole ineligibility for certain repeat drug distributors. Those offenders who are not deterred by the prospect of enduring harsher penalties and who continue to commit serious drug crimes will, upon apprehension and conviction, be incapacitated for a substantial period of time. [See discussion of amendments to 2C:43-6];

- Provide that mandatory terms of imprisonment and terms of parole ineligibility can only be waived with the consent of the prosecutor pursuant to a plea or post-conviction agreement. This provision is intended to recognize that many drug offenders are part of a complex distribution chain and to facilitate and encourage offenders to cooperate with law enforcement efforts to detect, apprehend and successfully prosecute otherwise well-insulated drug traffickers. [See discussion of 2C:35-12];

- Create enhanced fines which can be based on three times the street value of the controlled dangerous substances involved, [See discussion of amendments to 2C:43-3 and 2C:44-2];

- Require the imposition of monetary penalties based on the degree of the offense, the proceeds of which will be placed in a fund for enhanced education, public awareness and rehabilitation programs. [See discussion of 2C:35-15];

- Permit courts and prosecutors to "aggregate" the amount of drugs distributed on separate occasions or to separate individuals in order to determine the degree of the crime committed. This will ensure that the most prolific drug dealers will be accurately identified and subjected to appropriate punishment. [See discussion of 2C:35-5c.];

- Authorize the rehabilitation of certain drug dependent persons convicted of specific offenses during a five-year period of probation. Such rehabilitation includes mandatory periodic urinalysis and a minimum of six months confinement to a residential treatment facility. This provision would also establish strict revocation procedures to ensure compliance with the program and the safety of the community. [See discussion of 2C:35-14];

- Require that all persons convicted of any drug-related offense, including disorderly persons and petty disorderly persons offenses, forfeit their driving privileges for not less than six months, and further renders any juvenile under age 17 adjudicated delinquent for a drug-related offense ineligible for a driver's license for at least six months after he reaches the age of 17. [See discussion of 2C:35-16];

- Facilitate the waiver of jurisdiction of juvenile offenders to adult court when the juvenile is accused of a drug-induced death or of selling drugs for profit while on or near school property. [See discussion of amendments to 2A:4A-26];

- Provide that persons convicted of a disorderly persons possessory drug offense which is committed on or near school grounds or on school buses be required to perform not less than 100 hours of community service in addition to any other sentence imposed. [See discussion of 2C:35-10];

- Make conditional discharge applicable only to disorderly persons or petty disorderly persons offenses, leaving pretrial intervention as the means for the pretrial diversion of persons accused of indictable drug offenses. [See discussion of 2C:36A-1 and 2C:43-12];

- Streamline trial practice and related costs by authorizing in certain circumstances the use of sworn laboratory certificates in lieu of the live testimony of State forensic chemists. [See discussion of 2C:35-19];

- Authorize the pretrial destruction of bulk seizures of controlled substances after notice to counsel and making a photographic record. [See discussion of 2C:35-21];

- Authorize the State or counties to recoup certain laboratory analysis fees from drug offenders to help defray the cost of maintaining forensic laboratory facilities. [See discussion of 2C:35-20].

DISCUSSION OF SPECIFIC PROVISIONS OF THE COMPREHENSIVE DRUG REFORM DRUG REFORM ACT OF 1986

2C:35-1.1.

This section, a declaration of policy and legislative findings, is divided into subsections which summarize the necessity for revising New Jersey's drug laws, including the transfer of the criminal offenses defined in Title 24 into Title 2C, of the Code of Criminal Justice. It is hoped that this declaration, by identifying the purposes to be achieved by this reform initiative, will aid the courts in interpreting and implementing the specific provisions of the act.

2C:35-2.

This section provides the definitions used throughout the "Comprehensive Drug Reform Act of 1986," and transfers virtually verbatim the existing definitions found at N.J.S.A. 24:21-2. It should be noted that while the criminal offenses defined in Title 24 are hereby transferred to Title 2C, many of the provisions remaining in Title 24 pertain to regulatory and noncriminal matters. These provisions, including the provision which authorizes the Commissioner of Health periodically to amend the schedules of controlled substances, are generally retained and will remain in full force and effect.

The section also adds a new definition, "residential treatment facility," which is a facility which has been approved by any county probation department for the inpatient treatment and rehabilitation of certain drug dependent persons. [See discussion of 2C:35-14].

Finally, this section adds a new definition to current law for "controlled substance analog." A controlled substance analog is a substance which has a chemical structure and an effect substantially similar to that of a controlled dangerous substance and which was specifically designed to produce that similar effect. The definition of "controlled dangerous substance" specifically states that wherever it appears in any law or regulation it shall include the term "controlled substance analog."

Such analogs, commonly called "designer drugs," are often nearly identical to actual controlled substances listed in one of the schedules. A single molecule within the complex chemical structure, for example, may have been intentionally altered. The inclusion of analogs within the definition of controlled dangerous substance is designed to close a loophole in the law which currently allows a criminal drug manufacturer who purposely designs a substance similar in chemical structure or effect to a controlled dangerous substance to avoid prosecution and punishment because, technically, the distribution of such a drug cannot be crimmalized unless it is specifically included in one of the schedules. The process of amending the schedules by legislation or by rulemaking, however, is a cumbersone and time-consuming one. This provision is intended to keep the criminal law current with technological advances which are undertaken for the purpose of evading successful prosecution and punishment.

In general, a person who manufactures, distributes or dispenses a controlled substance analog will be guilty of the same offense as if he had manufactured, distributed or dispensed the formally recognized controlled dangerous substance after which the analog is patterned. It would make little sense to have a single degree classification applicable to all analogs, since some analogs, by virtue of their chemical structure and physiologic effect, are inherently more dangerous than others.

Therefore, a person who manufacturers an analog which simulates the effect of a Schedule I narcotic drug would be guilty of the same degree offense as if he had illegally manufactured the same quantity of the recognized Schedule I narcotic drug.

The definition of controlled substance analog makes clear that the term does not include a lawfully produced new substance, such as one manufactured in accordance with the provisions of the "Federal Food, Drug and Cosmetic Act."

It should be noted, finally, that the use throughout the act of the phrase "controlled substance analog" in the disjunctive to "controlled dangerous substance" is meant for clarification only, and its absence from other sections should not be construed to take analogs out of the definitional ambit of controlled dangerous substances unless an express intention to the contrary is clearly stated.

2C:35-3.

This section creates a new conspiracy offense known as Leader of Narcotics Trafficking Network. The express purpose of this section is to target for enhanced punishment the upper echelon members, the so-called kingpins, of an organized drug distribution scheme. Although the penal code generally provides that a conspiracy to commit a first-degree crime is a crime of the second degree, (see N.J.S. 2C:5-4a.), the conspiracy offense defined in this section is designated as one of the first degree. This section further establishes a mandatory term of imprisonment and fines which are designed to reduce the economic incentives to traffic in drugs. Specifically, a person convicted of this offense faces a sentence of an ordinary term of life imprisonment during which he will be ineligible for parole for 25 years. (By way of comparison, the mandatory term of parole ineligibility imposed upon a person convicted of murder is 30 years). There is left open the possibility for waiver of the mandatory minimum term pursuant to

N.J.S.A. 2C:35-12. The court may also impose a fine of up to $500,000 or five times the street value of the drugs involved in the conspiracy, whichever is greater. This represents a departure from the general provisions established by this act permitting a fine of up to three times the street value of the controlled substances involved. [See discussion of amendments to N.J.S.A. 2C:43-3 and N.J.S.A. 2C:44-2].

Because of the nature of the complex and well-organized hierarchies that may exist in drug trafficking operations, the persons who profit most from these illegal enterprises frequently are able to insulate themselves within the network. This section is specifically aimed at these individuals. The offense is closely patterned after the "leader of organized crime" offense which is part of New Jersey's racketeering laws. See N.J.S.A. 2C:5-2g. This section does not, however, require proof of the existence of a "pattern" of racketeering activity. See N.J.S.A. 2C:41-2. Nor does this offense require proof that the proceeds of the crime were invested in an enterprise which affects trade or commerce. However, for the State to be successful in a prosecution under this section, it must prove not only that the defendant was engaged in a conspiracy with others, but that this conspiracy was done for the purpose of making a profit. It is not a defense that the profit either was generated or intended to be generated outside of New Jersey. Nor is it necessary for the State to prove that a profit was actually made, but rather only that the conspirators intended to make a profit. Whereas New Jersey's racketeering laws address the problem of the infiltration of organized crime into the legitimate business community, this section addresses the problem of the movement of controlled dangerous substances within the illicit drug supply network.

This new offender category is not defined by the amount, purity or monetary value of the drugs involved, but rather by the offender's role in the drug distribution hierarchy. This section specifically targets those offenders who are responsible for organizing, overseeing and financing a drug distribution network. Nothing in this statute prevents successful prosecution of more than one person as a leader of a narcotics trafficking network.

In determining whether a particular scheme or course of conduct is undertaken for profit, the trier of fact may take into account all attending circumstances, including but not limited to the number of persons involved in the scheme or course of conduct, the amount and purity of the controlled dangerous substances involved, or the amount of cash or currency involved. The jury may also consider the actor's "net worth" and his expenditures in relation to his legitimate sources of income. Under this approach, where the State can show that the defendant has purchased extravagant or luxury items, or has otherwise engaged in a lifestyle seemingly beyond his financial means (based on his known and reported sources of legitimate income), the jury may infer that these items were, in fact, purchased with the proceeds of criminal activity. This information can be used either to establish or corroborate that the criminal scheme in which the defendant participated was intended to be a lucrative one.

The portion of this section which reads "bring into or transport in this State" is intended to include within the scope of this offense those drug traffickers who use New Jersey's highways, turnpikes and roadways as convenient conduits for the transport of illegal drugs to and from other areas or markets. It is no defense to a prosecution for this offense that the drugs involved in the commercial scheme were brought into or transported in this State exclusively for ultimate distribution in another jurisdiction.

This offense does not merge with a conviction for any substantive offense which is the object of the conspiracy. A person convicted of being a leader of narcotics trafficking network may also be prosecuted, convicted and separately punished for the offense of manufacturing, distributing or dispensing controlled dangerous substances, for operating a controlled dangerous substance production facility, for employing a juvenile in a drug distribution scheme and certain other specified crimes. Similarly, and notwithstanding the already stern penalties mandated for this first degree crime, this section would not prohibit the court from imposing an extended term pursuant to N.J.S. 2C:43-7, if, for example, the defendant were a repeat drug offender.

2C:35-4

This section creates the new first degree crime for maintaining or operating a controlled dangerous substance production facility. Such laboratories have proliferated throughout the State, and have become an important part of the illicit drug trafficking networks operating in New Jersey. These laboratories, moreover, often employ sophisticated technologies and trained chemists.

This section is designed to reach those offenders who maintain or operate any premises, place or facility which is used for the unlawful manufacture of certain specified controlled substances, including methamphetamine, LSD, PCP (angel dust), or any substance classified as a narcotic drug in Schedules I or II, which includes heroin and cocaine. This offense is also designed to reach any person who aids, promotes, finances or otherwise participates in the maintenance or operations of such a laboratory.

Under current law, persons who maintain a building or premises for the unlawful manufacture of illegal drugs may be found guilty of keeping what is called a "common nuisance" -- a disorderly persons offense. See N.J.S.A. 24:21-35 and N.J.S.A. 2C:33-12. N.J.S. 24:21-21a(6) further provides that it is an offense punishable by up to three years imprisonment to maintain a premises which is "resorted to" by persons illegally using drugs, or which is used for the "keeping or selling" of illegal drugs. This section makes clear that maintaining or operating physical plants which produce dangerous drugs constitutes an especially serious offense, since such commercial operations have become an indispensable and prolific source for controlled substances, especially methamphetamine, which then enter the illicit stream of commerce and are distributed throughout the State. The previously mentioned other sections of law continue to be applicable in all other relevant factual settings, for example, manufacture of certain Schedule III or IV drugs.

It is expected that many persons covered under this section could also be prosecuted for the separate offense of manufacturing, distributing or dispensing a controlled dangerous substance in violation of N.J.S.A. 2C:35-5. Unlike 2C:35-5, however, the offense defined in this section is designated as a first degree crime without regard to the quantity or purity of the controlled substances involved, provided that the particular substance produced in the illegal laboratory was one of those which are specifically identified in this section. This offense will thus ensure that all manufacturers of these drugs are subject to stern punishment, even where the State is unable to physically seize large quantities.

This section further provides that a person convicted of maintaining or operating an illegal drug laboratory, except as set forth in 2C:35-12, shall be sentenced to a term of imprisonment which must include a mandatory term of parole ineligibility. The term of parole ineligibility, moreover, could be fixed as high as ten years if the court, after considering the applicable aggravating and mitigating factors, were to impose the maximum twenty year sentence available upon a conviction of a first degree crime.

Furthermore, this section provides that the court may also impose a fine not to exceed $500,000 or five times the street value of all controlled substances at any time manufactured or stored at the illegal laboratory. This provision represents another deviation from the fine sentencing scheme adopted in this chapter with respect to all drug offenses, which generally provides that the court may impose a fine not to exceed three times the street value of the controlled substances involved. [See discussion of amendment to N.J.S.A. 2C:43:-3]. With respect to this particular offense, moreover, the determination of street value is not limited only to the quantity of controlled substances which were actually seized by law enforcement. Rather, the sentencing court in calculating the maximum possible fine could consider the total volume of controlled dangerous substances which the State can show was at any time produced or stored at the particular facility or chain of facilities maintained or operated by the defendant. [See discussion of amendment to N.J.S. 2C:44-2].

It should be noted that this offense incorporates the current definition of "manufacture," see N.J.S.A. 2C:35-2, which expressly excludes the "preparation or compounding of a controlled substance by an individual for his own use." Accordingly, a private residence used by its owner for the preparation, compounding or conversion of substances such as "crack" or free base cocaine would not fall within meaning of a "production facility" as used in this section provided that the substance was "manufactured" by a single individual solely for his own use. A structure used by persons who produce or refine crack from raw cocaine for commercial distribution to others, however, (so-called "crack houses" or "crack kitchens") would indeed constitute a production facility for the purposes of this section, as would a structure used by numerous individual addicts who produce their own "crack," for example.

Finally, this section makes clear that this offense does not apply to legitimate commercial laboratories, research facilities and pharmacies, that is, those facilities which are expressly authorized to conduct their operations pursuant to the regulatory provisions of Title 24, which are left intact and remain in full force and effect.

2C:35-5

This section makes it unlawful for any person to purposely or knowingly manufacture, distribute, or dispense a controlled dangerous substance or analog, or to possess such a substance with intent to manufacture, distribute or dispense, except as may be expressly authorized by law. With the exception of the inclusion of controlled substance analogs into this penal scheme, these acts are presently made criminal under N.J.S.A. 24:21-19. Unlike the current provisions of Title 24, however, this section expressly highlights certain specific substances -- heroin, cocaine, PCP (angel dust), LSD, methamphetamine, marijuana and hashish -- because of their prevalence or inherent degree of dangerousness.

This section modifies the quantity threshold limits currently used to determine the seriousness of a given distribution offense. The sternest punishment for heroin and cocaine dealers, for example, would be reserved for those defendants who have at any time cumulatively distributed, or possessed with intent to distribute, more than five ounces of either of these particular drugs.

These offenders would be guilty of a first degree crime and would receive a mandatory minimum term of parole ineligibility. The one ounce threshold for heroin and cocaine found in current law, moreover, would be reduced to one-half ounce. Under this sentencing scheme, persons distributing between one-half ounce to five ounces of heroin or cocaine would be guilty of a second degree crime [See 2C:35-5b.(2)]. Persons distributing less than one-half ounce of these substances, in turn, would be guilty of a third degree crime [See 2C:35-5b.(3)]. In addition, this section would for the first time create a similar threshold scheme with respect to methamphetamine, LSD and PCP.

For the purposes of this section, as well as the offense defined at 2C:35-10, it is intended that current law governing the definition of "possession" and the related concepts of "joint" and "constructive" possession, would be retained. This act is not intended to overrule or supersede all current statutory or case law. Rather, this legislation embraces the penal code's general approach that ". . . provisions [of the act]. . . not inconsistent with those of prior laws shall be construed as a continuation of such laws." N.J.S.A. 2C:1-1e.

This section provides that when calculating the total weight of a given sample drugs, the forensic laboratory doing the analysis should include all adulterants and dilutants. With respect to some substances, moreover, it is necessary for the State to establish that the sample includes a statutory threshold amount of the pure, free base substance. In those cases where that threshold is not met, the defendant would be guilty of the lesser offense with respect to the distribution of that particular type of substance. In other words, if a seized sample of cocaine is found to include less than 3.5 grams of the pure, free base substance, the defendant would be guilty of a third degree crime, even though the total weight of the sample (including adulterants and dilutants) may exceed five ounces.

Subsection c. of this section provides that when the degree of the offense depends on the quantity of the substance involved, that quantity, whether such possession was actual or constructive, is to be determined by the trier of fact. This subsection also provides that the quantity involved in individual acts of distribution etc. whether at different times or to different people, may be added together or "aggregated" in determining the degree of the offense. The aggregation provision may be used by the prosecutor. Under this provision, a person who distributes two ounces of cocaine on one day, and three ounces on the next day, for example, could be convicted of distributing an aggregate five ounces -- a first degree crime -- even if the two acts of distribution were to different people and were made at different locations. The aggregation permitted under this section includes "adulterants or dilutants."

This concept is analogous to the aggregation principle for theft established in N.J.S.A. 2C:20-2b(4). That section provides that "amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense."

Unlike the theft aggregation provision, it is not necessary under this section for the State to prove that the separate drug transactions were committed "pursuant to one scheme or course of conduct." Rather, given the very nature of these offenses, it is assumed that all acts of manufacturing, dispensing, distribution or possession with intent to distribute committed by a particular defendant are essentially part of a single distribution scheme or continuing course of conduct. This section nonetheless does establish time limits with respect to the aggregation transactions. Specifically, the trier of fact may only aggregate the quantities involved in chronologically separate acts which could each be individually prosecuted within the statute of limitations applicable to the particular offense. See N.J.S.A. 2C:1-6.

The drafters intend that indictments under this section should clearly state where it is intended that the amounts involved in chronologically separate transactions are to be aggregated for the purpose of determining the degree of the offense. The ultimate trier of fact, therefore, should not be permitted at trial to aggregate the amounts involved unless the theory of the prosecution so provides. It is intended, moreover, that, as in the case of the aggregation of amounts involved in theft, the prosecuting authority would have the discretion not to take advantage of the aggregation provision and instead charge the defendant in separate counts with distinct offenses. So too, the prosecutor would retain the discretion to exclude from the aggregation process any particular incident or transaction where its inclusion would not affect the degree of the offense. If, for example, a defendant participates in two distribution transactions involving an aggregate quantity of cocaine in excess of five ounces, and is thereafter arrested and found to be in possession of yet another five ounces of cocaine, he could be charged, convicted and separately punished under this section for two distinct first degree crimes, subject only to the law governing merger and the constitutional protection against double jeopardy. The prosecutor would not in that or any case be required by this section to aggregate the amounts involved.

The impact of the aggregation concept on sentencing practices will be significant, since it would be possible under this theory to convert two or more third degree distribution or possession with intent to distribute offenses into a single second degree conviction. Where the aggregate quantity of substances puts the offense into the second degree category, moreover, the presumption of imprisonment established at N.J.S.A. 2C:44-1d. would result in the imposition of custodial, as opposed to probationary terms.

Finally, the offenses defined in this section with respect to the distribution of large quantities of heroin, cocaine and other Schedule I or II narcotics, and LSD and PCP, require the court to impose a minimum term of imprisonment during which the defendant would be ineligible for parole. The court in these cases would have no discretion to impose a noncustodial term, and such mandatory minimum sentences could only be waived or reduced with the consent of the prosecutor pursuant to the provisions of N.J.S.A. 2C:35-12.

2C:35-6

This section specifically prohibits an adult from using or employing a juvenile in a scheme to illegally manufacture or distribute controlled substances. In many cases, drug traffickers use children to infiltrate schools and playgrounds. These children are used to distribute drugs to their schoolmates, and essentially become intermediaries between adult drug dealers and juvenile users. This section, which creates an offense similar to those previously set forth at N.J.S.A. 2A:96-5 and 96-5.1, provides that any adult who uses children in any way to facilitate the distribution of drugs is guilty of a second degree crime. Because this offense focuses on the dangers posed by the insidious act of employing children in any drug distribution scheme, the degree of the offense does not depend on the nature, quantity or purity of the controlled substance involved. Unlike current provisions in Title 2A, moreover, punishment for this offense does not depend on whether the adult defendant is an addict, since this chapter contains other provisions with respect to sentencing alternatives which are available for certain drug dependent persons. [See discussion of 2C:35-14].

A person convicted of this second degree offense must be sentenced to a term of imprisonment which shall include a term of parole ineligibility. This mandatory term can only be waived or reduced with the consent of the prosecutor pursuant to the provisions of N.J.S.A. 2C:35-12.

In addition, this section provides that the court may also impose a fine not to exceed $300,000 or five times the street value of the controlled substance involved.

Finally, this section provides that it is no defense to a prosecution for this offense that the defendant mistakenly believed that the person which he illegally used, solicited, directed, hired or employed was eighteen years of age or older, even if that mistaken belief was reasonable. In other words, an adult will be held strictly liable under this section for employing a juvenile in a drug distribution scheme. This concept is borrowed from current law governing sexual offenses, which similarly provides that it is not a defense to a prosecution for a crime under chapter 14 of Title 2C that "the actor believed the victim to be above the age stated for the offense, even if such mistaken belief was reasonable." See N.J.S.A. 2C:14-5c.

2C:35-7

This section was added to the "Comprehensive Drug Reform Act of 1986" by P.L. 1987, c. 101 which was approved April 15, 1987. A space was reserved for this section in the original bill at this designation. This section of the act had been Senate Bill No. 2449 of 1986.

This section creates a new third-degree crime to deal with persons who distribute, dispense or possess with intent to distribute a controlled substance within 1,000 feet of a school or school bus. This section, which is roughly modeled after federal law found at 21 U.S.C. §845a, effectively creates a drug "safety zone" around schoolyards in recognition not only that children, who are often the targets of distributors, congregate there, but also that areas surrounding schools must be kept drug free if they are to serve as the primary medium for educating young people as to the dangers of drug use.

Under this section, any person who violates N.J.S.A. 2C:35-5 while inside a drug safety zone shall be sentenced to a minimum term of three years during which the defendant would be ineligible for parole, except that where the underlying offense involves the distribution of less than 25 grams of

marijuana, or less than 5 grams of hashish, the minimum term is one year. These minimum terms of imprisonment and parole ineligibility can only be waived with the prosecutor's consent pursuant to N.J.S.A. 2C:35-12.

Punishment for violation of this section, moreover, does not merge for sentencing purposes with punishment imposed for the underlying violation of N.J.S.A. 2C:35-5, since this section responds to a separate and distinct danger apart from drug distribution generally, that is, the distribution of drugs within a designated school safety zone. This provision is thus designed to ensure the imposition of the mandatory term of imprisonment, subject only to the provisions of N.J.S.A. 2C:35-12, for any person convicted of distributing within a school safety zone, even where the defendant is also convicted of an underlying second-degree distribution offense which otherwise would not mandate a term of imprisonment and parole ineligibility. Because this offense focuses entirely on the dangers associated with the infiltration of illicit drugs and drug trafficking activity into school safety zones, the degree of punishment imposed upon a violation of this section, in contrast to the offense defined in N.J.S.A. 2C:35-5, generally does not depend on the type or amount of drug involved, except where the substance is a small quantity of marijuana or hashish.

The definition of school property is generally derived from current law at N.J.S.A. 2C:33-15, and is limited to elementary and secondary (junior high and high) schools. It does not matter for purposes of this section whether the school is public, private or parochial. The definition of school property, however, does not include nursery, preschool or day care centers; nor does it include colleges, junior colleges, universities or proprietary adult vocational schools. Cf. 21 U.S.C. §845a. The definition of "school bus" can be found at N.J.S.A. 39:1-1.

The protected school safety zone includes all school property including playgrounds and athletic fields, and further extends 1,000 feet in all directions (measured "as the crow flies") from the outermost boundary of the school grounds or campus, and not from the perimeter of the school building itself. Cf. N.J.S.A. 33:1-76, which instead measures the distance from a licensed

liquor establishment to a school "in the normal way that a pedestrian would properly walk from the nearest entrance of said church or school to the nearest entrance of the premises sought to be licensed." It does not matter in a prosecution under this section whether children were actually present or whether the school was in session at the time the offense occurred. Rather, this section is intended to create a permanent, 24-hour drug safety zone around schools, in recognition that children routinely congregate on school property and schoolyards before and after the normal school day, and during summer recess and other vacation periods.

It is not a defense to a prosecution under this section that the actor was unaware that he was distributing within a school zone; rather, as to this element, the defendant will be held strictly liable for his illegal acts occurring within a zone. it is thus incumbent upon drug traffickers to ascertain their proximity to schools and remove their illegal operations and activities from these specially protected areas, or assume the risk and stern consequences for their failure to do so.

Needless to say, there is no protected right, fundamental or otherwise, to illegally distribute drugs anywhere in this State. In recognition that school safety zones will encompass many private residences and premises, especially in urban areas, this section nonetheless does establish an affirmative defense where: 1) the charged offense occurred entirely within a private residence, 2) no juveniles were present during the commission of the offense, and 3) the offense did not involve distribution for profit.

The second element of the affirmative defense would fail were <u>any</u> minors, including a defendant's own children or siblings, to be present in the premises during any part of the commission of the offense. It is thought, moreover, that the third element of the affirmative defense is necessary to effectuate the underlying purpose of this new offense, since the consequences of commercially motivated drug transactions are thought to contribute directly to the violent and dangerous criminal milieu which this section is designed to displace from the areas surrounding schools. This affirmative

defense must be proved by the defendant by a preponderance of the evidence. See N.J.S.A. 2C:1-13. If the defendant fails to establish all three elements of the defense, the entire defense fails. This section, moreover, does not create an affirmative defense with respect to any other offense or provision of the Comprehensive Drug Reform Act.

2C:35-8

This section provides for the enhanced punishment of adults who distribute controlled substance to juveniles or pregnant women. It is designed to protect New Jersey's youth, and to disrupt the distribution of drugs at the high school and junior high school level by making the punishment for adults so prohibitive as to offset profit-making incentives which may currently exist. Under this section, any person who is at least eighteen years old and who distributes drugs to anyone seventeen years of age or younger or a pregnant woman is subject to twice the punishment otherwise established for distributing drugs to adults in violation of N.J.S.A. 2C:35-5. The effect of this provision would be to automatically double the entire range of permissible sentences authorized for a given degree classification. Thus, for example, a second degree offender subject to enhanced punishment under this section could be sentenced to a term of imprisonment ranging between 10 and 20 years (double the ordinary range for a second degree crime of between five and 10.)

This enhanced punishment would apply not only to the potential term of incarceration, but also to the potential maximum fine and mandatory penalty provisions. This section also requires that any term of parole ineligibility required to be imposed be doubled. The imposition of this enhanced punishment may be waived or reduced with the consent of the prosecutor pursuant to the provisions of N.J.S.A. 2C:35-12. Title 24 had provided that any adult who distributes a substance to a juvenile was punishable by a term of imprisonment up to twice that otherwise authorized See N.J.S.A. 24:21-26. Because there was no definite range of sentences for any drug offense, however, such enhancement may not have been a meaningful deterrent.

An adult convicted of distributing large quantities of heroin or cocaine to a juvenile, for example, would have been eligible for a term of imprisonment ranging from zero to "double life." The court still had unfettered discretion to impose a brief or even noncustodial term, and was given no statutory guidance as to what sentence to impose.

This section provides that the court may not impose more than one enhanced sentence upon any defendant based on the distribution of drugs to underage persons. This provision is patterned after current law found at N.J.S.A. 2C:44-5a(3), which precludes the imposition of more than one extended term upon any defendant. Both of these provisions are designed to protect against unrealistic prison exposures for repeat offenders convicted of multiple new offenses. Under this section, if a defendant is convicted of two or more separate offenses which do not merge and which each involved the distribution of drugs to underage persons, the court would be authorized only to impose enhanced, double punishment under this section upon one of those separate convictions. In that event, this section requires that the court double the punishment applicable to the most serious offense. The most serious offense, moreover, is defined as the one which is of the highest degree classification, or, where applicable, the offense which mandates the longest term of parole ineligibility.

Notwithstanding this general prohibition against imposing more than one enhanced term upon an offender, this section nonetheless makes clear that the sentencing court may also impose an extended term of imprisonment.

This section does not establish a separate, substantive crime, but rather provides only for sentencing enhancement, upon the application of the prosecutor. Such application may be made at any time after the defendant is convicted and prior to sentencing, provided, of course, that this does not violate the defendant's understanding of the terms and consequences of a negotiated guilty plea. The determination as to the applicability of this section, therefore, is not made by a jury, but rather is made by the trial judge at the time of sentencing. Grounds must be established by the prosecutor at a hearing.

Finally, this section makes clear that it is no defense to the imposition of this form of enhanced punishment that the defendant mistakenly believed that the recipient of the drugs was eighteen years of age or older, even if such mistaken belief was reasonable. In other words, an adult will be held strictly liable under this section for illegally distributing a controlled substance to a person who is, in fact, a juvenile. This same concept applies in N.J.S.A. 2C:35-6.

2C:35-9

This section creates a new offense. This offense provides that any person who illegally manufactures, distributes or dispenses methamphetamine, LSD, PCP or any other controlled substance which is classified in Schedules I or II, is strictly liable for the death of another which results from the injection, inhalation or ingestion of the particular substance and is guilty of a first degree crime.

To maximize the deterrent effect, this offense is made one of strict liability, meaning that the State need not prove in a prosecution arising under this section that the defendant intended, knew or even should have known that death would or was likely to have resulted from his unlawful act of manufacturing, distributing or dispensing. This section thus puts illicit manufacturers and distributors clearly on notice that they operate in this State at their peril with respect to the risk that a death may result from their illegal activities.

It is necessary in a prosecution under this section for the State to prove that the defendant manufactured, distributed or dispensed drugs in violation of N.J.S.A 2C:35-5. A violation of N.J.S.A. 2C:35-5 is not established unless the State proves beyond a reasonable doubt that the defendant "knowingly" or "purposely" manufactured, distributed or dispensed a controlled substance. Thus, the term "strict liability" is not entirely descriptive of this offense, since the State must indeed show that the defendant's predicate act of manufacturing, distributing or dispensing was a knowing or purposeful one within the meaning of N.J.S.A. 2C:2-2b(2). A person who distributes a substance without knowledge as to its character as a controlled substance, therefore, could not be convicted under this section.

The State must further prove beyond a reasonable doubt that the death actually resulted from the injection, inhalation or ingestion of the very substance which had been distributed, dispensed or manufactured by the defendant. The State must thus prove that the death would not have occurred but for the defendant's illegal act of manufacturing, distributing or dispensing, and that the death was not too remote in its occurrence or otherwise too dependent upon conduct of another which was unrelated to the actual ingestion of the substance as to have a just bearing on the defendant's liability.

This section specifically establishes the element of causation which must be proved by the State in a prosecution for this offense. The element of causation specifically defined for this particular offense is patterned after the general penal code provisions found at N.J.S.A. 2C:2-3. Notwithstanding the provisions of subsection e. of N.J.S.A. 2C:2-3, which would ordinarily apply with respect to strict liability offenses, however, the State need not show in a prosecution under this section that the death was a "probable consequence" of the defendant's conduct.

This section makes clear that it is no defense that the decedent contributed to his own death by this purposeful, knowing, reckless or negligent ingestion of the substance. Nor is it a defense that the substance was administered to the decedent by another with the decedent's consent. For purposes of this offense, such acts by the decedent are deemed to be "concurrent" rather than intervening events sufficient to break the chain of causation.

The offense defined in this section is somewhat similar to the "felony murder" provisions developed at common law and which are now codified in chapter 11 of the penal code. The penal code currently provides, for example, that criminal homicide constitutes murder when the defendant, acting either alone or with one or more other persons, is engaged in the commission of, attempt to commit or immediate flight after committing certain enumerated crimes, and in the course of such crime of flight therefrom causes the death of a person other than one of the participants. N.J.S.A. 2C:11-3a(3). It is well-established that the State need not prove in such a prosecution that the death was purposely, knowingly or recklessly committed. Rather, a wholly unintended killing constitutes murder if it results from the commission of the underlying felony. It is equally well-settled that a participant may be convicted of murder under this theory even if the victim dies as a consequence of a shot fired by a police officer who was attempting to apprehend the fleeing felon. In other words, it is generally not á defense to a prosecution for felony murder that the death was directly caused by the volitional act of another. Current law thus establishes an unambiguous warning for accountability for even unintended deaths which are closely connected to the commission of certain inherently dangerous crimes. The offense defined in this section posts a similar warning to all drug manufacturers and dealers.

Nothing in this section, is intended to preclude or limit any prosecution for homicide under chapter 11 of the penal code. Thus, if a person distributes or administers a controlled substance with intent to kill, or else does so recklessly with extreme indifference to human life, he could also be charged with the more serious offenses or murder of aggravated manslaughter. In addition, this section explicitly provides that a conviction for this offense does not merge with a conviction for any other distribution offense defined in chapter 35 of Title 2C.

2C:35-10

This section is similar to the provisions of law previously found at N.J.S.A. 24:21-20, except that the specific penalties, degree classifications and potential fines applicable to each offense are modified. This section also makes clear that all adulterants or dilutants are to be included in determining the weight of any sample of controlled substance.

This section also provides that any person who possesses 50 grams or less of marijuana, or 5 grams or less of hashish, or who is caught under the influence of any drug, while on any school property or bus, or within 1,000 feet of any school property, or who is not otherwise sentenced to imprisonment, shall be required to perform 100 hours of community service.

Under subsection b. of this section, which has been transferred nearly verbatim from law previously found at N.J.S.A. 24:21-20, the State is not required to prove that a defendant was under the influence of a specific drug; rather, the State need only prove that the accused used or was under the influence of some drug, analog or counterfeit substance. The State can satisfy this burden of proof by showing that the accused displayed physiological or physical symptoms or reactions caused by the use of any controlled substance. This subsection provides that any person who uses or is under the influence of any controlled substance which has not been lawfully prescribed or administered for the treatment of an illness, is guilty of a disorderly persons offense.

Because the mandatory community service provision of this section prescribes a form of enhanced punishment, rather than defining a separate substantive offense, it is intended that the determination of whether the person committed the offense while on school property or a school bus, or within 1,000 feet of school property, will be made by the court at the time of sentencing.

2C:35-11

Under this section, which is patterned after prior laws found at N.J.S.A. 24:21-19.1 and 24:21-19.2, the distribution of an imitation controlled dangerous substance is designated as a third degree crime, punishable by three to five years in prison, and fine of up to $100,000 (a greater fine than generally permissible). Under Title 24, the penalty for this offense ranged from zero to three years imprisonment.

This section would exempt from liability any practitioners and their agents, servants and employees who dispense drugs in the normal course of their business. This section would also exempt from criminal liability those persons who manufacture, process, package, distribute or sell placebos in the normal course of their business or professional practice, or who do so for research purposes authorized by the Federal Food and Drug Administration.

2C:35-12

A number of the most serious offenses defined in this act require the imposition of mandatory terms of imprisonment and mandatory terms of parole ineligibility. These mandatory minimum terms can only be waived or reduced pursuant to a negotiated plea or post conviction agreement with the prosecuting authority. It is essential in drug cases that prosecutors be able to secure the cooperation (in the form of confidential information and testimony) of certain lower and middle level offenders to be able to identify, apprehend, prosecute and convict the more culpable, higher echelon members in a given drug distribution network. For this reason, one of the key objectives of this section and of the act is to provide persons engaged in illicit drug activities with strong incentives to cooperate with law enforcement to overcome the perceived and substantial risks associated with turning State's evidence and exposing their superiors, suppliers and affiliates.

Under this section, the trial court would retain the discretion afforded under current practice to reject a proffered plea agreement where the court finds that the interests of justice would not be served by effectuating that agreement. See R. 3:9-3. If the court chooses to accept a guilty plea offered pursuant to a negotiated agreement, however, it would, for the purpose of imposing sentence, thereafter be bound by the specific terms and conditions of that negotiated agreement.

This section also expressly recognizes that a plea agreement is essentially a form of contract between the State and a defendant which is ratified and enforced by the courts. Under current law, it is established that the court may not impose a sentence greater than that contemplated by a plea agreement, since this would be deemed to violate the defendant's understanding of his agreement to enter a guilty plea. Courts are free under current law, however, to impose a lesser sentence than that contemplated by a negotiated agreement, and may even elect to suspend the imposition of sentence altogether. This section expressly precludes a court from imposing a lesser prison term or fine than that expressly mandated by a plea agreement.

It should be noted, however, that although the State and the defendant under this section are free to stipulate a specific prison term, period of parole ineligibility or fine to be imposed, the plea agreement need not do so. Rather, a plea agreement could remain silent as to any or all such terms and conditions, in which event the court would retain its discretion, subject only to the requirements of this act, to impose any sentence deemed appropriate.

A post-conviction agreement is also authorized by this section, which may be consummated at any time after a guilty verdict, including after the imposition of sentence. An offender who is sentenced to prison, for example, could belatedly decide to cooperate with law enforcement. In such event, where the prosecutor consents and joins in the application, and provided that the court does not find that the interests of justice would not be served by

effectuating the terms of the post-conviction agreement, the defendant would be entitled to be resentenced by the court to any term which could originally have been imposed pursuant to a negotiated plea agreement.

2C:35-13

This section makes it unlawful for any person to acquire or obtain possession of a controlled dangerous substance by means of misrepresentation, fraud, forgery, deception or subterfuge. This offense is closely patterned after law previously found at N.J.S.A. 24:21-22a(3). Under that law, a person was punished by imprisonment for not more than three years, and by a fine of not more than $30,000. This section designates the offense as a third degree crime punishable by three to five years in prison and a fine of up to $30,000 or three times the street value of the controlled substances involved, whichever is greater. Any person who, for example forges a prescription in order to obtain a controlled substance from a pharmacist would be guilty under this section of a third degree crime. This offense recognizes, along with the offense defined in N.J.S.A. 2C:35-10, that New Jersey's drug abuse problem is not restricted to the use of drugs such as cocaine, marijuana, but also includes the abuse of prescription drugs.

This section also establishes a new offense which makes it a third degree crime for any person to acquire or obtain possession of a forged or fraudulent certificate of destruction permitted pursuant to N.J.S.A. 2C:35-21.

This section, finally, makes clear that a prosecution for a violation of this offense does not preclude a separate prosecution for offenses defined in chapter 20 of Title 2C. Such a theft prosecution, depending upon the value or quantity of the drugs involved, could constitute a crime of the second degree and thus result in a longer term of imprisonment than that which is authorized by this section.

2C:35-14

This section provides for rehabilitative treatment as an alternative to incarceration in appropriate cases. A defendant's eligibility for admission into a rehabilitation program under this section, and the standards governing his or her continued participation in such a program, are carefully prescribed.

Specifically, a person who has been convicted of a first degree offense is ineligible for admission into a rehabilitative program. A person convicted of N.J.S.A. 2C:35-7 or 2C:35-6 is also ineligible for rehabilitative treatment under this section unless the prosecutor joins in the defendant's application for admission. In such cases, the court would have no discretion to admit the defendant into a rehabilitation program over the prosecutor's objection. Similarly, any person convicted of a drug distribution offense who had previously been convicted of a distribution offense would not be eligible for rehabilitative treatment unless the prosecutor joins in application.

While probation under current law may ordinarily be imposed for any length of time not to exceed five years, probation under this section, can only be imposed for a fixed, five year term. As a condition of probation, and in addition to any other conditions which may be imposed by the court, the section mandates that the defendant enter a drug rehabilitation program approved for such purposes by the court. As part of this program, the defendant must submit to periodic urine testing for drug use throughout the five year probationary period. Such procedures will ensure that a defendant placed on probation under this section will not be able to conceal continued drug usage.

Subsection c. of this section mandates that a person convicted of a second degree crime or convicted under N.J.S.A. 2C:35-7 who is placed in a drug rehabilitation program under this section must be committed to a residential treatment facility for a minimum of six months. This section further provides that the period of commitment to a residential treatment program cannot exceed five years. This section provides clear notice that a defendant who leaves a residential treatment facility without authorization is subject to a charge of criminal escape as defined at N.J.S.A. 2C:29-5.

Upon successful completion of the required residential treatment program, the defendant must fulfill the remaining period of the five years of probation with credit for time served in the residential facility and for any incarceration in a county jail or correctional facility which may have been imposed and served as a condition of probation.

Subsection d. prescribes the procedures to be followed for revoking a defendant's placement into a rehabilitation program. Specifically, this subsection provides that where a defendant violates any term or condition of probation, the court may, in its discretion, revoke the defendant's probation and sentence the defendant to any custodial term which might originally have been imposed.

If the court elects not to revoke the defendant's probation upon a first violation, and the defendant is again found to have violated any term or condition of the probation, the court must revoke the defendant's probation on that subsequent violation and proceed to sentence the defendant to the term which could originally have been imposed. The court upon a second violation of probation would have no discretion to continue the defendant's participation in the rehabilitation program.

Where the defendant's probation pursuant to this section is revoked for any reason, it is intended that the defendant would be resentenced to a custodial term, since the defendant would no longer be eligible for rehabilitative treatment and because it would be inappropriate to place the defendant on regular probation which generally is less restrictive than the rehabilitation program contemplated by this section. It is intended, in this regard, that a revoked defendant would be resentenced to prison.

This section expressly provides that where the defendant's participation in a rehabilitation program is revoked, he will thereafter be ineligible for release from prison under the Intensive Supervision Program (ISP) administered by the courts. Release into that program would be inappropriate where the defendant has already abused the opportunity for rehabilitative treatment and judicial lenity afforded to him pursuant to this section.

Subsection e. of this section, finally, authorizes the court, after considering the defendant's financial resources, to require him to pay for all or any portion of the costs associated with his participation in any rehabilitation program or period of residential treatment authorized or mandated by this section.

2C:35-15

This section provides for a mandatory Drug Enforcement and Demand Reduction (DEDR) penalty to be assessed against each person convicted, adjudicated delinquent or placed in supervisory treatment for any violation of chapters 35 and 36 of Title 2C. This mandatory penalty is based on the degree of the offense with a maximum of $3,000 for a first degree crime. Unlike the penal code provisions with respect to fines, the amount of the monetary penalties is fixed with respect to each degree classification, and the sentencing court has no discretion to impose a penalty in any amount other than that prescribed for the degree offense or offenses for which the defendant was convicted, adjudicated delinquent, or placed in supervisory treatment pursuant to N.J.S.A 2C:43-12.

This section provides that a separate DEDR penalty must be imposed for each separate offense. This section makes clear that all DEDR penalties are to be in addition to and not in lieu of any fine authorized by law or required to be imposed pursuant to the provisions of N.J.S.A. 2C:35-12. If, for example, a defendant pleaded guilty to a second degree crime pursuant to a negotiated agreement which specifically provided for the imposition of a fine of $20,000, the court would be required pursuant to N.J.S.A. 2C:35-12 not only to impose the agreed-upon fine of $20,000, but would also be required to impose the applicable DEDR penalty in the amount of $2,000.

Subsections b. and c. of this section provide for the collection and disposition of all DEDR penalties. Specifically, all monies collected pursuant to this section are to be forwarded to a newly created revolving fund in the Department of Law and Public Safety to known as the "Drug Enforcement and Demand Reduction Fund." These monies, in turn, are to be used to fund enforcement efforts and educational, public awareness, rehabilitation or other public programs designed to prevent drug abuse.

Subsection d. of this section anticipates the situation where a defendant is unable to pay all fines, penalties and fees which have been assessed against him. Specifically, this subsection provides that all monies collected from a defendant are to be applied first toward the payment of the mandatory $30 Violent Crimes Compensation Board penalty imposed pursuant to N.J.S.A. 2C:43-3.1. Remaining monies collected from a defendant are to be applied next to the payment of the forensic laboratory fee imposed pursuant to N.J.S.A. 2C:35-20, and then to any DEDR penalties imposed pursuant to this section. Any remaining monies would than be used to satisfy any other court-ordered obligations which are not required to be imposed by law, but rather which are imposed in the discretion of the sentencing court. This section thus makes clear that while the collection of DEDR penalties is to take precedence over the collection of ordinary fines, it does not take precedence over the collection of VCCB penalties and laboratory analysis fees.

Subsection e. of this section, finally, establishes the only mechanism for waiving or reducing the statutorily prescribed DEDR penalty. Specifically, a court may suspend the collection of the penalty where the defendant agrees to enter a drug rehabilitation program and where he agrees to assume all or some part of the financial burden of his participation in that program. It is not necessary under this subsection that the defendant bear the entire cost of the program. The specific rehabilitation program, moreover, must be approved by the court, although it need not necessarily be the same program as is contemplated or mandated by the provisions of N.J.S.A. 2C:35-14.

Pursuant to this subsection, the court must still impose the applicable DEDR penalty at the time of sentencing. The execution or collection of that penalty, however, may be suspended during the defendant's continuing participation in the rehabilitation program. Where the defendant's payment to the program exceeds the statutorily prescribed DEDR penalty, the court may discharge the defendant's payment obligation entirely. Where, however, the defendant's participation is for any reason terminated before he has successfully completed the rehabilitation program, he will be required to pay the entire statutorily prescribed DEDR penalty, regardless of any payments which he may have made to enroll or participate in the program.

2C:35-16

This section provides that any person who is convicted of or adjudicated delinquent for any offense defined in chapters 35 or 36 of Title 2C must forfeit his driver's license for at least six months, but not more than two years. This section would apply to any drug or drug paraphernalia offense, including disorderly persons or petty disorderly persons offenses. In the event that the court-ordered suspension exceeds the minimum six month period, the Director of the Division of Motor Vehicles may, in his discretion, reinstate the license after the expiration of the minimum six months, provided the defendant presents a doctor's certification stating he is not a drug dependent person.

This provision is similar to that which was found at N.J.S.A. 24:21-20c, which authorized, but does not require, that every person adjudicated a disorderly person for the unlawful possession of drugs forfeit his right to operate a motor vehicle for a period of not more than two years and until "such privilege shall be restored to him by the Director of Motor Vehicles upon application to and after certification by a physician to the Director that such person is not a drug dependent person with the meaning of this act."

To maximize the deterrent effect, the sanction mandated by this section is not dependent upon a finding by the court that a motor vehicle was used in committing the drug offense. This represents a departure from current law found at N.J.S.A. 2C:43-2c, which permits discretionary license suspension where a motor vehicle was used in the course of committing an offense. See also N.J.S.A. 2C:33-15 (authorizing discretionary license suspension in cases involving the possession of alcoholic beverages in motor vehicles). Rather, this penalty automatically applies to all persons convicted of drug and drug paraphernalia offenses.

This penalty is believed to be a particularly effective deterrent with respect to young would-be drug offenders, who may view the loss of driving privileges as an especially unpleasant restriction. For this reason, the section makes clear that if the offender is less than 17 years of age a the time of his conviction or adjudication of delinquency, the suspension of his driving privileges will be postponed until he reaches the age of 17, when he would have become eligible to obtain a driver's license.

To ensure enforcement of this provision, the section provides that the court which enters a conviction or adjudication of delinquency for an offense defined in chapters 35 or 36 must give notice of the conviction or adjudication to the Director of the Division of Motor Vehicles.

2C:35-17

This section retains the current exception to the physician-patient privilege in cases where a patient gives a doctor false information in an effort to obtain a controlled dangerous substance, and is taken virtually verbatim from its predecessor statute, N.J.S.A. 24:21-24b.

2C:35-18

This section provides that where a defendant is the authorized holder of an appropriate registration or order form, or is otherwise exempted from criminal liability by virtue of the provisions of Title 24, he may assert an affirmative defense to any prosecution for a violation of any offense arising under chapter 35 or 36. The affirmative defense established in this section must be proved by the defendant by a preponderance of the evidence.

Similarly, subsection b. of this section makes clear that a duly authorized officer engaged in the enforcement of this State's drug laws is exempt from liability. Accordingly, a law enforcement officer who handles a controlled substance in the course of the performance of his duties would not be charged with illegal possession of that substance.

2C:35-19

This section is designed to streamline trial practice by allowing the use of sworn laboratory certificates as an exception to the hearsay rule of evidence. Such certificates would be admissible in criminal and quasi-criminal cases in lieu of the live testimony of forensic chemists. This provision is intended to alleviate the burden imposed on State and county laboratory facilities by the necessity of having their employees travel throughout the State to make perfunctory court appearances in cases where the substance of their testimony is not genuinely in dispute.

Subsection a. of this section gives the Attorney General the authority to designate State forensic laboratories. A law enforcement agency may submit any substance believed to be a controlled dangerous substance or analog, or any poisons, drugs, medicine, human body tissues or fluids, to a designated laboratory for chemical analysis. Subsection b. of this section requires the laboratory employee performing the chemical analysis to prepare, upon the request of any law enforcement agency, a sworn certificate signed under oath attesting to the results of the analysis. This certificate can then be used in court as evidence of the composition, quality and quantity of the substance submitted.

The certificate must also set forth the type of analysis performed and the results achieved, and must detail the experience and expertise of the subscriber to establish not only that the equipment used was in satisfactory condition, but that the subscriber was qualified to perform the analysis and make the conclusions.

Subsection c. of this section prescribes the procedures to be followed when a party intends to use a laboratory certificate as evidence in a criminal or quasi-criminal proceeding. Specifically, where a party intends to offer a certificate into evidence, notice of that intent must be given to the court and to the opposing party at least 20 days before the proceeding begins. Along with this notice, the offering party must include not only a copy of the actual proffered certificate, but also all reports relating to the laboratory analysis in question. This procedure will ensure complete and prompt disclosure of all relevant information and will thereby allow the opposing party a fair opportunity to make an informed decision whether to contest the admissibility of the certificate.

This subsection also prescribes the procedures to be followed when an opposing party elects to object to the certificate's admission into evidence. The decision to admit a certificate in lieu of live testimony is vested in the court's discretion.

It is intended that the court ordinarily should admit the certificate unless it appears that the nature, quantity or purity of the tested substance is legitimately in dispute. Where it appears from the statement of objections that there is a legitimate factual dispute with respect to any relevant portion of the certificate, the court should deny admissibility of the certificate and require the State to produce the forensic chemist at trial.

If the opposing party does not comply with the prescribed procedures and time limitations established pursuant to this section, his objection to the certificate's admissibility is waived. These time limitations should not be relaxed by the court except upon a showing of good cause. This subsection also provides that the determination of the certificate's admissibility must be determined not later than two days in advance of the trial date to permit arrangements as may be necessary.

2C:35-20

This section requires the imposition of a fee to be used to offset the costs of performing laboratory analyses. Under this section, any person convicted of an offense under chapter 35 and any person charged with an offense under chapter 35 who was placed in supervisory treatment pursuant to the pretrial intervention program established at N.J.S. 2C:43-12, shall be assessed a laboratory analysis fee of $50 for each such offense. Juveniles adjudicated delinquent for any violation of chapter 35 shall be assessed a laboratory analysis fee of $25 for each such adjudication.

These fees will be used to fund forensic laboratories and to reimburse the State or county for the cost of testing drugs. Specifically, the criminal laboratory fees authorized by this section are to be collected in the same manner as fines and restitutions, and shall be forwarded to the appropriate forensic laboratory fund. Subsection d. of this section prescribes the procedures for establishing these forensic laboratory funds, while subsections e. through g. generally detail how the fees are to be collected and allocated from the funds.

2C:35-21

This section authorizes the destruction of bulk seizures of controlled dangerous substances. Seized drugs are considered contraband, and are subject to the forfeiture provisions of the penal code. See N.J.S.A. 2C:64-1 et seq. Where large quantities of drugs have been seized, the State is confronted with a number of security and logistical problems in storing the substances and safeguarding them against theft. Under this section, large quantities of illegal drugs or analogs may upon notice to defense counsel and pursuant to court order, be destroyed completely or in part prior to trial. Procedures are provided for cases where defense counsel objects.

Where seized drugs are to be destroyed by a court order authorized by this section, the State or county forensic laboratory which performed the analysis must photograph the substance prior to its destruction. This photographic record, in turn, may be introduced as evidence. This provision is similar to the procedures to be followed by law enforcement agencies when stolen private property is recovered and taken into custody. N.J.S.A. 2C:65-1 currently provides, for example, that the law enforcement agency may make and retain a complete photographic record of the property, which, upon proper authentication, may be introduced as evidence in any court in lieu of the actual property.

Nothing in this section is intended to require the prosecutor to apply for the pretrial destruction of any bulk seizure. The prosecutor therefore has the discretion under this section to elect not to apply for destruction of all or any portion of seized drugs, and may instead retain these substances as evidence for presentation at trial.

This section provides that the ultimate decision to order or deny the destruction of seized substances is vested in the sound discretion of the trial court. Prior to the execution of any court order of destruction, defense counsel must be given a reasonable opportunity to inspect or test the substance. The laboratory which destroys the controlled substance, moreover,

must file with the court a sworn certificate indicating when and how the substance was destroyed, as well as the quantity destroyed. Such a certificate will ensure that the seized drugs were in fact destroyed in accordance with the court order. If any person acquires or obtains a forged or fraudulent certificate, he would, in addition to any other offense prescribed by the penal code, be guilty of the offense set forth at N.J.S.A. 2C:35-13.

2C:35-22

This section provides that if any section, clause, sentence or part of this chapter is found to be unconstitutional or invalid, that finding will not affect or impair any other portion of the chapter. The invalid provision will thus be deemed to be severed from the remaining portions.

2C:35-23

This section addresses the issue of pending cases, and is patterned after N.J.S.A. 2C:1-5, which governed the transitional period following the enactment of the New Jersey Code of Criminal Justice, which became effective on September 1, 1979. Unlike N.J.S.A. 2C:1-1, this transitional section does not permit a defendant to be resentenced. Specifically, this section provides that if an offense was committed prior to the effective date of this chapter, it shall be governed by prior law, except that the defendant may elect to be sentenced under the provisions of this chapter which are otherwise applicable to the offense and the offender. Similarly, this section provides N.J.S.A. 2C:35-19 (pertaining to the admissibility of sworn laboratory certificates) and N.J.S.A. 2C:35-21 (pertaining to the pretrial destruction of bulk seizures of controlled substances) shall apply to all pending cases, provided that these sections are justly applicable and that their application would not introduce confusion or delay.

An offense committed on or after the effective date of this act, that is, an offense for which any element thereof occurred after the effective date, is to be governed under the provisions of this act.

This section also makes clear that any defendant who, as of the effective date of this act, has not yet made application for supervisory treatment under N.J.S.A. 24:21-27, which is repealed by this legislation, would not thereafter be eligible for supervisory treatment except pursuant to the provisions of N.J.S.A. 2C:43-12 and except as may be provided in chapter 36A of this act.

Chapter 36--Drug Paraphernalia

Section 2 of the "Comprehensive Drug Reform Act of 1986" adds a new chapter, chapter 36, to the Code of Criminal Justice. This chapter, which is comprised of sections 2C:36-1 through 2C:36-9, transfers the previous sections of law that had been found at N.J.S.A. 24:21-46 through N.J.S.A. 24:21-50. These sections, except for N.J.S.A. 2C:36-6, are transferred virtually verbatim from that prior law.

N.J.S.A. 2C:36-6 makes it a disorderly persons offense to have under one's control or to possess with intent to use a hypodermic syringe, needle or any other instrument adapted for the use of controlled substances, except as may be expressly authorized by law. This offense is closely patterned after the disorderly persons offense established at N.J.S.A. 24:21-51. This new section, however, incorporates only those current provisions of law which are relevant to a criminal proceeding. The Title 24 provision, in contrast, also contains a number of regulatory provisions concerning the conduct of licensed physicians, dentists, veterinarians and similar practitioners. These regulatory provisions are left intact in Title 24.

Chapter 36A--Conditional Discharge for Certain first Offenders

Section 3 of the Comprehensive Drug Reform Act adds a new chapter, chapter 36A, to the Code of Criminal Justice. This chapter governs the conditional discharge for certain first offenders, and is taken virtually verbatim from existing law found at N.J.S.A. 24:21-27.

Unlike that law, however, the conditional discharge provisions of this chapter are inapplicable to persons charged with indictable drug crimes. Rather, this chapter applies only to persons charged with disorderly persons or petty disorderly persons offenses arising under chapter 35 or 36. Such offenses are ordinarily heard in municipal courts, and are prosecuted by municipal prosecutors.

To consolidate New Jersey's drug laws into the penal code, this act eliminates conditional discharge for drug offenders accused of indictable crimes, and provides instead that the diversion of these criminal proceedings be accomplished through the pretrial intervention program set forth at N.J.S.A. 2C:43-12. [See also discussion of amendments to N.J.S.A. 2C:43-12].

Amendment to N.J.S.A. 2C:5-2

Section 4 of the Comprehensive Drug Reform Act makes a technical amendment to the conspiracy provisions of the penal code. Specifically, this section clarifies that the term controlled dangerous substance would now be defined in chapter 35 of the code, and also incorporates the term controlled substance analog.

Amendment to N.J.S.A. 2C:20-2

Section 5 of the Comprehensive Drug Reform Act amends the theft provisions of the Code of Criminal Justice with respect to the gradation of certain thefts involving controlled substances by amending N.J.S.A. 2C:20-2. Under law previously found at N.J.S.A. 24:21-30, which is repealed by this legislation, theft of a controlled dangerous substance in an amount in excess of one kilogram was made punishable by imprisonment for up to twelve years and a fine of up to $25,000. Under the existing theft provisions of the penal code, any theft committed by extortion, or any other form of theft of property valued at $75,000 or more is designated as a second degree crime, punishable by a term of imprisonment between five and ten years and a fine of

up to $100,000. This section amends the theft gradation provisions of the penal code so that the theft of a controlled dangerous substance valued at $75,000 or more, or which is in a quantity in excess of one kilogram, regardless of its value, is designated as a second degree crime. The theft of a controlled dangerous substance, even in a small quantity or of a small value, is specifically designated under the penal code as a third degree crime, punishable by imprisonment between three to five years and a fine of up to $7,500.

It should be noted that the theft of any controlled dangerous substance, regardless of quantity or value, would remain a second degree crime if the theft were committed by means of extortion.

Amendment to N.J.S.A. 2C:39-7

Section 6 of the Comprehensive Drug Reform Act would amend N.J.S. 2C:39-7, which makes it a fourth degree crime for any person who has been convicted for the unlawful use, possession or sale of a controlled dangerous substance thereafter to purchase, own, possess or control a weapon. This section of the act is intended to clarify an ambiguity in this provision of the penal code, and would expressly exclude from this general prohibition convictions for disorderly persons or petty disorderly persons drug offenses.

It should be noted in this regard that another provision of the penal code, which governs the issuance of firearms purchaser identification cards, N.J.S.A. 2C:58-3c., requires only that such cards not be issued to persons who have been convicted of a crime. This amendment thus provides consistency in that regard.

Amendment to N.J.S.A. 2C:41-1

Section 7 of the Comprehensive Drug Reform Act makes a technical amendment to the definition of racketeering activity contained in the penal code at N.J.S.A. 2C:41-1. Specifically, this section changes the current

reference to Title 24 in that penal code provision to reflect the transfer of criminal offenses from Title 24 by changing the reference from N.J.S.A. 24:21-19 to N.J.S.A. 2C:35-5 or 2C:35-4 or 2C:35-6.

Amendment to N.J.S.A. 2C:43-1

Section 8 of the Comprehensive Drug Reform Act makes a technical amendment to the sentencing provisions of the Code of Criminal Justice found at N.J.S.A. 2C:43-1. Specifically, this section deletes that portion of current law which provides that the sentencing provisions concerning degree classifications do not apply to sentences authorized for the criminal offenses that are currently defined in Title 24. The single most important feature of this legislation is to incorporate all drug offenses into the penal code degree classification scheme. This section thus confirms that all crimes, including all indictable drug offenses, are to be designated as crimes of the first, second, third or fourth degree, and that all of the sentencing provisions of the penal code are to apply with full force and effect to convictions for drug offenses. [See also discussion of amendment to N.J.S.A. 2C:43-2].

Amendment to N.J.S.A. 2C:43-2

Section 9 of the Comprehensive Drug Reform Act makes a technical amendment to the sentencing provisions found at N.J.S.A. 2C:43-2 to account for the transfer of all drug offenses from Title 24 into Title 2C. Specifically, this section makes clear that all persons convicted of drug offenses shall henceforth be sentenced in accordance with the sentencing provisions of the penal code. [See also discussion of amendment to N.J.S.A. 2C:43-1].

Amendment to N.J.S.A. 2C:43-3

Section 10 of the Comprehensive Drug Reform Act establishes a new method for calculating the maximum potential fine which may be assessed against a person convicted of any drug offense. This section provides that any

person who is convicted for violating any offense defined in chapter 35 may be subject to a greater fine than would ordinarily apply to the degree of the offense for which the defendant was convicted. Specifically, a defendant convicted of a drug offense may be fined up to three times the actual "street value" of the controlled dangerous substances or analogs involved. Given the lucrative nature of drug trafficking activities, especially with respect to the distribution of cocaine and its derivatives, the potential fines which could be imposed and successfully collected pursuant to this provision could in some cases exceed millions of dollars.

This provision is designed to substantially reduce the economic incentive to commit drug crimes, and is patterned after treble damages sentencing provisions commonly used in economic crime cases.

The manner for calculating the street value of the drugs involved for the purposes of this section is prescribed by amendments to N.J.S.A. 2C:44-2c. It should also be noted that the specific provisions of this act defining some of the more serious drug offenses, (e.g. leader of Narcotics Trafficking Network) provide that the court in those cases may impose fines of up to five (rather than three) times the street value of the controlled dangerous substances involved.

Amendment to N.J.S.A. 2C:43-3.1

Section 11 of the Comprehensive Drug Reform Act makes a technical amendment to current law found at N.J.S.A. 2C:43-3.1 to account for the transfer of drug offenses from Title 24 into the penal code. This amendment will ensure that persons convicted of drug offenses will continue to be assessed the mandatory $30 penalty which is to be paid to the Violent Crimes Compensation Board. Another provision of this legislation, moreover, would ensure that the collection of these penalties would take precedence over the collection of all other penalties, fees, fines and orders for restitution. [See discussion of 2C:35-15]. Accordingly, where a convicted defendant is unable

to pay all or some portion of the total amount of any penalties, fines, fees or orders of restitutions which may be imposed, those monies which are successfully collected from the defendant will be dedicated first to the payment of the VCCB penalty, next to the payment of the mandatory laboratory analysis fee established pursuant to N.J.S.A. 2C:35-19, and then to the payment of the mandatory Drug Enforcement and Demand Reduction penalty imposed pursuant to N.J.S.A. 2C:35-15. Any remaining monies collected from the defendant would thereafter be used to pay any cash fines or orders for restitution which may have been imposed in the sentencing court's discretion.

Amendment to N.J.S.A. 2C:43-6

Section 12 of the Comprehensive Drug Reform Act would amend the current provisions of the penal code at N.J.S.A. 2C:43-6 governing the imposition of extended terms of imprisonment for certain offenders. Specifically, this section is designed to incapacitate drug distributors who are repeat offenders. It provides that any person who is convicted of manufacturing, distributing, dispensing or possessing with intent to distribute a controlled substance in violation of N.J.S.A. 2C:35-5, of maintaining or operating a controlled dangerous substance production facility in violation of N.J.S.A. 2C:35-4, of employing a juvenile in a drug distribution scheme in violation of N.J.S.A. 2C:35-6, of leader of narcotics trafficking network in violation of N.J.S.A. 2C:35-3, or of distributing or possessing with intent to distribute near school property in violation of N.J.S.A. 2C:35-7, who had previously been convicted of a drug distribution offense shall, on application of the prosecutor, be sentenced by the court to an extended term of imprisonment if the grounds therefor are established at a hearing. The length of the extended term which must be imposed upon the defendant depends upon the degree of the offense for which he is convicted, and is generally established at N.J.S.A. 2C:43-7.

Furthermore, this section requires that a person sentenced to a mandatory extended term be given a minimum term during which he would be ineligible for parole. This term of parole ineligibility must be fixed by the court at between one-third and one-half of the sentence ultimately imposed or three years, whichever is greater, except that in the case of a fourth degree conviction, the term of parole ineligibility must be fixed at no less

The enhanced sentencing provisions of this section, it should be noted, are not implicated unless the prosecuting authority after conviction affirmatively makes an application to the court to invoke these provisions. As with all mandatory terms established pursuant to the provisions of chapter 35 of this act, this enhanced sentence could nonetheless be waived or modified with the consent of the prosecutor pursuant to the provisions of N.J.S.A. 2C:35-12.

Finally, this section makes clear that a previous conviction exists for the purposes of this enhanced punishment scheme where the defendant has at any time previously been convicted of a drug distribution offense under chapter 35 or its predecessor statute, or under any similar statute of the United States or any other state.

Amendment to N.J.S.A. 2C:43-7

Section 13 of the Comprehensive Drug Reform Act makes a technical amendment to current law found at N.J.S.A. 2C:43-7 to include a specific reference to the new extended term provisions for repeat drug distribution offenders set forth at N.J.S.A. 2C:43-6e. This section also prescribes the extended term applicable to a person convicted of the newly created offense of Leader of Narcotics Trafficking Network set forth in N.J.S.A. 2C:35-3.

Amendment to N.J.S. 2C:43-12

Section 14 of the Comprehensive Drug Reform Act amends the pretrial intervention provisions of the Code of Criminal Justice found at N.J.S.A. 2C:43-12 to reflect the repeal of the conditional discharge provisions currently found at N.J.S.A. 24:21-27. That provision of Title 24 permitted first time drug offenders to avoid having a record of a criminal conviction by entering a treatment program supervised by the court. Where a defendant satisfactorily completed the supervisory treatment program, the criminal charges or judgment of conviction were discharged by the court.

Persons accused of disorderly persons or petty disorderly persons drug offenses remain eligible for conditional discharge in accordance with the provisions of N.J.S.A. 2C:36A-1, et seq. which are substantially identical to the provisions previously found in Title 24.

The most notable distinction between the penal code pretrial intervention program and the conditional discharge provisions is that a defendant may not ordinarily be admitted to pretrial intervention without the consent of the prosecuting authority. The prosecutor's decision to consent to a defendant's admission into pretrial intervention, moreover, can only be overruled by a court where the court finds that the prosecutor's decision constitutes a gross and patent abuse of discretion. Under the conditional discharge program, in contrast, the decision to admit a defendant to supervisory treatment was and is vested entirely in the discretion of the trial court.

Furthermore, the conditional discharge provisions permit a court to admit a defendant into supervisory treatment even after the defendant has pleaded guilty or had been found guilty of the offense at trial. Pretrial intervention is a means of providing a defendant the opportunity to participate in a supervisory treatment program before judicial and prosecutorial resources have been needlessly expended. One of the stated goals of this State's pretrial intervention program is to divert qualified defendants from the ordinary course of prosecution as soon as possible after the filing of a criminal complaint to relieve defendants from the anxiety of facing prosecution, to apply appropriate rehabilitative measures at an early date, and to effect savings in the expenditure or criminal justice resources. See Pressler, Current N.J. Court Rules, Comment R. 3:28, Guideline 6.

This section also clarifies that enrollment into pretrial intervention is not available to a person who has previously been admitted into a pretrial intervention program, or who has previously received supervisory treatment pursuant to the former conditional discharge provisions of Title 24. This is designed to make certain that no person is afforded more than one opportunity to participate in a supervisory treatment program.

Amendment to N.J.S.A. 2C:44-2

Section 15 of the Comprehensive Drug Reform Act establishes a procedure for calculating the maximum potential fines which may be imposed against certain convicted drug offenders. This section amends current law found at N.J.S.A. 2C:44-2, which generally sets forth the criteria for imposing fines and restitution. Specifically, current law is amended to include a subsection describing the method which a sentencing court must utilize in determining the "street value" of a controlled substance where the maximum potential fine which may be imposed depends upon the street value of the controlled substances involved in the offense. This section is intended to provide the court with guidance as to how to impose an enhanced fine authorized pursuant to N.J.S.A. 2C:43-3. The provisions of this section are only relevant where the sentencing court elects to impose a fine greater than that otherwise statutorily established for the particular offense for which the defendant was convicted.

This section provides that the sentencing court's finding as to the amount, purity and value of the substances involved may be based on expert opinion in the form of live testimony or by affidavit, or by such other means which the court finds to be appropriate, such as, for example, learned treatises, published scientific studies or reliable surveys. It is expected, moreover, that in making its decision, the court will take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing or any other court proceedings. Similarly, the court may consider information contained in the presentence report.

This section makes clear that the sentencing court's finding as to street value is not subject to modification by an appellate court, unless the reviewing court determines that the finding was totally lacking in support in the record or was arbitrary or capricious. It should be noted, finally, that pursuant to the provisions of N.J.S.A. 2C:35-12, a defendant and prosecutor may expressly agree as to the street value of the drugs involved, and

may therefore stipulate as to the amount of the maximum potential fine which can be imposed. Where a plea or post conviction agreement so provides, the sentencing court would have no discretion to impose a fine in an amount other than that expressly agreed to by the defendant and prosecuting authority. [See discussion of 2C:35-12].

Amendment to N.J.S.A. 2C:52-5

Section 16 of the Comprehensive Drug Reform Act makes a technical amendment to the current law found at N.J.S.A. 2C:52-5, which governs the expungement of criminal records of young drug offenders. Specifically, this section would amend current law to replace references to deleted provisions of Title 24 with appropriate references to chapters 35 and 36 of Title 2C.

Amendment to N.J.S.A. 2C:64-2

Section 17 of the Comprehensive Drug Reform Act makes a technical amendment to current law found at N.J.S.A. 2C:64-2, which governs the forfeiture of prima facie contraband. Current law requires that all prima facie contraband be retained by the State until entry of judgment or dismissal of the criminal proceeding arising out of the seizure. This section clarifies that the State need not retain prima facie contraband where it has successfully applied for a court order authorizing the pretrial destruction of bulk seizures of controlled substances pursuant to the provisions of N.J.S.A. 2C:35-21.

Amendment to N.J.S.A. 24:21-22

Section 18 of the Comprehensive Drug Reform Act amends current law found at N.J.S.A. 24:21-22. Specifically, this section repeals that portion of Title 24 which makes it unlawful for a person to acquire or obtain possession of a controlled dangerous substance by means of misrepresentation, fraud, forgery, deception or subterfuge. These acts will continue to be criminalized, but that offense is now established at N.J.S.A. 2C:35-13.

Amendment to N.J.S.A. 24:21-23

Section 19 of the Comprehensive Drug Reform Act amends current law found at N.J.S.A. 24:21-23 to account for the transfer of indictable drug offenses to the penal code. Specifically, this section amends current law to change the general penalty for violations of that Title from a "misdemeanor" to a disorderly persons offense. This section applies to persons who violate any provision of Title 24 for which no specific penalty is provided. Under current law, an offense designated as a misdemeanor is generally punishable as a fourth degree crime. See N.J.S.A. 2C:1-4 and N.J.S.A. 2C:43-1. Since the criminal offenses are now moved into Title 2C, it is deemed appropriate that the regulatory offenses retained in Title 24 be punished as nonindictable, disorderly persons offenses.

Amendment to N.J.S.A. 24:21-24

Section 20 of the Comprehensive Drug Reform Act would amend current law found at N.J.S.A. 24:21-24b. to delete from Title 24 the subsection which provides that information communicated to a medical practitioner in an attempt to illegally obtain a controlled dangerous substance will not be considered a privileged communication. The substance of this provision has been retained and has been transferred to the penal code at N.J.S.A. 2C:35-17.

Amendment to N.J.S.A. 24:21-29

Section 21 of the Comprehensive Drug Reform Act makes a technical amendment to N.J.S.A. 24:21-29 by deleting a reference to statutory provisions which are repealed by this act.

Amendment to NJ.S.A. 24:21-36

Section 22 of the Comprehensive Drug Reform Act makes a technical amendment to N.J.S.A. 24:21-36, which provides that whenever a licensed

drug manufacturer or practitioner is convicted of violating any provision of Title 24, the court is required to notify the appropriate State department or professional licensing board. Specifically, this section is technically amended to also require such notification with respect to a violation of any of the offenses now defined in chapters 35 and 36 of Title 2C.

Amendment to N.J.S.A. 2A:4A-26

Section 23 of the Comprehensive Drug Reform Act amends current provisions of the Code of Juvenile Justice found at N.J.S.A. 2A:4A-26, which governs the waiver of juvenile offenders to adult court. This amendment permits the State to demonstrate that a juvenile accused of certain drug offenses should be tried as an adult in Superior Court. Specifically, this section would relieve the State of the burden of showing in certain cases that the "nature and circumstances" of charges involving certain drug offenses are "sufficiently serious that the interests of the public" require that the juvenile be tried as an adult.

This section would only apply with respect to certain alleged violations which were committed for pecuniary gain and which were committed on or near school property and for certain drug-induced deaths. With respect to such offenses, this section makes clear that as a matter of public policy, these crimes are inherently serious ones which invariably threaten the public safety. This section does not, however, require that a juvenile who is charged with one of these offenses automatically be waived to adult court. Rather, that decision would continue ultimately to rest in the sound discretion of the trial court.

Statutory and Regulatory Reference to Act and Predecessor Law

Section 24 of the Comprehensive Drug Reform Act makes clear that whenever in any law, rule or regulation, reference is made to the "Comprehensive Controlled Dangerous Substances Act of 1970," (N.J.S.A. 24:21-1 et seq.) that reference would be

deemed to include the appropriate chapter, section or provision of the New Jersey Code of Criminal Justice, as amended and supplemented by this legislation. Similarly, any reference to chapters 35 or 36 of the penal code would be deemed to incorporate predecessor statutes in Title 24.

Repealed Statutes

In light of the transfer of criminal offenses from Title 24 into Title 2C, a number of provisions become redundant or superfluous. Accordingly, section 25 of the Comprehensive Drug Reform Act expressly repeals the following provisions of law:

N.J.S.A. 24:24-19
N.J.S.A. 24:21-19.1
N.J.S.A. 24:21-19.2
N.J.S.A. 24:21-20
N.J.S.A. 24:21-26
N.J.S.A. 24:21-27 (with provision for persons already in treatment)
N.J.S.A. 24:21-30
N.J.S.A. 24:21-46 through 24:21-50
N.J.S.A. 2A:96-5
N.J.S.A. 2A:96-5.1

In addition, this section would repeal the conditional discharge provisions currently found at N.J.S.A. 24:21-27, except that those provisions of Title 24 would continue to remain in full force and effect with respect to any person who, prior to the effective date of this legislation, had already made application for conditional discharge under Title 24 or who is already participating in a supervisory treatment program pursuant to that law.