

**To: New Jersey Law Revision Commission**  
**From: Mark J. Leszczyszak**  
**Re: Unlawful Possession of Weapons (N.J.S. § 2C:39-5(i))**  
**Date: February 19, 2015**

## MEMORANDUM

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### I. INTRODUCTION

This potential project arises out of Staff's review of the Supreme Court of New Jersey's decision in *State v. Grate*,<sup>1</sup> and aims to "[r]econcile conflicting provisions found in the law."<sup>2</sup> The Supreme Court of New Jersey recently held N.J.S. § 2C:39-5(i) unconstitutional as a result of the United States Supreme Court decision in *Alleyne v. United States*.<sup>3</sup>

*State v. Grate* arose out of Defendant-appellants' convictions for "second-degree unlawful possession of a weapon and third-degree unlawful possession of a weapon at an educational institution."<sup>4</sup> As a result, "[h]aving found that it was substantially likely defendants were involved in organized criminal activity, the court made both sentences subject to the mandatory five-year parole disqualifier under N.J.S.A. 2C:39-5(i)."<sup>5</sup> Both defendants appealed for various reasons, but the Appellate Division rejected the "arguments and affirmed their convictions and sentences in an unpublished opinion."<sup>6</sup> Thereafter, defendant-appellant Cromwell filed petition for certification with the Supreme Court of New Jersey, and after the United States Supreme Court decision in *Alleyne* was released, filed a supplemental petition arguing "that the mandatory minimum sentence imposed under N.J.S.A. 2C:39-5(i) was unconstitutional."<sup>7</sup> Defendant-appellant Grate joined Cromwell's *Alleyne* argument.<sup>8</sup> Both the State and the Attorney General conceded that "*Alleyne* renders N.J.S.A. 2C:39-5(i) unconstitutional as written[.]" and asked the "Court to graft onto N.J.S.A. 2C:39-5(i)" the correct requirement.<sup>9</sup> However, the Court "decline[d] the State's invitation" to do so since it found that to comply "would be rewriting [the statute's] essential requirements."<sup>10</sup>

### II. CONSTITUTIONAL INFIRMITY

The Supreme Court of the United States held in *Alleyne* "that 'any fact that increases the mandatory minimum sentence is an 'element' that must be submitted to the jury' to be found

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<sup>1</sup> 2015 WL 176343 (N.J. Sup. Ct. Jan. 15, 2015).

<sup>2</sup> N.J.S. § 1:12A-8 (1986).

<sup>3</sup> 133 S. Ct. 2151 (2013).

<sup>4</sup> 2015 WL 176343, 3\* (N.J. Sup. Ct. Jan. 15, 2015).

<sup>5</sup> *Ibid.* (emphasis added).

<sup>6</sup> *Id.* at 4\*.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id.* at 8\*.

<sup>10</sup> *Id.* at 9\*.

beyond a reasonable doubt.”<sup>11</sup> In reaching this conclusion, the *Alleyne* Court considered “how to determine what facts must be submitted to the jury.” The Court distinguished between “a special sort of fact known as a ‘sentencing factor[.]’” and “elements” of a crime. Sentencing factors have been defined as “facts that are not found by a jury but that can still increase the defendant’s punishment.”<sup>12</sup>

The Court in *Apprendi v. New Jersey*<sup>13</sup> “identified a concrete limit on the types of facts that legislatures may designate as sentencing factors”<sup>14</sup> and held “that a fact is by definition an element of the offense and must be submitted to the jury if it *increases the punishment above* what is otherwise legally prescribed.”<sup>15</sup> *Apprendi* involved “a New Jersey statute that increased the maximum term of imprisonment from 10 years to 20 years if the trial judge found that the defendant committed his crime with racial bias.”<sup>16</sup> Although *Apprendi* “only concerned a judicial finding that increased the statutory *maximum*[.]”<sup>17</sup> the *Alleyne* Court, in overruling *Harris v. United States*, reasoned that

*Apprendi* ‘s [sic] definition of “elements” necessarily includes not only facts that increase the ceiling, *but also those that increase the floor*. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory *minimum* sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.”<sup>18</sup>

The *Apprendi* Court “explained that there was no ‘principled basis for treating’ a fact increasing the *maximum term* of imprisonment differently than the facts constituting the base offense”<sup>19</sup> and consequently “found that *Apprendi*’s sentence had been unconstitutionally enhanced by the judge’s finding of racial bias by a preponderance of evidence.”<sup>20</sup>

### III. PROPOSED CHANGES

In pertinent part, N.J.S. § 2C:39-5(i) states

A person convicted of violating subsection a., b. or f. of this section shall be sentenced by the court to a term of imprisonment, which shall include the imposition of a minimum term during which the defendant shall be ineligible for parole, if *the court finds* that the aggravating circumstance set forth in paragraph

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<sup>11</sup> 133 S. Ct. 2151, 2156 (2013) (overruling *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L. Ed.2d 524 (2002)).

<sup>12</sup> *Ibid.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 86, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)).

<sup>13</sup> 530 U.S. 466 (2000).

<sup>14</sup> 133 S. Ct. 2151, 2157 (2013).

<sup>15</sup> *Id.* at 2158 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)) (emphasis added).

<sup>16</sup> *Id.* at 2157 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 470 (2000)).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.* at 2158 (citations omitted) (emphasis added).

<sup>19</sup> *Ibid.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000)) (emphasis added).

<sup>20</sup> *Ibid.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 491-492 (2000)).

(5) of subsection a. of N.J.S.2C:44-1 applies. The minimum term of parole ineligibility shall be fixed at five years. *The sentencing court shall make a finding* on the record as to whether the aggravating circumstance set forth in paragraph (5) of subsection a. of N.J.S.2C:44-1 applies, and *the court shall presume* that there is a substantial likelihood that the defendant is involved in organized criminal activity if there is a substantial likelihood that the defendant is a member of an organization or group that engages in criminal activity. The prosecution at the sentencing hearing shall have the initial burden of producing evidence or information concerning the defendant's membership in such an organization or group.

In light of the recent decision in *State v. Grate*, it is recommended that the statutory language be amended in order to restore the statute's validity.

#### IV. CONCLUSION

The current statutory construction of N.J.S. § 2C:39-5(i) that requires the courts to “find that a defendant was involved in organized criminal activity before requiring the imposition of a mandatory minimum prison term”<sup>21</sup> renders it unconstitutional pursuant to *Alleyne v. New Jersey*. Given the State's and the Attorney General's recognition of the statute's infirmity in light of the *Alleyne* decision, coupled with their request to the Court to change the requirement,<sup>22</sup> it is recommended that the statute be amended in order to restore the statute's constitutionality.

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<sup>21</sup> 2015 WL 176343, 8\* (N.J. Sup. Ct. Jan. 15, 2015).

<sup>22</sup> *Id.* at 9\*.