# AMENDMENTS TO THE PROPOSED

# NEW JERSEY CODE OF CRIMINAL JUSTICE

PREPARED BY:

The Office of the Attorney General
of New Jersey and The New Jersey
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# AMENDMENTS TO THE PROPOSED NEW JERSEY CODE OF CRIMINAL JUSTICE

In 1968, our Legislature created a Commission "to study and review the statutory law pertaining to crimes, disorderly persons, criminal procedure and related subject matter." N.J.S.A. 1:19-4. The purpose of the Commission was to prepare a revision of our criminal law "so as to embody" modern principles of justice and to "eliminate inconsistencies, ambiguities" and "redundant provisions". Id. The articulated objective of the enabling legislation was to "revise and codify the law in a logical, clear and concise manner." Id.

Pursuant to its legislative mandate, the Commission issued its Final Report in October 1971 and recommended the enactment of a comprehensive penal code. The efforts of the Commission were in keeping with those of other jurisdictions where codes have been enacted. Most notable in this context is the recent adoption of penal codes in California, New York, Illinois, Wisconsin, Michigan, Connecticut, North Dakota, Louisiana and Kentucky. In a similar fashion, Congress is presently considering the enactment of a Federal Criminal Code.

Since the Criminal Law Revision Commission issued its Final Report, those concerned with the administration of justice have carefully scrutinized the proposed Code, as well they should, for the revision drastically alters existing statutes and judicial precedents. In 1972, 1975 and 1976, the Attorney General prepared extensive analyses of the proposed Code. In a similar vein, the Public Advocate, the New Jersey County Prosecutors Association and

the Essex County Prosecutor published similar studies regarding the efficacy of the Criminal Law Revision Commission's Final Report. In addition, members of the Attorney General's Office appeared and testified before the Assembly Judiciary Committee.

We think it significant that the Attorney General, the Public Advocate and the New Jersey County Prosecutors Association all endorsed the passage of the proposed New Jersey Penal Code by the Assembly. That is not to say that these organizations approved of each and every provision contained in the Bill ultimately adopted by the Assembly. Following adoption of the Code by the Assembly, members of the New Jersey County Prosecutors Association and the Attorney General's staff formed a Task Force charged with the responsibility of preparing proposed amendments. Meetings of the Task Force were conducted on various occasions. The following amendments constitute the work product of the Task Force. These amendments substantially strengthen the ability of law enforcement agencies to ferret out crime in the State of New Jersey. The Attorney General and the New Jersey County Prosecutors Association urge enactment of the proposed New Jersey Code of Criminal Justice as amended herein.

This report is comprised of two sections. Section A includes those provisions which should be deleted in their entirety. Section B sets forth proposed amendments. Brackets [] signify deletions, and underlinings indicate additional amendatory language and modifications.

## SECTION A

NOTE: The following provisions are to be deleted.

Section 2C:1-1d(2). Rules of Construction

[(2) Any person who is under sentence of imprisonment on the effective date of the code for an offense committed prior to the effective date and who, on said effective date, has not had his sentence suspended or been paroled or discharged, may move to have his sentence reviewed by the sentencing court and the court shall impose a new sentence as though the person had been convicted under the code, except that no period of detention or supervision shall be increased as a result of such resentencing.]

### Statement

Section 2C:1-1d(2) permits incarcerated defendants convicted prior to the effective date of the Code of Criminal Justice to apply for sentence reduction. In such cases, the court is authorized to impose a new sentence "as though the person had been convicted under the code...." This provision would severely disrupt court calendars and render nugatory countless plea bargains. We recommend that it be deleted, leaving in effect the "savings clause" contained in N.J.S.A. 1:1-15.

## Section 2C:1-7. Limitation on Dismissals

[2C:1-7. Limitation on Dismissals. The court shall not dismiss a prosecution for a first or second degree offense which involves the use of a firearm as defined in 2C:39-1 (f) on a motion by the prosecutor which is made pursuant to an agreement between the prosecutor and the defendant.]

### Statement

This provision prohibits plea negotiations with respect to first and second degree offenses which involve use of a firearm. It is to be noted that the provision does not pertain to the exercise of prosecutorial discretion prior to grand jury action. More importantly, sufficient safeguards against improper plea bargaining presently exist. R.3:25-1 requires the judiciary to review all motions to dismiss filed by a prosecutor. It is thus apparent that no abuse of the plea negotiation process can occur unless the prosecutor and the court abuse their powers. This is highly unlikely. We thus recommend deletion of this provision.

## Section 2C:2-11. De Minimis Infractions

[2C:2-11. De Minimis Infractions. The assignment judge may dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

a. Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;

b. Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

c. Present such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. The assignment judge shall not dismiss a prosecution under this section without giving the prosecutor notice and an opportunity to be heard. The prosecutor shall have a right to appeal any such dismissal.]

### Statement

This provision permits the judiciary to dismiss a prosecution relating to a "de minimis infraction". While we agree with the concept that in some instances conduct which might constitute an offense should not be prosecuted, we question the power of the

judiciary to dismiss a grand jury indictment based upon probable cause. Suffice it to say, there is little need for this provision, since the prosecutor may now administratively dismiss a complaint and the grand jury otherwise serves as an adequate screening device. It is evident that a prospective defendant is protected from arbitrary prosecution by the powers of both the prosecutor and the grand jury. The charging discretion being vested in the executive branch of government, the assignment judge should not be given the authority to dismiss a de minimis infraction.

Section 2C:18-2(c). Burglary

[c. Multiple convictions. A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense.]

Statement

This provision precludes the State from obtaining more than one conviction when a burglary and another substantive offense occurs as a result of the illegal entry. Thus, for example, if an individual burglarizes a residence for purposes of stealing certain valuable items, or raping the occupant, he may not be convicted of both burglary and larceny or burglary and rape. Clearly, this provision offers an undesirable windfall to defendants by rewarding the criminal who completes the intended course by absolving him from prosecution for either the burglary or the underlying crime. Multiple prosecutions and enhanced penalties should be permitted.

Section 2C:43-2e. Authorized Dispositions

[e. The court shall retain jurisdiction over the defendant and may on its own motion or on motion of the prosecutor, the defendant or the Commissioner of Institutions and Agencies, modify the sentence originally imposed, except that the term of imprisonment or supervision shall not be increased by such resentencing and the court shall not be required to hear more than one such motion a year.]

Statement

This provision permits a defendant to move to reduce or otherwise modify the sentence imposed on an annual basis. Our Supreme Court has attempted to reduce the avalanche of alleged grievances advanced in such motions by applying strict time limits within which defendants must move to obtain sentence modification. In our view, the proposed statute would seriously disrupt the court calendars with little if any benefit resulting to the defendant.

Section 2C:44-5a(3). Multiple Sentences; Concurrent and Consecutive Terms

[(3) The aggregate of consecutive terms shall not exceed the longest extended term authorized for the highest grade and degree of crime for which any of the sentences was imposed; and]

Statement

This provision severely restricts the authority of the sentencing judge to impose consecutive prison terms. We urge deletion of this restriction. The sentencing judge presently has broad powers with respect to whether sentences are to run consecutively or concurrently. The well-established policies of deterrence and isolation of the offender mandate that the courts be vested with the authority to insure that dangerous criminals are incarcerated for extended periods of time. Section 2C:44-5a (3) is in derogation of these policies and, therefore, should be deleted.

## SECTION B

NOTE: The following provisions are to be amended.

Section 2C:2-4. Ignorance or Mistake.

a. Ignorance or mistake as to a matter of fact [or law] is a defense if the defendant reasonably arrived at the conclusion underlying the mistake and:

(1) It negatives the culpable mental state required to establish the offense; or

(2) The law provides that the state of mind established by such ignorance or mistake constitutes a defense.

b. Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. [In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

c. A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(1) The statute defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(2) The actor acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (a) a statute, (b) judicial decision, opinion, judgment, or rule, (c) an administrative order or grant of permission, or (d) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense; or

(3) The actor otherwise diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude.

The defendant must prove a defense arising under subsection c. of this section by a preponderance of evidence.]

Statement

This provision permits the defendant to raise the defense of mistake of law. Present law does not permit ignorance of a criminal statute to affect the culpability requirement of an offense. To permit such a strategy would encourage ignorance defenses and would open the floodgates to an easily-contrived defense. The public should be presumed to know the proscription of our penal laws. This provision also permits a defendant to mitigate the offense committed where he mistakenly believed he was committing another crime of a lesser degree. We perceive no

rational basis for this novel extension of the defense of mistake of fact. The state of mind of the offender should be a circumstance to be considered during sentencing. There is no reason to reduce the offense charged to a lesser degree merely because the defendant mistakenly believed he was committing another crime.

Section 2C:1-8(2). Prosecution When Conduct Constitutes More Than One Offense.

a. Prosecution for multiple offenses; limitations or convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

[(2) One offense consists only of a conspiracy or other form of preparation to commit the other;]

Statement

This provision precludes the State from obtaining a conviction for conspiracy and the underlying substantive offense which was the object of the conspiracy. Thus, one charged with murder and conspiracy to commit murder may only be convicted of a single offense. It is evidence that both analytically and as a matter of public policy, this provision is deficient. The offense of conspiracy is designed to project a distinct interest apart from that of a particular substantive offense. The societal danger posed by illicit conspiratorial combinations warrants punishment for both the conspiracy and substantive offense. This view is in accord with present law.

Section 2C:2-12. Entrapment.

a. A public law enforcement official or a person [acting] engaged in active cooperation with such an official or one acting as an agent of a public law enforcement official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense where there was otherwise no predisposition to commit the offense on the part of the individual on his own by either:

(1) making knowingly false representations designed to implant in the mind of the innocent person and to induce the belief that such conduct is not prohibited; or

(2) employing methods of persuasion or inducement which create a substantial likelihood [risk] that such an offense will be committed by persons other than those who are ready to commit it on their own.

Statement

At the present, the Federal and State decisional law permit the consideration of the predisposition or lack thereof by the defendant. The Code's formulation deemphasizes the individual role and focuses exclusively on the conduct of the law enforcement official. Such a change obscures the many instances where the individual harbors the intention to commit the crime or was very quick to respond to a suggestion of same. Deterrent policies are accounted for by requiring a direct

causation between the act of inducement and act of crime; it seems unnecessary therefore to obfuscate the role of the defendant. In this way, the truly innocent person is protected without impeding law enforcement from utilizing legitimate means in ensnaring the unwary criminal. Therefore, the inclusion of the amendment whereby the individual's predisposition may be considered provides for a better evaluation of the totality of circumstances.

Section 2C:4-1. Insanity Defense [Abolished].

[Insanity as a specific, separate defense to a charge of a crime is abolished.]

A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong.

Statement

Section 2C:4-1 abolishes insanity as a defense to a criminal charge. We recommend that this approach should be rejected and that the law of insanity be codified to conform to the status of our current law. Insanity should be retained as a specific, separate defense which would, if proven, relieve a defendant of criminal responsibility.

Section 2C:4-2. Evidence of Mental Disease or Defect Admissible When Relevant to Element of the Offense.

[a. Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense.

b. Whenever evidence is admitted under subsection a. of this section, the prosecution may therafter offer evidence in rebuttal.]

Statement

Under this provision, a defendant would be permitted to introduce evidence of mental disease or defect bearing upon his ability to form the requisite mental state. To some extent, this provision coupled with Section 2C:4-1 continues the defense of insanity, but requires that the mental defect be sufficient to prevent the offender from harboring the proscribed intent. As we have noted, we believe that the McNaughten defense should be retained and that an offender should not be convicted where he lacks mental responsibility for commission of the crime. In those instances where the defendant was so mentally defective as to lack the ability to form the proscribed criminal intent, he will be acquitted in any event. This is so because the State cannot prove that the defendant harbored the requisite criminal intent. In our view, the inability of the defendant to form the proscribed criminal intent is not an affirmative defense. Rather, the State must prove criminal intent when it is an element of the crime charged.

Section 2C:4-3. Requirement of Notice.

[If the defendant intends to claim mental disease or defect as negating a state of mind which is an element of the crime charged or as a matter which should be considered at trial in determining the penalty, he shall serve notice of such intention upon the prosecutor in accordance with the Rules of the Court.]

a. Mental disease or defect excluding responsibility is an affirmative defense to be proved by the accused by a preponderance of the evidence.

b. If a defendant intends to claim insanity or mental infirmity as a defense, he shall serve notice of such intention upon the prosecuting attorney in accordance with the Rules of Court.

c. When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and judgment shall so state.

Statement

The proposed amendment requires the defendant to notify the prosecutor that he intends to raise the insanity defense and to establish lack of mental responsibility by a preponderance of the evidence. This is in accord with present case law.

Section 2C:4-6. Determination of Fitness to Proceed.

c. If the defendant has not regained his fitness to proceed within [a period of 12 months] <u>such time as the Court may deem adequate</u> from the time that it was determined that the defendant lacked such fitness, the court shall after a hearing, if one is requested, dismiss the charges and either order the defendant discharged, or, subject to law governing civil commitment of a person suffering from mental disease or defect, order the defendant committed to an appropriate institution.

<u>Statement</u>

The provision, as drafted, mandates dismissal of criminal charges if the defendant is unfit to proceed 12 months after an initial determination to that effect. We believe that this requirement is too rigid and fails to allow for the special circumstances of each case. It is our view that such a determination is best left to the sound discretion of a trial court. Certainly, there will be instances where dismissal may be warranted prior to 12 months, and other situations where dismissal should not be granted until after the passage of a significant period.

Section 2C:4-9. Release of Persons Committed by Reason of Mental Disease or Defect.

b. If the court is satisfied by the report filed pursuant to subsection a. of this section and such testimony of the reporting psychiatrists as the court deems necessary that the committed person may be discharged, released on condition ~~without~~ danger to himself or others, or treated as in civil commitment the court shall order his discharge, his release on such conditions as the court determines to be necessary or his transfer. If the court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged, released or transferred. Any such hearing shall be deemed a civil proceeding. According to the determination of the court upon the hearing, the court shall proceed as in section 2C:4-8[c]b (1), (2) or (3).

d. Each defendant's case shall be [specifically] administratively reviewed by the commiting court at 6-month intervals until the expiration of the maximum period pursuant to subsection [c]b (3) of section 2C:4-8. At the expiration of that maximum, the defendant must be discharged; however, the State or other properly specified party may then choose to bring an involuntary civil commitment action pursuant to R.S.30:4-25 et seq.

Statement

These amendments merely alter the statutory designations set forth in the Code in accordance with the changes we have suggested.

Section 2C:4-7. Testimony by Psychiatrists or Other Experts.

[When a psychiatrist or other expert testifies concerning the defendant's mental condition, he shall be permitted to testify as to the nature of any examination of the defendant, any diagnosis of the mental condition of the defendant at the time of the commission of the offense charged and, as permitted by section 2C:4-2, his opinion as to whether the defendant had the particular state of mind which is an element of the offense charged, or, as permitted by section 2C:4-8, his opinion as to the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law was impaired by mental disease or defect. His testimony may include information reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.]

Disposition. If a defendant is acquitted by reason of insanity, the court shall dispose of the case as provided for in section 2C:4-8 of this Act.

Statement

This amendment deletes the proposal presently contained in Section 2C:4-7 which permits psychiatric and other expert testimony

bearing upon the accused's inability to form the requisite criminal intent by virtue of his mental disease. To the extent that the provision authorizes expert testimony with respect to the accused's inability to "appreciate the wrongfulness of his conduct," it is unnecessary.

Section 2C:4-8. Commitment of a Person by Reason of Mental Disease or Defect.

[a. After conviction, upon motion of the defendant or the prosecutor, that disposition of the defendant be made pursuant to this section, the court shall order a hearing on the issue.]

a. After acquittal by reason of insanity or mental defect the [b. The] court may, upon motion of the prosecutor, for good cause shown, order that the defendant undergo a psychiatric examination by a psychiatrist of the prosecutor's choice. If the examination cannot take place because of the unwillingness of the defendant to participate, the court shall proceed as in section 2C:4-5c. The defendant, pursuant to this section, may also be examined by a psychiatrist of his own choice.

b. The Court shall dispose of the defendant in the following manner:

[c. If at the hearing, the court finds from the evidence before it, that the defendant at the time of the commission of the crime suffered from a mental disease or defect (such mental disease or defect shall not include any abnormality manifested only by repeated criminal or other repeated wrongful conduct) which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, the court shall in lieu of sentence:]

(1) If the court finds that the defendant may be released without danger to the community or to himself without supervision, the court shall so release the defendant; or

(2) If the court finds that the defendant may be released without danger to the community or to himself under supervision or under conditions, the court shall so order; or

(3) If the court finds that the defendant cannot be released with or without supervision or conditions without posing a danger to the community or to himself, it shall commit the defendant to a mental health facility approved for this purpose by the Commissioner of Institution and Agencies for an indeterminate term not to exceed the maximum term of imprisonment provided by law for the crime of which the defendant has been [convicted] acquitted.

[d.]c. No person committed under this section shall be confined within any penal or correctional institution or any part thereof.

[e. If the court finds from the evidence admitted at the hearing that the defendant did not at the time of the commission of the crime suffer from a mental disease or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law, the Court shall impose sentence in the manner provided by law.]

[f. No statute relating to the remission of sentence by way of commutation time for good behavior and for work performed shall apply to any person committed pursuant to this section, but provision may be made for monetary compensation in an amount to be prescribed by the state parole board in lieu of remission of sentence for work performed.]

[g. No civil disability applying to persons convicted of an offense shall apply to persons committed or released under this section.]

Statement

As we have noted, the Code, as it is presently written, abolishes the insanity defense. Following conviction, a hearing is to be conducted during which the traditional McNaughten test may be applied. Since we believe that the insanity defense should be retained, the above amendment deletes those provisions requiring a post-conviction sanity hearing. If the defendant is acquitted by reason of insanity, the prosecutor may move to commit him to a mental institution for treatment. Following a hearing, the defendant may be committed if he poses a danger to the community or to himself. This is in accord with current case law.

Section 2C:11-1. Homicide.

2C:11-1. (no change)

2C:11-2. Criminal Homicide. a. A person is guilty [or] of criminal homicide if he purposely, knowingly, recklessly or, under the circumstances set forth in section 2C:11-5, [negligently] causes the death of another human being.

b. Criminal homicide is murder, manslaughter or [negligent homicide] death by auto.

2C:11-3. Murder. a. Except as provided in section 2C:11-4a.(1), criminal homicide constitutes murder when:

(1) It is commited purposely; or

(2) It is committed knowingly; or

(3) It is committed when the actor, acting either alone or with one or more persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, [aggravated] rape, [aggravated] sodomy, aggravated arson, burglary, kidnapping or criminal escape, and in the course of and in furtherance of such crime or of immediate flight therefrom, [he, or another participant, if there be any, causes the] a death of a person other than one of the participants ensues [;] . [except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any

way solicit, request, command, importune, cause or aid in the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.]

b. (no change)

2C:11-4. Manslaughter (no change)

2C:11-5. [Negligent Homicide] Death by Auto a. Criminal homicide constitutes [negligent homicide] death by auto when it is [committed negligently.] caused by driving a vehicle carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others.

b. [Negligent homicide] Death by auto is a crime of the fourth degree.

c. No record of a judgment or conviction hereunder shall be admissible in a civil action for damages arising out of the accident in which the death occurred.

2C:11-6. Aiding Suicide. (no change)

STATEMENT

The first change in the criminal homicide statutes is the deletion of the offense of negligent homicide. The existence of such a substantive offense would give rise to a flood of criminal complaints every time a death occurs as the aftermath of action or inaction of a person. The most obvious example would be in the cause of death after treatment by a physician. With the deletion, criminal homicide would be committed only where the act was reckless, if not purposely or knowingly. It is believed, however, that the death by auto statute should remain in force and effect.

This amendment changes the "felony-murder rule" to encompass those situations where a police officer or victim causes the death of anyone other than a participant in the underlying felony. To effectuate this change, an "ensues" clause has been added.

Lastly, the affirmative defenses have been deleted. Any person who participates in one of the underlying felonies should be held accountable for a death which is a likely consequence of the commission of such felonies.

Sections 2C:14-1 and 2. Rape and Sodomy.

2C:14-1. Rape. a. Aggravated rape. Any person who has sexual intercourse with another [not his spouse], is guilty of aggravated rape if:

(1) He compels the other person to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on such other person or on any third person; or

(2) He has substantially impaired the other person's power to appraise or control his conduct by administering or employing without the knowledge of such other person, drugs, intoxicants or other means for the purpose of preventing resistance; or

(3) The other person is unconscious; or

(4) The other person is less than 12 years old.

[Aggravated rape is a crime of the first degree if (a) in the course thereof the actor inflicts serious bodily injury upon anyone, or (b) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties. Otherwise the offense is a crime of the second degree. Sexual intercourse includes intercourse per os or per anum with some penetration, however slight; emission is not required.]

b. Rape. Any person who has sexual intercourse with another [not his spouse, commits a crime of the third degree] <u>is guilty of rape</u> if:

(1) He compels the other person to submit by any threat that would prevent resistance by a person incapable of appraising the nature of his conduct; or

(2) He knows that the other person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his conduct; or

(3) He knows that the other person is unaware that a sexual act is being committed or that the other person submits because that person mistakenly supposes that the actor is his spouse.

[c. It is an affirmative defense to prosecution under this section that the actor believed he was the spouse of the other person at the time of the act.]

c. "Sexual intercourse" includes intercourse per os or per anum with some penetration, however slight; emission is not required.

d. Rape is a crime of the first degree, but a person convicted of aggravated rape may be sentenced by the court to a term of 20 years of which the person must serve 10 years before being eligible for parole.

2C:14-2. Sodomy and Related Offenses. a. Aggravated Sodomy. A person who engages in deviate sexual conduct or who causes another to engage in deviate sexual conduct, is guilty of aggravated sodomy if:

(1) He compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(2) He has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(3) The other person is less than 12 years old.

[Aggravated sodomy is a crime of the first degree if (a) in the course thereof the actor inflicts serious bodily injury upon anyone, or (b) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted the actor sexual liberties. Otherwise it is a crime of the second degree.]

[For purposes of this chapter, deviate sexual conduct includes sexual intercourse per os or per anum between persons who are not husband and wife.]

b. Sodomy. A person who engages in deviate sexual conduct with another person, or who causes another to engage in deviate sexual conduct [commits a crime of the third degree] <u>is guilty of sodomy</u> if:

(1) He compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(2) He knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(3) He knows that the other person submits because he is unaware that a sexual act is being commited upon him.

c. Sodomy is a crime of the first degree, but a person convicted of aggravated sodomy may be sentenced by the Court to a term of 20 years of which the person must serve 10 years before being eligible for parole.

d. For the purposes of this Chapter, deviate sexual conduct includes sexual intercourse per os or per anum between persons.

[c.]e. Sexual contact with a human dead body. A person who knowingly engages in sexual contact, as defined in section 2C:14-4, with a human dead body is a disorderly person.

Statement

As presently drafted, the offenses of rape and sodomy have three gradations of penalties, i.e., first, second and third degree. Thus, under this scheme an individual who forcibly rapes or sodomizes another may be sentenced to as little as 5 to 8 years imprisonment. Present law provides for a maximum term of 30 years for rape and 20 years for sodomy. We recognize that the sentencing provisions of the Code insure that actual time served will more closely parallel the sentences imposed. However, a maximum term of eight years for forcible rape or sodomy is deemed unconscionably lenient. Moreover, the policy reasons for grading rape and sodomy as first, second or third degree offenses seem obscure. The ultimate harm to be penalized is the coerced submission of an individual to unwanted sexual activities. It makes little sense to substantially mitigate the degree of the

offense merely because the perpetrator utilized one form of coercion or leverage over another. Therefore, we have designated rape and sodomy as crimes of the first degree.

We have also identified aggravated rape or sodomy as a form of those offenses which may require that the defendant serve a substantial specified minimum period of incarceration without parole.

Section 2C:14-5. Provisions Generally Applicable to Chapter 14.

a. Mistake as to age. Whenever in this Chapter the criminality of conduct depends on a child's being below [the age of 12] a specified age, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older [than 12]. [When criminality depends on the child's being below a critical age other than 12, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.]

Statement

This section presently provides that when a definition of criminality of conduct depends on a child's age being below 12, mistake of age is not a defense. However, the section also provides that when the criminality depends on the child being below a critical age other than 12, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age. We believe that mistake of age should not be a defense to any sexual offense as defined by this Chapter.

Section 2C:34-1. Lewdness and Obscenity.

2C:34-1. [Open] Lewdness. A person commits a disorderly persons offense if [in a place exposed to public view] he does any flagrantly lewd and offensive act which he knows or reasonably expects is likely to be observed by [members of the public] other non-consenting persons who would be affronted or alarmed. "Lewd acts" shall include the exposing of the genitals for the purpose of arousing or gratifying the sexual desire of the actor or of any other person.

2C:34-2. (no change)

2C:34-3. [Blank.] Obscenity For Persons 16 Years of Age and Older. a. Definitions for purpose of this section:

(1) "Obscene material" means any description, narrative account or depiction of sexual activity or anatomical area contained in, or consisting of, a picture of other representation, publication, sound recording or film, which by means of posing, composition, format or animated sensual details:

(a) Depicts or describes in a patently offensive way, ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, or lewd exhibition of the genitals,

(b) Lacks serious literary, artistic, political, or scientific value, when taken as a whole, and

(c) Is a part of a work, which to the average person applying contemporary community standards, has a dominant theme, taken as a whole, which appeals to the prurient interest.

b. A person who sells obscene material to a person

## Statement

The offense of open lewdness has been amended to include lewd acts which occur in private places, as long as the act is intended to affront or alarm the innocent, non-consenting observer.

The proposed penal code does not proscribe in any way the dissemination of obscene material to persons sixteen years of age or older. This amendment, comporting with recent opinions of the United States Supreme Court, makes it a disorderly persons offense to sell obscene material to a person sixteen years of age or older. While we believe that dissemination of obscene material to adults should not be a criminal offense, nevertheless, we are of the view that some penal sanctions should remain.

Section 2C:37-1. Gambling.

2C:37-1. Definitions. The following definitions apply to this chapter and to chapter 64:

a. (no change)

b. (no change)

c. (no change)

d. (no change)

e. (no change)

f. (no change)

g. "Bookmaking" means advanced gambling activity by unlawfully accepting bets from members of the public as a business, [rather than in a casual or personal fashion,] upon the outcomes of future contingent events.

h. (no change)

i. (no change)

j. (no change)

k. (no change)

2C:37-2. Promoting Gambling. a. Promoting Gambling Defined. A person is guilty of promoting gambling when he knowingly:

(1) Accepts or receives money or other property [, other than as a player,] pursuant to an agreement or understanding with any person whereby he participates or will participate in the proceeds of gambling activity; or

(2) Engages in conduct [, other than as a player,] which materially aids any form of gambling activity. Such

conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any ~~other phase of~~ its operation.

b. Grading. A person who violates the provisions of subsection a. by:

(1) Engaging in bookmaking to the extent he receives or accepts in any 1 day more than five bets totaling more than $1000.00; or

(2) Receiving, in connection with a lottery or policy scheme or enterprise (a) money or written records from a person other than a player whose chances or plays are represented by such money or records, or (b) more than $100.00 in any 1 day of money played in such scheme or enterprise, is guilty of a crime of the third degree and notwithstanding the provisions of 2C:43-3, shall be subject to a fine of not more than $25,000.00 [.] <u>as well as the remaining authorized non-monetary dispositions enumerated in Chapter 43</u>.

A person who violates the provisions of subsection a. by engaging in bookmaking to the extent he receives or accepts three or more bets in any 2-week period is guilty of a crime of the fourth degree and notwithstanding the provisions of 2C:43-3, shall be subject to a fine of not more than $15,000.00[.]

as well as the remaining authorized non-monetary dispositions enumerated in Chapter 43. Otherwise, promoting gambling is a disorderly persons offense and notwithstanding the provisions of 2C:43-3, shall be subject to a fine of not more than $10,000.00[.] as well as the remaining authorized non-monetary dispositions enumerated in Chapter 43.

c. Defenses

(1) It is a defense to a prosecution under subsection a. that the person participated only as a player. It shall be the burden of the defendant to prove by clear and convincing evidence his status as such player.

2C:37-3. a. (no change)

b. (no change)

c. Grading. Possession of gambling records is a crime of the third degree and notwithstanding the provisions of 2C:43-3 shall be subject to a fine of not more than $25,000.00 as well as the remaining authorized non-monetary dispositions enumerated in Chapter 43, when the writing, paper, instrument or article:

(1) In a bookmaking scheme or enterprise, constitute, reflect or represent more than five bets totaling more than $1,000.00; or

(2) in the case of a lottery or policy scheme or enterprise, constitute, reflect or represent more than one hundred plays or chances therein.

Otherwise, possesion of gambling records is a disorderly persons offense and notwithstanding the provisions of 2C:43-3, such a person shall be subject to a fine of not more than

$10,000.00[.] as well as the remaining authorized non-monetary dispositions enumerated in Chapter 43.

2C:37-4. Maintenance of a Gambling Resort. a. A person is guilty of a crime of the third degree if, having substantial proprietary or other authoritative control over premises which are being used with his knowledge for purposes of [gambling activity] violations of 2C:37-2 and 2C:37-3, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation [and he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or will participate in the proceeds of such gambling activity on such premises] and, notwithstanding the provisions of 2C:43-3, shall be subject to a fine of not more than $25,000.00[.] as well as the remaining authorized non-monetary dispositions enumerated in Chapter 43.

b. A person is guilty of a [disorderly persons offense] crime of the third degree if, having substantial proprietary or other authoritative control over premises open to the general public which are being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation[.] and, notwithstanding the provisions of 2C:43-3, shall be subject to a fine of not more than $25,000.00 as well as the remaining authorized non-monetary dispositions enumerated in Chapter 43.

STATEMENT

The definition of bookmaking has been amended to delete the defense that the receiving of bets occurred in a casual or personal fashion. The availability of such an exception invites easily contrived defenses. In the absence of this phrase, the State would be required to prove that bets were being taken as a business.

Rather than excepting players from the separate sections of 2C:37-2, Promoting Gambling, a general exception to the entire offense has been provided. The burden has been placed upon the defendant to show by clear and convincing evidence that he is merely a player. Each of the penalty provisions of this chapter recites high monetary fines, above those enumerated in Chapter 43. Language has been added to indicate that in addition to these fines the other non-monetary dispositions authorized in Chapter 43 may be imposed, including incarceration.

The section proscribing the maintenance of a gambling resort has been amended so as not to require the State to prove that the accused accepted or received something of value in return for his cooperation. Such proof would be impossible. This section has been further amended so as to create an offense only when the persons resorting to the premises are violating 2C:37-2 and 2C:37-3. In this way, a friendly card game would not be proscribed as long as all the participants were players as defined in 2C:37-1c. and as applied to 2C:37-2.

The disorderly persons offense of maintaining a public place as a gambling resort has been elevated to a crime of the third degree. Gambling activity in a public place is at least as serious as that in private. For this reason, the occurrence of any gambling activity, whether by players or not, in a public place would subject the person under whose control the premises remain to a charge of maintaining a gambling resort.

Section 2C:43-6. Sentence of Imprisonment for Crime; Ordinary Terms.

a. A person who has been convicted of a crime may be sentenced to imprisonment, as follows:

(1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between [8] 10 years and 20 years;

(2) In the case of a crime of the second degree; for a specific term of years which shall be fixed by the court and shall be between 5 years and [8] 10 years;

Statement

The present version of the Code provides for terms of imprisonment less stringent than those contained in the 1971 Report on the Proposed Penal Code. We believe that the penalties as originally set forth by the Law Revision Committee should be retained. In this regard, we believe that crimes of the first degree should be punishable by a fixed term between 10 and 20 years; and that crimes of the second degree by a fixed term between 5 and 10 years.

Section 2C:43-7. Sentence of Imprisonment for Crime; Extended Terms.

a. In the cases designed in section 2C:44-3 [and] or 2C:11-3, a person who has been convicted of a crime may be sentenced to an extended term of imprisonment, as follows:

(1) In the case of a crime sentenced under 2C:11-3 b. (1) for a specific term of years which shall be fixed by the court and shall be between 30 years and [50 years] life imprisonment;

(2) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be [between 15] from 20 years [and 30 years] to life imprisonment;

(3) In case of a crime of the third degree, for a term which shall be fixed by the court between [8 and 15] 10 and 20 years;

(4) In the case of a crime of the third degree, for a term which shall be fixed by the court between 5 and [8] 10 years.

b. As part of a sentence for an extended term, the court may fix a minimum term during which the defendant shall not be eligible for parole and which may be up to one-half of the term set pursuant to subsection a.

c. By operation of law, there shall be added to the terms described in subsection a. the separate parole term described in section 2C:43-9.

## Statement

The amendment which we have proposed increases the terms of imprisonment in two instances. First, where the defendant has been convicted of murder, it is our view that the court should possess the discretion to impose an enhanced penalty. Although no criteria are set forth, the amendment would be applied only where the background of the accused or the details surrounding the offense mandate imprisonment for a term between 30 years and life imprisonment. Second, section 2C:44-3 provides for enhanced penalties with respect to persistent offenders, professional criminals, sociopathic personalities and those who violate our laws for pecuniary purposes. This amendment increases the custodial terms which could be imposed with respect to such individuals.

Section 2C:44-1. Criteria for Determining Sentence

2C:44-1. Criteria for [Withholding or Imposing] Sentence [of Imprisonment] [a. Except as provided in subsection d. of this section, the court shall deal with a person who has been convicted of an offense without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:]

a. In determining the appropriate sentence to be imposed on a person who has been convicted of an offense the court may properly consider the following aggravating circumstances:

(1) The nature and circumstances of the offense;

(2) The gravity and seriousness of harm inflicted on the victim;

(3) [(1)] [There is undue] The risk that [during the period of a suspended sentence or probation] the defendant will commit another crime;

(4) [(2)] [The defendant is in] The need [of] for correctional treatment [that] which can be provided only in an institution;

(5) [(3)] A lesser sentence will depreciate the seriousness of the defendant's crime because it involved a breach of the public trust under chapters 27 and 30; or

(6) [(4)] The offense is characteristic of organized criminal activity;

(7) The defendant has previously been convicted of a crime or other penal offense;

(8) The crime was committed in an especially heinous, cruel or depraved manner;

(9) The defendant committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(10) The defendant procured the commission of the offense by payment or promise of payment, of anything of pecuniary value;

(11) The defendant committed the offense against a police or other law enforcement, correctional employee or fireman, while performing his duties or because of his status as a public servant;

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

[b. The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:]

b. In determining the appropriate sentence to be imposed on a person who has been convicted of an offense the court may properly consider the following mitigating circumstances:

(1) The defendant's conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his conduct would cause or threaten serious harm;

(3) The defendant acted under a strong provocation;

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

(5) The victim of the defendant's conduct induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

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

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

(10) The defendant is particularly likely to respond affirmately to probationary treatment;

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

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

[c. A plea of guilty by a defendant or failure to so plead shall not be considered in withholding or imposing a sentence of imprisonment.]

[d. Presumption of imprisonment. Where a statute defining an offense of the first or second degree provides that a presumption of imprisonment shall be applied upon conviction or where a statute outside the code defining an offense which would be a first or second degree offense under the code provides for a mandatory sentence, the provision as to sentencing without imprisonment under subsection a. shall not apply and a presumption of imprisonment shall apply. The court shall deal with a person who has been convicted of such a crime by imposing a sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.]

Statement

The original provisions of the Code contemplate presumptions for and against incarceration. Such a scheme is inconsistent with modern penological theory which recognizes that deterrence, isolation of the offender, and, to a lesser extent, retribution are valid sentencing goals. The proposed amendment deletes the presumptions against and for incarceration. In their stead, various aggravating and mitigating factors are set forth to guide the sentencing court in determining both the nature and quantum of the sentence to be imposed. We stress that the circumstances listed in the amendment have been traditionally considered in resolving sentencing questions. Further, these factors are not to be considered all-inclusive. Rather, they serve as appropriate criteria

which, along with other factors, are designed to provide the sentencing court with guidelines. It is to be observed that we expect retention of the Rule which requires the sentencing court to set forth its reasons with respect to the sentence to be imposed.

Finally, we have deleted the provision which states that a plea of guilty may not be considered in determining whether a custodial sentence is to be imposed. It is undisputed that a defendant who elects to contest the criminal charges against him should not be penalized. Nevertheless, it is widely recognized that an appropriate confession of guilt signifies the prospect of redemption of the offender.

Section 2C:44-3. Criteria ~~for Sentence~~ of Extended Term of Imprisonment.

The court may sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in this section. The finding of the court shall be incorporated in the record.

a. The defendant is a persistent offender. A persistent offender is a person who is 21 years of age or over, who has been previously convicted [of a crime involving the infliction, or attempted or threatened infliction of serious bodily injury and who has at least twice previously been sentenced as an adult for such a crime to a custodial term and where one of those prior offenses was committed within the 5 years preceding the commission of the offense for which the offender is now being sentenced.] on at least two separate occasions of two crimes committed at different times when he was at least 18 years of age.

b. The defendant is a professional criminal. A professional criminal is a person who committed an offense as part of a continuing criminal activity in concert with [five] two or more persons, and [was in a management or supervisory position or gave legal, accounting or other managerial counsel.] the circumstances of the crime show he has knowingly devoted

himself to criminal activity as a major source of livelihood.

c. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value the amount of which was unrelated to the proceeds of the crime or he procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

d. The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public. The court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusion that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

Statement

This amendment modifies the criteria applicable to those offenders subject to enhanced penalties. We view our proposal as extremely important since it is applicable to career criminals and those dangerous individuals in our society who should be isolated for protection of the public. The present definition of "persistent offenders" is completely unworkable. As is readily apparent, subsection a. is inadequate in situations where the

defendant perpetrates another crime after being released from imprisonment for five years or more. The requirement that a prior offense must have been committed within the five years preceding the latest crime clearly does not take into account the fact that the defendant may have been incarcerated during this period. In any event, we believe that the five year requirement is unwarranted. Rather, an individual who commits three offenses on separate occasions should be subject to this provision. Thus, we have deleted the five year time limit. So too, we have deleted the provision requiring that all three crimes must have involved the infliction or threat to inflict serious bodily harm. Finally, we have deleted the requirement that the defendant must have received custodial terms with respect to the two prior convictions. We have also amended the definition of "professional criminal". In our view, a person who commits an offense as part of a continuing criminal activity in concert with others should be subject to an enhanced penalty if it can be proven that he knowingly devoted himself to criminal activity as a major source of livelihood. Lastly, we have included in the enhanced penalty provision mentally abnormal persons whose conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences and who poses a serious danger to others. This provision was initially recommended by the New Jersey Criminal Law Revision Commission, but was deleted by the Assembly Judiciary Committee.