

**CUMULATIVE SUPPLEMENT
TO
THE CRIMINAL LAW DIGEST
March 2001 - January 2013**

ACCOMPLICE LIABILITY

I. Jury Instructions

A. Generally

When a defendant is charged as an accomplice and lesser-included offenses already are charged in an indictment, the trial court must charge the jury on the lesser-included crimes and on accomplice liability. *State v. Ingram*, 196 N.J. 23 (2008).

B. Distinguishing Principal from Accomplice

1. Error Found

The trial court should separately charge the jury that when a principal and an accomplice are charged with the same crime, they may possess differing mental states, and thus, commit crimes with different levels of culpability. *State v. Ingram*, 196 N.J. 23 (2008) (harmless error found).

ALIBI

I. NOTICE OF ALIBI

A. Failure to Provide Notice

Only in the rarest of circumstances should the “interest of justice standard” result in the prohibition of a defendant’s own alibi testimony as an appropriate sanction for failure to give the prosecutor prior notice under R. 3:12-2. *State v. Bradshaw*, 195 N.J. 493 (2008). The Court added a fourth requirement to the balancing test for preclusion of a defendant’s undisclosed alibi testimony - whether the failure to give notice was willful and intended to gain a tactical advantage. *Id.*

II. JURY INSTRUCTIONS

The trial court could have given the jury the requested alibi instruction, however, the failure to do so was harmless error. *State v. Echols*, 199 N.J. 344 (2009).

APPEALS (See also COURTS, DOUBLE JEOPARDY)

I. INTRODUCTION

A. Right to Appeal

Based on the trial court’s finding that this was a *de minimis* case under N.J.S.A. 2C:2-11, complainant had no right to appeal the harassment complaint’s dismissal. *State v. Vitiello*, 377 N.J.Super. 452 (App. Div. 2005). Only the prosecutor, not a private complainant, could appeal such a dismissal. *Id.*

B. Procedural Aspects

When a sentencing court fails to notify defendant of the 45-day window to file an appeal, the time to file one is extended. Thus, defendant’s appeal, filed nearly a year after sentencing, was considered timely. *State v. Johnson*, 396 N.J.Super. 133 (App. Div. 2007).

The Appellate Division reached the issue of the DNA Act’s constitutionality, despite defendant’s failure to present it to the trial judge, because the matter was of sufficient public concern. *State v. O’Hagen*, 380 N.J.Super. 133 (App. Div. 2005), *aff’d o.g.*, 189 N.J. 140 (2007).

An appeal from municipal court directly to the Appellate Division violates R. 2:2-3. *State v. Nikola*, 359 N.J.Super. 573 (App. Div.), *certif. denied*, 178 N.J. 30 (2003); *State v. Fulford*, 349 N.J.Super. 183 (App. Div. 2002).

C. Briefs on Appeal

The State may not refuse to take a position on an issue defendant raises, and must provide a factual and legal reply unless it concedes the issue. *State v. Roper*, 362 N.J.Super. 248 (App. Div. 2003).

Appellate counsel must cite and discuss cases directly on point, especially when lower courts relied on them. *State v. Jorn*, 340 N.J.Super. 192 (App. Div. 2001).

II. INTERLOCUTORY APPEALS

A. To the Supreme Court

See *State v. Boretsky*, 186 N.J. 271 (2006); *State v. Harvey*, 176 N.J. 522 (2003).

III. TIME TO APPEAL

A defendant advised of the right to appeal under R. 3:21-4(h) but who fails to timely prosecute that appeal presumptively is not entitled to “as within time” relief. *State v. Molina*, 187 N.J. 531 (2006). If defendant was not so advised, he or she is entitled to relief provided the sentencing transcript confirms the failure and the application for leave to appeal within time is filed no later than 5 years from sentencing. *Id.*

In computing the State’s 10-day time period to appeal a downgraded sentence pursuant to N.J.S.A. 2C:44-1f(2), the “next business day” rule applies. *State v. Johnson*, 376 N.J.Super. 163 (App. Div.), *certif. denied*, 183 N.J. 592 (2005).

IV. APPEALS BY DEFENDANTS

The denial of a motion to dismiss an indictment does not constitute a final judgment for purposes of appeal. *State v. Nemes*, 405 N.J.Super. 102 (App. Div. 2008).

There was no reason to reverse defendant’s conviction on trial *de novo* because, although defendant did not waive his right to be present at his municipal appeal and therefore, the trial should not have proceeded even with defense counsel’s consent, such trials are not on the record and defendant suggested no basis on which his record could be supplemented. *State v. Taimanglo*, 403 N.J.Super. 112 (App. Div. 2008), *certif. denied*, 197 N.J. 477 (2009).

See *State v. Hogue*, 175 N.J. 578 (2003)(defendant on direct appeal may move for a remand to the trial court for DNA testing).

V. APPEALS BY THE STATE

A. Dismissal of Indictment, Accusation or Complaint

The State, a party in interest, can appeal domestic violence restraining order violation dismissals based on the victim’s failure to appear for status conferences. *State v. Brito*, 345 N.J.Super. 228 (App. Div. 2001).

The State was not procedurally barred from raising, for the first time on appeal, additional distinctions between New Jersey and New York statutes regarding child endangerment because the “general tenor” of its argument remained unchanged. *State v. Gruber*, 362 N.J.Super. 519 (App. Div.), *certif. denied*, 178 N.J. 251 (2003).

B. Appeal from Sentence

State timely appealed defendant’s sentence pursuant to N.J.S.A. 2C:44-1f(2). *State v. Evers*, 368 N.J.Super. 159 (App. Div. 2004); see *State v. Johnson*, 376 N.J.Super. 163 (App. Div.), *certif. denied*, 183 N.J. 592 (2005).

State untimely attempted to appeal from the imposition of probationary terms on resentencing for defendant’s second degree convictions. *State v. Gould*, 352 N.J.Super. 313 (App. Div. 2002).

State's appeal of failure to impose "Three Strikes" sentence (*State v. Galiano*, 349 N.J. Super. 157 (App. Div. 2002), *certif. denied*, 178 N.J. 375 (2003); *State v. Livingston*, 340 N.J. Super. 133 (App. Div.), *aff'd*, 172 N.J. 209 (2002)) and NERA term (*State v. Parolin*, 339 N.J. Super. 10 (App. Div. 2001), *rev'd o.g.* 171 N.J. 223 (2002)).

VI. STANDARDS OF REVIEW ON APPEAL

A. Reasons for Decision

Appellate courts affirm or reverse judgments and orders, not the reasons for them. *State v. Maples*, 346 N.J. Super. 408 (App. Div. 2002).

B. Factfinding by the Trial Court

Appellate courts are required to give deference to the trial court's findings based upon witnesses' testimony. *State v. Dangerfield*, 171 N.J. 446 (2002); *State v. Smith*, 374 N.J. Super. 425 (App. Div. 2005).

C. Waiver by Guilty Plea

Defendant's unconditional guilty plea waived any right he had to appeal the denial of his motion to suppress his statements. *State v. Knight*, 183 N.J. 449 (2005).

VII. MOLDING THE VERDICT

Because sufficient evidence created a jury issue on robbery, molding that conviction to a theft from the person conviction was unwarranted. *State v. Lopez*, 187 N.J. 91 (2006).

ARREST (See also ESCAPE, OBSTRUCTION OF JUSTICE, RESISTING ARREST, SEARCH AND SEIZURE, SELF-DEFENSE)

II. PROBABLE CAUSE FOR ARREST

See *State v. Brown*, 205 N.J. 133 (2011) (defendant's commission of the new crime of resisting arrest gave police probable cause to arrest despite invalid arrest warrants for other crimes); *State v. Chippero*, 201 N.J. 14 (2009); *State v. Dangerfield*, 171 N.J. 446 (2002); *State v. Breslin*, 392 N.J. Super. 584 (App. Div.), *certif. denied*, 192 N.J. 477 (2007); *State v. Carroll*, 386 N.J. Super. 143 (App. Div. 2006); *State v. Nikola*, 359 N.J. Super. 573 (App. Div.) (officers had probable cause to believe that defendant was driving drunk, and could therefore walk down her driveway and follow her into her open garage to arrest her without a warrant), *certif. denied*, 178 N.J. 30 (2003).

III. WARRANTLESS ARRESTS BY POLICE OFFICERS

A. Adults

Evidence obtained in violation of the Fourth Amendment because a police officer reasonably, but mistakenly, believed there was an outstanding arrest warrant should not be suppressed. Suppression is not an automatic consequence of a Fourth Amendment violation; the question turns on police culpability and the potential of exclusion to deter wrongful police conduct. *Herring v. United States*, 129 S.Ct. 695 (2009).

Valid warrantless arrest for misdemeanor seat belt violation. *Atwater v. City of Logo Vista*, 532 U.S. 318 (2001).

A dispatcher's advisement to a police officer of an outstanding warrant for the defendant without also advising that the warrant was for someone with a differently spelled first name and different birth date was objectively unreasonable. *State v. Handy*, 206 N.J. 39 (2011). The majority declined to apply the *Herring* standard that limits the exclusionary rule to deliberate, reckless, grossly negligent or systemic error, finding that case distinguishable. *Id.*

Police can arrest for disorderly or petty disorderly persons offenses committed in their presence. *State v. Dangerfield*, 171 N.J. 446 (2002).

A fugitive fleeing from one state to another to avoid prosecution violates the Federal Fugitive Felon Act, and thus, United States marshals are authorized to arrest him, even without a warrant. *State v. Aikens*, 401 N.J.Super. 298 (App. Div. 2008).

V. PROCEDURE AFTER A WARRANTLESS ARREST

Police did not violate the Fourth Amendment when they arrested respondent based on probable cause and searched him incident to the arrest, even though Virginia law prohibited arrest for the particular offense (driving on a suspended license). *Virginia v. Moore*, 128 S.Ct. 1598 (2008)

While police can arrest for disorderly or petty disorderly persons offenses committed in their presence, the Supreme Court chose not to resolve whether any search limitations were appropriate in connection with a defendant validly arrested for defiant trespass. *State v. Dangerfield*, 171 N.J. 446 (2002).

However, consistent with *State v. Pierce*, 136 N.J. 184 (1994), officers have the right, following a valid custodial arrest for a motor vehicle violation or criminal offense, to search defendant's person based solely on the arrest. *Id.*

VI. ARRESTS WITH WARRANTS

C. Execution

See *State v. Bell*, 388 N.J.Super. 629 (App. Div. 2006), *certif. denied*, 189 N.J. 647 (2007); *State v. Cleveland*, 371 N.J.Super. 286 (App. Div.), *certif. denied*, 182 N.J. 148 (2004); *State v. Rose*, 357 N.J.Super. 100 (App. Div.), *certif. denied*, 176 N.J. 429 (2003).

IX. DETENTION ON LESS THAN PROBABLE CAUSE

C. Investigatory Detention

2. On-The-Street

A stop based only on a "hunch," not on objectively reasonable and articulable suspicion, is improper. *State v. Love*, 338 N.J.Super. 504 (App. Div. 2001).

ARSON, CAUSING OR RISKING WIDESPREAD INJURY OR DAMAGE, CRIMINAL MISCHIEF

I. ARSON: SCOPE OF THE OFFENSE

Most forms of arson no longer include an intent to burn a dwelling house or other structure as an element, and thus defendant could be convicted of felony murder for setting fire to the victim and not to a structure itself. *State v. Arenas*, 363 N.J.Super. 1 (App. Div. 2003), *certif. denied*, 178 N.J. 452 (2004). The sole *mens rea* element is to purposely or knowingly place another person in danger of death or bodily injury by starting a fire. *Id.*

ASSAULT

II. TYPES OF ASSAULT AND THE CONSTITUENT ELEMENTS

A. Simple Assault - N.J.S.A. 2C:12-1a

Proof of the victim's physical pain to show the bodily injury element does not require description of that pain from the victim or witnesses; descriptions of the defendant's conduct is sufficient to sustain the conviction. *State v. Stull*, 403 N.J.Super. 501 (App. Div. 2008).

The trial court erred in convicting defendant, over objection, of simple assault when the jury acquitted of aggravated assault and could not reach a verdict as to simple assault as a lesser-included offense. *State v. Miller*, 382 N.J.Super. 494 (App. Div. 2006).

B. Aggravated Assault - N.J.S.A. 2C:12-1b

Private school teachers are not covered by the plain language of N.J.S.A. 2C:12-1b(5)(d), but the Legislature is invited to reconsider this omission. *State v. Cannarella*, 186 N.J. 63 (2006).

- C. Endangering an Injured Victim - *N.J.S.A. 2C:12-1.2*.
 Insufficient evidence existed that the victim was alive after defendant fired a shot through the back of his head and killed him almost instantly, and the statute gives no fair warning that one who abandons a homicide victim's body somehow endangers an injured victim. *State v. Moon*, 396 *N.J. Super.* 109 (App. Div. 2007), *certif. denied*, 193 *N.J.* 586 (2008). The State must produce evidence that would allow jurors to find that the victim was alive and physically helpless, mentally incapacitated, or otherwise unable to care for himself and that defendant left the scene knowing or reasonably believing that the victim was in that condition. *Id.*
- D. Assault by auto in a school zone - *N.J.S.A. 2C:12-1(c)(3)(a)*
 Defendant unable to present colorable claim that offense did not occur in school zone, as zone extended from edge of entire school property, not from the edge of the closest school building. *State v. McDonald*, 211 *N.J.* 4 (2012).

ATTEMPT

I. INTRODUCTION

The trial court logically explained the law of attempt before the elements of aggravated sexual assault, and the mistaken inclusion of instructions concerning two other types of "attempt" was not prejudicial because given the evidence, a conviction of attempted aggravated sexual assault, based on taking a substantial step toward that result, was virtually inevitable. *State v. Kornberger*, 419 *N.J. Super.* 295 (App. Div.), *certif. denied*, 208 *N.J.* 368 (2011).

II. REQUIRED MENTAL STATE

See *State v. Davis*, 390 *N.J. Super.* 573 (App. Div.) (evidence sufficient to convict defendant of attempted sexual assault), *certif. denied*, 192 *N.J.* 599 (2007).

IV. SUBSTANTIAL STEP

See *State v. Perez*, 177 *N.J.* 540 (2003); *State v. Condon*, 391 *N.J. Super.* 609 (App. Div.), *certif. denied*, 192 *N.J.* 74 (2007).

ATTORNEYS (See R.P.C. 1.1 et seq., R. 1:14)

II. DEFENSE COUNSEL - CONFLICT OF INTEREST

No conflict of interest existed where defense attorney in a capital case also represented for a day a client who was questioned during the police investigation of the case. *State v. Jimenez*, 175 *N.J.* 475 (2003).

A law firm may not represent a defendant accused of killing another of the firm's clients. *State in re S.G.*, 175 *N.J.* 132 (2003). Here the firm represented both clients during the same 2 week period, and defendant could not waive the conflict. *Id.*

There was a *per se* conflict of interest where defense counsel represented defendant during his guilty plea and thereafter and then represented another participant in the same crimes before defendant's sentencing. *State v. Alexander*, 403 *N.J. Super.* 250 (App. Div. 2008)

No conflict of interest existed where defense counsel, a former public defender retained by the Public Defender's Office, had civilly sued that Office. *State v. Davis*, 366 *N.J. Super.* 30 (App. Div. 2004). Counsel's clients were the individual defendants, not the Public Defender. *Id.*

In *State v. Pierrevil*, 341 *N.J. Super.* 266 (App. Div. 2001), the Appellate Division reversed the trial court's grant of the State's motion to recuse defense counsel. Counsel had represented another man charged with the same murder for which defendant was standing trial, but that representation would not materially limit representation of defendant. The matter was remanded to resolve whether a

potential or actual conflict existed, and if a potential conflict did exist the court had to determine whether or not a likelihood of prejudice existed.

A conflict of interest existed where a defense attorney was contemporaneously under indictment in the same count as his client and was being prosecuted by the same prosecutor's office. Because there was no credible evidence in the record that defendant had knowingly waived this conflict, the Court reversed defendant's convictions and remanded for a new trial. *State v. Cottle*, 194 N.J. 449 (2008).

IV. PRIVILEGE

The attorney-client privilege protected defendant's application for Public Defender representation, including the factual materials he submitted in support of that application. *In the Matter of Subpoena Duces Tecum*, 420 N.J. Super. 182 (App. Div.), *leave to appeal granted*, 208 N.J. 364 (2011).

Grand jury subpoena, compelling defendant's attorney to testify regarding his communications with his client about false requests for postponements of defendant's court appearances, was valid. *State v. Ray*, 372 N.J. Super. 496 (App. Div. 2004), *cert. denied*, 544 U.S. 1022 (2005). The State had established a *prima facie* case of defendant's fraud committed against the court, and the attorney-client privilege does not shield communications where the attorney is used to perpetrate a crime or fraud. *Id.*

VI. CONTEMPT/DISCIPLINARY ACTION

See *State v. Mahoney*, 188 N.J. 359 (2006)(relevance of defendant's attorney recordkeeping duties pursuant to R. 1:21-6); *In re Seelig*, 180 N.J. 234 (2004).

BAIL

I. BEFORE CONVICTION

G. Forfeiture of Bail

See *State v. Toscano*, 389 N.J. Super. 366 (App. Div. 2007); *State v. Ruccatano*, 388 N.J. Super. 620 (App. Div. 2006); *State v. Hawkins*, 382 N.J. Super. 458 (App. Div. 2006); *State v. Ramirez*, 378 N.J. Super. 355 (App. Div. 2005); *State v. Simpson*, 365 N.J. Super. 444 (App. Div. 2003); *State v. Clayton*, 361 N.J. Super. 388 (App. Div. 2003); *State v. Dillard*, 361 N.J. Super. 184 (App. Div. 2003); *State v. Harmon*, 361 N.J. Super. 250 (App. Div. 2003); *State v. DeLaHoya*, 359 N.J. Super. 194 (App. Div. 2003); *State v. Calcano*, 397 N.J. Super. 302 (App. Div.), *certif. denied*, 194 N.J. 446 (2008).

3. Standard of Review

Defendant's post-verdict release substantially increased his flight risk, and the pre-conviction surety could not be compelled to accept that increased risk. *State v. Ceylan*, 352 N.J. Super. 139 (App. Div.), *certif. denied*, 174 N.J. 545 (2002).

Trial court can, in its discretion, order forfeiture of a portion of the bail posted when defendant violates a condition of bail by contacting and threatening codefendants. A violation of such a "non-appearance" condition can, under the totality of the circumstances, justify the court's exercise of discretion in forfeiting bail. *State v. Korecky*, 169 N.J. 364 (2001).

H. Cancellation

See *State v. Tuthill*, 389 N.J. Super. 144 (App. Div. 2006)(bail bond's mistaken cancellation was a mere clerical error the trial judge could correct without the surety's consent), *certif. denied*, 192 N.J. 69 (2007).

I. Bail Jumping Statute

Upholding the constitutionality of the bail jumping statute, N.J.S.A. 2C:29-7, and holding that it imposes no burden on defendants to prove a lawful excuse

for their failure to appear. While the statute does not indicate a culpable mental state, the gap filler provision of *N.J.S.A. 2C:2-2c(3)* requires the State to prove that defendant's failure was "knowing." Element of failure to appear "without lawful excuse" is not unconstitutionally vague on its face. *State v. Emmons*, 186 *N.J.* 601 (2007).

IV. BAIL PENDING EXTRADITION PROCEEDINGS

The discretionary lodging of a detainer by federal immigration authorities for the purpose of removing defendant from the country marked a change in circumstances that can affect whether defendant will fail to appear for trial, justifying an increase in bail. *State v. Fajardo-Santos*, 199 *N.J.* 520 (2009).

BURGLARY AND BURGLAR'S TOOLS

III. TRIAL

A. Evidence

State can offer sanitized evidence of TRO precluding defendant from entering his former residence to prove this element of burglary. *State v. Silva*, 378 *N.J. Super.* 321 (App. Div. 2005).

CAPITAL PUNISHMENT

I. CONSTITUTIONALITY

A. Federal Standards

Juveniles cannot be executed for their capital crimes. *Roper v. Simmons*, 543 *U.S.* 551 (2005).

Under *Apprendi v. New Jersey*, 530 *U.S.* 466 (2000), the jury, not a judge, must find the aggravating factors leading to a death sentence. *Ring v. Arizona*, 536 *U.S.* 584 (2002)(overruling *Walton v. Arizona*, 497 *U.S.* 639 (1990)). *Ring*, however, does not apply retroactively on collateral review. *Schriro v. Summerlin*, 542 *U.S.* 348 (2004).

II. GUILT PHASE

Trial court should have excused a juror who appeared to be biased and to have predetermined defendant's guilt. *State v. Loftin*, 191 *N.J.* 172 (2007). The court also should have questioned the other jurors to ensure that none of them had been tainted. *Id.*

Defendant's guilty plea to capital murders did not obviate the State's need to present evidence, including defendant's statements to police, evidence of the crimes themselves, photographs of the crime scene, and evidence of his post-crime behavior. *State v. Wakefield*, 190 *N.J.* 397 (2007).

Trial court should have *voir dire*d jurors on the effect of hearing other-crimes evidence, used to prove identity, of defendant's sexual assault on a Maine State Trooper. *State v. Fortin*, 178 *N.J.* 540 (2004).

D. Jury Voir Dire

See *Miller-El v. Dretke*, 545 *U.S.* 231 (2005)(state violated *Batson* in striking 10 of 11 African-Americans while offering only pretextual reasons for doing so); *Martini v. Hendricks*, 348 *F.3d* 360 (3d Cir. 2003)(as to trial court's excusal of potential juror), *cert. denied*, 543 *U.S.* 1025 (2004).

F. Jury Charges at Guilt Phase

Sequential instructions on own-conduct murder and accomplice liability coerced jury into returning a death-eligible guilt-phase verdict. *State v. Josephs*, 174 *N.J.* 44 (2002). The State need not meet a "no doubt" standard for conviction in circumstantial evidence cases. *Id.*

See *State v. Wakefield*, 190 *N.J.* 397 (2007) (reasonable doubt).

G. Claims of Mental Retardation

A capital defendant claiming mental retardation must prove such a claim by a preponderance of the evidence at the close of the guilt phase. *State v.*

Jimenez, 191 N.J. 453 (2007); *State v. Jimenez*, 188 N.J. 390 (2006). The absence of retardation is not akin to a capital “trigger” the State has to prove beyond a reasonable doubt, and in a rare case where reasonable minds cannot differ as to its existence the judge can decide the issue pre-trial and thus avoid capital litigation altogether. *Id.* Also, defendant is ineligible for the death penalty if one juror finds that he or she has proved mental retardation by a preponderance of the evidence. *Id.*

III. PENALTY PHASE

A. General Principles

A statute requiring the death penalty when jurors unanimously find that mitigating factors do not outweigh aggravating factors is constitutional.

Kansas v. Marsh, 126 S.Ct. 2516 (2006).

Absent a showing of special need, defendants cannot be shackled before the jury during the penalty phase. *Deck v. Missouri*, 544 U.S. 622 (2005).

The amendment to N.J.S.A. 2C:11-3, which eliminated the death penalty and imposed a sentence of life imprisonment without parole for certain murders, did not violate *ex post facto* when applied to defendant. *State v. Fortin*, 198 N.J. 619 (2009). To best preserve the Legislature’s goal in enacting the amended statute, if the jury finds beyond a reasonable doubt that the aggravating factors outweighed the mitigating so that defendant would be subject to a death sentence, then no *ex post facto* violation existed in imposing the life-without-parole sentence under the amended statute. If the jury does not so find, defendant must be sentenced under the former statute to a 30-year to life sentence with a 30-year parole disqualifier. *Id.*

Defendant’s statements were relevant to prove whether he committed the murders purposefully, the “escape apprehension” aggravating factor, and the mitigating factors. *State v. Wakefield*, 190 N.J. 397 (2007). Also, capital defendants are not entitled to an instruction that a “presumption against the death penalty” exists. *Id.* (relying on *State v. Moore*, 122 N.J. 420 (1991), and *State v. Rose*, 112 N.J. 454 (1988)).

Defendant should have been allowed to waive *ex post facto* claim so the jury could be told that he would be sentenced to life without parole. *State v. Fortin*, 178 N.J. 540 (2004).

Ambiguous verdict sheet meant that some jurors may have considered an aggravating factor that was not unanimously found. *State v. Nelson*, 173 N.J. 417 (2002).

The State must prove the absence of mental retardation beyond a reasonable doubt at the penalty phase. *State v. Jimenez*, 188 N.J. 390 (2006); see *Schriro v. Smith*, 546 U.S. 6 (2005)(states can develop their own procedures for adjudicating mental retardation claims).

See *State v. Chew*, 179 N.J. 186 (2004)(as to defendant’s claims of ineffective assistance at the penalty phase).

B. Aggravating Factors

Now aggravating factors must be submitted to the grand jury pursuant to the state constitution. *State v. Fortin*, 178 N.J. 540 (2004). Grand jurors, however, need not be “death qualified,” and could not be *voir dire*d regarding their views on capital punishment. *State v. Toliver*, 180 N.J. 164 (2004).

Mitigating evidence need not be presented to the grand jury. *Id.*

See *Brown v. Sanders*, 546 U.S. 212 (2006).

A defendant must serve life without parole if the jury finds that an aggravating factor exists. *State v. Fortin*, 400 N.J.Super. 434 (App. Div. 2008), *aff’d in part, rev’d in part*, 198 N.J. 619 (2009).

6. Murder in Course of a Felony

State must reprove “murder in the course of another murder” aggravating factor beyond a reasonable doubt where the guilt-phase factfinder is different from the penalty-phase factfinder. *State v. Josephs*, 174 N.J. 44 (2002). This does not permit the penalty-phase factfinder to overturn defendant’s murder conviction, though. *Id.*

C. Mitigating Factors

Trial counsel was ineffective for failing to investigate and present a mitigation defense during the penalty phase. *Marshall v. Hendricks*, 313 F.Supp.2d 423 (D.N.J. 2004), *aff’d sub nom. Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006).

See *State v. Fortin*, 400 N.J.Super. 434 (App. Div. 2008), *aff’d in part, rev’d in part*, 198 N.J. 619 (2009).

1. Extreme Mental or Emotional Disturbance - N.J.S.A. 2C:11-3c(5)(a)

See *State v. Chew*, 179 N.J. 186 (2004).

5. Any Other Factor Relevant to Defendant’s Character, Record or Circumstances of the Offense - N.J.S.A. 2C:11-3c(5)(h)(catch-all)

Trial court erroneously instructed the jury on the use of victim-impact evidence, on the alternative sentences the jury could impose in lieu of a death sentence, and not to consider any rejected aggravating factor.

State v. Koskovich, 168 N.J. 448 (2001).

6. Miscellaneous

Defense counsel must review evidence the prosecution will likely use at sentencing even when a capital defendant and his family have suggested that no mitigating evidence is available. *Rompilla v. Beard*, 545 U.S. 374 (2005).

See *State v. Francis*, 191 N.J. 571 (2007) (R. 3:13-4(b) does not permit defendants the right to prevent prosecutors from investigating mitigation evidence).

IV. JURY DELIBERATION ISSUES

Although the jury instructions permitted the deliberating jury to transition from a greater offense to a lesser offense only after voting to acquit on the greater offense, these instructions did not bar the jurors from reconsidering an initial vote to acquit on a greater offense. The jury was not told it “could not rethink the issue” and therefore double jeopardy did not bar retrying the defendant on the greater offenses. *Blueford v. Arkansas*, 132 S. Ct. 2044 (2012).

Neither double jeopardy nor fundamental fairness barred a capital retrial where the jury could not reach a unanimous verdict as to murder. *State v. Cruz*, 171 N.J. 419 (2002).

V. MISCELLANEOUS

Trial counsel was ineffective during sentencing phase, according to professional norms at the time, for failing to adequately investigate defendant’s background when considering trial strategy of whether or not to present mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003); see *Marshall v. Hendricks*, 313 F.Supp.2d 423 (D.N.J. 2004), *aff’d sub nom. Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006).

Strickland standards were met even though trial counsel failed to both adduce mitigating evidence and present a closing argument during a capital sentencing hearing. *Bell v. Cone*, 535 U.S. 685 (2002).

Both trial and appellate counsel were ineffective regarding a biased juror and that juror’s possible effect on the rest of the jury. *State v. Loftin*, 191 N.J. 172 (2007).

The Supreme Court, on leave to appeal, reversed suppression of defendant's statements made to police both before and after his arrest. *State v. Boretsky*, 186 N.J. 271 (2006).

Cumulative error existed in defendant's capital trial (*i.e.*, trial court admitted evidence that defendant was in custody when he confessed and erred in charging the jury regarding the failure to recover the victim's body). *State v. Reddish*, 181 N.J. 553 (2004). Also, capital defendants have the right to proceed *pro se* at the guilt and penalty phases, with the assistance of standby counsel. *Id.*; see *State v. Figueroa*, 187 N.J. 589 (2006).

Issue raised in defendant's second post-conviction relief petition was identical to one raised in his first petition, and thus R. 3:22-5 procedurally barred it. *State v. Marshall*, 173 N.J. 343 (2002). Also, the second petition was untimely pursuant to R. 3:22-12. *Id.*

See *Oregon v. Guzek*, 546 U.S. 517 (2006) (federal constitution did not mandate that defendant be allowed to introduce alibi evidence at penalty phase); *In re Readoption of Death Penalty Regulations*, 367 N.J. Super. 61 (App. Div.) (remand to the Department of Corrections to further consider several of its regulations implementing the statute for carrying out a lethal injection), *certif. denied*, 182 N.J. 149 (2004).

VI. APPELLATE REVIEW

See *State v. DiFrisco*, 187 N.J. 156 (2006).

VII. PROPORTIONALITY

A. Individual Proportionality Review

Defendant's death sentence was disproportionate to those of similarly situated defendants. *State v. Papasavvas*, 170 N.J. 462 (2002).

VIII. POST-CONVICTION RELIEF

Newly-discovered evidence, previously unknown to both the prosecutor and defense counsel, and not disclosed to the jury at trial, entitled defendant to a new trial on his aggravated sexual assault and endangering charges. *State v. Askia Nash*, 212 N.J. 518 (2013). Presentation of sworn or certified statement school officials stating that the librarian-defendant's victim, who was a special education student, was assigned an aide who accompanied him at school throughout the day, was newly discovered evidence which would have changed the outcome of the case had it been presented to the jury. *Id.*

Defendant was not entitled to PCR relief by impermissibly aggregating the votes of those justices who dissented on proportionality review after replacing a justice who dissented on direct appeal. *State v. Harris*, 194 N.J. 157 (2007).

Trial judges may not instruct capital juries that they must be unanimous in finding mitigating factors. *State v. Martini*, 187 N.J. 469 (2006), *cert. denied*, 127 S.Ct. 1285 (2007).

Prosecutor interfered with defendant's right to have a witness testify at a PCR hearing, thus violating due and compulsory process. *State v. Feaster*, 184 N.J. 235 (2005).

Defendant's trial counsel were effective at both the guilt and penalty phases of trial, and defendant presented no evidence to support his claim of mental retardation. *State v. Harris*, 181 N.J. 391 (2004), *cert. denied*, 545 U.S. 1145 (2005). Indeed, defendant's penalty phase expert had testified at trial that defendant was not retarded. *Id.* To prove mental retardation, a defendant at the post-conviction proceeding must (1) come forward with some evidence of

retardation; and (2) if he or she does, an adversarial hearing must be conducted to satisfy due process requirements. *Id.*

No disqualification of the entire county prosecutor's office was required based on the mere allegation of some members' misconduct. *State v. Harvey*, 176 N.J. 522 (2003).

Defendant failed to prove that counsel was ineffective during the penalty phase; counsel conducted sufficient investigation into potential mitigation evidence. *State v. DiFrisco*, 174 N.J. 195 (2002), *cert. denied*, 537 U.S. (2003).

Evidence deemed mitigating in hindsight would have opened the door to damaging rebuttal evidence. Also, defendant had no right to the effective assistance of expert witnesses, and could only couch this claim in terms of effectiveness of counsel who obtained the experts. *Id.* See *State v. Loftin*, 191 N.J. 172 (2007).

Before a trial court can accept the remote testimony from a distant location (as opposed to live, in-court testimony) at a PCR evidentiary hearing, there must be a satisfactory demonstration that the means to be used will ensure the "essential integrity of the testimony for fact-finding purposes." *State v. Santos*, 210 N.J. 129 (2012).

CARJACKING

Carjacking is not a predicate offense under *N.J.S.A. 2C:14-2a(3)* elevating a second degree sexual assault to a first degree aggravated sexual assault. *State v. Drury*, 190 N.J. 197 (2007). The similarities between carjacking and robbery were "insufficient" to include carjacking as a predicate. *Id.*

CAUSATION

III. CULPABILITY

B. Reckless or Criminally Negligent Conduct

As a matter of law, removal of life support from a non-brain dead victim raised no causation or intervening cause issues in a death by auto case. *State v. Pelham*, 176 N.J. 448, *cert. denied*, 540 U.S. 909 (2003).

CONSPIRACY (See also ACCOMPLICE LIABILITY, COMPLICITY, EVIDENCE)

I. GENERALLY

A federal defendant bears the burden of proving withdrawal from a criminal conspiracy outside the limitations period. *Smith v. United States*, 133 S.Ct. 714 (2013). The government does not have to prove beyond a reasonable doubt a fact that "excuse[s] conduct that would otherwise be punishable." Withdrawal does not negate an element of conspiracy, which is simply "the combination of minds in an unlawful purpose." *Id.*

III. CONSPIRACIES WITH MULTIPLE OBJECTIVES

Fraud scheme between defendant and psychiatrist resembled the multiple, separate conspiracies model of *Kotteakos v. United States*, 328 U.S. 750 (1946), not the single, all-encompassing conspiracy model of *Blumenthal v. United States*, 332 U.S. 539 (1947). *State v. Decree*, 343 N.J.Super. 410 (App. Div.), *certif. denied*, 170 N.J. 388 (2001).

VII. TRIAL ISSUES

C. Jury Instructions

Trial court gave the jury an incorrect instruction as to the definition of "handicap" for purposes of a conspiracy to commit bias intimidation charge. *State v. Dixon*, 396 N.J.Super. 329 (App. Div. 2007).

Trial judge properly declined to charge conspiracy to murder as a lesser-included offense of murder because no rational basis existed for that charge. *State v. Cagno*, 409 N.J.Super. 552 (App. Div.), *certif. granted in part, denied*

in part, 200 N.J. 550 (2009). The conspiracy charge as a whole was consistent with relevant case law. *Id.*

There were no issues with the statement of law or any alleged omissions of key instructions or omission of a prior inconsistent statement charge. *State v. Baylor*, 423 N.J. Super. 578 (App. Div. 2011), *certif. denied*, 210 N.J. 263 (2012).

D. Sufficiency of the Evidence

The State submitted sufficient evidence from which a jury could conclude beyond a reasonable doubt that defendant conspired to, and did, commit an armed robbery. *State v. Samuels*, 189 N.J. 236 (2007). Conspiracies can be proven by circumstantial evidence and inferences from actions. *Id.*

VIII. RACKETEERING

See *State v. Cagno*, 409 N.J. Super. 552 (App. Div.), *certif. granted in part, denied in part*, 200 N.J. 550 (2009).

CONTEMPT

I. INDICTABLE CONTEMPT

A. Rules Governing Indictable Contempt

See *State v. Lewis*, 389 N.J. Super. 409 (App. Div.), *certif. denied*, 190 N.J. 393 (2007); *State v. Finamore*, 338 N.J. Super. 130 (App. Div. 2001).

B. Current Examples of Indictable Contempt

7. Defendant was guilty of contempt for violating a telephonic domestic violence TRO that did not comply with the recording rule R. 5:7A(b)). *State v. Masculin*, 355 N.J. Super. 250 (Law Div. 2001). The failure to record a telephonic TRO, while constituting a procedural deficiency, does not void that civil order where the applicant was sworn. *Id.*
8. Juvenile could not be adjudicated delinquent for contempt when she violated a court order to obey the rules of home and school. *State in re S.S.*, 183 N.J. 20 (2005).

II. PUNITIVE CONTEMPT

A. Contempt in *Facie Curiae*

2. Rules Governing Contempt in *Facie Curiae*

See *Amoresano v. Laufgas*, 171 N.J. 532 (2002)(summary contempt before the court under R. 1:10-1 based on letters and recusal motions defendant sent the trial judge claiming corruption and partiality).

3. Procedure for Dealing with Contempt in *Facie Curiae*

See *Amoresano v. Laufgas*, 171 N.J. 532 (2002).

5. Scope of Appellate Review

Appellate court must review record and make a *de novo* determination. *Amoresano v. Laufgas*, 171 N.J. 532 (2002).

7. Examples of Contempt in *Facie Curiae*

Letters and motions accusing trial judge of corruption and partiality qualify. *Amoresano v. Laufgas*, 171 N.J. 532 (2002).

B. Contempt Outside the Presence of the Court

2. Rules Governing Contempt Outside the Presence of the Court

Defendant must be given the opportunity to cross-examine State witnesses at the contempt hearing pursuant to R. 1:10-2. *Amoresano v. Laufgas*, 171 N.J. 532 (2002).

3. Examples of Contempt Outside the Presence of the Court

Intimidating statements said to a witness and an attorney were contumacious. *Amoresano v. Laufgas*, 171 N.J. 532 (2002).

CONTROLLED DANGEROUS SUBSTANCES (See also SEARCH AND SEIZURE)

II. CONSTITUTIONALITY

- D. *N.J.S.A. 2C:35-7.1*
See *State v. Brooks*, 366 *N.J.Super.* 447 (App. Div. 2004).
- G. *N.J.S.A. 2C:35-7, 12, 14 and 15*
See *State v. Murray*, 338 *N.J.Super.* 80 (App. Div.), *certif. denied*, 169 *N.J.* 608 (2001).
- H. *N.J.S.A. 2C:35-19*
Defendant shoulders no burden to detail his or her objections to a laboratory report's admission, and once a timely objection is made the State must either produce an expert witness at trial to testify or prove at a hearing the testing procedure's reliability. *State v. Miller*, 170 *N.J.* 417 (2002).
See *State v. Simbara*, 175 *N.J.* 37 (2002)(State had established laboratory certificate's admissibility, but defendant could confront analyst who prepared it).
A defendant is not required to object to the admission of a lab certificate until ten days after receiving supporting lab reports and data. *State v. Heisler*, 422 *N.J.Super.* 399 (App. Div. 2011).
- I. *N.J.S.A. 2C:35-4.1*
The statute prohibiting the use of booby traps and fortified structures in connection with drug crimes was neither vague nor overbroad. *State v. Walker*, 385 *N.J.Super.* 388 (App. Div.), *certif. denied*, 187 *N.J.* 83 (2006).
- V. Sentencing Alternatives/Options
An informal hearing is sufficient for the Drug Court to give full and fair consideration to a defendant's application to the Drug Court program. *State v. Clarke*, 203 *N.J.* 166 (2010).

III. SUFFICIENCY OF EVIDENCE

- A. Possession Generally
Defendant's arrest on the street, before police entered and searched his apartment with a warrant and discovered a gun, did not preclude his conviction pursuant to *N.J.S.A. 2C:39-4.1a* because his apartment was the crime scene, he had the ability to control the drugs and gun in his apartment, and the statute's rationale is to deter drug dealers with firearms. *State v. Harrison*, 358 *N.J.Super.* 578 (App. Div. 2003), *aff'd*, 179 *N.J.* 229 (2004).
- B. Constructive Possession/Circumstantial Evidence
Defendants in a park zone violate *N.J.S.A. 2C:35-7.1* when they constructively possess drugs physically located outside the zone for distribution within the zone. *State v. Lewis*, 185 *N.J.* 363 (2005). Nothing in the statute limits its reach only to actual possession of the drugs in the park zone. *Id.*
Defendant, arrested outside his apartment as police searched it and found drugs and a loaded gun, constructively possessed both. *State v. Spivey*, 179 *N.J.* 229 (2004). The closer in proximity a gun is to drugs, the stronger the inference that the two are related to a common purpose. *Id.*
- C. School/Public Places Zones
State may present sufficient evidence to gain an *N.J.S.A. 2C:35-7.1* conviction even without introducing the ordinance approving the map used to designate the drug-free public housing zone. *State v. Trotman*, 366 *N.J.Super.* 226 (App. Div. 2004). But it need not prove that the public housing authority held a valid title to the units so long as the property is used as a public housing facility. *Id.*
See *State v. McDonald*, 211 *N.J.* 4 (2012) (school zone extends from the edge of entire school property, not merely from the closest school building on that property)

See *State v. Brooks*, 366 N.J.Super. 447 (App. Div. 2004).

IV. TRIAL-RELATED ISSUES

A. Elements/Basis for Prosecution

1. School Zone Offense

The Goddard School does not fall within the definition of “elementary schools” for purposes of N.J.S.A. 2C:35-7; the plain language of the school zone statute was unclear as to whether the legislature intended that a kindergarten class in an otherwise private daycare center fell within the statute’s reach. *State v. Shelley*, 205 N.J. 320 (2011).

5. Distribution

A person does not “distribute” drugs to another with whom he shares joint possession. *State v. Morrison*, 188 N.J. 2 (2006). Defendant and the victim jointly purchased and possessed heroin, which caused the victim’s death; the trial court correctly dismissed the distribution and liability for drug-induced death counts of the indictment because the two simultaneously and jointly possessed the heroin for their own use intending only to share it together. *Id.*

The “personal use defense” for preparing or compounding drugs does not apply to a charge of growing them. *State v. Wilson*, 421 N.J.Super. 301 (App. Div. 2011), *certif. denied*, 209 N.J. 98 (2012).

6. Employing a Juvenile

See *State v. Lassiter*, 348 N.J.Super. 152 (App. Div. 2002)(State must prove principal in drug distribution scheme was 18 years or older at the time of the drug sale).

B. Expert Testimony

Expert testimony that “an exchange of narcotics took place” in the prison setting, in response to a hypothetical, was improper because the factual allegations were straightforward and not beyond the jury’s understanding. *State v. Sowell*, ___ N.J. ___ (2013). Facts that a visitor was seen handing an object to defendant, who placed it in a potato chip bag where corrections officers found heroin moments later, were not hard to grasp and did not require expert interpretation. *Id.* However, expert testimony related to how drugs are packaged and smuggled into prison, the value of drugs inside the prison, and whether the amount of drugs recovered reflected distribution or personal use, was appropriate. *Id.*

Expert’s testimony that defendant constructively possessed drugs with intent to distribute amounted to a legal conclusion and pronouncement of defendant’s guilt, and thus, was unduly prejudicial. *State v. Reeds*, 197 N.J. 280 (2009).

See *State v. Nesbitt*, 185 N.J. 504 (2006)(reaffirming that, pursuant to *State v. Summers*, 176 N.J. 306 (2003), and *State v. Odom*, 116 N.J. 65 (1989), State’s expert witness can testify in the context of a hypothetical question regarding street-level drug sales); *State v. Thompson*, 405 N.J.Super. 76 (App. Div.) (expert’s testimony that tracked the statutory language was an improper opinion that a drug transaction had occurred, but no manifest injustice resulted given overwhelming evidence of defendant’s guilt), *certif. denied*, 199 N.J. 133 (2009).

V. SENTENCING

A. In General

1. Sentencing Alternatives/Options

Trial court properly denied defendant admission into the drug court program (*N.J.S.A. 2C:35-14*). *State v. Matthews*, 378 *N.J. Super.* 396 (App. Div.), *certif. denied*, 185 *N.J.* 596 (2005).

2. Extended Terms

Repeat drug offender extended terms do not violate *Blakely*. *State v. Pagan*, 378 *N.J. Super.* 549 (App. Div. 2005); *State v. Vasquez*, 374 *N.J. Super.* 252 (App. Div. 2005).

B. Plea Agreements/Attorney General Guidelines/Cooperation Agreements

Post-*Brimage* Attorney General Guidelines in negotiating cases under *N.J.S.A. 2C:35-12* generally should be applied prospectively to all pending cases, including those where defendant committed an offense pre-*Brimage* but pled guilty and was sentenced post-*Brimage*. An exception would exist where applying the post-*Brimage* guidelines would result in a harsher parole disqualifier, however. *State v. Fowlkes*, 169 *N.J.* 387 (2001).

Remand may be necessary if the trial court record is silent as to the use of *Brimage* guidelines in arriving at defendant's sentence for pleading guilty to possessing cocaine. *State v. Hammer*, 346 *N.J. Super.* 359 (App. Div. 2001). See *State v. Rolex*, 167 *N.J.* 447 (2001)(effect of "no appearance/no waiver" provisions in school zone plea agreement cases in different counties).

VI. MISCELLANEOUS

Trial judge properly admitted defendant into drug court, despite his prior convictions that precluded "special probation" under *N.J.S.A. 2C:35-14*, because defendant was drug dependent, was not charged with a disqualifying crime, and did not possess a firearm during the commission of any of his crimes. *State v. Meyer*, 192 *N.J.* 421 (2007).

Defendant tampered with evidence when he shook a bag of cocaine out of a moving vehicle while police pursued him, thereby preventing officers from retrieving it. *State v. Mendez*, 175 *N.J.* 201 (2002).

COURTS

II. MANAGEMENT OF THE TRIAL

A. Public Trial - Access of the Press (See also **SIXTH AMENDMENT**)

Sequestration order was not violated when trial judge permitted the victim to sit in the back of the courtroom when defendant testified. *State v. Williams*, 404 *N.J. Super.* 147 (App. Div. 2009), *certif. denied*, 201 *N.J.* 440 (2010).

Defendant's constitutional rights were not violated by the courtroom being closed to the public where the victim of defendant's sexual conduct was a minor because defendant was on trial for a petty disorderly persons offense, not a criminal offense, defendant never objected to the closure, and his conviction on trial *de novo* was conducted in public proceedings in the Law Division. *State v. Taimanglo*, 403 *N.J. Super.* 112 (App. Div. 2008), *certif. denied*, 197 *N.J.* 477 (2009).

Trial court improperly excluded victim's and defendant's families from the courtroom, which violated defendant's Sixth Amendment right to a public trial. *State v. Cuccio*, 350 *N.J. Super.* 248 (App. Div.), *certif. denied*, 174 *N.J.* 43 (2002).

B. Defendant's right to testify - *State v. Cullen*, 428 *N.J. Super.* 107 (App. Div. 2012) (reversing defendant's burglary conviction when defendant initially waived right to testify, changed his mind prior to summations and jury charge, and trial court denied request to testify; permitting defendant to testify would not have caused prejudice or confusion, and nothing of substance had occurred between defendant's initial decision and his later contrary decision)

C. Control of Defendants and Witnesses

1. Shackling of Defendant
Defendants cannot be shackled during a capital trial's penalty phase absent some showing of special need. *Deck v. Missouri*, 544 U.S. 622 (2005).
 2. Shackling of Witnesses
The ruling in *State v. Artwell*, 177 N.J. 526 (2003), presumptively banning restraints on witnesses, constituted a new rule of law with only prospective application. *State v. Dock*, 205 N.J. 237 (2011). Pursuant to *State v. Artwell*, 177 N.J. 526 (2003), the trial court made no finding that the only defense witness needed to testify in restraints. *State v. King*, 390 N.J. Super. 344 (App. Div.), *certif. denied*, 190 N.J. 394 (2007). The record revealed no basis for such a finding, either. *Id.* Defendant's co-conspirator could not appear in court to testify as a State witness while handcuffed and shackled. *State v. Russell*, 384 N.J. Super. 586 (App. Div. 2006). The trial court failed to establish the need for restraints, and the holding in *Artwell* applies to any State witness. *Id.*
 3. Dress
"[D]efendant had the right not to appear in civilian clothing that may appear distasteful or disrespectful to a reasonably objective jury." *State v. Herrera*, 385 N.J. Super. 486 (App. Div. 2006). The panel for some reason faulted the trial judge for not examining the clothing defendant declined to wear; defendant wanted a jacket and tie. *Id.*
- D. Conduct of Trial Judge
1. Judge's Authority to Examine Witnesses
Defendant was entitled to a new trial because the judge injected himself into the case by questioning witnesses, including defendant and his expert, whom he appeared to disbelieve, revealed that disbelief to the jury and supported a State' witness. *State v. O'Brien*, 200 N.J. 520 (2009). This violated the precepts of *State v. Taffaro*, 195 N.J. 442 (2008). *Id.* Although permitted under certain circumstances, the trial court's questions of the defendant before the jury underscored the weaknesses in the defense case and suggested disbelief of defendant's testimony. *State v. Taffaro*, 195 N.J. 442 (2008). The Court reaffirmed the well-established principle that judges must maintain the appearance of impartiality and refrain from any action suggesting they favor one side over the other. *Id.* Judge did not assume an advocate's role in questioning a defense witness. *State v. Medina*, 349 N.J. Super. 108 (App. Div.), *certif. denied*, 174 N.J. 193 (2002).
 2. *Ex Parte* Communications Between Judge and Jurors or Witnesses
Trial judge had *ex parte* communications with a deliberating jury, and the record did not reveal what was said. *State v. Basit*, 378 N.J. Super. 125 (App. Div. 2005). Reversal was required even though counsel consented to the communications. *Id.*
See State v. Brown, 362 N.J. Super. 180 (App. Div. 2003).
See State v. Morgan, 423 N.J. Super. 453 (App. Div. 2011), *certif. granted in part*, 210 N.J. 477 (2012) (reiterating that counsel should be present whenever the judge interacts with the jury, but ultimately affirming defendant's convictions in the case because the integrity of the jury's deliberations was never compromised. At issue were two *ex-parte* communications between the judge and jury. The first *ex-parte* communication involved innocuous scheduling issues unrelated to the substance of the jury's function. Reversal was not required because

the communications were on record. Secondly, the judge, without input from counsel, permitted the jurors to take home sections of the jury instructions. The court held that such a procedure was wrong, but did not violate defendant's right to a fair trial under the circumstances. The judge directed the jurors to stay within the four corners of the charge, and any error was harmless based on the jury's verdict.

3. Remarks and Conduct of Trial Judge

Trial court cannot permit an individual to sit as a juror after that juror has revealed her bias. *State v. Tyler*, 176 N.J. 171 (2003). Prejudice is presumed by leaving the person in the jury box as punishment for trying to avoid jury service, and denies defendant the right to a fair and impartial jury. *Id.*

See *State v. Loyal*, 386 N.J. Super. 162 (App. Div.) (trial court could not *sua sponte* instruct the jury, after defendant summed up regarding the absence of his fingerprints on the murder weapon, that speculation or conjecture about fingerprints should not enter into its decision in any way), *certif. denied*, 188 N.J. 356 (2006); *State v. Tilghman*, 385 N.J. Super. 45 (App. Div.) (although trial judge should not have told defense counsel to "give these jurors a break" during counsel's opening statement, this did not sway the jury), *certif. granted in part o.g. and summarily remanded*, 188 N.J. 269 (2006).

4. *Voir Dire*

Trial court acted reasonably in declining to conduct individualized *voir dire* of jurors when there was no indication that the jurors had been exposed to a news article that revealed defendant's alleged gang membership and rank within the gang as an enforcer and where there was no evidence that the jurors had been photographed with a cell phone while in the hallway. *State v. Tindell*, 417 N.J. Super. 530 (App. Div. 2011).

Trial court need not ask prospective jurors in *voir dire* if they could accept an acquittal by reason of insanity whereby defendant would be provided for and the public safety would be protected. *State v. O'Brien*, 183 N.J. 376 (2005). Trial judges retain discretion to question prospective jurors about attitudes concerning substantive defenses or other rules of law that the trial may implicate. *Id.*

Trial courts must adhere to the AOC's "Approval Jury Selection Standards, Including Model *Voir Dire* Questions" directive in conducting juror *voir dire*. *State v. Morales*, 390 N.J. Super. 470 (App. Div. 2007).

Trial court erroneously required counsel to exercise peremptory challenges before asking the jury panel if the trial schedule would affect any member's ability to serve, and defendant need not prove any actual prejudice. *State v. Tinnes*, 379 N.J. Super. 179 (App. Div. 2005).

While the trial court should have asked defendant's requested *voir dire* questions, the questions asked sufficiently explored areas of possible prejudice and resulted in a fair and impartial jury. *State v. Hill*, 365 N.J. Super. 463 (App. Div.), *certif. denied*, 179 N.J. 373 (2004).

See *State v. Jones*, 346 N.J. Super. 391 (App. Div.), *certif. denied*, 172 N.J. 181 (2002).

E. Mistrial (See also **DOUBLE JEOPARDY**)

Defendants cannot engage in courtroom misconduct and then expect to be rewarded with a mistrial or a new trial for their egregious behavior, when the trial judge took appropriate cautionary measures to ensure a fair trial. *State v. Montgomery*, 427 N.J. Super. 403 (App. Div. 2012) (trial court did not abuse

its discretion in declining to grant a mistrial after defendant assaulted defense counsel, fought with sheriff's officers, and attempted to escape courtroom; judge gave appropriate cautionary instruction that jury must disregard the incident and base its verdict solely on the evidence presented).

A trial court is not required to consider any particular means of breaking an impasse due to a hung jury nor does it need to consider giving the jury new options for a verdict that were not required under state law. *Blueford v. Arkansas*, 132 S. Ct. 2044 (2012).

Mid-trial mistrial was improperly granted when a witness refused to answer the State's questions. *State v. Allah*, 170 N.J. 269 (2002).

Substitution of a juror pursuant to R. 1:8-2(d) after a jury has indicated its inability to reach unanimity is not a proper remedy; a mistrial is required. *State v. Banks*, 395 N.J. Super. 205 (App. Div.), *certif. denied*, 192 N.J. 598 (2007).

Stand-by counsel was not ineffective in not seeking a mistrial when the trial court terminated defendant's right to represent himself. *State v. Drew*, 383 N.J. Super. 185 (App. Div.), *certif. denied*, 187 N.J. 81 (2006).

Removal of a deliberating juror for reasons personal to him was necessary and proper, but the correct remedy was a mistrial, not substitution. *State v. Banks*, 395 N.J. Super. 205 (App. Div.), *certif. denied*, 192 N.J. 598 (2007); *State v. Williams*, 377 N.J. Super. 130 (App. Div.), *certif. denied*, 185 N.J. 297 (2005). Deliberations had advanced too far, and the reconstituted jury returned a verdict shortly after the substitution. *Id.* (relying on *State v. Jenkins*, 182 N.J. 112 (2004)).

No mistrial was mandated when, during deliberations, it was discovered that a juror had prior criminal convictions; juror was removed and replaced by an alternate. *State v. Farmer*, 366 N.J. Super. 307 (App. Div.), *certif. denied*, 180 N.J. 456 (2004).

No mistrial was required, and a curative instruction was proper, where unrelated evidence of defendant's physical abuse of the child sexual assault victim arose. *State v. L.P.*, 352 N.J. Super. 369 (App. Div.), *certif. denied*, 174 N.J. (2002).

Defendant could be retried after two mistrials. *State v. Jenkins*, 349 N.J. Super. 464 (App. Div.), *certif. denied*, 174 N.J. 43 (2002). The jury remains a deliberating one until the court accepts the verdict and discharges the panel, and a verdict is not reached when a foreperson claims that one is. *Id.*

Mid-trial mistrial was improperly granted *sua sponte* based on the dismissal of two jurors and the prosecutor's vacation. *State v. Georges*, 345 N.J. Super. 538 (App. Div. 2001), *certif. denied*, 174 N.J. 41 (2002).

Curative instruction, not a mistrial, was the proper remedy for a witness' improper comment that he was "locked in the same barracks" as defendant. *State v. Denmon*, 347 N.J. Super. 457 (App. Div.), *certif. denied*, 174 N.J. 41 (2002).

See *State v. Brown*, 362 N.J. Super. 180 (App. Div. 2003).

F. Motions for Judgment of Acquittal (See also **APPEALS, DOUBLE JEOPARDY**)

Defendant and another who jointly purchased and possessed drugs for their own use, intending only to share it together, did not "distribute" it between themselves for purposes of the distribution and liability for drug-induced death counts of the indictment. *State v. Morrison*, 188 N.J. 2 (2006).

The State presented sufficient evidence for defendant's child luring and attempted endangering convictions -- the act of endeavoring, or trying, to get a child into a car constitutes child luring, and defendant's statement illustrated that his purpose was to engage in a prohibited sexual offense with the child. *State v. Perez*, 177 N.J. 540 (2003).

See *State v. Samuels*, 189 N.J. 236 (2007)(State's evidence supported conspiracy to commit armed robbery); *State v. Cabrera*, 387 N.J. Super. 81 (App. Div. 2006)(State's evidence supported sexual assault of an infant); *State v. Harris*, 384 N.J. Super. 29 (App. Div.)(insufficient evidence to convict defendant of possession of a knife for unlawful purposes), *certif. denied*, 188 N.J. 357 (2006); *State v. Ebert*, 377 N.J. Super. 1 (App. Div. 2005)(sufficient evidence existed that defendant "operated" a motor vehicle while intoxicated and drove recklessly); *State v. Horne*, 376 N.J. Super. 201 (App. Div.) (sufficient evidence existed that victim feared imminent bodily harm when he saw defendant's fake gun, the victim described defendant and a cohort and their vehicle to the police, and the victim identified both men at trial as the robbers), *certif. denied*, 185 N.J. 264 (2005); *State in re G.B.*, 365 N.J. Super. 179 (App. Div. 2004)(no evidence proved sexual contact was done with the purpose of degrading or humiliating the victim or sexually arousing or gratifying the juvenile); *State v. Stafford*, 365 N.J. Super. 6 (App. Div. 2003)(sufficient evidence supported defendant's convictions for violating township ordinance prohibiting the feeding of migratory waterfowl); *State v. Lassiter*, 348 N.J. Super. 152 (App. Div. 2002)(as to accomplice liability for employing a juvenile to distribute drugs).

G. Instructions to the Jury

1. Requests to Charge

Although both the prosecutor and defense counsel sought a *Clawans* adverse inference instruction against the other regarding a witness, the trial court erroneously granted only the prosecutor's request. *State v. Velasquez*, 391 N.J. Super. 291 (App. Div. 2007). Whenever it is reasonable to infer that defendant's decision to do without a witness is explainable by reliance on the presumption of innocence, an adverse inference is improper. *Id.*

Defendant asked for the model jury charge on identity regarding the use of police photographs, and the trial court should have issued it. *State v. Swint*, 364 N.J. Super. 236 (App. Div. 2003).

2. Content - In General

The issuance of an adverse inference missing witness charge against a defendant under *Clawans* was inappropriate in defendant's robbery trial because it favored the State on an element of the offense and undermined the presumption of innocence. *State v. Hill*, 199 N.J. 545 (2009).

A trial court's supplemental charge omitted language from the proper initial charge, which may have coerced dissenters into agreeing with a verdict reached shortly thereafter. *State v. Figueroa* 190 N.J. 219 (2007).

Although an instruction should have been given limiting the use of defendant's pre-arrest silence to impeachment purposes, the lack of such an instruction, and the evidence of defendant's silence in the State's case-in-chief, were not plain error. *State v. Brown*, 190 N.J. 144 (2007); see *State v. Tucker*, 190 N.J. 183 (2007); *State v. Elkwisni*, 190 N.J. 169 (2007).

In a capital case, the trial court must convey to the jurors via the instructions that each must individually determine whether a mitigating

factor exists and that the jury need not be unanimous in finding such factors. *State v. Martini*, 187 N.J. 469 (2006).

Although territorial jurisdiction is an element of every offense, it is non-material and a jury need only be instructed to find it if defendant requests such a change or if the record clearly indicates a factual dispute as to jurisdiction. *State v. Denofa*, 187 N.J. 24 (2006).

The statutory language of robbery suggests that no robbery exists unless defendant uses force during the time he was in the course of committing a theft or during the immediate flight therefrom. *State v. Lopez*, 187 N.J. 91 (2006). Thus no “afterthought” concept of robbery exists in New Jersey. *Id.*

Although the jury should have been instructed that expert testimony on the effects of battering on women was admitted for the limited purpose of assessing the credibility of the victim’s non-verbal response that defendant had not hit her, this testimony had no capacity to produce an unjust result. *State v. Townsend*, 186 N.J. 473 (2006).

CSAAS instruction as to permissible uses of the evidence was sufficient. *State v. R.B.*, 183 N.J. 308 (2005).

Model fresh complaint and CSAAS jury instructions had the capacity to confuse the jury regarding how to evaluate the child victim’s credibility vis-a-vis a delayed disclosure of abuse. *State v. P.H.*, 178 N.J. 378 (2004).

But so long as the jury is charged that silence or delay in and of itself is not inconsistent with a claim of abuse, the proper balance is struck. *Id.*

Defendants charged only with possession of a weapon by a convicted person do not receive a bifurcated trial. The rule in *State v. Ragland*, 105 N.J. 189 (1986), does not extend to bifurcation of elements of a single charge. *State v. Brown*, 180 N.J. 572 (2004). The jury should receive appropriate limiting instructions to decrease the risk of undue prejudice;

sanitization of the predicate offense would lessen the potential risk. *Id.*

Defendant entitled to assert a “mistake of fact” defense because he claimed that he believed the suitcase he possessed contained stolen furs, not 33 pounds of cocaine. *State v. Pena*, 178 N.J. 297 (2004). Thus the trial court should have instructed the jury as to the non-lesser-included offense of receiving stolen property. *Id.*

Specific unanimity charge is needed if two theories of guilt are based on different acts and evidence. *State v. Frisby*, 175 N.J. 583 (2002).

Trial court correctly instructed the jury that removal of life support from a victim who was not brain-dead did not constitute an intervening cause of death that would insulate defendant from criminal liability for death by auto. *State v. Pelham*, 176 N.J. 448, *cert. denied*, 540 U.S. 909 (2003).

“[M]odel jury charges can, of course, be wrong or . . . incomplete.” *Id.*

The trial court erred in charging attempted sexual assault because it instructed the jury on both the “impossibility” and “substantial step” theories of attempt when only the latter applied, and because the jury did not indicate in convicting defendant upon which theory it did so. *State v. Condon*, 391 N.J. Super. 609 (App. Div.), *certif. denied*, 192 N.J. 74 (2007).

The instructions as to statutory entrapment were adequate. *State v. Davis*, 390 N.J. Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007).

Although a more detailed charge as to the contested facts of allegedly suggestive identification procedures was warranted, defendant never

sought such a charge and never objected to the charge given. *State v. King*, 390 N.J.Super. 344 (App. Div.), *certif. denied*, 190 N.J. 394 (2007). Although the trial court initially severed the contempt charge involving defendant's violation of a domestic violence restraining order, after defendant testified and was questioned about that order the parties agreed to have the jury consider the contempt. *State v. Amodio*, 390 N.J.Super. 313 (App. Div.), *certif. denied*, 197 N.J. 477 (2007). Also, the restraining order was evidence of defendant's motive to kill his girlfriend and her child. *Id.*

Trial court erred in its causation instruction as to vehicular homicide because it did not address defendant's theory of causation. *State v. Eldridge*, 388 N.J.Super. 485 (App. Div. 2006), *certif. denied*, 189 N.J. 650 (2007).

The lack of *Hampton* and *Kociolek* instructions regarding defendant's oral statements was not plain error requiring reversal. *State v. Martinez*, 387 N.J.Super. 129 (App. Div.), *certif. denied*, 188 N.J. 579 (2006). Those two cases are restricted to the oral statements of a defendant, not of a witness. *Id.*

The jury was properly instructed regarding the prohibition on the use of booby traps or fortified premises in connection with manufacturing or distributing drugs. *State v. Walker*, 385 N.J.Super. 388 (App. Div.), *certif. denied*, 187 N.J. 83 (2006).

Defendant, who asked the trial court not to charge aggravated and reckless manslaughter as lesser-included offenses to murder, could argue on appeal that the court erred in not giving such instructions. *State v. O'Carroll*, 385 N.J.Super. 211 (App. Div.), *certif. denied*, 188 N.J. 489 (2006). The Appellate Division reversed his murder conviction, even though defendant had strangled his girlfriend to death over a period of time. *Id.* Also, a self-defense instruction was necessary despite defense counsel's acknowledgment that he could not raise that claim based on the evidence. *Id.*

Trial court correctly instructed the jury as to forgery that, to convict, the jury must find that defendant acted with a purpose to defraud or knew that he was facilitating a fraud. *State v. Felsen*, 383 N.J.Super. 154 (App. Div. 2006).

Although not initially instructing the jury on all elements of aggravated manslaughter, trial court thereafter repeatedly read the correct instructions. *State v. Messino*, 378 N.J.Super. 559 (App. Div.), *certif. denied*, 185 N.J. 297 (2005). No material inconsistency existed in the charge on murder and its lesser-included offenses; in fact, the jury acquitted defendant of murder. *Id.* Also, the endangering instructions were proper. *Id.*

Trial judge should have explained to the jury the effect of a mistake-of-law defense as to criminal trespass, and should not have limited presentation of defendant's defense. *State v. Wickliff*, 378 N.J.Super. 328 (App. Div. 2005). Criminal trespass conviction requires specific knowledge that entry was unauthorized, and here evidence that defendant was mistaken about the law as to his right to enter a residence in furtherance of his bounty hunter activities was an essential feature of his defense. *Id.*

Although defendant planned an escape and the assault on the corrections officer incident to it, the jury could have found that he lacked the necessary purpose for attempted murder. Thus the trial court should have

issued an accomplice liability instruction as to this charge, as it had for aggravated assault. *State v. Franklin*, 377 N.J.Super. 48 (App. Div. 2005). Here the jury could have found that defendant's intent was to escape and not to kill, even if his codefendants did have the latter intent. *Id.*

Trial court correctly charged the jury that it could consider the drug quantity and packaging in determining if defendant possessed drugs with intent to distribute. *State v. Vasquez*, 374 N.J.Super. 252 (App. Div. 2005). And although juries should always be instructed to determine if the State has proven defendant's guilt beyond a reasonable doubt and not about "guilt versus innocence," here no likelihood existed that the judge's misstatement affected the verdict. *Id.*

Trial court correctly instructed the jury on money laundering. *State v. Harris*, 373 N.J.Super. 253 (App. Div. 2004), *certif. denied*, 183 N.J. 257 (2005).

The courts should not instruct juries that stipulations bind their factfindings on those issues. *State v. Wesner*, 372 N.J.Super. 489 (App. Div. 2004), *certif. denied*, 183 N.J. 214 (2005). Rather, judges should instruct the jury that (1) the parties have agreed to certain facts, and that the jury should treat these facts as being undisputed, *i.e.*, the parties agree that these facts are true, and (2) as with all evidence, undisputed facts can be accepted or rejected by the jury in reaching a verdict. *Id.*

Trial court's suggestion to jurors, at approximately 4:30 p.m. on a Friday during deliberations, that they end deliberations for the day and come back on Monday unless they were close to a verdict did not coerce or compromise the verdict. *State v. Barasch*, 372 N.J.Super. 355 (App. Div. 2004).

Trial court's instructions as to failure to remit collected state taxes were proper. *State v. Barasch*, 372 N.J.Super. 355 (App. Div. 2004). The State need not prove that defendant's failure to remit was with the purpose to evade or avoid payment. *Id.*

Trial court did not properly instruct the jury on the potential grade-enhancing elements of flight and physical force in a resisting arrest prosecution. *State v. Simms*, 369 N.J.Super. 466 (App. Div. 2004).

Trial court erred in instructing the jury on possession of weapons during the commission of certain drug crimes (N.J.S.A. 2C:39-4.1). *State v. Holden*, 364 N.J.Super. 504 (App. Div. 2003).

Lack of an alibi instruction was not plain error. *State v. Swint*, 364 N.J.Super. 236 (App. 2003).

Despite defendant's failure to object at trial and the fact that the defense evidence of misidentification was "thin," plain error arose when the trial court did not instruct the jury as to the State's burden to prove identification. *State v. Davis*, 363 N.J.Super. 556 (App. Div. 2003).

Defendant's racketeering and theft by extortion convictions were reversed because the trial court failed to instruct the jury regarding the territorial elements of these offenses. *State v. Casilla*, 362 N.J.Super. 554 (App. Div.), *certif. denied*, 178 N.J. 251 (2003). It was unclear whether the conduct forming the basis for his attempted theft by extortion occurred in New Jersey, and whether the racketeering enterprise in which he participated affected trade or commerce in New Jersey. *Id.* Also, the trial court did not instruct the jury as to the "failure to release the victim unharmed and in a safe place" element of first degree kidnapping despite

the fact that the jurors properly convicted defendant of murdering his victim. *Id.*

The trial court erred in charging the jury on endangering the welfare of children because *N.J.S.A. 2C:24-4b* does not apply to virtual child pornography images or pornography involving young-looking adults. *State v. May*, 362 *N.J.Super.* 572 (App. Div. 2003). Also, the State had to prove beyond a reasonable doubt that the images on defendant's computer were of real children and that he knew this. *Id.* The instructions given were clear that the State had to prove the ages of those depicted, but in future cases trial courts must examine each image to determine which can be evaluated based on the jury's common knowledge and which require expert testimony to assist the jury in deciding if the person depicted is older or younger than sixteen. *Id.*

Trial court should not include certain language regarding "materiality" not found in the model perjury charge. *State v. Neal*, 361 *N.J.Super.* 522 (App. Div. 2003).

Charge as to aggravated sexual assault by a person in a supervisory position should include a discussion of whether a significant age disparity or maturity existed between the victim and defendant, what role the athletic activity (this case involved a sports coach) played in the victim's life, what extent the coach offered guidance and advice to the victim on questions and issues outside athletics, and the coach's power to affect the victim's future athletic participation. *State v. Buscham*, 360 *N.J.Super.* 346 (App. Div. 2003). Also, the trial court failed to issue a fresh complaint instruction. *Id.*

Cautionary instructions are to be issued regarding the prosecutor's replay of videotaped trial testimony during summation. *State v. Muhammad*, 359 *N.J.Super.* 361 (App. Div.), *certif. denied*, 178 *N.J.* 36 (2003).

Trial court correctly defined "physical force or violence" in response to a jury question regarding the resisting arrest instructions. *State v. Brannon*, 178 *N.J.* 500 (2004).

Trial court erred in denying defendant's request to charge the ordinary "irregularity" defense of *N.J.S.A. 2C:29-5d*. *State v. Moultrie*, 357 *N.J.Super.* 547 (App. Div. 2003). The State has the burden of disproving both elements of the defense in its case-in-chief. *Id.*

Due to the facts involved, the trial court should have fashioned a charge as to "simulated possession of a weapon" in its robbery instructions. *State v. Harris*, 357 *N.J.Super.* 532 (App. Div. 2003).

Charge properly guided the jury in considering the battered women's syndrome and defendant's self-defense and passion/provocation manslaughter claims. *State v. Tierney*, 356 *N.J.Super.* 468 (App. Div.), *certif. denied*, 176 *N.J.* 72 (2003). Defense counsel vigorously argued self-defense in summation, and in doing so incorporated the syndrome. *Id.*

Jury charge contrasting purposeful conduct with accidental conduct as to resisting arrest and aggravated assault diluted the "purposeful" element of both crimes. *State v. Ambroselli*, 356 *N.J.Super.* 377 (App. Div. 2003). It also failed to discuss those culpability levels -- knowing, reckless, and negligent -- in between. *Id.*

Jury instruction in official misconduct case was proper where the trial court charged that a police officer's duties include the mandate to arrest those committing crimes the officer observed. *State v. Corso*, 355 *N.J.Super.*

518 (App. Div. 2002), *certif. denied*, 175 N.J. 547 (2003). Defendant, an off-duty police officer, gave an individual Ecstasy pills to sell. *Id.* Trial court correctly instructed the jury that it could consider a witness' failure to disclose evidence at a previous time both in evaluating credibility and as substantive evidence -- defendant made a pre-arrest statement omitting her trial accusation against the child victim's father for endangering their 2-year-old son's welfare. *State v. N.A.*, 355 N.J. Super. 143 (App. Div. 2002), *certif. denied*, 175 N.J. 434 (2003).

Penalty-phase instructions in a capital case on the possibility of a non-unanimous verdict, although not perfect, did not mislead the jury. *State v. Marshall*, 173 N.J. 343 (2002).

Some jurors, due to an ambiguous verdict sheet in a capital case, may have considered an aggravating factor not unanimously found. *State v. Nelson*, 173 N.J. 417 (2002).

While accomplice liability instructions related the relevant legal principles, the jury's ambiguous question showed its lack of understanding of this theory. *State v. Savage*, 172 N.J. 374 (2002).

Courts should not instruct jurors in child sexual assault cases that they can disregard the delay in reporting defendant's attacks. *State v. P.H.*, 178 N.J. 378 (2004).

No need exists to define commonly understood terms, such as "obtain." *State v. Gaikwad*, 349 N.J. Super. 62 (App. Div. 2002). Also, the jury's verdict proved proper application of the term "electronic communications." *Id.*

Trial court did not direct the jury to convict in its instructions, but rather merely outlined the charges. *State v. D.V.*, 348 N.J. Super. 107 (App. Div.), *aff'd o.b.* 176 N.J. 338 (2003).

Trial court should relate the facts to the law in crafting the instructions, and tailor the charge to the parties' factual hypotheses. *State v. Jones*, 346 N.J. Super. 391 (App. Div.) (as to "taking" component of interference with custody charge), *certif. denied*, 172 N.J. 181 (2002).

Murder instructions were erroneous because they permitted the jury to find that the homicide itself inferred that defendant's purpose was to kill or cause serious bodily injury resulting in death. *State v. Chavies*, 345 N.J. Super. 254 (App. Div. 2001).

Luring instructions were faulty because the trial court permitted the jury "unbridled autonomy" in deciding defendant's criminal purpose; the Legislature conditioned culpability on a purpose to commit a criminal offense -- not mere disorderly or petty disorderly persons offenses -- with or against a child. *State v. Olivera*, 344 N.J. Super. 583 (App. Div. 2001).

Terroristic threats under N.J.S.A. 2C:12-3a include that defendant "threatens to commit any crime of violence," and the jury instructions must guide the jurors on the qualities of this element and explain the elements and definitions of such crimes. *State v. MacIlwraith*, 344 N.J. Super. 544 (App. Div. 2001). This is particularly essential if the only other convictions involving the facts of the terroristic threats charge result in but petty disorderly persons convictions. *Id.*

Trial court sufficiently instructed the jury on the degrees of recklessness for aggravated assault and assault by auto, and no charge defining defendant's negligence and carelessness theories, or how intoxication evidence related to recklessness, was required. *State v. Pigueiras*, 344 N.J. Super. 297 (App. Div. 2001), *certif. denied*, 171 N.J. 337 (2002).

See *State v. Samuels*, 189 N.J. 236 (2007)(vicarious liability instructions “obliterated the distinction between the crime of conspiracy and accomplice liability”); *State v. Mahoney*, 188 N.J. 359 (2006)(jury should be sufficiently instructed about considering and applying a relevant court rule); *State v. Lopez*, 395 N.J. Super. 98 (App. Div.)(kidnapping instruction proper), *certif. denied*, 192 N.J. 596 (2007); *State v. Rodriguez*, 365 N.J. Super. 38 (App. Div. 2003)(no error in insanity charge, which tracked the model jury charge), *certif. denied*, 180 N.J. 150 (2004); *State v. Romano*, 355 N.J. Super. 21 (App. Div. 2002)(State must disprove beyond a reasonable doubt affirmative defense of necessity once defendant comes forward with some evidence of it); *State v. T.C.*, 347 N.J. Super. 219 (App. Div. 2002)(general unanimity instruction sufficient where the jury is presented with one theory involving conceptually similar acts), *certif. denied*, 177 N.J. 222 (2003); *State v. Shelton*, 344 N.J. Super. 505 (App. Div. 2001)(reasonable doubt charge proper), *certif. denied*, 171 N.J. 43 (2002).

3. Lesser-Included Offenses

Only murder, not aggravated manslaughter, is reducible to manslaughter when passion/provocation is present. *State v. Galicia*, 210 N.J. 364 (2012).

No rational basis existed for a jury charge on third-degree theft as a lesser-included offense of robbery. *State v. Cassidy*, 198 N.J. 165 (2009).

Defendant’s testimony provided the basis for a lesser-included attempted robbery instruction. *State v. Samuels*, 189 N.J. 236 (2007).

Trial courts do not have an obligation to *sua sponte* charge related but non-included offenses. *State v. Thomas*, 187 N.J. 119 (2006). Rather, the duty to so charge unindicted offenses is limited to lesser-included offenses where the facts at trial clearly indicate a basis to convict on the lesser and acquit on the greater. *Id.* “When a court charges a lesser-included offense and neither party objects, . . . we will uphold a conviction of the lesser charge so long as the evidence in the record provides rational support for the conviction.” *State v. Muhammad*, 182 N.J. 55 (2005).

Failure to charge requested lesser-included offense of criminal restraint invalidated defendant’s felony murder and kidnapping convictions. *State v. Savage*, 172 N.J. 374 (2002).

Although the trial court instructed the jury on the lesser-included charges of aggravated and reckless manslaughter, no evidence in the record supported such verdicts. *State v. Lewis*, 389 N.J. Super. 409 (App. Div.), *certif. denied*, 190 N.J. 393 (2007). Inclusion of such options “simply gave defendant a chance he did not deserve.” *Id.*

Facts clearly indicated the validity of aggravated manslaughter instructions in defendant’s murder prosecution, and the jury could find that the evidence supported such a verdict. *State v. Gaines*, 377 N.J. Super. 612 (App. Div.), *certif. denied*, 185 N.J. 264 (2005).

Defendant was entitled to a passion/provocation manslaughter instruction even though he never asked for it. *State v. Castagna*, 376 N.J. Super. 323 (App. Div.), *certif. denied*, 185 N.J. 36 (2005).

Trial court committed plain error in not charging attempted theft as a lesser-included offense of robbery because the jury could view the evidence as supporting such a charge. *State v. Villanueva*, 373 N.J. Super. 588 (App. Div. 2004).

No rational basis existed to charge passion/provocation manslaughter as a lesser-included offense of murder. *State v. Abdullah*, 372 N.J.Super. 252 (App. Div.), *aff'd o.g.* 184 N.J. 497 (2005).

Failure to charge on lesser-included offenses of simple assault, terroristic threats, and theft invalidated defendant's robbery conviction. *State v. Harris*, 357 N.J.Super. 532 (App. Div. 2003).

Trial court should have charged theft of services as a lesser-included offense of robbery where defendant failed to pay a cab fare, walked away, and then threatened the cab driver who followed him and demanded his fare. *State v. Grissom*, 347 N.J.Super. 469 (App. Div. 2002).

Trial court erred in charging joyriding as a lesser-included offense of theft, over defendant's objection, because it is not such an offense. *State v. Roberson*, 356 N.J.Super. 332 (Law Div. 2002).

See *State v. Jenkins*, 178 N.J. 347 (2004)(despite defendant's express request that no lesser-included offenses of murder be charged to the jury, trial court erred in acceding to this request because the facts clearly indicated that a manslaughter verdict was possible); *State v. Denofa*, 375 N.J.Super. 373 (App. Div.)(defendant not entitled to lesser-included aggravated manslaughter charge), *certif. denied*, 185 N.J. 35 (2005); *State v. N.A.*, 355 N.J.Super. 143 (App. Div. 2002)(defendant not entitled to any lesser-included offense charge pursuant to N.J.S.A. 9:6-3), *certif. denied*, 175 N.J. 434 (2003); *State v. Taylor*, 350 N.J.Super. 20 (App. Div.)(trial court erred in not charging passion/provocation manslaughter *sua sponte*), *certif. denied*, 174 N.J. 190 (2002); *State v. Gaikwad*, 349 N.J.Super. 62 (App. Div. 2002)(no rational basis to charge wrongful access to a computer under N.J.S.A. 2C:20-32); *State v. Viera*, 346 N.J.Super. 198 (App. Div. 2001)(attempted possession/provocation manslaughter as a lesser-included offense of attempted murder), *certif. denied*, 174 N.J. 38 (2002); *State v. Hammond*, 338 N.J.Super. 330 (App. Div.), *certif. denied*, 169 N.J. 609 (2001).

5. Further Deliberations

See *State v. DiFerdinando*, 345 N.J.Super. 382 (App. Div. 2001), *certif. denied*, 171 N.J. 338 (2002).

6. Curative Instruction

Trial court repeatedly instructed the jury to disregard a disruptive defendant's conduct and instead focus on the evidence. *State v. Drew*, 383 N.J.Super. 185 (App. Div.), *certif. denied*, 187 N.J. 81 (2006).

Defendant represented himself during a portion of his trial. *Id.*

Curative instruction as to a coindictee's testimony volunteering that defendant had been offered a plea deal similar to his served to bolster the coindictee's credibility. *State v. Murphy*, 376 N.J.Super. 114 (App. Div. 2005). A proper instruction regarding this result of the cross-examination of a State witness would have advised the jury not only as to the limited use of the coindictee's testimony but also as to its prohibited use. *Id.*

7. Defendant's Election Not to Testify

Failure to give a requested no-adverse-inference charge is constitutional, but not structural, error; thus harmless error analysis applies. *Lewis v. Pinchak*, 348 F.3d 355 (3d Cir. 2003), *cert. denied*, 540 U.S. 1200 (2004).

8. Other-Crimes Limiting Instruction

Jurors must be instructed that other-crimes evidence can only be used for certain limited purposes and not for prohibited ones. *State v. Williams*, 190 N.J. 114 (2007).

Reversal was warranted because the other-crimes limiting instruction, combined with the prosecutor's closing remarks, had the capacity to undermine confidence in defendant's murder conviction. *State v. Blakney*, 189 N.J. 88 (2006). Limiting instructions should be given both when the other-crimes evidence is presented and in the final jury charge. *Id.*

In a case involving other-crimes evidence and a statutory entrapment defense, the better practice is to conduct a sequential trial in which the jury first is charged as to the other-crimes evidence and its proper use and; if convictions result, then entrapment would be separately instructed and considered. *State v. Davis*, 390 N.J. Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007).

Even a less-than-perfect limiting instruction, to which defendant never objected, contained the essential point that other-crimes evidence cannot be used for propensity purposes. *State v. T.C.*, 347 N.J. Super. 219 (App. Div. 2002), *certif. denied*, 177 N.J. 222 (2003).

See *State v. Burden*, 393 N.J. Super. 159 (App. Div. 2007) (absence of an other-crimes limiting instruction was harmless), *certif. denied*, 196 N.J. 344 (2008); *State v. Burris*, 357 N.J. Super. 326 (App. Div. 2002) (instructions properly limited jury's consideration of another - crimes evidence), *certif. denied*, 176 N.J. 279 (2003).

12. Expert Witnesses

See *State v. Summers*, 350 N.J. Super. 353 (App. Div. 2002), *aff'd*, 176 N.J. 306 (2003).

13. Identification

A. Generally

Although identification was a key issue and the trial court had not given a detailed, albeit unrequested, identification charge, the jury was instructed on the State's burden of proving that defendant had committed the crime. *State v. Cotto*, 182 N.J. 316 (2005).

The trial judge's misstatement that witnesses made an in-court identification was harmless given the full charge and the facts before the jury. *State v. Wilson*, 362 N.J. Super. 319 (App. Div.), *certif. denied*, 178 N.J. 250 (2003). Defendant also made no request for a factually "tailored" identification instruction, and the charge on

possession of a handgun for unlawful purposes was proper. *Id.* See *State v. Gaines*, 377 N.J. Super. 612 (App. Div.) (although an unrequested specific identification charge should be given where identification is a legitimate issue, instructions issued were adequate), *certif. denied*, 185 N.J. 264 (2005); *State v. King*, 372 N.J. Super. 227 (App. Div. 2004) (although trial court should have given an identification charge, no plain error existed), *certif. denied*, 185 N.J. 266 (2005).

B. Cross-Racial

A cross-racial identification instruction cannot be withheld merely because of relative skin tones (Hispanic victim's skin was darker than African-American defendant's). *State v. Walton*, 368 N.J. Super. 298 (App. Div. 2004). Thus the trial court should have granted defendant's request for a cross-racial identification charge. *Id.*

No basis in the record existed for a cross-racial identification instruction, and no basis in the caselaw existed for cross-ethnic instruction. *State v. Valentine*, 345 N.J. Super. 490 (App. Div. 2001), *certif. denied*, 171 N.J. 338 (2002); see *State v. Dixon*, 346 N.J. Super.

126 (App. Div. 2001)(correct identification and cross-racial identification charges), *certif. denied*, 172 N.J. 181 (2002).
See *State v. Ways*, 180 N.J. 171 (2004).

C. Cross-Ethnic

The cross-racial jury instruction required by *State v. Cromedy*, 158 N.J. 112 (1999), is not broadened to include language cautioning about inaccuracies in cross-ethnic identifications. *State v. Romero*, 191 N.J. 59 (2007). However, added language to the model out-of-court identification was necessary regarding the jurors' need to critically analyze a witness' identification. *Id.*

Where the victim was the only person who identified defendant, and his encounter with defendant was not planned, failure to give a cross-racial identification charge under *Cromedy* was error. *State v. Walker*, 417 N.J. Super. 154 (2010).

14. Self-Defense

See *State v. Rodriguez*, 195 N.J. 165 (2008); *State v. Villanueva*, 373 N.J. Super. 588 (App. Div. 2004).

15. Flight

Before a defendant's conduct can evidence a knowing, voluntary, and unjustified absence from trial under R. 3:16(b) on a superceding indictment, defendant must first receive actual notice of the charges contained in that indictment at an arraignment or other court proceeding. *State v. Grenci*, 197 N.J. 604 (2009).

Defendant's voluntary, but unexplained absence from trial, without more, should not give rise to jury charge that his absence constitutes evidence of consciousness of guilt. *State v. Ingram*, 196 N.J. 23 (2008).

A defendant's failure to appear for trial pursuant to R. 3:16(b) does not necessarily constitute flight, and defendants who waive their right to be present at trial through an unexcused absence and are tried *in absentia* are not subject to such an instruction. *State v. Horne*, 376 N.J. Super. 201 (App. Div.), *certif. denied*, 185 N.J. 264 (2005).

16. Fresh Complaint

See *State v. Williams*, 377 N.J. Super. 130 (App. Div.)(plain error in trial court's conflicting fresh complaint instructions), *certif. denied*, 185 N.J. 297 (2005).

H. Questions by the Jury

1. As to Jury Instructions

Trial judge erroneously gave the dictionary definition of "handicap" when the jury asked for a definition of "bias intimidation" in a conspiracy to commit bias intimidation prosecution. *State v. Dixon*, 396 N.J. Super. 329 (App. Div. 2007).

Trial court appropriately responded to jury's questions during deliberations, and defendant had no objections. *State v. Wilson*, 362 N.J. Super. 319 (App. Div.), *certif. denied*, 178 N.J. 250 (2003).

2. Reading Testimony to the Jury

Where a case was tried in a courtroom where the testimony was video-recorded with no stenographer present, it was within the trial court's discretion to respond to the jury's request for a play back of testimony by playing the recording of the testimony. *State v. Miller*, 205 N.J. 109 (2011).

Readbacks must occur in open court and on the record with the judge, counsel, and defendant present. *State v. Brown*, 362 N.J. Super. 180

(App. Div. 2003). Here, the court reporter and counsel went into the jury room and did the readback over defense counsel's objection, and the trial judge explained to the jurors *ex parte* what would happen. This constituted structural error. *Id.*

I. Receiving the Jury's Verdict

1. Consistency

Jury's verdict was not inconsistent, and therefore defendant could be retried for robbery after reversal on appeal. *State v. Lopez*, 187 N.J. 91 (2006).

Juries may return inconsistent verdicts so long as sufficient evidence in the record supports the conviction beyond a reasonable doubt. *State v. Banko*, 182 N.J. 44 (2004).

See *State in re J.P.F.*, 368 N.J. Super. 24 (App. Div.), *certif. denied*, 180 N.J. 343 (2004); *State v. Gaikwad*, 349 N.J. Super. 62 (App. Div. 2002).

2. Molding the Verdict (See also **THEFT**)

Choice given to State to accept molded verdict to lesser-included offense instead of retrying defendant. *State v. Viera*, 346 N.J. Super. 198 (App. Div. 2001), *certif. denied*, 174 N.J. 38 (2002).

3. Partial Verdict

When a jury acquits on the indicted offenses but cannot reach a verdict on a lesser-included disorderly persons or petty disorderly persons offense, such as simple assault, defendant can elect to have the matter remanded to municipal court for resolution. *State v. Miller*, 382 N.J. Super. 494 (App. Div. 2006).

A jury cannot return a partial verdict, be discharged, and later be reconstituted to render a guilty verdict on a remaining count. *State v. Black*, 380 N.J. Super. 581 (App. Div. 2005), *certif. denied*, 186 N.J. 244 (2006). Once a jury has been discharged and dispersed, it cannot be reassembled to correct an omission in the verdict. *Id.*

III. POST-TRIAL MOTIONS

A. Motion for Judgment of Acquittal After Discharge of Jury (See R. 3:18-2)

Defendant's possession of a firearm for unlawful purposes conviction was not inconsistent with acquittals. *State v. Banko*, 182 N.J. 44 (2004).

Sufficient evidence supported defendant's conviction for violating N.J.S.A. 2C:35-7.1. *State v. Brooks*, 366 N.J. Super. 447 (App. Div. 2004).

Trial court erroneously reduced defendant's second degree official misconduct conviction to one of the third degree; the benefit defendant had obtained was the money he took for his own use and then returned months later, and not merely the interest that could have been earned on it during that time period. *State v. Cetnar*, 341 N.J. Super. 257 (App. Div.), *certif. denied*, 170 N.J. 89 (2001).

B. Motion for New Trial

See *State v. Bianco*, 391 N.J. Super. 509 (App. Div.) (defendant waived his right to complain that a juror knew defendant's paramour by strategically choosing not to seek the juror's removal until after conviction), *certif. denied*, 192 N.J. 74 (2007); *State v. Brooks*, 366 N.J. Super. 447 (App. Div. 2004); *State v. Peterson*, 364 N.J. Super. 387 (App. Div. 2003) (based on DNA testing pursuant to N.J.S.A. 2A:84A-32a); *State v. Petrozelli*, 351 N.J. Super. 14 (App. Div. 2002) (based on ineffective assistance of counsel).

2. Based Upon Weight of the Evidence

Appellate Division, while acknowledging that defendant had waived his claim that the verdict was against the weight of the evidence, nonetheless reached the claim. *State v. Herrera*, 385 N.J. Super. 486 (App. Div. 2006). Criminal sexual assault conviction was not against the weight of the evidence. *State in re J.P.F.*, 368 N.J. Super. 24 (App. Div.), *certif. denied*, 180 N.J. 343 (2004).

Claim that evidence did not support kidnapping conviction because the victim was not confined for a substantial period could be raised, despite R. 2:10-1, for first time on appeal. *State v. Soto*, 340 N.J. Super. 47 (App. Div.), *certif. denied*, 170 N.J. 209 (2001).

See *State v. DiFerdinando*, 345 N.J. Super. 382 (App. Div. 2001), *certif. denied*, 171 N.J. 338 (2002).

4. Based Upon Newly Discovered Evidence

Hearing needed on new trial motion where defendant, tried *in absentia*, was found incarcerated in a New York federal prison. *State v. Givens*, 353 N.J. Super. 280 (App. Div. 2002). Incarceration is not a *per se* involuntary waiver of appearance for trial. *Id.*

When a court has actual knowledge, before or during trial that defendant is incarcerated and thus, unable to appear, it must conduct an inquiry before proceeding with trial to determine if defendant's absence was knowing and voluntary. *State v. Luna*, 193 N.J. 202 (2007). In cases where the fact of a defendant's incarceration first comes to light after trial, defendants may file a post-trial motion for a new trial where they bear the burden of showing that their failure to attend trial was due to their incarceration and that they did not have the ability or means to advise their attorney or the court of this fact. *Id.*

IV. RESTRICTIONS PLACED UPON JUDGES

A. Disqualification

No basis existed for the trial judge to recuse himself *sua sponte* simply because he adjudicated pretrial motions and reviewed grand jury transcripts. *State v. Medina*, 349 N.J. Super. 108 (App. Div.), *certif. denied*, 174 N.J. 193 (2002).

Although no actual bias on the trial judge's part mandated recusal, certain findings made suggested that the trial should proceed before a different judge. *State v. Gomez*, 341 N.J. Super. 560 (App. Div.), *certif. denied*, 170 N.J. 86 (2001).

Trial judge's prior involvement in prosecuting defendant on other crimes created a conflict of interest that defendant could not waive, and required recusal. *State v. Kettles*, 345 N.J. Super. 466 (App. Div. 2001), *certif. denied*, 171 N.J. 443 (2002).

CRUEL AND UNUSUAL PUNISHMENT

I. GENERALLY

NERA does not impose cruel and unusual punishment. *State v. Johnson*, 166 N.J. 523 (2001); *State v. Shoats*, 339 N.J. Super. 359 (App. Div. 2001).

A scheme sentencing fourteen-year-old murderers to life without parole which prevented those meting out punishment from considering a juvenile's age and age-related characteristics violates the Eighth Amendment's prohibition on cruel and unusual punishments. *Miller v. Alabama / Jackson v. Hobbs*, 132 S. Ct. 2455 (2012). The Eighth Amendment forbids a sentencing scheme that automatically mandates life in prison without possibility of parole for juvenile offenders. *Id.*

II. DEATH PENALTY (See also **CAPITAL PUNISHMENT**)

Eighth Amendment did not mandate that capital defendants be allowed to introduce alibi evidence at the sentencing hearing. *Oregon v. Guzek*, 546 U.S. 517 (2006).

Executing the mentally retarded violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304 (2002).

See *In re Readoption of Death Penalty Regulations*, 367 N.J.Super. 61 (App. Div.) (challenges to Department of Corrections regulations implementing death sentence), *certif. denied*, 182 N.J. 149 (2004).

CULPABILITY

III. CONSTRUCTION OF STATUTES AS TO CULPABILITY REQUIREMENTS

See *State v. Morrison*, 188 N.J. 2 (2006)(regarding “distribution” for purposes of N.J.S.A. 2C:35-5 and 9).

DEFENSES (See also ALIBI, INSANITY, INTOXICATION, SELF-DEFENSE)

I. GENERALLY

See *State v. Pelham*, 176 N.J. 448 (defendant’s criminal liability not lessened by victim’s subsequent decision to disconnect life support), *cert. denied*, 540 U.S. 909 (2003); *State v. Ortiz*, 389 N.J.Super. 235 (App. Div. 2006)(at a bench trial the judge found defendant not guilty of attempted murder and a weapons offense by reason of insanity), *rev’d on other grounds*, 193 N.J. 278 (2008); *State v. Gilchrist*, 381 N.J.Super. 138 (App. Div. 2005)(trial court erred in requiring the prosecutor to provide the defense with the rape victim’s photograph because the defense failed to articulate any legitimate pretrial basis for obtaining the photograph); *State v. May*, 362 N.J.Super. 572 (App. Div. 2003)(defendant claimed that computer images were of dolls and “virtual” children in endangering the welfare of children case).

III. MISTAKE OF FACT OR LAW

B. Ignorance or Mistake Negating an Element of the Offense

See *State v. Pena*, 178 N.J. 297 (2004); *State v. Wickliff*, 378 N.J.Super. 328 (App. Div. 2005).

IV. DURESS

A. Generally

Evidence that defendant suffered from battered woman syndrome had limited relevance in cases where defendant asserts a duress defense, but can be relevant in determining if defendant acted recklessly in placing herself in a situation where it was probable that she would be subjected to duress. *State v. B.H.*, 183 N.J. 171 (2005). Such evidence is not relevant to determining whether a person of “reasonable firmness” in defendant’s position would have been able to resist her abuser’s threat; rather, the test is the purely objective “person of reasonable firmness” standard set forth in N.J.S.A. 2C:2-9a. *Id.*

B. Procedural Issues and Burden of Proof

Unless a common-law defense casts doubt on an element of a crime, the burden of proving an excuse defense, such as duress, remains with defendant. *Dixon v. United States*, 126 S.Ct. 2437 (2006).

VI. DE MINIMIS INFRACTIONS

A. Generally

Shoplifting is a serious offense, and an attempt to trivialize it pursuant to monetary value is “fraught with potential dangers” because it could be seen as authority to shoplift below a certain amount. *State v. Evans*, 340 N.J.Super. 244 (App. Div. 2001).

VII. ENTRAPMENT

B. Due Process Entrapment

No evidence of entrapment exists in cases where police create characters to conduct undercover investigations or use decoys, traps, and deceptions to catch those engaged in crime or to obtain evidence. *State v. Davis*, 390 N.J. Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007). Here defendant initiated nearly all contact with the supposed child, and police never controlled or directed the crimes. *Id.*

The evidence indicated very little “inducement” by the informant and very little resistance by defendant, and thus no entrapment existed. *State v. Brooks*, 366 N.J. Super. 447 (App. Div. 2004).

C. Statutory Entrapment

See *State v. Davis*, 390 N.J. Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007).

VIII. NECESSITY AND JUSTIFICATION

A. Generally

See *State v. Tierney*, 356 N.J. Super. 468 (App. Div.) (“imperfect” self-defense is not a recognized defense, although it can be relevant to the required state of mind), *certif. denied*, 176 N.J. 72 (2003).

B. Procedural Issues and Burden of Proof

State must disprove affirmative defense of necessity beyond a reasonable doubt when defendant offers some evidence of it. *State v. Romano*, 355 N.J. Super. 21 (App. Div. 2002).

Trial courts must explain that while a reasonable belief in the need to defend oneself was required to justify conduct as to aggravated assault, an honest but unreasonable belief could negate the mental state for possession of a weapon for unlawful purposes. *State v. McLean*, 344 N.J. Super. 61 (App. Div. 2001), *certif. denied*, 172 N.J. 179 (2002).

DISCOVERY (See also SUBPOENAS)

I. DISCOVERY BY DEFENDANT

C. Confidential and Secret Materials

9. Racial Profiling

Federal defendants seeking discovery on selective prosecution claims must meet the standards of *United States v. Armstrong*, 517 U.S. 456 (1996). *United States v. Bass*, 536 U.S. 862 (2002).

Defendants entitled to racial profiling discovery are afforded it before a court can decide whether post-stop conduct “breaks the chain” between the alleged profiling and the seizure of contraband. *State v. Lee*, 190 N.J. 270 (2007). If defendant proves that profiling occurred in his case, the trial court should then consider whether attenuation occurred. *Id.*

Defendant was entitled to certain discovery regarding allegations that a superior officer in the prosecutor’s office used a racial epithet in a meeting to describe defendant, which the State was ordered to produce. *State v. Williams*, 197 N.J. 538 (2009).

In a case where profiling was alleged when a trooper pulled defendants over and was attacked by them before he could shoot one and detain the other, the Appellate Division believed that it could not fairly address the attenuation doctrine before knowing what discovery revealed. *State v. Gonzalez*, 382 N.J. Super. 27 (App. Div. 2005).

Where defendant establishes a colorable claim of racial profiling, discovery was necessary to decide whether there was an illegal stop which was attenuated by defendant’s post-stop conduct. *State v. Ball*, 381 N.J. Super. 545 (App. Div. 2005).

Defendants preserve a racial profiling claim merely by challenging in a suppression proceeding the consent they gave to troopers to search, even if no profiling claim itself was made before the trial court. *State v. Payton*, 342 N.J. Super. 106 (App. Div. 2001). But the *Interim Report* did not acknowledge profiling by agencies other than the State Police, and thus defendant could not use it to meet the discovery threshold for an alleged profile stop by Port Authority officers. Indeed, courts may not take judicial notice of the *Report's* contents in non-State Police cases. *State v. Halsey*, 340 N.J. Super. 492 (App. Div. 2001), *certif. denied*, 171 N.J. 443 (2002). Defendants were not entitled to racial profiling discovery to challenge their 1992 convictions for trying to kill a state trooper during a motor vehicle stop on the New Jersey Turnpike. The Attorney General had already dismissed defendant's drug convictions, leaving only their attempted murder and related convictions. The Court concluded that because the exclusionary rule did not apply, no need existed for further discovery to determine attenuation and whether stop was illegal. Instead, defendant could have peacefully obeyed the trooper's instructions and then tried to suppress the drugs in court. *State v. Herrera/State v. Gonzalez*, 211 N.J. 308 (2012).

Appellate Division ordered a remand before the statewide judge despite no proof in the record as to racial profiling. *State v. Francis*, 341 N.J. Super. 67 (App. Div. 2001).

DISORDERLY PERSONS

III. GENERAL CONSTITUTIONAL ISSUES

C. Search and Seizure; Arrest

State v. Dangerfield, 171 N.J. 346 (2002)(police can arrest for disorderly and petty disorderly persons offenses committed in their presence); *State in re J.M.*, 339 N.J. Super. 244 (App. Div. 2001).

IV. SENTENCING

See *State v. Moran*, 202 N.J. 311 (2010) (adopting various factors to consider in determining a license suspension and its length of time); *State v. Bendix*, 396 N.J. Super. 91 (App. Div. 2007)(as to driver's license suspension).

V. SPECIAL DISORDERLY AND PETTY DISORDERLY PERSONS STATUTES AND CASES

B. Disorderly Conduct - N.J.S.A. 2C:33-2

2. Offensive Language - N.J.S.A. 2C:33-2b

See *State v. Paserchia*, 356 N.J. Super. 461 (App. Div. 2003).

G. Disrupting Meetings and Processions - N.J.S.A. 2C:33-8

Defendant, who was "vociferous" and "cantankerous" at a township council meeting, was not objectively disruptive because he voiced no "fighting words," evidenced no purpose to disrupt the meeting and did not actually disrupt it, and spoke about the council's substantive conduct. *State v. Charzewski*, 356 N.J. Super. 151 (App. Div. 2002).

VI. ADDITIONAL DISORDERLY PERSONS OFFENSES

Defendant convicted of simple assault may not have weapons returned that were seized pursuant to a domestic violence order. *State v. Wahl*, 365 N.J. Super. 356 (App. Div. 2004).

DNA

I. STATUTES

The Supreme Court rejected all constitutional challenges to the Act, declined to afford juveniles special protection, refused to permit expungement of DNA identifiers after service of sentence, and allowed law enforcement to use DNA

test results to investigate and solve crimes committed before the sample was taken. *State v. O'Hagen*, 189 N.J. 140 (2007); *A.A. v. Attorney General*, 189 N.J. 128 (2007).

N.J.S.A. 53:1-20.17 to .28, the DNA Database and Databank Act, is constitutional and not penal in nature. *State in re L.R.*, 382 N.J.Super. 605 (App. Div. 2006), *certif. denied*, 189 N.J. 642 (2007).

II. ADMISSIBILITY

Y-STR DNA testing was proven to be generally accepted within the scientific community. *State v. Calleia*, 414 N.J.Super. 125 (App. Div.), *rev'd on other grounds*, 206 N.J. 274 (2011).

DOMESTIC VIOLENCE

I. LEGISLATIVE INTENT

D. Sufficiency of the Act Allegedly Constituting Domestic Violence

2. Harassment

See *H.E.S. v. J.C.S.*, 175 N.J. 309 (2003)(defendant's video surveillance of wife's own bedroom could constitute harassment).

5. Stalking

See *H.E.S. v. J.C.S.*, 175 N.J. 309 (2003).

II. REMEDIES UNDER THE PREVENTION OF DOMESTIC VIOLENCE ACT

A. Jurisdiction and Venue - N.J.S.A. 2C:25-28a

Domestic Violence Act authorizes New Jersey courts to issue domestic violence restraining orders when the victim has fled the state to seek shelter from abuse. *State v. Reyes*, 172 N.J. 154 (2002). New Jersey courts have jurisdiction when domestic violence occurs out of state and defendants pursue victims seeking refuge in New Jersey. *Id.*

B. Temporary Restraining Orders

Procedural deficiencies (failure to swear complainant or to contemporaneously record testimony) rendered TRO and included warrant invalid. *State v. Cassidy*, 179 N.J. 150 (2004).

1. Effectiveness of a TRO

Failure to record a telephonic TRO, where the applicant is sworn, is a procedural deficiency that does not violate an indictable contempt charge. *State v. Masculin*, 355 N.J.Super. 250 (Law Div. 2002).

4. Notice to and Service Upon Defendant

Trial court must decide if defendant had actual notice of TRO before dismissing complaint for lack of proof of law enforcement officer's service of TRO. *State v. Mernar*, 345 N.J.Super. 591 (App. Div. (2001) (complainant claimed to have served a copy of TRO on defendant). When an alleged violation of a restraining order exists, the matter turns on whether actual notice was given, not the manner of service. *Id.*

C. Hearing on Domestic Violence Complaint - N.J.S.A. 2C:25-9

1. Timing of the Hearing

Less than 24 hours notice to defendant, and court's refusal to grant an adjournment, violate due process. *H.E.S. v. J.C.S.*, 175 N.J. 309 (2003).

E. Contempt Proceedings Upon a Violation of a Domestic Violence Order

See *State v. Masculin*, 355 N.J.Super. 250 (Law Div. 2002).

III. ARREST, SEARCH AND SEIZURE

A. Arrest and Filing Criminal Complaints

3. Probable Cause

To issue a search warrant under the Act, "reasonable cause" must exist that defendant has committed an act of domestic violence, possesses or has access to a firearm or other weapon, and his or her possession of or

access to the weapon poses a heightened risk of injury to the victim. *State v. Johnson*, 352 N.J.Super. 15 (App. Div. 2002). Also, a description of the weapon and its believed location must be reasonably specified in the warrant. *Id.*

B. Seizure of Weapons

1. Searches Pursuant to the Domestic Violence Act

Procedural deficiencies in TRO rendered it and included warrant invalid. *State v. Cassidy*, 179 N.J. 150 (2004).

Looking at and recording a firearm's serial number is not a seizure, and entry of that serial number into the NCIC database is not a search for Fourth Amendment purposes. *State v. Carlton Harris*, 211 N.J. 566 (2012). And illegal weapons lawfully seized during a domestic violence search warrant's execution under N.J.S.A. 2C:25-28j of the PDVA can serve as the basis of a subsequent criminal prosecution if the illegal nature of the weapons is immediately apparent. *Id.*

C. Return of Seized Weapons

See *State v. Wahl*, 365 N.J.Super. 356 (App. Div. 2004).

IV. OTHER RELATED ISSUES

H. Federal Law

Defendant convicted of simple assault in a domestic violence situation was prohibited from owning or possessing any firearms shipped or transported in interstate or foreign commerce under 18 U.S.C. §922(g)(9). *State v. Wahl*, 365 N.J.Super. 356 (App. Div. 2004).

I. Police Questioning

Officers responding to a domestic dispute may question those present without issuing *Miranda* warnings so long as the inquiries are reasonably related to confirming or dispelling suspicion and those questioned are not restrained to a degree associated with formal arrest. *State v. Smith*, 374 N.J.Super. 425 (App. Div. 2005). Such warnings are not required before general on-the-scene questioning in the factfinding process. *Id.*

DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND RES JUDICATA

I. RETRIAL NOT PROHIBITED

Double jeopardy clause did not bar retrying a defendant on the greater offenses of capital murder and first-degree murder where the jury foreperson announced in court that the jury was "unanimous against" guilt on those two offenses and deadlocked on a lesser-included offense, the jury resumed deliberations, and the judge declared a mistrial when the jury still could not reach a verdict after further deliberations. *Blueford v. Arkansas*, 132 S. Ct. 2044 (2012). The "foreperson's report was not a final resolution of anything," because "the jury's deliberations had not yet concluded." *Id.*

Where a defendant is found guilty of an offense by a jury and the conviction is reversed on appeal based on trial error, as opposed to insufficient evidence, there is no double jeopardy issue. *State v. Salter*, 425 N.J. Super. 504 (App. Div. 2012).

In a trial *de novo*, the Law Division judge could rely on the trooper's observations and roadside tests of defendant for drunk driving, even though the municipal court had rejected them. *State v. Kashi*, 360 N.J.Super. 538 (App. Div.), *aff'd per curiam*, 180 N.J. 45 (2004). No double jeopardy arose because drunk driving can be proven through either of two alternative evidential methods -- proof of blood alcohol content or proof of physical condition. *Id.*

II. RETRIAL PROHIBITED

A. Acquittals During Trial

Double jeopardy precluded trial court from “reconsidering” grant of judgment of acquittal because such an acquittal was a final judgment. *Smith v. Massachusetts*, 543 U.S. 462 (2005).

B. Acquittals After Deliberation of Verdict

Once defendant establishes a colorable claim that retrial would violate double jeopardy, State bears the burden to establish that reprosecuting defendant would not do so. *State v. Salter*, 425 N.J. Super. 504 (App. Div. 2012).

Where the indictment charged two counts of first-degree aggravated sexual assault, and the jury acquitted defendant of one count and found him guilty of the second, State was unable to show that evidence at retrial would not be the same evidence from the initial trial. *Id.* Appellate Division thus affirmed order dismissing the count with prejudice. *Id.*

Purported appeal from an order denying a request for appointment of a special municipal prosecutor was prohibited by double jeopardy after defendants were acquitted of ordinance violations at a trial *de novo* in the Law Division. Because the State was precluded from appealing the acquittal, so too was any party in its stead. *State v. Carlson*, 344 N.J. Super. 521 (App. Div. 2001), *certif. denied*, 171 N.J. 336 (2002).

C. Dismissals Pre-Trial

Federal constitution does not prohibit reinitiation of criminal proceedings where double jeopardy has not attached and no pattern of prosecutorial harassment exists. *Stewart v. Abraham*, 275 F.3d 220 (3d Cir. 2001), *cert. denied*, 536 U.S. 958 (2002).

D. Dismissals at Trial

Trial court erred in granting mistrial *sua sponte* based on various incidents, and should not have done so absent input from the attorneys and exploration of other alternatives. *State v. Georges*, 345 N.J. Super. 538 (App. Div. 2001), *certif. denied*, 174 N.J. 41 (2002). Two, a retrial would require considerable expenditures of time and resources. *Id.*

III. SAME OFFENSE

Defendant’s guilty plea to fourth degree creating a risk of widespread injury or death precluded his subsequent prosecution of DWI and reckless driving in municipal court when defendant’s driving under the influence formed the essential facts of the criminal charge. *State v. Hand*, 416 N.J. Super. 622 (App. Div. 2010).

Although defendant was acquitted of possessing a murder weapon, collateral estoppel did not apply and he could be convicted of committing the murders with the gun, especially where defendant presented perjured testimony by his witness. *State v. Kelly*, 406 N.J. Super. 332 (App. Div. 2009), *aff’d*, 201 N.J. 471 (2010). Even though double jeopardy precluded the State from retrying defendant on the acquitted offenses, he could not stand behind those acquittals to avoid retrial on separate offenses. *Id.*

The municipal court’s “bungling” produced a legal nullity as to defendant’s guilty plea to receiving stolen property, which did not bar on double jeopardy grounds his subsequent guilty pleas in the Law Division to eluding, aggravated assault and theft. *State v. Colon*, 374 N.J. Super. 199 (App. Div. 2005). Neither state nor federal double jeopardy principles barred his later prosecution on the pending indictment for crimes unconnected to the municipal offense. *Id.*

IV. MULTIPLE PUNISHMENT

Community supervision for life is a punitive portion of a defendant’s sentence, therefore, the addition of that aspect of a sentence only after defendant had

completely served the rest of his sentence was improper and ran afoul of the state and federal constitutions' double jeopardy provision. *State v. Schubert*, 212 N.J. 295 (2012).

Double jeopardy not applicable to the civil sexually violent predator act. *Seling v. Young*, 531 U.S. 250 (2001).

Imposing a more severe sentence at resentencing for a remaining conviction after another conviction had been reversed did not violate double jeopardy. *State v. Young*, 379 N.J. Super. 498 (App. Div. 2005), *certif. granted and summarily remanded*, 188 N.J. 349 (2006). The new sentence did not exceed the original term achieved via consecutive sentences, and the trial judge, in imposing the original sentences, clearly indicated that he would have imposed an extended term but for his ability to impose a consecutive sentence. *Id.* See *A.A. v. State of New Jersey*, 176 F. Supp.2d 274 (D.N.J. 2001) (Internet Registry for Megan's Law registrants does not violate double jeopardy), *aff'd*, 341 F.3d 206 (3d Cir. 2003).

V. MISTRIALS

B. Manifest Necessity

Trial court erred in granting a mistrial mid-trial based on purported manifest necessity, and double jeopardy required indictment's dismissal. *State v. Allah*, 170 N.J. 269 (2002).

C. Deadlocked Juries

State can re prosecute defendant capitally when jury, at the first capital trial, could not reach a unanimous verdict as to murder. *State v. Cruz*, 171 N.J. 419 (2002).

VI. GOVERNMENT APPEALS

State may appeal from trial court's grant of judgment notwithstanding the verdict; defendant was on notice that State intended to appeal, and thus had no expectation of finality in the sentence imposed. *State v. Cetnar*, 341 N.J. Super. 257 (App. Div.), *certif. denied*, 170 N.J. 89 (2001).

State could not untimely appeal from the trial court's imposition of probationary terms where defendant already had begun to serve those terms. *State v. Gould*, 352 N.J. Super. 313 (App. Div. 2002). While the State had appealed from defendant's original illegal sentence, it did not do so upon resentencing to legal terms. *Id.*

VII. FEDERAL-STATE RELATIONS AND DUAL SOVEREIGNTY

To dismiss an indictment pursuant to N.J.S.A. 2C:1-3f, the trial court must determine both that defendant is being prosecuted for an offense based on the same conduct in another jurisdiction and that New Jersey's interests will be adequately served by that foreign prosecution. *State v. Gruber*, 362 N.J. Super. 519 (App. Div.), *certif. denied*, 178 N.J. 251 (2003). Here the trial judge erred in dismissing defendant's New Jersey indictment for endangering based on a prior New York prosecution. *Id.*

VIII. RESENTENCE AFTER APPEAL OR ON DEFENDANT'S MOTION

State timely appealed defendant's sentence pursuant to N.J.S.A. 2C:44-1f(2), and thus no double jeopardy principle precluded resentencing. *State v. Evers*, 368 N.J. Super. 159 (App. Div. 2004).

ELUDING

II. ELEMENTS AND CONSTRUCTION

Second degree eluding does not require that defendant knowingly create a risk of death or injury to another; "knowingly" refers to the "flees or attempts to elude any police or law enforcement officer" element. *State v. Thomas*, 187 N.J. 1999

(2006); *State v. Dixon*, 346 N.J.Super. 126 (App. Div. 2001), *certif. denied*, 172 N.J. 181 (2002).

Eluding is elevated to a second degree crime even where defendant's unlawful conduct creates a risk of death or injury only to himself or herself. *State v. Bunch*, 180 N.J. 534 (2004). The term "any person," as used in the eluding statute, includes defendant. *Id.*

"Knowingly fled or attempted to elude" language in N.J.S.A. 2C:29-2b was likely included to foreclose any argument that defendant, to be convicted, must successfully elude the police. *State v. Mendez*, 345 N.J.Super. 498 (App. Div. 2001), *aff'd*, 175 N.J. 201 (2002). "Purposeful" mental state applicable to law of attempt is not imported into eluding. *Id.*

Uncontested failure to define "attempt" in eluding charge was not reversible error. *State v. DiFerdinando*, 345 N.J.Super. 382 (App. Div. 2001), *certif. denied*, 171 N.J. 338 (2002).

See *State v. Crawley*, 187 N.J. 440 (2006)(citizens may not use an improper police stop to justify commission of a new and distinct offense such as eluding, resisting arrest, escape, or obstruction).

ENDANGERING THE WELFARE OF CHILDREN

I. IMPAIRING THE MORALS OF A CHILD

A. Definition/Elements

The "knowing" mental element is required for the endangering statute's first element -- "engages in sexual conduct," but in light of the legislative history of the statute, the second element -- "conduct which would impair or debauch the morals of the child" can be satisfied without proof that the defendant was aware that his conduct would cause such a result. *State v. Bryant*, 419 N.J.Super. 15 (App. Div. 2011).

B. Sufficiency

A reasonable basis existed for the jury to convict the 34-year-old defendant of child luring and attempted endangerment when he offered to give the same seventh grade girl a ride in his car on one occasion and to come to his car on another, and admitted that he was physically attracted to the child. *State v. Perez*, 177 N.J. 540 (2003).

A defendant's subjective belief that a victim is a child suffices to impose liability for attempted endangering when that person was actually an adult (law enforcement). *State v. Kuhn*, 415 N.J.Super. 89 (App. Div. 2010), *certif. denied*, 205 N.J. 78 (2011).

Sufficient evidence existed to convict defendant of endangering the welfare of children even though he was not physically present when the crimes were committed -- defendant had telephoned the children and engaged in sexually explicit conversations with them. *State v. Maxwell*, 361 N.J.Super. 502 (Law Div. 2001), *aff'd*, 361 N.J.Super. 401 (App. Div.), *certif. denied*, 178 N.J. 34 (2003).

C. Evidence

See *State v. VanDyke*, 361 N.J.Super. 403 (App. Div.)(in endangering and sexual assault case, defendant could proffer evidence of child victim's school records to impeach testimony of child's mother), *certif. denied*, 178 N.J. 35 (2003); *State v. E.B.*, 348 N.J.Super. 336 (App. Div.)(trial court should have permitted defendant to offer DYFS worker's testimony that child victim's accusations of abuse were unsubstantiated), *certif. denied*, 174 N.J. 192 (2002).

D. Jury Instructions

See *State v. McInerney*, 428 N.J.Super. 432 (App. Div. 2012), in which the

Appellate Division reversed the second-degree endangering conviction of a long-term baseball coach of a high school, who had asked ten boys about their sexual activities, including intimate details about masturbation, asked some of the boys to videotape these activities, and provided them condoms. The Court held that the evidence and available inferences were adequate to prove beyond a reasonable doubt that the defendant assumed responsibility for the care of the children within the meaning of the statute. However, the jury instruction was problematic. The judge directed jurors that under appropriate circumstances a person who has assumed responsibility for the care of a child may include a school staff member, but did not explain what those appropriate circumstances were and effectively left the legal standard to the jurors' judgment. The judge also effectively directed the jurors that a school employee, even one without responsibility for the care of the child, was included in the parent or guardian definition, contrary to *State v. Galloway*, 133 N.J. 631 (1993). The panel urged the Model Jury Charge Committee to reconsider the guidance provided in footnote 5 of the Model Charge, and suggested adding a footnote cautioning against incorporating Title 9's definitions of parent or guardian or custodian and explaining what makes a child abused or neglected. Where the evidence of the ongoing relationship is supervisory in nature, rather than custodial, factors such as disparity in ages or maturity, the importance of the activity the adult supervises, and the extension of the supervisory relationship beyond "guidance and advice" expected are all relevant to assessing whether the defendant assumed ongoing and continuing responsibility for the child's care through a "continuing or regular supervisory" relationship. See *State v. Bryant*, 419 N.J. Super. 15 (App. Div. 2011) (provision of the model jury charge that defendant must know that sexual conduct would impair or debauch a child's morals is wrong; the knowing mental element can be satisfied without proof that defendant was aware that his conduct would cause such a result); *State v. D.V.*, 348 N.J. Super. 107 (App. Div.) (trial court's instructions did not direct the jury to convict defendant of endangering), *aff'd*, 176 N.J. 338 (2003).

II. CHILD ABUSE

See *State v. N.A.*, 355 N.J. Super. 143 (App. Div. 2002), *certif. denied*, 175 N.J. 434 (2003).

C. Admissibility of Evidence

Police erred in relating hearsay statements of non-testifying witnesses that inferred defendant's guilt. *State v. Frisby*, 175 N.J. 583 (2002).

Although the abused child's statement to his mother was admissible as a non-testimonial excited utterance, his statements to a DYFS worker, made in response to investigative questioning, were testimonial and violative of *Crawford v. Washington*, 541 U.S. 36 (2004). *State v. Buda*, 195 N.J. 278 (2008).

D. Jury Instruction

"Willfully forsaken," as used in N.J.S.A. 9:6-1 and incorporated in N.J.S.A. 2C:24-4, requires that defendant intend to permanently abandon a child.

Thus this term must be so defined for the jury. *State v. N.I.*, 349 N.J. Super. 299 (App. Div. 2002).

III. CHILD PORNOGRAPHY

A. Definition

Computer image printouts of existing photographs of naked children do not give rise to second degree endangering the welfare of children convictions

because they are not “reproductions” pursuant to *N.J.S.A. 2C:24-4b(4)*. *State v. Sisler*, 177 *N.J.* 199 (2003). Absent proof of dissemination or intent to do so, defendant was not a seller, distributor, or manufacturer of child pornography pursuant to *N.J.S.A. 2C:24-4b(5)(a)*. *Id.*

See *State v. May*, 362 *N.J. Super.* 572 (App. Div. 2003)(involving computer images of children).

C. Constitutionality

See *State v. May*, 362 *N.J. Super.* 572 (App. Div. 2003)(*N.J.S.A. 2C:24-4b* constitutional).

D. Legal Duty of Care

First degree endangering the welfare of a child by the production of pornography (*N.J.S.A. 2C:24-4b(3)*) is only committed if defendant is a parent, guardian or other person legally charged with the care or custody of the child. *State v. McAllister*, 394 *N.J. Super.* 571 (App. Div. 2007).

Defendant, the live-in boyfriend of the victim’s mother, gave no factual basis for finding that he was legally charged with the child’s care or custody. *Id.*

ESCAPE

V. DEFENSES

An invalid stop does not prevent defendant’s conviction for a new and distinct offense (escape, eluding, obstruction, or resisting arrest) arising from that stop.

State v. Crawley, 187 *N.J.* 440 (2006).

EVIDENCE

IV. CHARACTER EVIDENCE (See also BIAS, CREDIBILITY)

Extending the holding in *State v. Guenther*, 181 *N.J.* 129 (2004), the Court held that a defendant may impeach the credibility of a victim-witness with false allegations made after the underlying accusations made against defendant.

State v. A.O., 198 *N.J.* 69 (2009).

Irrelevant traits of character of defendant, an attorney, were inadmissible as to intent. *State v. Mahoney*, 188 *N.J.* 359, *cert. denied*, 127 *S.Ct.* 507 (2006).

Defense witnesses could not testify about their personal experiences with defendant that formed the basis for their character opinions. *Id.*

The interests of justice required relaxation of the strictures against specific conduct evidence pursuant to *N.J.R.E. 608*, thereby permitting use of a prior false criminal accusation to impeach a victim-witness’ credibility. *State v. Guenther*, 181 *N.J.* 129 (2004); *State v. R.E.B.*, 385 *N.J. Super.* 72 (App. Div. 2006).

Trial courts should hold a hearing to determine, by a preponderance of the evidence, whether defendant has proven that the victim made a prior accusation alleging criminal conduct and whether that accusation was false. *State v. Guenther*, 181 *N.J.* 129 (2004).

The State may not offer proof of a 16-year-old victim’s virginity prior to her sexual encounter with defendant as evidence that she was unlikely to have consented to such relations; *N.J.R.E. 404(a)* prohibits such use. *State v. Burke*, 354 *N.J. Super.* 97 (Law Div. 2002).

V. CONFRONTATION (See also **SIXTH AMENDMENT**)

Testimonial statements of witnesses absent from trial are only admissible if the declarant is unavailable and defendant has had a prior opportunity to cross examine. *Crawford v. Washington*, 541 *U.S.* 36 (2004). This decision overrules *Ohio v. Roberts*, 448 *U.S.* 56 (1980). *Id.*

The Confrontation Clause required that a defendant have the right to confront the analyst who certified in a laboratory report that defendant’s blood alcohol concentration was well above the threshold for aggravated DWI, unless the

analyst was unavailable, and the accused had an opportunity, pretrial, to cross-examine that particular analyst. *Bullcoming v. New Mexico*, 546 U.S. ____ 131 S.Ct. 2705 (2011).

Where a Cellmark lab expert testified that, in her opinion, defendant's DNA matched that of the rape victim's attacker, there was no Confrontation Clause violation because the clause has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. *Williams v. Illinois*, 132 S. Ct. 2221 (2012). The Cellmark report itself could have been admitted into evidence because it different from affidavits, depositions, prior testimony, and confessions. *Id.*

Whether an out-of-court statement elicited during police questioning is testimonial under *Crawford* depends on whether the circumstances of the encounter, viewed objectively, indicate that the primary purpose of the questions was to establish past facts or to enable police to provide aid in an ongoing emergency. *Davis v. Washington*, 547 U.S. 813 (2006).

A mortally wounded shooting victim's statements to police as to the identification and description of the shooter and the location of the shooting were not testimonial and therefore did not violate the confrontation clause because the circumstances of the interaction between the victim and the police objectively indicated that the primary purpose of the questioning was to enable police assistance in meeting an ongoing emergency. *Michigan v. Bryant*, 131 S.Ct. 1143 (2011).

Affidavits reporting the results of a state drug laboratory's analysis is testimonial and therefore, subject to the Confrontation Clause under *Crawford*. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). Accordingly, defendant was entitled to confront the analyst at trial to challenge the affidavit's conclusion that the material seized by the police was cocaine. *Id.*

Admission of a child-victim's out-of-court statement to police did not violate the Confrontation Clause under *Crawford*, merely because the child was reluctant to answer many questions put to her on the stand by the prosecutor. *State v. Nyhammer*, 197 N.J. 383 (2009), *cert. denied*, 130 S.Ct. 165 (2009).

A non-testifying robbery witness' statements relating to the details of a crime to a police officer did not satisfy the present sense hearsay exception (*N.J.R.E.* 803(c)(1)) and were testimonial in nature. *State v. J.A.*, 195 N.J. 324 (2008).

A child's statements to his mother and a DYFS worker were admissible as excited utterances and were non-testimonial. *State v. Buda*, 195 N.J. 278 (2008).

Trial judge erred in excluding evidence under *N.J.S.A. 2C:14-7* regarding the sexual assault victim's past flirtations with defendant occurring between 1½ and 6 years prior to the assault. *State v. Garron*, 177 N.J. 147 (2003), *cert. denied*, 540 U.S. 1160 (2004). The rape shield statute keeps from the jury constitutionally compelled evidence that must be admitted; evidence relevant to the defense that has probative value outweighing its prejudicial effect must be placed before the factfinder. *Id.*

The confrontation clause was satisfied where the expert witness who testified to defendant's blood alcohol content supervised the testing of defendant's blood sample and drew his own conclusions from the information generated by the machine that conducted the test, and he executed the lab certification. *State v. Rehmann*, 419 N.J. Super. 451 (App. Div. 2011).

The state constitution provides no greater protection for defendants to cross-examine hearsay declarants about their out-of-court testimonial assertions than

the United States Supreme Court pronounced in *Crawford* and *Davis*. *State v. Kent*, 391 N.J.Super. 352 (App. Div. 2007).

Admitting the uniform certification that blood was taken in a medically acceptable manner was testimonial hearsay that violated defendant's confrontation rights in his drunk driving prosecution. *State v. Renshaw*, 390 N.J.Super. 456 (App. Div. 2007).

Crawford does not apply to sentencing hearings. *United States v. Robinson*, 482 F.3d 244 (3d Cir. 2007).

The "confrontation" requirement of *Crawford* does not apply where the *reliability* of testimonial evidence is not at issue, and a defendant's confrontation rights may be satisfied even though the declarant does not testify. *United States v. Trala*, 386 F.3d 536 (3d Cir. 2004), *vacated and remanded o.g.* 546 U.S. 1086 (2006). The jury would not mistakenly assume the truth of declarant's statements because they were admitted as being obviously false and to establish that declarant was lying, and defendant could cross-examine the police officer to whom the statements were given. *Id.*

VI. CREDIBILITY AND BIAS (See also PRIOR INCONSISTENT STATEMENTS)

Testimony given by the plaintiff or defendant during the trial of a domestic violence proceeding can be used for the limited purpose of cross-examination in a related criminal trial. *State v. Duprey*, 427 N.J. Super. 314 (App. Div. 2012).

The testimony that a witness actually saw a defendant more times than he indicated in his police statement did not warrant a mistrial because defense counsel was permitted to exploit this apparent inconsistency. *State v. Yough*, 208 N.J. 385 (2011).

Battered woman syndrome evidence is relevant to a defendant's credibility and to whether she honestly believed that an imminent threat of danger existed.

State v. B.H., 183 N.J. 171 (2005).

Racial profiling evidence inadmissible to attack witness' credibility at trial; defendant offered no viable theory to use possible evidence of racial profiling and judge reviewed trooper's personnel file and found nothing whatsoever of discoverable nature. *State v. Herrera/State v. Gonzalez*, 211 N.J. 308 (2012).

VIII. EXPERT WITNESS (See also SCIENTIFIC AND TECHNICAL EVIDENCE)

A. Generally

A detective, who was not qualified as an expert witness, should not have been permitted to testify that he observed defendant engage in what he believed to be narcotics transactions under N.J.R.E. 701 because it intruded on the jury's fact-finding role by expressing an opinion on guilt. *State v. McLean*, 205 N.J. 438 (2011).

Drug expert's testimony improper for intruding on jury's factfinding function and commenting on defendant's guilt, where (1) testimony was not in hypothetical form and referred to defendant directly, (2) testimony tracked language of the criminal statute, and (3) testimony commented directly on guilt by expressing that he possessed drugs with intent to sell them. *State v. Jones*, 425 N.J. Super. 258 (App. Div. 2012).

Expert witness could not testify that defendant's slip-and-fall was not staged. *State v. Tarlowe*, 370 N.J.Super. 224 (App. Div. 2004).

Expert witness cannot offer a net opinion. *State v. Pavlik*, 363 N.J.Super. 307 (App. Div. 2003).

Police officer's unchallenged expert testimony about drug distribution did not invade the jury's factfinding role. *State v. Summers*, 350 N.J.Super. 353 (App. Div. 2002), *aff'd*, 176 N.J. 306 (2003). An expert can testify, in the context of a hypothetical question, that an individual possessed drugs for

distribution. *State v. Summers*, 176 N.J. 306 (2003); see *State v. Nesbitt*, 185 N.J. 504 (2006).

Trial court correctly allowed a State's accident reconstruction expert to testify as to the "speed loss" of defendant's vehicle in an assault by auto case.

State v. Pigueiras, 344 N.J. Super. 297 (App. Div. 2001), *certif. denied*, 171 N.J. 337 (2002).

See *State v. Bealor*, 187 N.J. 574 (2006) (although expert testimony is the preferred method for proving marijuana intoxication, police officers may be so qualified based on their training); *State v. Miraballes*, 392 N.J. Super. 342 (App. Div.) (as to non-traditional religious expert), *certif. denied*, 192 N.J. 75 (2007); *State v. Walker*, 385 N.J. Super. 388 (App. Div.) (trial court properly admitted a detective's expert opinions that the apartment was fortified and that defendant possessed drugs for distribution), *certif. denied*, 187 N.J. 83 (2006); *State v. L.P.*, 338 N.J. Super. 227 (App. Div.) (CSAAS), *certif. denied*, 170 N.J. 205 (2001).

B. Expert Testimony Based on Hearsay

Rebuttal testimony of the State's psychiatrist was admissible. *State v. Burris*, 357 N.J. Super. 326 (App. Div. 2002), *certif. denied*, 176 N.J. 279 (2003).

State's expert improperly offered inadmissible hearsay and opinions as to defendant's credibility and moral character. *State v. Vandeweaghe*, 351 N.J. Super. 467 (App. Div. 2002), *aff'd*, 177 N.J. 229 (2003).

Expert can rely on hearsay as to prior crimes, if of a type that experts in the relevant field rely on in reaching a conclusion. *State v. Eatman*, 340 N.J. Super. 295 (App. Div.), *certif. denied*, 170 N.J. 85 (2001).

C. Qualification of Expert Witness

Expert on battered woman's syndrome did not give a "net" opinion, and could testify about domestic violence and the effects of battering even though the deceased victim had not been diagnosed as suffering from battered woman's syndrome. *State v. Townsend*, 186 N.J. 473 (2006). Thus the State's expert could testify that battered women and those suffering from the syndrome lie to protect their abusers out of fear of future abuse. *Id.*

Reversible error to allow a medical examiner qualified as a pathology expert to testify to matters of biomechanics and accident reconstruction in order to show defendant drove the car in a vehicular homicide case. *State v. Locascio*, 425 N.J. Super. 474 (App. Div.), *certif. denied*, 212 N.J. 459 (2012).

A qualified expert properly gave blood spatter testimony. *State v. Lewis*, 389 N.J. Super. 409 (App. Div.), *certif. denied*, 190 N.J. 393 (2007).

Insufficient evidence of general acceptance in the relevant scientific community existed of defense expert witness' proffered testimony about the credibility of defendant's confessions. *State v. Free*, 351 N.J. Super. 203 (App. Div. 2002). Thus the witness' opinions were not scientifically reliable, and the subject matter involved -- the credibility of confessions -- was not beyond the average juror's grasp. *Id.*

IX. FRESH COMPLAINT

Child victim's foster mother and another foster child could relate unprompted fresh complaint evidence that defendant had sexually assaulted her. *State v. L.P.*, 352 N.J. Super. 369 (App. Div.), *certif. denied*, 174 N.J. 546 (2002). Such evidence is especially appropriate where the State relies on CSAAS testimony. *Id.*

See *State v. W.B.*, 205 N.J. 588 (2011); *State v. Nyhammer*, 197 N.J. 383 (2009); *State v. R.E.B.*, 385 N.J. Super. 72 (App. Div. 2006); *State v. Pillar*, 359 N.J. Super. 249 (App. Div.), *certif. denied*, 177 N.J. 572 (2003).

XI. HEARSAY

A. Generally

Because the jury only needed to know that police fairly displayed a photographic array, the reasons for including defendant's photo -- he was developed as a suspect based on "information received" -- were irrelevant and highly prejudicial. *State v. Branch*, 182 N.J. 338 (2005).

The guilty pleas of non-testifying accomplices are inadmissible hearsay, and cannot be offered to attack their credibility. *State v. Rucki*, 367 N.J. Super. 200 (App. Div. 2004).

Hearsay rules do not apply to undisputed facts agreed to by the parties and presented to the grand jury. *State v. Neal*, 361 N.J. Super. 522 (App. Div. 2003).

Prosecutor erred in eliciting unobjected-to testimony from a police officer revealing specific information that officer had received linking defendant as the perpetrator. *State v. Taylor*, 350 N.J. Super. 20 (App. Div.), *certif. denied*, 174 N.J. 190 (2002). Repeating what a non-testifying individual told the police denied defendant his right of confrontation. *Id.*; see *State v. Vandeweaeghe*, 351 N.J. Super. 467 (App. Div. 2002)(police officer may testify that he or she went to a scene "based on information received"), *aff'd*, 177 N.J. 229 (2003).

See *State v. Frisby*, 175 N.J. 583 (2002)(officers repeated hearsay of non-testifying witnesses and inferred defendant's guilt); *State v. Burris*, 357 N.J. Super. 326 (App. Div. 2002)(certain hearsay properly admitted under various evidence rules, and accompanied by correct limiting instructions), *certif. denied*, 176 N.J. 279 (2003).

B. Adoptive Admissions (See also **SELF-INCRIMINATION**)

Confidential informant's pre-charge statements were not adoptive admissions. *State v. Brown*, 170 N.J. 138 (2001)(overruling *State v. Dreher*, 302 N.J. Super. 408 (App. Div.), *certif. denied*, 152 N.J. 10 (1997), *cert. denied*, 524 U.S. 943 (1998)).

C. Business and Official Records

A breathalyzer machine's certificate of operability offered by the State to meet its burden of proof remains admissible as a business record under N.J.R.E. 803(c)(6), and does not violate *Crawford*. *State v. Dorman*, 393 N.J. Super. 28 (App. Div.), *aff'd*, *State v. Sweet*, 195 N.J. 357 (2008). The certificate was not created with any specific case in mind, and was intended to document the regular business function of monitoring a particular breathalyzer machine. *Id.* A drunk driving laboratory certificate is "testimonial," and does not qualify as a business record (N.J.R.E. 803(c)(6)) or as a government record (N.J.R.E. 803(c)(8)) absent the preparer's testimony. *State v. Berezansky*, 386 N.J. Super. 84 (App. Div. 2006), *certif. granted*, 191 N.J. 317 (2007), *appeal dismissed*, 196 N.J. 82 (2008); see *State v. Kent*, 391 N.J. Super. 352 (App. Div. 2007); *State v. Renshaw*, 390 N.J. Super. 456 (App. Div. 2007); *State v. Cleverley*, 348 N.J. Super. 455 (App. Div. 2002)(Breath Test Inspectors' Inspection Certification admissible as a business record (N.J.R.E. 803(c)(6)) or record of a public official (N.J.R.E. 803(c)(8)) when properly authenticated).

D. Declarations Against Interest

Confidential informant's pre-charge statements were not against informant's interest, and did not meet N.J.R.E. 803(c)(25). *State v. Brown*, 170 N.J. 138 (2001).

Codefendant's statement that he reluctantly participated in burglary of a home, and that a third party killed the homeowner when she surprised the

burglars by returning, was too self serving and tainted by a motive to exculpate the declarant from liability to be admissible under *N.J.R.E.* 803(c)(25) at defendant's trial. *State v. Nevius*, 426 *N.J. Super.* 379 (App. Div. 2012), *cert. denied*, ___ *N.J.* ___ (2013).

2. Co-Conspirator Statements

See *State v. James*, 346 *N.J. Super.* 441 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002); *State v. Baluch*, 341 *N.J. Super.* 141 (App. Div.), *certif. denied*, 170 *N.J.* 89 (2001); *State v. Soto*, 340 *N.J. Super.* 47 (App. Div.), *certif. denied*, 170 *N.J.* 209 (2001).

4. Confession of Another

A deceased's statement to a witness that "I shot some kid" was on its face inculpatory, and automatically qualified as a statement against interest under *N.J.R.E.* 803(c)(25) at defendant's trial for murdering a child. *State v. Williams*, 169 *N.J.* 349 (2001). The statement's reliability affected only its weight, not its admissibility, and excluding it was not harmless error. *Id.* The statement police heard defendant make to a co-defendant, that he was going to get his gun and bullet-proof vest and "party with the cops" was admissible as a statement against interests. *State v. Baylor*, 423 *N.J. Super.* 578 (App. Div. 2011), *certif. denied*, 210 *N.J.* 263 (2012).

E. Excited Utterances

Child's statement to his mother and DYFS worker concerning his abuse at defendant's hands was admissible as a non-testimonial excited utterance. *State v. Buda*, 195 *N.J.* 278 (2008).

Statements by a child in response to a detective's questioning immediately following a burglary of her home were not excited utterances because she had the opportunity to deliberate before answering questions. *State v. Branch*, 182 *N.J.* 338 (2005). The Court declined, however, to require that the declarant be unavailable as a condition to admitting such utterances. *Id.* Statements made by defendant to her murder victim regarding uncharged acts of misconduct relating to defendant's mother's death, which the victim related to her own mother, are *res gestae* and excited utterances to prove motive. *State v. Long*, 173 *N.J.* 138 (2002).

Child's oral statements given at the police station a few hours after defendant molested her were excited utterances, but her subsequent written statement given at police request was not so admissible because the record did not reveal if *N.J.R.E.* 803(c)(2) was satisfied. *State v. Conigliaro*, 356 *N.J. Super.* 54 (App. Div. 2002). The error in admitting the written statement was not harmless, despite the proper admission of the nearly identical oral statement. *Id.*

Statements of criminal accomplices inculpatory defendants "are ... so inherently suspect that they should not be admitted in a criminal trial." *State v. Rivera*, 351 *N.J. Super.* 93 (App. Div.), *aff'd o.b.* 175 *N.J.* 612 (2003).

Codefendant's statements inculpatory himself and defendant in drug crimes were not admissible as excited utterances because their relationship (that the drugs were defendant's and not his) to the startling event (codefendant's arrest for discarding the drugs) was questionable. *Id.*

Excited utterances by a witness to a stabbing were admissible under *N.J.R.E.* 803(c)(2), but prosecutor erred in refusing to provide witness' address and telephone number to the defense. This deprived defendant of an opportunity to investigate. *State v. Clark*, 347 *N.J. Super.* 497 (App. Div. 2002).

See *State v. J.A.*, 195 *N.J.* 324 (2008)(insufficient record to determine whether a non-testifying witness' statements to police officer about the details

- of a crime were excited utterance); *State v. Cotto*, 182 N.J. 316 (2005)(although certain hearsay statements were not excited utterances, their admission caused defendant no significant harm).
- G. Informant Hearsay
 See *State v. Vandeweaghe*, 177 N.J. 229 (2003).
- J. Prior Consistent Statements (See also BIAS, CREDIBILITY)
N.J.R.E. 803(a) contains no temporal requirement, and its purpose is best served by allowing trial judges to evaluate relevance under all of the circumstances in which the prior statement is offered. *State v. Muhammad*, 359 N.J. Super. 361 (App. Div.), *certif. denied*, 178 N.J. 36 (2003). Whether the statement was made before or after an asserted motive to fabricate existed is a substantial, but not a controlling, factor in determining relevance. *Id.*
 See *State v. Baluch*, 341 N.J. Super. 141 (App. Div.), *certif. denied*, 170 N.J. 89 (2001).
- M. State of Mind (See also RES GESTAE)
 A victim's state of mind hearsay statements are admissible if relevant to show defendant's motive and a showing is made that defendant either knew or probably knew of that state of mind. *State v. Calleia*, 206 N.J. 274 (2011). Co-defendant's statements concerning future criminal acts he intended to commit with defendant were inadmissible against defendant under the state of mind exception, *N.J.R.E.* 803(c)(3). *State v. McLaughlin*, 205 N.J. 185 (2011).
 Portions of murder victim's diary and letter were not admissible pursuant to *N.J.R.E.* 803(c)(3) because her state of mind was not relevant. *State v. Chavies*, 345 N.J. Super. 254 (App. Div. 2001).
 See *State v. Long*, 173 N.J. 138 (2002).
- N. Tender Years
 The Court upheld the totality-of-the circumstances test for admitting tender years statements under *N.J.R.E.* 803(c)(27), while rejecting a *per se* rule of exclusion due to failure to electronically record. *State v. P.S.*, 202 N.J. 232 (2010).
 Child sexual assault victim's statements to his mother were properly admitted under the tender years exception. *State v. Coder*, 198 N.J. 451 (2009); *State v. R.B.*, 183 N.J. 308 (2005). Because the statements did not result from any law enforcement effort to prove past events potentially relevant to later prosecution, the statements were non-testimonial. *Coder*, 198 N.J. 451.
 The tender years exception does not violate *Crawford* where the child testifies at trial and is available to defend or explain his or her prior videotaped statement. *State v. Burr*, 392 N.J. Super. 538 (App. Div.), *aff'd*, 195 N.J. 119 (2008).
 See *State v. T.E.*, 342 N.J. Super. 14 (App. Div.), *certif. denied*, 170 N.J. 86 (2001).
- O. Dying Declaration
 See *State v. Taylor*, 350 N.J. Super. 20 (App. Div.)(trial court erred in admitting a dying declaration (*N.J.R.E.* 804(b)(2))(on a surveillance videotape showing murder victim's last few minutes of life), *certif. denied*, 174 N.J. 190 (2002).
- P. Statement Offered Against a Party
 The hearsay exceptions in *N.J.R.E.* 803(c)(5) and 803(b)(1) allows the admissibility of a defendant's unsigned and unacknowledged transcribed statement to police provided there is no objection and all foundational

requirements are met. The trial court did not commit plain error by permitting the State to move the transcribed confession into evidence after the record had closed. *State v. Gore*, 205 N.J. 363 (2011).

R. 3:9-2, allowing a court accepting a guilty plea to order that such plea not be evidential in a civil proceeding, was not intended to apply to a Title 9 or Title 30 action commended by DYFS. *State v. Lacey*, 416 N.J. Super. 123 (App. Div. 2010), *certif. denied*, 205 N.J. 101 (2011).

Defendant's spontaneous statements, made after arrest and waiver of *Miranda* rights, were inadmissible because they were not relevant to proving or disproving a fact of consequence, and his cognitive deficit pointed to a certain lack of reliability. *State v. Beckler*, 366 N.J. Super. 16 (App. Div.), *certif. denied*, 180 N.J. 151 (2004).

Defendant's guilty pleas are evidential in civil proceedings pursuant to R. 3:9-2 as statements against interest under N.J.R.E. 803(b)(1). *State v. Tsilimidos*, 364 N.J. Super. 454 (App. Div. 2003). Defendant must show good cause why the plea should not be evidential. *Id.*

Q. Present Sense Impression

A non-testifying robbery witness' statements relating to the details of a crime to a police officer did not satisfy the present sense hearsay exception (N.J.R.E. 803(c)(1)) and were testimonial in nature. *State v. J.A.*, 195 N.J. 324 (2008).

XII. IMPEACHMENT (See also PRIOR CONVICTIONS)

Defendant entitled to review school records of child sexual assault victim to impeach the credibility of the victim's mother, who testified that her son's behavior changed after defendant became involved with him. *State v. VanDyke*, 361 N.J. Super. 403 (App. Div.), *certif. denied*, 178 N.J. 35 (2003). When ruling on whether the State may impeach defendant with prior convictions, the court may consider intervening disorderly persons convictions when conducting a remoteness analysis under *Sands*. Seven intervening disorderly persons offenses "bridged the gap" between 13-year-old drug convictions and defendant's current offenses. *State v. Harris*, 209 N.J. 431 (2012).

XIV. JUDICIAL NOTICE (See also SCIENTIFIC AND TECHNICAL EVIDENCE)

The judicial notice rule (N.J.R.E. 201) cannot be used for finding the truth of facts that are reasonably disputed, not generally or universally known, or not easily verifiable. *State v. Silva*, 394 N.J. Super. 270 (App. Div. 2007). See *State v. Simbara*, 175 N.J. 37 (2002).

XV. PRIVILEGES

B. Cleric-Penitent Privilege

Defendant was not protected under the cleric-penitent privilege because the circumstances surrounding the communications did not demonstrate that defendant made them to a pastor in confidence for purposes of spiritual counsel. *State v. J.G.*, 402 N.J. Super. 290 (App. Div. 2008)

C. Marital Privilege

Where a witness and defendant were married after the filing of a criminal complaint against the defendant, there was no legal basis for disregarding the spousal privilege under N.J.R.E. 501(2) that precludes the spouse of an accused from testifying in a criminal action, and the record gave no indication that this was a sham marriage entered into by the parties to prevent the witness from testifying. *State v. Mauti*, 416 N.J. Super. 178 (App. Div. 2010), *aff'd*, 208 N.J. 519 (2012).

- Defendant and her husband had waived the spousal privilege against his testifying at her trial (*N.J.R.E.* 501(2)) because he had strategically waived it at his prior trial. To allow otherwise would permit a procedural rule to shield against the finding of truth at a criminal trial. *State v. Baluch*, 341 *N.J. Super.* 141 (App. Div.), *certif. denied*, 170 *N.J.* 89 (2001).
- XVI. NEUTRALIZATION (See also HEARSAY, PRIOR INCONSISTENT STATEMENTS)
 Trial courts may not permit the State to “neutralize” the testimony of an uncooperative witness who did not testify in a manner that “surprised” the prosecutor. *State v. Benthall*, 182 *N.J.* 373 (2005).
- XVII. PHOTOGRAPHIC EVIDENCE
 Trial court properly admitted nude photographs of defendant to corroborate child’s descriptions of his body based on her observations during his sexual assaults upon her. *State v. L.P.*, 352 *N.J. Super.* 369 (App. Div.), *certif. denied*, 174 *N.J.* 546 (2002).
- XXII. OTHER CRIMES - *N.J.R.E.* 404(b)
 A. Other Crimes - Generally
 Evidence that defendant had sold drugs to the co-defendant 30 times over a six-month period prior to their commission of a robbery was unduly prejudicial other-crimes evidence and should have been sanitized. *State v. Barden*, 195 *N.J.* 375 (2008).
 Defendant’s confession to being in the midst of a two-day robbery spree was admissible in his robbery trial, but the admission of evidence regarding his involvement in a prior uncharged robbery was error requiring retrial because it was factually dissimilar from the robbery for which he was being tried. *State v. Kemp*, 195 *N.J.* 135 (2008).
 No *per se* ban exists on admitting uncorroborated other-crimes testimony of a cooperating codefendant if it meets the *Cofield* test. *State v. Hernandez*, 170 *N.J.* 106 (2001).
 Defendant’s admission that he had held a full vial of cocaine on a prior occasion was admissible to impeach his claim that he was unaware of the contents of four vials found in his possession upon his arrest. *State v. Lykes*, 192 *N.J.* 519 (2007).
 Although defendant’s attempt to bribe his victim not to testify against him might be viewed as part of the *res gestae*, the Appellate Division panel somehow considered that argument foreclosed by *State v. Williams*, 190 *N.J.* 114 (2007). *State v. Burden*, 393 *N.J. Super.* 159 (App. Div. 2007), *certif. denied*, 196 *N.J.* 344 (2008). Believing that evidence supporting a count in the indictment nonetheless must be analyzed under *N.J.R.E.* 404(b), the panel found the evidence here so admissible. *Id.*
 Evidence that defendant possessed oxycodone, in a prosecution for cocaine possession, was impermissible other-crimes evidence, as the apparent prejudice of the evidence outweighed its probity. *State v. Jones*, 425 *N.J. Super.* 258 (App. Div. 2012).
 Robbery that defendant committed immediately upon receiving a gun was relevant to establish that he obtained it for the purpose of committing armed robberies. *State v. Muhammad*, 359 *N.J. Super.* 361 (App. Div.), *certif. denied*, 178 *N.J.* 36 (2003).
 See *State v. Vallejo*, 198 *N.J.* 122 (2009) (allusions to other crimes and DV restraining order “poisoned” defendant’s trial); *State v. Castagna*, 400 *N.J. Super.* 164 (App. Div. 2008) (evidence admissible to prove motive); *State v. Baker*, 400 *N.J. Super.* 28 (App. Div.), *aff’d*, 198 *N.J.* 189 (2009)(testimony

- regarding defendant's earlier bank robbery was admissible to flesh out the material issue of defendant's intent and whether there was knowledge or a plan in a subsequent robbery), *aff'd*, 198 N.J. 189 (2009); *State v. Davis*, 390 N.J. Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007); *State v. Townsend*, 374 N.J. Super. 25 (App. Div. 2005)(trial court properly admitted other-crimes evidence of defendant's violence committed against the deceased to prove motive, intent and state of mind), *aff'd in part and rev'd in part o.g.* 186 N.J. 473 (2006); *State v. Beckler*, 366 N.J. Super. 16 (App. Div.)(defendant's statements about sex acts with boys inadmissible because they lacked relevance to case), *certif. denied*, 180 N.J. 151 (2004); *State v. Jenkins*, 356 N.J. Super. 413 (App. Div.)(trial court properly admitted other-crimes evidence that murder victim had testified against defendant at a prior murder trial because it proved an element of the witness retaliation charge and established motive; cumulative effect of the multitude of other-crimes evidence admitted and the lack of clear and complete limiting instructions deprived defendant of a fair trial), *aff'd*, 178 N.J. 347 (2004); *State v. T.C.*, 347 N.J. Super. 219 (App. Div. 2002)(trial court correctly admitted evidence of defendant's withholding of food from her son for time period outside time frame of endangering charge), *certif. denied*, 177 N.J. 222 (2003).
- D. Other Crimes - Motive
- Evidence of defendant's membership in the Bloods gang were triggered by defense raising the issue and making many of the references itself. *State v. Baylor*, 423 N.J. Super. 578 (App. Div. 2011), *certif. denied*, 210 N.J. 263 (2012).
- Evidence that defendant was previously in jail awaiting trial for the attempted murder of the victim and main witness in that case was admissible under N.J.R.E. 404(b) in the subsequent trial for the same victim's eventual murder, committed by a fellow inmate at defendant's behest, as proof of motive, intent and plan. *State v. Rose*, 206 N.J. 141 (2011).
- Gang-related evidence was properly admitted under N.J.R.E. 404(b) because it was relevant to defendant's motive in explaining why he would shoot someone with whom he was friendly by demonstrating the "rival gangs" aspect. *State v. Goodman*, 415 N.J. Super. 210 (App. Div. 2010), *certif. denied*, 205 N.J. 78 (2011).
- Specific instances of defendant's conduct toward his former girlfriend, his financial circumstances, job as a male dancer or insinuations of male prostitution and credit fraud were not relevant to his motive for killing the victim under N.J.R.E. 404(b). *State v. Foglia*, 415 N.J. Super. 106 (App. Div.), *certif. denied*, 205 N.J. 15 (2010).
- Defendant put in issue his motive and intent by claiming that he never knowingly or intentionally possessed child pornography and that his conversations with the supposed child were mere fantasizing with another he believed was an adult, which permitted the State to adduce bad-acts evidence. *State v. Davis*, 390 N.J. Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007).
- Jury could not view victim's videotaped testimony against defendant at a prior murder trial because it, together with additional other-crimes evidence, created too great a risk that jurors would attribute to him a propensity to kill. *State v. Jenkins*, 178 N.J. 347 (2004).
- See *State v. Townsend*, 374 N.J. Super. 25 (App. Div. 2005), *aff'd in part and rev'd in part o.g.* 186 N.J. 473 (2006).
- E. Other Crimes - State of Mind

Evidence of defendant's post-shooting conduct tending to prove his consciousness of guilt was relevant to his mental state and admissible at his reckless manslaughter retrial. *State v. Williams*, 190 N.J. 114 (2007). Such evidence could permit the jury to find that defendant was subjectively aware of the risk his conduct posed -- an element of the mental state of recklessness. *Id.* Finally, the evidence's probative value was not outweighed by the potential for undue prejudice. *Id.*

Defendant put in issue his motive and intent by claiming that he never knowingly or intentionally possessed child pornography and that his conversations with the supposed child were mere fantasizing with another he believed to be an adult, which permitted the State to adduce bad-acts evidence. *State v. Davis*, 390 N.J. Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007).

See *State v. Lewis*, 389 N.J. Super. 409 (App. Div.) (evidence of defendant's prior bad acts admissible to demonstrate his state of mind), *certif. denied*, 190 N.J. 393 (2007); *State v. Townsend*, 374 N.J. Super. 25 (App. Div. 2005), *aff'd in part and rev'd in part* o.g. 186 N.J. 473 (2006).

I. Other Crimes - Identity

Defendant's use of a murder weapon in a prior robbery was highly relevant to the disputed material issue of identity in subsequent murders where the same weapon was used. *State v. Gillispie*, 208 N.J. 59 (2011).

See *State v. Fortin*, 189 N.J. 579 (2007); *State v. Fortin*, 178 N.J. 540 (2004); *State v. Jenkins*, 349 N.J. Super. 464 (App. Div.), *certif. denied*, 174 N.J. 43 (2002).

J. Subsequent Crimes - Generally

Evidence of defendant's robbery was inadmissible to bolster a critical prosecution witness' credibility at defendant's trial for a prior robbery because it was irrelevant and too prejudicial. *State v. Darby*, 174 N.J. 509 (2002).

See *State v. Cofield*, 127 N.J. 329 (1992).

K. State Witnesses

Defendant could not present irrelevant evidence of prior police misconduct to support his claim that officers involved in his case -- who were not alleged to have committed misconduct themselves -- had "planted" evidence and fabricated charges. *State v. Franklin*, 384 N.J. Super. 306 (App. Div. 2006).

"Other act" evidence regarding the police department was inadmissible because it related to the department generally and not to the officers testifying, and trial courts must weight probativeness versus prejudice when defendant offers bad act evidence. *Id.*

L. Jury Instructions

Trial court erred by not sanitizing defendant's unrelated prior aggravated manslaughter conviction in this drug prosecution, despite otherwise weighing its probative and prejudicial value and issuing two limiting instructions. *State v. Hamilton*, 193 N.J. 255 (2008). However, the Court did not suggest that Brunson should be expanded to require sanitization of all prior convictions or any class of convictions. *Id.*

XXIII. PRIOR INCONSISTENT STATEMENTS

Such statements were admissible even though the hearing occurred after they were admitted. *State v. Soto*, 340 N.J. Super. 47 (App. Div.), *certif. denied*, 170 N.J. 209 (2001); see *State v. Baluch*, 341 N.J. Super. 141 (App. Div.), *certif. denied*, 170 N.J. 89 (2001).

XXVI. RELEVANCE

Expert testimony on defendant's Asperger's Disorder was relevant to his defense, and the trial court precluding this evidence denied defendant access to evidence that was material to his explanation of his conduct, requiring a new trial. *State v. Burr*, 195 N.J. 119 (2008).

Fact that defendant was driving while on the revoked list, absent any indication of the reasons for that revocation, was not probative of recklessness in an aggravated manslaughter prosecution where defendant drove drunk and killed his passenger in an accident. *State v. Bakka*, 176 N.J. 533 (2003). But evidence of his revocation was not clearly capable of producing an unjust result. *Id.*

Photographs of defendant's nude body were relevant to corroborate the child sexual assault victim's descriptions of his body. *State v. L.P.*, 352 N.J. Super. 369 (App. Div.), *certif. denied*, 174 N.J. 546 (2002).

A DYFS worker's conclusion -- that children's claims that their father had sexually abused them were unsubstantiated -- was relevant and admissible because it provided the jury with a "credibility-impeaching inference." *State v. E.B.*, 348 N.J. Super. 336 (App. Div.), *certif. denied*, 174 N.J. 192 (2002).

Also, here the jury heard the victims' stories five times and defendant's denial but once. *Id.*

XXVIII. RES GESTAE

The Supreme Court repudiated the res gestae doctrine as a basis to admit evidence of uncharged misconduct, adopting a test to determine whether the evidence is "intrinsic" to the crime charged and not that of some other bad act governed by N.J.R.E. 404(b) but rather by Rules 401, 402, and 403. *State v. Rose*, 206 N.J. 141 (2011).

Defendant's earlier, uncharged sexual assaults upon his niece were part of the *res gestae*. *State v. L.P.*, 338 N.J. Super. 227 (App. Div.), *certif. denied*, 170 N.J. 205 (2001).

See *State v. Barden*, 195 N.J. 375 (2008); *State v. Long*, 173 N.J. 138 (2002); *State v. Burden*, 393 N.J. Super. 159 (App. Div. 2007), *certif. denied*, 196 N.J. 344 (2008); *State v. Muhammad*, 359 N.J. Super. 361 (App. Div.) (prior robbery committed with the gun was part of the *res gestae* of the indictment's conspiracy to commit armed robbery count), *certif. denied*, 178 N.J. 36 (2003).

XXIX. SCIENTIFIC AND TECHNICAL EVIDENCE (See also EXPERT WITNESS, JUDICIAL NOTICE)

Y-STR DNA evidence was proven to be generally accepted in the scientific community and was therefore admissible. *State v. Calleja*, 414 N.J. Super. 125 (App. Div.), *rev'd on other grounds*, 206 N.J. 274 (2011).

Presumptive blood testing was determined to be "scientific" but no evidence was presented to prove that the scientific community considered it reliable. *State v. Pittman*, 419 N.J. Super. 584 (App. Div. 2011).

Proposed expert witness testimony as to the credibility of defendant's confessions was not scientifically reliable because insufficient evidence of general acceptance in the relevant scientific community existed. *State v. Free*, 351 N.J. Super. 203 (App. Div. 2002).

See *State v. Simbara*, 175 N.J. 37 (2002) (State Police lab certificate conformed to N.J.S.A. 2C:35-19, but defendant can confront its preparer at trial); *In re Commitment of W.Z.*, 173 N.J. 109 (2002); *In re Commitment of R.S.*, 173 N.J. 134 (2002); *State v. Green*, 417 N.J. Super. 190 (App. Div. 2010) (laser speed detecting device has not been proven scientifically reliable, thus, its accuracy must be established before the trial court); *State v.*

Behn, 375 N.J.Super. 409 (App. Div.)(comparison of bullet lead analysis is not scientifically reliable), *certif. denied*, 183 N.J. 591 (2005); *State v. DeFrank*, 362 N.J.Super. 1 (App. Div. 2003)(pursuant to N.J.S.A. 2A:62A-11, State could move into evidence the certification a nurse signed attesting that he had obtained defendant's blood sample at police request, even though that signature was not notarized); *State v. Deloatch*, 354 N.J.Super. 76 (Law Div. 2002)(STR method of DNA testing was sufficiently reliable and generally accepted in the scientific community).

EX POST FACTO

I. APPLYING THE PROHIBITION (GENERAL PRINCIPLES)

A. Application Limited to Penal Statutes

Not applicable to civil sexually violent predator act. *Smith v. Doe*, 538 U.S. 84 (2003); *Seling v. Young*, 531 U.S. 250 (2001).

Not applicable to the DNA Database and Databank Act. *State in re L.R.*, 382 N.J.Super. 605 (App. Div. 2006), *certif. denied*, 189 N.J. 642 (2007).

See *A.A. v. State of New Jersey*, 176 F.Supp.2d 274 (D.N.J. 2001)(Internet Registry for Megan's Law registrants does not constitute *ex post facto* law), *aff'd*, 341 F.3d 206 (3d Cir. 2003).

Not applicable to statutes that enhance punishment for repeat DWI offenders because they stiffen penalties for the latest crime rather than increase the penalty for a prior offense. *State v. Zeikel*, 423 N.J. Super. 34 (App. Div. 2011).

II. MISCELLANEOUS APPLICATIONS

A. Capital Punishment

See *State v. Fortin*, 178 N.J. 540 (2004)(defendant could waive *ex post facto* claim).

B. Megan's Law

Internet Registry does not violate *ex post facto* restriction. *A.A. v. State of New Jersey*, 176 F.Supp.2d 274 (D.N.J. 2001), *aff'd*, 341 F.3d 206 (3d Cir. 2003).

C. Rules of Evidence

Application of the forfeiture by wrongdoing exception to the hearsay rule, N.J.R.E. 804(b)(9), to wrongdoing that occurred prior to the new rule's effective date did not violate the Ex Post Facto Clause. *State v. Rose*, 425 N.J. Super. 463 (App. Div. 2012). The rule did not alter the degree or lessen the amount or measure of proof necessary to convict the defendant. *Id.*

D. Operating motor vehicle during period of license suspension, N.J.S.A. 2C:40-26

Conviction under subsection (b), driving on a suspended or revoked license (for a second or subsequent DWI/refusal) does not violate *ex post facto* principles where defendant caught driving after effective date of law, regardless of whether license suspension/revocation occurred prior to the effective date. *State v. Carrigan*, 428 N.J. Super. 609 (App. Div. 2012).

EXPUNGEMENT

I. Generally

Recent amendments to the expungement statute, N.J.S.A. 2C:53-1 *et seq.*, which permit a person with a third- or fourth-degree conviction or other eligible conviction to seek relief five years from the date of conviction when expungement is "consistent with the public interest." *In re Kollman*, ___ N.J. ___ (2012). Petitioners bear the burden of proving that the expungement is "in the public interest"; the burden only shifts to the State if an objection is made under

N.J.S.A. 2C:52-14, if a statutory bar exists, or if the need for the records outweighs the remedy of expungement. *Id.*

II. RECORDS WHICH CANNOT BE EXPUNGED

A. DNA Records

The DNA Database and Databank Act (*N.J.S.A. 53:1-20.17 to -20.28*) includes no general expungement provision. *A.A. v. Attorney General*, 384 *N.J.Super.* 67 (App. Div. 2006), *aff'd*, 189 *N.J.* 128 (2007). Only those whose charges are dismissed after reversal of their conviction or adjudication may seek expungement. *Id.*

III. OBJECTIONS TO EXPUNGEMENT

A. Types Of Objections

1. Failure of a Petitioner to Fulfill Any of the Statutory Prerequisites

The filing of a tort claims notice does not constitute the commencement of "civil litigation" against a public entity, triggering the statutory bar against the granting of an expungement petition. *State v. J.R.S.*, 398 *N.J.Super.* 1 (App. Div. 2008).

2. Criminal Convictions

See *In re Ross*, 400 *N.J.Super.* 117 (App. Div. 2008) (defendant is not entitled to expungement if he commits more than one crime on separate occasions, even if convicted and sentenced for them on a single date); *State v. P.L.*, 369 *N.J.Super.* 291 (App. Div. 2004)(proper expungement of defendant's third degree possession of marijuana with intent to distribute conviction; *N.J.S.A. 2C:52-2c* did not apply); *State v. King*, 340 *N.J.Super.* 390 (App. Div. 2001); *In re Petition for Expungement of Records of D.A.C.*, 337 *N.J.Super.* 493 (App. Div. 2001)(no expungement of CDS distribution conviction even for accomplice; overruling *In re R.C.*, 292 *N.J.Super.* 151 (Law Div. 1996)).

IV. EXPUNGEMENT OF JUVENILE ADJUDICATIONS

The unnumbered paragraph of *N.J.S.A. 2C:52-4.1(a)* stating, "For purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if that act had been committed by an adult," must be construed to apply only to petitions to expunge juvenile adjudications. *In re Expungement Petition of J.B.*, 426 *N.J. Super.* 496 (App. Div. 2012). If it applied also to adult convictions, it would preclude expungement of those adult convictions, which was not the legislative intent of enacting *N.J.S.A. 2C:52-4.1* (providing two ways to expunge juvenile adjudications). *Id.*

Defendant met all five criteria for expunging juvenile adjudications under *N.J.S.A. 2C:52-4.1(b)*. *In re Expungement Petition of J.B.*, 426 *N.J. Super.* 496 (App. Div. 2012).

V. EFFECT OF EXPUNGEMENT

When a former public official successfully expunges a conviction for a disorderly persons offense that touched upon her public office, the expungement order does not undermine the validity of an order entered at the time of conviction that permanently disbarred her from public office. *In re Expungement Petition of D.H.*, 204 *N.J.* 7 (2010).

A defendant who successfully has his or her conviction expunged is not, years later, subject to forfeiture of employment after being permitted to continue in their position. *In re Forfeiture of Public Office of Nunez*, 384 *N.J.Super.* 345 (App. Div.), *certif. denied*, 187 *N.J.* 491 (2006). *N.J.S.A. 2C:51-2*, however, precludes expungement for crimes committed by public servants that involved or touched upon their office. *Id.*

EXTRADITION

I. NATURE & SOURCE OF PROCEEDINGS (See also **INTERSTATE AGREEMENT ON DETAINERS**)

Defendant validly confessed after he voluntarily agreed to an informal waiver of extradition from Pennsylvania under the Uniform Criminal Extradition Act. *State v. Soto*, 340 N.J.Super. 47 (App. Div.), certif. denied, 170 N.J. 209 (2001). Any possible error in so waiving was harmless. *Id.*

See *State v. Nguyen*, 419 N.J.Super. 413 (App. Div.), certif. denied, 208 N.J. 339 (2011)(holding speedy trial right did not apply where defendant was transferred from New York to New Jersey under the Uniform Criminal Extradition Act and not under the Interstate Agreement on Detainers); *Hoxha v. Levi*, 465 F.3d 554 (3d Cir. 2006).

FIRST AMENDMENT

II. FREEDOM OF SPEECH

A. Source

See *Johnson v. Yurick*, 156 F.Supp.2d 427 (D.N.J. 2001), aff'd, 39 F. App'x 742 (3d Cir. 2002).

VI. MISCELLANEOUS APPLICATIONS OF FIRST AMENDMENT LAW

Inmates have no First Amendment right to provide legal assistance to fellow inmates. *Shaw v. Murphy*, 532 U.S. 223 (2001). See *Johnson v. Yurick*, 156 F.Supp.2d 427 (D.N.J. 2001)(first assistant prosecutor's discussions with criminal assignment judge behind prosecutor's back not afforded First Amendment or state constitutional free speech protection), aff'd, 39 F. App'x 742 (3d Cir. 2002).

FLIGHT (See also ESCAPE, RESISTING ARREST)

I. INSTRUCTION TO JURY

The trial court should not have charged flight, allowing the jury to draw an inference of guilt based upon defendant's flight, when the jury did not have evidence relevant to the reasonableness of that inference before it. *State v. Latney*, 415 N.J.Super. 169 (App. Div. 2010).

FORFEITURE (See also REMOVAL)

I. IN GENERAL

See *State v. McGovern*, 385 N.J.Super. 428 (App. Div. 2006)(prosecutor sought forfeiture of police officer's non-service firearm due to domestic violence); *State v. One 1990 Thunderbird*, 371 N.J.Super. 228 (App. Div. 2004)(N.J.S.A. 2C:64-1 to -9 are constitutional).

III. FORFEITURE PROCEDURE FOR DERIVATIVE CONTRABAND

B. Forfeiture Procedures

1. Civil Proceedings

Partial forfeiture was proper where defendant grew marijuana in only a part of his home; total forfeiture would be excessive. *State v. One House*, 346 N.J.Super. 247 (App. Div. 2001).

A hearing was needed to determine if car and money were derivative contraband under N.J.S.A. 2C:64-1a. *State v. One 1994 Ford Thunderbird*, 349 N.J.Super. 352 (App. Div. 2002).

3. Discovery

The State's inconsequential violation of the discovery rule R. 4:14-7(c) did not prejudice account holder or deprive him of the rule's protection. *State v. Franklin Savings Account No. 2067*, 389 N.J.Super. 272 (App. Div. 2006). Trial courts must measure their sanctions for discovery violations based upon the offending party's culpability and the prejudice to the other party. *Id.*

FORGERY (See also CREDIT CARDS, THEFT)

III. INSTRUMENTS SUBJECT TO FORGERY

A. Writings

See *State v. Felsen*, 383 N.J.Super. 154 (App. Div. 2006)(forged prescription).

C. Sound and Audiovisual Recordings

N.J.S.A. 2C:21-21c(4) sufficiently defined “manufacturer” in New Jersey Anti-Piracy Act to avoid due process problem. *State v. El Moghrabi*, 341 N.J.Super. 354 (App. Div.), *certif. denied*, 169 N.J. 610 (2001).

V. CULPABILITY

See *State v. Mahoney*, 188 N.J. 359 (2006)(error in jury instruction did not affect defendant’s forgery convictions).

FOURTEENTH AMENDMENT

I. DUE PROCESS

B. Capital Cases

See *Shafer v. South Carolina*, 532 U.S. 36 (2001).

E. Evidence

See *Illinois v. Fisher*, 540 U.S. 544 (2004)(defendant must prove bad faith in prosecution’s failure to preserve potentially useful evidence).

H. Sentencing and Parole

The minimum penalty for a crime may be increased based on a factual finding (here, carrying a gun) found by a judge and not a jury. *Harris v. United States*, 536 U.S. 545 (2002).

I. Void for Vagueness and Overbreadth

N.J.S.A. 39:4-50(g) was vague in defining a “second offender” in a school zone for sentencing purposes. *State v. Reiner*, 180 N.J. 307 (2004).

Municipal ordinance prohibiting obstruction of public sidewalks was unconstitutionally vague, and had to be strictly construed because it essentially was criminal in nature. *State v. Golin*, 363 N.J.Super. 474 (App. Div. 2003).

Use of the term “substantially identical” in the assault firearms statute, N.J.S.A. 2C:39-1w, is not unduly vague. *State v. Petrucci*, 343 N.J.Super. 536 (App. Div. 2001), *certif. granted & remanded*, 176 N.J. 277 (2003).

See *In re Commitment of W.Z.*, 173 N.J. 109 (2002)(Sexually Violent Predator Act’s involuntary civil commitment provisions do not violate substantive due process); *State v. Chepilko*, 405 N.J.Super. 446 (App. Div. 2009) (municipal ordinance prohibiting hawking, peddling, or vending goods on boardwalk was not unconstitutionally vague as applied to defendant); *State v. Tarlowe*, 370 N.J.Super. 224 (App. Div. 2004)(Health Care Claims Fraud Act was not unconstitutionally vague); *State v. Simpson*, 365 N.J.Super. 444 (App. Div. 2003)(bail forfeiture rules, R. 1:13-3(d) and (e) and R. 3:26-6, did not violate procedural due process); *State v. Bond*, 365 N.J.Super. 430 (App. Div. 2003)(community supervision for life statute, N.J.S.A. 2C:43-6.4, not vague or overbroad); *State v. Stafford*, 365 N.J.Super. 6 (App. Div. 2003)(township ordinances prohibiting the feeding of migratory wildfowl on private property were not vague); *State v. Jones*, 346 N.J.Super. 391 (App. Div.)(interference with custody statute not overbroad) *certif. denied*, 172 N.J. 181 (2002).

J. Miscellaneous

State supreme court’s retroactive application of “year and a day” rule’s abolition did not deny due process. *Rogers v. Tennessee*, 532 U.S. 451 (2001).

Due process protections applicable to identification procedures of people do not extend to inanimate objects, such as vehicles. *State v. Delgado*, 188 N.J. 48 (2006).

The lapse of almost 20 years from the date of the crime until indictment did not violate defendant's due process right. *State v. Townsend*, 186 N.J. 473 (2006).

Right to be present during trial includes right to notice of adjourned trial date. *State v. Smith*, 346 N.J. Super. 233 (App. Div. 2002).

See *H.E.S. v. J.C.S.*, 175 N.J. 309 (2003) (lack of sufficient time to defend against imposition of FRO violates due process, as does refusal to grant an adjournment).

II. EQUAL PROTECTION

A. General

N.J.S.A. 2C:35-7.1 is neutral on its face, and neither its purpose nor effect is discriminatory. *State v. Brooks*, 366 N.J. Super. 447 (App. Div. 2004).

N.J.S.A. 40:69A-166 did not violate equal protection because disqualification from public office for those convicted of crimes involving moral turpitude was reasonably tailored to further legitimate governmental interests. *McCann v. Clerk of the City of Jersey City*, 167 N.J. 311 (2001).

See *State v. O'Hagen*, 189 N.J. 140 (2007) (DNA Database and Databank Act does not violate equal protection); *State v. Petrucci*, 343 N.J. Super. 536 (App. Div. 2001), *certif. granted & remanded*, 176 N.J. 277 (2003).

B. Jury Selection

1. Use of Peremptory Challenges

See *State v. Chevalier*, 340 N.J. Super. 339 (App. Div.), *certif. denied*, 170 N.J. 386 (2001).

C. Selective Enforcement

See *State v. Francis*, 341 N.J. Super. 67 (App. Div. 2001).

FRAUD

VIII. HEALTH CARE CLAIMS FRAUD

A. Definitions

N.J.S.A. 2C:21-4.3c applied to defendant even though the injuries sustained in his staged slip-and-fall were allegedly legitimate. *State v. Tarlowe*, 370 N.J. Super. 224 (App. Div. 2004).

D. Culpability

See *State v. Martinez*, 392 N.J. Super. 307 (App. Div. 2007); *State v. Tarlowe*, 370 N.J. Super. 224 (App. Div. 2004).

XXX. MONEY LAUNDERING AND ILLEGAL INVESTMENTS

D. Culpability

New Jersey's money laundering statute is neither vague nor overbroad; a defendant's actions of transporting large amounts of currency from clients requiring anonymity and an absence of record keeping fell squarely within the conduct the New Jersey Legislature sought to criminalize. *Amaya v. New Jersey*, 766 F. Supp.2d 533 (2011), *aff'd sub nomine* 455 Fed. Appx. 266 (2011).

Defendant, an attorney representing a real estate developer engaged in fraudulent real estate transactions, failed to file and record title documents, failed to disclose preexisting mortgages, and also maintained an attorney trust account for transferring funds derived from the illicit transactions. *State v. Harris*, 373 N.J. Super. 253 (App. Div. 2004), *certif. denied*, 183 N.J. 257 (2005).

GRAND JURY (See also INDICTMENT)

II. CHALLENGES TO THE ARRAY AND TO INDIVIDUAL JURORS (See also **JURIES**)

Grand jurors need not be *voir dire*d regarding their views on the death penalty, and need not be “death qualified.” *State v. Toliver*, 180 N.J. 164 (2004). The grand jurors’ role is accusatory, not adjudicatory. *Id.*

Rule 3:6-3(a) does not require the assignment judge to personally interrogate every potential grand juror who may have a bias in a particular case. *State v. Land*, 376 N.J. Super. 289 (App. Div.), *certif. denied*, 184 N.J. 210 (2005).

Rather, the assignment judge exercises discretion in making such inquiries. *Id.*

III. SECRECY AND DISCOVERY (See also **DISCOVERY** and **RELEASE OF GRAND JURY MATERIALS** in the Prosecutor’s Grand Jury Manual)

Plaintiff’s complaint seeking police investigative reports under the Right-to-Know law was dismissed on summary judgment because confidentiality of grand jury presentments outweighed the public’s common law right to know about the investigation’s details. *Daily Journal v. Police Dep’t of Vineland*, 351 N.J. Super. 110 (App. Div.), *certif. denied*, 174 N.J. 364 (2002). Criminal investigative reports, while separate from grand jury investigations, are not public records under N.J.S.A. 47:1A-1 to 4. *Id.*

V. INDICTMENT (See also **INDICTMENT**)

B. Challenging the Adequacy of Proofs

See *State v. Neal*, 361 N.J. Super. 522 (App. Div. 2003)(hearsay rules not applicable to undisputed facts).

VI. PRESENTMENTS

Private citizens have no right to present an allegation or evidence of a crime directly to the grand jury. *In re Grand Jury Appearance Request by Loigman*, 183 N.J. 133 (2005).

VII. PROSECUTOR’S CONDUCT (See also **PROSECUTORS**)

See *State v. Francis*, 191 N.J. 571 (2007); *State v. Lisa*, 391 N.J. Super. 556 (App. Div. 2007), *aff’d*, 194 N.J. 409 (2008).

VIII. SUBPOENA (See also **DISCOVERY, SUBPOENAS**)

Existing grand jury subpoena procedures are sufficient to access bank records for investigative purposes. *State v. McAllister*, 184 N.J. 17 (2005). The Court asked the Criminal Practice Committee to study the issue of whether a notice requirement would reflect good policy. *Id.*

See *State v. Reid*, 194 N.J. 386 (2008) (law enforcement can obtain subscriber information provided to internet service providers (ISP) from the ISP using a grand jury subpoena served without notice to the subscriber); *State v. Domicz*, 188 N.J. 285 (2006)(use of grand jury subpoena for utility records is constitutional).

GUILTY PLEAS AND PLEA BARGAINING

I. PREREQUISITES TO ENTRY OF GUILTY PLEA

A. Factual Basis

Defendant’s admissions during his plea colloquy that he forced an injured, intoxicated, incoherent and barely-clothed victim into the woods on a cold January night were sufficient to support a conviction of manslaughter. The court and counsel should take care to elicit a factual basis that addresses each element of each crime in substantial detail. *State v. Campfield*, ___ N.J. ___ (2013).

A sufficient factual basis existed to support the juvenile’s guilty plea to unlawful possession of a weapon -- he fired a paintball gun at another’s car, contrary to N.J.S.A. 2C:39-1f and 5d. *State in re G.C.*, 179 N.J. 475 (2004).

Defendant gave an insufficient factual basis to support his guilty plea to absconding from parole. *State v. Pineiro*, 385 N.J.Super. 129 (App. Div. 2006).

Defendant's attack on the adequacy of his guilty plea's factual basis was untimely because he never moved to withdraw his plea and had never appealed his conviction. *State v. Mitchell*, 374 N.J.Super. 172 (App. Div. 2005). He could, however, pursue post-conviction relief. *Id.*

Trial court's rejection of guilty plea to aggravated manslaughter was based on an insufficient factual underpinning and legal mistakes. *State v. Madan*, 366 N.J.Super. 98 (App. Div. 2004).

Guilty plea to robbery while armed with an unloaded but operable gun constitutes a NERA crime. *State v. Jules*, 345 N.J.Super. 185 (App. Div. 2001), *certif. denied*, 171 N.J. 337 (2002).

See *In re Civil Commitment of J.D.*, 348 N.J.Super. 347 (App. Div. 2002) (juvenile's plea attempt failed to address crime's elements); *State v. Shoats*, 339 N.J.Super. 359 (App. Div. 2001) (lack of a factual basis for a "violent crime"); *State v. Hernandez*, 338 N.J.Super. 317 (App. Div. 2001).

B. Voluntariness and Understanding the Consequences of the Plea

Defendants pleading guilty to a NERA offense must be informed of the mandatory period of parole supervision, but failure to so inform does not require vacation of the plea agreement. *State v. Johnson*, 182 N.J. 232 (2005); *State v. Rosado*, 182 N.J. 245 (2005). To vacate the plea, defendants must demonstrate how the omission of information about the NERA parole term materially affected their decision to plead guilty and prejudiced that decision-making. *Id.* (disapproving of the holding in *State v. Freudenberger*, 358 N.J.Super. 162 (App. Div. 2003)).

Juvenile could not validly plead guilty to a sexual assault when unrepresented by counsel. *In re Civil Commitment of J.D.*, 348 N.J.Super. 347 (App. Div. 2002).

See *Iowa v. Tovar*, 541 U.S. 77 (2004) (uncounselled defendant pleading guilty must knowingly and intelligently waive the right to counsel, but need not be informed of possible defenses to the criminal charges or that waiving the right in pleading guilty risks overlooking a viable defense); *State v. Bellamy*, 178 N.J. 127 (2003) (as a matter of fundamental fairness, trial courts are to advise defendants pleading guilty to sexually violent offenses of the possibility of the collateral consequence of civil commitment under the Sexually Violent Predator Act); *State v. Bond*, 365 N.J.Super. 430 (App. Div. 2003) (community supervision for life statute gave adequate notice that use of drugs is prohibited, and defendant received written notice of all conditions of such supervision); *State v. Jamgochian*, 363 N.J.Super. 220 (App. Div. 2003) (community supervision for life was a penal, not collateral, consequence of a guilty plea that defendant needs to understand); *State v. Wood*, 361 N.J.Super. 427 (App. Div. 2003) (NERA's applicability pursuant to "deadly weapon" definition).

II. PLEA BARGAINS GENERALLY

The prosecutor's mistake in failing to notify a crime victim about a plea agreement is insufficient to invalidate the agreement. *State v. Means*, 191 N.J. 610 (2007).

Certain issues not preserved in pleading guilty (*i.e.*, Fifth Amendment claims) are waived for appeal. *State v. Marolda*, 394 N.J.Super. 430 (App. Div.), *certif. denied*, 192 N.J. 482 (2007).

The filing of an arrest warrant is one method of “commencing” violation of probation proceedings pursuant to *N.J.S.A. 2C:45-3c*. *State v. Nelson*, 178 *N.J.* 192 (2003).

The trial court erroneously imposed a lesser sentence than that negotiated between the parties pursuant to the *Brimage* guidelines. *State v. Thomas*, 392 *N.J.Super.* 169 (App. Div.), *certif. denied*, 192 *N.J.* 597 (2007).

The county prosecutor had no power to bargain away the Attorney General’s authority to seek civil commitment under the Sexually Violent Predator Act (*N.J.S.A. 30:4-27.24 et seq.*). *In re Commitment of P.C.*, 349 *N.J.Super.* 569 (App. Div. 2002). The prosecutor’s entry into a plea agreement containing a stipulation that the Act did not apply intruded upon the Attorney General’s authority to protect the public from sexually violent predators. *Id.*

Defense counsel may not waive the right to seek less than a particular sentence, and have an unfettered right to argue in favor of a lesser term at sentencing. *State v. Briggs*, 349 *N.J.Super.* 496 (App. Div. 2002).

See *State v. Rosario*, 391 *N.J.Super.* 1 (App. Div. 2007); *State v. Malik*, 365 *N.J.Super.* 267 (App. Div. 2003)(as to Medicaid fraud and misconduct by a corporate official), *certif. denied*, 180 *N.J.* 354 (2004); *State v. Dorio*, 422 *N.J.Super.* 445 (App. Div. 2011), *certif. granted*, 210 *N.J.* 217 (2012) (denial of defendant motion to enforce an oral plea agreement where proffer expressly stated that no plea bargains or promises other than those stated in writing had been made).

III. PLEA BARGAINING UNDER THE CODE

See *State v. Rolex*, 167 *N.J.* 447 (2001); *State v. Hammer*, 346 *N.J.Super.* 359 (App. Div. 2001).

IV. WITHDRAWAL OF GUILTY PLEAS

In evaluating a motion to withdraw a guilty plea, trial courts must consider four factors: 1) whether defendant has asserted a colorable claim of innocence, 2) the nature and strength of defendant’s reasons for withdrawal, 3) the existence of a plea bargain, and 4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to defendant. *State v. Slater*, 198 *N.J.* 145 (2009).

Balancing *Slater* factors, interests of justice did not warrant withdrawal of guilty plea for assault by auto in a school zone. Defendant unable to present colorable claim that he did not commit offense, nor able to provide credible excuse for failure to assert his defense prior to plea. *State v. McDonald*, 211 *N.J.* 4 (2012).

A trial court abused its discretion by denying defendant’s pre-sentencing motion to withdraw his guilty plea to aggravated manslaughter when he articulated a colorable claim of innocence based on a plausible defense of self-defense.

State v. Munroe, 210 *N.J.* 429 (2012).

A trial court abused its discretion by denying defendant’s request for an adjournment to seek substitute counsel on his motion to withdraw his guilty plea where his present attorney could not represent defendant on the motion due to a conflict of interest. *State v. Hayes*, 205 *N.J.* 522 (2011).

Where it was established on a factual level that counsel materially misinformed defendant about the immigration consequences of his guilty plea, the plea should be withdrawn. *State v. Nunez-Valdez*, 196 *N.J.* 599 (2009). See also *State v. Gaitan/Goulbourne*, 209 *N.J.* 229 (2012), in which the Supreme Court held that the decision in *Padilla v. Kentucky*, 130 *S.Ct.* 1473 (2010), holding that defense attorneys must advise their clients of potential immigration

consequences of pleading guilty or risk providing constitutionally deficient assistance of counsel, is a new rule of constitutional law not entitled to retroactive application on collateral review. The Court further found that its decision in *State*

v. Nunez-Valdez, 200 N.J. 129 (2009), which allowed the defendant to withdraw his guilty plea because of misadvice by defense counsel on immigration consequences, did not announce a new rule of law thus was applicable on collateral review. Importantly, the Court explained that its decision in to re-draft the plea form after *Nunez-Valdez* did not render as “misadvice” the information on the then-existing form, nor did the revised form vest further rights in those who attack their pleas on collateral review.

Defense counsel’s refusal to pursue a plea withdraw motion deprived defendant of his right to counsel, and counsel’s undermining defendant’s assertions of innocence on his plea withdrawal application deprived him of the effective assistance of counsel. *State v. Barlow*, 419 N.J.Super. 527 (App. Div. 2011).

Where a plea agreement contained no conditions giving the State the right to withdraw from the agreement and did not place on the record any conditions on the State’s acceptance of the plea, defendant had a right to enforce the plea agreement. *State v. Conway*, 416 N.J.Super. 406 (App. Div. 2010).

There was no basis to grant the motion to withdraw defendant’s guilty plea because defendant did not have a meritorious claim that his rights were violated under *Brady v. Maryland*, 373 U.S. 83 (1963), because the evidence, a videotape of his DWI arrest that was destroyed, was not shown to be material, no evidence proved that the tape had exculpatory value before it was destroyed, defendant did not prove that he would have pled not guilty had the tape been provided, and defendant’s Alcotest results established his intoxication. *State v. Mustaro*, 411 N.J.Super. 91 (App. Div. 2009).

Parties could not negotiate an illegal sentence (here, 5 years with 3½ years of parole ineligibility), even under N.J.S.A. 2C:35-12. *State v. Smith*, 372 N.J.Super. 539 (App. Div. 2004), *certif. denied*, 182 N.J. 428 (2005).

Defendant seeking post-conviction relief could move to withdraw his guilty pleas and go to trial because his mother slept with his attorney before sentencing. *State v. Lasane*, 371 N.J.Super. 151 (App. Div. 2004), *certif. denied*, 182 N.J. 628 (2005).

The trial court did not abuse its discretion in denying defendant’s pre-sentencing motion to withdraw his guilty plea to sexual assault. Defendant had asserted that he had an alibi that prior counsel did not present due to pressure supposedly brought to bear to take the plea. *State v. Luckey*, 366 N.J.Super. 79 (App. Div. 2004). Defendant was, however, entitled to a remand to reconsider his withdrawal application because the plea form did not define community supervision for life as a plea consequence and to permit him to argue the consequences of potential commitment under the Sexually Violent Predator Act. *Id.*

The Appellate Division chose to consider defendant’s attacks on all of his statements -- including his oral statements made at the scene and his taped statements given at headquarters -- because in pleading guilty to capital murder he was generally informed that he could appeal his “statements.” *State v. Diloreto*, 362 N.J.Super. 600 (App. Div. 2003), *aff’d o.g.* 180 N.J. 264 (2004).

Defendant who pleaded guilty to violating his probation waives any statute of limitations defense. *State v. Nellom*, 354 N.J.Super. 485 (App. Div. 2002), *aff’d*, 178 N.J. 192 (2003).

Appellate court reached the issue concerning the admissibility of defendant’s statement despite defendant’s failure to preserve the issue as part of the guilty plea pursuant to R. 3:9-3(f). *State v. Brown*, 352 N.J.Super. 338 (App. Div.), *certif. denied*, 174 N.J. 544 (2002).

Defendant could not successfully claim that he had not understood the Megan's Law consequences of community supervision for life when he pleaded guilty to endangering a child's welfare via sexual conduct because he had reviewed the guilty plea forms setting forth the registration consequences, and at sentencing and in the judgment of conviction was informed that he was subject to lifetime community supervision. *State v. Williams*, 342 N.J. Super. 83 (App. Div.), *certif. denied*, 170 N.J. 87 (2001). Defendant also never asserted his innocence and was never misinformed of the Megan's Law consequences of pleading guilty. *Id.* In seeking to withdraw a guilty plea based on the State's failure to disclose exculpatory evidence, the applicable inquiry focuses on the withheld evidence's persuasiveness and the impact it would have had on defendant's decision to plead guilty. *State v. Parsons*, 341 N.J. Super. 448 (App. Div. 2001). Parsons was entitled to retract his plea because the evidence not revealed included investigation of an arresting officer for potentially having violated discovery rules at defendant's arrest.

Defendants cannot seek to vacate only the NERA parole ineligibility term and not the plea agreement itself. *State v. Reardon*, 337 N.J. Super. 324 (App. Div. 2001).

See *State v. Johnson*, 182 N.J. 232 (2005), and *State v. Rosado*, 182 N.J. 245 (2005) (based on lack of information regarding mandatory period of parole supervision); *State v. Bellamy*, 178 N.J. 127 (2003) (failure to advise defendant pleading guilty to sexually violent offense of the possibility of civil commitment pursuant to the Sexually Violent Predator Act -- a collateral plea consequence -- meant he could move to withdraw his plea); *State v. Telford*, 420 N.J. Super. 465 (App. Div.), *certif. denied*, 209 N.J. 595 (2011) (concluding that counsel had provided effective assistance when he advised his client he "might" be deported, while sidestepping *Padilla* and *Nunez-Valdez* retroactivity issue because of other issues in the case); *State v. Moore*, 377 N.J. Super. 445 (App. Div.) (defendant may withdraw his guilty plea where the Appellate Division concluded that his downgraded sentence was invalid), *certif. denied*, 185 N.J. 267 (2005); *State v. Colon*, 374 N.J. Super. 199 (App. Div. 2005); *State v. Och*, 371 N.J. Super. 274 (App. Div.), *certif. denied*, 182 N.J. 150 (2004)

In *State v. S.K.*, 423 N.J. Super. 540 (App. Div. 2012), the Appellate Division vacated defendant's guilty plea to contempt for violating a DVRO and dismissed the complaint against him because, although defendant knew he could not contact the victim at her home or place of employment, he was never informed about a provision in the FRO also barring him from "any other place where plaintiff was located."

In *State v. Agathis*, 424 N.J. Super. 16 (App. Div. 2012), the court ruled that defendant was entitled to an evidentiary hearing based on counsel's representations that he could regain his firearms i.d. card after completing probation, which possibly made defendant's plea "uninformed."

V. CONDITIONAL PLEAS AND EFFECT OF GUILTY PLEAS ON APPEAL

By pleading guilty, defendant waived any challenge to the indictment, to the State's evidence, to the trial court's conduct, and to disclosure of the surveillance location. *State v. Owens*, 381 N.J. Super. 503 (App. Div. 2005).

See *State v. Moraes-Pena*, 386 N.J. Super. 569 (App. Div.) R. 3:28(g) contemplates an appeal to the Appellate Division of a PTI denial even though a guilty plea normally waives any pre-plea issue), *certif. denied*, 188 N.J. 492 (2006).

GUN PERMITS

II. PURCHASE OF FIREARMS - N.J.S.A. 2C:58-3

B. Firearms Purchaser Identification Card

In evaluating the denial of a duplicate firearms purchaser identification card, trial judges must give appropriate weight to the interest of the community where the applicant resides at the time the application is filed. *In re Application of Boyadjian*, 362 N.J.Super. 463 (App. Div.), certif. denied, 178 N.J. 250 (2003). And judges reviewing such applications must appropriately consider the local interest factor to the extent reflected in a police chief's denial. *Id.*

See *State v. Cordoma*, 372 N.J.Super. 524 (App. Div. 2004).

E. How to Obtain a Permit to Purchase a Handgun and Firearms Purchaser Identification Card

See *In re Application of Boyadjian*, 362 N.J.Super. 463 (App. Div.), certif. denied, 178 N.J. 250 (2003).

III. PERMITS TO CARRY HANDGUNS - N.J.S.A. 2C:58-4

C. Who May Obtain

Bounty hunters are not recognized by state statute and have no legal responsibility to act without police assistance, and as a class could not obtain carry permits. *In re Application of Borinsky*, 363 N.J.Super. 10 (App. Div. 2003). None of the applicants had made a sufficiently particularized showing of justifiable need to carry handguns in pursuit of their voluntarily undertaken, private activities. *Id.*

HABEAS CORPUS

I. IMPLEMENTING STATUTES AND RULES

For purposes of applying *Lindh v. Murphy*, 521 U.S. 320 (1997), a case is not "pending" in federal court until an actual habeas corpus application is filed with it. *Woodford v. Garceau*, 538 U.S. 202 (2003).

To be granted, a certificate of appealability does not require a showing that an appeal will succeed -- the only issue is whether the district court's decision was debatable among jurists of reason. *Miller-El v. Cockrell*, 534 U.S. 1122 (2003). Neither the statutory provisions of §3599 nor §4241 provide state prisoners with the right to suspend federal habeas corpus proceedings due to being adjudged incompetent. *Ryan v. Valencia Gonzalez*, 133 S.Ct. 696 (2013).

II. NATURE OF THE WRIT

A state prisoner does not have the right to suspension of federal habeas corpus proceedings even when considered incompetent to assist counsel during these proceedings, because "counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence." *Ryan v. Valencia Gonzalez*, 133 S.Ct. 696 (2013). Although the right now to be tried or convicted while incompetent to stand trial is a trial right based in the Due Process Clause, the right did not extend to federal habeas corpus stage. *Id.*

Although a preliminary hearing is a critical stage in a prosecution and requires counsel, denial of counsel can be harmless error. *Ditch v. Grace*, 479 F.3d 249 (3d Cir.), cert. denied, 128 S.Ct. 377 (2007). No presumption of prejudice applies, and the denial of counsel here was harmless given the substantial evidence of guilt. *Id.*

The Sixth Amendment right to a speedy trial is non-jurisdictional, and is therefore waived when defendant enters an unconditional guilty plea. *Washington v. Sobina*, 475 F.3d 162 (3d Cir. 2007).

Insufficient evidence existed to conclude that appellate counsel was ineffective, prosecutorial misconduct claims were not exhausted in state court and were nonetheless insufficient to taint the trial with unfairness, and limitations on petitioner's ability to cross-examine a prosecution witness were not constitutional

error. *Wright v. Vaughn*, 473 F.3d 85 (3d Cir. 2006), *cert. denied*, 128 S.Ct. 660 (2007).

Trial counsel was ineffective in failing to undertake adequate pretrial investigation. *Rolan v. Vaughn*, 445 F.3d 671 (3d Cir. 2006).

Although AEDPA requires deference to claims adjudicated on the merits in state court, this implies that the claims must be adjudicated by a court of competent jurisdiction. *Lambert v. Blackwell*, 387 F.3d 210 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005).

State trial court's error in forcing petitioner to proceed at trial *pro se* when he refused to accept his third appointed attorney did not contradict or unreasonably apply Supreme Court precedent. *Fischetti v. Johnson*, 384 F.3d 140 (3d Cir. 2004).

The state courts' application of *Strickland* was not objectively unreasonable, and petitioner failed to demonstrate a reasonable likelihood that a different result would have been reached had counsel not erred. *Affinito v. Hendricks*, 366 F.3d 252 (3d Cir. 2004), *cert. denied*, 543 U.S. 1057 (2005); see *Sutton v. Blackwell*, 327 F.Supp.2d 477 (D.N.J. 2004).

Supreme Court of New Jersey's decision that petitioner received the effective assistance of counsel during his capital trial was both a reasonable application of federal law and a reasonable interpretation of the facts pursuant to 28 U.S.C. §2254(d)(1) and (2). *Martini v. Hendricks*, 188 F.Supp.2d 505 (D.N.J. 2002), *aff'd*, 348 F.3d 360 (3d Cir. 2003), *cert. denied*, 543 U.S. 1025 (2004). So, too, were the Supreme Court's conclusions that no *Brady* violation had occurred, that alleged exclusion of potential jurors based on reservations about the death penalty did not violate due process or petitioner's right to an impartial jury, that the trial court's refusal to instruct the jury on a particular matter was not improper, that the trial court did not err in answering a jury question, and that the trial court's exclusion of certain defense evidence during the post-conviction relief hearing did not violate due process. *Id.*

Habeas relief does not lie for ineffective assistance of post-conviction relief counsel claims. *Bryant v. Hendricks*, 2007 U.S. Dist. LEXIS 7736 (D.N.J. 2007). See *Middleton v. McNeil*, 541 U.S. 433 (2004)(court of appeals failed to give appropriate deference to the state court, which determined that jury instructions were not reasonably likely to mislead the jury); *Yarborough v. Gentry*, 540 U.S. 1 (2003); *Price v. Vincent*, 538 U.S. 634 (2003)(reiterating requirements of 28 U.S.C. §2254(d)(1) and (2) and its decision in *Williams v. Taylor*, 529 U.S. 262 (2000)); *Perry v. Johnson*, 531 U.S. 1003 (2001); *State v. Rountree*, 640 F.3d 530 (3d Cir.), *cert. denied*, 132 S.Ct. 533 (2011) (court saw no reason to conclude that lack of consolidation of defendant's Essex and Camden County cases caused him any harm); *Shelton v. Carroll*, 464 F.3d 423 (3d Cir. 2006)(court's limitation on defendant's scope of allocation was not contrary to clearly established federal law); *Johnson v. Carroll*, 369 F.3d 253 (3d Cir. 2004), *cert. denied*, 544 U.S. 924 (2005); *Cordova v. Baca*, 346 F.3d 924 (9th Cir. 2003)(structural error requiring reversal exists where the state court determined that petitioner did not waive his right to counsel at trial; no harmless error analysis ensues); *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001); *Marshall v. Hendricks*, 313 F.Supp.2d 423 (D.N.J. 2004), *aff'd*, *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006).

III. "IN CUSTODY" REQUIREMENT

A. "In Custody"

State's sexually violent predator act was civil, not criminal, and could not be deemed punitive; inmate's double jeopardy and *ex post facto* challenges were

precluded. *Lackawanna County District Attorney v. Coss*, 531 U.S. 923 (2001); *Seling v. Young*, 531 U.S. 250 (2001).

Defendant's release from custody caused his habeas petition challenging the Bureau of Prison's failure to grant him early release to be moot. *Burkey v. Marberry*, 556 F.3d 142 (3d Cir. 2009).

Petitioner was not "in custody" for purposes of 28 U.S.C. §2254 simply because, after completing his state prison sentence, he continued to make restitution payments. *Obado v. New Jersey*, 328 F.3d 716 (3d Cir. 2003). Petitioner who completed his state sentence but was confined by the INS was not in custody under 18 U.S.C. §2241. He therefore could not seek habeas corpus relief and could not attack the validity of his convictions. *Neyor v. Immigration & Naturalization Serv.*, 155 F.Supp.2d 127 (D.N.J. 2001). The State had an interest in the finality of convictions, and petitioner both had failed to exhaust available state remedies and had procedurally defaulted on certain claims. *Id.*

B. Past or Future Confinement

See *Lackawanna County District Attorney v. Coss*, 531 U.S. 923 (2001).

IV. PARTIES AND JURISDICTIONS

A. Forum

District court declined to transfer petition to the proper court because it did not appear that such a transfer was in the interest of justice. *Coleman v. Samuels*, 2006 U.S. Dist. LEXIS 56783 (D.N.J. 2006), *aff'd*, 218 F. App'x 178 (3d Cir.), *cert. denied*, 127 S.Ct. 2896 (2007).

B. "Final" Decisions

Only final decisions of a district court are appealable; an order committing a capital habeas petitioner for psychiatric evaluation is not such a decision. *Pierce v. Blaine*, 467 F.3d 362 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 2910 (2007).

V. PRO SE PETITIONS

District courts are not required to warn *pro se* litigants, presenting mixed petitions with unexhausted claims, as to the time bar's potential effect if petitioner dismisses the petition without prejudice and returns to state court to exhaust. *Piiler v. Ford*, 542 U.S. 225 (2004). District court judges have no obligation to counsel *pro se* litigants. *Id.*

See *Pindale v. Nunn*, 248 F.Supp.2d 361 (D.N.J. 2003)(State required to serve, on petitioner requesting them, the exhibits accompanying its answer); *Traore v. Gonzalez*, 2007 U.S. Dist. LEXIS 1156 (D.N.J. 2007)(petitioner not entitled to *pro bono* counsel).

VI. TIME LIMITATIONS

The time limits for filing a notice of appeal are jurisdictional, and an untimely notice deprives the court of appeals of jurisdiction. *Bowles v. Russell*, 127 S.Ct. 2360 (2007).

The one-year statute of limitations for seeking federal habeas corpus relief was not tolled while petitioner sought certiorari from a final state court collateral review judgment. *Lawrence v. Florida*, 127 S.Ct. 1079 (2007). Such collateral review is not "pending" while the Supreme Court considers a certiorari petition. *Id.*

Even if the State failed to raise the one-year time bar, the district court may dismiss an untimely habeas petition *sua sponte*. *Day v. McDonough*, 547 U.S. 198 (2006).

Timeliness is a “condition to filing,” not a “condition to obtaining relief.” *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). See also *Allen v. Siebert*, 128 S.Ct. 965 (2008).

Federal courts may raise a statute of limitations issue *sua sponte*. *United States v. Bendolph*, 409 F.3d 155 (3d Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006).

One-year statute of limitations applies on a claim-by-claim basis. *Fielder v. Varner*, 379 F.3d 113 (3d Cir. 2004), *cert. denied*, 543 U.S. 1067 (2005). Thus petitioner’s claim based on newly discovered evidence was timely because he filed it within one year of discovery, but his other claims were untimely. *Id.*

Indictment was returned before the five-year statute of limitations under N.J.S.A. 2C:1-6(b)(1) because theft by deception was not completed until the contractual period for repayment had ended. *State v. Dorio*, 422 N.J. Super. 445 (App. Div. 2011), *certif. granted*, 210 N.J. 217 (2012).

See *Johnson v. United States*, 544 U.S. 295 (2005); *McAleese v. Brennan*, 483 F.3d 206 (3d Cir. 2007); *Bryant v. Hendricks*, 2007 U.S. Dist. LEXIS 7736 (D.N.J. 2007); *King v. Ortiz*, 2006 U.S. Dist. LEXIS 90278 (D.N.J. 2006).

A. 28 U.S.C. §2244(d) and Direct Review

See *Sciacca v. Macfarland*, 2006 U.S. Dist. LEXIS 65531 (D.N.J. 2006).

B. Statutory Tolling

The filing of a *certiorari* petition from the denial of a state post-conviction relief petition does not toll the one-year statute of limitations for seeking federal habeas relief under 28 U.S.C. §2244(d). See also *Allen v. Siebert*, 128 S.Ct. 965 (2008).

A federal habeas corpus petition is not an “application for State post-conviction or other collateral review” for purposes of 28 U.S.C. §2244(d)(2), and therefore does not toll the one-year time period for filing a petition under AEDPA. *Duncan v. Walker*, 533 U.S. 167 (2001). Congress’ omission of the word “Federal” in this context meant that it did not intend properly filed federal habeas petitions to toll the limitation period. *Id.*

Post-conviction relief petition improperly filed under state law is not “properly filed” for statutory tolling purposes. *Satterfield v. Johnson*, 434 F.3d 185 (3d Cir. 2005), *cert. denied*, 127 S.Ct. 198 (2006).

Because the district court erroneously dismissed petitioner’s first petition, he was entitled to equitable tolling of AEDPA’s time limits. *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir.), *cert. denied*, 546 U.S. 957 (2005).

Petitioner who did not receive notice from state supreme court of the denial of permission to appeal was not entitled to equitable tolling because he failed to show due diligence in determining the status of his appeal. *LaCava v. Kyler*, 398 F.3d 271 (3d Cir. 2005).

Attorney malfeasance alone does not warrant equitable tolling. *Schlueter v. Varner*, 384 F.3d 69 (3d Cir. 2004), *cert. denied*, 544 U.S. 1087 (2005).

Petitioner also must prove that he or she acted diligently and that extraordinary circumstances caused the petition to be untimely. *Id.*

Counsel’s misinformation to petitioner regarding the time available to file a habeas corpus petition did not constitute grounds for equitable tolling. *Johnson v. Hendricks*, 314 F.3d 159 (3d Cir. 2002), *cert. denied*, 538 U.S. 1022 (2003). Errors in computing the one-year statute of limitations did not trigger any principle of equity rendering the limitation period unfair, no extraordinary circumstances required equitable tolling, and nothing prevented petitioner from complying with 28 U.S.C. §2244(d)(1). *Id.*

The one-year limitations period is tolled while a “properly filed” state post-conviction relief application is “pending” in the state courts. *Carey v. Saffold*, 536 U.S. 214 (2002).

The one-year limitations period is tolled during the time between the state trial court’s denial of post-conviction relief and petitioner’s filing of an appeal from that denial. *Badger v. Hendricks*, 2005 LEXIS 23562 (D.N.J. 2005).

See *Sciacca v. Macfarland*, 2006 U.S. Dist. LEXIS 65531 (3d Cir. 2006).

VII. EXHAUSTION OF STATE REMEDIES

If a petition contains both exhausted and unexhausted state claims, the district court may not stay or hold the petition in abeyance while petitioner fully exhausts unless good cause for failing to exhaust exists and the claims are not plainly meritless. *Rhines v. Weber*, 544 U.S. 269 (2005).

Even where it is clear that petitioner has not exhausted all available state remedies, the State will be held to its waiver if it concedes exhaustion before the district court. *Sharrieff v. Cathel*, 547 F.3d 225 (3d Cir. 2009).

Even the likely futility of litigating the merits of petitioner’s claims in state court is no excuse for failing to comply with AEDPA’s exhaustion requirement. *Parker v. Kelchner*, 429 F.3d 58 (3d Cir. 2005).

Petitioner’s reference to federal “due process clause” and a federal case in his state appeal was sufficient to exhaust state remedies for that claim. *Minett v. Hendricks*, 135 F. App’x 547 (3d Cir. 2005).

See *Lewis v. Pinchak*, 348 F.3d 355 (3d Cir. 2003)(Third Circuit declined to resolve appeal on exhaustion grounds), *cert. denied*, 540 U.S. 1200 (2004); *Bota v. New Jersey*, 2005 LEXIS 25701 (D.N.J. 2005)(civilly committed sex offender must exhaust state court remedies before filing a federal habeas claim).

VIII. PROCEDURAL DEFAULT

Exclusionary DNA evidence, together with evidentiary problems and a third-party confession, sufficiently supported a “gateway” claim of actual innocence so that petitioner could pursue habeas relief on defaulted claims. *House v. Bell*, 547 U.S. 518 (2006).

Federal courts faced with allegations of actual innocence must first address all non-defaulted claims for comparable relief and other grounds for cause to excuse the procedural default. *Dretke v. Haley*, 541 U.S. 386 (2004).

Supreme Court will not decide a question of federal law if a state court’s decision rests on an independent and adequate state law ground, be it substantive or procedural. *Lee v. Kemna*, 534 U.S. 362 (2002). Although ordinarily violation of a firmly established state law will foreclose review of a federal claim, there exist exceptional cases where exorbitant application of a generally sound rule renders the state ground inadequate to foreclose consideration of a federal question. *Id.*

Petitioner had procedurally defaulted on his death-eligibility claim because he failed to bring it before the state courts in accordance with state procedural rules. *Johnson v. Pinchak*, 392 F.3d 551 (3d Cir. 2004), *cert. denied*, 546 U.S. 849 (2005). Here the state courts, although addressing the merits of his case in the alternative, clearly rested their decisions on state procedural grounds as a separate and independent basis for denying petitioner’s death-eligibility claim. *Id.* The touchstone of the “actual innocence” exception to procedural default is actual innocence of the sentence imposed, not innocence of a sentence for which petitioner was merely eligible. *Id.*

See *Hubbard v. Pinchak*, 378 F.3d 333 (3d Cir. 2004)(“actual innocence” exception to procedurally defaulted claims applies only in the rarest of cases), *cert. denied*, 543 U.S. 1070 (2005).

IX. SUCCESSIVE PETITIONS

The district court lacked jurisdiction to consider petitioner's successive habeas petition because he failed to comply with the gatekeeping requirements of 28 U.S.C. §2244(b); so, too, did the Ninth Circuit. *Burton v. Stewart*, 127 S.Ct. 793 (2007). The Supreme Court therefore declined to reach the *Blakely* question upon which it had granted *certiorari*. *Id.*

Although under *Cage v. Louisiana*, 498 U.S. 39 (1990), a jury instruction is unconstitutional if a reasonable likelihood exists that the jury understood it to permit conviction without proof beyond a reasonable doubt, the Supreme Court did not make this rule retroactive to cases on collateral review. *Tyler v. Cain*, 533 U.S. 656, 664-66 (2001). AEDPA also greatly restricts a federal court's power to provide relief to state prisoners filing second or successive habeas petitions. *Id.* at 661.

Because *Booker* does not apply retroactively to cases on collateral review, it provides no justification for a second or successive habeas petition. *In re Olopade*, 403 F.3d 159 (3d Cir. 2005).

A motion for reconsideration of a habeas petition's denial pursuant to *F.R.C.P.* 60(b) should be considered a second or successive petition when it seeks to collaterally attack the underlying convictions. *Pridgen v. Shannon*, 380 F.3d 721 (3d Cir. 2004), *cert. denied*, 543 U.S. 1155 (2005).

Also, the Supreme Court did not "dictate" that the constitutional law announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was retroactive to cases on collateral review. *In re Turner*, 267 F.3d 225, 227 (3d Cir. 2001). Thus Turner could not file a second habeas petition raising an *Apprendi* claim. *Id.*

A federal habeas corpus petitioner's first successful motion to reinstate his direct appeal did not render later petitions "successive" under AEDPA. *In re Olabode*, 325 F.3d 166 (3d Cir. 2003).

See *In re Wagner*, 421 F.3d 275 (3d Cir. 2005).

In states where a defendant may not assert ineffective assistance of trial counsel on direct review (i.e., Arizona), the ineffective assistance of post-conviction counsel can constitute "cause" that can excuse a procedural default that would have barred a federal habeas court from hearing a claim of ineffective assistance of trial counsel. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

X. STATE LAW CLAIMS

A state court decision that buttons displaying the victim's image could be worn by his family during petitioner's trial did not deny petitioner a fair trial. *Cary v. Musladin*, 127 S.Ct. 649 (2006).

A state court decision is not "contrary to" clearly established federal law merely because the state court took a different view of ambiguous Supreme Court precedent than did the federal court of appeals. *Mitchell v. Esparza*, 540 U.S. 12 (2003). Here the state court did not apply the harmless error doctrine in an "objectively unreasonable" manner. *Id.*

Under AEDPA, petitioner's burden is to prove that the state court applied federal law in an objectively unreasonable manner. *Woodford v. Viscotti*, 537 U.S. 19 (2002).

State courts need not cite United States Supreme Court precedents, or even be aware of them, when making their determinations. The critical issue under 28 U.S.C. §2254(d) is if the state court decision contradicts or unreasonably applies such precedent. *Early v. Packer*, 537 U.S. 3 (2002).

Petitioner made out a *prima facie* *Batson* claim that Pennsylvania had to rebut. *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir.), *cert. denied*, 546 U.S. 957 (2005).

Also, federal courts are not to second guess a state parole board's decision absent a finding that it shocks the judicial conscience. *Hunterson v. DiSabato*, 308 F.3d 236 (3d Cir. 2002).

While the Appellate Division had correctly identified federal law governing prosecutorial misconduct, its decision was an unreasonable application of that law where the prosecutor implied that the African-American defendant had raped to satisfy his sexual frustrations; that defendant preferred Caucasian women because both his wife and his victim were white, and had chosen his victim on this basis; and that the jury would visit a "worse assault" on the victim if it did not believe her testimony. *Moore v. Morton*, 255 F.3d 95 (3d Cir. 2001). The trial court's curative instructions were proper, but could not cure the errors. *Id.*; see also *Penry v. Johnson*, 531 U.S. 1003 (2001)(erroneous supplemental instruction on mitigating evidence in a capital case); *Lackawanna County District Attorney v. Coss*, 531 U.S. 923 (2001)(no remedy for state prisoner attacking a current sentence enhanced by an allegedly unconstitutional prior conviction for which prisoner is no longer in custody).

XI. FEDERAL HABEAS PROCEEDINGS

Claims of insufficiency of the evidence face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, it is the responsibility of the jury -- not the court -- to decide what conclusions should be drawn from evidence admitted at trial. Second, on habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. *Coleman v. Johnson*, 132 S. Ct. 2060 (2012). Further, federal courts must look to state law for the substantive elements of a criminal offense, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law. *Id.*

A federal habeas court may excuse a procedural default of an ineffectiveness claim when the claim was not properly presented in state court due to the absence of counsel, or due to the post-conviction attorney's errors, in an initial-review proceeding. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

XII. DISCOVERY

State is to serve a copy of the exhibits accompanying its answer on a *pro se* petitioner who requests them. *Pindale v. Nunn*, 248 F.Supp.2d 361 (D.N.J. 2003).

XIII. EVIDENTIARY HEARING

Although the state court had unreasonably applied *Batson v. Kentucky*, 476 U.S. 79 (1986), in not requiring the prosecution to identify its reasons for striking 12 of 14 African-Americans in the jury pool, the proper remedy in the district court was an evidentiary hearing -- not the granting of a new trial -- to permit the State to "present evidence in defense of its actions." *Hardcastle v. Horn*, 368 F.3d 246, 259 (3d Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

District court to hold an evidentiary hearing on defendant's claim of ineffective assistance of counsel during the penalty phase. *Marshall v. Hendricks*, 307 F.3d 36 (3d Cir. 2002), *cert. denied*, 538 U.S. 911 (2003).

XIV. APPEALS

Where in his plea agreement, defendant waived the right to file a collateral attack, but then claimed his counsel was ineffective for failing to file an appeal, the court held that enforcing the waiver would not result in a miscarriage of justice because defendant did not identify any nonfrivolous ground, not covered by the waiver, for a direct appeal or collateral attack in his petition. *U.S. v. Mabry*, 536 F.3d 231 (3d Cir. 2008).

HARASSMENT (See also **DISORDERLY PERSONS**)

III. ELEMENTS/PURPOSE TO HARASS

Defendant's venting of frustration to a 911 dispatcher in crude terms over what he regarded as an improper roadblock did not evidence a purpose to harass another pursuant to *N.J.S.A. 2C:33-4*. *State v. Duncan*, 376 *N.J. Super.* 253 (App. Div. 2005).

Insufficient evidence existed to prove that defendant harassed his 18-year-old daughter during their argument over finances. *State v. Walsh*, 360 *N.J. Super.* 208 (App. Div. 2003).

HINDERING

No error in not requiring jury to specifically find which of two factual circumstances, or both, supported the hindering conviction. *State v. Chavies*, 345 *N.J. Super.* 254 (App. Div. 2001).

HOMICIDE (See also **CAPITAL PUNISHMENT, COMPLICITY, DEFENSES, INSANITY, INTOXICATION, SELF-DEFENSE**)

I. MURDER - *N.J.S.A. 2C:11-3*

A. Types of Homicide

Felony murder is committed even if defendant sets fire to the victim and not to a dwelling or other structure. *State v. Arenas*, 363 *N.J. Super.* 1 (App. Div. 2003), *certif. denied*, 178 *N.J.* 452 (2004). Defendant is guilty of felony murder for an intended killing committed in the course of a predicate felony. *Id.*

See *Kamienski v. Hendricks*, 2009 U.S. App. LEXIS 11456 (3d Cir. 2009) (felony murder was not applicable to defendant because selling illegal drugs was not included in the felony murder statute and no robbery or other requisite felony was committed).

Only murder, not aggravated manslaughter, reducible to manslaughter when passion/provocation present. *State v. Galicia*, 210 *N.J.* 364 (2012).

E. Evidence

See *State v. McGuire*, 419 *N.J. Super.* 88 (App. Div.), *certif. denied*, 208 *N.J.* 335 (2011) (direct and circumstantial evidence of defendant's guilt was overwhelming).

III. INSTRUCTIONS

A. Generally

Defendant's stated fear that his wife might be attempting to retrieve a weapon when he shot her in the back cannot constitute reasonable provocation justifying a passion/provocation instruction. *State v. Rambo*, 401 *N.J. Super.* 506 (App. Div. 2008), *certif. denied*, 197 *N.J.* 258 (2008).

No rational basis existed for lesser-included aggravated and reckless manslaughter charges. *State v. Hammond*, 338 *N.J. Super.* 330 (App. Div.), *certif. denied*, 169 *N.J.* 609 (2001).

See *State v. Goodman*, 415 *N.J. Super.* 210 (App. Div. 2010) (no rational basis to charge lesser-included offense of aggravated manslaughter where defendant shot the victim at least seven times at close range), *certif. denied*, 205 *N.J.* 78 (2011).

See *State v. Docaj*, 407 *N.J. Super.* 352 (App. Div.) (holding unobjected-to error in passion/provocation manslaughter charge was harmless because of the four references to the "cooling off" element, three correctly recited the State's burden of proof), *certif. denied*, 200 *N.J.* 370 (2009).

B. Murder

Defendant's conviction was affirmed, even though lesser included offenses were not charged, because the defense agreed at trial that there was no

rational basis to find defendant not guilty of lesser included offenses. *State v. Ramsey*, 415 N.J.Super. 257 (App. Div. 2010), *certif. denied*, 205 N.J. 77 (2011).

C. Felony Murder

“Rational basis” and “clearly indicated” standards apply when considering whether to charge a jury with the statutory affirmative defense to felony murder, depending upon whether the charge is requested or unrequested. *State v. Walker*, 203 N.J. 73 (2010). The Court concluded the evidence in the record clearly indicated that the trial court should have *sua sponte* instructed the jury on the unrequested affirmative defense, but because the jury’s findings based on the verdict as to other counts negated most, if not all, of the four prongs of the statutory defense, there was no plain error. *Id.* A felony murder instruction was confusing as to causation and required reversal because it did not address the possibility that others’ volitional acts could break the causal chain, and the trial court did not tailor the instructions to address one of defendant’s principle defenses. *State v. Belliard*, 415 N.J.Super. 51 (App. Div. 2010), *certif. denied*, 205 N.J. 81 (2011). The instruction on the felony murder affirmative defense was accurately conveyed. *Id.*

E. Vehicular Homicide

See *State v. Atwater*, 400 N.J.Super. 319 (App. Div. 2008); *State v. Eldridge*, 388 N.J.Super. 485 (App. Div. 2006), *certif. denied*, 189 N.J. 650 (2007).

IV. VEHICULAR HOMICIDE - N.J.S.A. 2C:11-5

Evidence of driving on the revoked list, when accompanied by the reasons for that revocation, may be probative of recklessness in a vehicular homicide case. *State v. Bakka*, 176 N.J. 533 (2003). Erroneously admitting such evidence can also be harmless. *Id.*

See *State v. Pelham*, 176 N.J. 448 (as to causation and intervening cause of death issues), *cert. denied*, 540 U.S. 909 (2003).

V. SENTENCES

C. Vehicular Homicide - N.J.S.A. 2C:11-5

Facts giving rise to a mandatory parole disqualifier under N.J.S.A. 2C:11-5b(1) need not be proven beyond a reasonable doubt to a jury. *State v. Stanton*, 176 N.J. 75, *cert. denied*, 540 U.S. 903 (2003).

See *State v. Jarrells*, 181 N.J. 538 (2004)(like *State v. Ferencsik*, 326 N.J.Super. 228 (App. Div. 1999), and *State v. Wade*, 169 N.J. 302 (2001), pre-amendment NERA applies to vehicular homicide); *State v. Lebra*, 357 N.J.Super. 500 (App. Div. 2003)(probationary term for vehicular homicide is illegal).

IDENTIFICATION

I. DUE PROCESS

See *State v. Denofa*, 375 N.J.Super. 373 (App. Div. 2005), *rev’d o.g.* 187 N.J. 24 (2006).

II. PROCEDURES

The state constitution requires law enforcement officers to contemporaneously memorialize in writing any out-of-court identification procedures. *State v. Delgado*, 188 N.J. 48 (2006). The Court also advised electronic recording of stationhouse identification procedures. *Id.*

B. Show-Ups

Although the show-up identification was impermissibly suggestive, the out-of-court identification was reliable and therefore admissible at trial. *State v. Herrera*, 187 N.J. 493 (2006). The Court declined to entertain defendant’s

claim that the state constitution requires a more stringent standard regarding show-up identifications. *Id.*

Although defendant was handcuffed in the back of a police vehicle when witnesses identified him, this happened shortly after the crimes occurred and it was necessary for the police to act swiftly in apprehending the perpetrator where shots were fired in a congested area and the public risk was high.

State v. Wilson, 362 N.J. Super. 319 (App. Div.), *certif. denied*, 178 N.J. 250 (2003).

C. Photographic Identifications

The Supreme Court revised the procedures for evaluating eyewitness identification evidence, holding that when a defendant can show “some evidence” of suggestiveness that could lead to mistaken identification, he may have a pretrial hearing where he must show evidence of suggestiveness relating to police conduct to warrant exclusion. *State v. Henderson*, 208 N.J. 208 (2011). If defendant meets the threshold showing, the State must offer proof that the identification is reliable, accounting for system and estimator variables. *Id.*

In identification cases, the threshold of suggestiveness necessary to warrant an admissibility hearing is higher when the actions are those of a private citizen rather than the police. *State v. Chen*, 208 N.J. 307 (2011). In cases involving private citizens, defendant must present evidence that the identification procedure was made under highly suggestive circumstances that could lead to a mistaken identification. *Id.*

In the absence of a proper trial court record, the Court declined to adopt a new standard for determining the admissibility of out-of-court photographic identification procedures. *State v. Adams*, 194 N.J. 186 (2008).

In the proper exercise of their gatekeeping function pursuant to *N.J.R.E.* 403 and 104, trial courts should grant requests for preliminary hearings when the reliability of the State’s identification evidence is called into question by the highly suggestive conduct of private actors that pose a significant risk of misidentification. *State v. Chen*, 402 N.J. Super. 62 (App. Div. 2008), *aff’d in part, modified in part*, 207 N.J. 404 (2011).

Victim who viewed many computer photographs of individuals had engaged in a “mugshot book” identification process police used every day. *State v. Janowski*, 375 N.J. Super. 1 (App. Div. 2005). This process was not equivalent to a photographic array that must be preserved to be admissible, and, regardless, no evidence illustrated that the procedure was impermissibly suggestive or that any such possible suggestiveness resulted in a very substantial likelihood of irreparable misidentification. *Id.*

Photographic array was not unduly suggestive, but even if it was the witnesses’ in-court identifications were not tainted. *State v. Galiano*, 349 N.J. Super. 157 (App. Div. 2002), *certif. denied*, 178 N.J. 375 (2003).

See State v. Branch, 182 N.J. 338 (2005) (Because the jury only needed to know that police fairly displayed a photographic array, the reasons for including defendant’s photo -- he was developed as a suspect based on “information received” -- were irrelevant and highly prejudicial). *See also State v. Lazo*, 209 N.J. 9 (2012) (detective’s testimony that defendant’s photo resembled a composite sketch was improper under *Branch* because the reasons an officer places a defendant’s photo in an array are irrelevant and prejudicial. Aside from improperly enhancing the victim’s credibility, the testimony intruded on the jury’s rule; Court also held that a composite sketch is admissible as a prior identification under *N.J.R.E.* 803(a)(3)). *State v.*

Johnson, 421 N.J. Super. 511 (App. Div. 2011) (prosecutor's comment that the State was precluded by the rules of evidence from explaining why a police detective chose defendant's picture to include in a photo array violated *Bankston* and *Branch* because it implied that the State had additional information about defendant's guilt from an undisclosed source); *State v. King*, 390 N.J. Super. 344 (App. Div.), *certif. denied*, 190 N.J. 394 (2007); *State v. Livingston*, 340 N.J. Super. 133 (App. Div.), *aff'd o.g.* 172 N.J. 209 (2002).

D. Voice Identifications

The victim was permitted to resume the stand and identify defendant's voice upon hearing it in court while he testified. *State v. Williams*, 404 N.J. Super. 147 (App. Div. 2009), *certif. denied*, 201 N.J. 440 (2010). Defendant's failure to object below was fatal to his argument on appeal. *Id.*

IV. JURY INSTRUCTION CONCERNING IDENTIFICATION

The Supreme Court referred the identification instruction to the Model Jury Charge and Criminal Practice Committees to consider a reference to "suggestibility" and any other factor deemed appropriate. *State v. Herrera*, 187 N.J. 493 (2006).

No need for a *sua sponte* cross-racial identification charge. *State v. Murray*, 338 N.J. Super. 80 (App. Div.), *certif. denied*, 169 N.J. 608 (2001).

See *State v. Galiano*, 349 N.J. Super. 157 (App. Div. 2002) (identification charge was proper), *certif. denied*, 178 N.J. 375 (2003).

INCOMPETENCY TO STAND TRIAL (See also INSANITY, WITNESSES)

III. DETERMINATION OF THE FITNESS TO PROCEED; EFFECT OF FINDING UNFITNESS; PROCEEDINGS IF FITNESS IS REGAINED; POST-COMMITMENT HEARINGS (N.J.S.A. 2C:4-6)

A. Determination of Fitness to Proceed

In a case where the defense experts testified that defendant was incompetent to stand trial and the State expert found him competent, the Appellate Division disagreed with the trial court hearing the witnesses and determined that the State witness was not as qualified to evaluate mental retardation. *State v. M.J.K.*, 369 N.J. Super. 532 (App. Div.), *certif. dismissed*, 181 N.J. 549 (2005). Therefore, the appellate court held that defendant could not stand trial. *Id.*

See *State v. Purnell*, 394 N.J. Super. 28 (App. Div. 2007).

INDICTMENT (See also GRAND JURY, JOINDER & SEVERANCE)

I. SUFFICIENCY

Each lie in support of one fraudulent claim in a single document cannot be viewed as a separate act of insurance fraud; instead, each constitutes a component of one fraudulent claim. *State v. Fleischman*, 189 N.J. 539 (2007). To sustain an indictment on child pornography charges, the State presented some evidence that defendant acted with complete awareness in using his computer and the internet to provide and offer child pornography in a shared folder to establish that defendant knowingly committed at least one of the statutorily prohibited actions. *State v. Lyons*, 417 N.J. Super. 251 (App. Div. 2010).

II. AMENDMENT AND TECHNICAL ERROR

A. Generally

See *State v. Tarlowe*, 370 N.J. Super. 224 (App. Div. 2004).

III. DISMISSAL OF INDICTMENT (See also **PROSECUTORS**)

A. Generally

Trial court abused its discretion by dismissing one of two counts alleging third-degree aggravated sexual contact because, based on a balancing of factors pursuant to *In re K.A.W.*, 104 N.J. 112 (1986), defendant had sufficient notice of the offenses so as to prepare a defense. *State v. Salter*, 425 N.J. Super. 504 (App. Div. 2012).

Passage of more than two months between charging the grand jury and presenting the case compounded the misleading effect of the charge and required dismissal. *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010). The Contractors Registration Act (N.J.S.A. 56:8-136 to 152) provides for both regulatory relief and criminal prosecution. *State v. Rowland*, 396 N.J. Super. 126 (App. Div. 2007), *certif. denied*, 193 N.J. 587 (2008). The trial judge improperly dismissed defendant's indictment charging him with a violation of N.J.S.A. 56:8-138(a), a statute which requires only that the State prove that defendant 1) engaged in the home-improvement business and 2) was not registered with the Division of Consumer Affairs. *Id.*

Prosecutor's erroneous instruction on reckless manslaughter justified dismissal of reckless manslaughter indictment. Charging the grand jury on a "duty to act" (under the so called "omission liability" provision in N.J.S.A. 2C:2-1b(2)), based on duties articulated in the Restatement of Torts that have never made their way into NJ law did not provide sufficient notice for due process purposes. *State v. Lisa*, 194 N.J. 409 (2008).

Trial courts cannot dismiss a criminal indictment in a domestic violence case based on collateral estoppel (*e.g.*, where the family part judge found that the victim failed to prove an act of violence by a preponderance of the evidence). *State v. Brown*, 394 N.J. Super. 492 (App. Div. 2007). The State was not in privity with the victim in her domestic violence action, and such action is designed to protect an individual victim - - a quite different purpose than in a criminal case where the State prosecutes on the public's behalf. *Id.*

Although the prosecutor's refusal to proceed while seeking a stay of the trial court's decision was clearly wrong, neither fundamental fairness nor the prosecutor's actions justified dismissing the indictment. *State v. Ruffin*, 371 N.J. Super. 371 (App. Div. 2004). The trial court erred in denying a stay after it suppressed evidence going to the heart of the State's case. *Id.*

While a defendant has no right to appear before the grand jury unless subpoenaed or invited to testify with his or her consent, he or she cannot be compelled to so appear while handcuffed or shackled, and accompanied by sheriff's officers, unless the trial court holds a hearing and determines that law enforcement's legitimate security concerns cannot otherwise be met. *State v. Grant*, 361 N.J. Super. 349 (App. Div. 2003). The trial judge has the sole responsibility for determining if physical restraints are required, and here the grand jury also should not have learned that defendant had overstayed his work visa and was being held on \$1,000,000 bail. *Id.*

See *State v. Irelan*, 375 N.J. Super. 100 (App. Div. 2005)(trial court erred in dismissing the indictment after improperly suppressing evidence seized from defendant's vehicle following his stop and arrest for DWI); *State v. Gruber*, 362 N.J. Super. 519 (App. Div.)(trial court erred in dismissing indictment under N.J.S.A. 2C:1-3f, the statutory curtailment of the dual sovereignty doctrine), *certif. denied*, 178 N.J. 251 (2003).

IV. JOINDER AND SEVERANCE (See also **JOINDER & SEVERANCE**)

See *State v. Lewis*, 389 N.J. Super. 409 (App. Div.)(although trial court should have severed the contempt charge, error was harmless to the murder and contempt convictions), *certif. denied*, 190 N.J. 393 (2007).

VII. VARIANCE

See *State v. Berardi*, 369 N.J. Super. 445 (App. Div. 2004) (although jury charged as to a type of carjacking not found in the indictment, error was not clearly capable of producing an unjust result and counsel apparently approved of the charge given), *certif. granted*, 183 N.J. 213, *appeal dismissed*, 185 N.J. 250 (2005).

INFORMANTS

I. GOVERNMENTAL PRIVILEGE TO WITHHOLD INFORMER'S IDENTITY

See *State v. Adim*, 410 N.J. Super. 410 (App. Div. 2009); *State v. Williams*, 364 N.J. Super. 23 (App. Div. 2003).

INSANITY (See also **INCOMPETENCY TO STAND TRIAL, INTOXICATION**)

I. RAISING THE INSANITY DEFENSE

Due process does not mandate the definition of legal insanity, and states may confine defense evidence of mental illness to the issue of insanity and bar defendant from relying on such evidence to contest *mens rea*. *Clark v. Arizona*, 126 S.Ct. 2709 (2006).

Trial courts may not appoint *amicus* counsel for the purpose of assisting them in investigating defendant's capacity to waive an insanity defense. *State v. Marut*, 361 N.J. Super. 431 (App. Div. 2003).

See *State v. Handy*, 421 N.J. Super. 559 (App. Div. 2011), *certif. granted*, 209 N.J. 99 (2012) (addressing procedure when defendant simultaneously raises insanity defense and self-defense).

III. JURY INSTRUCTIONS

A trial court had no duty to *sua sponte* instruct the jury on the defense of diminished capacity where defendant's evidence focused only on his insanity defense. *State v. Rivera*, 205 N.J. 472 (2011). The defense of diminished capacity was not clearly indicated by the evidence. *Id.*

Only in the rare and exceptional circumstance can a jury be instructed that a criminally insane person may be capable of comprehending that an act is legally wrong while not understanding that it is morally wrong. *State v. Winder*, 200 N.J. 231 (2009). This was not such a case. *Id.*

The evidence did not clearly indicate that defendant murdered his pregnant girlfriend as a result of a deific command, thus the Court found no error in not defining "wrong" as "legal and moral wrong" for the jury. A Worlock charge is only available in cases where a defendant's will is overborne by a perceived divine command that overcomes to ability to be conscious of society's laws disapproving of that command and a temporal proximity existed between the command and defendant's actions. Although majority declined to overrule the Worlock charge on stare decisis grounds, a two-member concurrence would have done so. *State v. Singleton*, 211 N.J. 157 (2012).

VI. PROCEEDINGS NECESSARY UPON AN ACQUITTAL BY REASON OF INSANITY

A. Commitment of a Person by Reason of Insanity (N.J.S.A. 2C:4-8)

Trial courts possess the inherent authority to impose conditions following a verdict of not guilty by reason of insanity, which may include periodic reviews pursuant to *State v. Krol*, 68 N.J. 236 (1975). *State v. Ortiz*, 193 N.J. 278 (2008).

INTERSTATE AGREEMENT ON DETAINERS (IAD) (See also **EXTRADITION**)

II. MECHANICS OF THE AGREEMENT

A. Article III

Defendant failed to deliver all necessary and executed IAD forms, thereby failing to trigger the 180 day time period for the State to try him. *State v. Pero*, 370 N.J.Super. 203 (App. Div. 2004).

A defendant's request for trial disposition of an indictment is not tantamount to a detainer, and does not trigger the 180 day time period for trial pursuant to N.J.S.A. 2A:159A-3a. *State v. Burnett*, 351 N.J.Super. 222 (App. Div. 2002).

B. Article IV

The "antishuttling" provision of the IAD bars a defendant's return to the receiving state even though he or she previously had been sent there on a detainer for a one-day arraignment and was returned to the sending state. The IAD's absolute language required that every prisoner's arrival in the receiving state triggered the "no return" mandate. *Alabama v. Bozeman*, 531 U.S. 1051 (2001).

Court orders equivalent to an order to produce do not qualify as a detainer under the IAD, but are a written request for temporary custody. *State v. Baker*, 198 N.J. 189 (2009). In determining that orders to produce were not a detainer, the Court declined to adopt the "writ plus" test accepted in a few jurisdictions. *Id.*

INTOXICATION

I. AS A DEFENSE TO A CRIME

A. Voluntary Intoxication

Where defendant objected to a jury charge on the defense of voluntary intoxication, the facts did not clearly indicate a rational basis for the conclusion that defendant suffered from such a prostration of faculties as to render him incapable of forming the requisite mens rea for aggravated sexual assault. *State v. R.T.*, 411 N.J.Super. 35 (App. Div. 2009), *aff'd*, 205 N.J. 493 (2011).

JOINDER & SEVERANCE

I. OFFENSES IN THE SAME INDICTMENT OR ACCUSATION

A. Permissive Joinder of Offenses

See *State v. Pierro*, 355 N.J.Super. 109 (App. Div. 2002) (*R. 3:7-6* joinder of burglary and theft offenses committed four days apart was proper), *certif. denied*, 175 N.J. 434 (2003).

B. Mandatory Joinder of Offenses

Cocaine sales made minutes apart were part of the "same episode" and should have been part of the same indictment. *State v. Williams*, 172 N.J. 361 (2002).

The mandatory joinder rule prevented the State from prosecuting defendant on a charge of unlawful possession of a weapon after he was tried and convicted of certain persons not to possess a weapon, but the trial court granted a judgment of acquittal notwithstanding the verdict. *State v. Veney*, 409 N.J.Super. 368 (App. Div. 2009).

C. Severance of Offenses

Defendant put his intent directly in issue by claiming that he was merely role-playing during conversations with a supposed child and did not knowingly possess child pornography. *State v. Davis*, 390 N.J.Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007). Thus, severance of the child-related charges from the pornographic image charges was unnecessary. *Id.*

Although the trial court should have severed the contempt charge, the error was harmless to defendant's murder and contempt convictions. *State v. Lewis*, 389 N.J.Super. 409 (App. Div.), *certif. denied*, 190 N.J. 393 (2007).

Although trial court could sever defendant's contempt charge from his burglary and assault charges, it erroneously precluded the State from offering evidence of defendant's inability to lawfully enter his former residence where the alleged burglary took place. *State v. Silva*, 378 N.J. Super. 321 (App. Div. 2005). Unless permitted to present evidence of the TRO depriving defendant of his right to enter, the State could not prove an element of burglary. *Id.* Child sexual assault offenses involving two victims were properly joined for trial. *State v. Krivacska*, 341 N.J. Super. 1 (App. Div.), *certif. denied*, 170 N.J. 206 (2001), *cert. denied*, 535 U.S. 1012 (2002).

II. DEFENDANTS

See *State v. Brown*, 170 N.J. 138 (2001).

JURIES

I. RIGHT TO JURY TRIAL

A. Generally

A mistrial revives the right to a jury trial and nullifies a prior waiver of the jury trial right. *State v. Campbell*, 414 N.J. Super. 292 (App. Div. 2010).

A defendant may knowingly and voluntarily waive the right to a jury trial and have a bench trial. *State v. Jackson*, 404 N.J. Super. 483 (App. Div.), *certif. denied*, 199 N.J. 129 (2009).

B. No Right to a Jury Trial

4. Disorderly persons offenses

See *State v. Miller*, 382 N.J. Super. 494 (App. Div. 2006).

7. Civil Action Under New Jersey Insurance Fraud Prevention Act - N.J.S.A. 17:33A-1 to 30

See *State v. Sailor*, 355 N.J. Super. 315 (App. Div. 2002).

8. Vehicular Homicide

Intoxication pursuant to N.J.S.A. 2C:11-5b(1) is not an element of vehicular homicide, but rather is a sentencing factor triggering a one-third to one-half term of parole ineligibility that the trial court can find at sentencing by a preponderance of the evidence. *State v. Stanton*, 176 N.J. 75, *cert. denied*, 540 U.S. 903 (2003).

C. Waiver

Waiver of right to jury trial invalid in absence of signed jury waiver as required by R. 1:8-1(a), coupled with judge's failure to question defendant on the record regarding his request to waive trial by jury, and judge's failure to state his reasons for granting defendant's request. *State v. Blann*, 429 N.J. Super. 220 (App. Div. 2013).

III. VOIR DIRE; EXCUSAL FOR CAUSE; PEREMPTORY CHALLENGES

A. Generally

1. R. 1:8-3

The Supreme Court modified *State v. Gilmore*, 103 N.J. 508 (1986), governing claims of discriminatory peremptory challenges to make it comport with *Johnson v. California*, 545 U.S. 162 (2005). *State v. Osorio*, 199 N.J. 486 (2009). The analytical framework now requires: (1) that the opponent of a challenge rebut its presumptive constitutionality by tendering evidence sufficient to raise an inference of discrimination, (2) the burden then shifts to the proponent of the strike to articulate clear and reasonably specific explanations of race neutrality, and (3) the trial court must weigh the proofs to determine whether the movant has shown by a preponderance of the evidence that the strike was exercised on unconstitutional grounds. *Id.*

See *State v. Fuller*, 182 N.J. 174 (2004).

2. Examples

To set out a *prima facie* case, defendants need not show that it was more likely than not that the prosecution's peremptory challenges were racially motivated. *Johnson v. California*, 544 U.S. 162 (2005); See *Snyder v. Louisiana*, 128 S.Ct. 1205 (2008)(prosecutors violated *Batson* in a capital case when the removed all five prospective African-American jurors through peremptory challenges); *Miller-El v. Dretke*, 544 U.S. 231 (2005)(prosecution violated *Batson* by striking 10 of 11 African-Americans for pretextual reasons).

Trial courts are required to adhere to the AOC's "Approved Jury Selection Standards, Including Model *Voir Dire* Questions" directive in conducting juror *voir dire*. *State v. Morales*, 390 N.J.Super. 470 (App. Div. 2007).

Trial judge generally should not reseal jurors invalidly excused based on gender. *State v. Chevalier*, 340 N.J.Super. 339 (App. Div.), *certif. denied*, 170 N.J. 386 (2001).

See *Rice v. Collins*, 546 U.S. 333 (2006)(prosecutor had a sufficiently race-neutral reason for striking an African-American juror); *State v. O'Brien*, 183 N.J. 376 (2005)(no need to ask prospective jurors if they could accept defendant's treatment if found not guilty be reason of insanity); *State v. Tinnes*, 379 N.J.Super. 179 (App. Div. 2005)(judge cannot conduct bifurcated *voir dire* that deprives party of intelligently exercising their right to challenge potential jurors).

B. *Voir Dire* Examination on Particular Topics

Demonstrably religious jurors are members of a cognizable group within the meaning of the representative cross-section rule. *State v. Fuller*, 182 N.J. 274 (2004). Parties exercising peremptory challenges may probe such jurors to elicit any trial-related bias, and reasons for disqualification need not rise to the level of a challenge for cause, but parties cannot rely on mere hunches to defeat a *prima facie* showing of discriminatory use of peremptory challenges on grounds of religious belief. *Id.*

See *State v. Hill*, 365 N.J.Super. 463 (App. Div.)(defendant requested questioning regarding the use of a hammer or blunt object to commit the crimes), *certif. denied*, 179 N.J. 373 (2004).

IV. DISQUALIFICATION OF JUROR

A trial court must remove a deliberating juror who unequivocally expresses an unwillingness or inability to put bias aside and follow the law. *State v. Jenkins*, 182 N.J. 112 (2004). The juror's refusal to abide by her sworn oath to follow the law, due to her emotional identification with defendant, left her "unable to continue" under R. 1:8-2(d)(1), even absent physical illness or disability. *Id.* Trial court may not permit an individual to sit as a juror after the juror has alleged bias. *State v. Tyler*, 176 N.J. 171 (2003).

Removal of a deliberating juror for reasons personal to him was proper. *State v. Williams*, 377 N.J.Super. 130 (App. Div.), *certif. denied*, 185 N.J. 297 (2005). The correct remedy was a mistrial given the totality of the circumstances, not substitution. *Id.*

See *State v. Farmer*, 366 N.J.Super. 307 (App. Div.)(juror properly removed during deliberations when it was discovered that he had prior criminal convictions), *certif. denied*, 180 N.J. 456 (2004).

The Law Division denied the Essex County Prosecutor's application to have the court order the jury manager to turn over the dates of birth for certain persons in the petit jury pool to the State to run criminal background checks on them. This was to protect the privacy of the members of the jury pool. *In re State of New*

Jersey Compelling the Jury Manager to Provide Information on Prospective Jurors, No. L-8900-11.

V. ALTERNATES; SUBSTITUTION

B. Examples

6. Trial court did not abuse its discretion in not interviewing all jurors following one's excusal because he knew the victim's mother. The excused juror stated that he had not told the other jurors, and had lacked a meaningful opportunity to have done so. *State v. R.D.*, 169 N.J. 551 (2001).
7. Financial hardship resulting from continued jury service can constitute "inability to continue" under R. 1:8-2(d). *State v. Williams*, 171 N.J. 151 (2002).
8. Juror properly disqualified and replaced by an alternate during deliberations when it was discovered that he had prior undisclosed criminal convictions. *State v. Farmer*, 366 N.J. Super. 307 (App. Div.), *certif. denied*, 180 N.J. 456 (2004).
9. Jury deliberations had advanced to the point that substitution with an alternate juror was not a viable option. *State v. Jenkins*, 182 N.J. 112 (2004); *State v. Williams*, 377 N.J. Super. 130 (App. Div.), *certif. denied*, 185 N.J. 297 (2005).

VI. FAIR CROSS-SECTION REQUIREMENTS

A. Generally

See *State v. Fuller*, 182 N.J. 274 (2004)(religious beliefs).

VII. SEQUESTRATION; DISPERSAL; REASSEMBLY OF JURY

See *State v. Black*, 380 N.J. Super. 581 (App. Div. 2005), *certif. denied*, 186 N.J. 244 (2006).

VIII. EXTRANEOUS INFLUENCES ON JURORS; EX PARTE CONTACTS

B. Examples

See *State v. DeStefano*, 339 N.J. Super. 153 (App. Div. 2001).

IX. PUBLICITY

A. Pretrial

See *State v. Jenkins*, 349 N.J. Super. 464 (App. Div.), *certif. denied*, 174 N.J. 43 (2002); *Harris v. Ricci*, 607 F.3d 92 (3d Cir. 2010) (empaneling foreign jury).

X. CONTENT OF DELIBERATIONS

A. Generally

Trial court can return jury for further deliberations after question asking about the consequences of a hung jury. *State v. DiFerdinando*, 345 N.J. Super. 382 (App. Div. 2001), *certif. denied*, 171 N.J. 338 (2002).

XII. RENDERING A VERDICT

In exercising its broad discretion in deciding whether a juror's response reflects agreement with the verdict, the trial court must eliminate all doubt about unanimity. *State v. Milton*, 178 N.J. 421 (2004). The purpose of polling is to reveal coerced decisions, and trial judges must elicit clear responses when faced with an uncertain or hesitant juror. *Id.*

The trial judge is required to discharge a jury once it reports a definite deadlock after a reasonable time and expresses that further deliberation would be futile. *State v. Adim*, 410 N.J. Super. 410 (App. Div. 2009).

JURISDICTION

I. TERRITORIAL APPLICABILITY OF THE CODE OF CRIMINAL JUSTICE

A. Although territorial jurisdiction is an element of every offense, it is non-material. *State v. Denofa*, 187 N.J. 24 (2006). Thus trial courts need only

instruct a jury to find territorial jurisdiction if defendant requests such a charge or the record clearly indicates a factual dispute regarding jurisdiction. *Id.*

B. In *State v. Sylvia*, 424 N.J. Super. 151 (App. Div. 2012), the court ruled that defendant's DWI was a "continuing" violation that started in one municipality and ended in another; therefore, either municipality could prosecute him.

Alternatively, there was enough evidence to find that violations occurred within the territorial jurisdiction of the municipal judge who tried the case.

JUVENILES

I. PHILOSOPHY OF JUVENILE JUSTICE

The legislative objective of the Code of Juvenile Justice is to significantly broaden the dispositions available to the sentencing court. *State in re M.C.*, 384 N.J. Super. 116 (App. Div. 2006). "Flexibility remains one of the major hallmarks of the Code...." *Id.*

III. CUSTODY (ARREST)

An officer was justified in arresting a juvenile and performing a search incident to arrest because, given the hour (2:00 a.m.), the officer had reasonable grounds to believe that the juvenile had left the home and care of his parents or guardian without their consent and could therefore detain the minor until identification could be determined and the minor returned to his parents. *State in re R.M.*, 408 N.J. Super. 304 (App. Div. 2009).

IV. DETENTION

The juvenile justice code does not authorize the Family Part to condition a term of probation upon completing a period of detention. *State in re T.S.*, 413 N.J. Super. 540 (App. Div. 2010).

V. WAIVER

A. Involuntary Transfer to Adult Court - N.J.S.A. 2A:4A-26; R. 5:22-2

Prosecutor's motion to waive a juvenile to adult court, falling within the Attorney General's Guidelines, must be accompanied by a statement of reasons. *State v. R.C.*, 351 N.J. Super. 248 (App. Div. 2002). The statement of reasons must show the prosecutor actually considered each factor that must be weighed under the Attorney General's Guidelines. *State in re V.A.*, 212 N.J. 1 (2012). Such waiver decisions are subject to judicial review, and waiver motions must be granted unless the juvenile clearly and convincingly proves that the decision was an abuse of prosecutorial discretion, rather than a patent and gross abuse of discretion. *Id.*

Because defendant was charged with an enumerated Chart I offense and was 17 when he committed that alleged offense, he could not prevent waiver to adult court by showing that the probability of rehabilitation prior to reaching age 19 substantially outweighed the reasons for waiver. *State v. Read*, 397 N.J. Super. 598 (App. Div.), *certif. denied*, 196 N.J. 85 (2008).

1. Criteria for Involuntary Waiver

Probable cause for purposes of N.J.S.A. 2A:4A-26 is a well-grounded suspicion that the committed the alleged crime, as set forth in *State v. J.M.*, 182 N.J. 402 (2005), and the probable cause standard governing waiver is similar to the standard that guides the grand jury's determination whether or not to indict. *State in re A.D.I/State in re A.D.II*, 212 N.J. 200 (2012). Juvenile was entitled to testify and present evidence at the probable cause portion of his waiver hearing. *State v. J.M.*, 182 N.J. 402 (2005). The prosecutor failed to provide a statement of reasons for seeking waiver, which triggered a remand, and the Court modified R. 5:22-2. *Id.*

A juvenile's psychological impairments are not among the factors the Attorney General's waiver guidelines require a prosecutor to consider in deciding whether to waive charges to adult court; however, this does not foreclose the possibility that such impairments could be relevant, in exceptional circumstances to a prosecutor's consideration of the guidelines' factors. *State v. Read*, 397 N.J. Super. 598 (App. Div.), *certif. denied*, 196 N.J. 85 (2008).

2. Juvenile's Ability to Present Evidence

Juveniles may present evidence during the probable cause portion of the waiver hearing. *State v. J.M.*, 182 N.J. 402 (2005).

VI. DISPOSITION

A. Factual Basis for Plea

An adequate factual basis existed for juvenile's plea to unlawful possession of a paintball gun. *State in re G.C.*, 179 N.J. 475 (2004).

B. Dispositional Alternatives (N.J.S.A. 2A:4A-43).

The Code of Juvenile Justice permits imposition of suspended sentences. *State in re M.C.*, 384 N.J. Super. 116 (App. Div. 2006).

C. Credit for Time Served

Juveniles are entitled to the same gap-time credit as adults, and it applies to the time served on the first sentence after a parole revocation. *State v. Franklin*, 175 N.J. 456 (2003).

D. Megan's Law

The Legislature intended to apply Megan's Law to juveniles, and the Law's purpose is to prevent the danger of recidivism posed by sex offenders and other offenders who commit predatory acts against children. *In re Registrant T.T.*, 188 N.J. 321 (2006). The sexual motive the Appellate Division engrafted as a prerequisite to Megan's Law applicability does not exist. *Id.* Megan's Law requirements apply to juveniles, but delinquents under age 14 when they committed their offenses may move to terminate those requirements when they turn 18. *In re J.G.*, 169 N.J. 304 (2001). See *State in re B.P.C.*, 421 N.J. Super. 329 (App. Div. 2011) (juveniles who are 14 years old at the time of the offense must register as sex offenders); *State in re J.P.F.*, 368 N.J. Super. 24 (App. Div.) (Megan's Law registration was mandatory, and trumped the non-disclosure provisions of the Code of Juvenile Justice), *certif. denied*, 180 N.J. 453 (2004).

E. Sufficiency of the Evidence

Sufficient credible evidence supported the trial court's finding that appellant's crimes, if committed by an adult, would constitute aggravated assault because the victim suffered significant bodily injury. *State in re T.A.*, 386 N.J. Super. 642 (App. Div. 2006).

Although the juvenile had touched a female classmate's buttocks in class and the trial court determined that he had done so for the purpose of degrading or humiliating the victim, the Appellate Division found the evidence lacking as to criminal sexual contact. *State in re D.W.*, 381 N.J. Super. 516 (App. Div. 2005). The panel claimed that common sense dictated that the juvenile's conduct was no more than "horseplay" between classmates and was not serious enough to constitute criminal sexual contact. *Id.*

F. Conditions of Probation

In exercising its broad dispositional powers concerning juveniles adjudicated delinquent, trial court could require juvenile, as a condition of probation, to advise the parent of any girl he dates of the terms of his charge's disposition involving his half-sister and of his Megan's Law status. *State in re D.A.*, 385

N.J. Super. 411 (App. Div.), *certif. denied*, 188 *N.J.* 355 (2006). Although this condition was unnegotiated, the juvenile did not seek to retract his plea. *Id.*

VII. CONSTITUTIONAL AND PROCEDURAL RIGHTS

B. Counsel

1. Required

The filing of the complaint and the obtaining of a judicially approved arrest warrant by the prosecutor's office was a critical stage in the proceedings, and pursuant to *N.J.S.A. 2A:4A-39(b)(1)*, juvenile defendant had the right to counsel and could not waive that right except in the presence of and after consultation with his attorney counsel. *State ex rel. P.M.P.*, 200 *N.J.* 166 (2009). See also *State v. Hodge*, 426 *N.J. Super.* 321 (2012) (holding that *P.M.P.* announces a new rule of law for retroactivity purposes).

Juvenile's guilty plea is invalid if he or she is unrepresented by counsel. *In re Civil Commitment of J.D.*, 348 *N.J. Super.* 347 (App. Div. 2002).

D. Fifth Amendment

1. Application of *Miranda v. Arizona*

The filing of the complaint and the obtaining of a judicially approved arrest warrant by the prosecutor's office was a critical stage in the proceedings, and pursuant to *N.J.S.A. 2A:4A-39(b)(1)*, juvenile defendant had the right to counsel and could not waive that right except in the presence of and after consultation with his attorney counsel. *State ex rel. P.M.P.*, 200 *N.J.* 166 (2009). See also *State v. Hodge*, 426 *N.J. Super.* 321 (2012) (holding that *P.M.P.* announces a new rule of law for retroactivity purposes).

Defendant's statement that because of his Bloods affiliation he would not discuss the case further could not reasonably be considered an assertion of his right to remain silent, and was made knowingly, voluntarily, and intelligently. *State v. Baylor*, 423 *N.J. Super.* 578 (App. Div. 2011), *certif. denied*, 210 *N.J.* 263 (2012).

When confronted with a suspect's ambiguous invocation of his or her right to remain silent, police officers may ask questions to clarify the suspect's intent. Whether a request was ambiguous would be analyzed using the totality of the circumstances. *State v. Diaz-Bridges*, 208 *N.J.* 544 (2012).

2. Presence of a Juvenile's Parents During Interrogation

Police must not allow a parent to take on the role of advising a juvenile of his or her rights. *State in re A.S.*, 203 *N.J.* 131 (2010). The Court also rejected the Appellate Division's *per se* rule that requires legal representation instead of parental presence when the juvenile's parent is closely related to the victim and discussed ways conflicts can be addressed without counsel's presence. *Id.*

Juvenile validly waived *Miranda* rights even though his parent was not present in the interrogation room throughout the entire interview. *State v. Q.N.*, 179 *N.J.* 165 (2004). The mother agreed to leave the room and watch the interview, and no *Presha* violation occurred. *Id.*

Parental-involvement requirement of *State v. Presha*, 163 *N.J.* 304 (2000), does not apply to statements of juveniles not subject to custodial interrogation. *State in re J.D.H.*, 171 *N.J.* 475 (2002).

See *State v. Milledge*, 386 *N.J. Super.* 233 (App. Div.), *certif. denied*, 188 *N.J.* 355 (2006); *State in re J.M.*, 339 *N.J. Super.* 244 (App. Div. 2001).

E. Due Process

Megan's Law does not violate a juvenile's due process, equal protection or freedom of movement rights. *In re J.G.*, 169 *N.J.* 304 (2001).

H. Jury Trial

- A. Juveniles not entitled to a jury trial. *In re J.G.*, 169 N.J. 304 (2001); *State in re A.C.*, 424 N.J. Super. 252 (App. Div. 2012)
- J. Sequestration of Witnesses
Trial courts may not sequester a juvenile's parents from the trial, even if they may be called as witnesses. *State in re V.M.*, 363 N.J. Super. 529 (App. Div. 2003).

KIDNAPPING, CRIMINAL RESTRAINT AND RELATED OFFENSES

I. KIDNAPPING

- B. Substantial Distance/Confinement for a Substantial Period of Time
State proved substantial confinement not merely incidental to the other crimes committed because female victim was brutally and repeatedly sexually assaulted, the male victim was repeatedly beaten in her presence, and defendant and cohorts took the victims' car keys, cell phone and wallet before leaving. *State v. Milledge*, 386 N.J. Super. 233 (App. Div.), *certif. denied*, 188 N.J. 355 (2006).
Handcuffing of elderly victims enhanced the risk of harm to them and was adequate evidence to prove that they were substantially confined for first degree kidnapping. *State v. Denmon*, 347 N.J. Super. 457 (App. Div.), *certif. denied*, 174 N.J. 41 (2002).
- C. Elements of Kidnapping
A person cannot be convicted of kidnapping, absent evidence of "force, threat, or deception," if the person acts with consent of a parent, even if the consenting parent has only joint, rather than sole, custody. *State v. Froland*, 193 N.J. 186 (2007).
Confinement of the victim in a moving car in conjunction with an armed robbery supported the "substantial distance" and "substantial confinement" elements of second-degree kidnapping. *State v. Norman Jackson*, 211 N.J. 394 (2012).
"Harm" component in the "released unharmed" provision of N.J.S.A. 2C:13-1c includes emotional or psychological harm, and disproving unharmed release is a material element of first degree kidnapping resting with the State. *State v. Sherman*, 367 N.J. Super. 324 (App. Div.), *certif. denied*, 180 N.J. 356 (2004).
As to the failure to release the victim unharmed and in a safe place element, see *State v. Casilla*, 362 N.J. Super. 554 (App. Div.), *certif. denied*, 178 N.J. 251 (2003).
- D. Jury Instructions
As to first degree kidnapping, see *State v. Sherman*, 367 N.J. Super. 324 (App. Div.), *certif. denied*, 180 N.J. 356 (2004).
- F. Sentencing
Natale applies to kidnapping, which has a 20 year presumptive term pursuant to N.J.S.A. 2C:44-1f(1)(a). *State v. Drury*, 190 N.J. 197 (2007).

II. CRIMINAL RESTRAINT AND RELATED OFFENSES

- D. Enticing a Child Into a Motor Vehicle, Structure or Isolated Area
Legislature conditioned defendant's culpability for luring under N.J.S.A. 2C:13-6 on the purpose to commit a criminal offense with or against a child, and not on the purpose to commit but a disorderly or petty disorderly persons offense. *State v. Olivera*, 344 N.J. Super. 583 (App. Div. 2001)(instruction erroneous).

LAW OF THE CASE

See *State v. King*, 340 N.J.Super. 390 (App. Div. 2001); *State v. Munoz*, 340 N.J.Super. 204 (App. Div.) (doctrine is discretionary and flexible), *certif. denied*, 169 N.J. 610 (2001).

MEDICAID

See *State v. Martinez*, 392 N.J.Super. 307 (App. Div. 2007).

MERGER

I. TESTS FOR DETERMINING MERGER

If a defendant is convicted of felony murder and more than one felony, only one predicate conviction merges. *State v. Hill*, 182 N.J. 532 (2005). Thus a special verdict sheet should be employed in such prosecutions so the jury can designate which offense is the predicate crime. *Id.* If more than one felony is designated, the sentencing court may only merge the predicate crime that set in motion the chain of events leading to the murder, *i.e.*, the "first in time" felony. *Id.*

II. MERGER GENERALLY

See *State v. Messino*, 378 N.J.Super. 559 (App. Div.) (aggravated manslaughter and endangering convictions did not merge given the case's facts), *certif. denied*, 185 N.J. 297 (2005); *State v. Stafford*, 365 N.J.Super. 6 (App. Div. 2003).

III. MERGER AND SENTENCING

Although driving while intoxicated convictions merge into vehicular homicide and aggravated assault convictions, mandatory drunk driving penalties survive merger. *State v. Wade*, 169 N.J. 302 (2001); *State v. Baumann*, 340 N.J.Super. 553 (App. Div. 2001).

Imposition of concurrent sentences meant that any claimed error as to merger had no effect on defendant's aggregate sentence. *State v. Soto*, 340 N.J.Super. 47 (App. Div.), *certif. denied*, 170 N.J. 209 (2001).

IV. MERGER AND PREPARATORY CRIMES

A. Possessory Offenses

Unlawful possession of a weapon and possession of a weapon for unlawful purposes convictions do not merge. *State v. Basit*, 378 N.J.Super. 125 (App. Div. 2005).

V. MERGER AND CONTROLLED DANGEROUS SUBSTANCES

N.J.S.A. 2C:39-4.1d, which bars merger of school zone and firearms convictions, is constitutional. *State v. Soto*, 385 N.J.Super. 257 (App. Div.), *certif. denied*, 188 N.J. 491 (2006).

See *State v. Walker*, 385 N.J.Super. 388 (App. Div.) (fortified premises conviction does not merge with other drug convictions), *certif. denied*, 187 N.J. 83 (2006).

MISCONDUCT IN OFFICE (See also BRIBERY AND CORRUPT INFLUENCES)

I. OFFICIAL MISCONDUCT

A. Definitions - Public Servant, Benefit

The head clerk of a formerly privatized motor vehicle agency was a "public servant" as defined in the Code, and thus could be convicted of official misconduct. *State v. Perez*, 185 N.J. 204 (2005). "Public servant" is defined broadly to include those authorized to perform governmental functions, regardless of whether they hold public employment. *Id.*

A volunteer firefighter was a "public servant" as defined in the Code, and thus, could be convicted of official misconduct. *State v. Quezada*, 402 N.J. Super. 277 (App. Div. 2008).

Although charges of receiving and failing to report based upon conflicts of interest law alone cannot provide a basis for criminal sanctions, charges of official misconduct, which alleged unauthorized acts performed with a purpose to obtain benefits for State employees and vendors may form the

basis for criminal liability. *State v. Thompson*, 402 N.J.Super. 177 (App. Div. 2008).

Officers of a private, non-profit corporation who were private contractors serving the needs of those with certain disabilities were not “public servants” for purposes of N.J.S.A. 2C:30-2. *State v. Mason*, 355 N.J.Super. 296 (App. Div. 2002). The corporation was not an arm of the government, its services were contractually limited, and defendants neither performed a regulatory function nor enforced regulations. *Id.*

B. Duties Imposed by Law the Breach of Which May Give Rise to Misconduct Charges

1. Police Officers

Off-duty officer may not provide drugs to another to sell. *State v. Corso*, 355 N.J.Super. 518 (App. Div. 2002), *certif. denied*, 175 N.J. 547 (2003).

C. Acts “Relating to a Public Servant’s Office”

An off-duty police officer’s sexual crime did not require permanent disqualification from public employment under N.J.S.A. 2C:51-2 because the crime did not involve or touch upon his law enforcement position. *State v. Hupka*, 203 N.J. 222 (2010). The majority upheld defendant’s agreement to never seek future State employment as a law enforcement officer because he voluntarily agreed to that condition as part of his plea agreement. *Id.*

Security guard at a board of education was a public servant, but her joining of a fraud scheme had nothing to do with her status; not all public employees submitting false health benefit claims commit official misconduct. *State v. Decree*, 343 N.J.Super. 410 (App. Div.), *certif. denied*, 170 N.J. 388 (2001).

D. Sufficiency of the Evidence

Defendant, a police officer, used public resources during business hours to further his illicit relationship with a supposed child, and therefore committed official misconduct. *State v. Davis*, 390 N.J.Super. 573 (App. Div.), *certif. denied*, 192 N.J. 599 (2007).

E. Merger

Convictions of official misconduct and committing a pattern of misconduct do not merge, but making false alarm convictions merge with official misconduct convictions. *State v. Quezada*, 402 N.J.Super. 277 (App. Div. 2008).

MOTOR VEHICLES

I. ARREST (See also **ARREST**)

A. Automobile Stops

1. Generally

See *State v. Golotta*, 178 N.J. 205 (2003); *State v. Dangerfield*, 171 N.J. 446 (2002).

2. Legality of a Stop

State conceded defendant’s stop for bypassing a drunk driving roadblock was improper. *State v. Badessa*, 185 N.J. 303 (2005).

Police had probable cause to stop defendant in his vehicle based on a citizen informant tip that he appeared to be intoxicated upon entering his car and driving off. *State v. Reiner*, 363 N.J.Super. 167 (App. Div. 2003), *rev’d o.g.* 180 N.J. 307 (2004).

Police may stop a driver for having a license plate obscured by a tinted plastic covering, *i.e.*, rendered less legible, pursuant to N.J.S.A. 39:3-77. *State in re D.K.*, 360 N.J.Super. 49 (App. Div. 2003).

II. AUTOMOBILE SEARCHES

A school principal, suspecting that evidence of criminal activity will be found in a student’s car parked on school grounds, is not required to have probable cause

before searching the vehicle. *State v. Best*, 403 *N.J. Super.* 428 (App. Div. 2008), *aff'd*, 201 *N.J.* 100 (2010). The reasonable suspicion standard in *State v. T.L.O.*, 94 *N.J.* 331 (1983) governs. *Id.*

III. DOUBLE JEOPARDY (See also **DOUBLE JEOPARDY**)

In a trial *de novo* in the Law Division, that court is not bound by the municipal court's factual findings, and hence double jeopardy is not triggered when the Law Division judge convicts defendant of drunk driving on an evidential basis rejected by the municipal court. *State v. Kashi*, 360 *N.J. Super.* 538 (App. Div. 2003), *aff'd*, 180 *N.J.* 45 (2004).

IV. DRUNK DRIVING

A. Blood and Urine Tests (See also **SEARCH AND SEIZURE**)

Defendant need only be given reasonable access to an independent test, and police need not release him or her absent a family member or friend to transport. *State v. Greeley*, 178 *N.J.* 38 (2003). Such a decision on the officers' part did not impermissibly encroach on defendant's statutory right to an independent blood-alcohol test pursuant to *N.J.S.A.* 39:4-50.2. *Id.*

Drunk driving statute was violated by a defendant who had ingested cocaine that physically impaired him. *State v. Franchetta*, 394 *N.J. Super.* 200 (App. Div. 2007).

See *State v. DeFrank*, 362 *N.J. Super.* 1 (App. Div. 2003) (admission of nurse's certification regarding blood drawing pursuant to *N.J.S.A.* 2A:62A-11).

B. Breathalyzer/Alcotest (Chemical Breath Testing)

1. Generally

The Supreme Court adopted, with modifications, the special master's report and recommendations that the Alcotest is scientifically reliable and that its results are admissible in drunk driving prosecutions. *State v. Chun*, 194 *N.J.* 54 (2008).

Observation of a defendant by an arresting officer, as opposed to an Alcotest operator, during the 20 minutes prior to the taking of an Alcotest was sufficient to meet the State's burden in Alcotest cases to show that during the 20-minute period immediately preceding the test, defendant did not ingest, regurgitate or ingest anything that would affect the test's reliability. *State v. Ugrovics*, 410 *N.J. Super.* 482 (App. Div. 2009), *certif. denied*, 202 *N.J.* 346 (2010).

The semi-annual recalibration requirement for Alcotest machines established in *Chun* does not apply to cases where police administered the test prior to *Chun* but in compliance with then-existing annual recalibration protocol. *State v. Pollock*, 407 *N.J. Super.* 100 (App. Div. 2009).

Absence of Breathalyzer training course completion date on the test operator's certification card did not render the card invalid. *State v. Sohl*, 363 *N.J. Super.* 573 (App. Div. 2003). Thus the trial court should not have suppressed defendant's Breathalyzer test results. *Id.*

Sequential lack of numbering of alcohol influence report does not require suppression of Breathalyzer evidence. *State v. Jorn*, 340 *N.J. Super.* 192 (App. Div. 2001).

See *State v. Holland*, 422 *N.J. Super.* 185 (App. Div. 2011) (concluding that nowhere in *Chun* did the Supreme Court expressly state that in order to be admissible, BAC tests derived from an Alcotest are only admissible when the device has been calibrated with the Ertco-Hart thermometer referenced in *Chun*, to the exclusion of all others; the panel remanded for the Law Division to determine whether the thermometer was properly

certified). On appeal after remand, the Appellate Division upheld the Law Division's findings that the Control Company, Inc. digital thermometer is comparable in all material respects to the Ertco-Hart thermometer referenced in *Chun*, and thus the Control Company's certificate of calibration constituted a proper foundational document for the calibration of its digital thermometers as required under *Chun*. *State v. Holland*, 423 N.J. Super. 309 (App. Div. 2011).

2. Expert Testimony (See also **EVIDENCE**)
See *State v. Cleverley*, 348 N.J. Super. 455 (App. Div. 2002).

C. Constitutional Rights

1. Speedy Trial (See also **SIXTH AMENDMENT**)
See *State v. Fulford*, 349 N.J. Super. 183 (App. Div. 2002).
2. Counsel
See *State v. Hrycak*, 184 N.J. 351 (2005); *State v. Schadewald*, 400 N.J. Super. 350 (App. Div. 2008).

D. Refusals/Implied Consent

Drivers stopped for suspected DWI are required to provide a breath sample to determine whether they have been driving drunk. Because defendant agreed to provide the required breath sample but failed to do so, he was among those who have consented and are not entitled to any reading of the additional paragraph police read to defendants arrested for DWI who give ambiguous or conditional responses when asked for a breath sample. *State v. Schmidt*, 206 N.J. 71 (2011).

A new element of a refusal violation is that the police inform a suspected drunk driver of the consequences of a refusal to take a breath test in a language the suspect understands. *State v. Marquez*, 202 N.J. 485 (2010). The Court vacated the aspect of the Appellate Division's decision requiring police officers to read the additional paragraph of the New Jersey Motor Vehicle Commission Standard Statement for Operators of a Motor Vehicle whenever a defendant immediately refuses to take a breathalyzer upon request. *State v. Spell*, 196 N.J. 537 (2008). The Court recognized that the Legislature vested the authority to determine the contents and procedure of the standard statement in the Chief Administrator of the Motor Vehicle Commission. *Id.*

Defendant unequivocally consented to the breath test, and his later failures to provide the necessary volume and length of breath samples did not render his earlier consent ambiguous or conditional. *State v. Schmidt*, 206 N.J. 71 (2011). Thus, defendant was not entitled to reading of the Additional Statement. *Id.*

A commercial vehicle driver whose conduct violates both the general and commercial DWI statutes may be arrested and charged under both, and if they refuse a breath test, they may be charged under both statutes.

However, the State cannot amend the complaint to charge refusal by a person driving a commercial vehicle after the expiration of the statute of limitations. *State v. Nunnally*, 420 N.J. Super. 58 (App. Div. 2011).

Defendant's reply to officer that he would take the breathalyzer test but that it was "under duress" did not constitute refusal to take such a test where the officer did not tell defendant, consistent with *State v. Widmaier*, 157 N.J. 475 (1999), that his response was unacceptable and that if he refused to take the test a summons would issue alleging a violation of the breathalyzer statute. *State v. Duffy*, 348 N.J. Super. 609 (App. Div. 2002).

See *State v. Badessa*, 185 N.J. 303 (2005); *State v. Rodriguez-Alejo*, 419 N.J. Super. 33 (App. Div. 2011) (defendant's DWI conviction was reversed where he was not read the second part of the standard DWI form after providing inadequate breath samples as required by *Schmidt*; defendant carried his burden of production and persuasion as to his limited knowledge of English); *State v. Federico*, 414 N.J. Super. 321 (App. Div. 2010) (defendant understood warning and circumstances); *State v. Bertrand*, 408 N.J. Super. 584 (App. Div. 2009) (holding a garage was a quasi-public area for purposes of the refusal statute); *State v. Breslin*, 392 N.J. Super. 584 (App. Div.), *certif. denied*, 192 N.J. 477 (2007).

E. Field Sobriety Testing

See *State v. Nikola*, 359 N.J. Super. 573 (App. Div.), *certif. denied*, 178 N.J. 30 (2003).

Police may conduct roadside field sobriety testing based on reasonable suspicion alone that the defendant was driving while intoxicated. Roadside sobriety testing is more analogous to a *Terry* stop than a formal arrest and thus the reasonable suspicion standard, rather than probable cause standard, applies. See *State v. Bernokeits*, 423 N.J. Super. 365 (App. Div. 2011).

F. Trial - Evidence & Procedure

1. Pre-trial Discovery

Defendants not entitled to inspect and photograph rooms in police stations where Alcotest administered to verify proper administration; neither defendant established reasonable justification that would overcome countervailing security interests disfavoring civilian access to interior of police stations. *State v. Carrero*, 428 N.J. Super. 495 (App. Div. 2012).

Discovery items requested by defendant, although not included in the Special Master's list of fundamental documents, established the reliability of the Alcotest device used in connection with a particular prosecution and should have been provided to defendant in discovery. *State v. Maricic*, 417 N.J. Super. 280 (App. Div. 2010).

R. 7:2-1(b)(2) requires that an officer sign a summons for drunk driving, but the failure to do so within the 30 days set forth in N.J.S.A. 39:5-3 is a curable defect. *State v. Fisher*, 180 N.J. 462 (2004). The State may correct the error either by affidavit or testimony demonstrating probable cause, or have the officer sign the ticket. *Id.*

G. Driving While Intoxicated

1. Operating a Motor Vehicle While Intoxicated

Competent lay observations of intoxication, coupled with additional independent proofs tending to demonstrate defendant's consumption of narcotic, hallucinogenic or habit-producing drugs as of the time of defendant's arrest, constitute proofs sufficient to allow the factfinder to conclude that defendant was intoxicated beyond a reasonable doubt. *State v. Bealor*, 187 N.J. 574 (2006); see *State v. Franchetta*, 394 N.J. Super. 200 (App. Div. 2007).

"Impairment" is defined broadly in both New Jersey and New York to include any degree of impairment of a physical or mental ability to operate a motor vehicle. *State v. Zeikel*, 423 N.J. Super. 34 (App. Div. 2011). New Jersey interprets "intoxication" to include any degree of impairment in driving ability. *Id.*

See *State v. Adubato*, 420 N.J. Super. 167 (App. Div. 2011), *certif. denied*, 209 N.J. 430 (2012); *State v. Kashi*, 360 N.J. Super. 538 (App. Div. 2003),

aff'd, 180 N.J. 45 (2004); *State v. Nikola*, 359 N.J.Super. 573 (App. Div.), *certif. denied*, 178 N.J. 30 (2003).

It is a violation of defendant's right against self-incrimination to use, as substantive evidence of guilt, and for purposes of assessing credibility, evidence of his silence after receiving a summons for allowing a drunken friend to drive defendant's sister's car from bar. *State v. Maf Stas*, 212 N.J. 37 (2012).

H. Right to Independent Tests

The State is not required to prove, as an element of a *per se* drunk driving violation, that defendants have been advised of their right to independent testing pursuant to N.J.S.A. 39:4-50.2(c) and (d). *State v. Howard*, 383 N.J.Super. 538 (App. Div.), *certif. denied*, 187 N.J. 80 (2006). See *State v. Greeley*, 178 N.J. 38 (2003)(right is not absolute).

I. Pretextual and Rejected Defenses

1. Involuntary Intoxication

Involuntary intoxication on chemicals or otherwise is not a defense to DWI. *State v. Federico*, 414 N.J.Super. 321 (App. Div. 2010).

J. Defenses

Common-law defense of necessity could apply to drunk driving where defendant alleged that he was fleeing from a beating he was receiving at a restaurant. *State v. Romano*, 355 N.J.Super. 21 (App. Div. 2002).

K. Sentencing

1. Prior Offenses

A conviction for refusing to submit to a breathalyzer test under N.J.S.A. 39:4-50.4a cannot be considered a prior conviction for purposes of sentencing on a subsequent DWI conviction under N.J.S.A. 39:4-50. *State v. Ciancaglini*, 204 N.J. 597 (2011).

The Supreme Court reaffirmed *State v. Laurick*, 120 N.J. 1, *cert. denied*, 498 U.S. 967 (1990), regarding prior uncounselled drunk driving convictions. *State v. Hrycak*, 184 N.J. 351 (2005).

Although defendant's first DWI conviction did not comply with *Laurick*, her completed 5A form and other documentary evidence illustrated that she had received notice and been assigned counsel. *State v. Weil*, 421 N.J.Super. 121 (App. Div. 2011).

Municipal court's order for no court to use defendant's guilty plea on his second DWI conviction to enhance any sentence imposed after the date of the plea did not control Law Division judge's sentencing defendant as a third time offender. *State v. Enright*, 416 N.J.Super. 391 (App. Div. 2010), *certif. denied*, 205 N.J. 183 (2011).

Defendant, with prior 1982 and 1998 drunk driving convictions, was a third offender for his 2000 drunk driving conviction pursuant to N.J.S.A. 39:4-50(a)(3). *State v. Burroughs*, 349 N.J.Super. 225 (App. Div.), *certif. denied*, 174 N.J. 43 (2002). Defendants have no vested right to continued leniency when committing subsequent drunk driving offenses. *Id.*; see *State v. Luthe*, 383 N.J.Super. 512 (App. Div. 2006).

Use of defendant's New York convictions under the amended 1997 statute allowing substantially similar convictions from other jurisdictions to constitute prior drunken driving convictions did not violate ex post factor laws and may be used to enhance his punishment. *State v. Zeikel*, 423 N.J. Super. 34 (App. Div. 2011). Failure to receive notice of the prior convictions did not bar imposing the progressively enhanced sentencing mandates of our drunk driving statutes. *Id.*

See *State v. Reiner*, 180 N.J. 307 (2004)(DWI under N.J.S.A. 39:4-50(a) is a separate offense from DWI under N.J.S.A. 39:4-50(g)); *State v. Conroy*, 397 N.J.Super. 324 (App. Div.), *certif. denied*, 195 N.J. 420 (2008)(defendant was entitled to ten-year “step-down” provision of N.J.S.A. 39:4-50(a)(3) on his fourth DWI conviction which occurred more than 10 years after his third, and because his first conviction was uncounseled, it did not qualify for enhanced sentencing purposes and he was deemed a third offender); *State v. Kotsev*, 396 N.J.Super. 389 (App. Div.), *certif. denied*, 193 N.J. 276 (2007) (SLAP was not a sentencing option for defendant’s third drunk driving conviction, and therefore he was required to serve jail time and perform community service); *State v. Breslin*, 392 N.J.Super. 584 (App. Div.)(for purposes of the refusal to take a Breathalyzer test), *certif. denied*, 192 N.J. 477 (2007).

2. License Suspension

Amendments to the drunk driving statute’s license suspension provision are not retroactive. *State v. Chambers*, 377 N.J.Super. 365 (App. Div. 2005).

Defendant’s prior conviction in New York for drunk driving subjected him to an enhanced penalty in New Jersey for driving with a suspended license because the New Jersey statute applies to non-resident drivers whose driving privileges have been suspended via revocation of their foreign licenses. *State v. Colley*, 397 N.J.Super. 214 (App. Div. 2007).

3. Merger

A drunk driving conviction does not merge with a conviction for refusing to submit to a breathalyzer test because under *Blockburger v. United States*, 284 U.S. 299 (1932), each statute requires proof of an additional fact that the other does not. *State v. Eckert*, 410 N.J.Super. 389 (App. Div. 2009).

V. FATALITIES AND BODILY INJURIES CAUSED BY VEHICULAR OPERATION - CHARGING OFFENSES

Appellate Division affirmed defendant’s guilty plea to leaving the scene of a motor vehicle accident resulting in death (N.J.S.A. 2C:11-5.1), determining that the statute was constitutional and did not require defendants to violate their right against self-incrimination. *State v. Fisher*, 395 N.J.Super. 533 (App. Div.), *certif. denied*, 192 N.J. 593 (2007).

See *State v. Eldridge*, 388 N.J.Super. 485 (App. Div. 2006), *certif. denied*, 189 N.J. 650 (2007).

VI. SPEEDING

A. Observational Offense

Officer’s testimony about the applicable speed limit can give rise to conviction, but does not create a rebuttable presumption of the lawful speed. *State v. Morgan*, 393 N.J.Super. 411 (App. Div. 2007).

VII. VIOLATION OF THE PUBLIC SAFETY, N.J.S.A. 2C:40-18b

See *State v. Lenihan*, 427 N.J.Super. 499 (App. Div. 2012) (affirming defendant’s conviction for “violation of the public safety” because of her seatbelt law violation; defendant lost control of her vehicle, crashed, and killed her 16-year-old passenger; a draw of defendant’s blood revealed that she had been huffing inhalants; the Court held that the seatbelt law was enacted to protect the public health and safety, and is not unconstitutionally vague).

OBSTRUCTION OF JUSTICE (See also CONTEMPT, ELUDING, ESCAPE, FLIGHT, HINDERING, RESISTING ARREST)

I. OBSTRUCTION - N.J.S.A. 2C:29-1

Citizens may not use an improper police stop to justify commission of a new and distinct offense such as obstruction, eluding, escape, or resisting arrest. *State v. Crawley*, 187 N.J. 440 (2006), *certif. denied*, 189 N.J. 650 (2007).

Flight from an unconstitutional investigatory stop that justifies an arrest for obstruction does not automatically justify the admission of evidence revealed during the course of that flight. *State v. Williams*, 410 N.J. Super. 549 (App. Div. 2009), *certif. denied*, 201 N.J. 440 (2010). There needs to be sufficient attenuation from the unconstitutional stop to justify admission. *Id.*

Defendant's refusal to provide information to a trooper called to an altercation was not obstruction because he never took flight, intimidated anyone, used force or violence, or physically interfered with the trooper. *State v. Camillo*, 382 N.J. Super. 113 (App. Div. 2005).

OPEN PUBLIC RECORDS ACT

I. GENERALLY - N.J.S.A. 47:1A-1 et seq.

Tapes of 911 calls are "government records" within the meaning of N.J.S.A. 47:1A-1.1 that generally are to be disclosed when requested pursuant to OPRA, and the custodian has the burden of proving that denying access is authorized. *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373 (App. Div. 2003). In this case involving Jayson Williams, neither the potential impact on jury selection nor possible juror confusion satisfied the government's burden of proof. *Id.*; see *Serrano v. South Brunswick Township and Middlesex County Prosecutor's Office*, 358 N.J. Super. 352 (App. Div. 2003) (reporter can have access to defendant's 911 call in an ongoing murder prosecution). See *Gannett New Jersey Partners v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005) (regarding specificity of document requests, need for disclosure and waiver of confidentiality).

PERJURY AND FALSE SWEARING

I. PERJURY

A. Definition

See *State v. Neal*, 361 N.J. Super. 522 (App. Div. 2003).

B. Materiality

The State produced sufficient evidence as to the falsity of defendant's statements to the grand jury regarding his expenditures as a board of education member. *State v. Neal*, 361 N.J. Super. 522 (App. Div. 2003). False testimony is "material" whenever it tends to prove the central matters in issue or if it establishes or disproves matters themselves bearing crucially on the central issues. *Id.* If the alleged falsehoods are of collateral matters, the materiality requirement may be met by testimony relating to those matters that has the capacity to affect the weight or focus of the evidence bearing on an ultimate issue. *Id.*

I. Sufficiency of the Evidence

See *State v. Neal*, 361 N.J. Super. 522 (App. Div. 2003).

POLICE

V. SELECTIVE ENFORCEMENT

Police cannot conduct a field inquiry based on race. *State v. Maryland*, 167 N.J. 471 (2001); see also *State v. Francis*, 341 N.J. Super. 67 (App. Div. 2001).

Defendant claiming that an MDT check was illegally motivated by race must establish a *prima facie* case. *State v. Segars*, 172 N.J. 481 (2002). Once he or she does, the State then must produce evidence of a race-neutral reason for the check; defendant, however, ultimately must prove discriminatory treatment by a preponderance of the evidence. *Id.*

POLYGRAPHS

II. ADMISSIBILITY

Trial court properly barred defendant's proffered suppression hearing testimony about the results of his polygraph examination. *State v. Domicz*, 188 N.J. 285 (2006). The Supreme Court reaffirmed its ruling in *State v. McDavitt*, 62 N.J. 36 (1972). *Id.*

Although the trial court should not have limited defendants' right to cross-examine a crucial State witness about the results of her polygraph test, the substantial evidence of their guilt rendered the error harmless. *State v. Castagna*, 187 N.J. 293 (2006).

Admission of polygraph expert's testimony was not harmless where it implicitly constituted an opinion on defendant's guilt and told the jury that law enforcement agencies believe that guilty people will fail a polygraph and innocent people will pass. *State v. Mervilus*, 418 N.J. Super. 138 (App. Div. 2011).

III. STIPULATION

C. Applicability

1. Witnesses

See *State v. Castagna*, 187 N.J. 293 (2006).

3. Sixth Amendment

Because defendant had not been formally charged at the time he signed a polygraph stipulation, his Sixth Amendment right to counsel was not violated. *State v. A.O.*, 198 N.J. 69 (2009).

POST-CONVICTION RELIEF (See generally R. 3:22-1 et seq.)

I. INTRODUCTION

It is the trial court's responsibility to address and decide the questions brought before it; it may not avoid the issues and defer them to the Appellate Division. *State v. Roper*, 362 N.J. Super. 248 (App. Div. 2003).

Although declining to hold as a matter of law that every defendant has a right to present oral argument to the trial judge in support of a PCR petition, in *State v. Parker*, 212 N.J. 269 (2012), the Court held that oral argument should generally be granted on petitions. When the judge decides not to hold oral argument, he or she should provide a statement of reasons tailored to the particular application stating why oral argument is unnecessary. Under the facts of Parker, the Court held that the defendant was entitled to oral argument.

II. GROUNDS FOR RELIEF

There is no procedural or substantive federal due process right for a prisoner to gain post-conviction access to forensic evidence for purposes of DNA testing. *District Attorney's Office v. Osborne*, 129 S.Ct. 2308 (2009).

Excessiveness of a sentence otherwise within legal limits is not cognizable on post-conviction relief. *State v. Acevedo*, 205 N.J. 40 (2011). A reviewing court cannot exercise original jurisdiction and modify a defendant's sentence. *Id.*

Defendant received the effective assistance of counsel during the guilt and penalty phases of his capital prosecution. *State v. Harris*, 181 N.J. 391 (2004).

Newly discovered third party guilt evidence presented at a post-conviction relief hearing entitled defendant to a new trial. *State v. Ways*, 180 N.J. 171 (2004).

Defendant received ineffective assistance of counsel during the penalty phase of his capital prosecution. *State v. Chew*, 179 N.J. 186 (2004).

Defendant need not wait until a direct appeal is resolved to move pursuant to N.J.S.A. 2A:84A-32a for a remand to seek DNA testing. *State v. Hogue*, 175 N.J. 578 (2003).

Defense counsel did not have to explain the sentencing law that defendant's future offenses may trigger, did not have to file a meritless suppression motion,

and did not inadequately advise defendant of his right to testify. *State v. Ball*, 381 N.J.Super. 545 (App. Div. 2005).

Post-conviction relief court correctly concluded on remand that any motion to suppress trial counsel could have filed would have been denied. *State v. Roper*, 378 N.J.Super. 236 (App. Div.), *certif. denied*, 185 N.J. 265 (2005).

Defendant was entitled to a new trial for a 1995 murder because the expert testimony regarding bullet lead composition was based on erroneous scientific foundations. *State v. Behn*, 375 N.J.Super. 409 (App. Div.), *certif. denied*, 183 N.J. 591 (2005). Although a wealth of physical and circumstantial evidence tied defendant to the murder, expert conclusions that comparison of bullet lead is not scientifically reliable was newly discovered. *Id.*

Defendant was entitled to withdraw his guilty plea because of the sexual relationship between his attorney and his mother during the plea and sentencing process. *State v. Lasane*, 371 N.J.Super. 151 (App. Div. 2004), *certif. denied*, 182 N.J. 628 (2005).

Although defendant failed to present a *prima facie* case of ineffective assistance of counsel, the Appellate Division addressed the claim in the interests of justice and rejected it. *State v. Cusumano*, 369 N.J.Super. 305 (App. Div.), *certif. denied*, 181 N.J. 546 (2004). Here the child sexual assault victim was severely traumatized, and defense counsel was not ineffective for not objecting to the trial court's admonition that no one enter or leave the courtroom while the child testified. *Id.*

Appellate counsel's failure to raise on direct appeal the trial court's rejection of defendant's aggravated manslaughter plea meant that defendant's subsequent murder conviction was vacated and the aggravated manslaughter plea agreement was reinstated. *State v. Madan*, 366 N.J. Super. 98 (App. Div. 2004).

Defendant entitled to post-conviction DNA testing pursuant to N.J.S.A. 2A:84A-32a because identity was a significant trial issue and favorable results would give rise to a reasonable probability that a new trial motion would be granted. *State v. Peterson*, 364 N.J.Super. 387 (App. Div. 2003). The strength of the State's evidence was irrelevant in deciding if identity was a significant trial issue. *Id.*

The court rules do not require that defendant be "in custody" to seek post-conviction relief. *State v. Roper*, 362 N.J.Super. 248 (App. Div. 2003). Here defendant's drug conviction made him eligible for a mandatory extended term if he is again convicted of distributing or possessing drugs with intent to distribute. *Id.*

Trial counsel effectively represented defendant, and strategically decided not to present an alibi defense because defendant concededly was not bedridden when the crime was committed and thus had been physically capable of committing it. *State v. Drisco*, 355 N.J.Super. 283 (App. Div. 2002), *certif. denied*, 178 N.J. 252 (2003). Also, trial counsel had no conflict of interest due to defendant's claim that he had been ineffective in representing defendant in another matter. *Id.*

Defendant failed to raise an issue of constitutional magnitude by claiming that the absence of transcripts from his 1979 trial denied him due process -- his 18 year flight from justice and any resultant delay was not the State's fault. *State v. Bishop*, 350 N.J.Super. 335 (App. Div.), *certif. denied*, 174 N.J. 192 (2002).

While trial counsel should have interviewed a defense alibi witness before trial, failure to do so did not constitute ineffective assistance of trial counsel because no prejudice existed. *State v. Banks*, 349 N.J.Super. 234 (App. Div. 2001), *aff'd o.b.* 171 N.J. 466 (2002).

It was not illegal for the trial court, upon imposing consecutive sentences, to require defendant to serve a less-restrictive term before serving the more-restrictive term. *State v. Ellis*, 346 N.J.Super. 583 (App. Div.), *aff'd o.b.* 174 N.J. 535 (2002).

Trial judge's prior involvement with prosecuting defendant in a different case mandated recusal from presiding over defendant's trial, and granting of post-conviction relief. *State v. Kettles*, 345 N.J.Super. 466 (App. Div. 2001), *certif. denied*, 171 N.J. 443 (2002).

Defendants can pursue racial profiling claim on post-conviction relief even if not raised at trial or on direct appeal. *State v. Clark*, 345 N.J.Super. 349 (App. Div. 2001).

Defendant's attorney had no conflict of interest, and defendant thus was not entitled to post-conviction relief. *State v. Murray*, 345 N.J.Super. 158 (App. Div. 2001), *certif. denied*, 172 N.J. 179 (2002).

Defendant, who untimely alleged ineffective assistance of trial counsel for not seeking DNA testing in his murder case, could apply to the trial court for the release of evidence, if it still existed, for such testing. Defendant must establish by a preponderance of the credible evidence that a reasonable probability exists that the case's outcome would have been different given a favorable DNA result. *State v. Cann*, 342 N.J.Super. 93 (App. Div.), *certif. denied*, 170 N.J. 208 (2001).

Those seeking such testing at public expense must first apply to the Public Defender for funding and receive that office's certification that it will pay for the tests if the motion for DNA testing is granted. *Id.*

Defendant's petition for PCR to set aside his guilty plea based on ineffective assistance was timely filed because he could not have filed it until the State moved to have him committed under the SVPA. *State v. Maldon*, 422 N.J. Super. 475 (App. Div. 2011). Defendant's petition was also proper because he did not know that the conviction resulting from his guilty plea could be the basis for his civil commitment. *Id.*

See *State v. Echols*, 199 N.J. 344 (2009) (defendant had not received ineffective assistance of trial or appellate counsel); *State v. Reevey*, 417 N.J.Super. 134 (App. Div. 2010), *certif. denied*, 206 N.J. 64 (2011) (defendant did not receive ineffective assistance of counsel based on counsel's failure, in defendant's absence, to object to material-witness warrants prior to a *Gross* hearing when a hearing was later conducted and defendant was present); *State v. Bringham*, 401 N.J.Super. 421 (App. Div. 2008) (defendant's PCR petition failed to comply with requirements for relief under *State v. Laurick*, 120 N.J. 1, *cert. denied*, 498 U.S. 967 (1990)); *State v. Lewis*, 389 N.J.Super. 409 (App. Div.) (claim that trial counsel was ineffective), *certif. denied*, 190 N.J. 393 (2007); *State v. Bell*, 388 N.J.Super. 629 (App. Div. 2006) (although police armed with an arrest warrant had no right to enter defendant's aunt's home to look for him without a search warrant, the remedy was not suppression of his confession), *certif. denied*, 189 N.J. 647 (2007); *State v. Gonzalez*, 382 N.J.Super. 27 (App. Div. 2005) (discovery for a racial profiling claim); *State v. Ball*, 381 N.J.Super. 545 (App. Div. 2005) (same); *State v. Lee*, 381 N.J.Super. 429 (App. Div. 2005) (no discovery for a racial profiling claim); *State v. Reldan*, 373 N.J.Super. 396 (App. Div. 2004) (defendant never presented a *prima facie* claim entitling him to DNA testing, which could not exculpate him), *certif. denied*, 182 N.J. 628 (2005); *State v. Bray*, 356 N.J.Super. 485 (App. Div. 2003) (claim that appellate counsel was ineffective); *State v. Maldon*, 422 N.J. Super. 475 (App. Div. 2011) (prima facie case of ineffective assistance made due to certification attorney incorrectly told defendant he would not be civilly committed).

In *State v. Agathis*, 424 N.J. Super. 16 (App. Div. 2012), the court ruled that defendant was entitled to an evidentiary hearing based on counsel's representations that he could regain his firearms i.d. card after completing probation, which possibly made defendant's plea "uninformed."

III. PROCEDURAL BARS

A. R. 3:22-4

See *State v. Martini*, 187 N.J. 469 (2006)(capital case); *State v. McIlhenny*, 357 N.J. Super. 380 (App. Div.)(barring ineffective assistance claims raised in defendant's second petition), *certif. denied*, 176 N.J. 430 (2003).

B. R. 3:22-5

See *State v. Marshall*, 173 N.J. 343 (2002); *State v. Cusumano*, 369 N.J. Super. 305 (App. Div.), *certif. denied*, 181 N.J. 546 (2004).

C. R. 3:22-12

Defendant's second PCR petition, filed 13 years after his murder conviction, was time barred. *State v. Milne*, 178 N.J. 486 (2004). The choice to pursue habeas corpus relief instead of PCR did not extend the time for filing the second petition, and defendant demonstrated neither excusable neglect nor any compelling reason to overcome the procedural bar. *Id.*

Defendant's ineffective assistance claims were time barred, and neither excusable neglect nor the interests of justice required relaxation of the rule.

State v. Goodwin, 173 N.J. 583 (2002).

Defendant's second petition was untimely, and his claims, available to him on direct appeal, fell "light years short" of proving a *prima facie* case of ineffective assistance of plea counsel. *State v. McIlhenny*, 357 N.J. Super. 380 (App. Div.), *certif. denied*, 176 N.J. 430 (2003).

Defendant's petition was filed within five years of entry of the judgment of conviction even though he was convicted in 1979, fled the jurisdiction before sentencing, was recaptured in 1997, and was sentenced in 1998. *State v. Bishop*, 350 N.J. Super. 335 (App. Div.), *certif. denied*, 174 N.J. 192 (2002).

Although R. 3:22-12 barred defendant's petition filed 60 days late, the Appellate Division reached the merits of his ineffective assistance of trial counsel claim. *State v. Cann*, 342 N.J. Super. 93 (App. Div.), *certif. denied*, 170 N.J. 208 (2001).

See *State v. Marshall*, 173 N.J. 343 (2002); *State v. Norman*, 405 N.J. Super. 149 (App. Div. 2009); *State v. Merola*, 365 N.J. Super. 82 (App. Div. 2003), *certif. denied*, 179 N.J. 312 (2004).

D. Relief from a Procedural Bar.

Defendant established cause to excuse a procedural default that occurred when he failed to appeal the denial of post-conviction application, where his counsel abandoned him while his state post-conviction application was pending. *Maples v. Thomas*, 565 U.S. ___, 132 S. Ct. 912 (2012).

IV. RIGHT TO COUNSEL ON POST-CONVICTION RELIEF

To satisfy R. 3:22-6(d), "all that is required" from post-conviction relief counsel is that they advance in their brief those arguments that can be made in support of the petition and simply list or incorporate by reference defendant's remaining claims so the post-conviction relief court can consider them. *State v. Webster*, 187 N.J. 254 (2006).

Although no court rule requires oral argument on a petition and the post-conviction relief court has discretion in permitting it, such discretion should generally be exercised in favor of argument. *State v. Mayron*, 344 N.J. Super. 382 (App. Div. 2001).

V. EVIDENTIARY HEARINGS ON POST-CONVICTION RELIEF

Defendant not entitled to an evidentiary hearing to determine the admissibility of his anticipated proffer of evidence as to his state of mind and alleged diminished capacity in a 1985 murder. *State v. Milne*, 178 N.J. 486 (2004). Here defendant could not raise the time-barred *Humanik* burden-shifting claim in a post-conviction relief petition. *Id.*

Defendant was entitled to an evidentiary hearing to explore defense counsel's explanation of the effect of the community supervision for life consequence of a guilty plea. *State v. Jamgochian*, 363 N.J. Super. 220 (App. Div. 2003).

Defendant was entitled to an evidentiary hearing, not to a grant of post-conviction relief, to explore appellate counsel's deficient performance and to determine if prejudice existed. *State v. Bray*, 356 N.J. Super. 485 (App. Div. 2003).

Defendant proved a *prima facie* claim triggering an evidentiary hearing regarding his assertion that trial counsel incorrectly advised him of his sentencing exposure if he was convicted at a trial. *State v. Taccetta*, 351 N.J. Super. 196 (App. Div.), *certif. denied*, 174 N.J. 544 (2002). See *State v. Taccetta*, 200 N.J. 183 (2009). See *State v. Cooper*, 410 N.J. Super. 43 (App. Div. 2009), *certif. denied*, 201 N.J. 155 (2010); *State v. Thompson*, 405 N.J. Super. 163 (App. Div. 2009); *State v. Ball*, 381 N.J. Super. 545 (App. Div. 2005); *State v. Murray*, 345 N.J. Super. 158 (App. Div. 2001), *certif. denied*, 172 N.J. 179 (2002).

PRETRIAL INTERVENTION

I. AUTHORIZATION

R. 3:28 requires that a criminal division manager allow a defendant to submit a PTI application and must evaluate that application, even if the application is unlikely to succeed. *State v. Green*, 407 N.J. Super. 95 (App. Div.), *certif. denied*, 200 N.J. 471 (2009).

III. TIME FOR APPLICATION

Unsuccessful PTI application may not be reconsidered after a plea or verdict. *State v. Frangione*, 369 N.J. Super. 258 (App. Div. 2004). Defendant ultimately pleaded guilty to a third degree crime, but her original PTI application was denied because the indictment also charged her with a second degree crime. *Id.*

IV. ELIGIBILITY FOR PTI

Prosecutor may consider defendant's juvenile record, and aspects of defendant's juvenile and adult histories of dismissed offenses, in reviewing a PTI application pursuant to N.J.S.A. 2C:43-12e. *State v. Brooks*, 175 N.J. 215 (2002).

Every defendant has a right to apply for PTI, and the criminal division must consider the application's merits, even if the application has little chance of being approved. *State v. Green*, 413 N.J. Super. 556 (App. Div. 2010).

A. Previously Diverted Defendants

Defendant who previously received supervisory treatment under the conditional discharge statute was prohibited from subsequent admission into PTI. *State v. O'Brien*, 418 N.J. Super. 428 (App. Div. 2011).

Defendant who had previously obtained diversionary treatment in Pennsylvania for drunk driving was not barred from PTI in New Jersey under N.J.S.A. 2C:43-12g. *State v. McKeon*, 385 N.J. Super. 559 (App. Div. 2006).

However, the trial court could factor in this out-of-state diversion when evaluating PTI admission. *Id.*

F. Illegal Aliens

Although PTI cannot be denied solely because defendant is an illegal alien, such status is a relevant factor prosecutors can consider when deciding PTI applications. *State v. Liviaz*, 389 N.J. Super. 401 (App. Div.), *certif. denied*, 190 N.J. 392 (2007).

G. Continuing Criminal Business or Enterprise (Guideline 3(i)(2))

Although a prosecutor's conclusion that defendant engaged in a continuing criminal enterprise generally constitutes sufficient justification for PTI rejection, and here defendant lied in certifying bi-weekly over 4 months that he was unemployed, the Appellate Division nonetheless remanded for reconsideration because the prosecutor should not have considered Guideline 3(i)(2). *State v. Watkins*, 390 N.J. Super. 302 (App. Div.), *aff'd and remanded*, 193 N.J. 507 (2008). This panel parsed the words "continuing" and "enterprise," and found that 4 months was too brief a time period to trigger the guideline. *Id.*

VII. REVIEW STANDARDS

A. Prosecutor's Review of PTI Applications

Prosecutors may not use defendant's illegal alien status as a *per se* prohibition to PTI, but it is a factor they may consider. *State v. Liviaz*, 389 N.J. Super. 401 (App. Div.), *certif. denied*, 190 N.J. 392 (2007).

Because PTI does not apply to motor vehicle offenses, prosecutor did not abuse his discretion in requiring a guilty plea to those charges, and the prosecutor had adequate grounds to deny defendant's PTI application. *State v. Mosner*, 407 N.J. Super. 40 (2009).

1. Examples

Prosecutor's denial of defendant's PTI application was not a gross abuse of discretion or a clear error of judgment. *State v. Mahoney*, 376 N.J. Super. 63 (App. Div.), *certif. denied*, 185 N.J. 35 (2005).

Defendant, an attorney accused of stealing from his clients after forging their names to an insurance settlement check and taking their money, could constitute a "public official" who breached the public's trust within Guideline 3(l)(4). *Id.*

See *State v. Randall*, 414 N.J. Super. 414 (App. Div.) (affirming denial of defendant's PTI application where she did not recognize responsibility for her conduct and where she engaged in violent conduct involving direct combativeness with a trooper), *certif. denied*, 203 N.J. 437 (2010).

B. Standards of Review by Courts

1. Patent and Gross Abuse of Discretion

Prosecutors have wide discretion in their PTI decisions, the judiciary's role is limited to checking only the most egregious examples of injustice and unfairness, and defendants attempting to overcome a prosecutorial veto must clearly and convincingly establish that the prosecutor's refusal to sanction admission was based on a patent and gross abuse of discretion. *State v. Liviaz*, 389 N.J. Super. 401 (App. Div.), *certif. denied*, 190 N.J. 392 (2007).

a. Examples

Prosecutor abused discretion in denying PTI for defendant convicted of eluding and drunk driving based upon defendant's prior motor vehicle offenses and drunk driving conviction. *State v. Negran*, 178 N.J. 73 (2003). Motor vehicle violations were petty offenses, not crimes, that could not be considered pursuant to N.J.S.A. 2C:43-12e(9). *Id.*

Prosecutor's decision in denying defendant's PTI application was not a patent and gross abuse of discretion where she concluded that the negative factors significantly outweighed the positive, including defendant's mental illness. *State v. Hoffman*, 399 N.J. Super. 207 (App. Div. 2008).

Prosecutor did not abuse his discretion in denying PTI for a defendant who pled guilty to assault by auto while intoxicated. *State v. Moraes-*

Pena, 386 N.J. Super. 569 (App. Div.), *certif. denied*, 188 N.J. 492 (2006).

Prosecutor did not abuse his discretion in denying PTI for a defendant convicted of possessing assault firearms, and the trial court had improperly substituted its discretion for that of the State. *State v. Motley*, 369 N.J. Super. 314 (App. Div. 2004).

See *State v. Brooks*, 175 N.J. 215 (2002) and *State v. Mahoney*, 376 N.J. Super. 63 (App. Div.) (no such abuse of discretion), *certif. denied*, 185 N.J. 35 (2005).

X. TERMINATION

A. Examples

A defendant's receipt of a conditional discharge of a municipal drug charge during PTI admission does not require removal from PTI, and is different from prior receipt of such a discharge before admission. *State v. Allen*, 346 N.J. Super. 71 (App. Div. 2001).

XII. APPEALS

Because the State did not file its notice of appeal until more than 15 days after defendant's enrollment into PTI, it failed to comply with the timeliness requirements of *Rules* 2:9-3(e) and 3:28(f), and therefore, the appeal was dismissed. *State v. Robbins*, 407 N.J. Super. 148 (App. Div. 2009).

PRISONERS AND PAROLE (See also PROBATION, SENTENCING, SEXUAL OFFENSES AND OFFENDERS, VICTIM'S RIGHTS)

I. COURT APPEARANCES BY PRISONERS

While in rare cases a defendant's Fifth Amendment due process liberty interest in rejecting medical treatment may be overcome and he or she can be compelled to take anti-psychotic medication to make him or her competent to stand trial, the United States Supreme Court set forth the relevant factors trial courts must weigh in deciding this issue. *Sell v. United States*, 539 U.S. 166 (2003). The test includes whether an important governmental interest is at stake, whether involuntary medication would significantly further such state interests, whether such medication was necessary to further those interests, and whether administration of the drugs was medically appropriate. *Id.*

II. PRISONER'S CLOTHES AND APPEARANCE

As a matter of course and unless otherwise permitted by the trial court, all witnesses shall not appear in prison garb, including prosecution witnesses. *State v. Kuchera*, 198 N.J. 482 (2009). With respect to restraints, the paramount concern is courtroom security which is entrusted to the sound discretion of the trial court, making the proponent of the witness irrelevant. *Id.*

Defense witnesses may not be physically restrained while testifying unless the trial court considers numerous factors and determines at a hearing that restraints are necessary to maintain courtroom security. *State v. Artwell*, 177 N.J. 526 (2003). If a witness is restrained, the court must instruct the jury in the clearest and most emphatic terms that the restraints be given no consideration whatsoever in deciding defendant's guilt. *Id.* Also, the trial court cannot require defense witnesses to testify in prison garb. *Id.*

See *State v. Grant*, 361 N.J. Super. 349 (App. Div. 2003) (trial court to hold a hearing before determining if defendant had to testify before the grand jury handcuffed and accompanied by sheriff's officers).

X. RELEASE OF SEX OFFENDERS

Indigents indefinitely committed under the Sexually Violent Predator Act have due process rights to appointed counsel on appeal and free transcripts. *In re*

Civil Commitment of D.L., 351 N.J.Super. 77 (App. Div. 2002), *certif. denied*, 179 N.J. 373 (2004).

See *In re Commitment of W.Z.*, 173 N.J. 109 (2002)(civil commitment pursuant to Sexually Violent Predator Act); *In re Commitment of R.S.*, 173 N.J. 134 (2002); *In re Commitment of J.D.*, 348 N.J.Super. 347 (App. Div. 2002).

XV. RIGHT TO PRIVACY AND FOURTEENTH AMENDMENT

A state statute requiring parolees to agree to suspicionless searches is constitutional under the Fourth Amendment. *Samson v. California*, 126 S.Ct. 2193 (2006).

PROBATION (See also PRISONERS AND PAROLE, SENTENCING).

I. PROBATION AND CONDITIONS

The filing of an arrest warrant “commences” violation of probation proceedings pursuant to N.J.S.A. 2C:45-3c. *State v. Nellom*, 178 N.J. 192 (2003).

Trial court could order, as a condition of probation, that a juvenile delinquent advise the parents of any girl he dates of the terms of his charge’s disposition involving his half-sister and his Megan’s Law status. *State in re D.A.*, 385 N.J.Super. 411 (App. Div.), *certif. denied*, 188 N.J. 355 (2006).

Sentencing court overstepped its authority by ordering that defendant, who was in the United States illegally, inform the ICE of her conviction because the record was barren of any reference to ICE notification as a special condition of probation, the State made no request that such a term be included in its sentence, and the condition itself was inappropriate because the prosecutor’s office had the ability to notify the ICE if it deemed it appropriate to do so. *State v. V.D.*, 401 N.J. Super. 527 (App. Div. 2008).

II. REVOCATION HEARING

Because probation revocation proceedings had not commenced during defendant’s probationary term, trial court was without jurisdiction to revoke it. *State v. Thomas*, 356 N.J.Super. 299 (App. Div. 2002).

PROSECUTORS

I. GENERALLY

“The prosecutors’ offices in this state have hundreds of experienced and well-trained attorneys, many of whom have made law enforcement their career. We have no reason to believe that they cannot be trusted to bring before the grand jury meritorious complaints of potential criminal conduct and to weed out frivolous allegations unworthy of presentation.” *In re Grand Jury Request by Loigman*, 183 N.J. 133, 144 (2005).

II. DISCRETION

Where specific conduct violates more than one statute -- here, second degree endangering under N.J.S.A. 2C:24-4a and a fourth degree offense under N.J.S.A. 9:6-3 -- the selection of the charge rests in the sound discretion of the prosecutor. *State v. D.A.V.*, 176 N.J. 338 (2003); see *State v. Conklin*, 394 N.J.Super. 408 (App. Div. 2007)(terroristic threats under N.J.S.A. 2C:12-3a and b).

Prosecutor can consider a defendant’s juvenile record and dismissed charges in reviewing a PTI application. *State v. Brooks*, 175 N.J. 215 (2002).

State can charge a defendant with both possession of contraband and evidence tampering when he or she has permanently destroyed all or part of the contraband. *State v. Mendez*, 175 N.J. 201 (2002).

Prosecutor did not abuse discretion in objecting to defendant’s admission into a “drug court” program -- the 42-year-old defendant was arrested with 50 bags of cocaine near a housing project, had a prior drug conviction, had unsuccessfully been treated on probation, and was charged with a second degree crime

pursuant to *N.J.S.A. 2C:35-7.1*. *State v. Hester*, 357 *N.J. Super.* 428 (App. Div.), *certif. denied*, 177 *N.J.* 219 (2003).

Motion to waive a juvenile up to adult court must be granted unless the juvenile clearly and convincingly proves that the decision to seek waiver was a patent and gross abuse of discretion. *State v. R.C.*, 351 *N.J. Super.* 248 (App. Div. 2002).

Trial court erred in dismissing a superseding indictment with prejudice based on alleged prosecutorial vindictiveness in re-presenting a death by auto case to the grand jury after not obtaining a death by auto count in the first indictment. That court should not have applied a presumption of vindictiveness, but even if that presumption applied the State had presented sufficient evidence of non-vindictive reasons for resubmitting the case. *State v. Gomez*, 341 *N.J. Super.* 560 (App. Div.), *certif. denied*, 170 *N.J.* 86 (2001).

Prosecutors can choose between two applicable offenses to charge as part of the normal discretionary decisions they make. *State v. T.C.*, 347 *N.J. Super.* 219 (App. Div. 2002), *certif. denied*, 177 *N.J.* 222 (2003); see *State v. Medina*, 349 *N.J. Super.* 108 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002); *State v. D.V.*, 348 *N.J. Super.* 107 (App. Div. 2002), *aff'd o.b.* 176 *N.J.* 338 (2003).

Prosecutor did not violate right to a jury trial in downgrading a third degree theft to a disorderly persons offense with the trial court's consent. *State v. Medina*, 349 *N.J. Super.* 108 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002). Also, the added collateral "penalty" of civil forfeiture of office did not trigger the right to a jury trial. *Id.*

See *Rice v. Collins*, 546 *U.S.* 333 (2006)(prosecutor had a sufficiently race-neutral reason for striking an African-American juror); *State v. Fuller*, 182 *N.J.* 174 (2004)(neither the State nor defendants may use peremptory challenges to discriminate against discrete, cognizable groups defined on the basis of religious principles, which are among the group classifications protected by the representative cross-section rule); *State v. Froland*, 378 *N.J. Super.* 20 (App. Div. 2005)(no evidence of vindictiveness in kidnapping prosecution), *rev'd*, 193 *N.J.* 186 (2006).

III. DUTY OF DISCLOSURE

A. Generally

Prosecutor need not disclose to the grand jury a codefendant's letter inculcating self and absolving defendant of liability because it is not "clearly exculpatory." *State v. Evans*, 352 *N.J. Super.* 178 (Law Div. 2001).

B. Exculpatory Evidence (*Brady* violations)

The prosecution's failure to preserve potentially exculpatory evidence does not violate due process unless defendant proves bad faith. *Illinois v. Fisher*, 540 *U.S.* 544 (2004). Here the cocaine seized was not material exculpatory evidence, the police destroyed it in good faith and in accordance with normal practices, and defendant failed to appear in court and escaped apprehension for over 10 years. *Id.*

IV. PROSECUTOR'S COMMENTS AND CONDUCT

A. Failure to Object

See *State v. Murray*, 338 *N.J. Super.* 80 (App. Div.), *certif. denied*, 169 *N.J.* 608 (2001).

B. Prosecutor Openings

Prosecutor's reference to defendant's conduct as "unthinkable" and "unspeakable," and her request that the jury "speak volumes" with its verdict, were misconduct, but reversal was unwarranted. *State v. Roman*, 382 *N.J. Super.* 44 (App. Div. 2005), *certif. dismissed*, 189 *N.J.* 420 (2007).

Promising that codefendant would testify and identify defendant as the murderer, but then having codefendant refuse to do so, was reversible error even absent an objection. *State v. Walden*, 370 N.J. Super. 549 (App. Div.), certif. denied, 182 N.J. 148 (2004). “[W]hen dealing with anticipated testimony from ... any witness from the criminal milieu,” prosecutors would be “well advised to keep such potentially prejudicial comments very general and non-committal, or not make them at all....” *Id.*

See *State v. Tarlowe*, 370 N.J. Super. 224 (App. Div. 2004); *State v. Marinez*, 370 N.J. Super. 49 (App. Div.), certif. denied, 182 N.J. 142 (2004).

C. Prosecutor Summations

The prosecutor’s closing comments about a cooperating co-defendant’s sentence and a detective’s testimony were proper, and no comment was made about defendant’s right to remain silent. Any other prosecutorial error was harmless. *State v. Smith*, 212 N.J. 365 (2012).

Prosecutor’s improper comments to the jury about a witness’s related civil litigation or administrative discipline did not necessitate mistrial since judge gave timely curative instruction. *State v. Norman Jackson*, 211 N.J. 394 (2012).

Prosecutor’s altering of the theory of the crime in prosecuting a codefendant did not affect defendant’s earlier guilty plea based on the state’s now-inconsistent theory. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005); see *State v. Roach*, 146 N.J. 208, cert. denied, 519 U.S. 1021 (1996).

Prosecutor in summation could analogize the conduct of defendant -- an attorney who stole his clients’ money and did not reimburse them for nearly a year, and then only after the police searched his law office -- to that of a shoplifter or burglar who gives back the items stolen upon being caught. *State v. Mahoney*, 188 N.J. 359, cert. denied, 127 S.Ct. 507 (2006).

Prosecutor’s use of sarcasm to defend a police officer’s credibility should have been avoided, but reversal was not warranted. *State v. R.B.*, 183 N.J. 308 (2005).

Although prosecutor’s comment that defendant tailored his testimony was supported by evidence and thus was permissible, prosecutor could not refer to defendant’s presence at trial in this regard. *State v. Daniels*, 182 N.J. 80 (2004). An evidentiary basis must exist to support a prosecutor’s reference to a defendant’s tailoring. *Id.* But see *State v. Feal*, 194 N.J. 293 (2008) (holding Daniels is only entitled to pipeline retroactivity because it was a break with past practice and constituted a new rule of law).

Prosecutor could not refer to defendant’s earlier failure to claim that the sexual assault victim was a prostitute because it involved defendant’s silence and lacked probative value; defendant did not testify at trial. *State v. Muhammad*, 182 N.J. 551 (2005). In doing so, the prosecutor violated the state law privilege against self-incrimination. *Id.*

Prosecutor should not have commented that deaf sexual assault victim might have other heightened sensory perceptions because this somehow vouched for the victim’s character and credibility, suggested facts outside the record, did not fairly respond to the defense’s credibility attack, and were beyond the bounds of propriety. *State v. Bradshaw*, 392 N.J. Super. 425 (App. Div. 2007), *aff’d o.g.*, 195 N.J. 493 (2008). This error was not harmless because defendant’s DNA samples may have been contaminated and he told the jury he was innocent. *Id.*

Remarks that defendant caused child victim “horrific” injuries that would “give you the heebie-jeebies” were fair comment, and use of an analogy to explain

some injuries was not reversible error. *State v. Roman*, 382 N.J. Super. 44 (App. Div. 2005), *certif. dismissed*, 189 N.J. 420 (2007). Prosecutor improperly claimed that defendant, who testified, was the only person who could say how his infant died and that the child had “testified” to the jurors through the autopsy results. *State v. Black*, 380 N.J. Super. 581 (App. Div. 2005), *certif. denied*, 186 N.J. 244 (2006). Also improper were the prosecutor’s appeals to the jury’s emotions and sympathy. *Id.* Prosecutors in summation may play back portions of witnesses’ trial testimony, but trial courts exercise sound discretion in addressing such requests on a case-by-case basis after conducting a N.J.R.E. 104(a)-type hearing. *State v. Muhammad*, 359 N.J. Super. 361 (App. Div.), *certif. denied*, 178 N.J. 36 (2003). See *State v. Nelson*, 173 N.J. 417 (2002); *State v. Smith*, 167 N.J. 158 (2001)(improper comments that defense experts would “shade their testimony” to make “hefty fees” in the future); *State v. Vasquez*, 374 N.J. Super. 252 (App. Div. 2005)(unchallenged comment that an officer must have conspired and lied in order for the jury to believe defendant responded to defense counsel’s own closing arguments calling the officer a liar, and the prosecutor correctly stated the law on reasonable doubt); *State v. Villanueva*, 373 N.J. Super. 588 (App. Div. 2004)(prosecutor should not comment upon the victim’s peaceful character absent some evidence of this issue, and no basis existed upon which to argue that a witness’ credibility is bolstered by a lack of criminal convictions); *State v. Abdullah*, 372 N.J. Super. 252 (App. Div.)(prosecutor in closing did not offer a personal opinion of defendant’s veracity, refer to matters outside the record or improperly attack the defense), *aff’d o.g.*, 184 N.J. 497 (2005); *State v. Walden*, 370 N.J. Super. 549 (App. Div.)(prosecutor cannot bolster the testimony of State witnesses via personal beliefs), *certif. denied*, 182 N.J. 148 (2004); *State v. Hill*, 365 N.J. Super. 463 (App. Div.) (prosecutor’s comments were either directed at the evidence or responsive to defense counsel’s statements), *certif. denied*, 179 N.J. 373 (2004); *State v. Rodriguez*, 365 N.J. Super. 38 (App. Div. 2003)(prosecutor should not have referred to murder victim as an “athletic young pretty mother of two children,” denigrated as an “excuse” the insanity defense offered, or told the jury to “let the battle for justice be won”; cumulative effect warranted a new trial), *certif. denied*, 180 N.J. 150 (2004); *State v. Jones*, 364 N.J. Super. 376 (App. Div. 2003)(prosecutor erred in telling the jury that the defense never dusted a gun for fingerprints and that defendant may know something the jurors did not); *State v. Neal*, 361 N.J. Super. 522 (App. Div. 2003)(prosecutor cannot characterize defendant’s calling of character witnesses “shameless,” or designate him as a person who could not care less about what he said or who he said it to, or call upon the jury to hold defendant accountable for betraying the children of his town); *State v. Terrell*, 359 N.J. Super. 241 (App. Div.)(improper to comment that defendant had a lot of money in his pockets when he did not have a job, and infer that it was drug proceeds), *certif. denied*, 177 N.J. 577 (2003); *State v. Morais*, 359 N.J. Super. 123 (App. Div.)(while prosecutor should not have singled out a juror in some of his closing remarks, reference was harmless; mention of “blue wall” was fair comment and responded to defense counsel’s closing), *certif. denied*, 177 N.J. 572 (2003); *State v. Jang*, 359 N.J. Super. 85 (App. Div.)(although remarks about murder victim’s character were inappropriate, they were harmless), *certif. denied*, 177 N.J. 492 (2003); *State v. Overton*, 357 N.J. Super. 387 (App. Div.)(repeatedly mistaking requisite mental state

was plain error because a possibility existed that jury would follow it), *certif. denied*, 177 N.J. 219 (2003); *State v. Negron*, 355 N.J. Super. 556 (App. Div. 2002)(prosecutor violated *State v. Smith*, 167 N.J. 158 (2001), by focusing on what the defense experts were paid; also accused defense counsel of misstating facts and of coaching and paying witnesses, and claimed that State witnesses were unpaid and had no reason to lie); *State v. Cooke*, 345 N.J. Super. 480 (App. Div. 2001)(comments involving defendant's right not to testify, matters not in evidence, and personal views, if error, cured by court's instructions), *certif. denied*, 171 N.J. 340 (2002); *State v. Tilghman*, 345 N.J. Super. 571 (App. Div. 2001)(improper references to defendant's post-arrest silence and request for attorney, and to credibility of elderly victims); *State v. Shelton*, 344 N.J. Super. 505 (App. Div. 2001)(reference to fingerprint evidence based on evidence in the record and made in response to defense counsel's closing argument), *certif. denied*, 171 N.J. 43 (2002); *State v. Francis*, 341 N.J. Super. 67 (App. Div. 2001); *State v. Munoz*, 340 N.J. Super. 204 (App. Div.)(prosecutor's closing comments were a direct response to defense counsel's summation, and isolated remark about a "concocted" alibi was cured by instruction), *certif. denied*, 169 N.J. 610 (2001); *State v. Murray*, 338 N.J. Super. 80 (App. Div.)(remark that DEA agent had no motive to lie was proper response to defendant's comment challenging agent's credibility), *certif. denied*, 169 N.J. 608 (2001); *Beneshunas v. Klem*, 137 F. App'x 510 (3d Cir.)(prosecutor's reference to defendant's termination of police interview did not violate the Fifth Amendment because it responded to defendant's testimony that he fully cooperated with the police), *cert. denied*, 546 U.S. 1019 (2005).

V. DIRECT/CROSS EXAMINATION

Defendant was denied a fair trial because the prosecutor cross-examined a defense medical health expert about defendant's courtroom demeanor where defendant and the expert were laughing in the courtroom, and the prosecutor also commented on this in summation. *State v. Adames*, 409 N.J. Super. 40 (App. Div.), *certif. denied*, 200 N.J. 504 (2009).

A recalcitrant State witness' improper refusal to answer some of the prosecutor's questions did not deprive defendant of a fair trial. *State v. Burns*, 192 N.J. 312 (2007). The witness asserted no constitutional testimonial privilege, the prosecutor acted properly in calling the witness, and the trial court properly exercised its discretion in allowing the witness to take the stand. *Id.*

Although some questions of defendant on cross-examination crossed the line between prior impeachment of his credibility and improper comments on his right to remain silent, no new trial was warranted. *State v. Elkwisni*, 190 N.J. 169 (2007).

Prosecutor could cross-examine defendant, an attorney charged with forgery, theft, and misapplication, on his attorney recordkeeping obligations under R.1:21-6. *State v. Mahoney*, 188 N.J. 359, *cert. denied*, 127 S.Ct. 507 (2006).

Prosecutor's cross-examination of defense expert witness with that witness' prior testimony did not deny defendant a fair trial. *State v. O'Brien*, 183 N.J. 376 (2005).

Prosecutor could not seek to "neutralize" the testimony of an uncooperative witness whose testimony did not "surprise" the prosecutor. *State v. Benthall*, 182 N.J. 373 (2005). Witness had been unwilling to testify and had given contradictory grand jury testimony. *Id.*

Prosecutor must have an evidentiary basis to cross-examine a defendant about tailoring testimony. *State v. Daniels*, 182 N.J. 80 (2004).

Prosecutor could cross-examine defendant about his access to the State's case via discovery and listening to the witnesses because reference to tailoring is permissible if evidence in the record supports the claim. *State v. Roman*, 382 N.J. Super. 44 (App. Div. 2005), *certif. dismissed*, 189 N.J. 420 (2007). The prosecutor also could demonstrate that defendant was a "despicable liar" because defendant had advanced several prior versions of what had happened to his infant son. *Id.*

Prosecutor should not ask defense witness if defendant, arrested possessing drugs and nearly \$1,000 in many denominations, had a job. *State v. Terrell*, 359 N.J. Super. 241 (App. Div.), *certif. denied*, 177 N.J. 577 (2003).

Prosecutor should not ask defendant if State witnesses are lying. *State v. T.C.*, 347 N.J. Super. 219 (App. Div. 2002), *certif. denied*, 177 N.J. 222 (2003).

Witnesses should make no reference to a defendant's invocation of the right to counsel. *State v. Olivera*, 344 N.J. Super. 583 (App. Div. 2001).

VI. MUNICIPAL PROSECUTORS

When a municipal prosecutor declines to prosecute a matter, a private prosecutor retained to pursue it, but who fails to comply with R. 7:8-7(b) and *State v. Storm*, 141 N.J. 245 (1995), causes structural error in the municipal court proceedings that requires reversal of defendant's convictions. *State v. Valentine*, 374 N.J. Super. 292 (App. Div. 2005).

See *State v. Bradley*, 420 N.J. Super. 138 (App. Div. 2011) (under R. 3:24(b), a private complainant lacks standing to prosecute a disorderly persons offense because he was not a prosecuting attorney).

VII. MISCELLANEOUS CASES

Prosecutors may not use racially motivated reasons to strike potential jurors. *Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005).

Prosecutor may not tell a recantation witness that if he testifies differently from his prior statement there would be "considerations." *State v. Feaster*, 184 N.J. 235 (2005).

Mere allegations of misconduct involving some members of a prosecutor's office do not disqualify the entire office. *State v. Harvey*, 176 N.J. 522 (2003).

Defendant's indictment was not defective because a law student with the prosecutor's office presented the case to the grand jury where the prosecutor's office intern program complied with R. 1:21-3(b), the Rules of Professional Conduct governed the student's actions, and an assistant prosecutor directly supervised the student during the grand jury presentation. *State v. Simon*, 421 N.J. Super. 547 (App. Div. 2011).

County prosecutors have constitutional and statutory authority to oversee all law enforcement in the county, including SPCA members who exercise law enforcement powers. *Gerofsky v. Passaic County SPCA*, 376 N.J. Super. 405 (App. Div. 2005).

See *State v. Wakefield*, 190 N.J. 397 (2007); *State v. Lewis*, 389 N.J. Super. 409 (App. Div.) (prosecutor's peremptory challenges were constitutional), *certif. denied*, 190 N.J. 393 (2007).

See *In re Taylor*, 196 N.J. 162 (2008) (request for additional funds by the prosecutor can only be granted if the assignment judge finds that the prosecutor establishes that they are essential for the prosecutor to meet his statutory obligations).

PROSTITUTION AND RELATED OFFENSES

I. Statutory Basis

The “engaging in prostitution” statute, *N.J.S.A. 2C:34-1b(1)*, is ambiguous with respect to whether a defendant can be charged with the fourth degree crime of prostitution based on a prior petty disorderly persons conviction. *State v. Gelman*, 195 *N.J.* 475 (2008). Accordingly, under the doctrine of lenity, the ambiguity was resolved in favor of the defendant. *Id.*

PUBLIC DEFENDER (See also COSTS)

I. Ancillary Services

Public Defender is to provide free transcripts to indigents appealing their indefinitely committed status under the Sexually Violent Predator Act. *In re Civil Commitment of D.L.*, 351 *N.J.Super.* 77 (App. Div. 2002), *certif. denied*, 179 *N.J.* 373 (2004).

RACKETEERING (RICO)

II. ELEMENTS

A. Enterprise

In charging the jury as to a racketeering enterprise, the State must prove that the enterprise in which defendant participated “affected trade or commerce” pursuant to *N.J.S.A. 2C:41-2c*. *State v. Casilla*, 362 *N.J.Super.* 554 (App. Div.), *certif. denied*, 178 *N.J.* 251 (2003).

REMOVAL (See also FORFEITURE, MISCONDUCT IN OFFICE)

I. FORFEITURE OF OFFICE REQUIRED FOR THE COMMISSION OF AN OFFENSE

A. Offenses for Which Forfeiture May Be Required

1. Disorderly Person Offense

Ordinary “abuse of discretion” standard applies to State’s sentencing-related decision not to seek waiver of forfeiture pursuant to *N.J.S.A. 2C:51-2e* following defendant’s disorderly persons or petty disorderly persons conviction. *Flagg v. Essex County Prosecutor*, 171 *N.J.* 561 (2002). Attorney General’s suggested guidelines for deciding whether or not to seek waiver of forfeiture should be formally promulgated to promote state-wide uniformity. *Id.*; see *State v. Gismondi*, 353 *N.J.Super.* 178 (App. Div. 2002)(petty disorderly persons offense of harassment required forfeiture).

Board of education could apply for forfeiture of defendant’s job as a maintenance worker following his loitering for the purpose of procuring narcotics conviction. *State v. Och*, 371 *N.J.Super.* 274 (App. Div.), *certif. denied*, 182 *N.J.* 150 (2004).

2. Offenses Involving or Touching Upon a Public Office, Position or Employment

Prior federal convictions did not include offenses involving or touching individual’s prior office as a mayor under *N.J.S.A. 2C:51-2d*. *McCann v. Clerk of the City of Jersey City*, 167 *N.J.* 311 (2001). McCann still could not run for mayor, though, because of the Faulkner Act (*N.J.S.A. 40:69A-1 to 149*), which the city had adopted and which precludes any person from such a position if convicted of a crime or offense involving moral turpitude. *Id.*

A defendant’s conviction of official misconduct and pattern of official misconduct requires forfeiture of all of the pension earned as a member of the pension system that covered the office or employment abused. *State v. Steele*, 420 *N.J.Super.* 129 (App. Div. 2011).

Forfeiture of public employment is a collateral consequence of a criminal conviction, and therefore, the general limitations on the State’s right to appeal do not apply, and the State may appeal a denial of its forfeiture

application. *State v. Kennedy*, 419 N.J.Super. 475 (App. Div.), *certif. denied*, 208 N.J. 369 (2011).

A defendant's act of tampering with physical evidence was dishonest, triggering forfeiture under N.J.S.A. 2C:51-a(2). *Id.*

The forfeiture of office of a city council member who drove to the site of where her nephew had been pulled over by university police officers, failed to comply with the officers' request to move her car out of the lane of traffic, and mentioned her connections with the city council and the provost of the university was appropriate because her conviction of obstruction of justice touched on her position as a city council member. *State v. Rone*, 410 N.J.Super. 589 (App. Div. 2009).

Off-duty police officer, who drove through a red light and killed a pedestrian and was convicted of third degree leaving the scene of a fatal accident, committed a crime that mandated forfeiture of his job and permanent debarment. *State v. Rodriguez*, 383 N.J.Super. 663 (App. Div. 2006). The crime involved or touched upon his position because it directly impacted on his competency as a police officer. *Id.*

Fact that defendant occasionally came into contact with police housed in the municipal building where he worked was not sufficient to involve and touch upon his public employment as a municipal laborer. *State v. Pavlik*, 363 N.J.Super. 307 (App. Div. 2003).

Off-duty police officer who pointed his service revolver at another, and was convicted of fourth degree aggravated assault, had committed a crime that "touched on" his public office and warranted a bar of future public office. *State v. Williams*, 355 N.J.Super. 579 (App. Div. 2002).

Police officer's off-duty drunk driving, terrorization of a neighborhood, false 911 call, firing of service handgun, use of badge to deter investigation, and failure to report this to his superiors involved and touched his public office. *State v. Gismondi*, 353 N.J.Super. 178 (App. Div. 2002).

B. Standing To Initiate Forfeiture Provisions

Board of education has standing to pursue forfeiture of employee's job even if the prosecutor will not. *State v. Och*, 371 N.J.Super. 274 (App. Div.), *certif. denied*, 182 N.J. 150 (2004).

C. Effect Of Expungement

Expungement precludes forfeiture of an employee's position based on a criminal conviction. *In re Forfeiture of Public Office of Nunez*, 384 N.J.Super. 345 (App. Div.), *certif. denied*, 187 N.J. 491 (2006). In fact, after sentencing defendant's employer informed him he was being retained. *Id.*

RESISTING ARREST (See also ELUDING, ESCAPE, FLIGHT)

I. GENERALLY

See *State v. Brannon*, 178 N.J. 500 (2004); *State v. Ambroselli*, 356 N.J.Super. 377 (App. Div. 2003).

II. DEFENSES

An invalid police stop does not prevent a defendant's conviction for a new and distinct offense (resisting arrest, obstruction, eluding, or escape) arising from that stop. *State v. Crawley*, 187 N.J. 440 (2006).

RESTITUTION

The Sixth Amendment does not bar a judge from determining restitution; *United States v. Booker*, 543 U.S. 220 (2005), does not apply. *State v. Martinez*, 392 N.J.Super. 307 (App. Div. 2007).

A jury instruction indicating victim's consent to defendant taking money from her in exchange for housing her would negate the State's case, however, the case was

remanded for a hearing on the amount of restitution and ability to pay. *State v. Washington*, 408 N.J.Super. 564 (App. Div.), *certif. denied*, 200 N.J. 549 (2009). Restitution to owner of a stolen motor vehicle is mandatory under N.J.S.A. 2C:43-2.1, and does not depend on defendant's ability to pay. *State v. Jones*, 347 N.J.Super. 150 (App. Div.), *certif. denied*, 172 N.J. 181 (2002). This also includes payments to the owner's insurance company, and not just of the deductibles. *Id.* See *State v. Pessolano*, 343 N.J.Super. 464 (App. Div.)(remand to reconsider restitution), *certif. denied*, 170 N.J. 210 (2001).

RETROACTIVITY

I. GENERAL PRINCIPLES

A. Federal Retroactivity Law

The rule in *Crawford v. Washington*, 541 U.S. 36 (2004), is not retroactive on collateral review. *Whorton v. Bockting*, 127 S.Ct. 1173 (2007).

The rule in *Ring v. Arizona*, 536 U.S. 584 (2002), is not retroactive on collateral review. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

The rule in *United States v. Booker*, 543 U.S. 220 (2005), is not retroactive on collateral review. *In re Olopade*, 403 F.3d 159 (3d Cir. 2005).

The rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is not retroactive to cases on federal habeas corpus review. *In re Turner*, 267 F.3d 225 (3d Cir. 2001).

See *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008); *Horn v. Banks*, 536 U.S. 266 (2002); *Rogers v. Tennessee*, 532 U.S. 451 (2001).

B. State Retroactivity Law

The new and unanticipated methodology the Supreme Court in *State v. W.A.*, 184 N.J. 45 (2005), endorsed in addressing defendant's right to be present at sidebar during jury *voir dire* applies prospectively only. *State v. Colbert*, 190 N.J. 14 (2007).

See *State v. Johnson*, 166 N.J. 523 (2001)(Supreme Court's construction of NERA not retroactive); *State v. Yanovsky*, 340 N.J.Super. 1 (App. Div. 2001)(*Carty* given limited retroactive effect).

II. DEGREE OF RETROACTIVE EFFECT

Supreme Court's opinion on when defendants will be afforded leave to appeal as within time is given prospective application only. *State v. Molina*, 187 N.J. 53 (2006).

New rule that defendants pleading guilty to sexually violent offenses be informed of the collateral possibility of civil commitment pursuant to the Sexually Violent Predator Act to be given limited retroactive effect. *State v. Bellamy*, 178 N.J. 127 (2003).

The need for reasonable articulable suspicion to seek consent to search a motor vehicle is retroactive to all cases pending in the trial court and on direct appeal as of June 23, 2000. *State v. Carty*, 174 N.J. 351 (2002).

Immigration consequences of guilty plea: In *State v. Gaitan/Goulbourne*, 209 N.J. 339 (2012), *cert. denied*, ___ U.S. ___ (2013), the Supreme Court held that the decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), holding that defense attorneys must advise their clients of potential immigration consequences of pleading guilty or risk providing constitutionally deficient assistance of counsel, is a new rule of constitutional law not entitled to retroactive application on collateral review. The Court further found that its decision in *State v. Nunez-Valdez*, 200 N.J. 129 (2009), which allowed the defendant to withdraw his guilty plea because of misadvice by defense counsel on immigration consequences, did not announce a new rule of law thus was applicable on collateral review.

Importantly, the Court explained that its decision in to re-draft the plea form after

Nunez-Valdez did not render as “misadvice” the information on the then-existing form, nor did the revised form vest further rights in those who attack their pleas on collateral review. The forfeiture by wrongdoing exception to the hearsay rule, N.J.R.E. 804(b)(9), applies retroactively to wrongdoing that occurred before the new rule’s effective date. *State v. Rose*, 425 N.J. Super. 463 (App. Div. 2012). The decision in *State v. Guenther*, 181 N.J. 129 (2004), is given “pipeline” retroactivity. *State v. R.E.B.*, 385 N.J. Super. 72 (App. Div. 2006). See *State v. Tavares*, 364 N.J. Super. 496 (App. Div. 2003) (*State v. Johnson*, 168 N.J. 608 (2001), applies retroactively).

IV. SPECIFIC APPLICATION OF RETROACTIVITY CRITERIA

A. Search and Seizure

Because racial profiling involves no new rule of law, it is not subject to a retroactivity analysis. *State v. Clark*, 345 N.J. Super. 349 (App. Div. 2002); *but see State v. Carty*, 174 N.J. 351 (2002) (limited retroactivity afforded to requirement of reasonable suspicion for consent searches of motor vehicles).

B. *Miranda* and the Fifth and Sixth Amendments

The decision in *State ex rel. P.M.P.*, 200 N.J. 166 (2009), announced a new rule of law for the custodial interrogation of juvenile suspects, and is to be applied prospectively. *State v. Hodge*, 426 N.J. Super. 321 (App. Div. 2012). The decision in *State v. Patton*, 362 N.J. Super. 16 (App. Div.), *certif. denied*, 178 N.J. 35 (2003), created no new rule of law because courts have never permitted police fabrication of tangible evidence, and therefore no retroactivity analysis was necessary. *State v. Chirokovskic*, 373 N.J. Super. 125 (App. Div. 2004).

The bright line rule in *Maryland v. Shatzer*, 130 S. Ct. 1213 (2011), which held that police must wait 14 days before reinterrogating a released suspect who previously invoked his right to counsel, was applied retroactively to defendant’s case, which was pending trial. *State v. Wessells*, 209 N.J. 395 (2012).

C. Other Retroactivity Decisions

See *State v. Chambers*, 377 N.J. Super. 365 (App. Div. 2005) (amendments to drunk driving statute’s license suspension provision are not retroactive).

ROBBERY

I. ELEMENTS

A. Attempted Robbery

The omission of the definition of attempt was not clearly capable of producing an unjust result when the jury’s verdict demonstrated that it determined defendant possessed the required culpability and acted purposefully, and the evidence demonstrated defendant took a substantial step in committing the crime. *State v. Belliard*, 415 N.J. Super. 51 (App. Div. 2010), *certif. denied*, 205 N.J. 81 (2011).

B. Robbery

2. Assault Element

No rational basis existed for a jury charge on third-degree theft as a lesser-included offense of robbery where defendant jumped over a glass partition in a bank, causing the teller to flee and took money from the teller’s drawer. *State v. Cassidy*, 198 N.J. 165 (2009). No rational jury could have concluded that defendant lacked the purpose to place the teller in fear of immediate bodily injury. *Id.*

As currently written, N.J.S.A. 2C:15-1 does not encompass “afterthought” robbery -- one in which defendant does not formulate the intent to steal

until after force is used. *State v. Lopez*, 187 N.J. 91 (2006). The intent to commit the theft must generate the violence. *Id.*

Defendant cannot be convicted of robbery if the jury is split in deciding against whom he used force. *State v. Gentry*, 183 N.J. 30 (2005). Rather, the jury must unanimously agree on which acts were committed against which victims. *Id.*

C. Flight from Attempted or Completed Robbery

To be guilty of robbery as an accomplice, a defendant must share the principal's intent to commit the theft before or at the time the theft is committed. *State v. Whitaker*, 200 N.J. 444 (2009). However, if defendant lacks the specific intent, but instead intends only to assist in hindering the principal's apprehension during flight after the theft, defendant is guilty of only hindering apprehension and not of robbery. *Id.*

D. Deadly Weapon

In an armed robbery case, a defendant is not considered to be armed with a deadly weapon other than a firearm, unless he or she had immediate access to the potential weapon and an intent to use it in a way that was capable of producing death or serious bodily injury. *State v. Rolon*, 199 N.J. 575 (2009). Although a purposeful state of mind is required for first degree robbery by use of a simulated weapon, the jury charge as a whole fairly instructed on that requirement where the jury was required to find that defendant purposely threatened the victim. *State v. Nero*, 195 N.J. 397 (2008). The Court asked the Model Jury Charge Committee to consider if this opinion necessitated additional clarification or modification to the model charge. *Id.*

A jury can consider defendant's words and conduct when determining whether the combination would suffice to induce the victim's reasonable belief that defendant possessed a deadly weapon during a robbery. *State v. Chapland*, 187 N.J. 275 (2006). The victim need not actually see the item defendant simulates to be the weapon. *Id.*

SEARCH AND SEIZURE

I. GENERAL PRINCIPLES

Installing a global positioning system (GPS) tracking device on the undercarriage of a person's car and monitoring the car's movements for 28 days is a search within the meaning of the Fourth Amendment. *United States v. Jones*, 132 S. Ct. 945 (2012). Placing the device constituted a physical occupation of private property for the purpose of obtaining information. *Id.*

Fourth Amendment permits police to use highway checkpoints to stop motorists and ask for information about a recent area crime. *Illinois v. Lidster*, 540 U.S. 419 (2004).

Police can approach bus passengers at random to ask questions and request consent to search, and are not required to advise them that they need not cooperate. *United States v. Drayton*, 536 U.S. 194 (2002).

State courts cannot interpret the federal constitution to provide greater protection than does the United States Supreme Court. *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

The DNA Act (N.J.S.A. 53:1-20.7 to -.28) does not subject defendants to unreasonable searches and seizures. *State v. O'Hagen*, 189 N.J. 140 (2007).

The taking of blood from a DWI suspect constitutes a search, and while the police need no warrant to extract it they may not use objectively unreasonable force to do so. *State v. Ravotto*, 169 N.J. 227 (2001).

Exigent circumstances justified the warrantless retrieval of telephone numbers from defendant's pager seized when he was arrested shortly after committing an

armed robbery with an accomplice -- the accomplice was at large, defendant did not possess the gun fired at the victim, the pager beeped while in police custody, and incoming pages could have deleted numbers stored in the pager's memory. *State v. DeLuca*, 168 N.J. 626 (2001).

II. WARRANT SEARCHES

The exclusionary rule does not require suppression of evidence found during a search after violating the "knock and announce" rule. *Hudson v. Michigan*, 547 U.S. 586 (2006). The prospect of civil liability and departmental discipline is sufficient to deter violations of the rule. *Id.*

Police, who possessed a "knock and announce" search warrant for narcotics trafficking and weapons charges, were justified in breaking down an apartment door upon waiting 15-20 seconds after knocking and announcing their presence. *United States v. Banks*, 540 U.S. 31 (2003). The officers feared the imminent loss of evidence if they waited any longer. *Id.*

Although evidence which justifies both an arrest and the issuance of a search warrant must support a finding of probable cause, the two probable cause determinations are not identical. *State v. Chippero*, 201 N.J. 14 (2009).

Evidence insufficient to justify an arrest may be sufficient to justify the search of a home in connection with the investigation of a crime. *Id.*

Police executing a search warrant in a drug case acted reasonably when they knocked and announced and waited 20-30 seconds before breaching the door. *State v. Robinson*, 200 N.J. 1 (2009). The Court refused to consider the claim that suppression was required because a flash-bang device was used without a no-knock warrant. *Id.*

A search warrant was invalid because it failed to identify the precise apartment in a multi-unit dwelling to which the suspect had access, and directed police to "ascertain facts needed to accurately describe the place to be searched without further judicial oversight or review;" the deficiency was not cured by this provision. *State v. Marshall*, 199 N.J. 602 (2009).

Insufficient evidence supported issuance of the underlying domestic violence search warrant. *State v. Dispoto*, 189 N.J. 108 (2007).

A search warrant based on a confidential informant making a single controlled but unobserved drug buy, which led to defendant's arrest, was valid. *State v. Keyes*, 184 N.J. 541 (2005). The controlled buy, though not seen by police, corroborated the informant's veracity and basis of knowledge; any police attempt to approach the target residence during that buy would have risked exposing the surveillance location and endangered both the informant and the officers. *Id.*

A suspect's prior arrests for assaulting a police officer and unlawful possession of a weapon can support issuance of a no-knock search warrant. *State v. Jones*, 179 N.J. 377 (2004). Generally, arrest records disclosed in supporting affidavits should include dispositional information, and, if not, an explanation that reasonable efforts were made to find such information. *Id.* Also, officers' lack of field testing of suspected cocaine purchased during a confidential informant's 3 controlled buys did not gut the finding of probable cause supporting a no-knock search warrant. *Id.*

Police articulated a reasonable, particularized suspicion of danger to officer safety to justify a no-knock search warrant for the home of defendant, who had been arrested for aggravated assault and unlawfully possessing a weapon. *State v. Sanchez*, 179 N.J. 409 (2004).

In executing a no-knock search warrant of defendant's apartment, police could arrest defendant outside his apartment and charge him with constructively

possessing drugs and a loaded gun found inside. *State v. Spivey*, 179 N.J. 229 (2004).

Defective domestic violence TRO and included warrant were invalid. *State v. Cassidy*, 179 N.J. 150 (2004).

Search warrant was used to seize child pornography on defendant's home computer, and defendant had no expectation of privacy in e-mails he sent with pornographic images or in the subscriber information stored at AOL's headquarters. *State v. Evers*, 175 N.J. 355 (2003). Even if federal or other state's law was violated, the Court would not invoke the exclusionary rule because none of the rule's purposes would be advanced. *Id.*

Two unobserved controlled drug buys by a confidential informant in an apartment building, together with some corroboration of the informant's tip -- here verifying the apartment's telephone number --, demonstrated probable cause to obtain a search warrant for that apartment. That the police could not see the informant enter defendant's apartment did not prevent a probable cause finding under the totality of the circumstances test. *State v. Sullivan*, 169 N.J. 204 (2001). To justify a "no-knock" search warrant, police must (1) have a reasonable, particularized suspicion that a no-knock entry was required to prevent the destruction of evidence, to protect the officers' safety, or to effect the arrest or seizure of evidence; (2) articulate the reasons for such suspicion, which can be based on the totality of the circumstances facing them; and (3) articulate a minimum level of objective justification to support a no-knock entry. *State v. Johnson*, 168 N.J. 608 (2001). The Court also rejected any good-faith exception. *Id.*

Both N.J.S.A. 2B:12-6 and R. 1:12-3(a) are broad enough to authorize search warrant approvals by an out-of-township municipal judge who was available when the municipal judge in the relevant township was not. *State v. Broom-Smith*, 406 N.J. Super. 228 (App. Div.), *aff'd*, 201 N.J. 229 (2010).

Under the "reasonable continuation doctrine," police officers executing a search warrant may re-enter the premises if they are unable to locate an item of evidence specified in the warrant during their initial entry if the subsequent entry is a continuation of the original search and not a new and separate search, and the decision to conduct a second entry to continue the search must be reasonable under the circumstances. *State v. Finesmith*, 406 N.J. Super. 510 (App. Div. 2009), *decision reached on appeal*, 408 N.J. Super. 206 (App. Div. 2009).

The Fourth Amendment does not prohibit judges from placing an affiant to a search warrant, who is not physically present, under oath. *State v. Gioe*, 401 N.J. Super. 331 (App. Div. 2008), *certif. denied*, 199 N.J. 129 (2009). Although requiring an affiant to appear personally before the issuing judge leads to a more thorough and deliberate examination of the factual basis for issuing the warrant, absent bad faith, no search or seizure made with a search warrant is unlawful because of technical insufficiencies; a fundamental violation only occurs if it involves a constitutional violation. *Id.*

A 15 to 20 second wait between the police knocking and announcing their presence and entry, "although close to or at the limit of what constitutes a reasonable wait time," was reasonable. *State v. Rodriguez*, 399 N.J. Super. 192 (App. Div. 2008). In determining what constitutes a reasonable wait time, the proper measure is not merely how long it would take the resident to reach the door, but also, how long it would take to dispose of the drugs. *Id.*

Police with a search warrant, supported by an affidavit justifying the warrant and the no-knock aspect, may use flash-bangs without prior judicial approval and

under certain circumstances. *State v. Fanelle*, 385 N.J.Super. 518 (App. Div. 2006). A remand was required, however, because the record was insufficient to determine whether or not use of a flash-bang was reasonable here. *Id.* See *State v. Fanelle*, 404 N.J.Super. 180 (Law Div. 2008) (holding the deployment of flash bangs was unreasonable under the facts of the case).

Police obtained a communications data warrant to use a mobile tracking device that located cell phones stolen during armed robberies. *State v. Laboo*, 396 N.J.Super. 97 (App. Div. 2007).

Although the municipal court judge issuing a search warrant should have recused himself because he had previously represented defendant and an appearance of impropriety under R. 1:12-1(f) existed, suppression of the evidence seized was not an appropriate remedy. *State v. McCann*, 391 N.J.Super. 542 (App. Div. 2007). This ruling applies prospectively only. *Id.*

Sufficient evidence existed in the search warrant affidavit to support a finding of probable cause to issue the warrant. *State v. Martinez*, 387 N.J.Super. 129 (App. Div.), *certif. denied*, 188 N.J. 597 (2006).

Police armed with a search warrant without a no-knock provision could use a ram to enter without knocking and announcing their presence when those outside the apartment warned those inside that officers were approaching. *State v. Walker*, 385 N.J.Super. 388 (App. Div.), *certif. denied*, 187 N.J. 83 (2006). The warning of the impending police raid created exigent circumstances justifying the no-knock entry. *Id.*

Police armed with a search warrant for a home permitting them to search “any and all persons arriving at, departing from and located therein reasonably believed to be associated with this investigation” could, while executing the warrant on the subject’s car, question and search defendant when he walked into the subject’s house at midnight without knocking or ringing the doorbell. *State v. Carlino*, 373 N.J.Super. 377 (App. Div. 2004), *certif. denied*, 182 N.J. 430 (2005). The search warrant was sufficiently particular, and the “no-knock” aspect was necessary to ensure officer safety and preserve potential evidence because the subject had surveillance equipment at his residence. *Id.*

Probable cause existed to obtain a search warrant for the house of a sheriff’s officer caught on videotape stealing evidence without prior judicial approval and *State v. Pineiro*, 369 N.J.Super. 65 (App. Div.), *certif. denied*, 181 N.J. 285 (2004). Probable cause exists to search a thief’s residence when stolen merchandise consists of items likely to be used or stored in that residence. *Id.*

An inadequate affidavit rendered a search warrant’s “no knock” provision clearly defective. *State v. Tavares*, 364 N.J.Super. 496 (App. Div. 2003).

Fact that drug traffickers are in a multi-dwelling apartment building with a fire escape does not justify a no-knock search warrant for an apartment. *State v. Ventura*, 353 N.J.Super. 251 (App. Div. 2002).

See *State v. Johnson*, 352 N.J.Super. 15 (App. Div. 2002)(standards for issuing a search warrant under the Prevention of Domestic Violence Act).

III. WARRANTLESS SEARCHES

A. Abandonment

Defendant lacked standing to challenge the search of an unclaimed duffel bag on a bus when, assuming defendant had apparent control or dominion over the bag, based on the totality of the circumstances, he knowingly and voluntarily relinquished any such interest when he told the police, in response to lawful, non-coercive questioning, that it did not belong to him, and the police attempted to identify other potential owners of the bag. *State v. Carvajal*, 202 N.J. 214 (2010).

Defendant had standing to challenge the warrantless search of a bag, which he denied ownership of, in a home because he had a possessory or participatory interest in the place searched and the property seized. *State v. Johnson*, 193 N.J. 528 (2008).

Defendant who attempted to push a bag of drugs out the window of a stolen car as police chased him abandoned that bag after he crashed the car and attempted to flee. *State v. Carroll*, 386 N.J. Super. 143 (App. Div. 2006). He “simply had no legitimate expectation of privacy in a stolen car that he left in a public space, fleeing from the scene of an accident.” *Id.*

See *State v. Linton*, 356 N.J. Super. 255 (App. Div. 2002) (police could enter abandoned building to find defendant, who discarded drugs in front of them and who lived elsewhere; defendant had no expectation of privacy in another’s vacant property); *State v. Premone*, 348 N.J. Super. 505 (App. Div. 2002) (remand to the trial court to determine if seizure of a bag and its contents in a motel room by motel employees, and subsequent search of it by the police, was proper under the abandonment exception to the warrant requirement). Looking at and recording a firearm’s serial number is not a seizure, and entry of that serial number into the NCIC database is not a search for Fourth Amendment purposes. *State v. Carlton Harris*, 211 N.J. 566 (2012).

B. Automobile Cases

1. Stops

After a car is lawfully stopped for a traffic infraction, an officer may conduct a patdown of a passenger if the officer reasonably suspects that the passenger is armed and dangerous, even if the officer does not have reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. *Arizona v. Johnson*, 129 S.Ct. 781 (2009).

When a police officer makes a traffic stop, all passengers are seized and thus may challenge the stop’s constitutionality. *Brendlin v. California*, 127 S.Ct. 2400 (2007).

A 17-year-old’s call to police that her father had left the house in a particularly described vehicle and was driving “drunk” supported a reasonable and articulable suspicion for a valid motor vehicle stop. *State v. Amelio*, 197 N.J. 207 (2009), *cert. denied*, 129 S. Ct. 2402 (2009).

Police corroboration of a reliable confidential informant’s tip provided reasonable articulable suspicion to stop defendant’s car. *State v. Birkenmeier*, 185 N.J. 552 (2006). After the stop, police saw a bag on the passenger seat and detected the strong odor of marijuana, which provided probable cause and exigent circumstances to search the car. *Id.*

An anonymous 911 caller reporting that a vehicle was being driven erratically permitted the police to stop that vehicle to investigate before observing any indicia of intoxication. *State v. Golotta*, 178 N.J. 205 (2003).

The police were justified in using information obtained from defendant’s cell phone carrier to discern defendant’s general location derived from the signals his cell phone emitted, which together with visual surveillance disclosing his car in a motel parking lot, violated no expectation of privacy because defendant parked his car in a public place. *State v. Earls*, 420 N.J. Super. 583 (App. Div. 2011), *certif. granted*, 209 N.J. 97 (2011).

An officer had a reasonable suspicion to believe that defendant was committing a motor vehicle violation by having small boxing gloves hanging from his rear view mirror at eye level, contrary to N.J.S.A. 39:3-74. *State v. Barrow*, 408 N.J. Super. 509 (App. Div.), *certif. denied*, 200 N.J. 547 (2009).

The Court noted that the statute requires articulable facts showing that an officer reasonably believed that the object obstructed the driver's view. *Id.* A stop of the car and subsequent questioning was proper where the driver and a passenger give conflicting versions of their travels and could not name the car's owner, and the driver had no license and acted very nervous. *State v. Baum*, 393 N.J. Super. 275 (App. Div. 2007), *aff'd*, 199 N.J. 407 (2009). Trooper had probable cause to believe that defendant was driving under the influence: defendant failed to maintain his lane, drove over the center line and onto the shoulder, failed to pull over immediately, exuded an odor of alcohol, and failed field sobriety tests. *State v. Breslin*, 392 N.J. Super. 584 (App. Div.), *certif. denied*, 192 N.J. 477 (2007).

These circumstances raised reasonable concerns as to whether the vehicle was being used for illegal purposes, and thus the officers could ask accusatory questions designed to elicit incriminating responses. *Id.* Police officer had no objectively reasonable basis for believing that defendant had committed a motor vehicle offense because the commercial vehicle statute (N.J.S.A. 39:4-46a, which requires display of the business' name and address on commercial vehicles) did not apply to passenger vehicles such as defendant's. *State v. Puzio*, 379 N.J. Super. 378 (App. Div. 2005).

Police act in an objectively reasonable manner when stopping a car due to reliance on DMV records indicating that the owner's license is suspended, even if such information turns out to be wrong. *State v. Pitcher*, 379 N.J. Super. 308 (App. Div. 2005), *certif. denied*, 186 N.J. 242 (2006).

Although the DMV database had never corrected the error indicating that defendant's license was suspended, the resulting stop that disclosed his drunkenness was constitutional because the reasonable suspicion standard does not require an officer to exclude all possible innocent explanations of the facts. *Id.*

Tinted plastic cover that obscured a license plate, *i.e.*, rendered it less legible, constituted a proper reason to conduct a motor vehicle stop. *State in re D.K.*, 360 N.J. Super. 49 (App. Div. 2003).

Darkly tinted windows present a significant obstruction that provides sufficient reason for the police to inspect such vehicles. *State v. Cohen*, 347 N.J. Super. 375 (App. Div. 2002).

Trooper's continued detention and brief questioning of a car passenger while waiting for registration and license checks were reasonable because not all suspicion of wrongdoing had been dispelled at that time. *State v. Pegeese*, 351 N.J. Super. 25 (App. Div. 2002).

Officers may continue to ask drivers questions in a non-intimidating manner after issuing a traffic citation and defendant was free to go. *United States v. Wilson*, 413 F.3d 382 (3d Cir. 2005). Such questioning did not constitute a Fourth Amendment seizure. *Id.*

See *State v. Adubato*, 420 N.J. Super. 167 (App. Div. 2011), *certif. denied*, 209 N.J. 430 (2012) (police had reasonable and articulable suspicion of DWI to question defendant, who was parked in his car in front of his house); *State v. Baum*, 199 N.J. 407 (2009) (officer's inquiries of car occupants was permissible, and their responses justified an expansion of the inquiry beyond the reasons for the initial stop).

State v. Scott, 193 N.J. 227 (2008) (affirming defendant's conviction for possessing cocaine in a vehicle in which he was the passenger).

2. Automobile Exception

Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest, limited to the area from within which the arrestee might gain possession of a weapon or destructible evidence, if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense causing the arrest. *Arizona v. Gant*, 129 S.Ct. 1710 (2009).

Police had probable cause to arrest defendant, a front-seat passenger in a car stopped for speeding, after finding cocaine and a roll of cash inside the vehicle's passenger compartment and where all occupants denied owning the contraband. *Maryland v. Pringle*, 540 U.S. 366 (2003).

A warrantless automobile search is permissible where 1) the stop is unexpected, 2) the police have probable cause to believe that the vehicle contains contraband or evidence of a crime, 3) exigent circumstances exist making it impracticable to obtain a warrant. *State v. Pena-Flores*, 198 N.J. 6 (2009).

The list of factors announced in *Pena-Flores* bearing on the exigency prong of the automobile exception in New Jersey was not meant to be exhaustive.

State v. Minittee, 210 N.J. 307 (2012). Other factors, not present in *Pena-Flores*, supported a finding of exigency in this case, including: an armed robbery, two fugitives from the robbery were at large and possibly armed, the search for the fugitives spanned multiple municipalities, the need to find a discarded weapon, the place where the car came to rest was not convenient for a careful search that would preserve possible evidence, and the fugitives might still be in the area of the car and fire on officers. *Id.*

Insufficient exigent circumstances existed to justify a warrantless search under the automobile exception -- 10 officers were present, a telephonic warrant may have been available, and the vehicle could have been impounded. *State v. Dunlap*, 185 N.J. 543 (2006).

Police had no probable cause to search defendant's car for drugs after they arrested him outside the vehicle for outstanding warrants and he dropped drugs from his jacket sleeves. *State v. Wilson*, 178 N.J. 7 (2003).

Exception permitted search of defendant's car where, during a pat-down, an officer discovered drug paraphernalia on defendant's person, had smelled burnt marijuana on him, and had observed a plastic bag protruding from the console of defendant's car. *State v. Nishina*, 175 N.J. 502 (2003).

No exigent circumstances existed to justify a warrantless search where it was not late at night, the stop was in a residential area, and four police officers were at the scene with the lone defendant; there was also no indication that the police did not have time to obtain a telephonic warrant. *State v.*

Shannon, 419 N.J.Super. 235 (App. Div.), *certif. granted*, 207 N.J. 188 (2011), *appeal dismissed*, 210 N.J. 225 (2012).

Although the search of the stolen vehicle after defendant's arrest could not be justified under the search incident to arrest exception because of *Eckel* and *Dunlap* -- assuming those cases had pipeline retroactivity--the automobile exception justified the search and seizure conducted. *State v. Carroll*, 386 N.J.Super. 143 (App. Div. 2006).

Police properly searched defendant's vehicle, pursuant to the automobile exception, after stopping him for traffic violations and arresting him for DWI. *State v. Irelan*, 375 N.J.Super. 100 (App. Div. 2005). The court ruled that (1) police may lawfully arrest a motorist when probable cause of a DWI violation exists; (2) incident to the arrest, police may search the arrestee's person; and (3) a contemporaneous warrantless search of the vehicle is permissible if,

under the totality of the circumstances, the vehicle is within the arrestee's immediate control such that he or she has the ability to reach a weapon or evidentiary item. *Id.*

Police had probable cause and exigent circumstances to search defendant's car, identified by citizen eyewitnesses as the one used after the crime and found a block from the crime scene, for a gun fired on a public street near the Atlantic City boardwalk. *State v. Wilson*, 362 N.J. Super. 319 (App. Div.), *certif. denied*, 178 N.J. 250 (2003). While defendant was already in custody when the car was searched, police were faced with a dangerous situation where the missing and presumably loaded gun needed to be found quickly. *Id.*

Exception does not permit the search of a car absent probable cause to believe that drugs were present -- defendant was a passenger and had exited the vehicle before even knowing the police were present, was arrested on outstanding warrants, and discarded drugs. *State v. Wilson*, 354 N.J. Super. 548 (App. Div. 2002), *aff'd*, 178 N.J. 7 (2003).

See *State v. Hammer*, 346 N.J. Super. 359 (App. Div. 2001) (seeing open beer container in car, and hollow-point bullets falling from driver's pocket, gave rise to exigent circumstances and probable cause to search the car for weapons).

3. Search Incident to Arrest

The Court ruled that the police did not have a basis to stop defendant and determine whether he was the subject of a fugitive warrant to be executed at a multi-unit apartment building that he and another man were leaving because the only feature that defendant shared with the fugitive was race. Therefore, the Court upheld the suppression of the heroin during a search incident to arrest. The court noted that, although in this case, the discovery of an outstanding warrant was not conclusive, they did not rule that it would not be determinative in other stops, such as after a legitimate traffic stop. *State v. Shaw*, ___ N.J. ___ (2012).

The state constitution precludes application of the *Belton* rule in New Jersey. *State v. Eckel*, 185 N.J. 523 (2006). "Once the occupant of a vehicle has been arrested, removed and secured elsewhere, the considerations informing the search incident to arrest exception are absent and the exception is inapplicable," but "where a defendant has been arrested but has not been removed and secured, the court will be required to determine, on a case-by-case basis whether he or she was in a position to compromise police safety or to carry out the destruction of evidence, thus justifying resort to the search incident to arrest exception." *Id.*; see also *State v. Dunlap*, 185 N.J. 543 (2006); *State v. Carroll*, 386 N.J. Super. 143 (App. Div. 2006).

Officers have the right, after validly arresting defendant for a motor vehicle violation and taking him or her into custody, to search defendant's person. *State v. Dangerfield*, 171 N.J. 446 (2002).

Police face no limitations on the scope of a search of an arrestee's person where that arrestee is to be taken into custody. *State v. Daniels*, 393 N.J. Super. 476 (App. Div. 2007).

Officers may conduct a warrantless search of a container in defendant's possession even if defendant no longer has access to it when the search is conducted. *State v. Oyenusi*, 387 N.J. Super. 146 (App. Div. 2006), *certif. denied*, 189 N.J. 426 (2007). Such a search, if contemporaneous with the arrest, is valid incident to that arrest. *Id.* Seizure of a container in an arrestee's possession does not require a warrant before it may be opened, and, except

- for *Belton*, the state supreme court generally does not extend greater protections under the state constitution regarding the scope of a search incident to a lawful arrest. *Id.*
4. Dog Sniffs
Use of drug-sniffing dog to smell outside of a car during a routine traffic stop, even absent reasonable articulable suspicion of drug activity, was constitutional. *Jenkins v. Caballes*, 543 U.S. 405 (2005). Use of the dog did not extend the stop's duration. *Id.*
- C. Consent
A physically present co-occupant's refusal to permit entry and consent to search a home renders a warrantless search consented to by another co-occupant invalid as to them. *Georgia v. Randolph*, 547 U.S. 103 (2006). *Carty* is extended to situations where police seek consent to search when dealing with a motorist broken down along the road whom they are assisting. *State v. Elders*, 192 N.J. 224 (2007). Here troopers stopped to assist those with a vehicle broken down on the Turnpike, were met with suspicious and inconsistent responses to preliminary questions, and sought and obtained consent to search the disabled vehicle. *Id.*
Police need no reasonable and articulable suspicion of criminal activity to seek consent to search a home. *State v. Domicz*, 188 N.J. 285 (2006) (declining to extend *State v. Carty*, 170 N.J. 632 (2002)).
Once police found marijuana in defendant's car, reasonable suspicion existed to seek his consent to search his home; that consent was freely and voluntarily given. *State v. Birkenmeier*, 185 N.J. 552 (2006). The Supreme Court assumed, without explicitly holding, that *Carty* applied to consent searches of something other than a vehicle. *Id.*
Police must have reasonable articulable suspicion of criminal wrongdoing before seeking consent to search a lawfully stopped vehicle. *State v. Carty*, 170 N.J. 632, *op. modified*, 174 N.J. 351 (2002). This new rule does not apply to roadblocks, checkpoints, and the like. *Id.*
Defendant's girlfriend, who was the renter of a storage unit, had authority to consent to a search of the unit even though she did not have a key. *State v. Earls*, 420 N.J. Super. 583 (App. Div. 2011), *certif. granted*, 209 N.J. 97 (2011).
Because an employer owned computers sold to him by his employee, defendant, he had the authority to consent to their search, and defendant abandoned the computers prior to the search and thus, had no reasonable expectation of privacy in them. Defendant also had no reasonable expectation of privacy in the information stored in his workplace computer. *State v. M.A.*, 402 N.J. Super. 353 (App. Div. 2008).
The "consent-once-removed" exception to the search warrant requirement does not apply if too long a time period (here, 30-45 minutes) elapses from the triggering event, and if the police conduct is not part of a single, continuous and integrated police action. *State v. Penalber*, 386 N.J. Super. 1 (App. Div. 2006). And *Payton v. New York*, 445 U.S. 573 (1980), prohibits police from making a warrantless, non-consensual entry into a suspect's home for a routine arrest. *Id.*
Police may search an apartment based on consent given by a resident appearing to have control of it. *State v. Farmer*, 366 N.J. Super. 307 (App. Div.), *certif. denied*, 180 N.J. 456 (2004). Officers were not compelled to advise the extremely cooperative resident of her right to refuse consent, given the lack of any suggestion that she would have declined to give it. *Id.*

No effective consent existed to search a pack defendant carried because he was not told of his right to refuse consent. *State v. Todd*, 355 N.J. Super. 132 (App. Div. 2002).

See *State v. Pegeese*, 351 N.J. Super. 25 (App. Div. 2002)(remand to trial court for reconsideration in light of *Carty*).

See *State v. Yanovsky*, 340 N.J. Super. 1 (App. Div. 2001)(agreeing with *Carty*); *State v. Leslie*, 338 N.J. Super. 269 (App. Div. 2001)(scope of consent to search car).

D. Home Searches

United States Supreme Court reaffirmed *Payton v. New York*, 445 U.S. 573 (1980), in holding that, absent exigent circumstances, a home may not be entered without a warrant. *Kirk v. Louisiana*, 536 U.S. 635 (2002).

Only reasonable suspicion is needed to search a probationer's home without a warrant where an accepted condition of probation permits such searches.

United States v. Knights, 534 U.S. 112 (2001).

The warrantless use of a thermal-imaging device aimed at a home from a public street to detect heat within constituted a search because such information could not otherwise have been obtained without physical intrusion into a constitutionally protected area. Such a search is presumed unreasonable without a warrant. *Kyllo v. United States*, 533 U.S. 27 (2001); see *State v. Domicz*, 188 N.J. 285 (2006)(police need not have anticipated the *Kyllo* ruling).

When police enter a home to render emergency aid and find a corpse, the police obligation to control the premises until the medical examiner arrives gives them the authority to remain at the scene and make any plain view seizures during that time; but once the body is removed, no warrant exception authorizes their continued presence and any re-entry requires a warrant. *State v. O'Donnell*, 202 N.J. 549 (2010).

Police who go to the front or back door of a home for purposes of making contact with a resident, and reasonably believe that door is used by visitors, do not unconstitutionally trespass onto the property. *State v. Domicz*, 188 N.J. 285 (2006).

Defendant had a legitimate expectation of privacy in his hospital room at a state psychiatric hospital. *State v. Stott*, 171 N.J. 343 (2002).

Exigent circumstances justified warrantless entry into defendant's bedroom and seizure of items in plain view. *State v. Craft*, 425 N.J. Super. 546 (App. Div. 2012). Officers obtained an arrest warrant for defendant, who was suspected in a shooting and potentially dangerous. *Id.* No warrant was necessary for entering the apartment because defendant's mother consented to the entry, and officers had reason to believe defendant was present because his cellphone began ringing in his bedroom when his mother called him. *Id.*

Exigent circumstances, combined with probable cause, justify a warrantless entry into a home to search for criminal wrongdoing. *State v. Laboo*, 396 N.J. Super. 97 (App. Div. 2007).

Because burning buildings clearly present an exigency of sufficient proportion to render a warrantless entry reasonable, and because the exigency does not end the moment the fire is extinguished, investigators can remain on the premises for a reasonable period of time to conduct their investigation before seeking search warrants. *State v. Amodio*, 390 N.J. Super. 313 (App. Div.), *certif. denied*, 192 N.J. 477 (2007). Also, investigators here were not required

to cease their activities upon smelling gasoline because they needed to eliminate other possible ignition sources. *Id.*

Police, who had an arrest warrant for defendant, could enter hotel room and arrest him where the door was ajar and officers could see defendant in the room. *State v. Cleveland*, 371 N.J. Super. 286 (App. Div.), *certif. denied*, 182 N.J. 148 (2004).

Police were invited into the home of defendant, a sheriff's officer, and saw stolen items in plain view. *State v. Pineiro*, 369 N.J. Super. 65 (App. Div.), *certif. denied*, 181 N.J. 285 (2004). Thus a warrantless seizure would have been proper had they not possessed a search warrant. *Id.*

Although armed with a warrant for defendant's arrest, police could not, after arresting and removing him from his motel room's bathroom, search that bathroom incident to arrest. *State v. Rose*, 357 N.J. Super. 100 (App. Div.), *certif. denied*, 176 N.J. 429 (2003). The fact that defendant's girlfriend was in the motel room gave rise to no reasonable basis to assume that she would destroy evidence. *Id.*

Police securing a home while seeking a search warrant could enter the open garage to better secure it. Exigent circumstances justified this action because defendant was believed to be transporting drugs from his home, his whereabouts were unknown, and drugs, a gun, and ammunition for another gun were found in the search of a home down the street. *State v. Myers*, 357 N.J. Super. 32 (App. Div. 2003).

Inevitable discovery doctrine did not save warrantless entry of defendant's apartment using a steel "ram" to secure the premises until a search warrant was issued. *State v. Lashley*, 353 N.J. Super. 405 (App. Div. 2002).

Absent consent or exigency, police may not lawfully execute an arrest warrant in a dwelling unless they have an objectively reasonable basis for believing that the person named in the warrant both resides there and was inside at the time. *State v. Miller*, 342 N.J. Super. 474 (App. Div. 2001). Police did not gain the homeowner's consent prior to entry, were acting under an arrest warrant only, and no special circumstances justified their actions. *Id.*

See *Georgia v. Randolph*, 547 U.S. 103 (2006); *La v. Hayducka*, 269 F. Supp.2d 566 (D.N.J. 2003), *appeal dismissed*, 122 F. App'x 557 (3d Cir. 2004).

In *State v. Heine*, 424 N.J. Super. 48 (App. Div.), *certif. denied*, 211 N.J. 608 (2012) a Garfield municipal code authorizing municipal officials to enter and inspect all dwellings and imposing criminal penalties on those who do not allow such inspections was found unconstitutional because it was an administrative search and, therefore, required a warrant.

In *State v. DeFranco*, 426 N.J. Super. 240 (2012), *certif. denied*, 212 N.J. 462 (2012) the court ruled that defendant did not have a reasonable expectation of privacy in a cell phone number because it was "assigned information" that did not reveal any details about defendant, as opposed to "generated information" that divulges details of peoples' lives, such as ISP records, long-distance billing information, banking records and utility usage records. Even if he did have a privacy interest, he waived it because he had provided to students and parents and had listed in the school staff directory.

E. Community Caretaking Function

The elements of the community caretaking exception are: (1) the police action must meet the objective reasonableness standard, (2) the police must act to fulfill a genuine community caretaker responsibility, (3) evidence of some form of exigency must exist that compels the police to ensure the

safety and well-being of the citizenry at large. *State v. Witczak*, 421 N.J. Super. 180 (App. Div. 2011). The exception was not satisfied where an officer entered a home to retrieve a gun that had been pointed at the victim and not to provide assistance to someone inside. *Id.*

The officers' initial entry into home to respond to domestic violence complaint was valid, but State failed to justify the subsequent search for weapons because once the officers secured the scene, they found no evidence corroborative of domestic violence. *State v. Edmonds*, 211 N.J. 117 (2012). Officers' entry into a home in response to a noise complaint where a large party was being hosted was lawful, but their subsequent "fanning out" to find the renters, during which they saw drugs in plain view in defendant's bedroom, was a search; the State failed to demonstrate the objectiveness of the officers' claimed exercise of their community caretaking function. *State v. Kaltner*, 420 N.J. Super. 524 (App. Div.), *aff'd o.b.*, 210 N.J. 114 (2012). Officers' re-entry into defendant's apartment where a dead body was present to seize evidence in plain view 30-45 minutes after the responding officers' initial entry to render emergency aid was a component of a single and continuous police action conducted under the emergency aid exception. *State v. O'Donnell*, 408 N.J. Super. 177 (App. Div. 2009), *aff'd*, 203 N.J. 160 (2010).

The community caretaking exception to the warrant requirement justified a police officer's entry into an apartment to speak on the telephone to the parent of an unattended child. *State v. Bogan*, 200 N.J. 61 (2009). The officer's duty to protect the child extended to his order for other officers to enter the apartment and question defendant, who fit the description given by a girl who had accused him of sexually assaulting her in that apartment earlier that day. *Id.*

Police could direct defendant, the subject of a missing persons report, to exit his vehicle and place him in a police car while they obtained details regarding the report. *State v. Diloreto*, 180 N.J. 264 (2004). The officers acted in good faith and in an objectively reasonable manner because, although the missing persons report had been withdrawn, their computers still listed defendant as such a person. *Id.* They could pat down defendant before placing him in their vehicle, and the discovery of a large metal object (loaded handgun magazine) justified their asking him the gun's location (under the front seat). *Id.*

Police dispatched to an "open line" 911 call are faced with a presumptive emergency requiring an immediate response. *State v. Frankel*, 179 N.J. 586 (2004). Officers could walk through the premises to verify that no one within was in danger even though defendant denied making the call and refused to allow the police to enter. A need existed for prompt action in response to such calls, and the police acted reasonably and prudently when confronted with a situation of unknown dimension. *Id.*

See Brigham City v. Stuart, 547 U.S. 398 (2006)(police may enter a home with a warrant when they have an objectively reasonable basis to believe an occupant is seriously injured or imminently threatened with such injury); *State v. Cassidy*, 179 N.J. 150 (2004); *State v. Cohen*, 347 N.J. Super. 375 (App. Div. 2002)(police can inspect vehicles with darkly tinted windows under community caretaking function).

Emergency Aid

In *State v. Edmonds*, 211 N.J. 117 (2012), the Supreme Court modified the three-part emergency aid exception test to conform with opinions from the United States Supreme Court. Now, the State need only show that the officer

had an objectively reasonable basis to believe that an emergency existed and that a reasonable nexus existed between the emergency and the place searched; the State no longer needs to show that the officer's primary motivation for entry into a home was to render aid. In *Edmonds*, the Court found entry into the home valid, but ruled no objective basis existed to search the house for weapons because the reason for their entry was complete when they ensured the safety of the child and defendant had no weapons on his person.

F. Independent Source

The State established by clear and convincing evidence that it would have obtained defendant's and co-defendant's telephone records under the independent source doctrine because they would have sought and obtained them through valid communication data warrants and via co-defendant's statements to the police. Also, no flagrant police misconduct occurred in obtaining those telephone records. *State v. Smith*, 212 N.J. 365 (2012). To invoke the independent source rule, the State (1) must demonstrate, wholly independent of the knowledge, evidence or other information acquired as a result of a prior illegal search, that probable cause existed to conduct the challenged search without the unlawfully obtained information; (2) must demonstrate by clear and convincing evidence that police would have sought a warrant without the tainted evidence; and (3) must demonstrate by clear and convincing evidence that the initial impermissible search was not the product of flagrant police misconduct, regardless of the strength of their proofs under the first and second prongs. *State v. Holland*, 176 N.J. 344 (2003). And when the search involves the illegal entry into a dwelling, that fact is relevant to the analysis. *Id.*

Handgun and witness' testimony admissible against defendant in murder prosecution under independent source and inevitable discovery rules. *State v. James*, 346 N.J. Super. 441 (App. Div.), *certif. denied*, 174 N.J. 193 (2002).

G. Inevitable Discovery

See *State v. Todd*, 355 N.J. Super. 132 (App. Div. 2002); *State v. James*, 346 N.J. Super. 441 (App. Div.), *certif. denied*, 174 N.J. 193 (2002).

H. Plain View, Plain Smell, Plain Touch

1. Plain View

Although an officer had the right to be where he was when he saw incriminating evidence in a backyard, a question existed as to whether that viewing was "inadvertent" because the officer looked over a fence with a flashlight. *State v. Lane*, 393 N.J. Super. 132 (App. Div.), *certif. denied*, 192 N.J. 600 (2007).

Burning buildings present an exigency rendering a warrantless entry reasonable, and that exigency does not end the moment the fire is extinguished. *State v. Amodio*, 390 N.J. Super. 313 (App. Div.), *certif. denied*, 192 N.J. 477 (2007). Thus investigators could remain on the premises for a reasonable period of time to investigate before seeking search warrants, and evidence found in plain view -- such as the likely murder weapon -- is admissible. *Id.*

Officer had only a "hunch" -- not probable cause -- to believe defendant's water bottle contained a date-rape drug. *State v. Sansotta*, 338 N.J. Super. 486 (App. Div. 2001).

See *State v. Mann*, 203 N.J. 328 (2010) (officer saw drugs in the back seat of a vehicle while questioning the occupants during a valid investigatory stop); *State v. Johnson*, 171 N.J. 192 (2002) (officers, acting

on a tip by a citizen informant, observed defendant place an object near a post on a porch, and properly went onto the porch to see what he had put down); *State v. Pineiro*, 369 N.J.Super. 65 (App. Div.), *certif. denied*, 181 N.J. 285 (2004).

2. Plain Smell

See *State v. Nishina*, 175 N.J. 502 (2003)(marijuana).

I. Police Encounters

1. Field Inquiry

Requiring a person detained under suspicious circumstances to identify himself or herself does not violate the Fourth Amendment. *Hiibel v. Sixth Jud. D. Ct., Nev.*, 542 U.S. 177 (2004). Interrogation relating to identity does not, by itself, constitute a Fourth Amendment seizure. *Id.*

Officer was justified in approaching defendant and asking for credentials where defendant was on school property late at night and offered no legitimate explanation for being on the premises. *State v. Nishina*, 175 N.J. 502 (2003).

While police may conduct a field inquiry absent any suspicious activity, they cannot use race to question individuals. *State v. Maryland*, 167 N.J. 471 (2001); see also *State v. Dangerfield*, 339 N.J.Super. 229 (App. Div. 2001), *aff'd as modified*, 171 N.J. 446 (2002).

Police need not have reasonable suspicion that a crime is occurring before asking for identification from a person lawfully in a public place; such questioning does not transform a field inquiry into a *Terry* stop. *State v. Sirianni*, 347 N.J.Super. 382 (App. Div.), *certif. denied*, 172 N.J. 178 (2002).

Articulable suspicion of illegal conduct is needed to support a stop, and although, absent this, officer could approach and question defendant sitting in a car, defendant could refuse to answer and was free to leave without showing identification. *State v. Stampone*, 341 N.J.Super. 247 (App. Div. 2001).

2. Investigative Detention

The Court ruled that the police did not have a basis to stop defendant and determine whether he was the subject of a fugitive warrant to be executed at a multi-unit apartment building that he and another man were leaving because the only feature that defendant shared with the fugitive was race. Therefore, the Court upheld the suppression of the heroin during a search incident to arrest. The court noted that, although in this case, the discovery of an outstanding warrant was not conclusive, they did not rule that it would not be determinative in other stops, such as after a legitimate traffic stop. *State v. Shaw*, ___ N.J. ___ (2012).

The totality of the circumstances satisfied the standards for an investigatory stop where the police had arrest and search warrants for a known drug dealer and his car; defendant parked next to the dealer's car in a fast-food restaurant parking lot and engaged the dealer in brief conversation; and when the police approached defendant appeared nervous, ran into the restaurant, failed to heed police commands to stop, and ran into a bathroom where the police seized drugs that defendant attempted to flush down the toilet. *State v. Mann*, 203 N.J. 328 (2010).

An experienced officer had a reasonable, articulable suspicion to stop defendant, who passed a cigarette box to another man and fled upon seeing the officer. *State v. Moore*, 181 N.J. 40 (2004). But more was

needed to establish probable cause to seize the box. *Id.*; see *State v. Pagan*, 378 N.J. Super. 549 (App. Div. 2005) (nearly identical to *Moore*). Lifting defendant's shirt to expose a gun that might be hidden in his waistband exceeded the scope of a reasonable intrusion, but the Court rejected the suggestion "that a *Terry* frisk permits only a limited pat-down search," noting that under certain circumstances, "searches beyond a pat-down frisk may be reasonable to insure the safety of the policeman." *State v. Privott*, 203 N.J. 16 (2010).

Reasonable suspicion existed to stop defendant when an anonymous 911 caller reported that his vehicle was being operated erratically. *State v. Golotta*, 178 N.J. 205 (2003). A 911 call carries enhanced reliability, the conduct involved the temporary stop of a motor vehicle based on reasonable suspicion, and drunk drivers pose a grave threat to public safety. *Id.*

Reasonable suspicion existed to stop defendant, and smell of burnt marijuana on his person justified a pat-down search. *State v. Nishina*, 175 N.J. 502 (2003).

If objectively reasonable concern for officer safety exists under the totality of the circumstances, he or she may retrieve contents of a bulge from defendant's person when unable to identify it as a weapon during a pat-down search. *State v. Roach*, 172 N.J. 19 (2002).

Totality of the circumstances did not create reasonable articulable suspicion to justify an investigate detention where an anonymous tip described two men carrying drugs and their travel routes, the police detained defendant and his companion exiting a bus and took them to a police office at the terminal, and questioned them in a manner presupposing criminal activity. *State v. Rodriguez*, 172 N.J. 117 (2002). Contrary to *Florida v. J.L.*, 529 U.S. 266 (2000), the informant provided no explanation or basis of knowledge as to his assertion of illegality, and neither defendant nor his cohort did anything suspicious or unusual. *Id.* Placing item in waist band upon leaving a train did not support an investigatory stop. *State v. Maryland*, 167 N.J. 471 (2001); see also *State v. Love*, 338 N.J. Super. 504 (App. Div. 2001).

To obtain an investigative detention order and DNA samples, the State must support the application with affidavits, not certifications. *In re Investigation of the Alleged Aggravated Sexual Assault of A.S.*, 366 N.J. Super. 402 (App. Div. 2004). Hearsay may provide an adequate basis for issuance of such orders, but not double or triple hearsay. *Id.*

A reliable confidential informant's tip regarding defendant's drug activities permitted the police to seize defendant at a train station where the informant had arranged to meet him and where she identified him for the officers. *State v. Williams*, 364 N.J. Super. 23 (App. Div. 2003).

Because the police had not arrested defendant, even though probable cause existed to so arrest him, and because no reasonable basis existed to believe that he was armed, his pack was not validly searched incident to arrest before he entered a police vehicle. *State v. Todd*, 355 N.J. Super. 132 (App. Div. 2002).

Anonymous call about three black males being involved in a drug transaction, one of whom was armed and using a particular pay phone, did not justify the stop of a black male at the phone 45 minutes later who did not respond to police questioning and who did not agree to be patted down. *State v. Richards*, 351 N.J. Super. 289 (App. Div. 2002).

See *United States v. Arvizu*, 534 U.S. 266 (2002)(focus must remain on the totality of the circumstances, and courts should afford due weight to the factual inferences drawn by law enforcement officers); *State v. Williams*, 192 N.J. 1 (2007); *State v. Nikola*, 359 N.J. Super. 573 (App. Div.), *certif. denied*, 178 N.J. 30 (2003).

3. Arrest

Suppression is not an automatic consequence of a Fourth Amendment violation; the question turns on police culpability and the potential of exclusion to deter wrongful police conduct. *Herring v. United States*, 129 S.Ct. 695 (2009).

Police had probable cause to search and arrest defendant when they saw him twice sell drugs in a high-crime area. *State v. O'Neal*, 190 N.J. 601 (2007). It did not matter that the officers searched and removed the drugs before placing him under arrest; it is the right to arrest, and not the actual arrest itself, that must pre-exist the search. *Id.*

An experienced narcotics detective who observes a defendant receive a small item in exchange for cash in a high drug trafficking areas has probable cause to arrest and search incident to that arrest. *State v. Moore*, 181 N.J. 40 (2004).

See *Arkansas v. Sullivan*, 532 U.S. 769 (2001)(officer's subjective intentions irrelevant for Fourth Amendment probable cause analysis); *State v. Dangerfield*, 171 N.J. 346 (2002)(as to disorderly and petty disorderly persons offenses); *State in re J.M.*, 339 N.J. Super. 244 (App. Div. 2001).

J. Police Action Based On Citizen's Tips, Informant's Tips or Anonymous Tips

1. Citizen's Tips

Police had probable cause to arrest defendant where a citizen informant reported on-scene that defendant pointed a gun at her and threw it under a nearby car and the discovery of the gun in that location corroborated her on-scene identification. *State v. Basil*, 202 N.J. 570 (2010).

See *State v. Reiner*, 363 N.J. Super. 167 (App. Div. 2003)(tip that defendant appeared to be drunk when he was seen entering his car and driving off constituted probable cause to stop him), *aff'd o.g.*, 180 N.J. 307 (2004); *State v. Nikola*, 359 N.J. Super. 573 (App. Div.)(information that an identified citizen informant gives police, based on direct personal observations, has a substantial degree of reliability), *certif. denied*, 178 N.J. 30 (2003).

2. Informant's Tips

Based on information received from a confidential informant, police could fly over defendant's property in a helicopter and observe marijuana growing in his field. *State v. Marolda*, 394 N.J. Super. 430 (App. Div.), *certif. denied*, 192 N.J. 482 (2007).

See *State v. Birkenmeier*, 185 N.J. 552 (2006); *State v. Cleveland*, 371 N.J. Super. 286 (App. Div.), *certif. denied*, 182 N.J. 148 (2004); *State v. Williams*, 364 N.J. Super. 23 (App. Div. 2003)(reliable confidential informant tipped off police to defendant's drug activities).

3. Anonymous Tips

See *State v. Privott*, 203 N.J. 16 (2010) (relevant circumstances extended well beyond an anonymous tip of a man with a gun at a particular location, justifying a stop and frisk); *State v. Williams*, 192 N.J. 1

(2007)(anonymous tip); *State v. Golotta*, 178 N.J. 205 (2003)(anonymous 911 caller); *State v. Rodriguez*, 172 N.J. 117 (2002); *State v. Patton*, 362

N.J. Super. 16 (App. Div.) (remand to trial court pursuant to *Florida v. J.L.*, 529 U.S. 266 (2000)), *certif. denied*, 178 N.J. 35 (2003).

K. Border and Airport Searches

Stop of airplane passenger at Newark Airport by an experienced detective was based on reasonable suspicion that she was transporting drugs -- she was flying from a known drug source city on a "bulk" ticket issued by a travel agency often used by drug traffickers, had carry-on luggage, an expired identification card, and was nervous during questioning. *State v. Stovall*, 170 N.J. 346 (2002). Even a group of "innocent" circumstances can, in the aggregate, constitute reasonable suspicion. *Id.*

Investigatory stop of defendant at the Newark Airport baggage carousel was justified where she acted suspiciously and the carousel eventually held but one bag, to which a drug-sniffing dog alerted. *State v. Brown*, 352 N.J. Super. 338 (App. Div.), *certif. denied*, 174 N.J. 544 (2002). After giving suspicious answers to detectives, defendant admitted the bag was hers; no *Miranda* warnings were necessary because she was not then under arrest, and no consent to subsequently search the bag was needed because probable cause existed to arrest defendant and the search was incident to that arrest. *Id.*

Trial court could deny suppression without an evidentiary hearing because no material facts were disputed -- those entering the United States are subject to routine border searches (initial stop and questioning, search of luggage and personal effects, removal of outer garments, and pat down), which are reasonable and require no particularized suspicion. *State v. Green*, 346 N.J. Super. 87 (App. Div. 2001). Here defendant exited a plane in Newark from Jamaica, and removal of his shoes and discovery of drugs in them was a routine search. *Id.*

L. Roadblocks

See *State v. Carty*, 170 N.J. 632 (*Carty* rule not applicable to roadblocks or checkpoints), *op. modified*, 174 N.J. 351 (2002); *State v. Badessa*, 373 N.J. Super. 84 (App. Div. 2004), *rev'd o.g.* 185 N.J. 303 (2005).

M. Inventory Searches

Inventory search rules apply to vehicles impounded in contemplation of civil forfeiture. *State v. One 1994 Ford Thunderbird*, 349 N.J. Super. 352 (App. Div. 2002).

N. Open Fields

Open fields are not constitutionally protected, and, in the case of a farmer's cornfield, were not part of the curtilage. *State v. Marolda*, 394 N.J. Super. 430 (App. Div.), *certif. denied*, 192 N.J. 482 (2007).

O. "Special Needs" searches

No appellate court in the country has found that a DNA database statute violates the prohibition against unreasonable searches and seizures. *State v. O'Hagen*, 189 N.J. 140 (2007). Indeed, the potential to use fingerprints and photographs to identify perpetrators of unsolved crimes has long been recognized as a justification for collecting and retaining such data. *Id.*

Department of Corrections has a special need to enforce prison security and prevent the influx of contraband, and thus a visitor's vehicle parked in the correctional facility's parking lot could be searched after its driver tested positive on an ion scan machine. *State v. Daniels*, 382 N.J. Super. 14 (App. Div. 2005). Prison visitors have a reduced expectation of privacy while on prison grounds. *Id.*

Parolees have a reduced level of protection from administrative searches, and the state constitution requires no greater limitation on a parole officer's right to search than does federal law. *State v. Maples*, 346 N.J.Super. 408 (App. Div. 2002).

See *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)(hospital patient who tested positive for drugs in urine test); *State v. Perkins*, 358 N.J.Super.151 (App. Div. 2003)(seizure of 85 guns pursuant to a domestic violence complaint satisfied "special needs" search as part of the State's interest in protecting the public, but seized weapons could not be used in a subsequent criminal proceeding unless an exception to the warrant requirement also was met).

P. Searches Involving Regulated Industries

Police may lawfully conduct an administrative inspection of a tractor trailer based on the closely regulated business exception, but the search became impermissible once it exceeded the regulations' scope when a trooper searched the sleeper cabin and closet and containers therein absent exigent circumstances. *State v. Pompa*, 414 N.J.Super. 219 (App. Div.), *certif. denied*, 205 N.J. 14 (2010).

Police officers making observations during a routine safety inspection of a commercial truck that reasonably led to the belief that it has a hidden compartment containing contraband need not obtain a search warrant before confirming the compartment's existence and determining its contents. *State v. Hewitt*, 400 N.J.Super. 376 (App. Div. 2008).

T. Protective Sweeps

A protective sweep of a home may occur when police (1) are lawfully on the premises for a legitimate purpose, and (2) have reasonable suspicion that the area to be swept harbors a dangerous person. *State v. Davila*, 203 N.J. 97 (2010). When these criteria are met, the sweep is valid if it is cursory and limited to areas where a person may be hiding. *Id.*

Protective sweeps can occur even in non-arrest situations. *State v. Lane*, 393 N.J.Super. 132 (App. Div.), *certif. denied*, 192 N.J. 600 (2007). It's validity turns on the officer's right to be in the location that generates a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger to those on the scene. *Id.*

U. Strip Searches

Police lacked probable cause to conduct a strip search of defendant, who had concealed drugs in his mouth. *State v. Harris*, 384 N.J.Super. 29 (App. Div.), *certif. denied*, 188 N.J. 357 (2006). Although police properly arrested and searched defendant incident to that arrest, the drugs defendant spit out gave no rise to any further reasonable belief that he had drugs hidden elsewhere on his body. *Id.*

IV. SUBPOENAS

See *State v. Domicz*, 188 N.J. 285 (2006)(grand jury subpoenas); *State v. McAllister*, 184 N.J. 17 (2005)(grand jury subpoenas); *State v. Reid*, 194 N.J. 386 (2008).

V. PROCEDURES REGARDING USE OF THE EVIDENCE

A. The Motion to Suppress

Sufficient credible evidence in the record existed to uphold the trial court's finding as to witness veracity. *State v. Dispoto*, 383 N.J.Super. 205 (App. Div. 2006), *aff'd o.g.* 189 N.J. 108 (2007).

B. Standing

Non-owner passenger in an illegally stopped car has standing to object to the stop. *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006).

Defendant had no standing under the federal and state constitutions to challenge a vehicle search because he was not in the car when the police searched it, he was unconnected to the motor vehicle stop itself, and a week had passed between the crime and the search. *State v. Bruns*, 172 N.J. 40 (2002).

Appellate Division assumed defendant had standing to challenge the validity of codefendant's search and seizure. *State v. Pagan*, 378 N.J. Super. 549 (App. Div. 2005).

C. "Break in the Chain"

Defendant's resistance and flight constituted obstruction, which broke the link in the chain between the initial, and possibly unconstitutional, investigatory stop and the later seizure of his handgun. *State v. Williams*, 192 N.J. 1 (2007). "[T]he law should deter and give no incentive to suspects who would endanger the police and themselves by not submitting to official authority."
Id.

SELF-DEFENSE

III. USE OF FORCE IN SELF-PROTECTION

J. Imperfect Self-Defense

See *State v. Tierney*, 356 N.J. Super. 468 (App. Div.), *certif. denied*, 176 N.J. 72 (2003).

IV. USE OF FORCE FOR THE PROTECTION OF OTHERS

A. Generally

Jury should be instructed, as to possession of a weapon for unlawful purposes, that defendant's honest but unreasonable belief that force was required to protect another negates the purposeful mental state to use the weapon unlawfully. *State v. Williams*, 168 N.J. 323 (2001).

VII. JURY INSTRUCTIONS

A. Generally

To dispel confusion concerning the applicability of self-defense when charges allege recklessness, the Court held that a jury finding of self-defense could not co-exist with a finding of manslaughter. *State v. Rodriguez*, 195 N.J. 165 (2008).

See *State v. Rambo*, 401 N.J. Super. 506 (App. Div.), *certif. denied*, 197 N.J. 258 (2008); *State v. O'Carroll*, 385 N.J. Super. 211 (App. Div.), *certif. denied*, 188 N.J. 489 (2006); *State v. Simms*, 369 N.J. Super. 466 (App. Div. 2004).

See *State v. Galicia*, 210 N.J. 364 (2012) (defendant's use of automobile - - to drive at the victim, travel several blocks disregarding traffic signs at high rate of speed with the victim on the hood, and braking and accelerating to throw the victim to his death - - constituted deadly force, and defendant, who was locked inside the safe confines of his vehicle, was in minimal, if any, danger. These facts did not clearly indicate a rational basis for a self-defense charge).

SELF-INCRIMINATION (See also COURTS, EVIDENCE, IMMUNITY, JUVENILES, SIXTH AMENDMENT)

I. CONSTITUTIONAL LIMITATIONS ON INTERROGATIONS

A. *Miranda* Generally

A juvenile's confession, given when his father was outside the interrogation room, was lawfully obtained and admissible at his delinquency hearing because, for various reasons enumerated by the court, the juvenile's father was "unwilling to be present." However, the court disapproved of asking a

juvenile during the waiver of his or her *Miranda* rights whether the juvenile wants a parent present or not because that question is inconsistent with the directive that the police not suggest that a parent be asked to leave. *State v. A.W.*, 212 N.J. 114 (2012).

The Fifth Amendment and the state privilege against self-incrimination do not require that a person being questioned by police, in addition to being given *Miranda* warnings, also be informed that he is a suspect. *State v. Nyhammer*, 197 N.J. 383 (2009). Nor must defendant be re-advised of his rights, if during the interview, he is told he is a suspect. *Id.*

Asking an officer responding to a 911 call if the officer could talk to an attorney on the telephone did not constitute an invocation of defendant's right to counsel. *State v. Boretsky*, 186 N.J. 271 (2006). Police were present to help the stabbed victim, and any contrary result as to invocation suggested in *State v. Chew*, 151 N.J. 30 (1997), is disavowed. *Id.*

Defendant's statements were admissible because they were given after advisement of his *Miranda* rights both when arrested and before his stationhouse questioning. *State v. Lopez*, 395 N.J. Super. 98 (App. Div.), *certif. denied*, 192 N.J. 596 (2007).

Asking an officer "Do you think I need a lawyer?" during custodial interrogation, after receiving the substance of his *Miranda* rights, was not a request by defendant for counsel. *State v. Messino*, 378 N.J. Super. 559 (App. Div.), *certif. denied*, 185 N.J. 297 (2005). This is particularly true when defendant never disputed that he was told he had the right to an attorney and never requested one. *Id.*

Defendant's spontaneous statements made after arrest and waiver of *Miranda* rights were inadmissible because he did not understand what was happening due to his cognitive deficit. *State v. Beckler*, 366 N.J. Super. 16 (App. Div.), *certif. denied*, 180 N.J. 151 (2004).

Defendant, properly extradited from another state via the Uniform Criminal Extradition Act and a voluntarily agreed-to informal waiver of extradition, validly confessed. *State v. Soto*, 340 N.J. Super. 47 (App. Div.), *certif. denied*, 170 N.J. 209 (2001).

Post-*Miranda* questioning about a weapon at large after defendant had invoked his right to counsel did not mandate reversal because he knowingly and voluntarily waived his right by admitting to killing his wife, disclosing the weapon's location, and asking to speak to officers. *State v. Melendez*, 423 N.J. Super. 1 (App. Div. 2011), *certif. denied*, 210 N.J. 28 (2012). Defendant initiated conversations about the investigate although he knew he had the right to counsel. *Id.*

See *Hiibel v. Sixth Judicial D. Ct., Nev.*, 542 U.S. 177 (2004); *State v. Lopez*, 395 N.J. Super. 98 (App. Div.), *certif. denied*, 192 N.J. 596 (2007); *State v. Elkwisnij*, 384 N.J. Super. 351 (App. Div.) (defendant's statements as to the handgun's location were not admissible pursuant to the exigency or public safety exception to *Miranda*), *certif. denied*, 187 N.J. 492 (2006).

B. When is a Defendant in Custody?

Defendant was in custody when an officer, before issuing *Miranda* warnings, asked him what was in his sock. *State v. O'Neal*, 190 N.J. 601 (2007). The Supreme Court adopted a safety exception to *Miranda* based on an objectively reasonable need to protect the police or the public from any immediate danger posed by a weapon. *Id.* Such questioning must be narrowly tailored to prompt a responsive answer. *Id.*

Interrogation occurring in a police-dominated atmosphere -- here, in a state psychiatric hospital -- unaccompanied by *Miranda* warnings, coupled with objective indications that defendant was a suspect and where his movements were circumscribed, meant that his statements were inadmissible. *State v. Stott*, 171 N.J. 343 (2002).

Defendant, suspected of drunk driving, was not subjected to custodial interrogation when answering general on-the-scene questions. *State v. Ebert*, 377 N.J. Super. 1 (App. Div. 2005). The officer was undertaking an initial investigation when called to the scene because defendant believed her car had been stolen; drunk, she simply could not find it. *Id.* Thus her statements that she had been drinking, that she was drunk, and that she had driven to the parking lot to “sleep it off” were admissible. *Id.*

Officers responding to a domestic dispute may question those present without giving *Miranda* warnings so long as the inquiries are reasonably related to confirming or dispelling suspicion and those questioned are not restrained to the degree associated with formal arrest. *State v. Smith*, 374 N.J. Super. 425 (App. Div. 2005).

Although in custody, defendant’s statements were admissible because he was never interrogated -- he initiated each and every encounter with the police in attempting to curry favor and improperly influence the officers. *State v. Cryan*, 363 N.J. Super. 442 (App. Div. 2003).

C. What Constitutes Interrogation?

Defendant, in attempting to obtain favorable treatment, initiated all statements with the police. Thus the officers were not obligated to advise him of his *Miranda* rights before responding to his unsolicited statements. *State v. Cryan*, 363 N.J. Super. 442 (App. Div. 2003).

See *State v. Ebert*, 377 N.J. Super. 1 (App. Div. 2005); *State v. Smith*, 374 N.J. Super. 425 (App. Div. 2005).

D. The Public Safety Exception

Exception did not apply where defendant was in a motel room, no one had seen a gun, and a threat to shoot someone was remote in time and place. *State v. Stephenson*, 350 N.J. Super. 517 (App. Div. 2002). Also, the gun was not in a public place or accessible to the public. *Id.*

Exception applied to pre-Mirandized questioning about a weapon’s location where police believed the weapon to be in a public place. *State v. Melendez*, 423 N.J. Super. 1 (App. Div. 2011), *certif. denied*, 210 N.J. 28 (2012).

E. Adequacy of *Miranda* Warnings

Where defendant made no incriminating statements before being advised of his *Miranda* rights, he was not subject to a “question first, warn later” interrogation and his statement was admissible. *State v. Yohnnson*, 204 N.J. 43 (2010).

The Supreme Court continues to rely upon the traditional “totality of the circumstances” test to assess the efficacy of pre-custodial *Miranda* warnings when considering post-arrest statements. *State v. Dispoto*, 189 N.J. 108 (2007).

Under the totality of the circumstances, the *Miranda* warnings were insufficient to effectively apprise the defendant of his privilege against self-incrimination. *State v. O’Neill*, 193 N.J. 148 (2007). The defendant was subjected to custodial interrogation without having been given his *Miranda* warnings until he had already incriminated himself. *Id.*

Even a violation of the Vienna Convention does not warrant suppression of a foreign national’s statement that otherwise would be admissible; the

Convention provides no basis for suppressing evidence for non-compliance. *State v. Cabrera*, 387 N.J. Super. 81 (App. Div. 2006)(relying on *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)). Prosecutor's office notified Mexican Consulate of defendant's arrest. *Id.*

Where defendant is in custody when given his *Miranda* rights, they need not be reissued. *State v. Milledge*, 386 N.J. Super. 233 (App. Div.), *certif. denied*, 188 N.J. 355 (2006).

Absent a showing of prejudice, failure to comply with the Vienna Convention will not result in reversal of a defendant's convictions. Defendant, a South Korean illegal alien, had turned himself in to the police, had received *Miranda* rights in both English and Korean, and after waiving them and speaking to the police then invoked his right to silence. *State v. Jang*, 359 N.J. Super. 85 (App. Div.), *certif. denied*, 177 N.J. 492 (2003); see *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)(exclusionary rule is not an appropriate remedy for a violation of Vienna Convention); *State v. Homdziuk*, 369 N.J. Super. 279 (App. Div. 2004)(German citizen given *Miranda* rights in his native language).

F. Waiver

The State may properly question a suspect, without defense counsel's consent, after a criminal complaint has been filed or an arrest warrant has issued but before an indictment has been returned. *State v. A.G.D.*, 178 N.J. 56 (2003). Also, a suspect's waiver of their self-incrimination right is not valid if the police do not inform them that a complaint or warrant has been obtained. *Id.*

Although the majority of the court believed that the trial record was insufficient to determine beyond a reasonable doubt that defendant voluntarily and knowingly waived his *Miranda* rights, the appropriate remedy was a remand to the trial court for a voluntariness hearing. *State v. Elkwisni*, 384 N.J. Super. 351 (App. Div. 2006), *aff'd*, 190 N.J. 169 (2007).

See *State v. Burno-Taylor*, 400 N.J. Super. 581 (App. Div. 2008) (detectives did not honor defendant's right to remain silent and could not proceed in extended attempts to persuade him to waive his *Miranda* rights).

G. Invocations and Their Consequences

A suspect must unambiguously invoke the right to counsel; the police are not required to end questioning or clarify whether the accused wants to invoke his rights if he makes an ambiguous or equivocal statement or no statement. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010).

Defendant did not assert his right to counsel, either ambiguously or otherwise, when he requested advice from the police as to whether he should assert his right to counsel and inquired about the procedures involved if he chose to assert that right. *State v. Alston*, 204 N.J. 614 (2011).

Statements made by a suspect and to the police — nine days after he asserted the right to counsel during custodial interrogation and was released — are inadmissible as violating the bright-line 14-day rule announced in *Maryland v. Shatzer*, 559 U.S. 98 (2010). *State v. Wessells*, 209 N.J. 395 (2012).

Defendant who assaulted an officer after waiving his *Miranda* rights and agreeing to speak, and who subsequently acknowledged those rights before talking again with another officer, did not invoke his right to remain silent. *State v. Milledge*, 386 N.J. Super. 233 (App. Div.), *certif. denied*, 188 N.J. 355 (2006). Defendant's actions both before and after the altercation illustrated a willingness to cooperate. *Id.*

Although defendant's request to speak with his parents was not immediately granted and *Miranda* warnings were not re-administered before asking him what he wanted to speak to his parents about, in the context of the case defendant was not invoking his right to remain silent. *State v. Roman*, 382 N.J. Super. 44 (App. Div. 2005), *certif. dismissed*, 189 N.J. 420 (2007). Also, defendant volunteered his statement before being told his parents were being contacted. *Id.*

Statements elicited after invocation of a *Miranda* right -- defendant asked if he could "say something off the record" and officers agreed to listen -- was a violation of constitutional dimension that rendered the statement involuntary. *State v. Pillar*, 359 N.J. Super. 249 (App. Div.), *certif. denied*, 177 N.J. 572 (2003).

Statements are inadmissible if, prior to their elicitation, defendant tells the police he or she does not wish to give them. *State v. Shelton*, 344 N.J. Super. 505 (App. Div. 2001), *certif. denied*, 171 N.J. 43 (2002). The police cannot ask a defendant to "clarify" his or her invocation of the right not to give a statement, but error was harmless given defendant's prior consistent oral statement that was properly admitted. *Id.*

See *Montejo v. Louisiana*, 556 U.S. 778 (2009) (a defendant who does not want to speak with the police without counsel present need only say as much)

Under a bright line rule articulated in *Maryland v. Shatzer*, 559 U.S. 98 (2010), police must wait 14 days before reinterrogating a released suspect who previously invoked his right to counsel to ensure that the coercive effects of *Miranda* custody have dissipated. *State v. Wessells*, 209 N.J. 395 (2012).

I. *Miranda* Violations and Taint

Constitutional *Miranda* violation triggers the "contribution" (whether the error contributed to the verdict) harmless error test. *State v. Pillar*, 359 N.J. Super. 249 (App. Div.), *certif. denied*, 177 N.J. 572 (2003).

The fruit of the poisonous tree doctrine does not apply to derivative evidence obtained as a result of a voluntary, but inadmissible, statement given before *Miranda* warnings were issued. *United States v. DeSumma*, 272 F.3d 176, 180 (3d Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002).

Defendant initiated conversations about the investigation, and fruits of these conversations was thus completely independent from, and untainted by, earlier improper post-*Miranda* questioning. *State v. Melendez*, 423 N.J. Super. 1 (App. Div. 2011), *certif. denied*, 210 N.J. 28 (2012).

J. Suppressed Statements Used for Impeachment Purposes

While taped messages defendant left on victim's answering machine were correctly ruled admissible to impeach her credibility if she testified inconsistently with them at trial, the trial court must determine if they and written statements she had made were given voluntarily because defendant claimed that the victim had coerced them. *State v. Marczak*, 344 N.J. Super. 388 (App. Div. 2001)(relying on *State v. Kelly*, 61 N.J. 283 (1972)), *certif. denied*, 171 N.J. 44 (2002). If on remand the statements were deemed voluntary her convictions would stand, but she was entitled to a new trial if they were not. *Id.*

K. Juveniles and *Miranda*

Juvenile validly waived his rights in his mother's presence and thereafter confessed outside her presence while she watched through a one-way mirror/window. *State v. Q.N.*, 179 N.J. 165 (2004).

Juveniles not subject to custodial interrogation have no right to parental involvement when giving statements. *State in re J.D.H.*, 171 N.J. 475 (2002).

N. Procedural Issues Relating to Confessions

Police may not destroy contemporaneous notes of interviews and observations at a crime scene after producing their final reports. *State v. W.B.*, 205 N.J. 588 (2011). Otherwise, upon request, a defendant may be entitled to an adverse inference charge. *Id.*

The state due process clause does not require that police electronically record custodial interrogations as a precondition to admissibility. *State v. Cook*, 179 N.J. 533 (2004). Such recording would benefit the criminal justice system, however, and a committee would be established to study the issue. *Id.*

As to the preservation of rights to appeal the admissibility of statements after a guilty plea, see *State v. Diloreto*, 362 N.J. Super. 600 (App. Div. 2003) (discussing R. 3:5-7(d) and R. 3:9-3(f)), *aff'd o.g.* 180 N.J. 264 (2004).

O. Trickery

Police may not fabricate tangible evidence -- here, an officer posing as an eyewitness was "interviewed" on an audiotape --, show that evidence to defendant and elicit a confession, and use the fabricated evidence at trial to support the voluntariness of the confession. *State v. Patton*, 362 N.J. Super. 16 (App. Div.), *certif. denied*, 178 N.J. 35 (2003). Although police may misrepresent facts or suggest that other evidence exists that implicates defendant, they may not fabricate tangible evidence to induce a confession. Also, here the fictitious audiotape contained hearsay of defendant's prior bad acts and violated his due process right, rendering his confession *per se* inadmissible. *Id.*

See *State v. Chirokovskic*, 373 N.J. Super. 125 (App. Div. 2004) (defendant's statements suppressed because police created a fictitious lab report claiming that defendant's DNA was on evidence containing the victim's blood).

P. Length of Interrogation

The length of defendant's interrogation did not render his confession involuntary under the totality of the circumstances. *State v. Knight*, 183 N.J. 448 (2005).

Q. Promises to Defendant

Once an officer promises defendant that his or her statements would be considered "off-the-record," subsequent statements made to another officer who neither retracted the prior promise nor explained the conflict are inadmissible. *State v. Fletcher*, 380 N.J. Super. 80 (App. Div. 2005). Thus the promises induced defendant's statements, which were not voluntarily given. *Id.*

R. Application of the Emergency Aid Doctrine

The emergency aid doctrine overrides the normal warrant requirement when police respond to a 911 emergency call. *State v. Boretsky*, 186 N.J. 271 (2006). The emergency-response activity in the victim's home, where defendant's presence violated a restraining order, bore no resemblance to a coercive custodial interrogation. Because the emergency aid doctrine overrides the need to give *Miranda* warnings, the protections of *Miranda* are not triggered. *Id.*

II. THE PRIVILEGE AGAINST SELF-INCRIMINATION

A. General Principles

A third party may not vicariously assert the Fifth Amendment rights of another person. *State v. Baum*, 199 N.J. 407 (2009).

Evidence of pre-arrest silence may be admitted if it generates an inference of consciousness of guilt bearing on defendant's credibility when measured

against defendant's apparent exculpatory trial testimony. *State v. Messino*, 378 N.J. Super. 559 (App. Div.), *certif. denied*, 185 N.J. 297 (2005).

Privilege had not expired during defendant's sex offender treatment process because his direct appeal was not final until his petition for certification was denied. *Lewis v. Department of Corr.*, 365 N.J. Super. 503 (App. Div. 2004).

C. Use of Pre-Arrest Silence

Evidence of defendant's silence preceding *Miranda* warnings, if at or near the time of defendant's arrest, cannot be used at trial for any purpose. *State v. Manaf Stas*, 212 N.J. 37 (2012). The State may both cross-examine a defendant concerning their pre-arrest silence or conduct to challenge their trial testimony and comment on this impeachment evidence in summation. *State v. Brown*, 190 N.J. 144 (2007).

D. Use of Post-Arrest Silence

Prosecutors may refer to a testifying defendant's omissions of certain facts in their original statement without violating *State v. Muhammad*, 182 N.J. 551 (2005); *State v. Tucker*, 190 N.J. 183 (2007). When a defendant agrees to give a statement, he or she has not remained silent, but has spoken. *Id.* Prosecutors may also cross-examine a defendant as to inconsistencies between his or her post-*Miranda* statements to police and their trial testimony. *State v. Elkwisni*, 190 N.J. 169 (2007). Once a defendant testifies about post-arrest statements made to police, the State can fairly cross-examine him or her concerning those statements and offer rebuttal testimony from the officers involved in those statements. *Id.*

Under the state privilege against self-incrimination, prosecutors may not use a defendant's silence arising at or near the time of arrest, during official interrogation, or while in police custody. *State v. Muhummad*, 182 N.J. 551 (2005).

E. Self-Incrimination and Trial Witnesses

The State did not use defendant's pretrial silence to impeach a defense witness; that witness failed to come forward when it was natural to have done so, and the defense never objected. *State v. Holden*, 364 N.J. Super. 504 (App. Div. 2003).

SENTENCING (See also GUILTY PLEAS AND PLEA BARGAINING, INTENSIVE SUPERVISION PROGRAM, MERGER, PRISONERS AND PAROLE, PROBATION, RESTITUTION, SEXUAL OFFENSES AND OFFENDERS)

I. FACTORS TO BE CONSIDERED AT SENTENCING

A. Aggravating Factors

Trial court inappropriately considered an "aggravating factor" not found in N.J.S.A. 2C:44-1a. *State v. Thomas*, 356 N.J. Super. 299 (App. Div. 2002).

(2) Harm inflicted on victim - N.J.S.A. 2C:44- 1a(2)

See *State v. Lawless*, 423 N.J. Super. 293 (App. Div. 2011), *leave to appeal granted*, 209 N.J. 230 (2012) (Defendant pled guilty to DWI and aggravated manslaughter after driving drunk, killing the driver of an oncoming car, and injuring the driver's two passengers. The Appellate Division held that the trial court erroneously considered the injuries to the two passengers - - the decedent's wife and daughter - - in finding aggravating factor two because they were not the victims of the crime defendant was being sentenced for - - the aggravated manslaughter).

(6) Prior Record - N.J.S.A. 2C:44-1a(6)

See *State v. Dalziel*, 182 N.J. 494 (2005).

Prior DWI convictions cannot support consideration of aggravating

factor six because they are neither crimes nor offenses as defined in the Code. See *State v. Lawless*, 423 N.J. Super. 293 (App. Div. 2011), *leave to appeal granted*, 209 N.J. 230 (2012).

(11) Cost of Doing Business - N.J.S.A. 2C:44-1a(11)

This factor does not apply unless the trial court is (1) balancing a non-custodial term against a prison sentence or (2) being asked to overcome the presumption of imprisonment pursuant to N.J.S.A. 2C:44-1f(2). *State v. Dalziel*, 182 N.J. 494 (2005).

B. Mitigating Factors

Defendant was denied her right to effective assistance of counsel because her attorney failed to present and argue mitigating evidence that she was a battered woman at her sentencing for killing her police officer husband. *State v. Hess*, 207 N.J. 123 (2011).

Plea agreements that restrict the right of counsel to argue for a lesser sentence, against an aggravating factor or for a mitigating factor or how the factors should be balanced, are void because they deprive defendants of the needed advocacy of their attorney and deny the court the information it needs to carry out its obligation to identify and weigh the appropriate sentencing factors. *State v. Hess*, 207 N.J. 123 (2011).

Sentencing courts do not have the discretion to reject a mitigating factor supported in the record. *State v. Dalziel*, 182 N.J. 494 (2005). Judges must consider all of the aggravating and mitigating factors, and to find those the evidence supports. *Id.*

(11) Excessive Hardship - N.J.S.A. 2C:44-1b(11)

Family's reliance on defendant for support was not dispositive "since any number of criminal defendants have family members who rely upon them." *State v. Evers*, 368 N.J. Super. 151 (App. Div. 2004).

(13) Youth - N.J.S.A. 2C:44-1b(13)

Youth itself is not a statutory mitigating factor unless defendant was substantially influenced by a more mature person. *State v. Halsey*, 340 N.J. Super. 492 (App. Div. 2001), *certif. denied*, 171 N.J. 443 (2002).

C. Codefendant's Sentences (Disparity)

Defendant with consecutive life sentences for two felony murders was entitled to concurrent terms because another judge had sentenced a codefendant to concurrent terms for the same murders. *State v. Roach*, 167 N.J. 565 (2001).

D. Post-sentencing rehabilitative efforts on remand for re-sentencing. In *State v. Randolph*, 210 N.J. 330 (2012), the Supreme Court considered whether, after a third remand for re-sentencing, the trial court erred in failing to consider evidence of the defendant's post-sentencing rehabilitative efforts. The court distinguished between (1) remands for reconsideration or resentencing, whether the court should view defendant as he stands that day and (2) remands where the reviewing court specifies a more limited proceeding, such as correction of a technical error or a directive to view the issue from the vantage point of the original sentencing. The Court found that when the App. Div. ordered "reconsideration and justification for the sentence of three consecutive maximum terms," that involved two considerations: (1) the proper imposition of consecutive terms and (2) the proper imposition of maximum terms. Whereas the former called for merely a statement of reasons

based on a technical analysis, the latter required a new analysis and weighing of aggravating and mitigating factors based on defendant as he stood on the day of re-sentencing.

II. PRESUMPTION OF IMPRISONMENT - *N.J.S.A. 2C:44-1d*

Off-duty police officer who provided Ecstasy pills to another to sell would not suffer a “serious injustice” by imprisonment. *State v. Corso*, 355 *N.J. Super.* 518 (App. Div. 2002), *certif. denied*, 175 *N.J.* 547 (2003). Defendant therefore was not entitled to a probationary term for committing second degree official misconduct. *Id.*

IV. PRESUMPTIVE TERMS - *N.J.S.A. 2C:44-1f*

N.J.S.A. 2C:44-1f(1) is unconstitutional to the extent it permits trial judges to increase the presumptive term in the absence of jury factfinding, based on proof beyond a reasonable doubt, of aggravating factors unrelated to prior convictions. *State v. Natale*, 184 *N.J.* 458 (2005). But the Court simply eliminated the presumptive terms and left intact the sentencing ranges. *Id.*

The “interest of justice” standard of *N.J.S.A. 2C:44-1f(2)* is separate and distinct from the “serious injustice” standard for overcoming the presumption of imprisonment. *State v. Lake*, 408 *N.J. Super.* 313 (App. Div. 2009).

Circumstances such as a defendant’s overall character or contributions to the community should not be considered; instead, the focus remains on the offense, not the offender, and characteristics or behavior of the offender are only applicable as they relate to the offense itself. *Id.*

V. DOWNGRADE OF SENTENCE - *N.J.S.A. 2C:44-1f(2)*

Trial judge mistakenly exercised his discretion when he refused to downgrade defendant’s second degree reckless manslaughter and aggravated assault convictions where the defendant with a low IQ suffered from post-traumatic stress disorder caused by sexual abuse. *State v. L.V.*, 410 *N.J. Super.* 90 (App. Div. 2009), *certif. denied*, 201 *N.J.* 156 (2010).

A downgraded sentence for kidnapping must include the mandatory minimum term required by *N.J.S.A. 2C:13-1c(2)*. *State v. Lopez*, 395 *N.J. Super.* 98 (App. Div.), *certif. denied*, 192 *N.J.* 596 (2007).

Trial court failed to make the necessary findings to impose a downgraded sentence. *State v. Johnson*, 376 *N.J. Super.* 163 (App. Div.), *certif. denied*, 183 *N.J.* 592 (2005).

Trial court abused its discretion in imposing a probationary term for second degree sexual assault. *State v. Cooke*, 345 *N.J. Super.* 480 (App. Div. 2001), *certif. denied*, 171 *N.J.* 340 (2002). A disagreement with the jury verdict cannot justify probation for a second degree crime under the “serious injustice” exception. *Id.*

See *State v. Evers*, 175 *N.J.* 355 (2003)(no probation for second degree distribution of child pornography); *State v. Moore*, 377 *N.J. Super.* 445 (App. Div.) (no compelling reason justified a downgrade), *certif. denied*, 185 *N.J.* 267 (2005); *State v. Lebra*, 357 *N.J. Super.* 500 (App. Div. 2003)(no probation for second degree vehicular homicide).

VI. INDETERMINATE SENTENCES FOR YOUTHFUL OFFENDERS

Consecutive indeterminate sentences for youthful offenders must be justified with rehabilitation-centered criteria, not the *Yarbough* criteria, which preclude consideration of facts relevant to rehabilitation. *State v. Hannigan*, 408 *N.J. Super.* 388 (App. Div. 2009).

Defendant not entitled to young adult offender sentencing for vehicular homicide conviction because he never applied for it and because such sentencing cannot

be imposed for NERA crimes. *State v. Corriero*, 357 N.J.Super. 214 (App. Div. 2003).

VII. PAROLE INELIGIBILITY TERMS

Waiver or reduction of a mandatory minimum sentence, pursuant to N.J.S.A. 2C:42-6.5c(2), requires a judge to find extraordinary circumstances such that imposing a mandatory minimum term would be a serious injustice overriding the need to deter such conduct in others. *State v. Rice*, 425 N.J. Super. 375 (App. Div.), *certif. denied*, 212 N.J. 431 (2012). The judge must find the extraordinary circumstances standard is met by clear and convincing evidence, and must state his reasons for waiving or reducing the mandatory minimum term. *Id.*

The “extraordinary circumstances” standard for waiving or reducing a mandatory minimum term is a higher standard than the “interests of justice” standard for downgrading an offense for sentencing. *State v. Rice*, 425 N.J. Super. 375 (App. Div.), *certif. denied*, 212 N.J. 431 (2012).

Defendants serving a Graves Act period of parole ineligibility above one-third of their base term may, after serving that one-third, apply for a change of sentence pursuant to R. 3:21-10. *State v. Brown*, 384 N.J.Super. 191 (App. Div. 2006). Although N.J.S.A. 2C:43-6c generally requires those committing crimes with guns to serve a parole disqualifier of between one-third and one-half of the sentence imposed, and trial courts have no jurisdiction to consider motions for a change of sentence when defendant is serving a required parole disqualifier, the sentencing judge’s election to impose such a sentence above one-third of the base term was discretionary. *Id.*

VIII. CONCURRENT AND CONSECUTIVE TERMS

A. Generally

The Sixth Amendment does not prohibit states from assigning judges, rather than juries, the factual findings necessary to impose consecutive, rather than concurrent, sentences for multiple offenses. *Oregon v. Ice*, 555 U.S. 160 (2009).

See *State v. Milledge*, 386 N.J.Super. 233 (App. Div.) (multiple victims and numerous convictions), *certif. denied*, 188 N.J. 355 (2006); *State v. Walker*, 385 N.J.Super. 388 (App. Div.) (consecutive sentence for fortified premises conviction (N.J.S.A. 2C:35-4.1e) violated neither due process nor double jeopardy), *certif. denied*, 187 N.J. 83 (2006); *State v. Messino*, 378 N.J.Super. 559 (App. Div.), *certif. denied*, 185 N.J. 297 (2005); *State v. Marinez*, 370 N.J.Super. 49 (App. Div.), *certif. denied*, 182 N.J. 142 (2004).

B. *Yarbough* Guidelines

The “multiple victim” factor of the *Yarbough* criteria is entitled to great weight and can itself support consecutive terms in a case where a drunk driver kills or seriously injures more than one victim. *State v. Carey*, 168 N.J. 413 (2001); *State v. Molina*, 168 N.J. 436 (2001). Cases involving multiple victims should ordinarily result in at least two consecutive sentences. *Id.*

Yarbough constitutes a qualitative, not a quantitative, approach to consecutive sentencing. *State v. Ellis*, 346 N.J.Super. 583 (App. Div.), *aff’d o.b.* 174 N.J. 535 (2002). A trial judge ordering defendant to first serve a less-restrictive term before a more-restrictive one should place on the record the specific consequences of such sentences. *Id.*

See *State v. Amodio*, 390 N.J.Super. 313 (App. Div.) (upholding consecutive sentences for killing two people), *certif. denied*, 192 N.J. 477 (2007).

C. One Incident

Consecutive sentences were proper for defendant's murder of one victim and attempted murder of the other. *State v. Jang*, 359 N.J. Super. 85 (App. Div.), *certif. denied*, 177 N.J. 492 (2003).

E. Statutory Consecutive Terms

See *State v. Martinez*, 387 N.J. Super. 129 (App. Div.) (as to N.J.S.A. 2C:39-4.1d consecutive terms for possessing a weapon during commission of certain crimes), *certif. denied*, 188 N.J. 579 (2006); *State v. Moore*, 377 N.J. Super. 445 (App. Div.) (as to N.J.S.A. 2C:44-5i consecutive terms), *certif. denied*, 185 N.J. 267 (2005).

F. Reasons for Consecutive Terms

Reasons for a consecutive term were self-evident in the record, even though the trial court had failed to set forth specific reasons for that term. *State v. Soto*, 385 N.J. Super. 247 (App. Div. 2006).

IX. MANDATORY SENTENCES

B. Graves Act

Imposing a Graves Act sentence does not violate *State v. Johnson*, 166 N.J. 523 (2001), and defendant, convicted of first degree robbery as an accomplice, knew his codefendants had guns both before and after the robbery where he was the getaway driver. *State v. Figueroa*, 358 N.J. Super. 317 (App. Div. 2003).

Trial courts can decide that a defendant intended to use a gun against another because *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), was good law after *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *State v. Watson*, 346 N.J. Super. 521 (App. Div. 2002), *certif. denied*, 176 N.J. 278 (2003). Thus N.J.S.A. 2C:43-6d was valid even after *State v. Johnson*, 166 N.J. 523 (2001), although trial courts should try all Graves Act cases as if *Johnson* applied until the Supreme Court of New Jersey decides the issue. *Id.*

See *State v. Brown*, 384 N.J. Super. 191 (App. Div. 2006) (Graves Act parole disqualifier above one-third of the base term is discretionary for purposes of a change of sentence motion); *State v. Perez*, 348 N.J. Super. 322 (App. Div.) (Act applies to inoperable firearms), *certif. denied*, 174 N.J. 192 (2002).

C. Graves Act Extended Term - N.J.S.A. 2C:43-6c; N.J.S.A. 2C:44-3

If the State seeks an extended Graves Act term, it must obtain an indictment charging possession or use of the gun in committing one of the designated crimes and then submit that charge to the jury. *State v. Franklin*, 184 N.J. 516 (2005). Ordinary Graves Act sentences, however, remain viable. *Id.* Extended Graves Act sentence is not triggered by a carjacking conviction. *State v. Livingston*, 340 N.J. Super. 133 (App. Div.), *aff'd o.g.* 172 N.J. 209 (2002).

D. NERA (No Early Release Act) - N.J.S.A. 2C:43-7.2 (effective June 9, 1997)

A defendant sentenced to consecutive NERA sentences must serve consecutive periods of parole supervision. *State v. Friedman*, 209 N.J. 102 (2012).

See *State v. Meekins*, 180 N.J. 321 (2004) (holding that only a NERA term at least equal to that applicable to a maximum ordinary term for the degree of crime involved can be imposed on a pre-amendment NERA extended term); see also *State v. Amodio*, 390 N.J. Super. 313 (App. Div.) (NERA applies to passion/provocation manslaughter), *certif. denied*, 192 N.J. 477 (2007); *State v. Berardi*, 369 N.J. Super. 445 (App. Div. 2004), *appeal dismissed*, 185 N.J. 250 (2005); *State v. Andino*, 345 N.J. Super. 35 (App. Div. 2001); *State v. Allen*, 337 N.J. Super. 259 (App. Div. 2001), *certif. denied*, 171 N.J. 43 (2002).

1. Constitutionality

That commutation and work credits do not reduce a NERA term does not violate due process. *State v. Webster*, 190 N.J. 305 (2007).

2. Violent Crime

The Court in *State v. Jarrells*, 181 N.J. 538 (2004), agreed with the decisions in *State v. Wade*, 169 N.J. 302 (2001), and *State v. Ferencsik*, 326 N.J. Super. 228 (App. Div. 1999), holding that NERA applied to vehicular homicide convictions.

An equally divided Supreme Court let stand the Appellate Division's decision that NERA does not apply to murder convictions. *State v. Manzie*, 168 N.J. 113, *superseded*, *State v. Parolin*, 171 N.J. 223 (2002); *see State v. Arenas*, 363 N.J. Super. 1 (App. Div. 2003) (no NERA for felony murder conviction), *certif. denied*, 178 N.J. 452 (2004); *State v. Burris*, 357 N.J. Super. 326 (App. Div. 2002), *certif. denied*, 176 N.J. 279 (2003); *State v. Chavies*, 345 N.J. Super. 254 (App. Div. 2001) (if defendant convicted of murder on retrial, *Manzie* applies). *Manzie*, though, is not of precedential value and does not bind lower courts.

Defendant's endangering conviction was a "violent crime" for pre-amendment NERA purposes. *State v. Messino*, 378 N.J. Super. 559 (App. Div.), *certif. denied*, 185 N.J. 297 (2005).

Defendant's manslaughter conviction was a "violent crime" for purposes of pre-amendment NERA. *State v. Johnson*, 376 N.J. Super. 163 (App. Div.), *certif. denied*, 183 N.J. 592 (2005). Thus the trial court was obligated to impose an 85% parole disqualifier even on a downgraded sentence. *Id.*

A NERA sentence is not applicable where the jury's second degree aggravated assault verdict did not identify if defendant caused, or only attempted to cause, serious bodily injury, or that use of a deadly weapon was a predicate of the conviction. *State v. Natale*, 348 N.J. Super. 625 (App. Div. 2002), *aff'd per curiam*, 178 N.J. 51 (2003).

Defendant's armed robbery conviction was a violent crime carrying with it a mandatory period of parole ineligibility, and prevented his request for reconsideration of sentence to enter a drug treatment facility during service of the parole disqualifier. *State v. Le*, 354 N.J. Super. 91 (Law Div. 2002).

3. Deadly Weapon

NERA applies to second degree possession of a weapon for unlawful purposes, and the amended NERA statute excluding this offense does not apply retroactively. *State v. Parolin*, 171 N.J. 223 (2002).

Pre-amendment NERA definition of "deadly weapon" requires a judicial finding that the weapon -- here, a stun gun -- was, in the manner it was used or intended to be used, known to be capable of producing death or serious bodily injury. *State v. Wood*, 361 N.J. Super. 427 (App. Div. 2003). The matter was remanded to the trial court to permit the State to present evidence that the particular stun gun used fit this definition. *Id.*

NERA is not factually applicable to second degree aggravated assault merely because the jury convicted defendant of third degree aggravated assault using a deadly weapon. *State v. Natale*, 348 N.J. Super. 625 (App. Div. 2002), *aff'd per curiam*, 178 N.J. 51 (2003). Also, NERA does not apply to an inoperable firearm. *State v. Perez*, 348 N.J. Super. 322 (App. Div.), *certif. denied*, 174 N.J. 192 (2002).

NERA is applicable to armed robbery with an unloaded but operable handgun. *State v. Jules*, 345 N.J. Super. 185 (App. Div. 2001) (overruling

State v. Spahle, 343 N.J.Super. 149 (Law Div. 2001)), *certif. denied*, 171 N.J. 337 (2002).

NERA is applicable to an aggravated assault conviction where defendant used a razor or box cutter. *State v. McLean*, 344 N.J.Super. 61 (App. Div. 2001), *certif. denied*, 172 N.J. 179 (2002).

4. NERA Hearing and Sentence

See *State v. Cooper*, 402 N.J.Super. 110 (App. Div. 2008) (defendant's 17-year sentence remanded for second time because increased base sentence resulted in an increase of the aggregate NERA term, which was improper); *State v. Marinez*, 370 N.J.Super. 49 (App. Div.) (Appellate Division modified legal NERA term it considered harsh), *certif. denied*, 182 N.J. 142 (2004).

6. NERA Guilty Plea

Defendant pleading guilty to second degree robbery, and who successfully moved to reduce his sentence to a term of probation, had to receive a NERA period of parole ineligibility upon violating his parole and being resentenced. *State v. Kearns*, 393 N.J.Super. 107 (App. Div. 2007). Reducing a sentence under R. 3:21-10(a) only suspends the original sentence pending successful completion of the probationary term, and defendant's sentence was illegal because the NERA parole disqualifier was mandatory. *Id.*

Defendant's sentences stemming from guilty pleas to second degree eluding and aggravated assault were illegal because they did not include the required NERA conditions. *State v. Colon*, 374 N.J.Super. 199 (App. Div. 2005). On remand, defendant could accept the NERA sentence, negotiate a new sentence, or withdraw his plea. *Id.*

E. Three Strikes - N.J.S.A. 2C:43-7.1

The amended Three Strikes statute in effect when defendant was sentenced anew after a remand, and not the original statute in effect when he was first sentenced, applied. *State v. Parks*, 192 N.J. 483 (2007).

Defendant was not convicted "on two or more prior and separate occasions" if sentenced on the same day for separate robberies. See *State v. Livingston*, 172 N.J. 209 (2002).

Three Strikes statute requires that defendant's prior predicate convictions be for first degree crimes. *State v. Jordan*, 378 N.J.Super. 254 (App. Div. 2005). This narrow construction of N.J.S.A. 2C:43-7.1a is consistent with the apparent legislative intent. *Id.*

N.J.S.A. 2C:43-7.1 does not require that a defendant's first 2 convictions be entered before he or she commits the third predicate act. *State v. Galiano*, 349 N.J.Super. 157 (App. Div. 2002), *certif. denied*, 178 N.J. 375 (2003). The reasoning as to the order of Three Strikes convictions tracks the logic of the Graves Act and persistent offender caselaw. *Id.*

F. Assault Firearm - N.J.S.A. 2C:43-6g

Factual determination of whether a firearm is an "assault firearm," for purposes of N.J.S.A. 2C:43-6g, must be made by a jury beyond a reasonable doubt to impose the mandatory parole disqualifier. *State v. Petrucci*, 343 N.J.Super. 536 (App. Div. 2001), *certif. granted & remanded*, 176 N.J. 277 (2003). On remand the Appellate Division reversed defendant's mandatory 10 year sentence with a 10 year parole disqualifier, determining that a finding that he possessed an assault firearm while committing a specified offense increased the maximum penalty for that second degree crime. *State v. Petrucci*, 365 N.J.Super. 454 (App. Div.), *certif. denied*, 179 N.J. 373 (2004).

A jury had to make this finding because it required that defendant serve the entire term. *Id.*

- G. Vehicular Homicide While Driving Drunk - *N.J.S.A. 2C:11-5b(1)*
Statute requires one-third to one-half parole disqualifier or 3 years, whichever is greater, for defendants committing vehicular homicide while driving drunk. *State v. Stanton*, 176 *N.J. 75*, cert. denied, 540 *U.S. 903* (2003). The trial judge makes the drunk driving determination by a preponderance of the evidence; such a finding is not as to an element of the crime pursuant to *N.J.S.A. 2C:1-14h* or *Harris v. United States*, 536 *U.S. 545* (2002), and drunk driving is a “mere circumstance” in determining defendant’s recklessness. *Id.*
- H. Repeat Drug Offender - *N.J.S.A. 2C:43-6f*
The sentencing court may constitutionally find as fact the existence of a prior conviction for purposes of determining a defendant’s eligibility for a mandatory extended term under *N.J.S.A. 2C:43-6f*. *State v. Thomas*, 188 *N.J. 137* (2006).

Defendant’s extended sentence as a repeat drug offender was illegal because he entered simultaneous guilty pleas to two indictments. *State v. Owens*, 381 *N.J. Super. 503* (App. Div. 2005). A prior conviction must exist at the time the extended sentence is imposed. *Id.*

X. DISCRETIONARY EXTENDED TERMS - *N.J.S.A. 2C:44-3*

A. Persistent Offender

State v. Hudson/McDonald, 209 *N.J. 513/209 N.J. 549* (2012): In these companion cases, the Supreme Court vacated sentences as to each defendant and remanded for re-sentencing, holding that the sentencing court erred in imposing a second extended term on each defendant for an offense committed prior to the imposition of an extended term each defendant had already received. Construing *N.J.S.A. 2C:44-5b*, which deals with sentences imposed at different times, the Court found that the statute’s plain language “sweeps in” *N.J.S.A. 2C:44-5a*’s bar to a sentence comprised of more than one extended term for an offense that was committed prior to imposition of the earlier extended term. The Court distinguished mandatory extended terms and cold cases as likely falling outside the ambit of this bar.

Since it is the prosecutor’s choice to seek an extended term under *N.J.S.A. 2C:44-3*, the trial court should give weight to the prosecutor’s decision regarding which conviction should be subject to the extended term. *State v. Thomas*, 195 *N.J. 431* (2008).

The discretionary persistent offender extended term statute is constitutional, and a sentencing judge, not a jury, can consider the objective facts regarding defendant’s prior convictions (*i.e.*, date of convictions, age at time of crimes, and elements and degrees of crimes) for purposes of extended term sentencing. *State v. Pierce*, 188 *N.J. 155* (2006). The “need to protect the public” finding under *State v. Dunbar*, 108 *N.J. 80* (1987), is not a precondition to a defendant’s eligibility for a discretionary extended term. *Id.*

Neither *Blakely* nor *Apprendi* requires a jury finding of factors permitting persistent offender extended terms. *State v. McMillan*, 373 *N.J. Super. 27* (App. Div. 2004), cert. denied, 182 *N.J. 628* (2005); *State v. Dixon*, 346 *N.J. Super. 126* (App. Div. 2001), cert. denied, 172 *N.J. 181* (2002).

Trial court may only impose one discretionary extended term. *State v. Denmon*, 347 *N.J. Super. 457* (App. Div.), cert. denied, 174 *N.J. 41* (2002). See *State v. Murray*, 338 *N.J. Super. 80* (App. Div.), cert. denied, 169 *N.J. 608* (2001).

- A defendant cannot be sentenced to a second extended term life sentence when he is already serving an extended term on a crime committed after the robbery for which he was being sentenced. *State v. Pennington*, 418 N.J. Super. 548 (App. Div. 2011), *certif. denied*, 209 N.J. 595 (2012).
- B. N.J.S.A. 2C:44-3g (sexual assault and criminal sexual contact committed upon a child with violence or threat of violence)
The decision in *State v. Franklin*, 184 N.J. 516 (2005), requires that the indictment allege the factual predicates essential to imposing an extended term pursuant to N.J.S.A. 2C:44-3g. *State v. Velasquez*, 391 N.J. Super. 291 (App. Div. 2007).
- C. Extended terms and juveniles:
The Appellate Division affirmed the juvenile defendant's extended term, ruling that a plain reading of N.J.S.A. 2A:4A-44d(3) reveals that a pending offense can count as one of the two separate offenses required for an extended term if the juvenile has previously been committed to an adult or juvenile facility; the two required offense need not both be prior offenses. *State ex rel. K.O.*, 424 N.J. Super. 555 (App. Div.), *certif. granted*, 212 N.J. 460 (2012).
- XI. PROBATION - N.J.S.A. 2C:45-3 and 4
The filing of an arrest warrant "commences" violation of probation proceedings pursuant to N.J.S.A. 2C:45-3c. *State v. Nellom*, 178 N.J. 192 (2003).
See State in re D.A., 385 N.J. Super. 411 (App. Div.), *certif. denied*, 188 N.J. 355 (2006).
- XII. SENTENCING ON PROBATION VIOLATIONS
Although incarceration can be imposed for a defendant inexcusably failing to comply with conditions of probation, it cannot result solely from her status as a pregnant drug addict as a way of protecting the fetus. *State v. Ikerd*, 369 N.J. Super. 610 (App. Div. 2004).
- XIII. RESTITUTION, FINES AND VCCB PENALTIES
- A. Restitution
The Sixth Amendment does not bar a judge from determining restitution; *United States v. Booker*, 543 U.S. 220 (2005), does not apply. *State v. Martinez*, 392 N.J. Super. 307 (App. Div. 2007).
See State v. Jones, 347 N.J. Super. 150 (App. Div.) (N.J.S.A. 2C:43-2.1 mandates payment of restitution to owner of stolen car regardless of defendant's ability to pay), *certif. denied*, 172 N.J. 181 (2002).
- B. Fines
The rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to the imposition of criminal fines. *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012). Under *Apprendi*, any fact other than a prior conviction that increases a criminal defendant's maximum statutory sentence must be found by a jury beyond a reasonable doubt. Criminal fines, like imprisonment, are penalties that trigger such procedural safeguards. *Id.*
See State v. El Moghrabi, 341 N.J. Super. 354 (App. Div.), *certif. denied*, 169 N.J. 610 (2001).
- C. Other
See State v. Milledge, 386 N.J. Super. 233 (App. Div.) (SANE penalty valid), *certif. denied*, 188 N.J. 355 (2006).
- XIV. STATE'S RIGHT TO APPEAL - N.J.S.A. 2C:44-1f(2) (See also **APPEALS**)
See State v. Lopez, 395 N.J. Super. 98 (App. Div.) (downgrade), *certif. denied*, 192 N.J. 596 (2007); *State v. Johnson*, 376 N.J. Super. 163 (App. Div.) (in computing the State's 10 day time period for appealing a downgraded

sentence, the “next business day” rule applies), *certif. denied*, 183 N.J. 592 (2005); *State v. Evers*, 368 N.J. Super. 159 (App. Div. 2004); *State v. Gould*, 352 N.J. Super. 313 (App. Div. 2002)(failure to appeal from resentencing, and defendant’s commencement of serving his sentence, barred State’s appeal under N.J.S.A. 2C:44-1f(2)); *State v. Livingston*, 340 N.J. Super. 133 (App. Div. 2001), *aff’d o.g.* 172 N.J. 209, 215 (2002).

XVI. CONFLICT BETWEEN ORAL SENTENCE AND JUDGMENT OF CONVICTION

See *State v. Murray*, 338 N.J. Super. 80 (App. Div.), *certif. denied*, 169 N.J. 608 (2001).

XVII. ILLEGAL SENTENCES

Parties cannot negotiate an illegal sentence. *State v. Smith*, 372 N.J. Super. 539 (App. Div. 2004), *certif. denied*, 182 N.J. 428 (2005).

See *State v. Chambers*, 377 N.J. Super. 365 (App. Div. 2005)(State can appeal an illegal sentence -- here, the length of defendant’s driver’s license suspension -- at any time).

XVIII. CREDIT FOR TIME SERVED

A. Jail Credit

Jail credits are no longer limited to time directly attributed to a particular offense; the credits must be awarded whether they are for the present offense or another or from the same or different county. *State v. Hernandez*, 208 N.J. 24 (2011).

Because defendants are entitled to credit for time spent in another state’s prison due to New Jersey detainers, so are those held in a foreign country on such detainers. *State v. Hemphill*, 391 N.J. Super. 67 (App. Div.), *certif. denied*, 192 N.J. 68 (2007).

Pursuant to R. 3:21-8, defendants are not entitled to jail credit for time spent on probation before they begin serving their custodial sentences. *State v. Evers*, 368 N.J. Super. 159 (App. Div. 2004).

Defendant’s commutation credits could not be removed because he failed to fully cooperate with sex offender treatment. *Lewis v. Department of Corr.*, 365 N.J. Super. 503 (App. Div. 2004).

B. Gap-Time Credits - N.J.S.A. 2C:44-5b(2)

Defendant is not entitled to gap-time credit for sentences served on other crimes that were completed before he was charged and tried for a crime that he committed prior to the crimes for which he served his sentences. *State v. L.H.*, 206 N.J. 528 (2011).

Juveniles are entitled to gap-time credit. *State v. Franklin*, 175 N.J. 456 (2003).

Defendants get no gap-time credit for time spent in New Jersey on an out-of-state sentence. *State v. Carreker*, 172 N.J. 100 (2002)(overruling *State v. McIntosh*, 346 N.J. Super. 1 (App. Div. 2001), and *State v. Dela Rosa*, 327 N.J. Super. 295 (App. Div.), *certif. denied*, 164 N.J. 191 (2000)).

Defendants do not get gap-time credit applied against their period of parole ineligibility imposed pursuant to NERA. *Meyer v. New Jersey State Parole Bd.*, 345 N.J. Super. 424 (App. Div. 2001), *certif. denied*, 171 N.J. 339 (2002).

Defendant was entitled to gap-time credit for 2 prior imprisonments for other crimes even though they covered the time his own conduct in hiding a body prevented the State from knowing that a crime had been committed at all.

State v. Ruiz, 355 N.J. Super. 237 (Law Div. 2003).

C. Commutation/Work Credits

NERA precludes application of commutation and work credits to the front end of a sentence to lessen the parole disqualifier. *State v. Webster*, 383 N.J.Super. 432 (App. Div. 2006), *aff'd o.b.* 190 N.J. 305 (2007). Such credits apply only to the remaining base term. *Id.*

XIX. MODIFICATION OR REDUCTION OF SENTENCE

A. Release Because of Illness or Infirmary

2. Release to a Drug or Alcohol Treatment Program

Second degree offenders are eligible for such programs pursuant to N.J.S.A. 2C:35-14. *State v. N.I.*, 349 N.J.Super. 299 (App. Div. 2002). Defendant utterly failed to provide any support for his claim that he was an alcoholic and should be resentenced to a drug treatment facility during service of his 85% NERA period of parole ineligibility for armed robbery. *State v. Le*, 354 N.J.Super. 91 (Law Div. 2002). See *State v. Brown*, 384 N.J.Super. 191 (App. Div. 2006)(defendants serving a Graves Act parole disqualifier above one-third of their base term may seek a change of sentence to a drug treatment program).

B. Release Because of a Change in the Law

The Legislature knows how to make a more lenient sentencing provision applicable to existing convictions. In creating a new offense rather than reducing the maximum sentence for an existing crime, the Legislature did not provide a basis for a convicted defendant to modify or reduce his or her sentence pursuant to R. 3:21-10. *State v. James*, 343 N.J.Super. 143 (App. Div. 2001).

C. Trial Court's Authority

Trial court could not vacate a sentence, even if no judgment of conviction had yet been entered, because of comments defendant allegedly made to a victim in court as he was being led away. *State v. Gilberti*, 373 N.J.Super. 1 (App. Div. 2004).

XX. INCREASE OF SENTENCE ON RESENTENCING (See also DOUBLE JEOPARDY)

See *State v. Evers*, 368 N.J.Super. 159 (App. Div. 2004)(no double jeopardy preclusion).

XXII. SEX OFFENDER SENTENCING

The purpose of Megan's Law is to prevent recidivism posed by sex offenders and offenders who commit predatory acts against children. *In re Registrant T.T.*, 188 N.J. 321 (2006). Megan's Law applies to juveniles, and the Attorney General should review and modify the youthful offender notification guidelines. *Id.*

Megan's Law does not give fair notice that a registrant's failure to verify their address is a crime pursuant to N.J.S.A. 2C:7-2a. *State v. Gyori*, 185 N.J. 422 (2005).

Defendants pleading guilty to sexually violent offenses must, as a matter of fundamental fairness, be informed of the collateral possibility of civil commitment pursuant to the Sexually Violent Predator Act. *State v. Bellamy*, 178 N.J. 127 (2003).

The rule enunciated in *Bellamy* applied retroactively only to pending cases where defendants had not yet exhausted all avenues of direct review, not to previously adjudicated cases. *State v. J.K.*, 407 N.J.Super. 15 (App. Div.), *certif. denied*, 200 N.J. 209 (2009).

Utmost deference afforded to civil commitment judge's balancing of societal interest and individual liberty in imposing the Sexually Violent Predator Act. *In re Civil Commitment of J.M.B.*, 197 N.J. 563 (2009). Even non-sex crimes

(kidnapping, threats to kill, aggravated assault, criminal restraint, and terroristic threats) can constitute a sexually violent offense for commitment purposes. *Id.* Avenel sentencing was justified where defendant sexually abused a child over a 2 year period. *State v. Hemphill*, 391 *N.J. Super.* 67 (App. Div.), *certif. denied*, 192 *N.J.* 68 (2007).

Defendant was properly sentenced to Avenel because his conduct in sexually assaulting his nieces was both repetitive and compulsive. *State v. N.G.*, 381 *N.J. Super.* 352 (App. Div. 2005).

The provision in *N.J.S.A. 2C:7-2* mandating registration is at the heart of Megan's Law, and cannot be avoided when a sex offender moves from one municipality to another without notifying either of his or her move. *State v. Leahy*, 381 *N.J. Super.* 106 (App. Div. 2005), *certif. denied*, 186 *N.J.* 245 (2006). State failed to submit adequate, admissible evidence to compel appellant's civil commitment under the Sexually Violent Predator Act. *In re Civil Commitment of G.G.N.*, 372 *N.J. Super.* 42 (App. Div. 2004). "[T]here is a tipping point where due process is violated by the use of hearsay." *Id.*

Juvenile adjudicated delinquent for an offense which, if committed by an adult, would constitute criminal sexual contact, was subject to Megan's Law registration and notification because his victim was 17 years old. *State in re J.P.F.*, 368 *N.J. Super.* 24 (App. Div.), *certif. denied*, 180 *N.J.* 453 (2004).

A jury need not determine beyond a reasonable doubt the findings necessary to trigger commitment to Avenel. *State v. Luckey*, 366 *N.J. Super.* 79 (App. Div. 2004).

Remand for resentencing on defendant's fourth degree sex crime was necessary because, while *N.J.S.A. 2C:43-6.4e(1)* mandates an extended term for repeat offenders committing such fourth degree crimes, *N.J.S.A. 2C:43-7* provides no parameters for the length of those extended terms. *State v. Olsvary*, 357 *N.J. Super.* 206 (App. Div.), *certif. denied*, 177 *N.J.* 222 (2003).

See *State v. Bond*, 365 *N.J. Super.* 430 (App. Div. 2003)(defendant had notice of community supervision for life conditions); *State v. Jamgochian*, 363 *N.J. Super.* 220 (App. Div. 2003)(defendants to know the effect of community supervision for life when pleading guilty to sex offenses).

XXIII. SUSPENDED SENTENCES - *N.J.S.A. 2C:43-2b, 45-1* and 2

Juveniles sentenced under the Code of Juvenile Justice may receive suspended sentences. *State in re M.C.*, 384 *N.J. Super.* 116 (App. Div. 2006).

Trial court revoked defendant's prior suspended sentence because of subsequent municipal convictions, and he could not on appeal attack the factual basis underlying the original judgment of conviction imposing the suspended term. *State v. Mitchell*, 374 *N.J. Super.* 172 (App. Div. 2005).

Material violation of the suspension of the sentence's terms can result in imprisonment, and guidelines for sentencing upon a revocation are the same as those applied to violations of probation. *State v. Cullen*, 351 *N.J. Super.* 505 (App. Div. 2002).

XXIV. APPLICATION OF *Blakely v. Washington*, 542 *U.S.* 296 (2004)

A. *Blakely*

"[T]he maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" is the statutory maximum for *Apprendi* purposes. *Blakely v. Washington*, 542 *U.S.* 296 (2004). Thus defendant could not be sentenced to more than the statutory maximum term of the standard range based upon the trial court's determination that he had acted with deliberate cruelty. *Id.*

Neither *Apprendi*, nor *Blakely* require the jury to determine the facts necessary to impose consecutive sentences. *Oregon v. Ice*, 555 U.S. 160 (2009). This decision reaffirms *Abdullah*. *Id.*

Failure to submit a sentencing factor to the jury in violation of *Blakely* and *Apprendi* is not structural error. *Washington v. Recuenco*, 548 U.S. 212 (2006).

The federal sentencing guidelines are unconstitutional under the Sixth Amendment, as construed in *Blakely*, because they mandated particular sentences for differing sets of facts not found by a jury. *United States v. Booker*, 543 U.S. 220 (2005). That portion of the statute making the guidelines mandatory must be severed and excised to make them discretionary, thereby permitting the sentencing court to tailor a sentence. *Id.* The extended term statutes for persistent offenders (*N.J.S.A. 2C:44-3a*) and repeat drug offenders (*N.J.S.A. 2C:43-6f*) are constitutional under *Blakely*. *State v. Thomas*, 188 N.J. 137 (2006); *State v. Pierce*, 188 N.J. 155 (2006). The prior conviction exception under *Blakely* must be read narrowly, and is limited to the finding of a prior conviction's existence. *State v. Thomas*, 188 N.J. 137 (2006). Moreover, the "need to protect the public" finding is no different from judicial findings as to aggravating factors, and thus sentencing courts may consider it. *State v. Pierce*, 188 N.J. 155 (2006). Finally, the range of sentencing defendant is subject to is from the bottom of the ordinary term range to the top of the extended term range. *Id.*

N.J.S.A. 2C:44-1f(1) was unconstitutional to the extent it permitted trial judges to increase the presumptive sentence, absent jury factfinding beyond a reasonable doubt, based on aggravating factors unrelated to a prior conviction. *State v. Natale*, 184 N.J. 458 (2005).

Consecutive maximum terms with periods of parole ineligibility did not violate *Blakely*. *State v. Abdullah*, 184 N.J. 497 (2005). Aggravating factors 3, 6 and 9 are offender-based, and fall within the recidivism exception in *Blakely*. *Id.*; see also *State v. King*, 372 N.J. Super. 227 (App. Div. 2004), *certif. denied*, 185 N.J. 266 (2005).

The *Brimage* guidelines do not violate *Blakely* or *Natale*. *State v. Thomas*, 392 N.J. Super. 169 (App. Div.), *certif. denied*, 192 N.J. 597 (2007).

Mental retardation is the "functional equivalent" of a capital trigger because death can only be imposed upon those who are not retarded. *State v. Jimenez*, 380 N.J. Super. 1 (App. Div. 2005), *aff'd in part and rev'd in part o.g.* 187 N.J. 91 (2006).

Defendant's sentence was vacated because he had no prior convictions. *State v. Lopez*, 378 N.J. Super. 521 (App. Div. 2005), *aff'd in part and rev'd in part o.g.* 187 N.J. 91 (2006).

Defendant's extended term, imposed because he was a repeat drug offender, did not come within *Blakely's* reach because it was based on his prior record. *State v. Pagan*, 378 N.J. Super. 549 (App. Div. 2005); *State v. Vasquez*, 374 N.J. Super. 252 (App. Div. 2005).

Imposition of consecutive sentences does not violate *Blakely*, nor does a negotiated sentence above the presumptive term. *State v. Anderson*, 374 N.J. Super. 419 (App. Div.) (relying on *United States v. Booker*, 543 U.S. 220 (2005)), *certif. denied*, 185 N.J. 266 (2005).

Persistent offender extended terms fall squarely within *Blakely's* recidivism exception, and require no jury finding for enhancement purposes. *State v. McMillan*, 373 N.J. Super. 27 (App. Div. 2004), *certif. denied*, 182 N.J. 628 (2005).

XXV. DNA TESTING

DNA Database and Databank Act is constitutional, and applies to juveniles. *State v. O'Hagen*, 189 N.J. 140 (2007); *A.A. v. Attorney General*, 189 N.J. 128 (2007).

Defendant did not have to submit to DNA testing because he was not serving a legal sentence on the effective date of the DNA Act's amendment. *State v. Crawford*, 379 N.J. Super. 250 (App. Div. 2005).

XXVI. RIGHT TO BE HEARD AT SENTENCING

The general contours on an appropriate video of a victim's life for sentencing purposes are: the video should be short in duration, not include any special effects such as narration or evocative music, or include childhood pictures of adult victims. *State v. Hess*, 207 N.J. 123 (2011).

Defendant's right to be heard at sentencing does not automatically extend to family members; only defendant, his counsel and the victim can, by rule, statute, and constitutional amendment address the court at sentencing, others are left to the court's discretion. *State v. Blackmon*, 202 N.J. 283 (2010).

SEXUAL OFFENSES AND OFFENDERS (See also OBSCENITY, PROSTITUTION AND RELATED OFFENSES)

I. INTRODUCTION

A. Sex Offenses In General

A defendant's subjective belief that a victim is a child suffices to impose liability for attempted sexual assault, attempted endangering, etc., when that person was actually an adult (in this case, law enforcement). *State v. Kuhn*, 415 N.J. Super. 89 (App. Div. 2010), *certif. denied*, 205 N.J. 78 (2011).

B. Definitions

Language "in the view of" a child found in N.J.S.A. 2C:14-1d and explained in *State v. Zeidell*, 154 N.J. 417 (1998), includes offending conduct the child actually observes and that involving an unreasonable risks that they will observe. *State v. Breitweiser*, 373 N.J. Super. 271 (App. Div. 2004), *certif. denied*, 182 N.J. 628 (2005). In other words, a child need not actually observe the offending conduct so long as an unreasonable risk exists that he or she might see defendant engage in the sexual contact. *Id.*

II. TYPES OF SEXUAL OFFENSES

B. Aggravated Sexual Assault

Trial court should have held an admissibility hearing before precluding defendant from presenting evidence that his child victim had subsequently accused another man of molesting her and then recanted. *State v. A.O.*, 192 N.J. 474 (2007).

Carjacking is not a predicate offense elevating second degree sexual assault to first degree aggravated sexual assault. *State v. Drury*, 190 N.J. 197 (2007). N.J.S.A. 2C:14-2a(3) does not include carjacking as a predicate offense. *Id.*

Where the infant victim required 65 stitches to close her wounds, defendant's aggravated sexual assault conviction stands. *State v. Cabrera*, 387 N.J. Super. 81 (App. Div. 2006).

See *State v. Rangel*, 422 N.J. Super. 1 (App. Div. 2011) (addressing the elevation of aggravated sexual assault to first degree if an act of sexual penetration is committed during the commission of another offense to compel submission to the sexual assault), *certif. granted*, 209 N.J. 233 (2012); *State v. Buscham*, 360 N.J. Super. 346 (App. Div. 2003) (addressing aggravated

sexual assault by a person with supervisory power or in a supervisory position pursuant to *N.J.S.A. 2C:14-2a(2)(b)*).

C. Sexual Assault

Defendant committed aggravated sexual assault by telephoning a child, pretending to be a doctor, and instructing her to penetrate herself and then describe it to him. *State v. Maxwell*, 361 *N.J. Super.* 502 (Law Div. 2001), *aff'd*, 361 *N.J. Super.* 401 (App. Div.), *certif. denied*, 178 *N.J.* 34 (2003). The definition of "sexual penetration" in *N.J.S.A. 2C:14-1b* and *c* clearly contemplated insertion of a hand, finger, or object of a person other than the actor. *Id.*

See *State v. Drury*, 190 *N.J.* 197 (2007); *State v. VanDyke*, 361 *N.J. Super.* 403 (App. Div.), *certif. denied*, 178 *N.J.* 35 (2003).

E. Criminal Sexual Contact

A defendant who knowingly masturbates within the view of a non-consenting adult commits lewdness, not criminal sexual contact, because no physical force or coercion was employed. *State v. Lee*, 417 *N.J. Super.* 219 (App. Div. 2010), *certif denied*, 206 *N.J.* (2011).

Physical force in addition to sexual contact is not required to violate *N.J.S.A. 2C:14-3*, proscribing criminal sexual contact. *State v. Triestman*, 416 *N.J. Super.* 195 (App. Div. 2010). Any unauthorized sexual contact is a crime under the statute. *Id.*

The juvenile's touching of a female classmate's buttocks in the classroom was "horseplay" and not criminal sexual contact. *State in re D.W.*, 381 *N.J. Super.* 516 (App. Div. 2005).

See *State v. Bellamy*, 178 *N.J.* 127 (2003).

III. RELATED OFFENSES (See **ENDANGERING THE WELFARE OF CHILDREN**)

Defendant committed attempted endangering where the jury could reasonably conclude beyond a reasonable doubt that his purpose was to engage in a prohibited sexual offense with the child victim, and his actions constituted a substantial step towards effectuating those intentions. *State v. Perez*, 177 *N.J.* 540 (2003).

See *State v. VanDyke*, 361 *N.J. Super.* 403 (App. Div.), *certif. denied*, 178 *N.J.* 35 (2003).

V. EVIDENCE

B. Admissibility of Evidence (See also **EVIDENCE**)

See *State v. J.A.C.*, 210 *N.J.* 281 (2012) (sexually explicit instant messages sent by minor-victim to other adults some two years after sexual assaults constituted "sexual conduct" under the Rape Shield Law; prejudicial nature of the communications outweighed probative value and their admission would have invaded the victim's privacy).

See *State v. W.B.*, 205 *N.J.* 588 (2011) (Expert testimony was beyond the limited scope of CSAAS evidence, but its admission was harmless); *State v. R.B.*, 183 *N.J.* 308 (2005)(CSAAS expert testimony properly admitted); *State v. Garron*, 177 *N.J.* 147 (2003)(rape shield statute interpreted to allow past conduct where evidence relevant to the defense has probative value outweighing its prejudicial effect), *cert. denied*, 540 *U.S.* 1160 (2004); *State v. Schnabel*, 196 *N.J.* 116 (2008)(expert testimony on CSAAS was properly admitted at trial, however defendant should have been permitted to introduce evidence of prior abuse by another person); *State v. B.M.*, 397 *N.J. Super.* 367 (App. Div. 2008)(defendant permitted to cross-examine child sexual assault victim about her complaints that three others had sexually assaulted her; however the State could offer rebuttal evidence concerning the guilty

pleas of the three other assailants because defendant may open the door to such evidence by the cross-examination); *State v. Peterson*, 364 N.J. Super. 387 (App. Div. 2003)(test for gaining DNA testing pursuant to N.J.S.A. 2A:84A-32a); *State v. VanDyke*, 361 N.J. Super. 403 (App. Div.)(access to child victim's school records), *certif. denied*, 178 N.J. 35 (2003); *State v. L.P.*, 338 N.J. Super. 227 (App. Div.)(CSAAS), *certif. denied*, 170 N.J. 205 (2001); *State v. Burke*, 354 N.J. Super. 97 (Law Div. 2002)(State cannot employ rape shield statute to offer evidence of victim's virginity in its case-in-chief)

VI. SENTENCING (See also **SENTENCING**)

B. Sentence and Punishment

1. In General

It is constitutionally important to distinguish a dangerous sexual offender subject to civil commitment from other dangerous individuals more properly dealt with exclusively through criminal proceedings. *Kansas v. Crane*, 534 U.S. 407 (2002). This distinction prevents civil commitment from becoming a mechanism for retribution or general deterrence. *Id.* See *State v. Bellamy*, 178 N.J. 127 (2003)(fundamental fairness required that defendants pleading guilty to sexually violent offenses be informed of the collateral consequence of possible commitment pursuant to the Sexually Violent Predator Act); *State v. Hemphill*, 391 N.J. Super. 67 (App. Div.)(Avenel sentencing), *certif. denied*, 192 N.J. 68 (2007); *State v. Velasquez*, 391 N.J. Super. 291 (App. Div. 2007)(jury must find the actual predicates for imposing an extended term pursuant to N.J.S.A. 2C:44-3g); *State v. Milledge*, 386 N.J. Super. 233 (App. Div.)(consecutive sentences for kidnapping, robbery, and aggravated sexual assaults), *certif. denied*, 188 N.J. 355 (2006); *State v. N.G.*, 381 N.J. Super. 352 (App. Div. 2005)(defendant was a repetitive and compulsive sex offender); *State v. Evers*, 368 N.J. Super. 159 (App. Div. 2004); *State v. Bond*, 365 N.J. Super. 430 (App. Div. 2003)(defendant notified of community supervision for life conditions, and that violating such a condition without good cause constituted a crime); *State v. Olsvary*, 357 N.J. Super. 206 (App. Div.)(as to extended term for fourth degree sex crime), *certif. denied*, 177 N.J. 222 (2003).

2. Avenel

The State need not prove to a jury beyond a reasonable doubt the findings necessary to commit a defendant to Avenel. *State v. Luckey*, 366 N.J. Super. 79 (App. Div. 2004).

VII. MEGAN'S LAW

B. Constitutionality

Megan's Law, as applied to juveniles, does not violate due process, equal protection or freedom of movement. *In re J.G.*, 169 N.J. 304 (2001). Convicted sex offenders must be included in the Internet Registry, and their right to privacy in their home addresses gives way to the State's compelling interest in preventing sex offenses in a mobile society. *A.A. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003). Registry created no *ex post facto* or double jeopardy violation, and its purpose was to inform the public for its own safety and not to humiliate the offender. *Id.* See *Smith v. Doe*, 538 U.S. 84 (2003)(Alaska sex offender registration law did not impose retroactive punishment in violation of *ex post facto*, and state legislature intended to enact a civil regulatory scheme to protect the public).

C. Caselaw

The purpose of Megan's Law is to prevent recidivism posed by sex offenders and offenders who commit predatory acts against children, and applies to juveniles. *In re Registrant T.T.*, 188 N.J. 321 (2006). The sexual motive the Appellate Division engrafted as a prerequisite to Megan's Law applicability does not exist. *Id.*

A registrant who fails to verify their address does not violate N.J.S.A. 2C:7-2a. *State v. Gyori*, 185 N.J. 422 (2005). He or she also must notify registry agents of any move. *State v. Leahy*, 381 N.J. Super. 106 (App. Div. 2005), *certif. denied*, 186 N.J. 245 (2006).

Failure to pay VCCB assessment as of the effective date of Megan's Law did not subject defendant to "other form of community supervision" requiring him to register pursuant to N.J.S.A. 2C:7-2b. *State v. S.R.*, 175 N.J. 23 (2002). In determining the scope of the notification under the Registration and Community Notification Law (RCNL) for Tier Two offenders, the State, absent limiting circumstances, need not show that registrants are personally likely to appear at a particular location to notify schools and community organizations within the geographic scope of notification. *In re M.F.*, 169 N.J. 45 (2001). The RCNL also is constitutional as applied to juveniles who commit sex offenses, and those under age 14 when they committed their offenses may move to terminate registration and notification requirements when they turn 18. *In re J.G.*, 169 N.J. 304 (2001).

Megan's law registration requirement should not be retroactively annulled because a plea to a crime subject to Megan's Law is later vacated. *State v. G.L.*, 420 N.J. Super. 158 (App. Div.), *certif. denied*, 208 N.J. 598 (2011).

Juveniles are subject to Megan's Law registration and notification. *State in re J.P.F.*, 368 N.J. Super. 24 (App. Div.), *certif. denied*, 180 N.J. 453 (2004).

Community supervision for life is a punitive portion of a defendant's sentence, therefore, the addition of that aspect of a sentence only after defendant had completely served the rest of his sentence was improper and ran afoul of the state and federal constitutions' double jeopardy provision. *State v. Schubert*, 212 N.J. 295 (2012).

Community supervision for life is a penal, not a collateral, consequence of a guilty plea of which defendant must be made aware. *State v. Jamgochian*, 363 N.J. Super. 220 (App. Div. 2003).

In *In re Registrant M.A.S.*, 344 N.J. Super. 596 (App. Div. 2001), the Appellate Division held that the "duration of offensive behavior" criterion of the RRAS reflected the belief that the longer the interval during which the diseased impulses fester the greater the danger the registrant will act out in the future. Thus the risk of reoffense was high for M.A.S. because more than 5 years had passed between his prior offense and his present crime. *Id.*

When a registrant moves and renotification occurs, the court must consider the recidivism risk in terms of the variable factors in the current situation. *In re H.M.*, 343 N.J. Super. 219 (App. Div. 2001).

Defendant's guilty plea was vacated where he was not informed that the community supervision provision of his guilty plea prevented him from living with his new wife and her child, and nothing in the record indicated that the judge or defense counsel explained the Megan's Law ramifications of defendant's plea. *State v. J.J.*, 397 N.J. Super. 91 (App. Div.), *certif. granted*, 194 N.J. 446 (2008).

VIII. SEX OFFENDER MONITORING ACT

The retroactive application of the intensive monitoring and supervision of sexual offenders under the Sex Offender Monitoring Act to those who

committed sex offenses before its enactment violated the *ex post facto* clauses of the state and federal constitutions. *Riley v. N.J. State Parole Bd.*, 423 N.J. Super. 224 (App. Div. 2011), *certif. granted*, 209 N.J. 596 (2012). Although the legislative intent of the Act is civil and non-punitive, the disabilities and restraints are similar to those historically regarded as punishment. *Id.*

SIXTH AMENDMENT

I. RIGHT TO COUNSEL

A. Origin

The right to counsel is afforded because of the effect it has on the ability of the accused to receive a fair trial. *Mickens v. Taylor*, 535 U.S. 162 (2002); *see Marshall v. Hendricks*, 313 F. Supp.2d 423 (D.N.J. 2004), *aff'd sub nom. Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006).

Sixth Amendment right to counsel is offense-specific, and does not extend to crimes “factually related” to charged offenses unless they are the “same offense” under *Blockburger*. *Texas v. Cobb*, 532 U.S. 162 (2001).

B. Choice of Counsel

Erroneous deprivation of defendant’s counsel of choice is structural error and is not subject to harmless error. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

Right to counsel of choice does not trump an actual conflict of interest. *State in re S.G.*, 175 N.J. 132 (2003).

The availability of competent counsel does not replace the right to choose one’s own counsel, and in this case, the court needed to ask defendant about the length of the delay he was requesting and to assess whether the request for different counsel was made in good faith. *State v. Kates*, 426 N.J. Super. 32 (App. Div. 2012), *certif. granted*, 213 N.J. 45 (2013).

C. Effectiveness and Competence of Counsel

Defense counsel must review evidence the prosecutor will likely rely on at sentencing, even when a capital defendant and his or her family members have suggested that no mitigating evidence is available. *Rompilla v. Beard*, 545 U.S. 374 (2005).

Both trial and appellate counsel were ineffective regarding a biased juror and that juror’s possible effect on the rest of the jury. *State v. Loftin*, 191 N.J. 172 (2007).

While *Gaitan* bars retroactive application of *Padilla* to PCR claims, brought on state constitutional grounds, for claims of ineffective assistance of counsel based on a failure to affirmatively advise (as opposed to misadvising) about deportation consequences of a guilty plea, defendant may have colorable claim on federal grounds. *State v. Barros*, 425 N.J. Super. 329 (App. Div. 2012).

Although not per se unreasonable, appellate counsel’s failure to communicate with defendant regarding his appeal fell below an objective standard of reasonableness; however, defendant failed to prove prejudice; Appellate counsel is not required to advance all grounds insisted upon because defendants have no constitutional right to have appellate counsel raise every non-frivolous issue requested on appeal. *State v. Gaither*, 396 N.J. Super. 508 (2007), *certif. denied*, 194 N.J. 444 (2008).

When an ineffective assistance of counsel claim is based on the failure to file a suppression motion, defendant must establish that his or her Fourth

Amendment claim is meritorious. *State v. O'Neal*, 190 N.J. 601 (2007). Here, such a motion would have failed. *Id.*

Both trial and appellate counsel were ineffective regarding a biased Defense counsel's high-risk strategy of admitting defendant's guilt to lesser offenses in the hope that it would enhance defendant's credibility and lead to acquittal on the most serious offense was not *prima facie* evidence of ineffective assistance of counsel. *State v. Castagna*, 187 N.J. 293 (2006). Defense counsel's failure to seek indictment's dismissal on double jeopardy grounds after improper grant of a mistrial constituted ineffective assistance of counsel. *State v. Allah*, 170 N.J. 269 (2002).

Although defendant did not meet with his substituted counsel until the morning of a scheduled suppression hearing, he failed to prove ineffective assistance of counsel or other prejudice; counsel did not indicate that he was unprepared or needed more time to investigate. *State v. Miller*, 420 N.J. Super. 75 (App. Div. 2011), *remanded*, 212 N.J. 189 (2012).

Defense counsel was not ineffective in questioning codefendant at the suppression hearing. *State v. Pagan*, 378 N.J. Super. 549 (App. Div. 2005). Defendant could not re-raise this issue on post-conviction relief because the Appellate Division had decided the issue on the merits. *Id.*

Trial counsel was not ineffective for not objecting to the trial court's instruction that no one could enter or leave the courtroom while a traumatized child testified in defendant's sexual assault case. *State v. Cusumano*, 369 N.J. Super. 305 (App. Div.), *certif. denied*, 181 N.J. 546 (2004).

Trial counsel erred in not filing a motion to suppress evidence, betraying a lack of essential legal knowledge and prejudicing defendant. *State v. Johnson*, 365 N.J. Super. 27 (App. Div. 2003), *certif. denied*, 179 N.J. 372 (2004). Thus the matter was remanded to the trial court to conduct a suppression hearing. *Id.*

Trial counsel incorrectly advising defendant of his sentencing exposure if convicted at a trial, which prevented a fair evaluation of a plea offer and induced its rejection, constituted remedial ineffective assistance. *State v. Taccetta*, 351 N.J. Super. 196 (App. Div.), *certif. denied*, 174 N.J. 544 (2002). See *State v. Taccetta*, 200 N.J. 183 (2009) (holding defendant's testimony that he would have committed perjury and pled guilty "legally disabled" defendant from taking a plea offer, and vacating the jury's verdict of guilty would be antithetical to the court rules, case law, and the administration of justice).

Defense counsel cannot agree to waive right to seek less than a particular sentence. *State v. Briggs*, 349 N.J. Super. 496 (App. Div. 2002). A plea agreement restriction to this effect deprived defendant of effective assistance of counsel. *Id.*

Habeas relief granted because trial counsel was ineffective in failing to undertake adequate pretrial investigation. *Rolan v. Vaughn*, 445 F.3d 671 (3d Cir. 2006).

Defense counsel's advice based on the then-current law was not "unreasonable." *Fountain v. Kyler*, 420 F.3d 267 (3d Cir. 2005), *cert. denied*, 546 U.S. 1140 (2006). Fact that later caselaw rendered advice incorrect did not give rise to ineffective assistance. *Id.*

While trial counsel reasonably chose to have one expert witness testify rather than another, the failure to provide that expert with petitioner's statements to the police was error. *Affinito v. Hendricks*, 366 F.3d 252 (3d Cir. 2004), *cert.*

denied, 543 U.S. 1057 (2005). No prejudice existed, however, because the other expert's conclusion would have faced a similar attack. *Id.* Trial counsel in capital case was ineffective for failing to investigate and present a mitigation case during the penalty phase. *Marshall v. Hendricks*, 313 F.Supp.2d 423 (D.N.J. 2004), *aff'd sub nom. Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006). See *Florida v. Nixon*, 543 U.S. 175 (2004)(counsel's decision to admit guilt and concentrate on avoiding a death sentence in the penalty phase was not ineffective; no presumed prejudice applied); *Yarborough v. Gentry*, 540 U.S. 1 (2003); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Bell v. Cone*, 535 U.S. 685 (2002); *Mickens v. Taylor*, 535 U.S. 162 (2002); *Glover v. United States*, 531 U.S. 198 (2001); *State v. Castagna*, 187 N.J. 293 (2006)(defense counsel not ineffective for calling defendant a "criminal" who was "guilty" of some counts); *State v. Chew*, 179 N.J. 186 (2004)(penalty phase counsel in capital prosecution was ineffective for not calling a psychiatrist to provide evidence as to N.J.S.A. 2C:11-3c(5)(a)); *State v. DiFrisco*, 174 N.J. 195 (2002)(penalty phase counsel in capital prosecution not proven to be ineffective), *cert. denied*, 537 U.S. 1220 (2003); *State v. Lewis*, 389 N.J.Super. 409 (App. Div.) (defendant could raise ineffective assistance of trial counsel claims when seeking post-conviction relief), *certif. denied*, 190 N.J. 393 (2007); *State v. Homdziuk*, 369 N.J.Super. 279 (App. Div. 2004) (regarding alleged Vienna Convention on Consular Rights violation); *Shelton v. Carroll*, 464 F.3d 423 (3d Cir. 2006)(petitioner, not counsel, decided to limit the scope of investigation and presentation of mitigation evidence); *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006) (counsel failed to conduct a reasonable background investigation prior to defendant's capital sentencing); *Thomas v. Varner*, 428 F.3d 491 (3d Cir. 2005)(defense counsel ineffective by failing to seek suppression of an identification), *cert. denied sub nom. Palakovich v. Thomas*, 549 U.S. 1110 (2007); *Jacobs v. Horn*, 395 F.3d 92 (3d Cir.) (counsel in capital case failed to adequately investigate, prepare and present mental health evidence relating to diminished capacity; also failed to inform psychiatrist that defendant faced the death penalty and had a troubled background), *cert. denied sub nom. Jacobs v. Beard*, 546 U.S. 962 (2005); *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001); *Marshall v. Hendricks*, 313 F.Supp.2d 423 (D.N.J. 2004), *aff'd sub nom. Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006).

In states where a defendant may not assert ineffective assistance of trial counsel on direct review (i.e., Arizona), the ineffective assistance of post-conviction counsel can constitute "cause" that can excuse a procedural default that would have barred a federal habeas court from hearing a claim of ineffective assistance of trial counsel. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

Counsel may be ineffective when he provides deficient advice to reject a plea offer, defendant shows reasonable probability he would have accepted the earlier offer and that the court would have accepted its terms, and he was then convicted after a fair trial and sentenced to a longer term than he would have received under plea offer. *Lafley v. Cooper*, 132 S. Ct. 1376 (2012). Remedy is to order the prosecution to reoffer the plea agreement. *Id.*

Counsel may be ineffective when failure to inform client of a guilty plea offer, caused the guilty plea to lapse and ultimately led to a less favorable outcome after further proceedings. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

D. Conflict of Interest

See *State in re S.G.*, 175 N.J. 132 (2003).

E. Intrusion of Third Persons on the Right to Counsel

Police may not question an indicted defendant at his home absent counsel's presence or a waiver of counsel, regardless of whether "interrogation" was conducted. *Fellers v. United States*, 540 U.S. 519 (2004).

A third party, including a target of a grand jury investigation, can hire and pay for an attorney to represent witnesses (including fellow targets) called before the grand jury, so long as the *Rules of Professional Conduct* are followed. *In re Grand Jury Investigation*, 200 N.J. 481 (2009). Six conditions for attorneys accepting third-party payments must be satisfied. *Id.*

Defendant's right to counsel was not violated when after the dismissal of murder charges against him, the police recorded his jailhouse confession to an informant disclosing the murder. *State v. Lenin*, 406 N.J. Super. 361 (App. Div.), *certif. denied*, 200 N.J. 477 (2009).

Trial court may not appoint *amicus* counsel to investigate and present any argument to waive an insanity defense and in favor of pursuing such a defense. *State v. Marut*, 361 N.J. Super. 431 (App. Div. 2003). *Amicus* counsel could not be afforded a confidential conversation with defendant because it could violate his privilege against self-incrimination to which the attorney-client privilege would not apply. *Id.*

F. Indigents (See also **COSTS**)

Sixth Amendment requires appointed counsel in any criminal prosecution resulting in "actual imprisonment," which includes imposition of a suspended sentence upon revocation of probation. *Alabama v. Shelton*, 535 U.S. 654 (2002).

Indigent defendants are entitled to assignment of counsel for purposes of prosecution in the Family Part for non-indictable offenses (here, contempt and criminal mischief). *State v. Ashford*, 374 N.J. Super. 332 (App. Div. 2004).

G. Waiver of Right to Counsel and Participation with Counsel

The right to counsel attaches at the guilty plea entry -- a critical stage of the criminal process --, and waiver of the right to counsel at a plea hearing must be knowing and intelligent (court to inform uncounselled defendants of the charges, the right to counsel regarding the plea, and the potential penal exposure). *Iowa v. Tovar*, 541 U.S. 77 (2004). Defendant need not be informed of the defenses to criminal charges that lay persons may not know or that waiving the right to counsel in pleading guilty risks overlooking a viable defense. *Id.*

Defendant can be competent to stand trial, but incompetent to knowingly and intelligently waive his right to counsel. *State v. McNeil*, 405 N.J. Super. 39 (App. Div.), *certif. denied*, 199 N.J. 130 (2009). Defendant must be mentally ill to lose the right of self-representation. *Id.*

Trial record amply demonstrated that defendant's waiver of trial counsel was knowing and intelligent. *State v. Dubois*, 189 N.J. 454 (2007).

Capital defendants, with assigned standby counsel, can represent themselves at the guilt and penalty phases. *State v. Reddish*, 181 N.J. 553 (2004); see *State v. Figueroa*, 186 N.J. 589 (2006) (because trial court's *voire dire* was insufficient, it erroneously denied defendant's request to represent himself).

Defendant representing himself *pro se* at trial was not required to be physically present at sidebars, so long as he was not deprived of meaningful participation in the contents of sidebars through standby counsel acting as a conduit. *State v. Davenport*, 177 N.J. 288 (2003). The jury was fully informed that defendant was representing himself and that counsel was acting as his

legal advisor, and in the future trial courts should explore every avenue to ensure that defendants participate in sidebars to the fullest extent possible. *Id.*

Defendant should have been permitted to represent himself at trial because he timely asserted this right, his demeanor did not in anyway suggest that he might be disruptive while representing himself, and he demonstrated a complete appreciation of the difficulties of self-representation, the nature and seriousness of the charges, and the potential consequences he faced. *State v. Thomas*, 362 N.J.Super. 229 (App. Div.), *certif. denied*, 178 N.J. 249 (2003). Courts cause structural error not subject to a harmless error analysis if they mistakenly deny defendant's request. *Id.*; see *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006)(erroneous deprivation of counsel of choice causes structural error); *Cordova v. Baca*, 346 F.3d 924 (9th Cir. 2003)(if petitioner did not validly waive right to counsel at trial, structural error exists requiring automatic reversal).

Trial court correctly denied defendant's motion to proceed *pro se* with trial. *State v. Pessolano*, 343 N.J.Super. 464 (App. Div.), *certif. denied*, 170 N.J. 210 (2001).

Defendant's waiver of right to counsel was involuntary when the trial court refused new counsel's motion for a continuance, prompting defendant to proceed *pro se*. *Pazden v. Maurer*, 424 F.3d 303 (3d Cir. 2005).

Trial court erroneously concluded that defendant did not fully understand the risks and consequences of his decision to proceed *pro se*, after insufficiently questioning him on whether he had the competency to make that choice.

State v. King, 210 N.J. 2 (2012). Some questions involving legal knowledge or defendant's ability to present a defense was essentially immaterial because defendant appeared to have capacity to represent himself. *Id.*

H. Particular Proceedings

Defendant's Sixth Amendment right to counsel attaches "at the first appearance before a judicial officer at which defendant is told of the formal accusation against him and restrictions are imposed on his liberty" even if a public prosecutor is not aware of or involved in that initial proceeding.

Rothgery v. Gillespie County, 554 U.S. 191 (2008).

Defendants are entitled to counsel at pre-indictment probable cause hearings, but this right is subject to harmless-error analysis. *State v. Dennis*, 185 N.J. 300 (2005).

Defendant was entitled to representation by assigned counsel in municipal court. *State v. Mierswa*, 420 N.J.Super. 207 (App. Div. 2011). While defendant's spouse made sufficient income to assist with defense costs, the judge must assess her willingness to contribute to his legal costs. *Id.*

See *State v. Hrycak*, 184 N.J. 351 (2005)(as to prior uncounselled drunk driving convictions that expose defendant to increased sentencing as a repeat offender).

Negotiation of a plea bargain is a critical phase of litigation for Sixth Amendment purposes. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

Defendants have a Sixth Amendment right to effective assistance during the plea bargaining process. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

II. RIGHT TO A SPEEDY TRIAL

Defendant has a right to a speedy trial *de novo* in the Law Division for an appeal from a municipal court conviction. *State v. Misurella*, 421 N.J.Super. 538 (App. Div. 2011).

Defendant could assert denial of a speedy trial claim in post-conviction relief. *State v. Hammond*, 338 N.J. Super. 330 (App. Div.), *certif. denied*, 169 N.J. 609 (2001).

See *State v. Townsend*, 186 N.J. 473 (2006); *State v. Gaikwad*, 349 N.J. Super. 62 (App. Div. 2002).

A. Constitutional Provisions

The Sixth Amendment right to a speedy trial is waived by an unconditional guilty plea. *Washington v. Sobina*, 475 F.3d 162 (3d Cir. 2007).

B. Speedy Trial Four Factor Test

See *State v. Tsetsekas*, 411 N.J. Super. 1 (App. Div. 2009) (Delay of defendant's DWI prosecution was excessive and denied him his speedy trial protections); *State v. Fulford*, 349 N.J. Super. 183 (App. Div. 2002) (State responsible for 32 month delay but defendant never asserted right to a speedy trial for nearly 2½ years and was not prejudiced).

D. Second Factor: Reasons for Delay

See *Douglas v. Cathel*, 456 F.3d 403 (3d Cir. 2006).

F. Fourth Factor: Prejudice to the Defense

See *Douglas v. Cathel*, 456 F.3d 403 (3d Cir. 2006).

G. Miscellaneous Examples

27-month delay (798 days) between filing of notice of appeal from a municipal court conviction to the date of the trial *de novo* did not deny defendant a speedy trial. *State v. Misurella*, 421 N.J. Super. 538 (App. Div. 2011).

Five month time period between defendant's arrest and his trial's start did not deny him a speedy trial. *State v. Berezansky*, 386 N.J. Super. 84 (App. Div. 2006), *certif. granted*, 191 N.J. 317 (2007), *appeal dismissed*, 196 N.J. 82 (2008).

Two and a half year time period between arrest and trial did not deny defendant a speedy trial. *State v. May*, 362 N.J. Super. 572 (App. Div. 2003). Three year and 4 month lapse of time between arrest and trial did not violate defendant's speedy trial right, nor did a 3 year lapse between sentencing and the filing of the appellate brief deny him a speedy appeal. *Douglas v. Hendricks*, 236 F. Supp.2d 412 (D.N.J. 2002).

In *State v. Kates*, 426 N.J. Super. 32 (App. Div. 2012), the Appellate Division reversed defendant's eluding and resisting arrest convictions because the trial court failed to adequately elicit facts and apply the relevant factors to reasonably balance defendant's desire to have counsel of his choice against the court's need to proceed with trial, and made no findings regarding either its calendar or the impact of a continuance on the State and its witnesses.

The availability of competent counsel does not replace the right to choose one's own counsel. *Certif. granted*, 213 N.J. 45 (2013).

III. RIGHT TO CONFRONTATION (See also **EVIDENCE, WITNESSES**)

A. Origin

A defendant's federal constitutional rights are violated by an evidence rule preventing him or her from introducing evidence of third-party guilt where the prosecution has introduced forensic evidence strongly supporting guilt.

Holmes v. South Carolina, 547 U.S. 319 (2006). The due process, compulsory process, and confrontation clauses afford defendants a meaningful opportunity to present a complete defense. *Id.*

Where defendant does not receive actual notice of the trial date, no inference of a waiver exists. *State v. Whaley*, 168 N.J. 94 (2001). This applies to adjourned trial dates, too. *State v. Smith*, 346 N.J. Super. 233 (App. Div. 2002).

Although *R. 3:16(b)* codifies a defendant's right to be present throughout trial, defendants can waive their right to be present during all phases of trial. *State v. Dellisanti*, 203 N.J. 444 (2010).

B. Cross-Examination

Testimonial statements of witnesses absent from trial are only admissible if the declarant is unavailable and defendant has had a prior opportunity to cross-examine, overruling *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford does not apply retroactively to cases final on direct review because it announced a new rule of criminal procedure that is not "watershed."

Whorton v. Bockting, 549 U.S. 406 (2007).

Defendant's confrontation rights were not violated by the admission of a State's witness' out-of-court statement because defendants had the opportunity to cross-examine the witness at trial before the jury. *State v. Cabbell*, 207 N.J. 311 (2011). However, an out-of-court statement of another State's witness was inadmissible because although defendants had the opportunity to cross-examine the witness at a pre-trial hearing, they did not have that opportunity at trial. *Id.*

An unidentified citizen informant's statement was testimonial and violated the Sixth Amendment as outlined in *Crawford*, but because the Court was evenly divided, this part of the holding had no precedential value. *State v. Basil*, 202 N.J. 570 (2010).

Defendants could cross-examine one of those involved in the victim's beating with the results of their polygraph test showing that the witness had been deceptive. *State v. Castagna*, 187 N.J. 293 (2006). But the error here was harmless. *Id.*

If a defendant attempts to undermine the judicial process by procuring or coercing silence from witnesses or victims, his rights under the Confrontation Clause will be extinguished on equitable grounds. *State v. Byrd*, 198 N.J. 319 (2009).

The state constitution provides no greater protection for defendants to cross-examine hearsay declarants about their out-of-court testimonial assertions than the United States Supreme Court pronounced in *Crawford* and *Davis*.

State v. Kent, 391 N.J. Super. 352 (App. Div. 2007).

Admitting a uniform certification that blood was taken in a medically acceptable manner was testimonial hearsay that violated defendant's confrontation rights in his drunk driving prosecution. *State v. Renshaw*, 390 N.J. Super. 456 (App. Div. 2007). Thus the State cannot rely on such certification absent testimony from the preparer, pursuant to *Crawford*, *Simbara*, and *Berezansky*, "certainly a certification prepared for purposes of trial, and indeed only for purposes of trial, can be nothing other than testimonial." *Id.*

Trial judge erred in ruling that elderly victim could testify out of defendants' presence by way of videotaped deposition pursuant to *R. 3:13-2*. *State v. Benitez*, 360 N.J. Super. 101 (App. Div. 2003). State must provide medical evidence that witness suffers from a physical or mental incapacity. *Id.*

See *State v. Dorman*, 393 N.J. Super. 28 (App. Div. 2007), *aff'd State v.*

Sweet, 195 N.J. 357 (2008) (breathalyzer machine's certificate of operability is not testimonial, and is admissible as a business record); *State v. Rucki*, 367 N.J. Super. 200 (App. Div. 2004) (prosecutor may not use guilty plea of a non-testifying accomplice to cross-examine defendant because it is inadmissible hearsay); *State v. Krivacska*, 341 N.J. Super. 1 (App. Div.) (child sexual

assault victim testified at trial), *certif. denied*, 170 N.J. 206 (2001), *cert. denied*, 535 U.S. 1012 (2002).

E. Use of Hearsay and Expert Testimony

Defendant is deprived of confrontation right when a police officer repeats what a non-witness told him or her that identifies defendant as the perpetrator. *State v. Taylor*, 350 N.J. Super. 20 (App. Div.), *certif. denied*, 174 N.J. 190 (2002).

See *State v. Buda*, 195 N.J. 278 (2008); *State v. Kent*, 391 N.J. Super. 352 (App. Div. 2007); *State v. Renshaw*, 390 N.J. Super. 456 (App. Div. 2007); *State v. Rucki*, 367 N.J. Super. 200 (App. Div. 2004).

IV. RIGHT TO COMPULSORY PROCESS

A. Origin

See *Holmes v. South Carolina*, 547 U.S. 319 (2006).

VI. RIGHT TO A PUBLIC TRIAL

See *State v. Cuccio*, 350 N.J. Super. 248 (App. Div.) (trial court erred in excluding defendant's and victim's family members from the court room), *certif. denied*, 174 N.J. 43 (2002).

SMOKE FREE AIR ACT

Smoking of any manner, including non-tobacco products, is prohibited in public places; therefore, defendant's wish to operate a "hookah" bar implicated no fundamental right and his conviction for violating the act was affirmed. *State v. Badr*, 415 N.J. Super. 455 (App. Div. 2010).

STALKING

See *State v. Lozada*, 357 N.J. Super. 468 (App. Div. 2003) (stalking and violation of domestic violence restraining order should be severed). Where the degree of the stalking offense is in question, the issue of whether there was stalking should be tried first without reference to any element -- *i.e.*, a restraining order -- that would elevate it to a third degree crime. If convicted, then defendant would stand trial before the same jury and face whatever additional proofs are necessary that would elevate the crime to third degree stalking. *Id.*

STATE CONSTITUTION

III. SEARCH AND SEIZURE LAW

A. Use of State Constitution in Search and Seizure Cases

See *State v. Domicz*, 188 N.J. 285 (2006); *State v. Cleveland*, 371 N.J. Super. 286 (App. Div.), *certif. denied*, 182 N.J. 148 (2004).

IV. OTHER CRIMINAL PROCEDURAL RIGHTS

Supreme Court exercised its supervisory powers under article VI, section 2, paragraph 3 of the state constitution to require that police contemporaneously memorialize out-of-court identification procedures. *State v. Delgado*, 188 N.J. 48 (2006).

STATUTE OF LIMITATIONS

Statute of limitations for a lesser-included simple assault charge had not expired because it did not run while defendant was being tried for the indictable offenses. *State v. Miller*, 382 N.J. Super. 494 (App. Div. 2006).

Plaintiffs failed to state the elements necessary to maintain a cause of action for malicious prosecution, and therefore the statute of limitations was not tolled.

Freeman v. New Jersey, 347 N.J. Super. 11 (App. Div.), *certif. denied*, 172 N.J. 178 (2002). Too, neither the discovery rules for racial profiling matters nor equitable tolling applied because plaintiffs were aware of the harm caused when searched. *Id.* See *State v. Coven*, 405 N.J. Super. 266 (App. Div. 2009) (statute of limitations on charge of misapplication of entrusted property).

STATUTES AND ORDINANCES

I. GENERAL RULES OF STATUTORY CONSTRUCTION

A. Legislative Intent

For resisting arrest, the force defendant employs need not rise to the level of creating a substantial risk of causing injury to a police officer or another. *State v. Brannon*, 178 N.J. 500 (2004). The legislative purpose behind N.J.S.A. 2C:29-2a(3) is to avoid physical confrontation between arrestees, the police, and the public. *Id.*

The DNA Database and Databank Act (N.J.S.A. 53:1-20.17 to .28) is neither penal in nature nor is its effect and purpose so punitive that it constitutes a criminal penalty. *State in re L.R.*, 382 N.J. Super. 605 (App. Div. 2006), *certif. denied*, 189 N.J. 642 (2007).

The goal of interpreting criminal statutes is to ascertain legislative intent; all rules of construction are subordinate to that proposition. *State v. SolarSKI*, 374 N.J. Super. 176 (App. Div. 2005). Here, a prior conviction for operating a vessel while intoxicated pursuant to N.J.S.A. 12:7-46 did not constitute a prior DWI conviction for sentencing purposes. *Id.*

See *State v. Lewis*, 185 N.J. 363 (2005) (N.J.S.A. 2C:35.7.1 protects those, particularly children, in and around public parks from the perils of drug trafficking); *State v. Conklin*, 394 N.J. Super. 408 (App. Div. 2007) (looking at the intent of the terroristic threats statute, N.J.S.A. 2C:12-3a and b); *State v. Goodmann*, 390 N.J. Super. 259 (App. Div. 2007) (looking at the intent of the shoplifting statute, N.J.S.A. 2C:20-11b); *State v. Brooks*, 366 N.J. Super. 447 (App. Div. 2004) (N.J.S.A. 2C:35-7.1 is neutral on its face, and was designed to protect the poor living in public housing from the rampant spread of drugs; neither its purpose nor effect was discriminatory).

B. Meaning of Statutory Language

N.J.S.A. 39:4-50 prohibits driving while under the influence of intoxicating liquor, narcotics, hallucinogens, or habit-forming drugs. *State v. Bealor*, 187 N.J. 574 (2006).

To prove second degree eluding under N.J.S.A. 2C:29-2b, the State need not show that defendant knew he or she was creating a risk of injury or death. *State v. Thomas*, 187 N.J. 119 (2006).

As currently drafted, N.J.S.A. 2C:12-1b(5)(d), aimed at upgrading certain simple assaults to aggravated assaults where the victim is a public official, applies only to employees of public schools. *State v. Cannarella*, 186 N.J. 63 (2006).

The phrase "circumstances not manifestly appropriate" in N.J.S.A. 2C:39-5d contemplates not only a threat of harm to a person but also a threat of damage to property. *State in re G.C.*, 179 N.J. 475 (2004).

The filing of an arrest warrant "commences" violation of probation proceedings pursuant to N.J.S.A. 2C:45-3c. *State v. Nellom*, 178 N.J. 192 (2003).

Legislature intended the term "reproduce" in N.J.S.A. 2C:24-4b(4) to require more than the printing of a preexisting image of child pornography for personal use. *State v. Sisler*, 177 N.J. 199 (2003).

The word "and" in the phrase "upon a change of address, a person [sex offender] shall notify the law enforcement agency with which the person is registered and shall register with the appropriate agency" in N.J.S.A. 2C:7-2d means "or" so that the statute is accorded its proper meaning and effect. *State v. Leahy*, 381 N.J. Super. 106 (App. Div. 2005), *certif. denied*, 186 N.J. 245 (2006).

The phrase “in the view of” a child found in *N.J.S.A. 2C:14-2d* and explained in *State v. Zeidell*, 154 *N.J.* 417 (1998), included offending conduct the child actually observes and that involving an unreasonable risk that he or she will observe. *State v. Breitweiser*, 373 *N.J. Super.* 271 (App. Div. 2004), *certif. denied*, 182 *N.J.* 628 (2005).

N.J.S.A. 2C:52-2c was clear and unambiguous regarding expungement of certain drug convictions, and the Appellate Division had no reason to look beyond the statute’s literal terms to ascertain its meaning. *State v. P.L.*, 369 *N.J. Super.* 291 (App. Div. 2004). “[I]t is the court’s duty to interpret a statute as written, not to legislate.” *Id.*

See *State v. Goodmann*, 390 *N.J. Super.* 259 (App. Div. 2007)(interpreting the language of the shoplifting statute, *N.J.S.A. 2C:20-11b*); *State v. Tarlowe*, 370 *N.J. Super.* 224 (App. Div. 2004)(as to the meaning of *N.J.S.A. 2C:21-4.3c*); *State v. Bradley*, 375 *N.J. Super.* 24 (Law Div. (2004) (unloaded and cased shotgun was not “readily usable” for hunting pursuant to *N.J.S.A. 23:1-1* and 4-42).

The failure to maintain a lane statute, *N.J.S.A. 39:4-88(b)* is properly constructed to encompass two offenses: failure to maintain a lane to the extent practicable, and a separate offense for changing lanes without ascertaining the safety of that lane change. *State v. Regis*, 208 *N.J.* 439 (2011).

C. Reading Statutes as a Whole, and Intrinsic Aids to Construction

To harmonize the sentencing options in *N.J.S.A. 2C:35-14* and 45-1, the court applied the doctrine that if two statements conflict the more specific one prevails. *State v. Matthews*, 378 *N.J. Super.* 396 (App. Div.), *certif. denied*, 185 *N.J.* 596 (2005).

G. The Preemption Doctrine and Statutory Construction

The Code of Criminal Justice statute (*N.J.S.A. 2C:36-6*) preempts a municipal ordinance authorizing health officials to distribute needles to drug addicts. *State v. Atlantic City*, 379 *N.J. Super.* 515 (App. Div. 2005), *certif. denied*, 186 *N.J.* 243 (2006).

Federal preemption inapplicable where New Jersey and federal law are in harmony. *State v. Wahl*, 365 *N.J. Super.* 356 (App. Div. 2004).

Statute proscribing disorderly conduct (*N.J.S.A. 2C:33-2*) preempts municipal ordinance banning such conduct. *State v. Paserchia*, 356 *N.J. Super.* 461 (App. Div. 2003).

See *State v. Stafford*, 365 *N.J. Super.* 6 (App. Div. 2003)(federal law did not preempt township ordinances banning the feeding of migratory waterfowl); *State v. Krause*, 399 *N.J. Super.* 579 (App. Div. 2008) (State law did not preempt municipal noise ordinance).

H. Constitutional Analysis and Statutory Construction (See also **FOURTEENTH AMENDMENT**)

Sexually Violent Predator Act is constitutional, and does not violate the ex post facto or vagueness prohibition, or double jeopardy. *In re Civil Commitment of J.M.B.*, 395 *N.J. Super.* 69 (App. Div.)(citing *In re Civil Commitment of J.H.M.*, 367 *N.J. Super.* 599 (App. Div. 2003)), *certif. denied*, 179 *N.J.* 312 (2004).

The statute prohibiting use of booby traps or fortified premises (*N.J.S.A. 2C:35-4.1*) is neither vague nor overbroad. *State v. Walker*, 385 *N.J. Super.* 388 (App. Div.), *certif. denied*, 187 *N.J.* 83 (2006). The statute’s non-merger and consecutive sentence provisions did not violate due process or double jeopardy. *Id.*

N.J.S.A. 2C:39-4.1d, the anti-merger statute, is constitutional. *State v. Soto*, 385 *N.J. Super.* 257 (App. Div.), *certif. denied*, 188 *N.J.* 491 (2006).

Although sentencing statutes (*N.J.S.A. 2C:47-1 to -10*) neither defined the terms “repetitive” or “compulsive,” nor explained the meaning of “a pattern of repetitive, compulsive behavior,” the liberty interest in an Avenel sentence is weak because defendants will not necessarily serve longer terms there and inmates are not guaranteed parole at any particular time. *State v. N.G.*, 381 *N.J. Super.* 352 (App. Div. 2005).

All statutes are presumed constitutional. *State v. One 1990 Ford Thunderbird*, 371 *N.J. Super.* 228 (App. Div. 2004).

“Released unharmed” provision of the kidnapping statute was not vague. *State v. Sherman*, 367 *N.J. Super.* 324 (App. Div.), *certif. denied*, 180 *N.J.* 356 (2004).

Community supervision for life statute (*N.J.S.A. 2C:43-6.4*) did not violate the separation of powers by giving the Parole Board the authority to promulgate conditions in the Administrative Code. *State v. Bond*, 365 *N.J. Super.* 430 (App. Div. 2003).

Municipal ordinance (obstruction of public sidewalks) was unconstitutionally vague. *State v. Golin*, 363 *N.J. Super.* 474 (App. Div. 2003). Since it was essentially criminal in nature, the ordinance had to be strictly construed. *Id.*

Definition of “sexual penetration” in *N.J.S.A. 2C:14-1c* was not unconstitutionally vague on its face or as applied in a case where defendant telephoned young girls and engaged in sexually explicit conversations with them, spoke of his desire to perform sexual acts on them and/or having them perform such acts on him, and on one occasion instructed a child to penetrate herself and then describe it to him. *State v. Maxwell*, 361 *N.J. Super.* 502 (Law Div. 2001), *aff’d*, 361 *N.J. Super.* 401 (App. Div.), *certif. denied*, 178 *N.J.* 34 (2003). Furthermore, *N.J.S.A. 2C:24-4a* was not unconstitutionally vague as applied to defendant because nothing required his physical presence to endanger children’s welfare. *Id.*

See *State v. D.A.*, 191 *N.J.* 158 (2007)(interpreting *N.J.S.A. 2C:28-5a*); *State v. Reiner*, 180 *N.J.* 307 (2004)(interpreting *N.J.S.A. 39:4-50(a)* and (g) as separate DWI offenses).

STIPULATIONS (See also POLYGRAPHS)

I. TRIAL LEVEL

A. Generally

See *State v. Wesner*, 372 *N.J. Super.* 489 (App. Div. 2004)(on how to instruct the jury as to stipulations), *certif. denied*, 183 *N.J.* 214 (2005).

SUBPOENAS

II. THE POWER TO SUBPOENA

See *State v. Clark*, 191 *N.J.* 503 (2007); *State v. McAllister*, 184 *N.J.* 17 (2005)(as to subpoenas *duces tecum*).

III. WHO CAN BE SUBPOENAED (See also WITNESSES)

A. Generally

The State can subpoena a member of the Advisory Committee on Judicial Conduct to testify at trial regarding defendant’s statements provided to the committee during its investigation. *State v. Clark*, 191 *N.J.* 503 (2007). Thus the trial court erred in quashing the subpoena. *Id.*

IV. SUBPOENA DUCES TECUM

A. Generally

See *State v. Domicz*, 188 N.J. 285 (2006)(for power company's electricity usage records for defendant's home); *State v. McAllister*, 184 N.J. 17 (2005) (for an individual's bank records).

VII. GRAND JURY SUBPOENAS (See also **GRAND JURY**)

See *State v. Reid*, 194 N.J. 386 (2008); *State v. McAllister*, 184 N.J. 17 (2005); *State v. Ray*, 372 N.J. Super. 496 (App. Div. 2004), cert. denied, 544 U.S. 1022 (2005).

TERRORISTIC THREATS

Defendant's terroristic threat conviction was vacated where there was evidence that he made threats against possible multiple victims, and the terroristic threat instruction failed identify the victim of defendant's alleged threats. *State v. Tindell*, 417 N.J. Super. 530 (App. Div. 2011).

THEFT

II. ELEMENTS

C. Theft by Deception

Fraud scheme between psychiatrist and school employees involving the filing of fake claims for treatments never received. *State v. Decree*, 343 N.J. Super. 410 (App. Div.), cert. denied, 170 N.J. 388 (2001).

D. Theft by Extortion

As to the territorial element of the offense and related jury instructions, see *State v. Casilla*, 362 N.J. Super. 554 (App. Div.), cert. denied, 178 N.J. 251 (2003).

E. Receiving and Fencing Stolen Property

To obtain a conviction for receiving stolen property pursuant to N.J.S.A. 2C:20-7a, the State must prove that the property in question was actually stolen. *State v. Hodde*, 181 N.J. 375 (2004).

G. Theft by Failure to Make a Required Disposition

In enacting Title 43 (unemployment compensation law), the Legislature did not intend to prohibit traditional criminal prosecution for theft of withheld unemployment or disability funds not paid over to the State. *State v. Pessolano*, 343 N.J. Super. 464 (App. Div.), cert. denied, 170 N.J. 210 (2001).

H. Unlawful Taking of a Means of Conveyance or Joyriding

See *State v. Roberson*, 356 N.J. Super. 332 (Law Div. 2002)(joyriding is not a lesser-included offense of theft because additional proofs are needed).

TRAFFIC VIOLATIONS

Affirming defendant's illegal U-turn conviction, the court concluded that defendant turned his vehicle around in violation of the statute. *State v. Smith*, 408 N.J. Super. 484 (App. Div.), cert. denied, 200 N.J. 477 (2009). Traffic control devices are presumed valid, and defendant must rebut that presumption. *Id.*

A motor vehicle offense is not a lesser-included offense of obstruction of justice because the obstruction and motor vehicle statutes are directed to different harms and the proofs required for each are entirely separate.

State v. Rone, 410 N.J. Super. 589 (App. Div. 2009).

N.J.S.A. 39:5-31, allowing any magistrate, to revoke a defendant's driver's license if found guilty of a willful traffic violation is not overbroad or vague and not inconsistent with the modern point system, nor did the Legislature intend to eliminate that authority by enacting the system. *State v. Moran*, 408 N.J. Super. 412 (App. Div. 2009), aff'd, 202 N.J. 311 (2010). Because driver's license suspension is a consequence of magnitude, an indigent defendant is entitled to a municipal public defender. *Id.*

The failure to maintain a lane statute, N.J.S.A. 39:4-88(b) is properly constructed to encompass two offenses: failure to maintain a lane to the extent practicable, and a separate offense for changing lanes without ascertaining the safety of that lane change. *State v. Regis*, 208 N.J. 439 (2011).

The principles identified in *State v. Moran*, 202 N.J. 311 (2010), which guide sentencing for reckless driving, are equally applicable to careless driving offenses. *State v. Palma*, 426 N.J. Super. 510 (App. Div. 2012), *certif. granted*, 213 N.J. 45 (2013). A judge may only impose a license suspension or custodial term in careless driving cases that present “aggravating circumstances.” *Id.* Those aggravating circumstances must be found in the record, and recited in the judge’s findings. *Id.*

TRESPASS AND DAMAGING TANGIBLE PROPERTY

I. TRESPASS

A. Scope of the Offense

1. Elements of Criminal Trespass - N.J.S.A. 2C:18-3a

A “dwelling” includes a vacant apartment between rentals that is suitable for occupancy. *State v. Scott*, 169 N.J. 94 (2001).

2. Elements of Defiant Trespass - N.J.S.A. 2C:18-3b

Defiant trespass can be committed on a public road right-of-way in a suburban area that is not a public forum. *State v. Hamilton*, 368 N.J. Super. 151 (App. Div.), *certif. denied*, 181 N.J. 548 (2004).

3. Elements of Criminal Trespass - N.J.S.A. 2C:18-3c

The “peeping Tom” subsection of the criminal trespass statute required criminal intrusion into a dwelling from a vantage point outside that dwelling. *State v. Burke*, 362 N.J. Super. 55 (App. Div.), *certif. denied*, 178 N.J. 374 (2003). Defendant could not be prosecuted under this subsection by secretly videotaping from inside his own residence two women showering and using his bathroom. *Id.*

4. Case law

Officer had probable cause to arrest defendant for defiant trespass because property owner gave sufficient notice against trespass. *State v. Gibson*, 425 N.J. Super. 523 (App. Div. 2012), *certif. granted*, 212 N.J. 460 (2012). A “no loitering” sign provided sufficient notice against trespass; property owner was not required to use the word “trespass” in the posting. *Id.*

Prosecution for defiant trespass pursuant to N.J.S.A. 2C:18-3b was appropriate where defendant disrupted a public meeting, was asked to leave, was told he would be arrested if he did not leave, and still ignored these official directives. *State v. Brennan*, 344 N.J. Super. 136 (App. Div. 2001), *certif. denied*, 171 N.J. 43 (2002).

There was no discriminatory police enforcement of the defiant trespassing statute against defendant where he was placed on a list of individuals not permitted on housing authority property due to his adjudication of possessing a weapon. *State In re X.B.*, 402 N.J. Super. 23 (App. Div. 2008).

See *State v. Daniels*, 393 N.J. Super. 476 (App. Div. 2007).

VICTIM’S RIGHTS

I. GENERALLY

The Victim’s Rights Amendment to the state constitution mandates that crime victims shall be treated with fairness, compassion and respect by the criminal justice system. *State v. Gilchrist*, 381 N.J. Super. 138 (App. Div. 2005).

III. VICTIM IMPACT STATEMENTS

In a capital case, family members may not testify about their opposition to the death penalty because victim-impact witnesses are prohibited from expressing their opinions as to an appropriate sentence. *State v. Koskovich*, 168 N.J. 448 (2001).

WEAPONS

I. DEFINITIONS - N.J.S.A. 2C:39-1

A. Constitutionality

The 14th Amendment's due process clause incorporates the 2nd Amendment's right to keep and bear arms for self-defense purposes recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

B. Firearms Generally

2. Method of Propulsion and Type of Projectile

Paintball gun satisfies N.J.S.A. 2C:39-1f. *State in re G.S.*, 179 N.J. 475 (2004).

H. No Early Release Act

NERA does not apply to inoperable firearms. *State v. Perez*, 348 N.J. Super. 322 (App. Div.), *certif. denied*, 174 N.J. 192 (2002).

II. PRESUMPTION AS TO POSSESSION, LICENSES AND PERMITS - N.J.S.A. 2C:39-2

B. Lack of License or Permits

State may not rely on the presumption in N.J.S.A. 2C:39-2b where defendant possessed a handgun permit in another state and testified that the guns were purchased in that state. *State v. Cuccio*, 350 N.J. Super. 248 (App. Div.), *certif. denied*, 174 N.J. 43 (2002).

III. PROHIBITED WEAPONS AND DEVICES - N.J.S.A. 2C:39-3

N.J.S.A. 2C:39-3d, which prohibits possessing a defaced firearm, is a *per se* offense; the State need not prove that at the time defendant knowingly possessed the firearm, he knew it was defaced. *State v. Smith*, 197 N.J. 325 (2009).

IV. POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSES - N.J.S.A. 2C:39-4

D. Jury Instructions

Charge needs to identify the specific unlawful purposes for which the weapon was possessed, and jury should be instructed that defendant's honest, though unreasonable, belief that force was required to protect another negates the crime's mental state of purpose to use the weapon unlawfully. *State v. Brims*, 168 N.J. 297 (2001); *State v. Williams*, 168 N.J. 323 (2001).

F. Sufficiency of the Evidence

Defendant's knowledge of the "illicit communal characteristic" of a firearm is not an element of N.J.S.A. 2C:39-4a(2). Defendant need not know firearm is community gun. *State v. Scott*, 429 N.J. Super. 1 (App. Div. 2012).

The record contained insufficient evidence that defendant possessed a knife for unlawful purposes during the commission of a drug offense. *State v. Harris*, 384 N.J. Super. 29 (App. Div.), *certif. denied*, 188 N.J. 357 (2006).

VI. SEQUESTRATION; N.J.R.E. 615

Trial courts may not sequester a juvenile's parents from his or her trial, even if they may be called as witnesses. *State in re V.M.*, 363 N.J. Super. 529 (App. Div. 2003).

VII. PERSONS PROHIBITED FROM HAVING WEAPONS - N.J.S.A. 2C:39-7

Defendants charged only with violating *N.J.S.A. 2C:39-7* are not entitled to a bifurcated jury trial, and should be tried in a unitary trial with appropriate limiting instructions to reduce the risk of undue prejudice from evidence of the predicate conviction. *State v. Brown*, 180 *N.J.* 572 (2004).

A defendant has the right to testify both at a trial on a charge of unlawful possession of a weapon and in the separate trial on a charge of certain persons not to possess a weapon. *State v. Lopez*, 417 *N.J. Super.* 34 (App. Div. 2010), *certif. denied*, 205 *N.J.* 520 (2011).

See *State v. Jones*, 364 *N.J. Super.* 376 (App. Div. 2003)(trial court can change decision to bifurcate trial issues if defendant decides not to testify).

WIRETAPPING

VI. EXCEPTIONS TO UNLAWFUL ELECTRONIC SURVEILLANCES - *N.J.S.A.* 2A:156A-4

B. Exceptions

2. Police may lawfully intercept communications of juvenile suspects under the Act. *State in re J.D.H.*, 171 *N.J.* 475 (2002).

Prosecutor's office is not limited to appointing but one designee to authorize consensual intercepts pursuant to *N.J.S.A. 2A:156A-4c*. *State v. Toth*, 354 *N.J. Super.* 13 (App. Div. 2002).

XXIII. REQUIREMENTS FOR ACCESS - *N.J.S.A.* 2A:156A-29

A CDW is not subject to the New Jersey Wiretapping and Electronic Surveillance Control Act's restrictive procedures and therefore only requires "reasonable grounds to believe that the record or other information . . . is relevant and material to an ongoing criminal investigation," *N.J.S.A. 2A:156A-29(e)*, instead of a showing of necessity because normal investigative procedures failed. *State v. Finesmith*, 408 *N.J. Super.* 206 (App. Div. 2009). *State v. Ates*, ___ *N.J. Super.* ___ (App. Div. 2012) (holding New Jersey Wiretap Act constitutional even if it allows interceptions of telephone calls involving individuals not located in NJ, so long as the interception itself occurs in this state. "Point of interception" is defined as where law enforcement officers are located when they intercept the calls).

WITNESSES (See also **EVIDENCE, IMMUNITY)**

I. CROSS-EXAMINATION

Testimony given by the plaintiff or defendant during the trial of a domestic violence proceeding can be used for the limited purpose of cross-examination in a related criminal trial. *State v. Duprey*, 427 *N.J. Super.* 314 (App. Div. 2012).

Impeachment with Extrinsic Evidence

The State may not cross-examine defendant with the guilty plea of a non-testifying accomplice because it is inadmissible hearsay. *State v. Rucki*, 367 *N.J. Super.* 200 (App. Div. 2004).

Defendant has the right to confront a State witness with his or her polygraph examination results and impeach their credibility. *State v. Castagna*, 187 *N.J.* 293 (2006).

Defendant could not cross-examine the victim about a prior aggravated assault conviction. *State v. Leonard*, 410 *N.J. Super.* 182 (App. Div. 2009), *certif. denied*, 201 *N.J.* 157 (2010).

The testimony that a witness actually saw a defendant more times than he indicated in his police statement did not warrant a mistrial because defense counsel was permitted to exploit this apparent inconsistency. *State v. Yough*, 208 *N.J.* 385 (2011).

V. REFUSAL TO ANSWER

Recalcitrant State witness' refusal to answer some of the prosecutor's questions did not deprive defendant of a fair trial. *State v. Burns*, 192 N.J. 312 (2007). On appeal, reviewing courts should focus on (1) whether the State has consciously and flagrantly attempted to make its case out of inferences arising from the witness' refusal, and (2) whether inferences from that refusal added "critical weight" to the State's case in a form not subject to cross-examination. *Id.*

VII. AVAILABILITY AND RIGHT TO CONFRONT WITNESSES AND TO COMPULSORY PROCESS

See *Giles v. California*, 554 U.S. 353 (2008)(a defendant does not forfeit his Sixth Amendment right to confront a witness whenever he causes the unavailability of that witness; such forfeiture only occurs "when the defendant engaged in conduct designed to prevent the witness from testifying"); *State v. Garcia*, 195 N.J. 192 (2008) (trial adjournment was necessary to enforce a court order requiring a correctional facility to produce an inmate to testify for the defense); *State v. Feaster*, 184 N.J. 235 (2005)(prosecutor violated due and compulsory process by warning a defense recantation witness at a PCR hearing that there would be "considerations" if he testified differently from his prior statement); *State v. Garron*, 177 N.J. 147 (2003)(under constitutional analysis, rape shield evidence relevant to defense that has probative value outweighing its prejudicial effect must be placed before the factfinder), *cert. denied*, 540 U.S. 1160 (2004); *State v. Benitez*, 360 N.J.Super. 101 (App. Div. 2003)(State bears heavy burden of proving, via medical evidence, that witness is unavailable to testify in court so as to admit their videotaped deposition pursuant to R. 3:13- 2).

VIII. INFANTS

The trial judge exercises discretion in determining a witness' competency to testify. *State v. G.C.*, 188 N.J. 118 (2006). The oath requirement of N.J.R.E. 603 is included within N.J.R.E. 601, and is satisfied if the witness understands the duty to tell the truth. *Id.*

Children can testify despite some leading or suggestive interview techniques. *State v. Krivacska*, 341 N.J.Super. 1 (App. Div.), *certif. denied*, 170 N.J. 206 (2001), *cert. denied*, 535 U.S. 1012 (2002).

The prosecutor may administer the oath to a child witness pursuant to N.J.R.E. 603, and the trial court properly allowed the child to take the stand with a support person next to her. The appellate court set forth several factors a trial judge should consider in permitting such a procedure. *State v. T.E.*, 342 N.J.Super. 14 (App. Div.), *certif. denied*, 170 N.J. 86 (2001).

X. EXPERT TESTIMONY

Expert witnesses may not opine on defendant's veracity or the reliability of a confession because that invades the jury's exclusive province. *State v. Rosales*, 202 N.J. 549 (2010).

Although expert testimony is the preferred method of proving marijuana intoxication, prosecutors could qualify police officers as experts based on their training. *State v. Bealor*, 187 N.J. 574 (2006).

An experienced police officer specializing in street gang investigations may give expert testimony on a street gang's hierarchy, organization and discipline. *State v. Torres*, 183 N.J. 554 (2005).

Expert testimony on CSAAS was properly admitted. *State v. R.B.*, 183 N.J. 308 (2005).

State expert could not testify because he failed to provide the defense with a reliable database that would permit a challenge to his conclusions. *State v. Fortin*, 178 N.J. 540 (2004).

Expert cannot proffer inadmissible hearsay and opinions as to defendant's personality disorder and credibility. *State v. Vandeweaghe*, 177 N.J. 229 (2003). A police officer may testify as an expert witness regarding street-level drug sales (*State v. Nesbitt*, 185 N.J. 504 (2006)) and possession of drugs with intent to distribute (*State v. Summers*, 176 N.J. 306 (2003)).

Defendants do not have the right to the effective assistance of expert witnesses; this claim must be analyzed in terms of the effectiveness of counsel obtaining the experts. *State v. DiFrisco*, 174 N.J. 195 (2002), *cert. denied*, 537 U.S. 1220 (2003).

Reversible error to allow a medical examiner qualified as a pathology expert to testify to matters of biomechanics and accident reconstruction in order to show defendant drove the car in a vehicular homicide case. *State v. Locascio*, 425 N.J. Super. 474 (App. Div.), *certif. denied*, 212 N.J. 459 (2012).

Drug expert's testimony improper for intruding on jury's factfinding function and commenting on defendant's guilt, where (1) testimony was not in hypothetical form and referred to defendant directly, (2) testimony tracked language of the criminal statute, and (3) testimony commented directly on guilt by expressing that he possessed drugs with intent to sell them. *State v. Jones*, 425 N.J. Super. 258 (App. Div. 2012).

Sequestering a defense expert was error where the most reliable way to secure expert opinion on the sufficiency and reliability of police testing methods would be to allow the expert to hear the testimony the State used to seek admission of the test results. *State v. Popovich*, 405 N.J. Super. 324 (2009).

A doctor's "educated guess" does not constitute competent opinion. *State v. Purnell*, 394 N.J. Super. 28 (App. Div. 2007).

Hypothetical question asked of State's non-traditional religions expert was prejudicial because it covered all of the State's proofs and 10 pages of transcript, and referenced defendant. *State v. Miraballes*, 392 N.J. Super. 342 (App. Div.), *certif. denied*, 192 N.J. 75 (2007). Also, the expert should not have testified that a person in defendant's position in her religion would not testify truthfully in court. *Id.*

The State's blood spatter expert was qualified to testify. *State v. Lewis*, 389 N.J. Super. 409 (App. Div.), *certif. denied*, 190 N.J. 393 (2007).

The Appellate Division concluded that the State drug trafficking expert impermissibly invaded the jury's province. *State v. Boston*, 380 N.J. Super. 487 (App. Div. 2005), *certif. denied*, 186 N.J. 243 (2006). In doing so, it tried to distinguish *State v. Summers*, 176 N.J. 306 (2003). *Id.*

Experts cannot offer a net opinion. *State v. Pavlik*, 363 N.J. Super. 307 (App. Div. 2003).

Proposed expert witness' testimony as to the credibility of defendant's confessions was not scientifically reliable, and the subject matter was not beyond the average juror's grasp. *State v. Free*, 351 N.J. Super. 203 (App. Div. 2002).

Accident reconstruction expert can testify as to the "speed loss" of defendant's vehicle before an accident. *State v. Pigueiras*, 344 N.J. Super. 297 (App. Div. 2001), *certif. denied*, 171 N.J. 337 (2002).

In *State v. Joseph*, 426 N.J. Super. 204 (App. Div.), *certif. denied*, 212 N.J. 462 (2012) the Appellate Division ruled that the State did not have to prove the scientific reliability of the photo retrieval system used to obtain the victims' out-of-court identifications or its operation by expert testimony: because a computer system with large numbers of randomly selected photographs used for

investigative purposes is essentially a mug-shot book, the subject matter was not beyond the average juror's ken.

Expert can rely on hearsay as to prior crimes if of a type that experts in the relevant field rely on in reaching conclusions. *State v. Eatman*, 340 N.J. Super. 295 (App. Div.), *certif. denied*, 170 N.J. 85 (2001).

See *State v. Townsend*, 186 N.J. 473 (2006)(expert testimony on traits of battered women); *State v. Walker*, 385 N.J. Super. 388 (App. Div.)(detective could testify as an expert on drugs possessed for distribution purposes and on an apartment's fortification), *certif. denied*, 187 N.J. 83 (2006); *State v. Tarlowe*, 370 N.J. Super. 224 (App. Div. 2004).

XII. MISCELLANEOUS

A. Restraints

Trial judge must balance the need for courtroom security against potential prejudice if a defense witness will testify while handcuffed; if witness does, jury is to receive a cautionary instruction. *State v. Smith*, 346 N.J. Super. 233 (App. Div. 2005).

See *State v. King*, 390 N.J. Super. 344 (App. Div.)(trial court failed to make findings that defense witnesses needed to be in restraints while testifying, and the record supported no such need), *certif. denied*, 190 N.J. 394 (2007); *State v. Russell*, 384 N.J. Super. 586 (App. Div. 2006)(defendant's co-conspirator could not be made to testify as a State witness while handcuffed and shackled).

B. Defendant's Witnesses

Trial court properly rejected defendant's proffer to introduce a municipal court mediator's testimony concerning the victim's mediation statements that contradicted the victim's trial testimony. *State v. Williams*, 184 N.J. 432 (2005). Defendant failed to demonstrate a need for the testimony that outweighed the need for maintaining confidentiality of mediation communications. *Id.*

The prosecutor's use of a child victim's statements to the defense investigator to corroborate a sexual assault was improper. *State v. Atkins*, 405 N.J. Super. 392 (App. Div. 2009).

C. Hypnotically Refreshed Testimony

See *State v. Moore*, 188 N.J. 182 (2006)(generally inadmissible; disavowing *State v. Hurd*, 86 N.J. 525 (1981)).

D. Transcript Notation

A notation in a transcript saying that defendant "growled" at him was nothing more than the court reporter's characterization of a noise during an unruly colloquy between defense counsel and the witness, who's native language is Spanish. The court provided instructions on how to settle the record. *State v. Yough*, 208 N.J. 385 (2011).

WITNESS TAMPERING

The witness tampering statute (N.J.S.A. 2C:38-5a) proscribes wrongful interference with an official action defendant believes has begun or is about to begin, *i.e.*, action taken after defendant is already the focus of, or believes he may be the focus of, an official proceeding. *State v. D.A.*, 191 N.J. 158 (2007). The hindering apprehension statute (N.J.S.A. 2C:29-3), on the other hand, targets the wrongful avoidance of an official action by attempting to prevent a witness from reporting a crime to the police. *Id.*