ORAL ARGUMENT SENTENCING

GUIDELINES

August 2006 Revision

TABLE OF CONTENTS

INTRODUCTION

This Manual is designed to outline the subjects that will be presented on the court's oral argument sentencing calendars. It provides discussions of the general law governing sentencing issues as well as more specific topics that have been addressed by statutory and decisional law.

The outline is structured to give brief discussions of various relevant subjects and is designed to serve as a useful bench reference and research supplement. Since it is intended as a complement to the Code, statutory sections have not been reproduced; they have been paraphrased where pertinent.

The research into statutory changes and published court decisions is current through August 11, 2006. Legal discussion of relevant statutory provisions is addressed to the current versions of these provisions, unless specifically noted otherwise.

I. SETTING A TERM OF IMPRISONMENT

A. General Criteria for Withholding or Imposing Sentence of Imprisonment

1. Except as otherwise provided by the Code, all persons convicted of an offense shall be sentenced in accordance with Chapter 43, N.J.S.A. 2C:43-1 to -22. Authorized dispositions are found at N.J.S.A. 2C:43-2. These include but are not limited to payment of a fine or restitution, placement on probation, performance of community-related service, and imprisonment. This manual deals primarily with sentences of imprisonment.

2. In determining whether to withhold or impose a sentence of imprisonment, a court considers the presumptions of imprisonment and nonimprisonment (N.J.S.A. 2C:44-1(d) and N.J.S.A. 2C:44-1(e), respectively), which are discussed separately at Section III, and the aggravating and mitigating circumstances (N.J.S.A. 2C:44-1(a) and N.J.S.A. 2C:44-1(b)).

3. N.J.S.A. 2C:43-2 does not of itself give a court the power to suspend a sentence. State v. Rivera, 124 N.J. 122, 125 (1991). Rather, a court may suspend the imposition of a sentence only after first determining that a noncustodial sentence is authorized and appropriate. Id. at 126. This means that a sentencing court must first look to the presumption of incarceration set forth in N.J.S.A. 2C:44-1(d). Id. at 125.

4. Where a court determines that probation is an appropriate sentence, it should nevertheless identify and weigh the aggravating and mitigating factors that led to that decision. State v. Baylass, 114 N.J. 169, 174 (1989).

5. The primary difference between suspension and probation is that probation places the defendant under the supervision of the county probation office and carries a reporting requirement, whereas suspension is ordinarily without such

supervision. Hence, the suspended imposition of sentence is a less intrusive punishment than a probationary term. State v. Cullen, 351 N.J. Super. 505, 508 (App. Div. 2002); State v. Malave, 249 N.J. Super. 559, 563-64 (App. Div. 1991), certif. denied, 127 N.J. 559 (1992).

6. According to N.J.S.A. 2C:44-5(f)(1), when a defendant is sentenced for more than one offense, a court may not impose both a sentence of probation and a sentence of imprisonment, except as authorized by N.J.S.A. 2C:43-2(b)(2) (allowing "split sentence" of up to 364 days in county jail to be served as part of probation). State v. Crawford, 379 N.J. Super. 250, 259 (App. Div. 2005). A sentence of probation assumes that a defendant can be rehabilitated without serving a term of imprisonment in excess of 364 days. Ibid.

7. When a sentence of imprisonment in excess of one year is imposed, the service of such a sentence satisfies a suspended sentence on another count. Id. at 11 (citing N.J.S.A. 2C:44-5(f)(3)).

B. Determination of Length of Term of Imprisonment

1. In determining the appropriate sentence to be imposed on a person who has been convicted of an offense, the court considers aggravating and mitigating circumstances.

   a. N.J.S.A. 2C:44-1(a): Recites the aggravating factors, numbered (1) through (13). A sentencing court lacks the power to import aggravating factors not contained within the Code's guidelines. State v. Thomas, 356 N.J. Super. 299, 310 (App. Div. 2002). But see State v. Taylor, 226 N.J. Super. 441, 454 (App. Div. 1988) (N.J.S.A. 2C:44-1(a) does not limit sentencing judge to thirteen specific factors).

      i. The cruel manner of an attack may be considered an aggravating factor. State v. Soto, 340 N.J. Super. 47, 71-72 (App. Div.), certif. denied, 170

N.J. 209 (2001). "Cruel" as used in N.J.S.A. 2C:44-1(a)(1) may be construed to require the intent to inflict pain or suffering on the victim. State v. O'Donnell, 117 N.J. 210, 217-18 (1989).

ii. When considering the harm a defendant caused to a victim for purposes of determining whether N.J.S.A. 2C:44-1(a)(2) is implicated, a court should engage in a "pragmatic assessment of the totality of harm inflicted by the offender on the victim," so that defendants who purposely or recklessly inflict substantial harm receive more severe sentences. State v. Carey, 168 N.J. 413, 426 (2001); State v. Kromphold, 162 N.J. 345, 358 (2000).

iii. The "vulnerability" referred to in N.J.S.A. 2C:44-1(a)(2) is not limited to the intrinsic condition of the victim and includes any reason that renders the victim substantially incapable of resistance. State v. O'Donnell, supra, 117 N.J. at 218-19. See N.J.S.A. 2C:20-25(h) (effective April 14, 2003) (computer-related theft against person under eighteen years old "shall" constitute aggravating circumstance for purpose of imposing sentence).

iv. The risk that a defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3), is supported by evidence that the defendant denied responsibility for the crime. State v. Carey, supra, 168 N.J. at 427.

v. Depreciating the seriousness of the offense, N.J.S.A. 2C:44-1(a)(4), deals only with violations of public trust under Chapters 27 and 30, or breaches of a position of trust or confidence.

State v. Mosch, 214 N.J. Super. 457, 463 (App. Div. 1986), certif. denied, 107 N.J. 131 (1987).

vi. The "organized criminal activity" factor of N.J.S.A. 2C:44-1(a)(5) applies if there is proof that the defendant is involved in such activity, even though the offenses for which he has been convicted have no relationship to that activity. State v. Merlino, 208 N.J. Super. 247, 259 (Law Div. 1984), aff'd in part, vacated in part on other grounds, 208 N.J. Super. 147 (App. Div. 1985), certif. denied, 103 N.J. 460 (1986).

vii. Prior convictions for driving while under the influence (DWI) may not be considered an aggravating factor under N.J.S.A. 2C:44-1(a)(6), because DWI does not constitute an "offense" under N.J.S.A. 2C:1-14(k). However, such prior convictions may be considered as part of the defendant's overall personal history, much like municipal and juvenile court records are considered. State v. Radziwil, 235 N.J. Super. 557, 575-76 (App. Div. 1989), aff'd o.b., 121 N.J. 527 (1990). See State v. Pindale, 249 N.J. Super. 266, 288 (App. Div. 1991) (judge appropriately considered defendant's prior juvenile record and prior driving record where crimes involved operation of motor vehicle).

viii. A finding that there is a need to deter a defendant from similar conduct in the future, pursuant to N.J.S.A. 2C:44-1(a)(9), may be supported by a defendant's consistent denial of involvement in wrongdoing and lack of remorse. State v. Rivers, 252 N.J. Super. 142, 153-54 (App. Div. 1991).

ix. The need for public safety and deterrence increases proportionally with the degree of the offense. State v. Carey, supra, 168 N.J. at 426.

x. Implicit in the court's findings regarding a defendant's risk of recidivism (N.J.S.A. 2C:44-1(a)(3)), the seriousness and extent of a defendant's prior criminal record (N.J.S.A. 2C:44-1(a)(6)), and the need to deter defendant and others (N.J.S.A. 2C:44-1(a)(9)), are "determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history." State v. Thomas, ___ N.J. ___, ___ (2006) (slip op. at 25-26).

xi. A finding that the imposition of a fine or other monetary penalty would be perceived as a cost of doing business, pursuant to N.J.S.A. 2C:44-1(a)(11), applies only when the sentencing judge is balancing a non-custodial term against a prison sentence. State v. Dalziel, 182 N.J. 494, 502 (2005); State v. Rivera, 351 N.J. Super. 93, 110 (App. Div. 2002), aff'd o.b., 175 N.J. 612 (2003). Hence, unless the court is being asked to overcome the presumption of imprisonment, this factor should not be used when sentencing for first and second degree crimes. State v. Rivera, supra, 351 N.J. Super. at 110.

b. N.J.S.A. 2C:44-1(b): Recites the mitigating factors, numbered (1) through (13), that the court "may properly consider." Despite the use of this language, where mitigating factors are amply based in the record before the sentencing judge, they must be found. State v. Dalziel, supra, 182 N.J. at 504.

i. Distribution of cocaine may constitute conduct that causes and threatens serious harm, so as to render inapplicable N.J.S.A. 2C:44-1(b)(1) and (2). State v. Tarver, 272 N.J. Super. 414, 434-35 (App. Div. 1994).

ii. "Strong provocation" under N.J.S.A. 2C:44-1(b)(3) refers to the conduct of the victim towards the actor, not to the defendant's own mental compulsions. State v. Jasuilewicz, 205 N.J. Super. 558, 576 (App. Div. 1985), certif. denied, 103 N.J. 467 (1986).

iii. Drug or alcohol dependency or intoxication does not necessarily satisfy the mitigating factor set forth in N.J.S.A. 2C:44-1(b)(4) (substantial grounds tending to excuse or justify the conduct). State v. Ghertler, 114 N.J. 383, 390 (1989); State v. Setzer, 268 N.J. Super. 553, 567-68 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994).

iv. A history of continuous physical, sexual, and psychological abuse committed by the victim on the defendant may be highly relevant in determining whether the following mitigating factors apply: N.J.S.A. 2C:44-1(b)(2) (defendant did not contemplate conduct would cause or threaten serious harm); N.J.S.A. 2C:44-1(b)(4) (substantial grounds tending to excuse or justify conduct); and N.J.S.A. 2C:44-1(b)(5) (victim induced or facilitated commission of crime). State v. Briggs, 349 N.J. Super. 496, 504 (App. Div. 2002).

v. A court may give minimal weight to a defendant's lack of a previous record, N.J.S.A. 2C:44-1(b)(7), if it explains the reason for doing so. State v. Soto, supra, 340 N.J. Super. at 72.

vi. Where N.J.S.A. 2C:44-1(b)(8) (conduct was result of circumstances unlikely to recur), N.J.S.A. 2C:44-1(b)(9) (defendant is unlikely to commit another crime), and N.J.S.A. 2C:44-1(b)(10) (defendant is likely to respond to probationary treatment) apply, such factors essentially negate the need for specific deterrence. State v. Briggs, supra, 349 N.J. Super. at 505.

vii. Youth may be considered a mitigating factor if the defendant was "substantially influenced by another person more mature than the defendant," N.J.S.A. 2C:44-1(b)(13), but this factor may not apply where the defendant participated in a premeditated, cold-blooded, execution-style murder. State v. Torres, 313 N.J. Super. 129, 162 (App. Div.), certif. denied, 156 N.J. 425 (1998).

viii. Although the jury may reject a defendant's insanity defense, this does not necessarily mean the sentencing judge should reject the argument that the defendant's mental condition was a mitigating factor. State v. Nataluk, 316 N.J. Super. 336, 349 (App. Div. 1998).

2. The aggravating and mitigating factors are used to insure that sentencing is individualized without being arbitrary and that the sentence imposed is tailored to the individual offender and the crime he or she committed. State v. Sainz, 107 N.J. 283, 288 (1987).

3. The aggravating and mitigating factors are not interchangeable on a one-to-one basis. The proper weight to be given to each is a function of its gravity in relation to the severity of the offense. State v. Roth, 95 N.J. 334, 368 (1984).

4. The sentencing decision follows from a qualitative, not quantitative, analysis of the aggravating and mitigating factors. State v. Kruse, 105 N.J. 354, 363 (1987); State v. Boyer, 221 N.J. Super. 387, 404 (App. Div. 1987), certif. denied, 110 N.J. 299 (1988).

5. An element of the offense may not be cited as an aggravating factor to increase punishment such as by imposing a sentence longer than the presumptive term or by imposing a period of parole ineligibility. State v. Kromphold, supra, 162 N.J. at 353; State v. Yarbough, 100 N.J. 627, 633 (1985), cert. denied, 475 U.S. 10l4, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986); State v. Pavin, 202 N.J. Super. 255, 266-67 (App. Div. 1985); State v. Link, 197 N.J. Super. 615, 620 (App. Div. 1984), certif. denied, 101 N.J. 234 (1985).

   a. The same prohibition against "double counting" also applies to mitigating factors. State v. Teat, 233 N.J. Super. 368, 372-73 (App. Div. 1989) (trial judge may not consider "strong provocation" as mitigating factor where jury already considered this in reducing murder to manslaughter).

   b. Where a court sentences on multiple charges, inherent elements of one charge may be used as aggravating factors for another. State v. Boyer, supra, 221 N.J. Super. at 405-06.

   c. In sentencing a defendant on multiple counts of death by automobile, the sentencing court may consider as an aggravating factor the number of deaths caused. State v. Travers, 229 N.J. Super. 144, 154 (App. Div. 1988). It may also consider whether injuries were sustained by additional victims who survived. State v. Carey, supra, 168 N.J. at 425.

   d. The rule against double counting is not violated where the trial court cites as an aggravating circumstance the fact that the

defendant had far more drugs in his or her possession than needed to constitute a first degree crime. State v. Varona, 242 N.J. Super. 474, 491 (App. Div.), certif. denied, 122 N.J. 386 (1990). The nature and circumstances of a drug offense include the amount of drugs involved. State v. Ascencio, 277 N.J. Super. 334, 336-37 (App. Div. 1994), certif. denied, 140 N.J. 278 (1995); State v. Toro, 229 N.J. Super. 215, 226 (App. Div. 1988), certif. denied, 118 N.J. 216 (1989), overruled on other grounds by State v. Velez, 119 N.J. 185 (1990).

e. Where a jury considers the defendant's extraordinary level of intoxication in finding the recklessness necessary to convict of second degree aggravated assault, the sentencing court is precluded from using the defendant's level of intoxication as an aggravating factor. State v. Kromphold, supra, 162 N.J. at 356.

f. When one injury alone inflicted on the victim is life threatening, the fact that several other injuries were also life threatening permits a judge to consider those additional injuries as an aggravating factor without double counting. State v. Mara, 253 N.J. Super. 204, 214 (App. Div. 1992).

6. The absence of any personal deterrent effect of a sentence greatly undermines its efficacy as a general deterrent because general deterrence unrelated to specific deterrence has relatively insignificant penal value. State v. Jarbath, 114 N.J. 394, 405 (1989). See State v. Gardner, 113 N.J. 510, 520 (1989) (general deterrence alone insufficient to overcome presumption against imprisonment); State v. Powell, 294 N.J. Super. 557, 567 (App. Div. 1996) (general deterrence alone insufficient to prevent downgrading of sentence).

7. When determining a term of imprisonment for a defendant who has violated probation, the only

aggravating factors that a court may properly consider are those that existed at the time of initial sentencing. The violation of probation itself may not be considered. State v. Baylass, supra, 114 N.J. at 176. However, the defendant's amenability to probation may be considered in weighing the mitigating factors, such as his or her ability to lead a law-abiding life and the likelihood that he or she will respond affirmatively to probationary treatment. Id. at 177. Hence, when sentencing a defendant for a violation of probation, a court should consider the aggravating factors found to exist at the original hearing and the mitigating factors as affected by the probation violation. Id. at 178; accord State v. Molina, 114 N.J. 181, 184-85 (1989).

a. It will be a rare case in which the balance of the original aggravating factors and the surviving mitigating factors weighs in favor of a term of imprisonment greater than the presumptive or in favor of a period of parole ineligibility. State v. Baylass, supra, 114 N.J. at 178.

b. The Baylass/Molina standards must be followed even where a court is resentencing for a violation of probation following a negotiated plea agreement pursuant to N.J.S.A. 2C:35-12, by which the prosecutor waived a mandatory minimum. In such a case, however, the court retains the discretionary authority to impose a parole ineligibility term in conjunction with a presumptive term of imprisonment. State v. Vasquez, 129 N.J. 189, 205-06 (1992).

c. A recommendation by the State that a defendant's sentence be downgraded to one degree lower, pursuant to N.J.S.A. 2C:44-1(f)(2), does not survive a violation of probation. State v. Frank, 280 N.J. Super. 26, 40-41 (App. Div.), certif. denied, 141 N.J. 96 (1995).

d. The Baylass/Molina standards apply only where the defendant was originally sentenced to a probationary term that was then violated, not where the defendant was originally sentenced to a custodial term and then placed on probation after a R. 3:21-10(b)(1) motion. In the latter case, the court does not have to readdress the "in/out" decision because it has already determined the appropriate custodial term and amended it to permit enrollment in a drug treatment program. State v. Williams, 299 N.J. Super. 264, 270 (App. Div. 1997).

e. The Baylass/Molina guidelines also apply to sentencing upon a violation of suspension of sentence. State v. Cullen, supra, 351 N.J. Super. at 511. The Code treats similarly the consequences of a probationary sentence and a suspended sentence, and an offender for whom imposition of sentence has been suspended should face no harsher consequences for violation than one who has been sentenced to probation. Id. at 510.

f. A court should not sentence a pregnant probation violator to prison for the purpose of protecting the health of her fetus, because such a consideration is unrelated to the principles underlying the Code. State v. Ikerd, 369 N.J. Super. 610, 620-22 (App. Div. 2004).

C. Ordinary Terms of Imprisonment

1. N.J.S.A. 2C:43-6(a): Except as otherwise provided, the court may sentence a person who has been convicted of a crime to a specific term of years which shall be fixed by the court as follows:

a. First degree: between ten and twenty years;

b. Second degree: between five and ten years;

c. Third degree: between three and five years;

d. Fourth degree: not to exceed eighteen months.

2. Exceptions:

a. Murder (where death penalty is not imposed):

i. Thirty years without parole eligibility, or a term of years between thirty years and life imprisonment with a parole ineligibility period of thirty years. N.J.S.A. 2C:11-3(b)(1). Effective June 18, 2002, this same sentence is mandated for an attempt or conspiracy to murder five or more persons. N.J.S.A. 2C:5-4(a).

ii. Life imprisonment without parole, if the victim was a law enforcement officer murdered while performing his duties or because of his official status. N.J.S.A. 2C:11-3(b)(2).

iii. Life imprisonment without parole, if the victim was less than fourteen years old and the murder was carried out in the commission of a sexual assault or criminal sexual contact. N.J.S.A. 2C:11-3(b)(3).

iv. Life imprisonment without parole, if the defendant was subject to capital sentencing and the jury or court found at least one aggravating factor, but where the death penalty was not imposed. N.J.S.A. 2C:11-3(b)(4).

b. Aggravated manslaughter under N.J.S.A. 2C:11-4(a)(1): between ten and thirty years. N.J.S.A. 2C:11-4(c). (Note: Effective January 8, 2002, causing death while eluding a law enforcement officer was elevated from manslaughter to aggravated manslaughter and made a first degree crime. N.J.S.A. 2C:11-4(a)(2); N.J.S.A. 2C:11-4(c)).

c. Kidnapping in the first degree:

i. Between fifteen and thirty years. N.J.S.A. 2C:13-1(c)(1); or

ii. Where the victim is less than sixteen years old and certain specified circumstances exist--twenty-five years without parole eligibility, or a term of years between twenty-five years and life imprisonment with a parole ineligibility period of twenty-five years. N.J.S.A. 2C:13-1(c)(2).

d. Human trafficking under N.J.S.A. 2C:13-8(a)(2): twenty years without parole eligibility, or a term of years between twenty years and life imprisonment with a parole ineligibility period of twenty years. N.J.S.A. 2C:13-8(d).

e. Carjacking: between ten and thirty years. N.J.S.A. 2C:15-2(b).

f. Bias Intimidation (where underlying crime is crime of first degree): between fifteen and thirty years. N.J.S.A. 2C:16-1(c).

g. Terrorism: where no death results, thirty years without parole eligibility, or a term of years between thirty years and life imprisonment with a parole ineligibility period of thirty years; if death results, life imprisonment without parole. N.J.S.A. 2C:38-2(b).

h. Producing or possessing chemical weapons, biological agents, or nuclear or radiological devices: where no death results, thirty years without parole eligibility, or a term of years between thirty years and life imprisonment with a parole ineligibility period of thirty years; if death results, life imprisonment without parole. N.J.S.A. 2C:38-3(a).

i. Unauthorized acts at nuclear electric generating plant, in violation of N.J.S.A. 2C:17-7: between fifteen and thirty years.

3. N.J.S.A. 2C:43-8: For conviction of a disorderly persons or petty disorderly persons offense, defendant may be sentenced to a term of imprisonment for a definite term, which shall not exceed six months for a disorderly persons offense or thirty days for a petty disorderly persons offense.

D. Presumptive Terms of Imprisonment

NOTE: In State v. Natale II, 184 N.J. 458, 487 (2005), the Court held that the Code's system of presumptive term sentencing violates the Sixth Amendment right to trial by jury. The holding was given pipeline retroactivity. Id. at 494. **This section is thus relevant only for those cases to which the holding in Natale II does not apply. See further discussion below at Section I(F).**

1. N.J.S.A. 2C:44-1(f)(1): When a court determines that imprisonment is warranted, it "shall" impose the presumptive term. State v. Kruse, supra, 105 N.J. at 358. These presumptive terms are:

a. First degree: fifteen years;

b. Second degree: seven years;

c. Third degree: four years;

d. Fourth degree: nine months.

2. Exceptions:

a. Murder: There is no presumptive sentence for murder. State v. Abdullah, 184 N.J. 497, 507-08 (2005).

b. Aggravated manslaughter: twenty years. N.J.S.A. 2C:44-1(f)(1)(a). [Note that aggravated manslaughter under N.J.S.A. 2C:11-4(a)(2), causing death of another while eluding law enforcement officer,

carries ordinary sentence for first degree crime.]

c. Kidnapping in first degree pursuant to N.J.S.A. 2C:13-1(c)(1): twenty years. N.J.S.A. 2C:44-1(f)(1)(a).

d. Bias intimidation (where underlying crime is crime of first degree): twenty years. N.J.S.A. 2C:16-1(c) (effective January 11, 2002).

e. There is no presumptive term for carjacking beyond the mandatory minimum of ten years imprisonment with five years of parole ineligibility. State v. Zadoyan, 290 N.J. Super. 280, 290 (App. Div. 1996).

E. Deviation From the Presumptive Term

NOTE: In State v. Natale II, supra, 184 N.J. at 487, the Court held that the Code's system of presumptive term sentencing violates the Sixth Amendment right to trial by jury. The holding was given pipeline retroactivity. Id. at 494. **The following principles are thus relevant only for those cases to which the holding in Natale II does not apply. See further discussion below at Section I(F).**

1. If there is a preponderance of aggravating or mitigating factors delineated in N.J.S.A. 2C:44-1(a) and (b), the court may increase or decrease the presumptive sentence accordingly within the limits of N.J.S.A. 2C:43-6. N.J.S.A. 2C:44-1(f)(1).

2. While judicial discretion is involved, it is tempered, in the interest of sentencing uniformity, by the mandatory requirement that the statutory criteria be examined and weighed. The sentencing court must clearly identify the relevant sentencing factors and describe how it balanced them. State v. Kruse, supra, 105 N.J. at 360.

3. Where an element of the crime is a specific fact, that element may not be used as an aggravating factor to impose a custodial sentence that is

longer than the presumptive term. State v. Link, supra, 197 N.J. Super. at 620.

4. The concept of a presumptive term does not apply to young adult offender indeterminate sentences under N.J.S.A. 2C:43-5, but only to specific term sentences under N.J.S.A. 2C:43-6 or N.J.S.A. 2C:43-7. State v. Berger, 258 N.J. Super. 553, 561-62 (App. Div. 1992).

5. Since carjacking carries no presumptive term, courts must look to the alternative elements identified in the carjacking statute, in conjunction with the aggravating and mitigating factors, to guide their imposition of sentence. State v. Zadoyan, supra, 290 N.J. Super. at 291.

   a. Where the first class of elevating factors is absent, it may be inappropriate to use the maximum sentence as a "starting point" from which to begin the application of any aggravating and mitigating factors. State v. Henry, 323 N.J. Super. 157, 164-65 (App. Div. 1999).

   b. In light of the enactment of NERA in 1997 (and as amended in 2001), trial courts must apply "even more greatly refined sensitivity respecting the categorization of carjacking cases." State v. Berardi, 369 N.J. Super. 445, 452-53 (App. Div. 2004), appeal dismissed, 185 N.J. 250 (2005).

F. Unconstitutionality of Presumptive Term Sentencing

1. Except where a defendant has stipulated to judicial factfinding, and other than the fact of a prior conviction, any fact that increases the penalty beyond the "statutory maximum" must be found by a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403, 412 (2004). The statutory maximum is the maximum sentence that a judge may impose solely on the basis of facts reflected in the verdict or admitted by the defendant. Id. at 303, 124 S. Ct. at 2537, 159 L. Ed. 2d at 413.

2. Under our Code's sentencing provisions, the "statutory maximum" for Blakely purposes is the presumptive sentence. Because the presumptive sentencing system allows judges to sentence beyond the presumptive term based on their finding of aggravating and mitigating factors, that system is incompatible with Blakely and violates the Sixth Amendment right to trial by jury. State v. Natale II, supra, 184 N.J. at 484.

3. To remedy the constitutional infirmity, presumptive terms must be eliminated. Id. at 487. Judges must still balance the aggravating and mitigating factors, but "will no longer be required to do so from the fixed point of a statutory presumptive." Id. at 488.

4. Picking the middle of the sentencing range as a logical starting point is one reasonable approach but is not compelled. Ibid. Reason also suggests that sentences will tend toward the lower end of the range when mitigating factors preponderate and toward the higher end when aggravating factors preponderate. Ibid.

5. This holding applies to defendants with cases on direct appeal as of August 2, 2005, and to those defendants who raised Blakely claims at trial or on direct appeal. Id. at 494.

a. Defendants to whom the holding in Natale II applies are entitled to a new sentencing hearing "based on the record at the prior sentencing." Id. at 495.

b. At the new hearing, the court should determine "whether the absence of the presumptive term in the weighing process requires the imposition of a different sentence." Id. at 495-96.

c. The court should not make new findings regarding aggravating and mitigating factors. Rather, the new hearing should be based on the original sentencing record. Id. at 496.

d. Any defendant challenging his sentence on Blakely grounds "will not be subject to a sentence greater than the one already imposed." Ibid.

6. The holding applies to both jury trial and guilty plea cases. Id. at 495. See separate discussion at Section VII with respect to sentences associated with plea agreements.

7. Defendants who received sentences above the presumptive and who were in the pipeline when Natale II was decided are entitled to resentencing even if the only aggravating factors relied upon were the recidivism factors of N.J.S.A. 2C:44-1(a)(3), (6), and (9), because these factors ordinarily entail more than the judicial fact-finding of the existence of a prior conviction. State v. Thomas, supra, ___ N.J. at ___ (slip op. at 25).

8. Because the crime of murder has no presumptive term, a sentence of life imprisonment does not violate a defendant's Sixth Amendment jury trial right. State v. Abdullah, supra, 184 N.J. at 507-08. Similarly, because there is no presumptive term for the crimes of kidnapping or carjacking, the holding in Natale II does not apply to sentences for those crimes. State v.

Drury, 382 N.J. Super. 469, 486-87 (App. Div.), certif. granted, 186 N.J. 603 (2006).

9. A court may not engage in an after-the-fact review of the trial record to determine whether certain facts were present which may be used to impose sentence greater than that authorized by the jury verdict. State v. Franklin, 184 N.J. 516, 536 (2005). That is, a defendant's trial admissions may not be used to justify a term above the statutory maximum unless the defendant consents to judicial factfinding. Id. at 538.

G. Mandatory Terms of Parole Ineligibility

1. N.J.S.A. 2C:43-6(b): As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating, it may impose a minimum term not to exceed one-half of the term set, during which time the defendant shall not be eligible for parole. See separate discussion at Section V.

2. N.J.S.A. 2C:43-6(c), (d): Commonly known as the Graves Act, specifies the conditions under which certain firearm offenders must be sentenced to mandatory periods of parole ineligibility. See separate discussion at Section VI.

3. N.J.S.A. 2C:43-7.2: Commonly known as the No Early Release Act (NERA), establishes required minimum sentences for certain enumerated first and second degree crimes.

4. For other specific mandatory periods of parole ineligibility, see discussion at Section V.

H. Downgrading

1. N.J.S.A. 2C:44-1(f)(2): In cases of first or second degree crimes, where the court is "clearly convinced that the mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands," the court may sentence defendant to a term appropriate to a crime of one degree lower. In

such a case, the sentence shall not become final for ten days to permit an appeal by the prosecution. See separate discussion of state appeals at Section X.

2. The decision to downgrade "in the interest of justice" should be limited to those circumstances in which a defendant can provide "compelling" reasons. Those reasons must be in addition to, and separate from, the mitigating factors that substantially outweigh the aggravating. State v. Megargel, 143 N.J. 484, 501-02 (1996); State v. Moore, 377 N.J. Super. 445, 450-51 (App. Div.), certif. denied, 185 N.J. 267 (2005); State v. Johnson, 376 N.J. Super. 163, 173 (App. Div.), certif. denied, 183 N.J. 592 (2005).

3. N.J.S.A. 2C:44-1(f)(2) requires that the sentencing court satisfy a two-prong test. State v. Megargel, supra, 143 N.J. at 496. The court must focus on the severity of the crime, including the nature of and the relevant circumstances pertaining to the offense. Those circumstances may make the offense very similar to one of a lower degree, thereby suggesting that a downgrade may be appropriate. Id. at 500. Facts personal to the defendant may also be considered, as may the concept of deterrence. Id. at 501.

4. A trial court must state on the record its reasons for downgrading a sentence and should particularly state why a sentence at the lowest range for the offense is not a more appropriate sentence than a downgraded sentence. Id. at 502.

5. On a downgrade from a second to third degree crime for sentencing purposes, the defendant remains "convicted" of a second degree crime for purposes of applying a presumption of imprisonment. State v. O'Connor, 105 N.J. 399, 404-05 (1987); State v. Lebra, 357 N.J. Super. 500, 507 (App. Div. 2003); State v. Partusch, 214 N.J. Super. 473, 476-77 (App. Div. 1987).

6. When downgrading from a first to second degree crime for sentencing purposes, the mandatory

period of parole ineligibility of N.J.S.A. 2C:35-5(b)(1) (applicable to first degree crimes) is not eliminated. State v. Barber, 262 N.J. Super. 157, 162 (App. Div.), certif. denied, 133 N.J. 441 (1993). See also discussion at Section XVI.

7. In those cases in which the Legislature has provided an enhanced penalty for a particular offense, such as kidnapping and aggravated manslaughter, a downgrade requires even more compelling reasons and a trial court must exercise extreme caution. State v. Megargel, supra, 143 N.J. at 502; State v. Mirakaj, 268 N.J. Super. 48, 50-51 (App. Div. 1993).

8. A trial court must consider the aggravating and mitigating factors in approving a downgrade for the purpose of sentencing pursuant to a plea bargain. State v. Nemeth, 214 N.J. Super. 324, 326-27 (App. Div. 1986).

9. The decision to downgrade and the decision to impose the maximum sentence within the lower degree range are distinct decisions, each of which reflects the exercise of judicial discretion. State v. Balfour, 135 N.J. 30, 38 (1994). Where the decision to downgrade is made in the context of a plea agreement, the guilty plea is one factor bearing on the lenity of the sentence. Id. at 38-39. That factor, however, need not be carried forward to the independent decision to affix a sentence within the permissible range for the lower degree crime, and a trial court may instead weigh only the enumerated statutory aggravating and mitigating factors to conclude that a term greater than the presumptive is justified. Id. at 39.

I. Young Adult Offender Sentences

1. N.J.S.A. 2C:43-5: Where the defendant is less than twenty-six years old at the time of sentencing, the court may impose an indeterminate term to a youth correctional facility instead of a sentence otherwise authorized by law.

a. This section is not applicable to those eligible for a Graves Act sentence. State v. Des Marets, 92 N.J. 62, 76 (1983); N.J.S.A. 2C:43-5.

b. This section is not applicable to anyone who has previously been sentenced to a state prison in this or any other state, N.J.S.A. 30:4-147, or to a federal prison or penitentiary. State v. Levine, 253 N.J. Super. 149, 162 (App. Div. 1992).

c. This section is not applicable to drug offenders who are subject to the mandatory parole ineligibility terms of N.J.S.A. 2C:35-5(b)(1) and N.J.S.A. 2C:35-7. State v. Luna, 278 N.J. Super. 433, 437-38 (App. Div. 1995).

d. This section is not applicable to convictions for crimes to which NERA applies. State v. Corriero, 357 N.J. Super. 214, 217-18 (App. Div. 2003).

2. Under the Code, there is no mandated preference for Youth Complex sentences for young adult offenders. Hence, the application of N.J.S.A. 2C:43-5 is merely one sentencing option for the court, the exercise of which is reserved for those cases where the court, in its sound discretion, deems it to be appropriate. State v. Styker, 262 N.J. Super. 7, 21 (App. Div.), aff'd o.b., 134 N.J. 254 (1993). In not exercising this option, a court may consider the seriousness of the offense as well as the relevant aggravating and mitigating factors. Id. at 22.

3. When imposing a custodial sentence pursuant to the young adult offender statute, a court may not impose a term longer than five years unless there is "good cause shown," in which case the maximum may be increased but may not exceed the maximum term otherwise provided by law for the crime in question. State v. Jarbath, supra, 114 N.J. at 402; State v. Corriero, supra, 357 N.J. Super. at 217 n.3; State v. Ferguson, 273 N.J. Super. 486, 492 (App. Div.), certif. denied, 138 N.J. 265

(1994). This means that the ordinary term for a young adult offender under this statute is five years. State v. Scherzer, 301 N.J. Super. 363, 497 (App. Div.), certif. denied, 151 N.J. 466 (1997).

a. The good cause standard may be met by an articulation of aggravating factors that preponderate over the mitigating. State v. Ferguson, supra, 273 N.J. Super. at 495. This does not mean, however, that absent such a preponderance the judge is precluded from finding good cause. State v. Scherzer, supra, 301 N.J. Super. at 498. Such a holding would restrict the judge in first and second degree convictions to a five year term unless the aggravating factors outweighed the mitigating, regardless of the nature of the crime or its circumstances. This, in turn, would preclude effective use of the young adult offender statute where the sentencing factors were in equipoise or favored mitigation but where the facts warranted more than a five year maximum. Ibid.

b. A concern that a defendant will be paroled after only thirty-two months may validly constitute good cause for going over the statute's five year ordinary term even where the sentencing factors are in equipoise or favor mitigation. Id. at 499-500.

c. A sentencing court should state on the record the reasons constituting good cause for imposing a young adult offender sentence greater than five years. Id. at 497.

J. Drug Offenders

See separate discussion at Section XVI for those offenders covered under the Comprehensive Drug Reform Act, N.J.S.A. 2C:35-1 to -24.

K. Other Specific Criteria

1. N.J.S.A. 2C:44-1(c)(1): The court may not

consider a plea of guilty or a failure to plead guilty in withholding or imposing a sentence of imprisonment.

2. N.J.S.A. 2C:44-1(c)(2): In determining an appropriate term of imprisonment, the court shall consider a defendant's eligibility for release under the law governing parole, including time credits awarded pursuant to Title 30 of the Revised Statutes. However, a sentencing judge is without the power to establish conditions for parole. State v. Beauchamp, 262 N.J. Super. 532, 536-37 (App. Div. 1993); State v. J.F., 262 N.J. Super. 539, 543 (App. Div. 1993).

3. Sentencing judges must state, at the time a prison sentence is imposed, the approximate period of time that a defendant will actually serve in jail based on current Parole Eligibility Tables. R. 3:21-4(j). See N.J.S.A. 2C:43-2(f)(1) (court shall explain parole laws as they apply to sentence and shall state approximate period of time defendant will serve in custody before parole eligibility). See also copy of Parole Eligibility Table in Appendix to this manual (available at www.state.nj.us/parole, click on "Parole Eligibility" and then "Parole Calculation").

L. Appellate Review of Sentences

1. N.J.S.A. 2C:44-7: The appellate court has the authority to review the findings of fact by a sentencing court in support of its finding of aggravating and mitigating circumstances and to modify a sentence where such findings are not fairly supported on the record. See R. 2:10-3 (allowing appellate court to impose such sentence as should have been imposed or to remand to trial court for proper sentence).

2. An appellate court may modify a sentence only if the sentencing court was "clearly mistaken." State v. Kromphold, supra, 162 N.J. at 355. It should not second-guess a trial judge's findings regarding aggravating and mitigating factors if they are supported by substantial evidence in the

record. Ibid.; State v. Soto, supra, 340 N.J. Super. at 71.

3. An appellate court must determine whether the findings of fact regarding aggravating and mitigating factors were based on competent and credible evidence in the record, whether the court applied the correct sentencing guidelines enunciated in the Code, and whether the application of the facts to the law constituted such an error of judgment as to shock the judicial conscience. State v. Roth, supra, 95 N.J. at 363-65. Accord State v. Roach, 146 N.J. 208, 230, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996); State v. Megargel, supra, 143 N.J. at 493-94; State v. O'Donnell, supra, 117 N.J. at 215-16; State v. Ghertler, supra, 114 N.J. at 387-88; State v. Jarbath, supra, 114 N.J. at 401.

4. Although the sentence on each count may itself be justified, the aggregate sentence may shock the judicial conscience, especially where it exceeds that which could have been imposed under the "three strikes and you're in law." State v. Candelaria, 311 N.J. Super. 437, 454-55 (App. Div.), certif. denied, 155 N.J. 587 (1998).

5. With respect to sentences to which the holding in Natale II applies, "[t]he touchstone is that the sentence must be a reasonable one in light of all the relevant factors considered by the court." State v. Natale II, supra, 184 N.J. at 488.

   a. Judges must still "identify the aggravating and mitigating factors and balance them to arrive at a fair sentence." Ibid.

   b. Sentencing decisions will still be reviewed under "established appellate sentencing jurisprudence" and appellate courts must still determine whether the sentencing court followed the applicable sentencing guidelines. Id. at 489.

6. Deference to the findings of a trial judge applies equally whether it is the defendant or

the State who is appealing. State v. Gerstofer, 191 N.J. Super. 542, 545 (App. Div. 1983), certif. denied, 96 N.J. 310 (1984).

7. Original appellate jurisdiction to review legal but excessive sentences includes the power to make new fact-findings, to reach independent determinations of the facts, and to call for additional evidence to supplement the record. State v. Jarbath, supra, 114 N.J. at 410. New fact-finding may be effectuated by reviewing the existing record or by supplementing the sentencing record either at the trial level through a limited remand or at the appellate level through the presentation of evidence on appeal. Id. at 412. The Appellate Division must set forth its reasons both for the exercise of original jurisdiction and for the sentence actually imposed. Id. at 414.

8. The exercise of original jurisdiction by appellate courts should not occur regularly or routinely; rather, where a sentence is deficient, a remand to the trial court for resentencing is preferred. State v. Kromphold, supra, 162 N.J. at 355; State v. Jarbath, supra, 114 N.J. at 410-11. A remand to a sentencing judge who has presided over the trial may be preferred because the judge is presumably more sensitive to the "nuances" of the case. State v. Abrams, 256 N.J. Super. 390, 403-04 (App. Div.), certif. denied, 130 N.J. 395 (1992).

9. The absence of a verbatim sentencing transcript does not, without more, preclude meaningful appellate review or necessitate a remand for reconstruction of the record. A defendant must be able to show how such a transcript would have helped on appeal. State v. Vasquez, 265 N.J. Super. 528, 561 (App. Div.), certif. denied, 134 N.J. 480 (1993).

II. CONCURRENT AND CONSECUTIVE SENTENCES

A. General Rule for Sentences Imposed at the Same Time

When a defendant receives multiple sentences of imprisonment for more than one offense, they shall run concurrently or consecutively "as the court determines at the time of sentence." N.J.S.A. 2C:44-5(a). "There shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." Ibid. The aggregate of consecutive terms to county jail shall not exceed eighteen months. N.J.S.A. 2C:44-5(a)(1).

B. Special Situations

1. For specific statutory provisions mandating consecutive sentences, see: N.J.S.A. 2C:11-5.1 (leaving scene of motor vehicle accident resulting in death); N.J.S.A. 2C:12-1.1 (leaving scene of motor vehicle accident resulting in serious bodily injury); N.J.S.A. 2C:12-1.2 (endangering an injured victim); N.J.S.A. 2C:12-2 (reckless endangerment by adulteration of food products); N.J.S.A. 2C:12-13 (throwing bodily fluid at Department of Corrections employees); N.J.S.A. 2C:13-1(c)(2) (kidnapping where victim is also victim of homicide); N.J.S.A. 2C:21-27 (financial facilitation of criminal activity); N.J.S.A. 2C:33-28 (solicitation of street gang members); N.J.S.A. 2C:35-4.1 (booby traps or fortified premises in manufacturing or distribution drug facilities); N.J.S.A. 2C:39-4.1 (possession of weapons during drug or bias crimes).

2. A term of imprisonment imposed on an inmate for assaulting a correctional employee, sheriff's department employee, or law enforcement officer while in the performance of their duties shall run consecutively to any term currently being served and to any term imposed for any other offense committed at the time of the assault. N.J.S.A. 2C:44-5(i). "Currently being served" refers to the time sentence is imposed, not the time of the assault. State v. Moore, 377 N.J.

Super. 445, 449 (App. Div.), certif. denied, 185 N.J. 267 (2005).

3. Although consecutive dispositions are authorized by the Code of Juvenile Justice, they should be the exception and not the rule. State in Interest of J.L.A., 136 N.J. 370, 380 (1994).

C. Guidelines for Sentences Imposed at the Same Time

1. Although N.J.S.A. 2C:44-5(a) does not specify when consecutive or concurrent sentences are appropriate, the Supreme Court has provided certain guidelines. These guidelines, announced in State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986), apply when the offender has engaged in a pattern of behavior constituting a series of separate offenses or multiple offenses in separate, unrelated episodes. They are:

   a. There should be no "free crimes" in a system where punishment fits the crime.

   b. The reasons for a consecutive or concurrent sentence should be separately given.

   c. The court should consider the facts of the crime, including whether:

      i. the crimes and their objectives were independent of each other;

      ii. the crimes involved separate acts or threats of violence;

      iii. the crimes were committed at separate times or places, rather than indicating a single period of aberrant behavior;

      iv. the crimes involved multiple victims;

      v. the convictions are numerous.

   d. There should be no double counting of aggravating factors.

e. Successive terms for the same offense should ordinarily not equal the punishment for the first offense.

f. There should be an overall limit on the cumulation of consecutive sentences for multiple offenses not to exceed the scope of the longest terms (including an extended term, if applicable) for the two most serious offenses.

g. Effective August 5, 1993, N.J.S.A. 2C:44-5(a) was amended to provide that there "shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." This amendment granted greater discretion to judges in determining the overall length of a sentence. State v. Abdullah, 184 N.J. 497, 513 (2005). Hence, Yarbough has been superseded by statute to the extent it recommended such an overall outer limit. State v. Pennington, 154 N.J. 344, 361-62 (1998).

2. The second, fourth, fifth, and sixth guidelines do not assist a court in making the threshold decision whether to impose concurrent or consecutive sentences; rather they merely establish certain procedural requirements. State v. Carey, 168 N.J. 413, 423 (2001).

3. The guideline that provides the clearest guidance to sentencing courts is the third one, which sets forth five factors that focus on the facts relating to the crime. Ibid. These factors should be applied qualitatively, not quantitatively. Id. at 427. Hence, a court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences. Id. at 427-28; see State v. Swint, 328 N.J. Super. 236, 264 (App. Div.) (even when offenses are connected by "unity of specific purpose," are somewhat interdependent of one another, and are committed within short period of time, this does not necessarily mean

that concurrent sentences must be imposed), certif. denied, 165 N.J. 492 (2000).

4. When faced with the decision whether to impose concurrent or consecutive sentences, the court should determine whether the Yarbough factor under consideration "renders the collective group of offenses distinctively worse than the group of offenses would be were that circumstance not present." State v. Carey, supra, 168 N.J. at 428.

5. The reasons for imposing consecutive sentences must be expressly stated. Failure to do so may compel a remand for resentencing. State v. Miller, 108 N.J. 112, 122 (1987). However, where the facts and circumstances leave little doubt as to the propriety of the sentences, and where there is no showing that the sentences are clearly mistaken, the appellate court may affirm. State v. Jang, 359 N.J. Super. 85, 98 (App. Div.), certif. denied, 177 N.J. 492 (2003).

6. The Yarbough decision is not intended to "trammel all consecutive sentences." Where appropriate, it allows for consecutive sentences as long as the court clearly states its reasons. State v. Mosch, 214 N.J. Super. 457, 465 (App. Div. 1986), certif. denied, 107 N.J. 131 (1987). Consecutive sentences are especially appropriate where society must be protected from those who are unwilling to lead productive lives and who resort to criminal activities. State v. Taccetta, 301 N.J. Super. 227, 261 (App. Div.), certif. denied, 152 N.J. 187, 188 (1997); State v. Mosch, supra, 214 N.J. Super. at 464. The focus should be on the overall fairness of the sentence. State v. Miller, supra, 108 N.J. at 122.

7. Some cases are so extreme and extraordinary that deviation from the guidelines is called for. State v. Carey, supra, 168 N.J. at 428; State v. Yarbough, supra, 100 N.J. at 647; State v. Hammond, 231 N.J. Super. 535, 544 (App. Div.), certif. denied, 117 N.J. 636 (1989); State v. Lewis, 223 N.J. Super. 145, 154 (App. Div.), certif. denied, 111 N.J. 584 (1988).

a. Crimes involving multiple victims suffering separate and distinct harm represent especially suitable circumstances for consecutive sentences. State v. Carey, supra, 168 N.J. at 428; State v. Roach, 146 N.J. 208, 230-31, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996); State v. Johnson, 309 N.J. Super. 237, 271-72 (App. Div.), certif. denied, 156 N.J. 387 (1998); State v. J.G., 261 N.J. Super. 409, 426 (App. Div.), certif. denied, 133 N.J. 436 (1993); State v. Russo, 243 N.J. Super. 383, 413 (App. Div. 1990), certif. denied, 126 N.J. 322 (1991).

i. This is because the "total impact of singular offenses against different victims will generally exceed the total impact on a single individual who is victimized multiple times." State v. Carey, supra, 168 N.J. at 429. This is true even where the defendant does not intend to harm multiple victims but it is foreseeable that his or her reckless conduct will result in multiple victims. Ibid.

ii. In vehicular homicide cases, the multiple-victims factor is entitled to great weight and should ordinarily result in the imposition of at least two consecutive terms when multiple deaths or serious bodily injuries have been inflicted upon multiple victims. Id. at 429-30.

b. This does not mean that all consecutive sentencing criteria are to be disregarded in favor of fashioning the longest sentence possible. Id. at 428; State v. Louis, 117 N.J. 250, 256-58 (1989). See State v. Candelaria, 311 N.J. Super. 437, 454 (App. Div.) (six consecutive sentences totalling 105 years on top of life sentence deemed excessive in the aggregate), certif. denied, 155 N.J. 587 (1998); State v. Rodgers, 230

N.J. Super. 593, 604 (App. Div.) (choosing to limit Yarbough "exception" to "more extraordinary cases"), certif. denied, 117 N.J. 54 (1989).

8. A judge may not impose sentences that are partially consecutive and partially concurrent. Such a split-sentencing scheme would contravene the Code's paramount goal of uniformity. State v. Rogers, 124 N.J. 113, 118 (1991).

9. The "no free crimes" guideline stated in Yarbough tilts in the direction of consecutive sentences because the Code focuses on the crime, not the criminal. State v. Carey, supra, 168 N.J. at 423. However, this guideline does not eliminate concurrent sentences from a court's sentencing options because not every additional crime in a series must carry its own increment of punishment. State v. Rogers, supra, 124 N.J. at 119.

10. A plea agreement may appropriately be considered and weighed in the decision to impose consecutive sentences. State v. S.C., 289 N.J. Super. 61, 71 (App. Div.), certif. denied, 145 N.J. 373 (1996).

11. Neither Yarbough nor any statutory provision precludes a sentencing judge from requiring that the less restrictive term of a consecutive sentence be served first. State v. Ellis, 346 N.J. Super. 583, 594 (App. Div.), aff'd o.b., 174 N.J. 535 (2002). Although such a requirement does not render the sentence illegal, it may constitute an abuse of discretion and should be accompanied by specific findings. Id. at 597.

12. Nothing in the holding of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), requires jury fact-finding before consecutive terms can be imposed on a defendant. State v. Abdullah, supra, 184 N.J. at 514. This is because, under our sentencing scheme, there is no presumption in favor of concurrent sentences and the maximum sentence authorized by the jury verdict is the "maximum sentence for each offense added to every other offense." Id. at 513-14.

D. Sentences Imposed at Different Times

1. Multiple terms of imprisonment shall run concurrently or consecutively "as the court determines" when a second or subsequent sentence is imposed. N.J.S.A. 2C:44-5(d). The court has the discretion how such multiple sentences shall run. State v. Mercadante, 299 N.J. Super. 522, 532 (App. Div.), certif. denied, 150 N.J. 26 (1997).

2. This grant of authority does not permit a court to run a sentence concurrently to a prior sentence that has already fully expired. Ibid.

3. When a defendant is sentenced pursuant to a negotiated plea agreement calling for the sentence to be served consecutively to a previously imposed sentence, the appellate court may affirm even if the trial judge has not made an explicit assessment of the Yarbough factors. State v. Soto (I), 385 N.J. Super. 247, 257 (App. Div. 2006).

4. The consecutive-feature provisions of the Code do not contemplate the imposition of sentences in foreign jurisdictions. Breeden v. New Jersey Dep't of Corrs., 132 N.J. 457, 465-66 (1993). However, a court is not necessarily precluded from imposing a sentence consecutive to a federal sentence that a defendant is currently serving. State v. Walters, 279 N.J. Super. 626, 634-37 (App. Div.), certif. denied, 141 N.J. 96 (1995).

5. When a defendant who has previously been sentenced to imprisonment is later sentenced for an offense committed prior to the former sentence, the court decides whether to make them consecutive or concurrent. The defendant is credited with time served on the prior sentence when determining the permissible aggregate length of the term or terms remaining to be served. N.J.S.A. 2C:44-5(b). See separate discussion of credits at Section XVIII.

E. Multiple Sentences in the Context of Suspension, Probation, Parole, and Bail (N.J.S.A. 2C:44-5(c), (f), (g), and (h))

1. N.J.S.A. 2C:44-5(f) regulates situations where both crimes were committed prior to the first sentencing. It does not govern sentences for crimes committed while on probation. State v. Sutton, 132 N.J. 471, 483-84 (1993). N.J.S.A. 2C:44-5(g) regulates sentences for offenses committed while on probation but where probation is not revoked. Ibid.

2. Whenever a defendant commits an offense while released on probation, parole, or bail, N.J.S.A. 2C:44-5 creates a presumption of consecutive terms, subject to the exercise of judicial discretion. Id. at 484. The standards enunciated in Yarbough should guide the court's determination in this regard. Id. at 485.

F. Calculation

1. When terms run concurrently, the shorter ones merge in and are satisfied by the discharge of the longer term. N.J.S.A. 2C:44-5(e)(1). When they run consecutively, "the terms are added to arrive at an aggregate term to be served equal to the sum of all terms." N.J.S.A. 2C:44-5(e)(2). See State v. Benedetto, 221 N.J. Super. 573, 578 n.1 (App. Div. 1987), certif. denied, 111 N.J. 559 (1988), and discussion at Section XVIII relating to aggregation of sentences in conjunction with computation of gap-time credits.

2. N.J.S.A. 2C:44-5(e)(2) does not address the issue of judicial discretion to direct the order in which consecutive sentences must be served. State v. Ellis, supra, 346 N.J. Super. at 592-93.

III. PRESUMPTIONS OF IMPRISONMENT OR NONIMPRISONMENT

A. Presumption of Imprisonment

1. General Rules

a. When dealing with a person convicted of a first or second degree crime, a court "shall" impose a sentence of imprisonment. N.J.S.A. 2C:44-1(d). Although the title of N.J.S.A. 2C:44-1(d) is "presumption" of imprisonment, the statute requires imprisonment of all first and second degree offenders absent "serious injustice." State v. Cannon, 128 N.J. 546, 557 n.7 (1992).

b. The presumption of incarceration applies to second degree drug offenders who have been successfully rehabilitated. The authorization of residential drug treatment as an alternative to incarceration, pursuant to N.J.S.A. 2C:35-14(a), is limited to drug dependent defendants. It is up to the Legislature to consider whether to make this alternative available to those who have overcome their addiction. State v. Soricelli, 156 N.J. 525, 537-38 (1999).

c. When dealing with repeat offenders convicted of theft or unlawful taking of a motor vehicle, a court "shall" impose a sentence of imprisonment. N.J.S.A. 2C:44-1(d).

d. The presumption of imprisonment shall not necessarily preclude the admission of a person into the Intensive Supervision Program. N.J.S.A. 2C:44-1(h).

2. Overcoming the Presumption

Considering the "character and condition of the defendant," the court may withhold imprisonment if it "would be a serious injustice which overrides the need to deter such conduct by others." N.J.S.A. 2C:44-1(d).

a. This exception confers a "residuum of power" on sentencing judges to consider a defendant's character or condition, but should be exercised only in "truly extraordinary and unanticipated" circumstances. State v. Evers, 175 N.J. 355, 389 (2003); State v. Roth, 95 N.J. 334, 358 (1984).

b. To overcome the presumption, a defendant must be able to show that his character and condition are so unique or extraordinary, when compared to defendants facing similar incarceration, that he is entitled to relief. State v. Evers, supra, 175 N.J. at 392. A trial court should determine whether there is "clear and convincing evidence that there are relevant mitigating factors present to an extraordinary degree and, if so, whether cumulatively, they so greatly exceed any aggravating factors that imprisonment would constitute a serious injustice overriding the need for deterrence." Id. at 393-94.

    i. Not every mitigating factor bears the same relevance and weight in this determination. It is the quality of the factor and its uniqueness in the particular setting that matters. Id. at 394.

    ii. The court must also look at "the gravity of the offense with respect to the peculiar facts of a case to determine how paramount deterrence will be in the equation." Id. at 395.

    iii. The presumption is not overcome merely because the defendant is a first offender, because the mitigating factors preponderate over the aggravating, or because the mitigating factors so outweigh the aggravating as to justify downgrading the offense. Id. at 388; State v. Jabbour, 118 N.J.

1, 7 (1990). The standard for overcoming the presumption is distinct from that for downgrading an offense, and the reasons offered to dispel the presumption must be more compelling than those that warrant downgrading. State v. Evers, supra, 175 N.J. at 389; State v. Megargel, 143 N.J. 484, 498-502 (1996).

c. The statutory benchmark of "serious injustice" demarks the point beyond which a sentence exceeds its appropriate penal objective of proportionate punishment. State v. Jarbath, 114 N.J. 394, 408 (1989).

i. Where relief has been allowed, a defendant has been able to show that he or she was "idiosyncratic." Ibid.; see State v. E.R., 273 N.J. Super. 262, 274-75 (App. Div. 1994) (uncontradicted prognosis of imminent death within six months due to AIDS-related disease constitutes "idiosyncratic" situation).

ii. Mere invocation of the serious injustice exception does not suffice without a detailed explanation of its application to the facts and circumstances at hand. State v. Lebra, 357 N.J. Super. 500, 511 (App. Div. 2003).

iii. The fact that the defendant would find incarceration difficult or that imprisonment would result in hardship to his family is not enough to constitute a serious injustice to override the need for deterrence. State v. Jabbour, supra, 118 N.J. at 8; State v. Johnson, 118 N.J. 10, 17-19 (1990). This is true even if the defendant is a police officer who might face peculiar hardships within the prison system. State v. Corso, 355 N.J. Super. 518, 528-29 (App. Div.

2002), certif. denied, 175 N.J. 547 (2003).

iv. Nor is it enough that the defendant is a first-time offender, a family man, a breadwinner, or an esteemed member of the community. State v. Evers, supra, 175 N.J. at 400.

v. Disagreement with a jury verdict cannot justify a finding of "serious injustice" so as to overcome the presumption of incarceration. State v. Cooke, 345 N.J. Super. 480, 489-90 (App. Div. 2001), certif. denied, 171 N.J. 340 (2002).

3. Plea Bargains

When a defendant pleads guilty to a first or second degree crime, the presumption applies, notwithstanding a plea bargain that defendant be sentenced as if for a crime of a lesser degree. The applicability of the presumption is to be determined not by the sentence imposed but by the offense for which a defendant is convicted. State v. O'Connor, 105 N.J. 399, 404-05 (1987).

4. Suspended Sentences

A court may suspend the imposition of a sentence only after first determining that a noncustodial sentence is authorized and appropriate. This means that the first step for a sentencing court is to look at the presumption of incarceration found at N.J.S.A. 2C:44-1(d), not the authorized dispositions provision of N.J.S.A. 2C:43-2(b). State v. Rivera, 124 N.J. 122, 125-26 (1991).

5. Split Sentences

N.J.S.A. 2C:43-2(b)(2) allows for a sentence of probation which includes as a condition up to 364 days of imprisonment. Such a "split sentence" does not satisfy the presumption of imprisonment and is invalid where a defendant has committed a first or second degree offense; it may be imposed only when the presumption of imprisonment has been overcome. State v. O'Connor, supra, 105 N.J. at 410-11.

B. Presumption of Nonimprisonment

1. General Rules

a. When dealing with a person convicted of an offense other than a first or second degree crime, who has not previously been convicted of an offense, a court shall not impose a sentence of incarceration. N.J.S.A. 2C:44-1(e).

b. According to N.J.S.A. 2C:44-1(e), the presumption does not apply to anyone convicted of: the third degree crimes of theft of a motor vehicle, unlawful taking of a motor vehicle, or eluding; the third degree crime of distributing, manufacturing, or possessing an item containing personal identifying information, in violation of N.J.S.A. 2C:21-17.3(b); the third degree crime of using a false government document, in violation of N.J.S.A. 2C:21-2.1(e); third or fourth degree bias intimidation, in violation of N.J.S.A. 2C:16-1; the third degree crime of knowingly leaving the scene of an accident that results in the death of another person, in violation of N.J.S.A. 2C:11-5.1; or the fourth degree crime of knowingly leaving the scene of an accident that results in serious bodily injury to another person, in violation of N.J.S.A. 2C:12-1.1. Note: Different effective dates apply to these various exceptions.

c. The presumption does not apply to the third degree crime of pattern of official misconduct. N.J.S.A. 2C:30-7(b).

2. Overcoming the Presumption

a. The presumption can be overcome only by a conclusion that the defendant's imprisonment is "necessary for the protection of the public" under the criteria set forth in N.J.S.A. 2C:44-1(a), with regard given to "the nature and circumstances of the offense and the history, character and condition of the defendant." N.J.S.A. 2C:44-1(e).

b. The sentencing court must be persuaded by a standard that is higher than "clear and convincing" evidence that incarceration is necessary. State v. Gardner, 113 N.J. 510, 517-18 (1989). An element of the crime cannot be counted as an aggravating factor in determining whether the presumption has been overcome. Id. at 519. Also, general deterrence alone is insufficient to overcome the presumption. Id. at 520.

3. Prior Conviction

When examining a defendant's past record, an "offense" includes disorderly persons and petty disorderly persons offenses. State v. Battle, 256 N.J. Super. 268, 285 (App. Div.), certif. denied, 130 N.J. 393 (1992); State v. Kates, 185 N.J. Super. 226, 227-28 (Law Div. 1982). A prior uncounseled conviction for a nonindictable offense is not an offense. State v. Garcia, 186 N.J. Super. 386, 389 (Law Div. 1982).

a. A prior conviction of an offense is an adjudication by a court of competent jurisdiction that the defendant committed an offense. N.J.S.A. 2C:44-4(a).

b. For a crime, an adjudication is sufficient, even if sentence has been suspended, as long as the time for appeal has expired and the

defendant has not been pardoned on the ground of innocence. N.J.S.A. 2C:44-4(b).

4. Split Sentences

a. Probation that includes a term of imprisonment, as authorized by N.J.S.A. 2C:43-2(b)(2), may be imposed even when the presumption of nonimprisonment applies and has not been overcome, but a period of parole ineligibility may not accompany such a sentence. State v. Hartye, 105 N.J. 411, 418-19 (1987).

b. When the presumption of nonimprisonment is overcome, the court is bound to set the sentence within the statutory presumptive range. Id. at 417. Accord State v. Gardner, supra, 113 N.J. at 518.

C. Nonapplicability of either Presumption

1. There is a difference between a presumption that is overcome and one that is inapplicable. A second offender charged with a third degree crime is not subject to either presumption. State v. Powell, 218 N.J. Super. 444, 450 (App. Div. 1987). Accord State v. Devlin, 234 N.J. Super. 545, 555 (App. Div.), certif. denied, 117 N.J. 653 (1989).

2. A custodial sentence is not necessary where the presumption of nonimprisonment is merely inapplicable; rather, such a sentence is called for only where the presumption is overcome. State v. Powell, supra, 218 N.J. Super. at 451.

IV. EXTENDED TERMS

A. General Rules for Discretionary Extended Terms

1. Upon application of the prosecutor, the court may impose an extended term on persons convicted of crimes of the first, second or third degree if it finds one or more of the grounds specified in N.J.S.A. 2C:44-3(a), (b), (c), or (f). The court must conduct a special hearing on the grounds alleged to support an extended sentence. N.J.S.A. 2C:44-6(e).

2. A motion for the imposition of an extended term of imprisonment "shall" be filed with the court by the prosecuting attorney within fourteen days of entry of a guilty plea or the return of a verdict. A copy of the motion shall be served on the defendant and defendant's counsel. Where the defendant pleads guilty pursuant to a negotiated agreement, the motion shall be filed prior to the plea. R. 3:21-4(e). The time for filing the motion may be extended for "good cause shown." Ibid.; State v. Reldan, 231 N.J. Super. 232, 235 (App. Div. 1989).

B. Grounds For Imposing a Discretionary Extended Term

Under N.J.S.A. 2C:44-3, at least one of the following conditions must be met:

1. The defendant is a "persistent offender": must be at least twenty-one years old at the time of the offense; previously convicted on two separate occasions of two crimes while at least eighteen years old; either the latest crime or the defendant's release from confinement must have been within ten years of the crime being sentenced (N.J.S.A. 2C:44-3(a)); or

2. The defendant is a "professional criminal": engaged in continuing criminal activity with two or more people and circumstances show criminal activity is a major source of defendant's livelihood (N.J.S.A. 2C:44-3(b)); or

3. The crime was committed for payment (N.J.S.A. 2C:44-3(c)); or

4. The defendant has been convicted of manslaughter, aggravated assault, kidnapping, aggravated sexual assault, aggravated sexual contact, robbery, burglary, eluding a police officer, escape, or drug manufacture or distribution, and in the course of committing said offense used or was in possession of a stolen motor vehicle (N.J.S.A. 2C:44-3(f)).

C. Persistent Offenders--Prior Convictions

1. A prior conviction of an offense is defined as an adjudication by a court of competent jurisdiction. N.J.S.A. 2C:44-4(a).

2. For a prior crime, an adjudication is sufficient, even if the sentence has been suspended, as long as the time to appeal has expired and the defendant has not been pardoned. N.J.S.A. 2C:44-4(b).

3. A conviction in "another jurisdiction" constitutes a prior conviction of a crime if a prison sentence in excess of six months was authorized under the law of that jurisdiction. N.J.S.A. 2C:44-4(c). Absent a showing of fundamental unfairness, use of a prior conviction obtained in a foreign country is presumed appropriate where the jurisdiction is one that has a judicial system that affords protections similar to our own. State v. Williams, 309 N.J. Super. 117, 123 (App. Div.), certif. denied, 156 N.J. 383 (1998). One of the criteria for fundamental fairness is whether the defendant was represented by counsel. Id. at 124.

4. There is no Sixth Amendment violation in the sentencing court's consideration of facts about a defendant's prior convictions (such as the dates of conviction, age when the offenses were committed, and elements and degrees of offenses), in order to determine whether the defendant qualifies as a "persistent offender," because

such findings fall within the "prior conviction" exception of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 488, 120 S. Ct. 2348, 2361-62, 147 L. Ed. 2d 435, 454 (2000). State v. Pierce,___ N.J. ___, ___ (2006) (slip op. at 11).

5. To satisfy N.J.S.A. 2C:44-3(a) (defendant was "previously convicted"), the other offenses do not have to occur, and the judgments of conviction do not have to be entered, prior to the commission of the offense then before the court for sentencing. State v. Cook, 330 N.J. Super. 395, 421 (App. Div.), certif. denied, 165 N.J. 486 (2000); State v. Mangrella, 214 N.J. Super. 437, 445 (App. Div. 1986), certif. denied, 107 N.J. 127 (1987).

6. The sentencing judge may consider convictions entered after the defendant committed the crime for which he is being sentenced, even when there is an appeal pending or a right of direct appeal. If the defendant is successful in the appeal, then the extended term must be amended. State v. Cook, supra, 330 N.J. Super. at 422. But see State v. Mangrella, supra, 214 N.J. Super. at 445-46 (consideration should be restricted to those judgments not pending appeal or not subject to right of direct appeal).

7. Compare this approach to the methods used to calculate persistent offender status for other purposes.

   a. Sex Offenders: Under N.J.S.A. 2C:14-6, a second or subsequent sex offender is subject to mandatory parole ineligibility--unless given an extended sentence under N.J.S.A. 2C:43-7--if he has been convicted of a sexually oriented offense "at any time." This has been interpreted to mean that the "first" or "earlier" crime had to have resulted in a conviction by the time the later offense was committed. State v. Anderson, 186 N.J. Super. 174, 176 (App. Div. 1982), aff'd o.b., 93 N.J. 14 (1983).

See further discussion of sex offender sentencing at Section XVII.

b. Graves Act: The plain language of the Graves Act does not limit the chronological sequence of convictions subject to its extended term provisions; the only requirement is that there be a prior conviction. State v. Hawks, 114 N.J. 359, 365 (1989). Hence, conviction for the first crime does not have to precede the commission of the second crime for the Graves Act's mandatory extended term to be imposed. Id. at 367. See further discussion of Graves Act sentencing at Section VI.

c. Repeat Drug Offenders: The imposition of an extended term under N.J.S.A. 2C:43-6(f) for repeat drug offenders does not depend on the chronological sequence of the offenses or convictions. It is required only that the defendant be previously convicted "at any time." State v. Hill, 327 N.J. Super. 33, 41-42 (App. Div. 1999), certif. denied, 164 N.J. 188 (2000). However, the statute does not apply where a defendant enters guilty pleas to two different charges on the same day, in the same proceeding, and pursuant to one agreement. State v. Owens, 381 N.J. Super. 503, 512-13 (App. Div. 2005).

d. Domestic Violence Act: The enhanced penalty provisions of N.J.S.A. 2C:25-30 apply only to individuals who have been previously convicted of a domestic violence offense as of the date the subsequent offense was committed. Hence, these provisions do not apply to someone simultaneously convicted of offenses occurring on two separate occasions. State v. Bowser, 272 N.J. Super. 582, 588-89 (Law Div. 1993).

8. Under N.J.S.A. 2C:44-3(a), a defendant may not be sentenced as a persistent offender if his "latest in time" prior crime and his "last release from confinement" both occurred more than ten years before the crime for which he is being sentenced,

even if his latest prior conviction was entered within the ten-year period. State v. Henderson, 375 N.J. Super. 265, 266, 270 (Law Div. 2004).

D. Setting an Extended Term

1. N.J.S.A. 2C:43-7(a): In cases designated in N.J.S.A. 2C:44-3, a person who has been convicted of a crime may be sentenced to an extended term of imprisonment as follows:

   a. Murder: between thirty-five years and life, of which the defendant shall serve thirty-five years before parole eligibility. N.J.S.A. 2C:43-7(a)(6). Prior to October 31, 1994, there was no extended term for murder. State v. Scales, 231 N.J. Super. 336, 340 (App. Div.), certif. denied, 117 N.J. 123 (1989).

   b. Kidnapping under N.J.S.A. 2C:13-1(c)(2): between thirty years and life, of which the defendant shall serve thirty years before parole eligibility. N.J.S.A. 2C:43-7(a)(7).

   c. Aggravated manslaughter under N.J.S.A. 2C:11-4(c) and first degree kidnapping under N.J.S.A. 2C:13-1(c)(1): between thirty years and life. N.J.S.A. 2C:43-7(a)(1).

   d. Aggravated sexual assault pursuant to the extended term provisions of N.J.S.A. 2C:44-3(g): between thirty years and life. N.J.S.A. 2C:43-7(a)(1).

   e. First degree crimes, other than those listed above: between twenty years and life. N.J.S.A. 2C:43-7(a)(2).

   f. Second degree crimes: between ten and twenty years. N.J.S.A. 2C:43-7(a)(3).

   g. Third degree crimes: between five and ten years. N.J.S.A. 2C:43-7(a)(4).

   h. Fourth degree crimes: N.J.S.A. 2C:43-7(a)(5)

i. Pursuant to N.J.S.A. 2C:43-6(c), N.J.S.A. 2C:43-6(g), and N.J.S.A. 2C:44-3(d): five years;

ii. Pursuant to any other provision of law: between three and five years.

2. As part of an extended term, the court "may" fix a minimum term of parole ineligibility not to exceed one-half of the overall term or, in the case of life imprisonment, twenty-five years. N.J.S.A. 2C:43-7(b). The decision to impose a parole ineligibility term is thus discretionary. However, once the court decides to impose a parole ineligibility term on a life sentence, the minimum term must be twenty-five years. State v. Pennington, 154 N.J. 344, 360 (1998). Extended Graves Act sentences, extended sentences for repeat drug offenders, and extended sentences for those using machine guns or assault firearms carry mandatory periods of parole ineligibility. N.J.S.A. 2C:43-7(c), (d).

3. Presumptive terms applicable to extended sentences are set forth in N.J.S.A. 2C:44-1(f)(1) as follows:

NOTE: In State v. Natale II, 184 N.J. 458, 487 (2005), the Court held that the Code's system of presumptive term sentencing violates the Sixth Amendment right to trial by jury. The holding was given pipeline retroactivity. Id. at 494. See further discussion at Section I(F). This holding also applies to presumptive term sentencing with respect to mandatory extended terms pursuant to N.J.S.A. 2C:43-6(f), State v. Nesbitt, 185 N.J. 504, 519 (2006), and N.J.S.A. 2C:43-7. State v. Young, 379 N.J. Super. 498, 514-15 (App. Div. 2005).

a. Aggravated manslaughter under N.J.S.A. 2C:11-4(c), first degree kidnapping under N.J.S.A. 2C:13-1(c)(1), and aggravated sexual assault pursuant to the extended term provisions of N.J.S.A. 2C:44-3(g): life imprisonment;

b. First degree crimes, other than murder and those listed above: fifty years;

c. Second degree crimes: fifteen years;

d. Third degree crimes: seven years.

4. Application of the Code's extended term scheme involves a four-step process. First, the sentencing court must determine if the minimum statutory predicates have been met. Second, it must decide whether to impose an extended term. Third, it must weigh the aggravating and mitigating circumstances to determine the base term of the extended sentence. Fourth, it must determine whether to impose a period of parole ineligibility. State v. Dunbar, 108 N.J. 80, 89 (1987).

a. With respect to the second step, it had previously been held that a court must determine whether an extended sentence was necessary for the "protection of the public." State v. Pierce, supra, ___ N.J. at ___ (slip op. at 13-14).

i. However, such a judicial finding does not fit within the prior conviction exception of Blakely v. Washington, supra, 543 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, because it involves assessments and evaluations that go beyond the objective facts of a defendant's criminal record. State v. Pierce, supra, ___ N.J. at ___ (slip op. at 17-18).

ii. Hence, to accord with Sixth Amendment jurisprudence, the finding of a "need to protect the public" is not a precondition to a defendant's eligibility for sentencing up to the top of the discretionary extended term range. Id. at ___ (slip op. at 21-22).

iii. Instead, once the court finds that the statutory eligibility requirements for an extended term sentence are met, the range of sentences "starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range." Id. at ___ (slip op. at 20).

b. The choice of a sentence within that range rests within the court's "sound judgment," based on its finding, weighing, and balancing of aggravating and mitigating factors. Id. at ___ (slip op. at 21). The consideration of protection of the public is part of that weighing process. Id. at ___ (slip op. at 22). The appellate court will review the sentencing court's explanation for its decision under the standard of abuse of discretion. Id. at ___ (slip op. at 21).

c. In determining whether to impose a period of parole ineligibility on an extended term, the court must be "clearly convinced that the aggravating factors substantially outweigh the mitigating factors." State v. Dunbar, supra, 108 N.J. at 92-93.

5. A court is not precluded from considering prior convictions already taken into account previously by another court when imposing a previous extended term. State v. Reldan, supra, 231 N.J. Super. at 237-38.

E. Multiple Offenses

1. When sentencing a defendant for more than one offense, only one extended term may be imposed. N.J.S.A. 2C:44-5(a)(2); State v. Pennington, supra, 154 N.J. at 360-61; State v. Vassos, 237 N.J. Super. 585, 588 (App. Div. 1990). This is so even if the terms are to be served concurrently. State v. Mays, 321 N.J. Super. 619, 636 (App. Div.), certif. denied, 162 N.J. 132 (1999); State v. Latimore, 197 N.J. Super. 197, 223 (App. Div. 1984), certif. denied, 101 N.J. 328 (1985).

2. This limitation does not apply to mandatory extended terms under the Graves Act (N.J.S.A. 2C:43-6(c)), State v. Connell, 208 N.J. Super. 688, 691-92 (App. Div. 1986), or under the Comprehensive Drug Reform Act (N.J.S.A. 2C:43-6(f)). State v. Singleton, 326 N.J. Super. 351, 355 (App. Div. 1999).

3. This limitation does not apply where extended terms are imposed by different courts for different offenses. It speaks only to situations where multiple sentences are imposed at the same time for more than one offense. State v. Williams, 299 N.J. Super. 264, 272-73 (App. Div. 1997); State v. Reldan, supra, 231 N.J. Super. at 238.

F. Graves Act Extended Terms

1. N.J.S.A. 2C:43-6(c) provides that when a person who has previously been convicted of a crime involving the use or possession of a firearm as defined in N.J.S.A. 2C:44-3(d) commits another Graves Act offense, the court "shall" sentence him or her to an extended term as authorized by N.J.S.A. 2C:43-7(c), even though such extended terms are ordinarily discretionary. Application by the prosecutor is not required. N.J.S.A. 2C:44-3. See further discussion of Graves Act sentencing at Section VI.

2. N.J.S.A. 2C:43-7(c) provides that such an extended term shall be set in accordance with N.J.S.A. 2C:43-7(a), except that it "shall" include a minimum term of parole ineligibility fixed at or between one-third and one-half of the sentence, or five years, whichever is greater. When a sentence of life imprisonment is imposed upon a subsequent Graves Act offender, the judge "must" impose a period of parole ineligibility of twenty-five years. State v. Swint, 328 N.J. Super. 236, 262 (App. Div.), certif. denied, 165 N.J. 492 (2000).

3. Three of the four guidelines enunciated in Dunbar (the first, second and fourth), are not germane

to mandatory extended term sentencing under the Graves Act. State v. Jefimowicz, 119 N.J. 152, 162 (1990). Only the requirement that the aggravating and mitigating factors be weighed to determine an appropriate "base term" and to fix the period of parole ineligibility is relevant to a Graves Act extended sentence. Id. at 162-63. Sentencing courts must be flexible in determining the duration of parole ineligibility even where a mandatory extended term is involved. Id. at 163.

G. Assault Firearms Provision

1. According to N.J.S.A. 2C:43-6(g), where a defendant who has previously been convicted of a crime involving the use or possession of any firearm as defined in N.J.S.A. 2C:44-3(d) commits another offense with a machine gun or assault firearm, he or she "shall" be sentenced to an extended term as authorized by N.J.S.A. 2C:43-7(d), even though such extended terms are ordinarily discretionary. Application by the prosecutor is not required. N.J.S.A. 2C:44-3.

2. According to N.J.S.A. 2C:43-7(d), such an extended sentence shall be set in accordance with N.J.S.A. 2C:43-7(a), except that it "shall" include a minimum term of parole ineligibility, which is specified in the statute according to the degree or nature of the crime.

H. Drug Offenses

1. See N.J.S.A. 2C:43-6(f) and N.J.S.A. 2C:43-7(c) for extended term provisions for drug offenders sentenced under the Comprehensive Drug Reform Act; see also N.J.S.A. 2C:35-8 (enhanced sentencing for distribution to persons under age eighteen or to pregnant females); N.J.S.A. 2C:35-12 (waiver of extended terms pursuant to plea agreement).

2. In order to be constitutional, N.J.S.A. 2C:43-6(f) must be construed to require that guidelines be adopted by the Attorney General in consultation with the county prosecutors to assist prosecutorial decision-making with respect

to enhanced sentence applications. State v. Lagares, 127 N.J. 20, 32 (1992). Such guidelines should reflect the legislative intent that extended sentences for repeat drug offenders are the norm, rather than the exception. Ibid.

3. Prosecutors must state on the record their reasons for seeking an extended sentence under N.J.S.A. 2C:43-6(f), and an extended term may be denied or vacated by a court where a defendant clearly and convincingly establishes that the prosecutor's decision was arbitrary and capricious. Id. at 32-33.

4. As construed, N.J.S.A. 2C:43-6(f) does not otherwise violate a defendant's due process or equal protection rights. Id. at 33-35.

5. For a discussion of the statewide guidelines issued by the Attorney General in response to Lagares, see State v. Kirk, 145 N.J. 159, 168-69 (1996). Those guidelines cured the constitutional infirmity found to exist by the Lagares Court. Id. at 173-74.

   a. For the guidelines effective May 20, 1998, see Attorney General Directive 1998-1, incorporating by reference Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12. They are found at www.state.nj.us/lps/dcj (click on "Attorney General Guidelines," then "AG Directives").

   b. Effective for offenses committed on or after September 15, 2004, the Attorney General promulgated revised guidelines. They are found at www.state.nj.us/lps/dcj (click on "Attorney General Guidelines," then "Go to Guidelines Listing Page," then "Brimage Guidelines 2").

6. N.J.S.A. 2C:43-6(f) does not authorize the prosecutor to fix the terms of the mandatory enhanced sentence. Once the prosecutor refuses to waive the mandatory extended sentence, the role of the prosecutor is limited to making a recommendation regarding the base term and the

parole disqualifier. State v. Kirk, supra, 145 N.J. at 177.

7. Because the enhanced sentencing provision of the Comprehensive Drug Reform Act is deterrence-oriented, the plain language of the extended term provision for repeat drug offenders, N.J.S.A. 2C:43-6(f), should be construed to apply irrespective of the chronological sequence of the offenses and convictions. State v. Hill, supra, 327 N.J. Super. at 41-42.

8. The finding that a defendant meets the requirement for a mandatory extended term as a repeat drug offender falls within the "prior conviction" exception of Blakely v. Washington, supra, 543 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, because the court's sole determination is to confirm that the defendant has the predicate prior convictions to qualify for enhanced sentencing. State v. Thomas, ___ N.J. ___, ___ (2006) (slip op. at 21-22).

9. See further discussion of Comprehensive Drug Reform Act sentencing at Section XVI.

I. Bias Crimes

1. Following the decision in Apprendi v. New Jersey, supra, 530 U.S. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455, which held that the extended term sentencing scheme of N.J.S.A. 2C:44-3(e) was unconstitutional, the Legislature deleted that provision and replaced it with N.J.S.A. 2C:16-1, which establishes the separate crime of bias intimidation. L. 2001, c. 443, § 1 (effective January 11, 2002).

2. A similar penalty-enhancement provision of the harassment statute, N.J.S.A. 2C:33-4(d), was also deleted. L. 2001, c. 443, § 3 (effective January 11, 2002).

J. Sex Offenders

1. A person who is convicted of a crime under N.J.S.A. 2C:14-2 or N.J.S.A. 2C:14-3 shall, upon

application of the prosecutor, be sentenced to an extended term of imprisonment if the crime involved violence or the threat of violence and the victim was sixteen years of age or less. N.J.S.A. 2C:44-3(g).

a. Such a crime is deemed to involve violence or the threat of violence if the victim sustains serious bodily injury, or if the defendant is armed with and uses a deadly weapon, threatens to use a deadly weapon, or threatens to inflict serious bodily injury. N.J.S.A. 2C:44-3(g).

b. A person convicted of aggravated sexual assault who is eligible for an extended term pursuant to N.J.S.A. 2C:44-3(g) shall be sentenced to a term between thirty years and life imprisonment. N.J.S.A. 2C:43-7(a)(1).

2. In cases where a defendant is convicted of certain enumerated sex offenses, the sentence shall also include a special sentence of "community supervision for life." N.J.S.A. 2C:43-6.4(a). Defendants serving such a special sentence who commit certain enumerated crimes while under supervision "shall" be sentenced to an extended term of imprisonment pursuant to N.J.S.A. 2C:43-7. N.J.S.A. 2C:43-6.4(e).

a. Effective January 14, 2004, the Legislature eliminated the requirement that the ground for such an extended sentence be established at a separate hearing. N.J.S.A. 2C:43-6.4(e)(2) (deleted by L. 2003, c. 267, § 1).

b. Prior to January 14, 2004, N.J.S.A. 2C:43-7(a)(5), which sets the extended terms for fourth degree crimes, failed to establish any specific parameters for fourth degree extended terms under N.J.S.A. 2C:43-6.4(e). State v. Olsvary, 357 N.J. Super. 206, 208-09 (App. Div.), certif. denied, 177 N.J. 222 (2003). This was corrected by L. 2003, c. 267, § 4. The current provision sets the extended term for

such crimes at between three and five years. N.J.S.A. 2C:43-7(a)(5) (as amended effective January 14, 2004).

K. Criminal Street Gang Activity

1. Effective July 8, 1999, if a crime was committed while the defendant was "knowingly involved in criminal street gang related activity" (i.e., for the benefit of, at the direction of, or in association with a criminal street gang), the court "shall," upon application of the prosecuting attorney, sentence the defendant to an extended term of imprisonment. N.J.S.A. 2C:44-3(h).

2. The ground for the extended term must be established by a preponderance of the evidence established at a hearing. In making its finding, the court shall take judicial notice of any evidence adduced at the trial or plea hearing and shall consider the presentence report and any other relevant information. N.J.S.A. 2C:44-3(h).

L. Persistent Violent Offenders ("Persistent Offenders Accountability Act" or "Three Strikes and You're In" Law)

1. A person convicted of certain enumerated first degree crimes, or their substantial equivalent under any similar statute, "who has been convicted of two or more crimes that were committed on prior and separate occasions, regardless of the dates of the convictions, . . . shall be sentenced to a term of life imprisonment . . . with no eligibility for parole." N.J.S.A. 2C:43-7.1(a) (as amended effective April 23, 2003). Although this statute refers only to N.J.S.A. 2C:15-1 as one of the enumerated crimes, without distinguishing between first or second degree robbery, it applies only to robberies in the first degree. State v. Jordan, 378 N.J. Super. 254, 258-61 (App. Div. 2005).

2. A person convicted of certain second or third degree crimes, or a certain combination of certain first, second, or third degree crimes,

and who committed any of those crimes on two or more prior and separate occasions, regardless of the dates of the convictions, "shall" be sentenced to an extended term of imprisonment pursuant to N.J.S.A. 2C:43-7. N.J.S.A. 2C:43-7.1(b) (as amended effective April 23, 2003).

3. These provisions apply only if the prior convictions are for crimes committed on separate occasions and only if the crime for which the defendant is being sentenced was committed either within ten years of the defendant's last release from confinement for commission of any crime, or within ten years of the commission of the most recent crime for which the defendant has a prior conviction. N.J.S.A. 2C:43-7.1(c).

4. The amendment effective April 23, 2003, was intended to clarify the prior language of the statute, which was construed to mean that multiple convictions entered simultaneously constitute only one strike and that, to be separate, each conviction must be entered by a court in a separate court session on different days. State v. Livingston, 172 N.J. 209, 218-23 (2002).

5. The law should not be construed to apply only to those who have been convicted and punished for the first two strike offenses before committing the third strike offense. State v. Galiano, 349 N.J. Super. 157, 164-65 (App. Div. 2002), certif. denied, 178 N.J. 375 (2003). Hence, "[i]f two qualifying convictions precede the sentencing of the third offense and that offense was committed either within ten years of defendant's most recent release from confinement for commission of any crime or within ten years of the commission of the most recent of the crimes for which defendant has a prior conviction, then defendant is eligible for the enhanced punishment of N.J.S.A. 2C:43-7.1a, even though the present sentence is for an offense committed prior to the entry of the pre qualifying convictions." Id. at 168.

6. Sentence shall not be imposed pursuant to these provisions unless the ground for such sentence has been established at a hearing at which the defendant has the right to hear and controvert the evidence against him and to offer evidence in his own behalf. N.J.S.A. 2C:43-7.1(d).

7. A defendant who is at least seventy years old and who has served at least thirty-five years in prison pursuant to these provisions shall be released on parole if the Parole Board determines he is not a danger to the community. N.J.S.A. 2C:43-7.1(e).

8. The "Three Strikes and You're In" Law does not violate the double jeopardy, ex post facto, due process, or equal protection clauses of the federal or state constitutions, does not violate the separation of powers doctrine, and does not constitute cruel and unusual punishment. State v. Oliver, 162 N.J. 580, 585-89 (2000).

9. The standard of proving a defendant's prior conviction under the statute is proof by a preponderance of the evidence. Id. at 590-92.

10. In the case of prior convictions of pre-Code offenses, the statute requires that the crimes be "substantially equivalent" to the enumerated Code offenses. Id. at 592-95.

11. The same "substantially equivalent" requirement of N.J.S.A. 2C:43-7.1(a) is imposed where the prior crime occurred in another jurisdiction. State v. Rhodes, 329 N.J. Super. 536, 544 (App. Div.), certif. denied, 165 N.J. 487 (2000). Also, it is not enough that the defendant was charged with such an offense in the other jurisdiction; the only relevant inquiry is whether he or she was actually "convicted" of that offense. Ibid.

12. Notice to impose sentence pursuant to this act must be filed with the court and served upon the defendant by the prosecutor within fourteen days of entry of the defendant's guilty plea or return of the verdict. R. 3:21-4(f).

M. Crimes Committed While Released on Bail (effective January 19, 1998)

1. A person convicted of certain enumerated crimes shall be sentenced to an extended term of imprisonment pursuant to N.J.S.A. 2C:43-7 if, at the time of the crime, the defendant was released on bail or on his or her own recognizance for one of the enumerated offenses and was convicted of that offense. N.J.S.A. 2C:44-5.1.

2. Sentence shall not be imposed pursuant to this provision unless the ground therefor has been established at a hearing at which the defendant has the right to hear and controvert the evidence and to offer evidence in his or her own behalf. N.J.S.A. 2C:44-5.1(b).

3. Notice to impose sentence pursuant to this statute must be filed with the court and served upon the defendant by the prosecutor within fourteen days of entry of the defendant's guilty plea or return of the verdict. R. 3:21-4(f).

V. PAROLE INELIGIBILITY

A. General Rules

1. For any sentence, the court may set a minimum period during which the defendant is not eligible for parole. The court must be "clearly convinced" that the aggravating factors set forth in N.J.S.A. 2C:44-1(a) "substantially outweigh" the mitigating factors in N.J.S.A. 2C:44-1(b). The term may not be more than one-half of the overall term set. N.J.S.A. 2C:43-6(b).

2. Periods of parole ineligibility are not to be treated as routine or commonplace. They are the exception, not the rule. State v. Martelli, 201 N.J. Super. 378, 382-83 (App. Div. 1985).

3. The court should state its reasons for parole ineligibility and describe the factors it considered and how it weighed them. State v. Bessix, 309 N.J. Super. 126, 130 (App. Div. 1998); State v. Watson, 224 N.J. Super. 354, 363 (App. Div.), certif. denied, 111 N.J. 620, cert. denied, 488 U.S. 983, 109 S. Ct. 535, 102 L. Ed. 2d 566 (1988); State v. Martelli, supra, 201 N.J. Super. at 385. However, the concern is that judges follow the statutory guidelines, not that they "ritualistically recite" a statutory formula. State v. McBride, 211 N.J. Super. 699, 705 (App. Div. 1986). Hence, where a court properly finds no mitigating factors and a number of aggravating factors, a parole ineligibility period may be sustained because it would be clear that the aggravating factors substantially predominated. Ibid.; accord State v. Morris, 242 N.J. Super. 532, 546 (App. Div.), certif. denied, 122 N.J. 408, 127 N.J. 321 (1990).

4. Where an element of the crime is a specific fact, that element may not be used as an aggravating factor to impose a period of parole ineligibility. State v. Link, 197 N.J. Super. 615, 620 (App. Div. 1984), certif. denied, 101 N.J. 234 (1985).

5. The imposition of a parole ineligibility term pursuant to N.J.S.A. 2C:43-6(b) does not violate the constitutional right to a jury trial because, for Sixth Amendment purposes, facts used to extend a sentence beyond the statutory maximum are deemed different from those used to set the minimum sentence. State v. Abdullah, 184 N.J. 497, 508-12 (2005).

6. There is no parole ineligibility on the custodial aspect of a probationary term. State v. Hartye, 105 N.J. 411, 419 (1987).

7. A defendant serving a statutorily mandated period of parole ineligibility or a period of parole ineligibility pursuant to N.J.S.A. 2C:43-6(b) is not eligible for entry into an ISP program. N.J.S.A. 2C:43-11(a)(3); State v. McPhall, 270 N.J. Super. 454, 457 (App. Div.), certif. denied, 137 N.J. 309 (1994).

8. Commutation and work credits do not reduce a statutorily or judicially imposed mandatory minimum period of parole ineligibility. Curry v. New Jersey State Parole Bd., 309 N.J. Super. 66, 70 (App. Div. 1998); Merola v. Department of Corrs., 285 N.J. Super. 501, 509 (App. Div. 1995), certif. denied, 143 N.J. 519 (1996).

9. The mechanical function of aggregating sentences (aggregating the primary parole eligibility terms calculated for each term of imprisonment to which a defendant is sentenced) is done by the Parole Board, not the sentencing court. Curry v. Parole Bd., supra, 309 N.J. Super. at 71.

B. Relation to Base Term

1. Although parole ineligibility terms are ordinarily imposed when terms greater than the presumptive are deemed appropriate, increasing the presumptive term is not a prerequisite for imposing parole ineligibility. State v. Kruse, 105 N.J. 354, 362 (1987). Nevertheless, the need for uniformity in sentencing and the heightened standard for parole ineligibility suggest that it

will be imposed rarely when the court has imposed only the presumptive sentence. Ibid.; State v. Modell, 260 N.J. Super. 227, 254-55 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993); State v. Bogus, 223 N.J. Super. 409, 433 (App. Div.), certif. denied, 111 N.J. 567 (1988). But see State v. Natale II, 184 N.J. 458, 484 (2005) (holding that Code's system of presumptive term sentencing violates Sixth Amendment right to trial by jury).

2. Although the same aggravating and mitigating factors are used to determine the appropriate sentence and the propriety of a period of parole ineligibility, the standard for balancing those factors is different. State v. Ghertler, 114 N.J. 383, 389 (1989). In determining an appropriate sentence, the court decides whether there is a "preponderance" of aggravating or mitigating factors. In determining parole ineligibility, however, the court must be "clearly convinced" that the aggravating factors "substantially outweigh" the mitigating factors. Ibid.; State v. Kruse, supra, 105 N.J. at 359.

3. The specific length of a parole ineligibility term must ordinarily be consistent with the length of the base term imposed and with the court's evaluation of the relevant aggravating and mitigating factors. State v. Towey, 114 N.J. 69, 81 (1989); State v. Biancamano, 284 N.J. Super. 654, 664-65 (App. Div. 1995), certif. denied, 143 N.J. 516 (1996). A high degree of correlation between the lengths of the base term and the minimum term is anticipated. State v. Towey, supra, 114 N.J. at 81; State v. Kruse, supra, 105 N.J. at 362. This correlation is also expected of mandatory sentences imposed on drug offenders. State v. Kirk, 145 N.J. 159, 177-78 (1996).

C. No Early Release Act (NERA) **(Prior to June 29, 2001)**

Note: Effective June 29, 2001, NERA was substantially amended. See Section D, below, for a discussion of the legislative scheme currently in effect. Because of the legislative changes, the substantial body of case law that developed following the original 1997 enactment of NERA has largely been rendered moot. See Pressler, Current N.J. Court Rules, comment 1.3.5 on R. 3:21-4 at 890 (2006).

1. Prior to its 2001 revision, N.J.S.A. 2C:43-7.2(a) provided that a court, imposing a sentence of incarceration for a crime of the first or second degree, shall fix a minimum term of 85% of the sentence during which the defendant shall not be eligible for parole if the crime is "violent" as defined in the statute.

2. A violent crime was defined as any crime in which the actor caused death, caused serious bodily injury, or used or threatened the immediate use of a deadly weapon. N.J.S.A. 2C:43-7.2(d). It also included any aggravated sexual assault or sexual assault in which the actor used, or threatened the immediate use of, physical force. N.J.S.A. 2C:43-7.2(d).

   a. Courts interpreted the "caused death" requirement of pre-amendment N.J.S.A. 2C:43-7.2(d) as follows:

      i. Pre-amendment NERA's provisions applied to vehicular homicide that was committed by causing death through the reckless operation of a vehicle. State v. Jarrells, 181 N.J. 538, 5540 (2004); State v. Wade, 169 N.J. 302, 303 (2001); State v. Ferencsik, 326 N.J. Super. 228, 231 (App. Div. 1999).

      ii. Pre-amendment NERA applied to reckless manslaughter because that crime involved conduct that produced the victim's death. State v. Newman, 325 N.J. Super. 556, 561 (App. Div. 1999), certif. denied, 163 N.J. 396 (2000).

iii. Pre-amendment NERA applied to a drug-induced death pursuant to the strict liability provisions of N.J.S.A. 2C:35-9. State v. Cullum, 338 N.J. Super. 458, 463-64 (App. Div.), certif. denied, 169 N.J. 607 (2001).

iv. Pre-amendment NERA did not apply to murder. State v. Manzie, 335 N.J. Super. 267, 275-76 (App. Div. 2000), aff'd, 168 N.J. 113 (2001); State v. Chavies, 345 N.J. Super. 254, 277 (App. Div. 2001).

b. Courts interpreted the "caused serious bodily injury" requirement of pre-amendment N.J.S.A. 2C:43-7.2(d) as follows:

i. An attempt to cause death or serious bodily injury, without causing either, would not meet the statutory definition of violent crime and was insufficient to subject a defendant to a pre-amendment NERA sentence. State v. Kane, 335 N.J. Super. 391, 398 (App. Div. 2000); State v. Staten, 327 N.J. Super. 349, 354 (App. Div.), certif. denied, 164 N.J. 561 (2000).

ii. Pre-amendment NERA included only serious bodily injury, not severe personal injury. State v. Mosley, 335 N.J. Super. 144, 153 (App. Div. 2000), certif. denied, 167 N.J. 633 (2001).

iii. Pre-amendment NERA applied to endangering the welfare of a child, even though that crime is not listed as one of the predicate crimes in the new statute. State v. Messino, 378 N.J. Super. 559, 587 (App. Div.), certif. denied, 185 N.J. 297 (2005).

c. Courts interpreted the requirement of "used or threatened the immediate use of a deadly weapon" of pre-amendment N.J.S.A. 2C:43-7.2(d) as follows:

i. Pure possession of a weapon, without using it or brandishing it against a victim, did not meet the pre-amendment definition of violent crime. State v. Natale, 348 N.J. Super. 625, 631 (App. Div. 2002), aff'd, 178 N.J. 51, 53 (2003).

ii. Second degree possession of a weapon for an unlawful purpose supported a pre-amendment NERA sentence where a defendant admitted the weapon was used to scare, frighten, and threaten the victim. State v. Parolin, 171 N.J. 223, 233 (2002).

iii. Accidental or reckless use of an otherwise innocent item, such as an automobile, had to be separated from its deliberate use as a weapon. State v. Burford, 321 N.J. Super. 360, 365 (App. Div. 1999), aff'd, 163 N.J. 16, 18-19 (2000). Pre-amendment NERA thus applied to second degree eluding a police officer where the deadly weapon, an automobile, was used as a "battering ram" against the officer. State v. Griffith, 336 N.J. Super. 514, 518-19 (App. Div. 2001).

iv. If a qualifying crime involved the use or threat of immediate use of any "firearm," pre-amendment NERA applied because a firearm was a "deadly weapon." This included BB guns and pellet guns. State v. Meyer, 327 N.J. Super. 50, 55-57 (App. Div.), certif. denied, 164 N.J. 191 (2000).

v. Pre-amendment NERA also included operable but unloaded handguns. State v. Jules, 345 N.J. Super. 185, 188 (App. Div. 2001), certif. denied, 171 N.J. 337 (2002).

vi. Pre-amendment NERA did not include inoperable guns. State v. Perez, 348 N.J. Super. 322, 325 (App. Div.), certif. denied, 174 N.J. 192 (2002); State v. Austin, 335 N.J. Super. 486, 489 (App. Div. 2000), certif. denied, 168 N.J. 294 (2001).

vii. Pre-amendment NERA included stun guns only if the State showed that, in the manner they were used or intended to be used, they were known to be capable of producing death or serious bodily injury. State v. Wood, 361 N.J. Super. 427, 430 (App. Div. 2003).

viii. Pre-amendment NERA did not incorporate the firearm definitions of Chapter 39 of Title 2C. State v. Austin, supra, 335 N.J. Super. at 491.

ix. The term "deadly weapon" under pre-amendment NERA was not as broadly defined as under other statutes. For example, it included only actual weapons, not objects reasonably believed to be weapons. State v. McLean, 344 N.J. Super. 61, 72-73 (App. Div. 2001), certif. denied, 172 N.J. 179 (2002); State v. Austin, supra, 335 N.J. Super. at 492; State v. Mosley, supra, 335 N.J. Super. at 153. It was the intent and conduct of the defendant in using the weapon that controlled, not the belief, reasonable or not, of the victim. State v. Grawe, 327 N.J. Super. 579, 593-94 (App. Div.), certif. denied, 164 N.J. 560 (2000).

d. With reference to the "physical force" requirement of pre-amendment N.J.S.A. 2C:43-7.2(d), not all first or second degree sexual assaults were covered. State v. Thomas, 166 N.J. 560, 571-72 (2001). Where the elements of a sexual offense did not contain as an element of proof any NERA

factor, there had to be proof of an independent act of force or violence or a separate threat of immediate physical force to satisfy pre-amendment NERA. Id. at 573-74.

3. To survive constitutional challenge, the factual predicate for a pre-amendment NERA sentence had to be submitted to the jury and found beyond a reasonable doubt. State v. Johnson, 166 N.J. 523, 544 (2001).

   a. Where the verdict necessarily included the factual predicate, no separate finding was required. State v. Johnson, 376 N.J. Super. 163, 269 (App. Div.), certif. denied, 183 N.J. 592 (2005). Even when the elements of the crime on which the jury returned a verdict did not "overlap completely" with the applicable pre-amendment NERA predicate, that predicate could still be determined to have formed a basis for the conviction. State v. Johnson, supra, 166 N.J. at 545-46; State v. Natale, supra, 348 N.J. Super. at 629, aff'd, 178 N.J. at 53.

   b. However, a pre-amendment NERA sentence could not be predicated on an element of a crime for which the defendant had not been convicted. State v. Mosley, supra, 335 N.J. Super. at 146-47. Where it was not clear that the jury found beyond a reasonable doubt the necessary NERA predicate, there had to be a remand for a jury trial on that issue. State v. Natale,, supra, 348 N.J. Super. at 635-36, aff'd, 178 N.J. at 53.

   c. See R. 3:19-1(b) (requiring special verdict sheet where jury must find factual predicate for enhanced sentence or existence of fact relevant to sentence, "unless that factual predicate or fact is an element of the offense").

4. Where a conviction was based on a guilty plea and at least one NERA factor was admitted in defendant's factual statements at the plea

hearing, the pre-amendment NERA statute applied. State v. Parolin, supra, 171 N.J. at 232.

a. In pleading guilty, a defendant could knowingly and voluntarily waive the right to have a jury determine a pre-amendment NERA sentencing enhancement factor. State v. Shoats, supra, 339 N.J. Super. at 370.

b. Nothing prohibited a defendant who had been indicted for a pre-amendment NERA-eligible offense from pleading guilty to a lesser offense but acknowledging the existence of a NERA predicate fact. State v. Reardon, 337 N.J. Super. 324, 326-27 (App. Div. 2001).

c. A guilty plea sufficed for pre-amendment NERA purposes when the elements of the offense provided the NERA factors, or when the defendant's factual basis satisfied NERA. State v. Hernandez, 338 N.J. Super. 317, 322-23 (App. Div. 2001); State v. Meyer, supra, 327 N.J. Super. at 55.

5. A pre-amendment NERA ineligibility term could not be imposed on an extended term sentence, but imposition of an extended term for a first or second degree violent crime had to embody a parole ineligibility term at least equal to the NERA sentence applicable to the maximum ordinary term for the degree of crime involved. State v. Meekins, 180 N.J. 321, 328 (2004); State v. Andino, 345 N.J. Super. 35, 38-39 (App. Div. 2001); State v. Allen, 337 N.J. Super. 259, 273-74 (App. Div. 2001), certif. denied, 171 N.J. 43 (2002).

D. NERA **(L.2001, c. 129, § 1, effective June 29, 2001)**

1. The reference to violent crime was eliminated from N.J.S.A. 2C:43-7.2(a). NERA now applies to those first or second degree crimes specifically enumerated in N.J.S.A. 2C:43-7.2(d), including murder, and to attempts or conspiracies to commit these crimes. N.J.S.A. 2C:43-7.2(d).

2. The amendment applies prospectively only. State v. Parolin, supra, 171 N.J. at 233. That is, a court should apply the NERA provisions in effect on the date of the crime. State v. Johnson, supra, 376 N.J. Super. at 168.

3. The minimum term imposed pursuant to this statute shall be included whether the sentence is imposed as an ordinary term of imprisonment, an extended term of imprisonment, or a term of imprisonment for murder. N.J.S.A. 2C:43-7.2(b). For the purpose of calculating the minimum term, a sentence of life imprisonment shall be deemed to be seventy-five years. N.J.S.A. 2C:43-7.2(b).

4. The provision requiring written notice to a defendant, N.J.S.A. 2C:43-7.2(e), was deleted from the statute. However, according to R. 3:21-4(f), as relaxed and supplemented by Supreme Court Order effective June 19, 2001, notice to impose a NERA sentence must be filed with the court and served on the defendant either with the plea offer or at the arraignment/status conference, whichever is earlier, but the court may extend the time for good cause shown.

E. General Principles Applicable to NERA Sentences

1. In imposing a minimum term pursuant to this statute, a court must also impose an additional term of parole supervision which shall commence upon the completion of the sentence of incarceration. N.J.S.A. 2C:43-7.2(c).

   a. During the term of parole supervision, the defendant remains in the legal custody of the Department of Corrections and is supervised by the Bureau of Parole, subject to the provisions of N.J.S.A. 30:4-123.51b. N.J.S.A. 2C:43-7.2(c).

   b. If the defendant violates parole conditions, he or she can be re-incarcerated for the balance of the parole term. N.J.S.A. 30:4-123.51b(a).

c. Under NERA's mandatory period of parole supervision, the fixed period of a defendant's supervision may extend beyond the term of the original sentence, and violation of that supervision could subject the defendant to additional incarceration that could make the aggregate custodial sentence far exceed the original sentence imposed. State v. Johnson, 182 N.J. 232, 240 (2005).

d. A defendant must be informed of the consequences of being subject to this extended parole supervision when pleading guilty to a NERA offense. Id. at 241.

2. The statute applies to those convicted as accomplices. That is, an accomplice of a person committing a qualifying offense is subject to NERA. State v. Rumblin, 166 N.J. 550, 553 (2001); State v. Cheung, 328 N.J. Super. 368, 371 (App. Div. 2000). With respect to pre-amendment NERA, to be sentenced as an accomplice under NERA for armed robbery, a defendant had to share with the principal the same mental state with regard to use or threatened immediate use of a deadly weapon. State v. Walton, 368 N.J. Super. 298, 310 (App. Div. 2004).

3. Although an offense may be downgraded to the second degree for sentencing under N.J.S.A. 2C:44-1(f)(2), the defendant remains "sentenced for a crime of the first degree" for purposes of parole supervision under NERA. State v. Cheung, supra, 328 N.J. Super. at 371.

4. A young adult offender sentence under N.J.S.A. 2C:43-5 cannot be imposed on a conviction for any crime to which NERA applies. State v. Corriero, 357 N.J. Super. 214, 217-18 (App. Div. 2003).

5. A defendant sentenced under NERA may not apply for reconsideration of his or her sentence pursuant to R. 3:21-10(b) until the mandatory term of parole ineligibility has been served. State v. Le, 354 N.J. Super. 91, 96 (Law Div.

2002). See separate discussion of R. 3:21-10(b) at Section XV.

6. Trial judges should stipulate the length of the NERA ineligibility period in terms of years, months, and days. State v. Hernandez, supra, 338 N.J. Super. at 319 n.1.

7. Gap-time credit pursuant to N.J.S.A. 2C:44-5(b)(2) cannot be applied to reduce the 85% parole ineligibility term mandated by NERA. Meyer v. New Jersey State Parole Bd., 345 N.J. Super. 424, 426 (App. Div. 2001), certif. denied, 171 N.J. 339 (2002).

8. Commutation and work credits cannot be used to reduce the mandatory period of parole supervision under NERA. However, they may be applied towards the remaining 15% of a defendant's prison sentence under NERA. State v. Webster, 383 N.J. Super. 432, 436-37 (App. Div. 2006); Salvador v. Dep't of Corrs., 378 N.J. Super. 467, 469-70 (App. Div.), certif. denied, 185 N.J. 295 (2005).

9. NERA does not violate the federal or state constitutional prohibitions against cruel and unusual punishment. State v. Johnson, supra, 166 N.J. at 548-49.

10. The real-time consequences of NERA may have had a substantial, and inconsistent, effect on the way judges exercise their sentencing discretion. State v. Marinez, 370 N.J. Super. 49, 57-58 (App. Div.), certif. denied, 182 N.J. 142 (2004).

F. Firearms Offenses

1. For certain specified offenses involving the use or possession of firearms, a sentence of imprisonment is mandatory and "shall include" the imposition of a period of parole ineligibility to be fixed at or between one-third to one-half of the overall sentence, or three years, whichever is greater; for fourth-degree crimes, the term is eighteen months. N.J.S.A. 2C:43-6(c). See further discussion of Graves Act sentencing at Section VI.

2. A person who is convicted of possession of a machine gun or assault firearm with the intent to use it against the person of another (N.J.S.A. 2C:39-4(a)), or is convicted of one of the following crimes--murder, manslaughter, aggravated assault, kidnapping, aggravated sexual assault, aggravated criminal sexual contact, robbery, burglary, escape, or drug distribution/manufacture--who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a machine gun or assault firearm, shall be sentenced to a term of imprisonment which shall include a minimum term fixed at ten years for a first or second degree crime, five years for a third degree crime, or eighteen months for a fourth degree crime, during which time the defendant shall be ineligible for parole. N.J.S.A. 2C:43-6(g).

   a. This statute thus requires imposition of a 100% parole ineligibility period for the second, third, and fourth degree offenses to which it applies. State v. Petrucci (II), 365 N.J. Super. 454, 460 n.2 (App. Div.), certif. denied, 179 N.J. 373 (2004).

   b. To impose such a 100% parole ineligibility period, the factual determinations that a weapon is an assault firearm and that the defendant's purpose in possessing it was to use it against the person of another must be made by a jury under the standard of beyond a reasonable doubt. Id. at 462-63.

3. See N.J.S.A. 2C:39-10(e) (requiring mandatory three-year period of parole ineligibility for anyone who sells a firearm to a person under age 18). N.J.S.A. 2C:43-6.2 contains an "escape valve" provision for first offenders.

4. See N.J.S.A. 2C:39-7(b) (requiring mandatory five-year term of parole ineligibility for persons who, after having been convicted of specified crimes, violate prohibition against buying, owning, or possessing firearm).

G. Murder

1. In non-capital murder cases, the sentence must be set at or between thirty years to life imprisonment and shall include a thirty-year period of parole ineligibility. N.J.S.A. 2C:11-3(b)(1); Merola v. Dep't of Corrs., supra, 285 N.J. Super. at 506-09. Prior to the extended term provision of N.J.S.A. 2C:43-7(a)(6), effective October 31, 1994, the parole ineligibility term for murder could not exceed thirty years. State v. Scales, 231 N.J. Super. 336, 340 (App. Div.), certif. denied, 117 N.J. 123 (1989).

2. Effective January 9, 1997, the sentence must be life imprisonment without parole if the victim was a law enforcement officer murdered while performing his duties or because of his official status. N.J.S.A. 2C:11-3(b)(2).

3. Effective April 3, 1997, the sentence must be life imprisonment without parole if the victim was less than fourteen years old and the murder was carried out in the commission of a sexual assault or criminal sexual contact. N.J.S.A. 2C:11-3(b)(3).

4. Effective August 22, 2000, the sentence must be life imprisonment without parole where the murder was tried as a capital case and where at least one aggravating factor was found, but where the death penalty was not imposed. N.J.S.A. 2C:11-3(b)(4).

H. Death by Vehicular Homicide

1. Any sentence imposed for death by vehicular homicide where the defendant was operating the vehicle under the influence of alcohol or narcotics, or with a blood alcohol level prohibited by N.J.S.A. 39:4-50, or while his driver's license was revoked or suspended, shall be sentenced to a term of imprisonment, which "shall include the imposition of a minimum term." The minimum term shall be between one-third and one-half of the sentence imposed, or three years, whichever is greater, during which the defendant shall be ineligible for parole. N.J.S.A. 2C:11-5(b)(1).

2. According to N.J.S.A. 2C:11-5(b)(2), the grounds for imposing such a mandatory minimum sentence must be established at a hearing by a preponderance of the evidence. Neither the federal nor New Jersey constitution requires the jury, rather than a judge, to make the determination whether the defendant was intoxicated for sentence enhancement purposes. State v. Stanton, 176 N.J. 75, 87-96, cert. denied, 540 U.S. 903, 124 S. Ct. 259, 157 L. Ed. 2d 187 (2003). Moreover, intoxication is not an element of the offense of vehicular homicide and does not increase the penalty for the offense beyond its prescribed statutory maximum. Id. at 96-97.

I. Sex Offenses

1. Second or subsequent sex offenders who do not receive extended sentences of imprisonment pursuant to N.J.S.A. 2C:43-7 "shall" receive a minimum period of parole ineligibility of at least five years. N.J.S.A. 2C:14-6. This applies equally to those sentenced to jail terms and to Avenel. State v. Chapman, 95 N.J. 582, 588-89 (1984). If the overall sentence is ten years or less, the parole ineligibility term must be five years; if the sentence is greater than ten years, the parole ineligibility term must be

at least five years but may be up to one-half the overall sentence. Id. at 589.

2. First-time sex offenders sentenced to Avenel are subject to parole ineligibility under ordinary Code provisions. N.J.S.A. 2C:47-3(b); State v. Chapman, supra, 95 N.J. at 588-89.

3. See further discussion of sex offender sentencing at Section XVII.

J. Drug Offenses

See N.J.S.A. 2C:35-1 to -23 for special provisions pertaining to minimum terms for offenders sentenced under the Comprehensive Drug Reform Act. See also separate discussion at Section XVI.

K. Assault While Fleeing Police

A person convicted under N.J.S.A. 2C:12-1(b)(6) while eluding "shall" be sentenced to a term of imprisonment which "shall" include imposition of a period of parole ineligibility to be fixed at or between one-third and one-half of the sentence imposed. N.J.S.A. 2C:43-6(i).

L. Human Trafficking

A person convicted under N.J.S.A. 2C:13-8(a)(2) (receiving anything of value from participation as an organizer, supervisor, financier or manager in a scheme or course of conduct of human trafficking) shall be sentenced to a term of imprisonment between twenty years and life of which the actor shall serve twenty years before being eligible for parole. N.J.S.A. 2C:13-8(d) (effective April 26, 2005).

M. Enticing a Child

A person convicted of a second or subsequent offense of enticing a child into a motor vehicle, structure or isolated area with the purpose to commit a criminal offense with or against the child shall be sentenced to a term of imprisonment which includes a mandatory minimum term of one-third to one-half of the sentence imposed, or three years, whichever is greater, during which time the defendant shall not be eligible for parole. This mandatory parole ineligibility term also applies to those offenders

previously convicted of violating N.J.S.A. 2C:14-2, N.J.S.A. 2C:14-3(a), or N.J.S.A. 2C:24-4. N.J.S.A. 2C:13-6 (amended effective January 9, 2004).

N. Arson

A person convicted of arson pursuant to N.J.S.A. 2C:17-1(a), (b), or (d) "shall" be sentenced to a term of imprisonment which "shall" include a minimum term of fifteen years during which the defendant shall be ineligible for parole, if the structure which was the target of the offense was a church, synagogue, temple or other place of public worship. N.J.S.A. 2C:17-1(g).

O. Computer Related Offenses

1. Every sentence of imprisonment for a computer related theft of the first degree shall include a minimum term of parole ineligibility of one-third to one-half of the sentence imposed. N.J.S.A. 2C:20-25(g) (effective April 14, 2003).

2. Every sentence imposed for a computer related theft where the victim is a government agency shall include a period of imprisonment, which period shall include a parole ineligibility term of one-third to one-half of the sentence imposed. N.J.S.A. 2C:20-25(h) (effective April 14, 2003).

3. Every sentence imposed upon a conviction of second degree unauthorized access of computer data shall include a period of imprisonment, which period shall include a parole ineligibility term of one-third to one-half of the sentence imposed. N.J.S.A. 2C:20-31(b) (effective April 14, 2003).

P. Violations of Probation

1. A parole disqualifier should not ordinarily be imposed when resentencing a defendant for a probation violation since, at the original sentencing, the mitigating factors weighed in favor of probation. State v. Baylass, 114 N.J. 169, 178 (1989). In weighing the factors upon a probation violation, a court should consider the aggravating factors found to exist at the

original hearing and the mitigating factors as affected by the probation violation. Ibid.; State v. Molina, 114 N.J. 181, 184-85 (1989).

2. These standards also apply to a defendant being resentenced for a violation of probation following a negotiated plea agreement pursuant to N.J.S.A. 2C:35-12 by which the prosecutor waived a mandatory minimum. Once a parole disqualifier under N.J.S.A. 2C:35-7 is waived, it is no longer "mandatory" for purposes of a probation violation resentencing. State v. Vasquez, 129 N.J. 189, 199-200 (1992). However, the court may, in its discretion, impose a period of parole ineligibility under appropriate circumstances and based on adequate findings. Id. at 205. Such a period of parole ineligibility may be imposed in conjunction with a presumptive term of imprisonment. Id. at 206.

VI. GRAVES ACT SENTENCING

A. General Provision

A person who is convicted of possession of a firearm with the intent to use it against the person of another (N.J.S.A. 2C:39-4(a)), or a person who is convicted of one of the following crimes--murder, manslaughter, aggravated assault, kidnapping, aggravated sexual assault, aggravated criminal sexual contact, robbery, burglary, or escape--who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm, shall be sentenced to a term of imprisonment which shall include a minimum term fixed at or between one-third and one-half the sentence, or three years, whichever is greater (eighteen months in the case of a fourth degree crime), during which time the defendant shall be ineligible for parole. N.J.S.A. 2C:43-6(c).

B. "Escape Valve" Provisions

1. Upon motion by the prosecutor to the assignment judge that the interests of justice would not be served by a term pursuant to N.J.S.A. 2C:43-6(c) for a person convicted of a first offense under the Graves Act, the assignment judge "shall" place the defendant on probation or reduce his or her parole ineligibility term to one year. N.J.S.A. 2C:43-6.2.

2. If the sentencing court believes that the interests of justice would not be served by imposition of a mandatory minimum term, it may refer the case of a first-time offender to the assignment judge, with the approval of the prosecutor. N.J.S.A. 2C:43-6.2.

3. Hence, where the prosecutor moves or consents, the assignment judge is required to impose a probationary sentence or a sentence with a mandatory one-year ineligibility term. The judge is not permitted to reject a deviation from the mandatory ineligibility term. State v. Alvarez, 246 N.J. Super. 137, 142-43 (App. Div. 1991);

State v. Ginty, 243 N.J. Super. 39, 42-43 and n.2 (App. Div. 1990).

4. In the case of referral by the sentencing court to the assignment judge, the prosecutor's only function is to approve the referral, not the reduced sentence itself. Id. at 43.

5. A defendant's request under N.J.S.A. 2C:43-6.2 that the sentencing judge refer the matter to the assignment judge should be made at sentencing. State v. Alvarez, supra, 246 N.J. Super. at 140, 141 n.2. Although the procedure remains less than clear for challenging a prosecutor's refusal to make application to the assignment judge, or to consent to such reference by the sentencing judge, a defendant must make some sort of a record in order to preserve an "escape valve" application. State v. Mastapeter, 290 N.J. Super. 56, 64-65 (App. Div.), certif. denied, 146 N.J. 569 (1996).

6. Where a defendant argues at sentencing only that the Graves Act does not apply, and where that argument is rejected on appeal, the interests of justice may nevertheless militate in favor of remanding to the trial court so that the defendant can be afforded the opportunity to seek the prosecutor's consent and move for leniency under N.J.S.A. 2C:43-6.2. State v. Mello, 297 N.J. Super. 452, 467-68 (App. Div. 1997).

7. N.J.S.A. 2C:43-6.2 has withstood constitutional challenge on separation-of-powers grounds. State v. Alvarez, supra, 246 N.J. Super. at 145-47. The "interests of justice" standard avoids arbitrary, unreasonable and capricious decision-making by the prosecutor and poses no constitutional impediment to exercise of the legislative will. Id. at 146.

8. A defendant retains the right to move before the assignment judge for a hearing to determine whether the prosecutor arbitrarily or unconstitutionally discriminated against him or her in determining whether the "interests of justice" warranted consent or referral. To be

granted such a hearing, a defendant must establish a prima facie case of arbitrariness or discrimination. State v. Watson, 346 N.J. Super. 521, 535 (App. Div. 2002), certif. denied, 176 N.J. 278 (2003); State v. Alvarez, supra, 246 N.J. Super. at 147-49.

a. To establish a prima facie case of arbitrariness, a defendant must do more than attack the wisdom of the statute or argue that the imposition of a three-year term of imprisonment is not wise or prudent. State v. Miller, 321 N.J. Super. 550, 555-56 (Law Div. 1999). Rather, a defendant must, at a minimum, marshal evidence that he or she is being treated differently from other persons similarly situated. Id. at 556-57.

b. Note that this standard has not been reexamined since the Supreme Court's decisions regarding review of prosecutorial waiver decisions under the Comprehensive Drug Reform Act. State v. Mastapeter, supra, 290 N.J. Super. at 65.

C. Special Rules Regarding Graves Act Sentences

1. The focus of the act is deterrence, not rehabilitation. State v. Des Marets, 92 N.J. 62, 68 (1983). The actor's state of mind or intent to use the firearm is irrelevant. Id. at 69. The act applies to both youthful and adult offenders. Id. at 76.

2. The specific length of a parole ineligibility term under the Graves Act must ordinarily be consistent with the length of the base term imposed and with the court's evaluation of the relevant aggravating and mitigating factors. Since, however, the relative weight of the aggravating and mitigating factors is irrelevant to the imposition of a Graves Act term, there may be less correlation than in non-Graves Act cases between the length of the base term and the severity of the parole ineligibility term. State v. Towey, 114 N.J. 69, 81-82 (1989).

3. The length of the minimum term may also be affected by the extent of the harm threatened or caused by the defendant's use or possession of the firearm. This consideration does not offend the principle that an element of the offense is not to be weighed as an aggravating factor, because the extent to which injury is threatened or inflicted is a factor distinct from the conduct that invokes the Graves Act, i.e., use or possession of a firearm. Id. at 81-83.

4. The Graves Act contemplates a firearm not in terms of present operability but in terms of original design. State v. Gantt, 101 N.J. 573, 584 (1986). The act requires neither proof nor a court finding that the weapon was operable, only that the device was originally designed to deliver a potentially lethal projectile. Design may be inferred from the appearance or based on lay testimony, but empirical examination or production of the weapon is not necessary. Id. at 589-90. The issue of inoperability becomes relevant only when substantial evidence is introduced tending to show that the weapon has undergone such alteration, mutilation, or deterioration that it has permanently lost the characteristics of a real gun. Ibid.; State v. Orlando, 269 N.J. Super. 116, 130-33 (App. Div. 1993), certif. denied, 136 N.J. 30 (1994).

5. An accomplice who had the purpose to promote or facilitate the crime with the use of a firearm is guilty of that crime even though he or she did not personally possess or use the firearm, and the Graves Act will apply in sentencing that accomplice. State v. White, 98 N.J. 122, 130 (1984). Even where the accomplice is found guilty only of an unarmed offense, if he or she knew or had reason to know before the crime was committed that his or her cohort would possess or use a firearm during the crime or immediate flight thereafter, the Graves Act applies to the accomplice. Id. at 131. However, it is not enough that a defendant saw his or her accomplice carrying weapons from the scene of the crime without disassociating himself or herself from the enterprise. Accomplice liability under the

Graves Act depends on proof of a shared purpose. State v. Wooters, 228 N.J. Super. 171, 175, 178-79 n.1 (App. Div. 1988).

6. A defendant cannot seek relief under R. 3:21-10(b) (application to enter drug treatment program), until the Graves Act mandatory term has been served. State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986). See separate discussion of drug treatment applications at Section XV.

7. When a Graves Act crime merges with a non-Graves Act crime, the sentence must be at least equal in length to the mandatory sentence required for the Graves Act crime. If the statutory guidelines do not permit such a sentence for the non-Graves Act crime, then the Graves Act crime survives merger. State v. Connell, 208 N.J. Super. 688, 696 (App. Div. 1986).

8. When sentencing for more than one Graves Act offense, the judge must impose a Graves Act sentence on each conviction. Id. at 697.

9. A remand may be necessary where an illegal Graves Act sentence is imposed but where a discretionary parole disqualifier could have been ordered. State v. Wooters, supra, 228 N.J. Super. at 174.

10. A Graves Act parole disqualifier is subsumed by the 85% parole disqualifier under NERA. See State v. Garron, 177 N.J. 147, 163 (2003), cert. denied, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004). Nevertheless, the judgment should reflect that a Graves Act sentence was applicable to the conviction in the event the defendant commits a second Graves Act offense, thereby requiring a mandatory extended term. State v. Cheung, 328 N.J. Super. 368, 371 (App. Div. 2000).

D. Procedure for Imposing Graves Act Sentences

1. The ground for such a mandatory sentence must be established at a hearing which may occur at the time of sentencing. At such a hearing, the

prosecutor must establish by a preponderance of the evidence that the weapon used or possessed was a firearm. The court shall make its finding after considering evidence or testimony adduced at trial or any other court proceeding, the presentence report, and any other relevant information. N.J.S.A. 2C:43-6(d).

2. At the hearing, the judge determines whether the defendant used or possessed a weapon and whether the weapon was a firearm. State v. Stewart, 96 N.J. 596, 605-06 (1984). Exclusive reliance on the jury's finding is an improper ground for applying the Graves Act. The statute requires an independent determination based on all relevant material. Id. at 606; State v. Hawkins, 316 N.J. Super. 74, 79-80 (App. Div. 1998), certif. denied, 162 N.J. 489 (1999); State v. Palmer, 211 N.J. Super. 349, 354 (App. Div. 1986).

   a. A jury verdict of acquittal is not irreconcilable with a finding of possession under the Graves Act. State v. Stewart, supra, 96 N.J. at 607.

   b. The finding of possession may be based on proof not admissible in evidence at the defendant's trial as the sentencing judge is not bound by the strict rules of evidence. State v. Hawkins, supra, 316 N.J. Super. at 80. It may even be reasonable to use a defendant's statement made during the course of a retraxit plea of guilt to rebut a contrary factual assertion raised expressly or inferentially by the defendant during the Graves Act hearing. Id. at 81-82.

   c. However, a Graves Act sentence may not be based upon testimony of a witness at a trial to which the defendant was not a party and whom he had no opportunity to cross-examine. State v. Wooters, supra, 228 N.J. Super. at 179. The court proceedings to which the statute refers are those in which the defendant participated or had the opportunity to participate. Ibid.

3. There is no constitutional impediment to the imposition of a Graves Act parole disqualifier within the standard sentencing range based on a judicial finding that the defendant possessed a gun during the offense. State v. Franklin, 184 N.J. 516, 534 n.6 (2005); State v. Figueroa, 358 N.J. Super. 317, 321-24 (App. Div. 2003).

   a. Prior to State v. Natale II, 184 N.J. 458 (2005), our Supreme Court held that where a defendant has been charged with possession of a firearm with the intent to use it unlawfully against the person or property of another, in violation of N.J.S.A. 2C:39-4(a), the person/property distinction is not an element of the offense so as to entitle a defendant to a jury trial on that issue but is an issue to be determined by the sentencing court at a Graves Act hearing. State v. Camacho, 153 N.J. 54, 72-73, cert. denied, 525 U.S. 864, 119 S. Ct. 153, 142 L. Ed. 2d 125 (1998).

   b. Compare State v. Petrucci (II), 365 N.J. Super. 543 (App. Div.) (holding that factual predicate for assault firearm sentence enhancement must be found by jury), certif. denied, 179 N.J. 373 (2004), with State v. Stanton, 176 N.J. 75 (holding that there need not be jury finding beyond reasonable doubt for vehicular homicide sentence enhancement), cert. denied, 540 U.S. 903, 124 S. Ct. 259, 157 L. Ed. 2d 187 (2003).

E. Extended Graves Act Terms (Second Offender With a Firearm)

1. A court shall sentence a defendant to an extended term if the defendant is at least eighteen years of age, is being sentenced for a Graves Act offense, and has previously been convicted of a Graves Act offense or an equivalent Title 2A offense. N.J.S.A. 2C:43-6(c); N.J.S.A. 2C:43-7; N.J.S.A. 2C:44-3(d). Effective June 20, 1997, imposition of a mandatory extended term is also required where the prior conviction occurred under any federal or state statute that is

"substantially" equivalent to a Graves Act offense. N.J.S.A. 2C:44-3(d).

2. Such extended terms shall be within the ranges permitted by N.J.S.A. 2C:43-7(a)(2) through (5), according to the degree of the crime, and shall include a minimum term fixed at or between one-third and one-half the sentence imposed, or five years, whichever is greater, during which time defendant shall not be eligible for parole. In the case of an extended term of life imprisonment, this minimum term shall be set at twenty-five years. N.J.S.A. 2C:43-6(c); N.J.S.A. 2C:43-7; N.J.S.A. 2C:44-3(d). See State v. Swint, 328 N.J. Super. 236, 262 (App. Div.) (when sentence of life is imposed on subsequent Graves Act offender, judge must impose period of parole ineligibility of twenty-five years), certif. denied, 165 N.J. 492 (2000).

3. An extended Graves Act term is not subject to the limitation in N.J.S.A. 2C:44-5(a)(2), which prohibits more than one extended term sentence, because a Graves Act extended term is the "ordinary sentence" for the crime. State v. Connell, supra, 208 N.J. Super. at 691.

4. Not all of the guidelines prescribed by State v. Dunbar, 108 N.J. 80 (1987), for fixing an extended sentence, apply to a mandatory extended term under the Graves Act. The only relevant guideline is that the aggravating and mitigating factors be weighed to determine an appropriate base term and to fix the period of parole ineligibility. State v. Jefimowicz, 119 N.J. 152, 162-63 (1990). See discussion of extended term sentencing at Section IV.

F. Procedures For Imposing Extended Graves Act Terms

1. Notice and Hearing

a. That a defendant possessed a gun during the commission of an offense is a fact that must be presented to a grand jury and found by a petit jury beyond a reasonable doubt if the court relies on that fact to impose an

extended term on the defendant as a repeat Graves Act offender. State v. Franklin, supra, 184 N.J. at 534.

b. The prosecutor must notify the defendant that an extended term will be sought and the defendant must be given a hearing on whether there was a prior conviction. State v. Martin, 110 N.J. 10, 14 (1988). This is so even though the defendant knows of the possibility and even though he or she does not explicitly claim that the prior offense was not a Graves Act offense. Ibid. The defendant must also be notified of the substance of the proof that the prosecution will use to support the claim that there is a prior Graves Act conviction. Id. at 20.

2. Proof of prior conviction

A prior conviction may be proved by any evidence made in connection with the arrest, conviction or imprisonment of the defendant, that reasonably satisfies the court that the defendant was convicted. N.J.S.A. 2C:44-4(d). Where appropriate, the proof should include a certified copy of the conviction and relevant portions of the trial, plea and motion transcripts, so that the defendant will be insured a realistic opportunity to contest the claim and to present controverting proofs. State v. Martin, supra, 110 N.J. at 18. Although a sentencing court is entitled to rely on the record of a prior conviction when that record is unambiguous and creates no uncertainty that the underlying offense was a Graves act violation, State v. Jefimowicz, supra, 119 N.J. at 158, the burden remains on the State to prove that use or possession of a firearm was involved in the prior transaction. State v. Robinson, 253 N.J. Super. 346, 358-59 (App. Div.), certif. denied, 130 N.J. 6 (1992).

3. Collateral attack on prior conviction

If a defendant's challenge to a prior conviction in the course of sentencing as a repeat Graves

Act offender will serve to invalidate the prior conviction, rather than merely clarify or explain it, he or she must proceed by an appropriate application for post-conviction relief. State v. Jefimowicz, supra, 119 N.J. at 160-61. In the absence of such an application, a sentencing court may rely on the record of the prior conviction to sentence the defendant to an extended term sentence if the record on its face clearly establishes that the prior conviction constituted a Graves act offense. Id. at 161.

4. Timing of prior conviction

a. For the mandatory extended term under the Graves Act to be imposed, it is not necessary that conviction for the first crime precede the commission of the second crime. The Graves Act imposes no limitation on the chronology of the convictions; the only requirement is that there be a prior conviction. State v. Hawks, 114 N.J. 359, 361, 365 (1989).

b. N.J.S.A. 2C:44-4(b) does not prevent the imposition of an extended Graves Act term while a prior Graves Act conviction is pending on appeal, or before the time for such an appeal has expired. State v. Haliski, 140 N.J. 1, 17-18 (1995). However, such an enhanced sentence is provisional only; if the prior Graves Act conviction is reversed on appeal, the extended term must be vacated upon the defendant's motion. Id. at 18-20. That motion may be made pursuant to R. 3:21-10(b)(6).

VII. SENTENCES ASSOCIATED WITH PLEA AGREEMENTS

A. General Rules

1. The standards of State v. Roth, 95 N.J. 334 (1984), apply in reviewing sentences that result from guilty pleas, including those entered as part of a plea agreement. State v. Sainz, 107 N.J. 283, 292 (1987). Such sentences must be within the statutory guidelines and the aggravating and mitigating factors to support the sentence must find support in the record. Ibid. Where a defendant receives the exact sentence bargained for, a presumption of reasonableness attaches to the sentence and an appellate court should not upset it absent a finding of a clear abuse of discretion. State v. S.C., 289 N.J. Super. 61, 71 (App. Div.), certif. denied, 145 N.J. 373 (1996); State v. Tango, 287 N.J. Super. 416, 422 (App. Div.), certif. denied, 144 N.J. 585 (1996).

2. When imposing a sentence based on a defendant's plea of guilty, the trial court need not accept the defendant's factual version as the sole source of information; rather, the court may look to other evidence in the record, may consider the "whole person," and may evaluate all of the circumstances surrounding the crime, so long as the defendant is not sentenced for a crime not fairly embraced by the plea. State v. Sainz, supra, 107 N.J. at 293; State v. Salentre, 275 N.J. Super. 410, 419 n.3 (App. Div.), certif. denied, 138 N.J. 269 (1994).

3. The maximum sentence authorized for Sixth Amendment purposes in a plea setting depends on the defendant's admissions at the plea hearing and any prior criminal convictions. State v. Natale II, 184 N.J. 458, 495 (2005). The State is free to seek judicial sentence enhancements only if the defendant stipulates to the relevant facts or consents to judicial factfinding. Blakely v. Washington, 542 U.S. 296, 310, 124 S. Ct. 2531, 2541, 159 L. Ed. 2d 403, 417-18(2004).

a. A guilty plea standing alone "does not constitute implicit consent to judicial factfinding of aggravating factors" to support a sentence above the statutory maximum. State v. Natale II, supra, 184 N.J. at 495.

b. Implicit agreement to judicial factfinding may be found, however, where a defendant pleads guilty and acknowledges exposure to a specific sentence in exchange for waiver of trial by jury. Id. at 495 n.12; State v. Soto (I), 385 N.J. Super. 247, 253-55 (App. Div. 2006); State v. Anderson, 374 N.J. Super. 419, 423-24 (App. Div.), certif. denied, 185 N.J. 266 (2005)

4. A plea agreement may be valid and enforceable even though it allows a court to increase a defendant's sentence in the event he or she fails to appear for sentencing. The sentence imposed in accordance therewith is legal as long as the court does not impose the sentence automatically by virtue of the defendant's nonappearance but, instead, considers such nonappearance as relevant to the aggravating factors. State v. Subin, 222 N.J. Super. 227, 237-40 (App. Div.), certif. denied, 111 N.J. 580 (1988); State v. Cooper, 295 N.J. Super. 40, 48-49 (Law Div. 1996). But see State v. Wilson, 206 N.J. Super. 182, 184 (App. Div. 1985) (extended sentence based entirely upon nonappearance is illegal because it is unrelated to any of the sentencing criteria set forth in the Code). See also State v. Shaw, 131 N.J. 1, 15 (1993) (discussing validity of nonappearance condition in plea agreement under waiver provision of N.J.S.A. 2C:35-12).

5. There is no authority for a court to accept a guilty plea subject to the prosecutor's right to withdraw if the sentence imposed is more lenient than the negotiated sentence. State v. Warren, 115 N.J. 433, 444 (1989). This "negotiated-sentence practice" constitutes an impermissible constraint on the sentencing discretion of trial courts under the Code. Id. at 446. Where a plea

is predicated on the improper "negotiated-sentence practice," both the sentence and the underlying plea must be vacated to correct the error. Id. at 450.

6. There is no absolute right to have a plea accepted. State v. Salentre, supra, 275 N.J. Super. at 419. In reviewing judicial rejection of a proffered plea agreement, this court should apply a simple erroneous exercise of discretion test. State v. Daniels, 276 N.J. Super. 483, 487 (App. Div. 1994), certif. denied, 139 N.J. 443 (1995). Although a trial court has wide discretion in deciding to reject a plea, that discretion is not limitless. State v. Madan, 366 N.J. Super. 98, 114 (App. Div. 2004). Simply concluding that the recommended sentence is too lenient may be insufficient. Ibid.

7. R. 3:9-3(c) contemplates that a judge may reject a "tentative agreement" or maximum sentence desired by a defendant before the plea is entered. State v. Salentre, supra, 275 N.J. Super. at 418. Even a negotiated plea disposition pursuant to R. 3:9-3(b) may be rejected where the judge's sound discretion leads to that conclusion. Id. at 418-19. Once a plea is entered, the judge's exercise of discretion is controlled at the time of sentencing by R. 3:9-3(e). Ibid.

8. Where the negotiation of a plea and sentence envisions that two charges will be disposed of in a single sentence and where one plea must be vacated, the other does not necessarily fall as long as the defendant receives no greater sentence than that contemplated by the agreement. State v. Dishon, 222 N.J. Super. 58, 60-61 (App. Div. 1987), certif. denied, 110 N.J. 508 (1988). Cf. State v. Barboza, 115 N.J. 415, 419-20 (1989) (where appellate court determines that plea has been accepted without adequate factual basis, State should not be allowed to downgrade conviction to lesser offense to conform to proofs, over defendant's objection).

9. The rules governing prosecutorial authority with respect to plea bargaining do not authorize any promises regarding sentencing or any binding sentence recommendations. State v. Watford, 261 N.J. Super. 151, 157 (App. Div. 1992). Determination of the specific sentence remains within the sole discretion of the judge. State in Interest of D.S., 289 N.J. Super. 413, 420-21, 424-25 (App. Div.), certif. denied, 146 N.J. 69 (1996).

10. Other than contract pleas applicable to drug offenders under N.J.S.A. 2C:35-12, a trial court is not required to reject a plea bargain in order to impose a sentence lower than the one bargained for. State v. Lebra, 357 N.J. Super. 500, 512 (App. Div. 2003). It is only when a court concludes that it should impose a greater sentence than what was encompassed in the plea agreement that the plea bargain must be rejected. Id. at 513.

11. Since a trial court may not impose an illegal sentence, a prosecutor should not offer a plea bargain that may not be legally implemented. State v. Baker, 270 N.J. Super. 55, 70 (App. Div.), aff'd o.b., 138 N.J. 89 (1994). There can be no plea bargain to an illegal sentence. State v. Crawford, 379 N.J. Super. 250, 258 (App. Div. 2005); State v. Manzie, 335 N.J. Super. 267, 278 (App. Div. 2000), aff'd, 168 N.J. 113 (2001); State v. Baker, supra, 270 N.J. Super. at 78 n.2; State v. Nemeth, 214 N.J. Super. 324, 327 (App. Div. 1986); accord Baker v. Barbo, 177 F.3d 149, 155 (3d Cir.), cert. denied, 528 U.S. 911, 120 S. Ct. 261, 145 L. Ed. 2d 219 (1999). A defendant who contends that sentence was imposed pursuant to an illegal plea bargain should first seek relief by moving to withdraw the plea of guilty. State v. Solarski, 374 N.J. Super. 176, 183 (App. Div. 2005).

    a. A plea agreement by a county prosecutor that operates as an impediment to a valid civil commitment of a sexual predator is void as against public policy. In re Commitment of

P.C., 349 N.J. Super. 569, 572 (App. Div. 2002).

b. Because a defense attorney must have the unfettered right to argue in favor of a lesser sentence than that contemplated by the negotiated plea agreement, a plea agreement whereby counsel agrees not to request a lesser sentence may be seen as violating a defendant's right to counsel at a critical stage. State v. Briggs, 349 N.J. Super. 496, 501-03 (App. Div. 2002).

12. If a judge is satisfied that the State has made an honest mistake in determining the terms of a plea offer pursuant to the Attorney General's Guidelines applicable to drug offenders, there is no reason why the State should not be allowed to withdraw the offer, "provided the application is made before the date of sentence." State v. Veney, 327 N.J. Super. 458, 461 (App. Div. 2000).

13. A plea agreement does not survive a violation of probation. State v. Frank, 280 N.J. Super. 26, 40-41 (App. Div.), certif. denied, 141 N.J. 96 (1995).

14. R. 3:9-3(g) approves use of a modified plea cut-off rule. According to that rule, after the pretrial conference has been conducted and a trial date set, the court shall not accept negotiated pleas absent the approval of the presiding judge based on a material change of circumstance or the need to avoid a protracted trial or a manifest injustice. The scope of appellate review of plea cut-off decisions may be subject to debate. Compare State v. Brimage, 271 N.J. Super. 369, 378-79 (App. Div. 1994) (patent or gross abuse of discretion constituting a miscarriage of justice) with State v. Bowen, 269 N.J. Super. 203, 213-14 (App. Div. 1993) (mistaken exercise of discretion).

15. A rejected plea offer can have no impact on the sentence imposed after trial and should be afforded no weight either by the trial court in setting the sentence or by an appellate court in

determining whether the sentence is excessive. State v. Pennington, 154 N.J. 344, 362-63 (1998).

16. Since the Legislature has made compensation to the victim a factor to be considered in sentencing, see N.J.S.A. 2C:44-1(b)(6), it follows that restitution may also be an element of a plea bargain package. State v. Corpi, 297 N.J. Super. 86, 92-93 (App. Div.), certif. denied, 149 N.J. 407 (1997).

17. Plea bargains entered into after a jury has reached a verdict of guilt, while not common, are not against public policy. State v. Owens, 381 N.J. Super. 503, 510-11 (App. Div. 2005).

18. See N.J.S.A. 2C:35-12 for provisions relating to sentencing agreements under the Comprehensive Drug Reform Act, and see discussion of these provisions at Section XVI.

B. Rules Regarding Consequences of a Plea of Guilty

1. In accepting a plea of guilty, the court should question the defendant under oath to determine that the plea is made "with an understanding of the nature of the charge and the consequences of the plea." R. 3:9-2 (oath requirement added effective September 1, 2004); State v. Kovack, 91 N.J. 476, 484 (1982).

2. There is a distinction between collateral consequences of a plea and those consequences that are "direct" or "penal." Lack of awareness of penal consequences may result in the vacating of a sentence imposed pursuant to a plea agreement. State v. Johnson, 182 N.J. 232, 236-37 (2005); State v. Bellamy, 178 N.J. 127, 134 (2003); State v. Kiett, 121 N.J. 483, 488 (1990); State v. Howard, 110 N.J. 113, 122 (1988); State v. Bailey, 226 N.J. Super. 559, 566 (App. Div. 1988); State v. Chung, 210 N.J. Super. 427, 431 (App. Div. 1986); State v. Heitzman, 209 N.J. Super. 617, 622 (App. Div. 1986), aff'd o.b., 107 N.J. 603 (1987).

3. A defendant seeking to withdraw a plea after sentencing, pursuant to R. 3:21-1, must show that he or she is prejudiced by enforcement of the agreement, i.e., that knowledge of the consequences would have made a difference in his or her decision to plead. State v. Johnson, supra, 182 N.J. at 241-44; State v. McQuaid, 147 N.J. 464, 495-96 (1997); State v. Kiett, supra, 121 N.J. at 490; State v. Howard, supra, 110 N.J. at 123.

4. Special applications of the rule

   a. The trial court must make certain that the defendant has been made aware of any loss of parole opportunities that may be a component of the sentence. The court should satisfy itself that the defendant understands the possibility that a stated period of parole ineligibility may be made part of the sentence. State v. Kovack, supra, 91 N.J. at 483-84.

   b. A person charged with a Graves Act offense must be specifically advised of the mandatory parole ineligibility term prescribed by N.J.S.A. 2C:43-6(c). It is not enough that the defendant is informed of the possibility of parole ineligibility. State v. Bailey, supra, 226 N.J. Super. at 567-68.

   c. A trial court's failure to inform a defendant of the possibility of confinement at Avenel, subject to a parole determination that is radically different from that applicable to other prisoners, can result in a finding of "manifest injustice" necessary to allow a defendant to withdraw the plea. State v. Howard, supra, 110 N.J. at 123-24. This ruling is to be applied retroactively only to cases pending when Howard was decided, in which the defendant had not yet exhausted all avenues of direct review. State v. Lark, 117 N.J. 331, 341 (1989).

d. There is no infringement on a defendant's constitutional rights in failing to comment on the possibility of restitution when the defendant pleads guilty. As long as there is no promise that restitution will not be required, a defendant should not expect to be able to retain the fruits of illegal activities. State v. Rhoda, 206 N.J. Super. 584, 596 (App. Div.), certif. denied, 105 N.J. 524 (1986). However, the better practice would be for the trial judge to bring such a potential restitutionary award to the defendant's attention. Ibid.

   i. A large restitution order imposed as a special condition of probation may be beyond the defendant's contemplation under the plea agreement where there was never any suggestion of such, but where fines, sentences and penalties were meticulously explained. State v. Saperstein, 202 N.J. Super. 478, 482 (App. Div. 1985).

   ii. Where restitution might be imposed on counts to be dismissed under a plea agreement, the defendant should be alerted to that fact and an adequate factual basis should be provided to support the restitution order. State v. Corpi, supra, 297 N.J. Super. at 91-92; State v. Krueger, 241 N.J. Super. 244, 254-55 (App. Div. 1990).

   iii. When accepting a guilty plea for theft of services pursuant to N.J.S.A. 2C:20-8, a municipal court should inform the defendant of the possibility of restitution, including the value of the services illegally obtained. State v. Kennedy, 152 N.J. 413, 425-26 (1998).

e. A substantial fine may be considered an integral and material part of a defendant's sentence. Where such a fine is not mentioned in the plea bargain, it may be deemed beyond the defendant's reasonable

expectations. State v. Alford, 191 N.J. Super. 537, 540 (App. Div. 1983), appeal dismissed, 99 N.J. 199 (1984).

f. Forfeiture of public employment consequent upon a conviction is not a penal consequence of a plea and the judge has no particular duty to advise a defendant of such matters before accepting a plea of guilty pursuant to a plea agreement. State v. Medina, 349 N.J. Super. 108, 122 (App. Div.), certif. denied, 174 N.J. 193 (2002); State v. Heitzman, supra, 209 N.J. Super. at 621-22, aff'd, 107 N.J. 603.

g. Deportation or any other effect upon immigration status is a collateral consequence only and failure to advise a defendant of such a consequence should not lead to a vacating of the plea. State v. Chung, supra, 210 N.J. Super. at 433; State v. Reid, 148 N.J. Super. 263, 266 (App. Div.), certif. denied, 75 N.J. 520 (1977). But see State v. Garcia, 320 N.J. Super. 332, 340-41 (App. Div. 1999) (relief may be appropriate where defense counsel's misinformation misled defendant about possible deportation consequences of plea and resulted in lengthening period of defendant's incarceration); State v. Vieira, 334 N.J. Super. 681, 688 (Law Div. 2000) (where knowledge of defendant's residency status is imputed to defense counsel, counsel's performance may be constitutionally deficient where he or she does not address issue of deportation with defendant).

h. A plea may be vacated where a defendant is not told about a mandatory sentence for third-time drunk driving offenders. State v. Regan, 209 N.J. Super. 596, 607 (App. Div. 1986).

i. A guilty plea may be vacated where the defendant did not understand the intent of the plea bargain to be the ineligibility for

supervisory treatment under Title 24. State v. Reinhardt, 211 N.J. Super. 271, 275 (App. Div. 1986).

j. In certain circumstances, a defendant's misunderstanding of entitlement to credits for time already served may affect understanding regarding maximum exposure so as to fail to satisfy the voluntariness requirement of a plea agreement. State v. Alevras, 213 N.J. Super. 331, 338 (App. Div. 1986). See also Sheil v. New Jersey State Parole Bd., 244 N.J. Super. 521, 528 (App. Div. 1990) (reasonable expectations under plea agreement may not be met where defendant is told about receiving jail credits, which would reduce a parole ineligibility period, but instead is entitled only to gap-time credits), appeal dismissed, 126 N.J. 308 (1991).

k. A defendant must be told of the sentencing consequences of an extended term where the prosecutor reserves the right to so move as part of a plea bargain. State v. Cartier, 210 N.J. Super. 379, 381-82 (App. Div. 1986).

l. Before accepting a guilty plea to an offense that carries a special sentence of community supervision for life pursuant to N.J.S.A. 2C:43-6.4 (part of "Megan's Law"), the court should explain to the defendant that community supervision means parole for life or that lifetime parole is mandatory. State v. Jamgochian, 363 N.J. Super. 220, 227 (App. Div. 2003); State v. Horton, 331 N.J. Super. 92, 102-03 (App. Div. 2000).

i. Although this condition may be met by the defendant's signing the applicable official plea forms and the court's engaging in colloquy with the defendant about these forms, State v. Williams, 342 N.J. Super. 83, 91 (App. Div.), certif. denied, 170 N.J. 207 (2001), if the trial court is aware

that a particular aspect of a penal consequence needs clarification, it should take the time to explain further. State v. Jamgochian, supra, 363 N.J. Super. at 227. An expanded plea form may be appropriate. Ibid.

ii. Although it may be inconsequential that a defendant does not learn of the specific details of community supervision until after being sentenced, State v. Williams, supra, 342 N.J. Super. at 92, a defendant may seek relief where he or she has been misinformed about such details. State v. Jamgochian, supra, 363 N.J. Super. at 225-26.

m. Civil commitment under N.J.S.A. 30:4-27.26(b), a provision of the Sexually Violent Predator Act, is merely a collateral consequence of a plea of guilty to a predicate offense under the act. State v. Bellamy, supra, 178 N.J. at 138. Nevertheless, fundamental fairness requires a court to inform a defendant of his or her possible future commitment when accepting a plea because the consequence may be so severe as to result in confinement for the remainder of the defendant's life. Id. at 138-40. This holding should be given a limited retroactive application. Id. at 140-43.

n. A defendant should be furnished written notice before a plea hearing concerning whether he or she may be subject to the provisions of the No Early Release Act ("NERA"). State v. Burford, 163 N.J. 16, 21 (2000). If a defendant desires to plead guilty but contests the applicability of NERA, he or she can enter the plea and acknowledge the potential exposure to NERA, and can agree to be bound by the determination at the sentencing hearing; or, the parties can agree that the defendant can

withdraw the plea if the judge finds NERA applies. Id. at 22.

i. Although having the defendant sign a supplementary plea form acknowledging that NERA applies may be sufficient, State v. Rumblin, 326 N.J. Super. 296, 299-302 (App. Div. 1999), aff'd, 166 N.J. 550 (2001), the trial judge should also review the subject with the defendant personally. State v. Meyer, 327 N.J. Super. 50, 54 (App. Div.), certif. denied, 164 N.J. 191 (2000).

ii. A defendant who acknowledges the applicability of NERA at the time of a plea may still argue that the factual basis was insufficient to permit a NERA sentence, but that argument must be made by application to the trial court to vacate the plea. State v. Hernandez, 338 N.J. Super. 317, 323 (App. Div. 2001).

iii. The failure of a defendant to be informed of NERA's mandatory period of post-release parole supervision may constitute a basis for withdrawal of the plea, because such parole supervision constitutes both a direct and penal consequence of the plea. State v. Johnson, supra, 182 N.J. at 240-41.

o. Where it is brought to the attention of the trial court that a defendant has pleaded guilty to or has been found guilty on other charges, or is presently serving a custodial term, and the plea agreement is silent on the issue, a defendant should be informed of the contingency that all sentences may be made to run consecutively. State v. Cullars, 224 N.J. Super. 32, 40-41 (App. Div.), certif. denied, 111 N.J. 605 (1988).

p. A trial court is not required to inform a defendant, as a prerequisite to accepting a guilty plea, that the court may impose a consecutive sentence for a conviction for probation violation if such a charge were filed in the future as a result of the defendant's guilty plea to the charge involved in the plea agreement. State v. Garland, 226 N.J. Super. 356, 364-65 (App. Div.), certif. denied, 114 N.J. 288 (1988).

q. There is no requirement that a defendant pleading guilty be told that the resulting conviction could someday provide the basis for an enhanced sentence after conviction of a future crime, because that potentiality is merely a collateral consequence of the plea. State v. Wilkerson, 321 N.J. Super. 219, 224-28 (App. Div.), certif. denied, 162 N.J. 128 (1999).

r. In pleading guilty, a defendant does not waive the right to appeal the sentence imposed following a violation of probation. State v. Vasquez, 129 N.J. 189, 194-95 (1992). However, after violating probation, a defendant may be resentenced to a maximum above that embodied in the original negotiated disposition even though he or she was not notified of that possibility at the time the plea was entered. State v. Ervin, 241 N.J. Super. 458, 468-69 (App. Div. 1989), certif. denied, 121 N.J. 634 (1990). The "collateral consequences" in such a case are those flowing from the defendant's own failure to honor the conditions of probation. Ibid. As good practice, however, a court should advise a defendant of the consequences of any probation violation. Id. at 470. See R. 3:21-4(c) (requiring court, at time of sentence, to inform defendants sentenced to probation what penalties might be imposed upon revocation). See separate discussion at Section XVI of consequences of a violation of probation upon a negotiated plea agreement under N.J.S.A. 2C:35-12.

s. A defendant's reasonable expectations under a plea bargain are not violated merely because he or she receives five years suspension of imposition of sentence instead of a five-year probationary term, because the potential future consequences of both sentences are the same. State v. Cullen, 351 N.J. Super. 505, 509 (App. Div. 2002).

C. Remedy On Appeal

1. Where a defendant has not been adequately apprised of the consequences of the plea agreement and seeks to set aside the sentence imposed pursuant thereto, the remedy on appeal is to allow the defendant to replead before the sentencing court. The sentencing court should decide whether to accept or reject the plea agreement as reasonably understood by the defendant. If the court rejects such an agreement, the defendant has three options: (1) withdraw the challenge to the original sentence; (2) renegotiate a plea agreement if the State is willing; or (3) withdraw the guilty plea. State v. Johnson, supra, 182 N.J. at 244; State v. Howard, supra, 110 N.J. at 125-26; State v. Kovack, supra, 91 N.J. at 484-85.

2. If the third option is chosen, the State is released from the terms of its bargain and may reinstate any previously dismissed counts. State v. Kovack, supra, 91 N.J. at 484-85. The State may also reinstate its application to treat defendant as a persistent offender. State v. Naji, 205 N.J. Super. 208, 216 (App. Div. 1985), certif. denied, 103 N.J. 467 (1986).

3. If the appellate court cannot tell from the record whether knowledge about the information regarding a penal consequence of the plea would have made a difference to the defendant, a remand may be necessary to allow the defendant to demonstrate how the omission materially affected the decision to plead guilty. State v. Johnson, supra, 182 N.J. at 244.

4. A defendant seeking to invalidate a plea agreement that includes a NERA sentence may be entitled to vacate the agreement and go to trial, but not to repudiate the NERA aspect of the sentence. State v. Reardon, 337 N.J. Super. 324, 326-27 (App. Div. 2001). This is especially true where a defendant has obtained the benefit of a negotiated downgrade. State v. Hernandez, supra, 338 N.J. Super. at 322.

5. Where the factual predicate for a NERA sentence was not adequately established by the guilty plea, the remedy may be to remand for a jury determination of that issue. State v. Shoats, 339 N.J. Super. 359, 369-70 (App. Div. 2001). But where that disposition would be inconsistent with the parties' reasonable expectations at the time of the plea, they should be given the option of vacating the plea and either reinstating the charges or negotiating a new bargain. Id. at 370.

VIII. SENTENCING PROCEDURE

A. Presentence Procedure

1. Before sentencing, the court must order a presentence investigation of the defendant to be conducted by court support staff. N.J.S.A. 2C:44-6(a); R. 3:21-2(a). The report shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant and prosecutor. R. 3:21-2(a). The investigation shall include, among other things, an analysis of the defendant's financial resources, debts, and any amounts owed for a court-ordered fine, assessment, or restitution. N.J.S.A. 2C:44-6(b).

2. If the sentencing court desires any additional information concerning an offender before imposing sentence, it may order psychological or medical testing of the defendant. N.J.S.A. 2C:44-6(c). In cases involving convictions of endangering the welfare of a child, trespassing in a school building, stalking, luring a child for the purpose of committing a criminal offense, or kidnapping a child less than eighteen years of age, the presentence investigation "shall" include a report on the defendant's mental condition. N.J.S.A. 2C:44-6(b).

3. By its own terms, R. 3:21-2 is mandatory. Hence, a trial court's failure to order a complete and current presentence report requires vacating any sentence imposed without one. State v. Mance, 300 N.J. Super. 37, 65-66 (App. Div. 1997). See also N.J.S.A. 2C:44-6(a) (court "shall not impose sentence without first ordering" any presentence report required by court rules).

4. See N.J.S.A. 2C:44-6.2 (effective April 14, 2004), for presentence investigation provisions with respect to an incarcerated defendant who is the sole caretaker of a minor child. See N.J.S.A. 2C:44-6.3 (effective April 14, 2004), for DYFS referral provisions in cases where the

victim is a minor and the defendant resides in a household with, or is a parent of, a minor child.

5. See N.J.S.A. 2C:43-2.2 and N.J.S.A. 2C:43-2.3 for circumstances under which a court may order a defendant to undergo AIDS/HIV infection testing.

6. When the appellate court remands for resentencing, without directing the imposition of a specific sentence, the sentencing proceedings must be conducted anew. Depending on the scope of the remand, the presentence report may be updated or an institutional report obtained if the defendant remained in custody. State v. Tavares, 286 N.J. Super. 610, 616 (App. Div.), certif. denied, 144 N.J. 376 (1996).

7. It is not necessary for a municipal court to order a presentence investigation if there is no indictable offense conviction. State v. Buglione, 233 N.J. Super. 110, 113 (App. Div.), certif. denied, 117 N.J. 636 (1989). See N.J.S.A. 2C:44-6; R. 7:9-1(a).

B. Defendant's Presence at Sentencing

The defendant "shall" be present at imposition of sentence. R. 3:16. Sentence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present. R. 3:21-4(b). Any sentence imposed in the defendant's absence is void. State v. Neff, 67 N.J. Super. 213, 217 (App. Div. 1961).

C. Defendant's Right to Speak at Sentencing

1. Under R. 3:21-4(b), the court is required, before imposing sentence, to address the defendant personally and ask if he or she wishes to make a statement or present information in mitigation of punishment. The defendant may answer personally or by an attorney.

2. Where the defendant is not given the opportunity to speak and contests this on direct appeal, the matter should automatically be remanded for resentencing; it is not necessary to show prejudice. State v. Cerce, 46 N.J. 387, 396-97

(1966); State in the Interest of J.R., 244 N.J. Super. 630, 639 (App. Div. 1990).

3. However, the failure to advise a defendant of the right to speak does not render the sentence illegal and is not a valid ground for post-conviction relief under R. 3:22-2(c). State v. Cerce, supra, 46 N.J. at 395-96.

4. The opportunity to speak at sentencing also applies to a defendant who is being sentenced on a violation of probation. State v. Lavoy, 259 N.J. Super. 594, 598-99 (App. Div. 1992).

D. Right to Counsel

1. The defendant has a constitutional right to have counsel present at sentencing. N.J. Const. art. I, ¶ 10; State v. Jenkins, 32 N.J. 109, 112 (1960). Sentencing and resentencing hearings are crucial stages of a trial for which counsel must be available. State v. Briggs, 349 N.J. Super. 496, 501 (App. Div. 2002); State v. G.B., 255 N.J. Super. 340, 346 (App. Div. 1992).

2. An attorney's incorrect advice regarding sentencing exposure that prevents a defendant from making a fair evaluation of a plea offer and induces him or her to reject a plea agreement that otherwise would have been accepted may constitute ineffective assistance of counsel. State v. Taccetta, 351 N.J. Super. 196, 200 (App. Div.), certif. denied, 174 N.J. 544 (2002).

E. Time of Sentencing

1. Sentence should be imposed without unreasonable delay. While pending, a defendant may be committed or continued to be held on bail. R. 3:21-4(a).

2. See State v. Marrero, 239 N.J. Super. 119, 123 (Law Div. 1989) (Avenel evaluation and sentencing of sex offender should be postponed where defendant has pending other nonsex-related crimes, because of possibility of self-incrimination during evaluation).

F. Consolidated Dispositions

1. In accordance with R. 3:25A-1, a defendant may move for consolidation of charges pending in multiple counties for the purposes of offering pleas and for sentencing. Written notice of the motion and an opportunity to be heard shall be given to the prosecutors of the respective counties.

2. In determining whether to order consolidation and, if so, the forum county, the court should consider the number of crimes committed in each county, the comparative gravity of the crimes in each county, the similarity or connection of the crimes, the county in which the most recent crime was committed, the county in which the most serious crime was committed, the defendant's sentencing status, the victim's rights, and any other relevant factor. R. 3:25A-1.

G. Evidence at Sentencing

1. At sentencing, a judge may consider material otherwise inadmissible under conventional evidentiary standards, such as much of the information contained in presentence reports, arrest records, polygraph reports, investigative reports, juvenile adjudications, and unlawfully seized evidence. State v. Jarbath, 114 N.J. 394, 412 n.4 (1989).

2. A court may consider any evidence which, from its content, nature, and manner of presentation, is inherently reliable, trustworthy, and credible. State v. Smith, 262 N.J. Super. 487, 530 (App. Div.), certif. denied, 134 N.J. 476 (1993); State v. Carey, 232 N.J. Super. 553, 555 (App. Div. 1989).

3. A sentencing judge may consider prior adult arrests that did not result in convictions as part of consideration of the "whole man" as long as no guilt is inferred from these prior arrests. State v. Green, 62 N.J. 547, 571 (1973). Similarly, a sentencing judge may consider a

defendant's juvenile record of charges that did not result in convictions. State v. Tanksley, 245 N.J. Super. 390, 396 (App. Div. 1991). Also, the Code specifically permits an evaluation of unindicted conduct in sentencing. State v. Walters, 279 N.J. Super. 626, 632-33 (App. Div.), certif. denied, 141 N.J. 96 (1995). See also United States v. Watts, 519 U.S. 148, 153-56, 117 S. Ct. 633, 636-38, 136 L. Ed. 2d 554, 563-65 (1997) (verdict of acquittal does not prevent federal sentencing court from considering conduct underlying acquitted charge); Witte v. United States, 515 U.S. 389, 397-99, 115 S. Ct. 2199, 2205-06, 132 L. Ed. 2d 351, 362-63 (1995) (consideration of past criminal behavior even if no conviction resulted does not violate defendant's due process rights).

4. Except where a defendant has stipulated to judicial factfinding, and other than the fact of a prior conviction, any fact that increases the penalty beyond the "statutory maximum" must be found by a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403, 412 (2004).

   a. The statutory maximum "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303, 124 S. Ct. at 2537, 159 L. Ed. 2d at 413.

   b. A court may not engage in an after-the-fact review of the trial record to determine whether certain facts were present which may be used to impose sentence greater than that authorized by the jury's verdict. State v. Franklin, 184 N.J. 516, 536 (2005). That is, a defendant's trial admissions may not be used to justify a term above the statutory maximum unless the defendant consents to judicial factfinding. Ibid.

   c. See R. 3:19-1(b) (as amended June 19, 2001) (requiring written verdict sheet to be used where jury must find factual predicate for

enhanced sentence or existence of fact relevant to sentencing unless that fact is element of offense).

5. A defendant has the constitutional right to remain silent at sentencing, even where he or she has entered a plea of guilty. This also means that the sentencing court may not draw any adverse inferences from the defendant's silence. Mitchell v. United States, 526 U.S. 314, 325-30, 119 S. Ct. 1307, 1313-16, 143 L. Ed. 2d 424, 435-39 (1999).

6. An initial plea offer made to a defendant, which is then rejected, is not a relevant sentencing factor. State v. Evers, 175 N.J. 355, 398 (2003).

7. A defendant's conduct at the time of sentencing may have little relevance to the aggravating factors, especially in the context of a sentence imposed in accordance with a negotiated plea agreement. State v. Gilberti, 373 N.J. Super. 1, 9 (App. Div. 2004).

H. Reasons for Sentence

1. The judge "shall" state the reasons for imposing sentence, including findings on the applicability of the aggravating and mitigating factors and the underlying factual basis. N.J.S.A. 2C:43-2(e); R. 3:21-4(g).

2. The court must explain the balancing process it employed and indicate the factors it considered, how it weighed them, and how it determined the sentence. State v. Kruse, 105 N.J. 354, 359-60 (1987). Merely enumerating the statutory factors does not provide any insight into the sentencing decision, which follows not from a quantitative, but from a qualitative, analysis. Id. at 363; State v. Boyer, 221 N.J. Super. 387, 404 (App. Div. 1987), certif. denied, 110 N.J. 299 (1988); State v. Morgan, 196 N.J. Super. 1, 5 (App. Div.), certif. denied, 99 N.J. 175 (1984).

3. Giving detailed reasons for the sentence is even more critical when the court deviates from imposing a presumptive term. State v. Kruse, supra, 105 N.J. at 362; State v. Martelli, 201 N.J. Super. 378, 383-84 (App. Div. 1985).

4. When the Appellate Division chooses to exercise original jurisdiction to supplement the sentencing record and to impose sentence directly, it must set forth its reasons both for the exercise of original jurisdiction and for the sentence actually imposed. State v. Jarbath, supra, 114 N.J. at 414.

5. The reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision. State v. Yarbough, 100 N.J. 627, 643 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

6. The court must provide its reasons as a "condition precedent" to imposing a period of parole ineligibility. State v. Kruse, supra, 105 N.J. at 363.

7. When a sentencing judge weighs a defendant's record heavily because of its length, and that length is due to numerous charges or arrests that did not result in convictions, the judge should state the reasons why those charges and arrests are relevant to the character of the sentence being imposed. State v. Tanksley, supra, 245 N.J. Super. at 397.

I. Statement of Real Time to Be Served

1. At the time a prison sentence is imposed, the court must state the approximate period of time the defendant will actually serve in custody according to the then current State Parole Board "Parole Eligibility Tables." R. 3:21-4(j). See copy of Parole Eligibility Table in Appendix to this manual (also available at the New Jersey State Parole Board website, www.state.nj.us/parole; click on "Parole Eligibility" and then "Parole Calculation").

2. The statement should also consider the impact of jail credits and should indicate that it is made for the benefit of the public and cannot be relied on by the defendant for purposes of proceedings before the Parole Board or any direct or collateral appeal. R. 3:21-4(j).

3. The court shall explain the parole laws as they apply to the sentence and shall state: the approximate time the defendant will serve in jail before parole eligibility, the jail credit or time already served, whether the defendant is entitled to good time and work credits, and whether the defendant is eligible for the Intensive Supervision Program. N.J.S.A. 2C:43-2(f).

J. Place to Serve Sentence

The sentencing judge, while not able to direct the Commissioner of Corrections to have a young adult offender serve a specific term sentence at a youth complex, can suggest or recommend that. State v. Styker, 262 N.J. Super. 7, 21 n.4 (App. Div.), aff'd o.b., 134 N.J. 254 (1993); State v. Berger, 258 N.J. Super. 553, 562 and n.6 (App. Div. 1992). The Commissioner retains the authority to transfer inmates. Ibid. (statutory citations omitted).

K. Right to Appeal

1. After it imposes sentence, the court "shall" advise the defendant that he or she has the right to appeal and, if indigent, has the right to appeal as an indigent. R. 3:21-4(h).

2. A defendant who has been advised of the right to appeal as provided under R. 3:21-4(h), yet fails to prosecute an appeal in a timely manner, should not ordinarily be granted leave to appeal "as within time" (i.e., nunc pro tunc). State v. Molina, ___ N.J. ___, ___ (2006) (slip op. at 12-13). However, an exception may be made where the defendant demonstrates, by certification and by a preponderance of the credible evidence, that he or she timely requested the filing of an appeal but that counsel failed to prosecute it. Id. at ___ (slip op. at 13).

3. A defendant who has not been advised of the right to appeal as required by R. 3:21-4(h) is entitled to "as within time" relief provided that the sentencing transcript confirms that the defendant was not so advised and an application for leave to appeal as within time is filed no later than five years from the date of sentencing. Id. at ___ (slip op. at 13).

4. The ruling in Molina is to be applied prospectively only. Id. at ___ (slip op. 14-15).

5. As an interim measure, trial courts must provide defendants with an "appeal rights" form, to be executed in duplicate by defendants and their counsel, one copy of which is to be kept in the court file and the other to be kept by the defendant. Id. at ___ (slip op. at 15-16).

6. Also as an interim measure, and as part of its sentencing colloquy, the trial court should review the appeal rights form with the defendant, satisfy itself that the defendant understands his or her rights and has executed the form knowingly and intelligently, and place that conclusion on the record. Id. at ___ (slip op. at 16).

L. Judgment

1. The judgment of conviction, indicating the plea, verdict or findings, adjudication and sentence, a statement of reasons for the sentence, and a statement of the credits received pursuant to R. 3:21-8, "shall" be signed by the judge and entered by the clerk. A copy of the judgment shall be forwarded to all the parties and their counsel by the Criminal Division Manager. R. 3:21-5.

2. The judgment of conviction should not contain any conditions for the future parole of a defendant, because the sentencing judge is without power to establish any such conditions. State v. Beauchamp, 262 N.J. Super. 532, 536 (App. Div. 1993). This is because once a judgment of conviction is entered, the trial court

relinquishes jurisdiction over the matter to the executive branch. Id. at 537.

3. It is not the oral pronouncement of sentence but the entry of a judgment prepared by the clerk and signed by the judge that establishes finality in a criminal case. State v. Gilberti, supra, 373 N.J. Super. at 6.

4. Because N.J.S.A. 53:1-20.20(g) (effective September 22, 2003) requires the submission of a DNA sample by all individuals convicted of a crime, the judgment of conviction should reflect the ordering of such a sample even if the oral sentencing transcript does not. State v. Vasquez, 374 N.J. Super. 252, 270 (App. Div. 2005). There is no ex post facto violation in requiring a DNA sample from a defendant whose crime predated the statute. State in the Interest of L.R., 382 N.J. Super. 605, 614-17 (App. Div. 2006).

M. Correction of Judgment

1. When the judgment of conviction contains an inadvertent clerical error, no fundamental right is violated if the judgment is corrected so that the sentence conforms to the judge's intentions. State v. Matlack, 49 N.J. 491, 501-02, cert. denied, 389 U.S. 1009, 88 S. Ct. 572, 19 L. Ed. 2d 606 (1967).

2. Where there is a discrepancy between the judge's oral pronouncement of sentence and the sentence in the judgment of conviction, the transcript controls. State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956). Where, however, the transcript is unclear as to the judge's intent, a remand may be necessary for clarification. State v. Murray, 338 N.J. Super. 80, 91 (App. Div.), certif. denied, 169 N.J. 608 (2001).

3. The failure to append a statement of reasons to the judgment of conviction may be cured by providing a copy of the statement from the sentencing transcript. Appending a statement of reasons to the judgment is a ministerial act

only. State v. Powell, 218 N.J. Super. 444, 450 (App. Div. 1987).

4. Where the appellate court directs a specific modification of the sentence or judgment--such as ordering sentences to be served concurrently, directing merger, or reducing the sentence to a specific term--a mere "ministerial" act suffices to implement the judgment and no further sentencing proceedings are required. State v. Tavares, supra, 286 N.J. Super. at 616.

5. Where the Parole Board finds an error in the judgment in the calculation of credits due a defendant, the proper procedure is to notify the judge and the parties. Such notification should result in correction of the judgment at the behest of the prosecutor, the defendant, or the judge sua sponte. Glover v. New Jersey State Parole Bd., 271 N.J. Super. 420, 423-24 (App. Div. 1994).

6. Double jeopardy protection generally prohibits increasing the sentence following commencement of execution. Thus, including in the judgment a parole ineligibility term that was not embodied in the sentence as originally pronounced amounts to an increase in the sentence and is prohibited, at least where service of the sentence commenced prior to the entry of final judgment. State v. Womack, 206 N.J. Super. 564, 569-71 (App. Div. 1985), certif. denied, 103 N.J. 482 (1986). The judgment, however, may include a parole ineligibility term that embodies confirmation of the sentencing court's indication at the time of sentencing that it intended to impose a period of parole ineligibility. Id. at 571.

7. The authority of a court to reconsider a sentence following the oral pronouncement but prior to entry of the judgment should be exercised only in exceptional circumstances. State v. Gilberti, supra, 373 N.J. Super. at 7. Where the defendant's subsequent misconduct is the reason for reconsideration, that conduct can be addressed by the court's exercise of its contempt power or by the initiation of new charges. Ibid.

IX. LEGALITY OF SENTENCES

A. Provisions Allowing Defendant to Challenge an Illegal Sentence

1. Direct appeals

If the judgment of conviction is reversed for error in the sentence, the appellate court may impose such sentence as should have been imposed or may remand to the trial court for a proper sentence. R. 2:10-3. This rule applies to both defense and prosecutorial sentencing appeals pursuant to the Code. See separate discussion of State appeals at Section X.

2. Post-conviction challenges

a. A petition for post-conviction relief is cognizable on the ground of "[i]mposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law." R. 3:22-2(c). State v. Flippen, 208 N.J. Super. 573, 575 n. 2 (App. Div. 1986).

b. The standard under R. 3:22-2(c) has been defined narrowly as applying only to two types of situations distinct from the broader "excessive sentence" standard. State v. Murray, 162 N.J. 240, 246 (2000). The first category includes sentences that exceed the penalties authorized by statute for a specific offense. Ibid. The second category includes sentences not imposed in accordance with the law, such as dispositions not authorized by the Code or failing to satisfy required presentencing conditions. Id. at 247.

c. Post-conviction proceedings are not a substitute for a direct appeal. State v. Mitchell, 126 N.J. 565, 583 (1992); State v. Cacamis, 230 N.J. Super. 1, 5 (App. Div. 1988), certif. denied, 114 N.J. 496 (1989);

State v. Adams, 227 N.J. Super. 51, 57 (App. Div.), certif. denied, 113 N.J. 642 (1988). Hence, only the legality of a sentence, and not its excessiveness, may be challenged on a post-conviction relief application. State v. Levine, 253 N.J. Super. 149, 154 (App. Div. 1992). A claim that a sentence is an abuse of judicial discretion is not cognizable on a petition for post-conviction relief. State v. Ellis, 346 N.J. Super. 583, 588 (App. Div.), aff'd o.b., 174 N.J. 535 (2002).

d. If there should have been a merger of offenses, then the sentence is considered illegal and the issue is cognizable on a post-conviction relief application. State v. Adams, supra, 227 N.J. Super. at 57.

e. Questions concerning the adequacy of the sentencing court's findings and the sufficiency of the weighing process employed to impose a parole ineligibility term are not cognizable on a petition for post-conviction relief. State v. Flores, 228 N.J. Super. 586, 595 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989).

f. The claim that the imposition of consecutive sentences runs afoul of the Yarbough guidelines is not cognizable in post-conviction relief proceedings because it does not relate to the legality of the sentences imposed. State v. Ellis, supra, 346 N.J. Super. at 596, aff'd, 174 N.J. 535; State v. Flores, supra, 228 N.J. Super. at 596.

g. A claim that a sentencing judge, in resentencing a defendant upon a probation violation, did so prior to and without regard to the criteria embodied in Baylass and Molina, may be raised for the first time in a post-conviction relief proceeding. State v. Ervin, 241 N.J. Super. 458, 475 (App. Div. 1989), certif. denied, 121 N.J. 634 (1990). But see State v. Lark, 117 N.J.

331, 341 (1989) (refusing to allow defendant to retroactively invoke Howard's rule, regarding Avenel consequences of guilty plea, for first time in post-conviction relief proceeding).

h. If a defendant's challenge to a prior conviction in the course of sentencing under the Graves Act as a repeat offender will serve to invalidate the prior conviction, rather than only clarify or explain it, the defendant must proceed by an appropriate application for post-conviction relief. State v. Jefimowicz, 119 N.J. 152, 160-61 (1990).

i. Claims of gap-time credits pertain to the legality of the sentence imposed and may be raised in a petition for post-conviction relief. State v. Shabazz, 263 N.J. Super. 246, 251 (App. Div.), certif. denied, 133 N.J. 444 (1993).

j. It is an open question whether a challenge to a prosecutor's refusal to waive a mandatory period of parole ineligibility under the drug statute may be raised in a post-conviction relief proceeding. State v. Jimenez, 266 N.J. Super. 560, 564 n.1 (App. Div. 1993).

k. Although a defendant may not raise in a post-conviction relief proceeding any issue that might reasonably have been raised in a direct appeal, an exception exists where denial of the petition would be contrary to constitutional law or would result in fundamental injustice. State v. Mitchell, supra, 126 N.J. at 584; State v. Laurick, 120 N.J. 1, 10, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990); State v. Shabazz, supra, 263 N.J. Super. at 249-50; State v. Levine, supra, 253 N.J. Super. at 155. Hence, a claim that a sentence is not authorized by any statutory provision is cognizable in a post-conviction relief proceeding even though it could have

been presented on direct appeal. State v. Levine, supra, 253 N.J. Super. at 156.

l. Under some extraordinary circumstances, a court's improper acceptance of a guilty plea may constitute an illegal sentence within the meaning of R. 3:22 if acceptance of the plea implicates constitutional issues. State v. Mitchell, supra, 126 N.J. at 577; State v. Shabazz, supra, 263 N.J. Super. at 250. However, a court's failure to spell out the factual basis of a plea does not necessarily constitute such an improper acceptance so as to render the sentence illegal. State v. D.D.M., 140 N.J. 83, 95 (1995).

m. Although a defendant has the opportunity to negotiate certain terms and conditions of a community supervision for life sentence, that opportunity does not prevent a defendant from applying for post-conviction relief and seeking withdrawal of a guilty plea where the defendant was misinformed about a condition. State v. Jamgochian, 363 N.J. Super. 220, 225 (App. Div. 2003).

n. A claim that a defendant was deprived of effective assistance of counsel due to trial counsel's potential conflict of interest falls outside the definition of an illegal sentence. State v. Murray, supra, 162 N.J. at 249. However, if an actual conflict is found, the court may apply the "injustice" or "extenuating circumstances" exceptions identified in Mitchell to determine whether the defendant is entitled to post-conviction relief. Id. at 251.

o. In some cases, the nature of the defendant's claim raised in a post-conviction relief petition may require development of facts that do not appear in the record. Post-conviction relief proceedings provide an appropriate vehicle for resolution of factual disputes in these instances. State

v. Preciose, 129 N.J. 451, 462 (1992); State v. Shabazz, supra, 263 N.J. Super. at 250.

p. R. 3:21-10(b)(4), which allows a change of sentence "as authorized by the Code," allows a defendant to move for re-sentencing where he or she is serving a sentence greater than the authorized maximum under the Code for an equivalent pre-Code offense. State v. James, 343 N.J. Super. 143, 147 (App. Div. 2001). The rule does not apply where the Legislature creates a new offense with a more lenient sentencing provision. Id. at 148. Moreover, where there is sufficient evidence to support a defendant's conviction of the older and higher degree offense, the sentence imposed is not an illegal one, because it is the sentence that applied to the crime at the time the offense was committed. Id. at 148 n.4.

B. Time For Defendant to Challenge an Illegal Sentence

1. A petition to correct an illegal sentence may be filed at any time. R. 3:22-12(a); State v. Murray, supra, 162 N.J. at 245-46; State v. Mitchell, supra, 126 N.J. at 576; State v. Levine, supra, 253 N.J. Super. at 155.

2. An illegal sentence may be corrected at any time and a court may do so sua sponte, as long as it has not been completed or served. State v. Crawford, 379 N.J. Super. 250, 257 (App. Div. 2005); State v. Tavares, 286 N.J. Super. 610, 617 (App. Div.), certif. denied, 144 N.J. 376 (1996); State v. Jurcsek, 247 N.J. Super. 102, 111 n. 3 (App. Div.), certif. denied, 126 N.J. 333 (1991); State v. Rhoda, 206 N.J. Super. 584, 593 (App. Div.), certif. denied, 105 N.J. 524 (1986); State v. Paladino, 203 N.J. Super. 537, 549 (App. Div. 1985); State v. Sheppard, 125 N.J. Super. 332, 336 (App. Div.), certif. denied, 64 N.J. 318 (1973).

3. A challenge to the gradation of an offense is not waived by failure to object to jury instructions at trial, since the issue concerns one of sentence legality. State v. Eure, 304 N.J.

Super. 469, 473 (App. Div.), certif. denied, 152 N.J. 193 (1997).

4. Where an illegal sentence is imposed, the court's jurisdiction to impose a correct one does not expire until a valid sentence is imposed. State v. Paladino, supra, 203 N.J. Super. at 550.

C. Time for the State to Challenge an Illegal Sentence

See discussion of State appeals at Section X.

D. Consequences of an Illegal Sentence

1. A court is free to vacate an illegal sentence and to impose a sentence mandated by law even though that may be higher than the original illegal sentence. State v. Heisler, 192 N.J. Super. 586, 592 (App. Div. 1984). However, where a "substantially harsher" sentence is imposed, and one that is not required by law, then the resentencing might not comport with principles of fundamental fairness or due process because it penalizes the defendant for successfully challenging an illegal sentence. Id. at 593.

2. Where a court increases a term of imprisonment in order to correct an illegality in the sentence, it may not consider the slate wiped clean so as to impose any statutorily authorized sentence. State v. Eigenmann, 280 N.J. Super. 331, 341 (App. Div. 1995). Rather, a court's authority in correcting an illegal sentence is limited and must be sparingly exercised. Id. at 346. Where a defendant has started to serve his sentence, there is no justification for setting aside, and increasing the severity of, the lawful elements of the original sentence. Id. at 347.

3. There is nothing illegal about changing a sentence following a vacating of a plea of guilty and allowing a defendant to be resentenced in accordance with State v. Kovack, 91 N.J. 476 (1982). State v. Naji, 205 N.J. Super. 208, 216 (App. Div. 1985), certif. denied, 103 N.J. 467 (1986). See separate discussion of sentences associated with pleas of guilty at Section VII.

4. A judgment of conviction may be corrected for technical errors or clerical mistakes, but it cannot embody a sentence that constitutes an increase above that originally imposed by the trial judge, unless it merely embodies that sentence which the trial judge intended to give at the time of sentencing. The record must sufficiently indicate an expression of that intent. State v. Womack, 206 N.J. Super. 564, 570-71 (App. Div. 1985), certif. denied, 103 N.J. 482 (1986).

5. Where a court illegally imposes a Graves Act sentence, but where a discretionary parole disqualifier may be justified, the remedy is not to amend the judgment of conviction but to remand to the trial court to allow the judge the opportunity to determine whether, and for how long, a parole ineligibility period should be imposed. State v. Wooters, 228 N.J. Super. 171, 174 (App. Div. 1988). However, if the court also gave reasons to support a discretionary term, then any error in referring to the Graves Act may be deemed harmless. State v. Guzman, 313 N.J. Super. 363, 384-85 (App. Div.), certif. denied, 156 N.J. 424 (1998); Compare State v. Copeman, 197 N.J. Super. 261, 265 (App. Div. 1984) (where discretionary parole disqualifier has to be vacated, but where Graves Act sentence should have been imposed, error may be corrected by amending judgment of conviction to reflect mandatory minimum under Graves Act).

6. Where a defendant's appeal results in a merger of two or more offenses, he or she may be resentenced without offending the double jeopardy clause, notwithstanding commencement of the original term, as long as the new sentence in the aggregate is not in excess of the sentence originally imposed. State v. Rodriguez, 97 N.J. 263, 277 (1984).

7. A defendant who appeals an underlying conviction along with the corresponding sentence has no legitimate expectation of finality in either. State v. Haliski, 140 N.J. 1, 21 (1995); State v.

Young, 379 N.J. Super. 498, 505 (App. Div. 2005). This is true whether or not the appeal of the conviction is successful. State v. Haliski, supra, 140 N.J. at 23. See Monge v. California, 524 U.S. 721, 730, 118 S. Ct. 2246, 2251, 141 L. Ed. 2d 615, 624-25 (1998) (sentencing decisions favorable to defendant cannot be analogized to acquittal for purposes of double jeopardy); Baker v. Barbo, 177 F.3d 149, 158 (3d Cir.) (defendant's initiation of appellate process may prevent convictions and sentences from being invested with finality), cert. denied, 528 U.S. 911, 120 S. Ct. 261, 145 L. Ed. 2d 219 (1999).

8. After a successful challenge to the imposition of a consecutive sentence, a defendant should reasonably expect that the trial court, on remand, may reconsider other components of the overall sentence to assure that the defendant receives proper punishment. State v. Espino, 264 N.J. Super. 62, 68-69 (App. Div. 1993). The only legitimate expectation of finality that a defendant has is that the original aggregate sentence will not be increased. Id. at 72.

9. Where a defendant challenges his convictions, but not his sentence, and where the appellate court reverses one of those convictions, the trial court on remand is free to consider whether to impose a discretionary persistent offender extended term on the remaining conviction, as long as there is no increase in the aggregate term. State v. Young, supra, 379 N.J. Super. at 505-09.

10. Where a sentence is corrected by "unmerging" two counts that were improperly merged, there is no double jeopardy problem in imposing a consecutive sentence on the second count as long as the new sentences, in the aggregate, do not exceed the original sentence imposed. State v. Crouch, 225 N.J. Super. 100, 107-08 (App. Div. 1988). But see State v. Loftin, 287 N.J. Super. 76, 113 (App. Div.) (where first degree crime is "unmerged," in place of second degree crime that should have merged, there is no prohibition against imposing consecutive sentence even if

that means increasing overall sentence), certif. denied, 144 N.J. 175 (1996).

11. Where an appellate court reverses a defendant's conviction for an offense into which the trial court merged a lesser offense, and where the errors found on appeal do not affect the lesser offense, the State may elect not to retry the defendant for the greater offense. In such a case, the lesser offense is "unmerged" and resurrected and a defendant may be sentenced thereon. State v. Harrington, 310 N.J. Super. 272, 280-81 (App. Div.), certif. denied, 156 N.J. 387 (1998); State v. Pennington, 273 N.J. Super. 289, 295-96 (App. Div.), certif. denied, 137 N.J. 313 (1994); State v. Brent, 265 N.J. Super. 577, 580, 590 (App. Div. 1993), rev'd on other grounds, 137 N.J. 107 (1994).

12. Where a defendant successfully challenges only the excessiveness of the parole disqualifier, the court on remand is not free to increase the base term even if the term is thought to be too lenient. To hold otherwise would give the State an implied right of cross-appeal in circumstances not envisioned by the Legislature. State v. Towey (II), 244 N.J. Super. 582, 598 (App. Div.), certif. denied, 122 N.J. 159 (1990).

13. A prior uncounseled DWI conviction (without waiver of the right to counsel) may establish repeat-offender status for purposes of enhanced penalties and fines, but not for increased loss of liberty. Hence, the actual period of incarceration imposed for a repeat offense may not exceed that for any counseled DWI convictions. State v. Laurick, supra, 120 N.J. at 16. This holding is still valid even after Nichols v. United States, 511 U.S. 738, 746-47, 114 S. Ct. 1921, 1927, 128 L. Ed. 2d 745, 754-55 (1994), where the United States Supreme Court held that an uncounseled conviction may be relied upon to enhance the sentence for a subsequent offense even though that sentence entails imprisonment. State v. Hrycak, 184 N.J. 351, 362-63 (2005).

14. A DWI offender cannot avoid the statutorily required minimum sentence for a third offender merely because the municipal court imposed an illegal penalty on an earlier conviction and the State failed to challenge that error by filing an appeal. A defendant has no legitimate expectation of finality in a sentence below the statutorily mandated minimum. State v. Nicolai, 287 N.J. Super. 528, 531-32 (App. Div. 1996).

E. Common Examples of Illegal Sentences

1. A defendant must be sentenced separately on each count of an indictment. State v. Francis, 341 N.J. Super. 67, 69 (App. Div. 2001). Penalties and assessments cannot be imposed on any merged count. Ibid.

2. A parole ineligibility term cannot be imposed on an aggregate sentence; rather, it must be imposed on a specific count. Failure to do so constitutes error that must be corrected by the trial court. State v. Orlando, 269 N.J. Super. 116, 141 (App. Div. 1993), certif. denied, 136 N.J. 30 (1994); State v. Adams, supra, 227 N.J. Super. at 68; State v. Subin, 222 N.J. Super. 227, 240-41 (App. Div.), certif. denied, 111 N.J. 580 (1988); State v. Jones, 213 N.J. Super. 562, 571 (App. Div. 1986).

3. It is improper to base a sentence on a fact unrelated to the sentencing criteria in the Code. Since the defendant's appearance at sentencing is not such a criterion, a plea agreement based on an extended term in the event of defendant's nonappearance in court cannot be enforced because such a sentence would be illegal. State v. Wilson, 206 N.J. Super. 182, 184 (App. Div. 1985). But see State v. Subin, supra, 222 N.J. Super. at 237-40 (nonappearance at sentencing may be relevant to risk of defendant's committing another offense and to the need for deterrence; no error as long as sentence is not automatically imposed by virtue of defendant's nonappearance). See also State v. Shaw, 131 N.J. 1, 15 (1993) (discussing validity of plea agreement pursuant

to N.J.S.A. 2C:35-12 made conditional on defendant's appearance at sentencing).

4. There can be no plea bargain to an illegal sentence. State v. Manzie, 335 N.J. Super. 267, 278 (App. Div. 2000), aff'd, 168 N.J. 113 (2001); State v. Baker, 270 N.J. Super. 55, 78 n.2 (App. Div.), aff'd o.b., 138 N.J. 89 (1994); State v. Nemeth, 214 N.J. Super. 324, 327 (App. Div. 1986). See separate discussion of sentences associated with pleas of guilty at Section VII.

5. A sex offender must be sentenced to a fixed term of years, whether sentenced to a custodial sentence or to the Adult Diagnostic and Treatment Center. State v. Dittmar, 188 N.J. Super. 364, 366-67 (App. Div. 1982), certif. denied, 97 N.J. 678 (1984). See separate discussion of sex offender sentences at Section XVII.

6. There is nothing illegal about a condition of probation that is not expressly authorized by N.J.S.A. 2C:45-1(b)(1) through (13), as long as it substantially relates to an appropriate penological and rehabilitative objective and is not unduly restrictive of a defendant's liberty. State v. Krueger, 241 N.J. Super. 244, 257 (App. Div. 1990). However, such a condition should not be imposed for a period greater than the probationary term itself. Id. at 256.

7. It is not illegal for a court to specify that a less restrictive sentence be served prior to a more restrictive one when consecutive sentences are imposed at the same time for convictions arising from a single trial. State v. Ellis, supra, 346 N.J. Super. at 597, aff'd, 174 N.J. 535.

8. A sentence recommendation by the State based on miscalculations in making a plea offer pursuant to the Attorney General's Guidelines applicable to drug offenders is not an "illegal" sentence under N.J.S.A. 2C:35-12. State v. Veney, 327 N.J. Super. 458, 462 (App. Div. 2000).

9. It is not unconstitutional to impose a more severe sentence upon reconviction following a reversal of a defendant's original conviction on appeal and a vacating of the original sentence, so long as the harsher sentence is based on subsequent events or conduct and is not motivated by retaliation. The reasons for imposing the harsher sentence must affirmatively appear on the record. North Carolina v. Pearce, 395 U.S. 711, 723, 89 S. Ct. 2072, 2079, 23 L. Ed. 2d 656, 668 (1969); State v. Pindale, 279 N.J. Super. 123, 128-30 (App. Div.), certif. denied, 142 N.J. 449 (1995); State v. Ferguson, 273 N.J. Super. 486, 498 (App. Div.), certif. denied, 138 N.J. 265 (1994); State v. Baker, supra, 270 N.J. Super. at 77; State v. Lozada, 257 N.J. Super. 260, 277-78 (App. Div.), certif. denied, 130 N.J. 595 (1992).

X. STATE APPEALS

A. General Rule

While double jeopardy considerations generally restrict the State's right to appeal in criminal actions, certain sentencing decisions may be appealed by the State.

B. Supreme Court

The State may appeal or seek certification in the Supreme Court from a final judgment or order of the Appellate Division. R. 2:3-1(a).

C. Appellate Division

1. The State's power to appeal to "the appropriate appellate court" is restricted to the situations specified in R. 2:3-1(b). With regard to sentencing, the rule allows the State to appeal from "a judgment in a post-conviction proceeding collaterally attacking a conviction or sentence," R. 2:3-1(b)(4), or "as otherwise provided by law." R. 2:3-1(b)(6).

2. Absent explicit statutory authority, the State has no right to appeal a criminal sentence. State v. Cannon, 128 N.J. 546, 573 n.13, 574 (1992); State v. Veney, 327 N.J. Super. 458, 460 (App. Div. 2000). Restrictions on the State's right to appeal rest upon the principle that such appeals implicate the double jeopardy clauses of the federal and state constitutions. State v. Lefkowitz, 335 N.J. Super. 352, 357 (App. Div. 2000), certif. denied, 167 N.J. 637 (2001); State v. Veney, supra, 327 N.J. Super. at 461.

3. R. 2:3-1 does not authorize an appeal simply because it is not precluded by the double jeopardy clauses. The rule is coextensive with the multi-prosecution, but not multi-punishment cases under the double jeopardy clauses. State v. Lefkowitz, supra, 335 N.J. Super. at 356-57 n.2.

4. The State has the right, if not the duty, to appeal or cross-appeal in order to seek correction of an illegal sentence. State v. Chambers, 377 N.J. Super. 365, 369-70 (App. Div. 2005); State v. Mercadante, 299 N.J. Super. 522, 528-29 (App. Div.), certif. denied, 150 N.J. 26 (1997); State v. Tavares, 286 N.J. Super. 610, 619 (App. Div.), certif. denied, 144 N.J. 376 (1996); State v. Baker, 270 N.J. Super. 55, 75-77 (App. Div.), aff'd o.b., 138 N.J. 89 (1994); State v. Leslie, 269 N.J. Super. 78, 86 (App. Div. 1993), certif. denied, 136 N.J. 29 (1994); State v. Laurick, 231 N.J. Super. 464, 474 n.4 (App. Div. 1989), rev'd on other grounds, 120 N.J. 1, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990); accord Baker v. Barbo, 177 F.3d 149, 158 (3d Cir.), cert. denied, 528 U.S. 911, 120 S. Ct. 261, 145 L. Ed. 2d 219 (1999).

5. The appellate court may also modify an illegal sentence sua sponte, even if such modification results in a term greater than that originally imposed. State v. Moore, 377 N.J. Super. 445, 449-50 (App. Div.), certif. denied, 185 N.J. 267 (2005); State v. Gould, 352 N.J. Super. 313, 317-18 (App. Div. 2002); State v. Horton, 331 N.J. Super. 92, 97 (App. Div. 2000); State v. Swint, 328 N.J. Super. 236, 263 (App. Div.), certif. denied, 165 N.J. 492 (2000); State v. Mercadante, supra, 299 N.J. Super. at 528-29; State v. Haliski, 273 N.J. Super. 157, 160 (App. Div. 1994), aff'd, 140 N.J. 1 (1995) State v. Baker, supra, 270 N.J. Super. at 72; State v. Kirk, 243 N.J. Super. 636, 643 (App. Div. 1990).

6. This is especially so where the sentence must be increased to conform to the dictates of a sentencing statute. State v. Johnson, 376 N.J. Super. 163, 168-70 (App. Div.), certif. denied, 183 N.J. 592 (2005); State v. Nicolai, 287 N.J. Super. 528, 531-32 (App. Div. 1996); State v. Tavares, supra, 286 N.J. Super. at 617; accord Baker v. Barbo, 177 F.3d 149, 158-59 (3d Cir.), cert. denied, 528 U.S. 911, 120 S. Ct. 261, 145 L. Ed. 2d 219 (1999).

7. However, there must be a threshold showing that the court has authority over the issue and that the State is procedurally allowed to obtain review of the sentence. State v. Kirk, supra, 243 N.J. Super. at 643-44. See State v. Koch, 256 N.J. Super. 207, 213-15 (Law Div. 1991) (following retrial and reconviction, second court may increase previous illegal sentence even though defendant did not appeal that sentence).

8. The appellate court may decline to entertain the State's argument regarding an illegal sentence where the State fails to file a cross-appeal. State v. Mays, 321 N.J. Super. 619, 634 (App. Div.), certif. denied, 162 N.J. 132 (1999).

9. The State has an obligation to move quickly when asserting an illegality because the defendant may have an expectation of finality in a sentence that is technically within statutory limits. State v. Tavares, supra, 286 N.J. Super. at 619.

10. N.J.S.A. 2C:44-7 expressly grants the appellate court power to review all sentences. Nevertheless, the power to correct an illegal sentence is vested in the appellate court irrespective of any specific grant of power. State v. Kirk, supra, 243 N.J. Super. at 645.

D. Leniency

1. Except as provided below, appellate courts may not review lenient sentences. State v. Morant, 241 N.J. Super. 121, 142 (App. Div.), certif. denied, 127 N.J. 323 (1990).

2. When a defendant is convicted of a first or second degree crime, the Code provides the State with the opportunity to appeal if the court imposes a term appropriate for one degree lower than the conviction or if it imposes a noncustodial or probationary sentence. In such cases, the sentence does not become final for ten days in order to allow the prosecution to appeal. N.J.S.A. 2C:44-1(f)(2); State v. Roth, 95 N.J. 334, 360 (1984).

a. A defendant is charged with notice of N.J.S.A. 2C:44-1(f)(2) and has no expectation of finality in the sentence until the ten-day period ends. State v. Johnson, supra, 376 N.J. Super. at 171-72; State v. Giorgianni, 189 N.J. Super. 220, 227 (App. Div.), certif. denied, 94 N.J. 569 (1983).

b. The ten-day period commences on the day after sentence is pronounced, and the day on which the notice is filed is included, unless it is a weekend day or legal holiday, in which case the ten-day period runs until the end of the next day that is not a weekend day or legal holiday. State v. Johnson, supra, 376 N.J. Super. at 172-73; R. 1:3-1; R. 3:21-4(i).

c. Strict compliance with N.J.S.A. 2C:44-1(f)(2) is required. The State's failure to perfect an appeal within the ten-day period will result in dismissal of the appeal. State v. Sanders, 107 N.J. 609, 616 (1987); State v. Johnson, supra, 376 N.J. Super. at 170; State v. Gould, 352 N.J. Super. 313, 318-19 (App. Div. 2002).

d. Any sentence other than imprisonment satisfies the "noncustodial" aspect of N.J.S.A. 2C:44-1(f)(2), including suspended sentences, probation, or ISP. State v. Cannon, supra, 128 N.J. at 567.

3. The State may appeal from a sex offender's resentence under the Code that it deems too lenient. State v. Cruz, 232 N.J. Super. 294, 297 (App. Div. 1989), rev'd on other grounds, 125 N.J. 550 (1991).

4. Where a defendant successfully challenges the excessiveness of a parole disqualifier, the court on remand is not free to increase the base term even if the term is thought to be too lenient. Otherwise the State would have an implied right of cross-appeal not envisioned by the Legislature. State v. Towey (II), 244 N.J.

Super. 582, 598 (App. Div.), certif. denied, 122 N.J. 159 (1990).

5. Erroneous exercises of discretion in sentencing cannot be corrected to a defendant's disadvantage, at least where the defendant has begun serving the sentence. State v. Veney, supra, 327 N.J. Super. at 461; State v. Eigenmann, 280 N.J. Super. 331, 339 (App. Div. 1995); State v. Kirk, supra, 243 N.J. Super. at 642. Where an illegal sentence is set aside at the State's behest, the slate is not wiped clean so as to permit imposition of any statutorily authorized sentence. State v. Eigenmann, supra, 280 N.J. Super. at 341. Although the illegal portion of the sentence may be increased, this does not justify setting aside or increasing the severity of the lawful elements of the original sentence. Id. at 347.

6. Where a court declines to impose a mandatory extended term under the Graves Act because of an absence of proofs regarding the prior offenses, and where the State appeals, the proper remedy is to remand to the trial court for reconsideration of the sentence. State v. Robinson, 253 N.J. Super. 346, 358-59 (App. Div.), certif. denied, 130 N.J. 6 (1992). On remand, the State may present additional proofs only if the court finds there are no due process or double jeopardy preclusions. Id. at 359. See Monge v. California, 524 U.S. 721, 734, 118 S. Ct. 2246, 2253, 141 L. Ed. 2d 615, 628 (1998) (double jeopardy clause does not preclude retrial on prior conviction allegation in noncapital sentencing context).

7. A defendant is on constructive notice of the State's right to appeal the entry of judgment notwithstanding the verdict pursuant to R. 2:3-1(b)(3). State v. Cetnar, 341 N.J. Super. 257, 265 (App. Div.), certif. denied, 170 N.J. 89 (2001). Where the State perfects that right prior to sentencing on a lesser charge and seeks to stay imposition of sentence, there is no expectation of finality in the sentence imposed. Ibid.

8. Where a judge declines to accept a guilty verdict, and the jury re-deliberates and returns a verdict on a lesser charge, the State may not appeal the sentence imposed on the lesser charge. State v. Lefkowitz, supra, 335 N.J. Super. at 355-58.

9. Where a court, over the objection of the prosecutor, imposes a sentence of special probation upon a drug or alcohol dependent offender, the sentence shall not become final for ten days in order to permit the State to appeal such a sentence. N.J.S.A. 2C:35-14(c); State v. Hester, 357 N.J. Super. 428, 437-38 (App. Div.), certif. denied, 177 N.J. 219 (2003). Note that R. 2:9-3(d) (pertaining to stays of sentence following appeal by State) has not been amended to refer to N.J.S.A. 2C:35-14(c). State v. Hester, supra, 357 N.J. Super. at 438 n.8.

E. Constitutionality of N.J.S.A. 2C:44-1(f)(2)

1. Since the sentence does not become final for ten days, jeopardy does not immediately attach for constitutional purposes. Once a defendant begins serving the custodial portion of the sentence, however, jeopardy does attach. After jeopardy attaches, any increase in sentence would violate the double jeopardy clauses of the federal and state constitutions. State v. Ryan, 86 N.J. 1, 10, cert. denied, 454 U.S. 880, 102 S. Ct. 363, 70 L. Ed. 2d 190 (1981); State v. Jones, 188 N.J. Super. 201, 206 (App. Div. 1983).

2. Jeopardy does not attach, however, merely because, during the ten-day period, a defendant begins serving the probationary term, especially where he or she is informed of the State's right to appeal and of the ten-day stay. State v. Christensen, 270 N.J. Super. 650, 655-56 (App. Div. 1994).

3. Granting the State the right to appeal a sentence under these limited circumstances does not violate State or federal constitutional double jeopardy, vagueness or fundamental fairness

principles. State v. Roth, supra, 95 N.J. at 344-45; accord State v. Cannon, supra, 128 N.J. at 573 n.13.

4. The State's appeal of a sentence does not subject the defendant to the harassment or risk of multiple prosecution which the double jeopardy clauses were meant to prohibit. Also, since the State is authorized by statute to appeal, the defendant has no expectation of finality. United States v. DiFrancesco, 449 U.S. 117, 136, 101 S. Ct. 426, 66 L. Ed. 2d 328, 345 (1980); State v. Roth, supra, 95 N.J. at 344; State v. Christensen, supra, 270 N.J. Super. at 655. See Monge v. California, supra, 524 U.S. at 729, 118 S. Ct. at 2251, 141 L. Ed. 2d at 625 (pronouncement of sentence does not have qualities of constitutional finality).

F. Stay of Sentence under N.J.S.A. 2C:44-1(f)(2)

1. When the State has appealed pursuant to N.J.S.A. 2C:44-1(f)(2), execution of sentence "shall" be stayed pending appeal. R. 2:9-3(d). Whether the sentence is custodial or noncustodial, bail shall be established as appropriate under the circumstances. Although a defendant may elect to execute the sentence, this operates as a waiver of the right to challenge the sentence increase on the ground that execution has commenced. R. 2:9-3(d).

2. There must be an actual, voluntary waiver. Where the ten-day period has expired and neither the court, the prosecutor nor the public defender has advised the defendant of the stay provision or of the right to waive under R. 2:9-3(d), the defendant cannot be said to have waived the right to challenge an increased sentence just because execution has commenced. State v. Williams, 203 N.J. Super. 513, 518 (App. Div. 1985). However, the defendant does not have to be advised of the right to choose until the bail hearing. State v. Sanders, supra, 107 N.J. at 617 n.7; State v. Christensen, supra, 270 N.J. Super. at 656.

3. A stay of sentence is effective under R. 2:9-3(d) as soon as the State files its notice of appeal, even if the State does not affirmatively file for a stay pending appeal until after the ten-day period of N.J.S.A. 2C:44-1(f)(2) expires. State v. Evers, 368 N.J. Super. 159, 169 (App. Div. 2004).

G. Plea Bargains

1. Where sentence is imposed upon a guilty plea entered pursuant to a plea bargain in which the State has promised to remain silent as to sentence, the State may not appeal the sentence as lenient. State v. Paterna, 195 N.J. Super. 124, 126 (App. Div. 1984).

2. The State may appeal from the inclusion, in a judgment of conviction, of the "non-evidential" provision of N.J.S.A. 2C:11-5(c) (plea of guilty to death by auto may not be evidential in any civil proceeding), where the State is not given advance notice that such a provision would be requested by the defense. State v. Faunce, 244 N.J. Super. 499, 501-02 (App. Div. 1990).

XI. MOTIONS FOR RECONSIDERATION

A. General Rules

1. A motion to reduce or change a sentence must be filed no later than sixty days after the judgment of conviction. On such a motion, or on its own initiative, the court may reduce or change a sentence, but no later than seventy-five days from entry of the judgment of conviction. R. 3:21-10(a).

2. However, the time limitations do not apply to illegal sentences, which may be corrected at any time, R. 3:22-12(a), or to motions to change a sentence as authorized by the Code. R. 3:21-10(b)(4). See discussion of legality of sentences at Section IX.

3. The time limitations also do not apply to applications for transfer to a drug treatment program. R. 3:21-10(b)(1). See separate discussion of such applications at Section XV.

4. Other exceptions to the time limitations include: motions to amend a custodial sentence because of the defendant's illness or infirmity (R. 3:21-10(b)(2)), motions upon joint application of the defendant and prosecutor (R. 3:21-10(b)(3)), motions for entry into ISP (R. 3:21-10(b)(5)), and motions to change a sentence when a prior conviction has been reversed or vacated (R. 3:21-10(b)(6)).

B. Motion Pending Appeal

Notwithstanding R. 2:9-1(a), the trial court may reconsider a sentence while an appeal is pending in the Appellate Division. R. 3:21-10(d).

C. Limitation

This rule cannot be invoked to increase a sentence. See State v. Matlack, 49 N.J. 491, 502, cert. denied, 389 U.S. 1009, 88 S. Ct. 572, 19 L. Ed. 2d 606 (1967); State v.

Williams, 167 N.J. Super. 203, 208 (App. Div. 1979), aff'd, 81 N.J. 498 (1980).

D. Defendant's Presence

According to R. 3:16(b), a defendant's presence in court is not required for a reduction of sentence under R. 3:21-10.

XII. RESTITUTION

A. General Rules

1. A person convicted of an offense may be sentenced to make restitution to the victim. N.J.S.A. 2C:43-2(b)(1). Such restitution shall not exceed the victim's loss but may be in addition to any fine imposed upon the defendant. N.J.S.A. 2C:43-3; State v. Scribner, 298 N.J. Super. 366, 370 (App. Div.), certif. denied, 150 N.J. 27 (1997); State v. Rhoda, 206 N.J. Super. 584, 591 (App. Div.), certif. denied, 105 N.J. 524 (1986). See State v. Newman, 132 N.J. 159, 164-69 (1993) (discussing historical distinction between fines and restitution). See also separate discussion of fines at Section XIII.

2. Restitution may be imposed in addition to either a sentence of imprisonment or a sentence of probation. N.J.S.A. 2C:44-2(b); State v. Zeliff, 236 N.J. Super. 166, 171 (App. Div. 1989). Hence, when vacating an initial sentence of probation to impose a term of imprisonment pursuant to a probation violation, a court need not, but may, vacate the restitution requirement. Ibid.

3. Where the victim is a department or division of the State, the court "shall" order restitution to the victim. In cases involving the failure to pay a State tax, the amount of restitution shall be the full amount of the tax plus civil penalties and interest. N.J.S.A. 2C:43-3 (final paragraph). This provision evinces a strong legislative intention to require full restitution from those who defraud the public, including corporate officers who fail to remit taxes on behalf of their corporations. State v. Paone, 290 N.J. Super. 494, 496-97 (App. Div. 1996).

4. When a prosecutor's office purchases drugs from a defendant as part of an undercover investigation, it is not a "victim" as defined by N.J.S.A. 2C:43-3(e). Hence, restitution may not be

imposed as a sanction to recover drug-buy money expended by the State. State v. Newman, supra, 132 N.J. at 176-77.

5. N.J.S.A. 2C:43-3(e) does not prohibit the payment of restitution to a municipality for disability benefits paid to a police officer wounded in the line of duty by a defendant. State v. Hill, 155 N.J. 270, 275-76 (1998).

6. N.J.S.A. 2C:43-2.1 imposes mandatory restitution to be paid to the owners of stolen cars. Unlike the general restitution statute, it is not dependent in any way upon a defendant's financial resources or ability to pay. State v. Jones, 347 N.J. Super. 150, 153 (App. Div.), certif. denied, 172 N.J. 181 (2002). The restitution award is available to insurance carriers who provide payments to their insureds as a result of losses sustained when a car is stolen. Id. at 153-54.

7. In addition to any restitution authorized by N.J.S.A. 2C:43-3, the court may order a defendant to make restitution for costs incurred by any law enforcement entity in extraditing the defendant from another jurisdiction if the defendant was located in the other jurisdiction in order to avoid prosecution or service of a criminal sentence. N.J.S.A. 2C:43-3.4.

8. For restitution provisions applicable to human trafficking offenses, see N.J.S.A. 2C:13-8(e) (effective April 26, 2005).

9. For restitution provisions applicable to graffiti offenses, see N.J.S.A. 2C:17-3, N.J.S.A. 2C:33-10, N.J.S.A. 2C:33-11, and N.J.S.A. 2C:33-14.1(b).

10. For restitution provision applicable to the offenses of theft of services and meter tampering, see N.J.S.A. 2C:20-8(k) and State v. Kennedy, 152 N.J. 413 (1998).

11. For restitution provision applicable to the offense of theft of personal identifying

information, see N.J.S.A. 2C:21-17.1 (effective October 16, 2002).

12. For restitution provisions applicable to violations of the minimum wage provisions for employees engaged in public works, see N.J.S.A. 2C:21-34(c) (effective January 14, 2004).

B. Criteria for Imposing Restitution

1. The court may order restitution if the defendant has derived a pecuniary gain from the offense, or the court is of the opinion that restitution is specially adapted to deterrence of the type of offense involved or to correction of the offender. State v. Newman, supra, 132 N.J. at 164; State v. Rhoda, supra, 206 N.J. Super. at 591 (interpreting statute in effect prior to December 1991).

2. Effective December 23, 1991, a court "shall" order a defendant to make restitution if the victim suffered a loss and the defendant is able to pay or, given a fair opportunity, will be able to pay. N.J.S.A. 2C:44-2(b). This change made explicit what previously had been implicit, i.e., that restitution is appropriate only if the offense causes a victim to suffer a loss. State v. Newman, supra, 132 N.J. at 175. The amendment eliminated the requirement that the offender derive a pecuniary gain. State v. Paone, supra, 290 N.J. Super. at 496.

3. In determining the amount and method of payment, a court shall consider all financial resources of the defendant, including likely future earnings, and shall set the amount to provide the victim with the fullest compensation consistent with the defendant's ability to pay. N.J.S.A. 2C:44-2(c)(2).

4. Ordinarily, there should be a hearing conducted to determine the defendant's ability to pay. State v. Newman, supra, 132 N.J. at 169; State v. McLaughlin, 310 N.J. Super. 242, 263 (App. Div.), certif. denied, 156 N.J. 381 (1998); State v. Smith, 307 N.J. Super. 1, 15-16 (App. Div. 1997),

certif. denied, 153 N.J. 216 (1998). A hearing may not be required where no dispute exists as to the amount of the loss, and where either the defendant concedes his or her ability to pay or the court can infer from the presentence report that the defendant has the ability to pay. State v. Orji, 277 N.J. Super. 582, 589-90 (App. Div. 1994). Cf. State v. Pessolano, 343 N.J. Super. 464, 479 (App. Div.) (hearing necessary where defendant disputes amount of restitution, is no longer employed, has lost his business, and is about to be incarcerated), certif. denied, 170 N.J. 210 (2001).

5. Restitution may be ordered even in the absence of the present means to pay because a court may take into account future income or assets as well as future earnings and potential expectations and prospects. State in the Interest of R.V., 280 N.J. Super. 118, 121-22 (App. Div. 1995). In the absence of a defendant's present ability to pay, the court should impose an appropriate amount of restitution, reduce it to a civil judgment, and make it subject to future enforcement. Id. at 123.

6. A restitution award shall not be reduced by any amount the victim received from the Violent Crimes Compensation Board; rather, the defendant shall pay the VCCB any restitution ordered for a loss previously compensated. N.J.S.A. 2C:44-2(c)(2).

7. When a defendant ordered to make restitution is also sentenced to probation, the court "shall" make continuing payment of installments a condition of probation. N.J.S.A. 2C:45-1(c); N.J.S.A. 2C:46-1(b)(1). Upon the termination of probation, if the defendant has failed to make restitution as ordered, the court "shall" extend the probationary period. N.J.S.A. 2C:45-2(c)(2).

8. Restitution may be imposed as a condition of probation on crimes alleged in counts to which a defendant has not pleaded guilty as long as there is a reasonable relationship between the restitution and the defendant's rehabilitation,

and there is a factual underpinning to support the restitution. State v. Corpi, 297 N.J. Super. 86, 91-92 (App. Div.), certif. denied, 149 N.J. 407 (1997); State v. Krueger, 241 N.J. Super. 244, 253 (App. Div. 1990).

9. Restitution may be made a condition of a defendant's participation in a pretrial intervention program. In such a case, the same standards apply that govern the resolution of issues where restitution is made a condition of probation. State v. Jamiolkoski, 272 N.J. Super. 326, 329 (App. Div. 1994).

10. When a defendant ordered to make restitution is also sentenced to a custodial term in a state correctional facility, the court may require the defendant to pay installments on the restitution. N.J.S.A. 2C:46-1(b)(2).

11. In the case of multiple offenders, there is a rebuttable presumption of proportionate liability, but the defendant is free to challenge such a presumption. State in the Interest of D.G.W., 70 N.J. 488, 507-08 (1976).

    a. There may be circumstances to justify imposing a joint obligation to pay the entire amount. Id. at 508 n.5; see State v. Pessolano, supra, 343 N.J. Super. at 479 n.10 (joint and several responsibility may be imposed in "appropriate manner and circumstances").

    b. But imposition of joint and several liability between or among multiple defendants, without examination of the individual defendant's present or future ability to pay, cannot be sustained. State v. Scribner, supra, 298 N.J. Super. at 371-72.

    c. A restitution award should not be made subject to an "unknown credit" for any amount paid by a codefendant. State v. Pessolano, supra, 343 N.J. Super. at 479. Rather, there should be a fixed obligation set for each defendant. Ibid.

C. Procedure for Imposing Restitution

1. Type of hearing required

a. Where restitution is imposed, property and liberty interests are implicated, the deprivation of which triggers the defendant's entitlement to due process. State in the Interest of D.G.W., supra, 70 N.J. at 502; State v. Paladino, 203 N.J. Super. 537, 547 (App. Div. 1985).

b. A summary hearing is required to determine the amount the defendant can pay and the time within which he or she can reasonably do so. State in the Interest of D.G.W., supra, 70 N.J. at 503; State v. Jamiolkoski, supra, 272 N.J. Super. at 329; State v. Paladino, supra, 203 N.J. Super. at 547.

c. Due process is satisfied where there is a hearing and a factual basis in the record to support the court's determination. State v. Harris, 70 N.J. 586, 599 (1976).

2. Information necessary for determination

a. The probation department shall investigate the incident to determine the nature and extent of damages or other losses caused by the defendant. State in the Interest of D.G.W., supra, 70 N.J. at 503.

b. The probation department report shall contain the method used for determining value. Any recognized method may be used, such as cost of repair or replacement, market value or appraisals. Where possible, verification shall be obtained in the form of affidavits. Id. at 504. The owner of personal property may give an estimate of the value of the property. State v. Rhoda, supra, 206 N.J. Super. at 594.

c. The probation department should also furnish sufficient details regarding the defendant's

present and probable future ability to repay any restitution ordered. State in the Interest of D.G.W., supra, 70 N.J. at 504-05; see N.J.S.A. 2C:44-6(b) (presentence investigation shall include analysis of defendant's financial resources and debts, including any amount owed for fine, assessment, or restitution).

d. The court should consider the offender, as well as the offense, especially when distinguishing between multiple defendants for purposes of restitution. State in the Interest of D.G.W., supra, 70 N.J. at 508; State v. Harris, supra, 70 N.J. at 594.

3. Conduct of the hearing

a. At the restitution hearing, strict rules of evidence do not apply. State v. Harris, supra, 70 N.J. at 598.

b. The defendant is free to cross-examine witnesses and present evidence in his or her own behalf as the trial judge deems necessary to a proper resolution of the issue. The defendant may also object to anything in the probation department report. Ibid.; State in the Interest of D.G.W., supra, 70 N.J. at 506.

c. There is no particular burden of proof which must be satisfied before a court may order a defendant to make restitution since a restitution hearing is not a plenary civil trial. State v. Harris, supra, 70 N.J. at 597.

D. Time and Method of Payment

1. The court may grant the defendant permission to make the payment within a specified period of time or in specified installments. Otherwise, the restitution shall be payable forthwith. N.J.S.A. 2C:46-1(a).

2. The court shall file a copy of the judgment of conviction with the Superior Court Clerk, who shall enter the information upon the record of docketed judgments. The entry shall have the same force as a docketed civil judgment. N.J.S.A. 2C:46-1(a).

3. A defendant sentenced to make restitution in conjunction with probation or a custodial sentence must also pay a transaction fee on each occasion a payment or installment payment is made. N.J.S.A. 2C:46-1(d); N.J.S.A. 2C:46-1.1 and -1.2.

E. Consequences of Nonpayment

1. At the time a defendant is sentenced to make restitution, the court shall not impose an alternative sentence to be served in the event of nonpayment. Rather, the response of the court to nonpayment shall be determined only after such nonpayment occurs. N.J.S.A. 2C:44-2(d).

2. Upon nonpayment of an order of restitution, the court, upon motion of the prosecutor, recipient of the restitution, or upon its own motion, shall recall the defendant or issue a summons or warrant of arrest for his or her appearance. The defendant shall be afforded notice and an opportunity to be heard on the issue of default. The standard of proof is preponderance of the evidence. The burden of establishing good cause for a default is on the defaulting party. N.J.S.A. 2C:46-2(a).

3. If the court finds that the defendant defaulted without good cause, it "shall" order the suspension of his or her driver's license or prohibit him or her from obtaining a driver's license. N.J.S.A. 2C:46-2(a)(1). Also, the court shall take appropriate action to modify or establish a reasonable schedule for payment. N.J.S.A. 2C:46-2(a)(3).

4. If the default is without good cause and is willful, the court may also impose a term of imprisonment or participation in a labor

assistance program or enforced community service. N.J.S.A. 2C:46-2(a)(2). When failure to pay restitution, to perform enforced community service, or to participate in a labor assistance program is found to be willful, it shall be considered contumacious. N.J.S.A. 2C:46-2(a)(4). However, the court is not authorized to change the amount of restitution ordered. State v. Newman, supra, 132 N.J. at 172.

5. Upon default, execution may be levied and such other measures taken as are authorized for the collection of an unpaid civil judgment. N.J.S.A. 2C:46-2(b). The victim entitled to payment may institute summary collection proceedings. N.J.S.A. 2C:46-2(c).

6. When a defendant defaults on restitution payable to a public entity other than the VCCB, the court may order the defendant to perform work in a labor assistance program or enforced community service program. N.J.S.A. 2C:46-2(e).

7. According to N.J.S.A. 2C:45-3(a)(4), no revocation of probation shall be based on the failure to make restitution unless the failure was willful. This is in accord with the United States Supreme Court's requirement that there be evidence that the defendant was responsible for the failure to make restitution before he or she may be incarcerated. State v. Townsend, 222 N.J. Super. 273, 277 (App. Div. 1988), citing Bearden v. Georgia, 461 U.S. 660, 672, 103 S. Ct. 2064, 76 L. Ed. 2d 221, 233 (1983).

F. Nature of a Restitutionary Award

1. Restitution is not technically punishment for a crime. Although it has aspects of rehabilitation and deterrence, it is predominantly nonpenal in nature. State v. Harris, supra, 70 N.J. at 592-93; State v. Rhoda, supra, 206 N.J. Super. at 590; State v. Paladino, supra, 203 N.J. Super. at 547. Nevertheless, it carries with it the "sting" of punishment and this punitive aspect may reasonably be said to serve a rehabilitative purpose by deterring future misconduct. State v. Krueger, supra, 241 N.J. Super. at 253. One of the purposes of the provisions governing the sentencing of offenders is to promote restitution to victims. N.J.S.A. 2C:1-2(b)(8).

2. Restitution focuses on rehabilitation of the criminal and recompense for the aggrieved victim. State v. Kennedy, supra, 152 N.J. at 424; State v. Newman, supra, 132 N.J. at 169, 173; State v. Harris, supra, 70 N.J. at 592; State v. DeAngelis, 329 N.J. Super. 178, 186 (App. Div. 2000); State v. Scribner, supra, 298 N.J. Super. at 371; State v. Rhoda, supra, 206 N.J. Super. at 591. Hence, a court should be cognizant of the futility of imposing any restitution where the defendant does not or probably will not have the ability to pay. Imposing a sentence of restitution that requires payment of more than a defendant can afford would frustrate the goal of rehabilitation. State v. Newman, supra, 132 N.J. at 172-73; State v. Scribner, supra, 298 N.J. Super. at 371; State in the Interest of R.V., supra, 280 N.J. Super. at 121-22.

3. Restitution is neither an element of the crime nor "damages" in the sense of civil liability. State v. Harris, supra, 70 N.J. at 597-98. An award of restitution does not preclude any aggrieved party from recovering damages in a civil action. Id. at 592.

4. According to N.J.S.A. 2C:44-2(f), restitution is in addition to any civil remedy a victim may have, but any amount due under any civil remedy shall be reduced by the amount of restitution

ordered. This is to prevent double recovery to the victim. State v. DeAngelis, supra, 329 N.J. Super. at 184.

5. A civil settlement or release between the victim and the defendant does not operate to release the defendant from obligations under a court-imposed restitution order. Id. at 189. This is because such a settlement fails to fulfill the goals of restitution, i.e., compensation to the victim and rehabilitation for the defendant. Id. at 188.

6. There is no double jeopardy problem in increasing the amount of restitution after an appeal. State v. Rhoda, supra, 206 N.J. Super. at 590.

7. There is ordinarily no denial of any of a defendant's constitutional rights by failing to comment on a potential restitution award at the time a plea of guilty is entered. Id. at 595-96. But see State v. Kennedy, supra, 152 N.J. at 425-26 (suggesting that, when accepting guilty plea to offense that involves restitution as consequence of sentencing, court should inform defendant of that fact); State v. Krueger, supra, 241 N.J. Super. at 255 (defendant should be alerted to possibility that restitution might be ordered for crimes later dismissed by plea agreement); State v. Saperstein, 202 N.J. Super. 478, 482 (App. Div. 1985) (large restitution order may be beyond terms of plea bargain). See discussion of sentences in association with pleas of guilty at Section VII.

8. Where a restitution order is converted to a civil judgment in favor of the State, the underlying restitution obligation remains part of the criminal sentence following a defendant's successful completion of probation. As such, it is not dischargeable in bankruptcy. State v. Kemprowski, 265 N.J. Super. 471, 472-74 (App. Div. 1993).

9. The non-alienability clause of the Employee Retirement Income Security Act of 1974 (ERISA) does not prevent the State from requiring a defendant to make restitution after pension funds

have been distributed. The funds are unprotected by the clause because they are in the pensioner's possession. State v. Pulasty, 136 N.J. 356, 361, cert. denied, 513 U.S. 1017, 115 S. Ct. 579, 130 L. Ed. 2d 494 (1994).

10. Federal courts have held that a restitution order does not punish a defendant beyond the "statutory maximum" as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence. See, e.g., United States v. Leahy, 438 F.3d 328, 337 (3d Cir. 2006) (in imposing restitution under certain federal statutes, court is not imposing punishment beyond that authorized by jury-found or admitted facts).

G. Appellate Review of Restitution Orders

1. Since the ordering of restitution is part of the sentencing process, it is a matter within the discretion of the judge. That determination shall be accepted except in the case of an abuse of discretion. State v. Harris, supra, 70 N.J. at 598-99.

2. To facilitate appellate review, the court should explain the reasons underlying its decision, including the amount of restitution awarded and the terms of payment. State v. Kennedy, supra, 152 N.J. at 425; State v. Newman, supra, 132 N.J. at 170-71; State v. McLaughlin, supra, 310 N.J. Super. at 264-65; State v. Scribner, supra, 298 N.J. Super. at 371.

3. With respect to factual determinations made by the judge at the restitution hearing, these are reviewable under the standard of State v. Johnson, 42 N.J. 146 (1964). State v. Rhoda, supra, 206 N.J. Super. at 594 (if findings could reasonably have been reached on sufficient credible evidence present in record, they should not be disturbed).

4. A defendant cannot belatedly challenge the excessiveness of a restitution order on an appeal from a judgment of probation violation, which judgment merely continues in force the prior

restitution requirement. State v. Zeliff, supra, 236 N.J. Super. at 171.

XIII. FINES

A. General Rule

When sentencing a person convicted of an offense, a court may order the defendant to pay a fine. The fine may be ordered alone or in conjunction with imprisonment or probation. N.J.S.A. 2C:43-2(b)(1) and (4); N.J.S.A. 2C:43-3; N.J.S.A. 2C:44-2(a). See separate discussion of restitution at Section XII. See also State v. Newman, 132 N.J. 159, 164-69 (1993) (discussing historical distinction between fines and restitution).

B. Criteria for Imposing a Fine

1. A fine may be imposed in addition to a sentence of imprisonment or probation if the defendant has derived a pecuniary gain from the offense, or the court is of the opinion that a fine will deter the type of offense involved or promote the correction of the offender (N.J.S.A. 2C:44-2(a)(1)); the defendant is able, or given a fair opportunity to do so, will be able to pay the fine (N.J.S.A. 2C:44-2(a)(2)); and the fine will not prevent the defendant from making restitution to the victim (N.J.S.A. 2C:44-2(a)(3)).

2. In determining the amount and method of payment of a fine, the court shall consider the defendant's financial resources and the nature of the burden its payment will impose. N.J.S.A. 2C:44-2(c)(1).

3. Fines are payments demanded by the State to punish the defendant and to deter conduct that causes social harm. A court's determination of the appropriate sanction should take into account these objectives. State v. Newman, supra, 132 N.J. at 169, 177.

4. Although N.J.S.A. 2C:44-2(c) contemplates that the court's evaluation will focus on the defendant's present financial condition, it does not exclude consideration of future financial

circumstances. Id. at 179. At sentencing, the defendant should be given the opportunity to present or contest evidence on the ability to pay question. Ibid.

5. The court is required to state on the record the reasons for imposing the fine. Id. at 170; State v. Ferguson, 273 N.J. Super. 486, 499 (App. Div.), certif. denied, 138 N.J. 265 (1994).

6. Although drug-buy money is not recoverable by the State as restitution, it should be considered by the court in connection with the imposition of a fine. State v. Newman, supra, 132 N.J. at 177. The amount of such money received by the defendant may be considered when determining ability to pay. Id. at 179.

C. Maximum Amount of Fine

1. Unless otherwise provided, the maximum fine depends on the degree of the offense. According to N.J.S.A. 2C:43-3(a), (b), (c), and (d), the current maximum fines are:

   a. For a first degree crime: $200,000.

   b. For a second degree crime: $150,000.

   c. For a third degree crime: $15,000.

   d. For a fourth degree crime: $10,000.

   e. For a disorderly persons offense: $1000.

   f. For a petty disorderly persons offense: $500.

2. A court may impose a higher amount equal to double the pecuniary gain to the defendant or loss to the victim. The amount of the gain or loss is determined by the court, which may hold a separate hearing on the issue. N.J.S.A. 2C:43-3(e).

3. The above stated maximums may be doubled in the case of a second or subsequent conviction of

certain tax offenses, and in the case of theft and fraud-related offenses. N.J.S.A. 2C:43-3(g).

4. In the case of a conviction for being a leader of a firearms trafficking network, the court may impose a fine of up to $500,000 or five times the value of the firearms involved, whichever is greater. N.J.S.A. 2C:39-16.

D. Drug Offenses

1. The maximum fine allowable in the case of violations under the Comprehensive Drug Reform Act is any amount equal to three times the street value of the substance involved, N.J.S.A. 2C:43-3(h), or any higher amount specifically authorized by another section of the Code. N.J.S.A. 2C:43-3(f). See also N.J.S.A. 2C:44-2(e) (setting forth procedure to be used by court in making determination of street value and governing standard of review on appeal).

2. For maximum fines allowable under the Comprehensive Drug Reform Act, notwithstanding the provisions of N.J.S.A. 2C:43-3, see N.J.S.A. 2C:35-3 (leader of narcotics trafficking network); N.J.S.A. 2C:35-4 (maintaining or operating controlled dangerous substance production facility); N.J.S.A. 2C:35-5(b) (manufacturing, distributing, or dispensing); N.J.S.A. 2C:35-6 (employing juvenile in drug distribution scheme); N.J.S.A. 2C:35-7 (distributing, dispensing or possessing within 1000 feet of school property or school buses); N.J.S.A. 2C:35-8 (distribution to persons under eighteen and to pregnant females); N.J.S.A. 2C:35-10(a) (possession); N.J.S.A. 2C:35-10.5(a) (distribution or possession of prescription legend drugs); N.J.S.A. 2C:35-11(d) (imitation controlled dangerous substances); N.J.S.A. 2C:35-13 (obtaining by fraud); N.J.S.A. 2C:35-15 (mandatory drug enforcement and demand reduction penalties); and N.J.S.A. 2C:35-20 (mandatory forensic laboratory fees).

3. When a defendant is sentenced to pay a penalty pursuant to N.J.S.A. 2C:35-15 or a laboratory fee pursuant to N.J.S.A. 2C:35-20, the court may

grant permission for payment to be made within a specified period of time or in specified installments; otherwise, it shall be payable forthwith. N.J.S.A. 2C:46-1(a). See also N.J.S.A. 2C:46-1(b) and N.J.S.A. 2C:46-1(d) (regarding installment payments and transaction fees on such penalties or laboratory fees when imposed in conjunction with probation or custodial sentence).

4. A fine is only one of several monetary sanctions a drug offender may be required to pay, and is the last of those sanctions to be apportioned from any money actually collected. State v. Newman, supra, 132 N.J. at 178, citing N.J.S.A. 2C:46-4.1.

E. Time and Method of Payment

1. If no permission is granted to pay the fine within a specified period of time or in installments, it shall be payable "forthwith." N.J.S.A. 2C:46-1(a).

2. A copy of the judgment of conviction shall be filed with the Superior Court Clerk, who shall enter the information on the record of docketed judgments. This entry shall have the same force as a docketed civil judgment. N.J.S.A. 2C:46-1(a).

3. When a defendant sentenced to pay a fine is also sentenced to probation, the court "may" make continuing payment of installments on the fine a condition of probation. N.J.S.A. 2C:45-1(b)(11); N.J.S.A. 2C:46-1(b)(1). When a defendant sentenced to pay a fine is also sentenced to a custodial term in a state correctional facility, the court may require the defendant to pay installments on the fine. N.J.S.A. 2C:46-1(b)(2).

4. A defendant who has been ordered to pay a fine may petition the sentencing court for revocation of the fine or any unpaid portion. If the court is satisfied that the circumstances that had warranted imposing the fine have changed or that

it is otherwise unjust to require payment, the court may revoke the fine in whole or in part. N.J.S.A. 2C:46-3; N.J.S.A. 2C:46-2(a)(3); State v. Joseph, 238 N.J. Super. 219, 222 (App. Div. 1990). The criteria to be used in determining whether a fine should be revoked are changed circumstances or hardship. The determination of these factors rests in the court's sound discretion. State v. Gardner, 252 N.J. Super. 462, 466 (Law Div. 1991).

5. A defendant sentenced to pay a fine in conjunction with probation or a custodial sentence must pay a transaction fee on each occasion a payment or installment payment is made. N.J.S.A. 2C:46-1(d); N.J.S.A. 2C:46-1.1 and -1.2.

F. Consequences of Nonpayment

1. When a defendant fails to complete the payment of a fine, the State may institute a summary collection action under N.J.S.A. 2C:46-2(a), or may take any measures as are authorized for the collection of an unpaid civil judgment pursuant to N.J.S.A. 2C:46-2(b). State v. Joseph, supra, 238 N.J. Super. at 222.

2. At a summary collection proceeding, the court shall afford the defendant notice and an opportunity to be heard. The standard of proof is preponderance of the evidence, and the burden of establishing good cause for a default is on the defaulting party. N.J.S.A. 2C:46-2(a).

   a. If the default is without good cause, the court "shall" order the suspension of the defendant's driver's license or prohibit the defendant from obtaining a license. N.J.S.A. 2C:46-2(a)(1).

   b. If the default was without good cause and was willful, the court "may" also imprison the defendant or order that he or she participate in a labor assistance program or enforced community service. The term of imprisonment or enforced service need not be

equated with any dollar amount but may not exceed one day for each $20 of the fine. N.J.S.A. 2C:46-2(a)(2). This $20-per-day credit for time served in lieu of payment may be extended for time served by a defendant while awaiting the collection hearing itself. State v. Joseph, supra, 238 N.J. Super. at 224.

c. If failure to pay a fine, perform enforced community service, or participate in a labor assistance program is found to be willful, the failure to do so shall be considered contumacious. N.J.S.A. 2C:46-2(a)(4).

3. If probation was conditioned upon the payment of a fine, the State may institute a violation of probation proceeding pursuant to N.J.S.A. 2C:45-3, or may move to extend the probation for up to five years for the payment of the fine pursuant to N.J.S.A. 2C:45-2(c)(1). State v. Joseph, supra, 238 N.J. Super. at 222; State v. DeChristino, 235 N.J. Super. 291, 297 (App. Div. 1989). Whereas a proceeding to extend the probationary term may be exercised for a reasonable time after expiration of the initial term of probation, the violation of probation remedy must be exercised prior to the expiration of the probationary period. State v. Joseph, supra, 238 N.J. Super. at 222-23; State v. DeChristino, supra, 235 N.J. Super. at 297-98.

XIV. VICTIMS OF CRIME COMPENSATION BOARD AND OTHER ASSESSMENTS

A. Victims of Crime Compensation Board

1. Minimum Assessment

a. In addition to any other disposition authorized by the Code, a person convicted of a disorderly persons offense, petty disorderly persons offense, or any crime not resulting in death or injury "shall" be assessed $50 for each crime of which the person was convicted, payable to the Victims of Crime Compensation Board (VCCB). N.J.S.A. 2C:43-3.1(a)(2)(a) (formerly the Violent Crimes Compensation Board).

b. A defendant may not be assessed a higher VCCB penalty than was authorized at the time the crime was committed. State v. J.F., 262 N.J. Super. 539, 542 (App. Div. 1993).

c. A minimum assessment under this section is mandatory and must be imposed regardless of the defendant's ability to pay or any other factor enumerated at N.J.S.A. 2C:44-2. State v. Malia, 287 N.J. Super. 198, 208 (App. Div. 1996).

2. Assessment Greater Than The Minimum

a. In addition to any other disposition authorized by the Code, any person convicted of a crime of violence resulting in injury or death of another person "shall" be assessed at least $100, but not to exceed $10,000 for each crime of which the person was convicted, payable to the VCCB. N.J.S.A. 2C:43-3.1(a)(1).

b. This assessment applies also to any person convicted of theft of an automobile pursuant to N.J.S.A. 2C:20-2, eluding a law enforcement officer pursuant to N.J.S.A.

2C:29-2(b), or unlawful taking of a motor vehicle pursuant to N.J.S.A. 2C:20-10(b), (c), or (d), if the crime resulted in the injury or death of another person. N.J.S.A. 2C:43-3.1(a)(1).

c. When determining the amount of the assessment, a court "shall" consider such factors as: the severity of the crime, the defendant's criminal record, the defendant's ability to pay, and the economic impact on the defendant's dependents. N.J.S.A. 2C:43-3.1(a)(1). It is not enough to say that a defendant might come into a substantial amount of money in the future; rather, there must be some relationship between the ability to pay over the course of the defendant's incarceration and parole and the actual amount assessed. State v. Gallagher, 286 N.J. Super. 1, 23 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

d. The requirement that the victim be injured is satisfied by "mental or nervous shock." Therefore, when a robber threatens a victim "as if he had a gun," it may be inferable that the victim suffered an injury, "no matter how transitory." State v. Diaz, 188 N.J. Super. 504, 508 (App. Div. 1983).

e. Where the conduct is insufficient to justify finding any injury, however, an assessment greater than the minimum is illegal and must be reduced. State v. Thompson, 199 N.J. Super. 142, 144-45 (App. Div. 1985).

f. The standard by which such assessments should be reviewed for alleged excessiveness is whether they are so manifestly unfair and excessive as to constitute an abuse of discretion. State v. Diaz, supra, 188 N.J. Super. at 509. The court should express its reasons for imposing an assessment greater than the minimum. State v. Gallagher, supra, 286 N.J. Super. at 23; State v. Pindale, 249 N.J. Super. 266, 289 (App. Div. 1991).

3. Drunk Drivers

a. Any person convicted of operating a motor vehicle while under the influence of liquor or drugs "shall" be assessed $50 payable to the VCCB. N.J.S.A. 2C:43-3.1(a)(2)(c).

b. This assessment also applies to any person convicted of operating a commercial motor vehicle or vessel while under the influence of liquor or drugs. N.J.S.A. 2C:43-3.1(a)(2)(c).

c. The assessment does not apply to a person convicted only of refusing to submit to a breathalyzer test. State v. Tekel, 281 N.J. Super. 502, 510-11 (App. Div. 1995).

4. Payment

a. As a condition of an order of probation, the court "shall" require a defendant to pay any assessment required by N.J.S.A. 2C:43-3.1. N.J.S.A. 2C:45-1(c); N.J.S.A. 2C:46-1(b)(1). Upon the termination of probation, if the defendant has failed to pay any such assessment, the probationary period "shall" be extended. N.J.S.A. 2C:45-2(c)(2).

b. A court may require the defendant to pay installments on the assessment required by N.J.S.A. 2C:43-3.1 where the assessment is imposed in conjunction with a custodial sentence. N.J.S.A. 2C:46-1(b)(2).

c. When a defendant who is sentenced to a custodial sentence in a state correctional facility has not, at the time of sentencing, paid an assessment required by N.J.S.A. 2C:43-3.1, either for the crime for which he or she is being sentenced or for a prior crime, the court shall order the Department of Corrections to collect the assessment during the defendant's incarceration, and to deduct the assessment from any income earned

by the inmate during such incarceration. N.J.S.A. 2C:43-3.1(a)(3).

d. If no permission is granted to pay the assessment within a specified period of time or in specified installments, it shall be payable "forthwith." N.J.S.A. 2C:46-1(a). A copy of the judgment of conviction shall be filed with the Superior Court Clerk, who shall enter the information on the record of docketed judgments. This entry shall have the same force as a docketed civil judgment. N.J.S.A. 2C:46-1(a).

e. A defendant sentenced to pay an assessment pursuant to N.J.S.A. 2C:43-3.1 in conjunction with probation or a custodial sentence must also pay a transaction fee on each occasion that a payment or installment payment is made. N.J.S.A. 2C:46-1(d); N.J.S.A. 2C:46-1.1 and -1.2.

f. When a defendant defaults in the payment of an assessment, upon motion of the VCCB or upon its own motion, the court shall recall the defendant or issue a summons or warrant of arrest for his or her appearance. The defendant shall be afforded notice and an opportunity to be heard. The standard of proof is preponderance of the evidence, and the burden of establishing good cause for a default is on the defaulting party. N.J.S.A. 2C:46-2(a).

g. If the court finds that the default is without good cause, it "shall" order the suspension of the defendant's driver's license or prohibit the defendant from obtaining one. N.J.S.A. 2C:46-2(a)(1).

h. If the failure to pay an assessment is without good cause and is willful, the court may impose a term of imprisonment or participation in a labor assistance program or enforced community service. N.J.S.A. 2C:46-2(a)(2).

i. When failure to pay an assessment, to perform enforced community service, or to participate in a labor assistance program is found to be willful, it shall be considered contumacious. N.J.S.A. 2C:46-2(a)(4).

B. Safe Neighborhoods Services Fund

1. Effective August 2, 1993, any person convicted of a crime, disorderly or petty disorderly persons offense, or drunk driving shall be assessed $75 for each conviction, said assessment to be deposited by the Department of the Treasury into the Safe Neighborhoods Services Fund (SNSF) created by N.J.S.A. 52:17B-164. N.J.S.A. 2C:43-3.2(a) and (c).

2. A SNSF assessment is improper where the crimes preceded the effective date of the legislative enactment authorizing the assessment. State v. Smith, 307 N.J. Super. 1, 16 (App. Div. 1997), certif. denied, 153 N.J. 216 (1998); State v. Schroth, 299 N.J. Super. 242, 248 (App. Div. 1997).

C. Law Enforcement Officers Training & Equipment Fund

1. Effective January 9, 1997, any person convicted of a crime shall be assessed a penalty of $30 which is to be deposited by the Department of Treasury into the Law Enforcement Officers Training and Equipment Fund. N.J.S.A. 2C:43-3.3(a) and (c).

2. A penalty assessment under this provision may not be imposed where the offense occurred prior to the effective date of the statute. State v. Dimitrov, 325 N.J. Super. 506, 512 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000).

D. Drug Abuse Education Fund

Effective December 23, 1999, each participant in a supervisory treatment program or conditional discharge program for a violation of a Chapter 35 or 36 offense shall be assessed a penalty of $50 for each adjudication or conviction. N.J.S.A. 2C:43-3.5(a). These penalties are to be forwarded to the Department of Treasury to be deposited in the Drug Abuse Education Fund. N.J.S.A. 2C:43-3.5(c).

E. Statewide Sexual Assault Nurse Examiner (SSANE) Fund

Effective May 4, 2001, any person convicted of a sex offense as defined in N.J.S.A. 2C:7-2 shall be assessed a penalty of $800 for each offense. N.J.S.A. 2C:43-3.6. These penalties are to be forwarded to the Department of Treasury to be deposited in the Statewide Sexual Assault Nurse Examiner Program Fund established by N.J.S.A. 52:4B-59. N.J.S.A. 2C:43-3.6(b).

F. Prevention of Violence Against Women Surcharge

Effective July 1, 2002, any person convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, or criminal sexual contact, shall be subject to a surcharge in the amount of $100 payable to the Treasurer for use by the Department of Community Affairs to fund programs and grants for the prevention of violence against women. N.J.S.A. 2C:43-3.7.

G. Sex Crime Victim Treatment Fund

Effective April 26, 2005, any person convicted of a sex offense as defined in N.J.S.A. 2C:7-2 shall be assessed a penalty for each such offense not to exceed: $2000 for a first degree crime; $1000 for a second degree crime; $750 for a third degree crime; and $500 for a fourth degree crime. N.J.S.A. 2C:14-10(a). All penalties shall be forwarded to the Department of Treasury to be deposited in the Sex Crime Victim Treatment Fund established by N.J.S.A. 52:4B-43.2. N.J.S.A. 2C:14-10(c).

XV. APPLICATIONS FOR ADMISSION OR TRANSFER INTO DRUG TREATMENT PROGRAM

A. Procedure

1. A motion may be filed at any time to change a custodial sentence to permit entry of the defendant into a custodial or noncustodial treatment or rehabilitation program for drug or alcohol abuse. R. 3:21-10(b)(1).

2. On such a motion, the moving party must file supporting affidavits and such other documents and papers as set forth the basis for the relief sought. R. 3:21-10(c).

B. Necessity for a Hearing

1. A hearing need not be conducted on a motion filed under R. 3:21-10(b) unless the court, after review of the materials submitted, concludes that a hearing is required in the interest of justice. R. 3:21-10(c).

2. A hearing shall be afforded only if the submitted material evidences a prima facie showing of merit in the application in light of the relevant criteria to be applied. State v. McKinney, 140 N.J. Super. 160, 164 (App. Div. 1976).

C. Criteria

1. There first must be proof of present addiction. Then, the ultimate issue for determination is whether the purposes for which a custodial sentence might reasonably be continued outweigh the interests sought to be served by a transfer to a narcotics treatment center. State v. Davis, 68 N.J. 69, 85-86 (1975); State v. Williams, 139 N.J. Super. 290, 299 (App. Div. 1976), aff'd o.b., 75 N.J. 1 (1977).

2. Factors relevant to the balancing test include the seriousness of the crime, the defendant's prior record (both criminal and addictive), the

potential threat to society posed by the defendant's release, the bona fides of the application, the likelihood of successful treatment, and any prior treatment record. Where a transfer would enhance the probability that the magnitude of the crime or the deterrent effect of the original sentence would be depreciated, it should not be granted. State v. Williams, supra, 139 N.J. Super. at 299-300.

3. A sentence cannot be changed or reduced pursuant to R. 3:21-10(b) below the parole ineligibility term required by statute.

   a. A defendant serving a Graves Act sentence may not make an application under R. 3:21-10(b) prior to expiration of the parole ineligibility period. State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986). However, when a court imposes a Graves Act parole ineligibility term that exceeds one-third of the sentence for the predicate crime, that portion above the mandatory one-third is considered "discretionary" so as to allow consideration of an application under R. 3:21-10(b) after a defendant has served that much time. State v. Brown, 384 N.J. Super. 191, 194-96 (App. Div. 2006).

   b. A defendant sentenced to an extended term under N.J.S.A. 2C:43-6(f) as a repeat drug offender may not apply for transfer until the mandatorily imposed parole ineligibility term has been served. State v. DeJesus, 252 N.J. Super. 456, 461-62 (Law Div. 1991).

   c. A defendant serving a term that includes a period of parole ineligibility pursuant to N.J.S.A. 2C:35-7 is ineligible for transfer to a drug treatment program until the mandatorily imposed parole ineligibility term has been served. State v. Diggs, 333 N.J. Super. 7, 10 (App. Div.), certif. denied, 165 N.J. 678 (2000).

   d. A defendant sentenced under the No Early Release Act, N.J.S.A. 2C:43-7.2, may not

apply for reconsideration of sentence until the mandatory imposed term of parole ineligibility has been served. State v. Le, 354 N.J. Super. 91, 96 (Law Div. 2002).

4. A trial court has jurisdiction to consider an application under R. 3:21-10(b) when the defendant is serving a period of parole ineligibility imposed as a matter of discretion. State v. Farrington, 229 N.J. Super. 184, 186 (App. Div. 1988). The court should consider the aggravating and mitigating factors which resulted in its initial determination to incarcerate the defendant with an ineligibility term. Ibid.

D. Burden of Proof

1. The burden rests upon the applicant to establish that he or she is an appropriate candidate. The applicant is obliged to establish such facts as would move the court to exercise its discretion favorably. The mere assertion or even proof that the defendant is willing to participate in a drug program or that a program would accept the defendant is not sufficient. State v. McKinney, supra, 140 N.J. Super. at 163.

2. The issue is not whether a better sentence could have been originally imposed. The need for finality prohibits such a constant or even periodic review of sentencing decisions. State v. Dachielle, 195 N.J. Super. 40, 46 (Law Div. 1984).

3. A "change of circumstances" should be a prerequisite to a change of sentence under this rule. State v. Kent, 212 N.J. Super. 635, 641-42 (App. Div.), certif. denied, 107 N.J. 65 (1986). The commission of a serious crime while under the influence of alcohol or drugs is not such an extraordinary or unusual circumstance as to justify relief under this rule. Id. at 643.

4. Where a defendant has failed to allege any rehabilitative programs that he or she participated in while in prison, such a failure may well create an aura of suspicion with respect

to the sincerity of the application. State v. McKinney, supra, 140 N.J. Super. at 163.

E. Consequences of Resentencing

Where a defendant is originally sentenced to a custodial term and then placed on probation following a successful R. 3:21-10(b)(1) motion, the court is not required to readdress the "in/out" decision if the defendant violates probation. This is because the court has already determined the appropriate custodial term and amended it only to permit enrollment in a drug treatment program. State v. Williams, 299 N.J. Super. 264, 270 (App. Div. 1997).

XVI. COMPREHENSIVE DRUG REFORM ACT

A. General Provisions

1. The Comprehensive Drug Reform Act of 1986, L. 1987, c. 106 (the CDRA), became operative on July 9, 1987. Its sentencing provisions are interspersed throughout N.J.S.A. 2C:35-1 to -24.

2. The legislation repealed the following provisions of the former Controlled Dangerous Substances Act: N.J.S.A. 24:21-19 (manufacturing, distributing and dispensing); N.J.S.A. 24:21-19.1 and -19.2 (imitation substances); N.J.S.A. 24:21-20 (possession, use, and being under influence of); N.J.S.A. 24:21-26 (distribution to persons under age eighteen); N.J.S.A. 24:21-27 (conditional discharge); N.J.S.A. 24:21-30 (thefts of large quantities); and N.J.S.A. 24:21-46 to -50 (certain drug paraphernalia offenses). L. 1987, c. 106, § 25.

B. Applicability

1. Except as otherwise noted below, a violation of any provision of the Controlled Dangerous Substances Act that has been amended or deleted by the CDRA but which was committed prior to the effective date of the CDRA, shall be governed by the prior law. N.J.S.A. 2C:35-23(a). See State v. Cacamis, 230 N.J. Super. 1, 5-6 (App. Div. 1988), certif. denied, 114 N.J. 496 (1989).

2. Any offense defined in the CDRA and committed on or after its effective date shall be governed by that act. N.J.S.A. 2C:35-23(b).

3. With respect to any case pending on or initiated after the effective date of the CDRA that involves an offense defined in the act but committed prior to its effective date, the court may, with the defendant's consent, impose sentence under the applicable provisions of Chapter 35 of Title 2C. N.J.S.A. 2C:35-23(c)(2).

4. Any person who, prior to the effective date of the CDRA, has applied for or is undergoing supervisory treatment pursuant to N.J.S.A. 24:21-27 ("§ 27 conditional discharge") shall continue to be governed by that section. The CDRA conditional discharge provision is found at N.J.S.A. 2C:36A-1.

C. Anti-Merger Provisions

1. The anti-merger provision of N.J.S.A. 2C:35-7 precludes merger of a conviction for distributing within 1000 feet of school property with a conviction for a violation of N.J.S.A. 2C:35-5(a) (manufacturing, distributing, or dispensing) or N.J.S.A. 2C:35-6 (employing a juvenile in a drug distribution scheme).

   a. However, with respect to offenses under N.J.S.A. 2C:35-5(a) that are of the third or fourth degree, general merger principles may be applied, and N.J.S.A. 2C:35-7 should be construed to allow merger of such "section 5" convictions into "section 7" convictions. State v. Gonzalez, 123 N.J. 462, 464 (1991); State v. Blow, 123 N.J. 472, 473 (1991). The intent of the Legislature was to assure that the parole ineligibility period mandated by N.J.S.A. 2C:35-7 is not negated by the merger of a conviction under that section into a conviction for another offense that does not mandate such an ineligibility period. State v. Gonzalez, 241 N.J. Super. 92, 101 (App. Div. 1990) (Skillman, J.A.D., dissenting), rev'd on dissent, 123 N.J. 462, 464 (1991).

   b. Similarly, the legislative purpose of the anti-merger provision is reconcilable with a construction that permits merger of section 7 offenses into first or second degree section 5 offenses as long as the period of parole ineligibility mandated by section 7 is preserved. State v. Dillihay, 127 N.J. 42, 54 (1992). This construction effectuates the legislative intent and avoids the constitutional issue posed by

nonmerger. Id. at 55. Accord State v. Brana, 127 N.J. 64, 67 (1992).

2. The same rationale applies to the anti-merger provision of N.J.S.A. 2C:35-7.1, which precludes merger of a conviction for distributing within 500 feet of a public housing facility, public park, or public building with a conviction under N.J.S.A. 2C:35-5(a) or N.J.S.A. 2C:35-6.

   a. Hence, a third degree conviction under section 5 should merge into a second degree conviction under section 7.1 so as to preserve the more stringent impact of a section 7.1 conviction. State v. Gregory, 336 N.J. Super. 601, 607 (App. Div. 2001).

   b. Although neither N.J.S.A. 2C:35-7 nor N.J.S.A. 2C:35-7.1 expressly precludes merger of those two offenses, the interests protected by both statutes are the same. State v. Parker, 335 N.J. Super. 415, 424 (App. Div. 2000). Hence, where the prohibited conduct occurs on a single date at a single location, which happens to fall within two statutorily prohibited zones, a school and a public park, merger is required. Id. at 426. The parole disqualifier of the section 7 offense must survive merger. Ibid.

3. Neither legislative intent nor constitutional limitations requires merger of convictions for violation of the school zone statute, N.J.S.A. 2C:35-7, and the strict liability drug death statute, N.J.S.A. 2C:35-9. State v. Maldonado, 137 N.J. 536, 583 (1994). Because neither statute's anti-merger provision demonstrates a clear intent to impose multiple punishment, the general merger statute, N.J.S.A. 2C:1-8, applies. Id. at 580-82.

4. Although the anti-merger provision of N.J.S.A. 2C:35-9 explicitly prohibits merger of that offense into a conviction under N.J.S.A. 2C:35-5(a), the basic distributing/manufacturing/dispensing offense, that does not answer the

reverse question. Hence, it is unclear whether the Legislature intended to impose multiple punishments. Id. at 583. Since all the elements of the basic offense are implicated when a defendant is convicted under the drug death statute, double jeopardy principles would require merger of convictions under N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-9 that arise out of the same transaction. Id. at 583-84.

5. A conviction for possessing a firearm or other weapon while in the course of committing certain enumerated drug offenses under Chapter 35 shall not merge with the underlying drug conviction nor shall the Chapter 35 conviction merge with the weapons violation. N.J.S.A. 2C:39-4.1(d). This provision does not violate a defendant's right of due process or protection against double jeopardy under either the federal or State constitution. State v. Martinez, ___ N.J. Super. ___, ___ (App. Div. 2006) (slip op. at 18-21); State v. Soto (II), 385 N.J. Super. 257, 261-66 (App. Div. 2006).

6. A conviction for using booby traps or maintaining fortified premises in connection with the manufacture or distribution of controlled dangerous substances does not merge with the underlying drug offense. N.J.S.A. 2C:35-4.1(e). This provision does not violate a defendant's right of due process or protection against double jeopardy under either the federal or State constitution. State v. Walker, 385 N.J. Super. 388, 408-11 (App. Div.), certif. denied, 187 N.J. 83 (2006).

D. Extended Term Provisions

1. The finding that a defendant meets the requirement for a mandatory extended term as a repeat drug offender falls within the "prior conviction" exception of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the court's sole determination is to confirm that the defendant has the predicate prior convictions to qualify for enhanced

sentencing. State v. Thomas, ___ N.J. ___, ___ (2006) (slip op. at 21-22).

2. The analysis of State v. Dunbar, 108 N.J. 80 (1987), as modified in State v. Jefimowicz, 119 N.J. 152 (1990), applies when imposing mandatory extended terms under N.J.S.A. 2C:43-6(f) for repeat drug offenders. State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005); State v. Williams, 310 N.J. Super. 92, 98-99 (App. Div.), certif. denied, 156 N.J. 426 (1998).

3. The chronological sequence of the offenses and convictions is irrelevant. The only requirement is that there be a previous conviction "at any time." State v. Hill, 327 N.J. Super. 33, 41-42 (App. Div. 1999), certif. denied, 164 N.J. 188 (2000). However, the statute does not apply where a defendant enters guilty pleas to two different charges on the same day, in the same proceeding, and pursuant to one agreement. State v. Owens, 381 N.J. Super. 503, 512-13 (App. Div. 2005).

4. A defendant sentenced to an extended term under N.J.S.A. 2C:43-6(f) as a repeat drug offender may not apply for reconsideration of sentence pursuant to R. 3:21-10(b) until the mandatorily imposed term of parole ineligibility has been served. State v. DeJesus, 252 N.J. Super. 456, 461-62 (Law Div. 1991). Similarly, a defendant serving a term that includes a period of parole ineligibility pursuant to N.J.S.A. 2C:35-7 is ineligible for transfer to a drug treatment program until the mandatorily imposed parole ineligibility term has been served. State v. Diggs, 333 N.J. Super. 7, 10-11 (App. Div.), certif. denied, 165 N.J. 678 (2000).

5. As written, N.J.S.A. 2C:43-6(f) violates the doctrine of separation of powers by giving unfettered power to prosecutors in the sentencing determination. That is, once a prosecutor applies for an extended sentence and establishes a prior conviction, the sentencing judge has no discretion to reject it. State v. Lagares, 127 N.J. 20, 31 (1992).

a. Hence, the statute should be interpreted to require that guidelines be adopted to assist prosecutorial decision-making. Such guidelines should reflect the legislative intent that extended sentences for repeat drug offenders are the norm. Id. at 32.

b. The statute should also be construed to require that an extended term be vacated or denied where the prosecutor acted arbitrarily or capriciously in seeking an enhanced sentence. Id. at 33. The burden is on the defendant to prove, clearly and convincingly, such an arbitrary or capricious exercise of discretion. Ibid.

c. As so interpreted, N.J.S.A. 2C:43-6(f) survives constitutional challenge, including a challenge on grounds of equal protection and due process. Id. at 33-35.

d. Statewide guidelines issued by the Attorney General in response to Lagares were extensively discussed in State v. Kirk, 145 N.J. 159, 168-70 (1996). These guidelines sufficiently cure the separation of powers infirmity. Id. at 172-74.

e. For the guidelines that were effective May 20, 1998, see Attorney General Directive 1998-1, incorporating by reference Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12. They are found at www.state.nj.us/lps/dcj (click on "Attorney General Guidelines," then "AG Directives"). For offenses committed on or after September 15, 2004, the Attorney General promulgated revised guidelines. They are found at www.state.nj.us/lps/dcj (click on "Attorney General Guidelines," then "Go to Guidelines Listing Page," then "Brimage Guidelines 2"). See also discussion at Section (E) below.

E. Negotiated Plea Agreement Provision

1. Where a drug offense specifies a mandatory sentence that includes a minimum term of parole

ineligibility, or a mandatory extended term that includes a minimum period of parole ineligibility, the mandatory sentence must be imposed "unless the defendant has pleaded guilty pursuant to a negotiated agreement or, in cases resulting in trial, the defendant and the prosecution have entered into a post-conviction agreement, which provides for a lesser sentence [or] period of parole ineligibility." N.J.S.A. 2C:35-12. If the agreement provides for a specified term of imprisonment or period of parole ineligibility, the court at sentencing "shall not" impose a lesser term or period than that expressly provided. N.J.S.A. 2C:35-12.

2. Because the parole disqualifier of N.J.S.A. 2C:35-7 (distributing within 1000 feet of school property) may be waived by the prosecutor pursuant to N.J.S.A. 2C:35-12, it is not absolute. State v. Vasquez, 129 N.J. 189, 199-201 (1992).

   a. Once the parole disqualifier is waived, it is no longer "mandatory" for purposes of resentencing on a violation of probation. Id. at 201-02. At such a resentencing, a prosecutor no longer retains any authority under N.J.S.A. 2C:35-12 to determine whether a parole disqualifier shall be imposed. Id. at 202-03. Rather, the court must follow the standards of Baylass/Molina subject to its discretionary authority to impose a period of parole ineligibility in the appropriate circumstances. Id. at 205-06.

   b. A prosecutor cannot overcome this holding by interjecting into the plea agreement a term that the sentence upon revocation of probation will include a period of parole ineligibility. Id. at 208.

3. A negotiated plea under N.J.S.A. 2C:35-12 may provide for a specified term of imprisonment within the range of ordinary or extended sentences authorized by law, a period of parole ineligibility, a fine, or any other sentencing

disposition provided for in N.J.S.A. 2C:43-2(b). State v. Bridges, 131 N.J. 402, 405 (1993).

4. Where a negotiated agreement calls for "a term of imprisonment," the court is precluded from imposing a lesser term than specified. It remains free, however, to reject the entire agreement in the interests of justice. Id. at 409-11; State v. Leslie, 269 N.J. Super. 78, 84 (App. Div. 1993), certif. denied, 136 N.J. 29 (1994). "A term of imprisonment" embraces a split sentence under N.J.S.A. 2C:43-2(b)(2). State v. Bridges, supra, 131 N.J. at 410-11.

5. The provisions of N.J.S.A. 2C:35-12 apply only where the prison sentence or period of parole ineligibility recommended by the prosecution is less than a sentence mandated by statute. State v. Thomas, 253 N.J. Super. 368, 372 (App. Div. 1992). Where the recommendation is not for a lesser sentence than one statutorily mandated, N.J.S.A. 2C:35-12 does not apply and the judge is free to impose any lesser prison sentence or period of parole ineligibility authorized by the Code for that offense. Id. at 374-75.

6. A sentence negotiated pursuant to N.J.S.A. 2C:35-12 must be a legal sentence. State v. Smith, 372 N.J. Super. 539, 542 (App. Div. 2004), certif. denied, 182 N.J. 428 (2005).

7. The procedure of R. 3:9-3(c), which allows a court to give a tentative indication of a legal sentence it would impose when the parties cannot agree to a negotiated recommendation, does not apply to a situation controlled by N.J.S.A. 2C:35-12, in which either a mandatory sentence has to be imposed or the prosecutor's recommendation incident to the negotiated plea has to be accepted. State v. Smith, supra, 372 N.J. Super. at 542-43.

8. Judicial oversight is mandated to protect against arbitrary and capricious prosecutorial decisions with respect to negotiated plea agreements. Hence, a prosecutor's statutory authority to grant or refuse waiver of mandatory terms does not offend principles of separation of powers

when the authority is exercised in accordance with appropriately adopted standards. State v. Vasquez, supra, 129 N.J. at 195-97.

a. A prosecutor should state on the record the reasons for the decision to waive or refuse to waive, and a defendant must be able to show, clearly and convincingly, that the exercise of discretion was arbitrary and capricious. Id. at 196; State v. Powell, 294 N.J. Super. 557, 568 (App. Div. 1996); State v. Leslie, supra, 269 N.J. Super. at 83; State v. Jimenez, 266 N.J. Super. 560, 568 (App. Div. 1993).

b. These requirements also apply where the prosecutor has decided not to plea bargain with the defendant and where the defendant proceeds to trial. State v. Murray, 338 N.J. Super. 80, 90 (App. Div.), certif. denied, 169 N.J. 608 (2001); State v. Perez, 304 N.J. Super. 609, 613-16 (App. Div. 1997).

9. Guidelines were originally promulgated by the Attorney General on September 15, 1992. See State v. Gerns, 145 N.J. 216, 229-30 (1996), and State v. Shaw, 131 N.J. 1, 11 (1993), for a discussion of these guidelines.

a. In State v. Brimage, 153 N.J. 1 (1998), the Court held that these Guidelines failed to promote uniformity in plea agreement policies because they permitted each county to adopt its own standard plea offers. Id. at 17-19.

i. The ruling in Brimage was prospective only, except with respect to all cases pending final appeal. Id. at 25-26. This rule of limited retrospectivity referred only to the rule of the case, that is, the invalidity of the prior guidelines because of intercounty disparity, and was intended to prevent a flood of litigants who had already been sentenced from seeking relief on

the ground that the prior set of guidelines under which they pled guilty had been declared unlawful. State v. Fowlkes, 169 N.J. 387, 394-95 (2001). It did not address the question whether revised guidelines adopted in response to Brimage should be applied uniformly to all pending cases. Id. at 395.

ii. However, because the rule cannot be interpreted to allow a plea offer that visits a harsher period of parole ineligibility on a defendant whose offense occurred pre-Brimage, in such cases a defendant's sentence should be meted out in accordance with the pre-Brimage Guidelines. Ibid.

iii. The Fowlkes ruling was grounded in statutory interpretation, not the constitutional requirements of the ex post facto clauses of the federal or State constitutions. Id. at 396. But see State v. Reyes, 325 N.J. Super. 166, 171-72 (App. Div. 1999) (no ex post facto violation to apply guidelines promulgated after defendant committed his offense, because ex post facto clause is directed at legislative, not executive, action, and because guidelines do not increase penalty otherwise prescribed by statute and do not constitute impermissible delegation of power by legislative branch).

b. In accordance with Brimage, the Attorney General promulgated new plea negotiation guidelines effective May 20, 1998. See Attorney General Directive 1998-1, incorporating by reference Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12. They are found at www.state.nj.us/lps/dcj (click on "Attorney General Guidelines," then "AG Directives"). (**Note**: For offenses committed on or after

September 15, 2004, the Attorney General promulgated revised guidelines, known as "Brimage Guidelines 2." They are found at www.state.nj.us/lps/dcj (click on "Attorney General Guidelines," then "Go to Guidelines Listing Page," then "Brimage Guidelines 2")).

i. Under the Brimage guidelines, decisions regarding waiver and/or the length of the mandatory minimum sentence are governed by a "Table of Authorized Plea Offers." State v. Fowlkes, supra, 169 N.J. at 394.

ii. The Brimage guidelines acknowledge the appropriateness of judicial review of the prosecutor's exercise of discretion. State v. Coulter, 326 N.J. Super. 584, 588 (App. Div. 1999). They anticipate review under the "gross and patent abuse of prosecutorial discretion" standard. Id. at 589.

iii. A defendant's objections to the prosecutor's actions must be raised at the trial level in order to afford the prosecutor an opportunity to make a record for appellate review. Ibid. Where a defendant challenges the assignment of aggravating and mitigating factors to the plea offer, a non-plenary type hearing should be conducted. At such a hearing, the prosecutor must show that the decision was made in "good faith" and based on information available and reasonable inferences to be drawn therefrom. Ibid.

iv. A defendant must show by clear and convincing evidence that the prosecutor's decision reflected a "gross and patent abuse of discretion," either because the facts do not, "under any reasonable

interpretation," support an aggravating factor relied upon or because the prosecutor overlooked facts that "indisputably" constitute a mitigating factor. Id. at 590.

v. Where there is no indication that the prosecutor considered the guidelines in extending a plea offer, a defendant is entitled to a remand at which time the prosecutor must engage in negotiations, make a sentence recommendation utilizing the appropriate guidelines, and state the reasons for the offer. State v. Hammer, 346 N.J. Super. 359, 371 (App. Div. 2001). If the recommendation is not acceptable to the defendant, the defendant must then have the opportunity to convince the court that the prosecutor's exercise of discretion was arbitrary and capricious. Id. at 371-72.

vi. Since the section of the Brimage guidelines dealing with "No Appearance Agreements" gave individual prosecutors wide discretion in determining the circumstances under which to include no appearance/no waiver provisions in plea offers, it was held invalid. State v. Rolex, 329 N.J. Super. 220, 226 (App. Div. 2000), aff'd o.b., 167 N.J. 447 (2001). Effective June 11, 2001, prosecutors were not permitted to offer no appearance/no waiver provisions in any plea negotiated pursuant to the guidelines. See Notice to Prosecutors, dated June 11, 2001 (www.state.nj.us/lps/dcj).

vii. The Brimage guidelines also apply to post-conviction sentence agreements. However, they provide a more stringent statewide standard for post-conviction agreements than for pretrial

agreements. State v. Castaing, 321 N.J. Super. 292, 296 (App. Div. 1999).

F. Mandatory Penalties and Fees

1. The mandatory penalties under N.J.S.A. 2C:35-15 (DEDR), N.J.S.A. 2C:35-16 (suspension of driving privileges), and N.J.S.A. 2C:35-20 (forensic laboratory fees) may not be imposed on a conviction for both conspiracy to possess and actual possession. State in the Interest of M.A., 227 N.J. Super. 393, 395 (Ch. Div. 1988).

2. Imposition of the mandatory penalties under these sections may not be based on a conviction for mere conspiracy (N.J.S.A. 2C:5-2) to commit a drug offense under Chapter 35 or 36. State in the Interest of W.M., 237 N.J. Super. 111, 117-18 (App. Div. 1989).

3. A defendant convicted under a charge of complicity (N.J.S.A. 2C:2-6) in the commission of a Chapter 35 offense is subject to the mandatory penalties. State v. Bram, 246 N.J. Super. 200, 208 (Law Div. 1990).

4. Where a defendant convicted of a second degree crime is sentenced as a third degree offender, the mandatory DEDR penalties applicable to a second degree offense must be imposed. State v. Williams, 225 N.J. Super. 462, 464 (Law Div. 1988).

5. Mandatory forfeitures of one's driver's license, pursuant to N.J.S.A. 2C:35-16, imposed on a single sentencing occasion must be concurrent. State in the Interest of T.B., 134 N.J. 382, 387 (1993).

6. A sentencing court has no authority under N.J.S.A. 2C:35-16 to postpone or delay the suspension of a defendant's driving privileges, because such suspension "shall" commence on the day sentence is imposed. State v. Hudson, 286 N.J. Super. 149, 154-55 (App. Div. 1995).

7. With respect to juveniles, the period of forfeiture under N.J.S.A. 2C:35-16 runs from the day after the person reaches the age of seventeen. State in the Interest of T.B., supra, 134 N.J. at 388; State in the Interest of J.R., 244 N.J. Super. 630, 641 (App. Div. 1990).

8. With respect to those who come into court already under suspension, the new suspension shall commence as of the date of termination of the existing suspension. N.J.S.A. 2C:35-16; State in the Interest of T.B., supra, 134 N.J. at 388.

9. The DEDR penalty and the forensic laboratory fee are mandated by statute and must be imposed without regard to a defendant's ability to pay or any other factor enumerated in N.J.S.A. 2C:44-2. State v. Malia, 287 N.J. Super. 198, 208 (App. Div. 1996). Hence, a court has no discretion to revoke the penalty and fee pursuant to N.J.S.A. 2C:46-3. State v. Gardner, 252 N.J. Super. 462, 465-66 (Law Div. 1991).

10. Although the DEDR penalty is mandatory and cannot be vacated as a matter of discretion, N.J.S.A. 2C:35-15(e) provides that the penalty may be reduced by any amount "actually paid" by the defendant for participation in, and successful completion of, a residential drug rehabilitation program. State v. Monzon, 300 N.J. Super. 173, 175-76 (App. Div. 1997). This provision encourages rehabilitation by permitting enrollment in substance abuse programs by use of funds which would otherwise have to be paid as a mandatory penalty. Id. at 177. A defendant can be found to have "actually paid" the costs of a program where payment is made by reduction of compensation earned during the program. Id. at 178.

11. When a defendant is sentenced to pay a DEDR penalty or forensic laboratory fee, the court may grant permission for the payment to be made within a specified period or in specified installments; otherwise, it "shall be payable forthwith." N.J.S.A. 2C:46-1(a).

12. When a defendant who is sentenced to pay a DEDR penalty or a forensic laboratory fee is also sentenced to probation or to a custodial term in a state correctional facility, the court may require the defendant to make continuing payment of installments on the penalty or fee. N.J.S.A. 2C:46-1(b).

13. A defendant sentenced to pay a DEDR penalty or a forensic laboratory fee in conjunction with probation or a custodial sentence must also pay a transaction fee on each occasion that a payment or installment payment is made. N.J.S.A. 2C:46-1(d); N.J.S.A. 2C:46-1.1 and -1.2.

14. For possession or distribution of certain drugs, the DEDR penalty shall be twice the amount otherwise applicable to the offense. N.J.S.A. 2C:35-5.11 (effective April 4, 2003).

15. The DEDR penalties do not violate the equal protection clause of the federal or State constitution, do not violate a defendant's substantive or procedural due process rights under the federal or State constitution, do not constitute cruel and unusual punishment under either the federal or State constitution, and do not violate the State constitutional prohibition against amendment by reference only. State v. Lagares, supra, 127 N.J. at 36-37; State in the Interest of L.M., 229 N.J. Super. 88, 94-102 (App. Div. 1988), certif. denied, 114 N.J. 485 (1989).

16. There is no constitutional violation in assessing DEDR penalties against a defendant as a condition of entry into a pretrial intervention program. State v. Bulu, 234 N.J. Super. 331, 342, 346-48 (App. Div. 1989).

17. See N.J.S.A. 2C:35A-1 to -8, for imposition, calculation, and collection of anti-drug profiteering penalty.

G. Rehabilitation Program Provisions

1. The provisions of N.J.S.A. 2C:35-14--allowing a court in certain instances to order a drug dependent person convicted of a crime of the second degree or less to enter a drug rehabilitation program as part of a probationary sentence--apply only to those convicted of a drug offense. State v. Witte, 232 N.J. Super. 64, 67-68 (App. Div. 1989).

2. This legislative authorization of an alternative to incarceration is available only to "drug dependent" defendants, not to those who have been successfully rehabilitated through treatment. State v. Soricelli, 156 N.J. 525, 537-38 (1999).

3. N.J.S.A. 2C:35-14 was substantially rewritten effective January 14, 2000, to provide for the program of "special probation" (also referred to as the "drug court" program). State v. Matthews, 378 N.J. Super. 396, 399 (App. Div.), certif. denied, 185 N.J. 596 (2005); State v. Hester, 357 N.J. Super. 428, 430 (App. Div.), certif. denied, 177 N.J. 219 (2003). The defendant must meet certain requirements set forth in N.J.S.A. 2C:35-14(a)(1)-(9). In addition, the court shall consider all relevant circumstances, including those developed at the trial, plea hearing, or other court proceedings, as well as the presentence report, to determine whether and to what extent the defendant is drug or alcohol dependent and would benefit from treatment. N.J.S.A. 2C:35-14(a).

4. N.J.S.A. 2C:35-14(b) enumerates crimes for which a defendant is disqualified from the program, and N.J.S.A. 2C:35-14(c) sets forth the circumstances under which the prosecutor must consent to enrollment. State v. Matthews, supra, 378 N.J. Super. at 399-400; State v. Hester, supra, 357 N.J. Super. at 439-40.

5. When circumstances are present that allow the prosecutor to object, and the prosecutor does object, the court shall not place the defendant on special probation unless it finds a "gross and patent abuse of prosecutorial discretion." N.J.S.A. 2C:35-14(c); see State v. Matthews,

supra, 378 N.J. Super. at 400; State v. Hester, supra, 357 N.J. Super. at 440.

6. This is the same standard used to review the denial of PTI applications. State v. Hester, supra, 357 N.J. Super. at 441. A defendant must show that the prosecutor's decision was not premised on a consideration of all relevant factors, was based on consideration of irrelevant or inappropriate factors, or amounted to a clear error in judgment. Id. at 443.

7. If a court imposes a sentence of special probation notwithstanding the objection of the prosecutor, the sentence shall not become final for ten days in order to allow the prosecutor to appeal. N.J.S.A. 2C:35-14(c).

8. If a defendant is not precluded from entering a drug court program by the restrictions in N.J.S.A. 2C:35-14(a) and (b), and the prosecutor does not have the right to object under the patent and gross abuse of discretion standard under N.J.S.A. 2C:35-14(c), then admission into a drug treatment program may be appropriate under the general probation provisions of N.J.S.A. 2C:45-1(b)(3) (authorizing court to impose, as condition of probation, institutional and outpatient treatment). State v. Matthews, supra, 378 N.J. Super. at 403.

   a. That is, the court must first look to the requirements of N.J.S.A. 2C:35-14 to see if any express conditions enumerated therein apply. If none apply, then a sentence into a drug court program exclusively under N.J.S.A. 2C:45-1 may be allowed. Ibid.

   b. Nothing in the Manual for Operation of Adult Drug Courts in New Jersey, promulgated by the Administrative Office of the Courts, gives a sentencing court the right to sentence a defendant under either statute and to ignore the constraints of N.J.S.A. 2C:35-14. Id. at 404.

H. Miscellaneous Sentencing Principles Applicable to CDRA

1. A defendant subject to the mandatory parole ineligibility provisions of N.J.S.A. 2C:35-5(b)(1) and N.J.S.A. 2C:35-7 may not be sentenced to an indeterminate term as a young adult offender pursuant to N.J.S.A. 2C:43-5. State v. Luna, 278 N.J. Super. 433, 437-38 (App. Div. 1995).

2. The provisions of N.J.S.A. 2C:44-1(f)(2)--allowing a court to sentence a defendant who is convicted of a first degree offense to a term appropriate to a crime of one degree lower--apply to persons convicted of first degree offenses under the CDRA. State v. Merritt, 230 N.J. Super. 211, 212-13 (Law Div. 1988). However, for purposes of imposing a mandatory parole ineligibility term under N.J.S.A. 2C:35-5(b)(1), the defendant remains "convicted" of a first degree crime. State v. Barber, 262 N.J. Super. 157, 160-62 (App. Div.), certif. denied, 133 N.J. 441 (1993); State v. Merritt, supra, 230 N.J. Super. at 214-15.

3. Simple possession of drugs (as contrasted to possession with intent to distribute or actual distribution) in a school zone is not a separate crime under N.J.S.A. 2C:35-10(a). Rather, it is a sentencing factor that requires the court to impose community service as a condition of probation if the defendant is not given a prison term. State v. Baynes, 148 N.J. 434, 449 (1997); State v. Younger, 305 N.J. Super. 250, 259-60 (App. Div. 1997).

4. The strict liability drug death provision, N.J.S.A. 2C:35-9, does not violate a defendant's due process rights, does not constitute cruel and unusual punishment, and is not unconstitutionally vague. State v. Maldonado, supra, 137 N.J. at 547-70.

5. The statutorily required mandatory sentence of life imprisonment with twenty-five years of parole ineligibility pursuant to the "drug kingpin" statute, N.J.S.A. 2C:35-3, does not constitute cruel and unusual punishment even when

the drug involved is only marijuana, as opposed to heroin or cocaine. State v. Kadonsky, 288 N.J. Super. 41, 45 (App. Div.), certif. denied, 144 N.J. 589 (1996).

6. N.J.S.A. 2C:35-7.1, which enhances the penalties for distribution within 500 feet of a public housing facility, does not unconstitutionally discriminate against the poor or minority populations who live in public housing. State v. Brooks, 366 N.J. Super. 447, 457-58 (App. Div. 2004).

XVII. SEX OFFENDER SENTENCING

A. Procedures Governing Disposition of Sex Offenders **(L. 1998, c. 72, effective December 1, 1998)**

1. A person convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to N.J.S.A. 2C:13-1(c)(2), or endangering the welfare of a child pursuant to N.J.S.A. 2C:24-4(a) or (b)(4), or an attempt to commit any such crime, shall be referred to the Adult Diagnostic and Treatment Center (ADTC or Avenel) for a physical and psychological examination. N.J.S.A. 2C:47-1.

2. The psychological examination is conducted by the Department of Corrections (DOC). N.J.S.A. 2C:47-1. Such examination must be completed within thirty days of receipt of the presentence report. N.J.S.A. 2C:47-2. No examination is required if the offender is sentenced to life imprisonment without parole. N.J.S.A. 2C:47-1.

3. The examination must determine whether the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, whether the offender is amenable to sex offender treatment, and whether the offender is willing to participate in that treatment. N.J.S.A. 2C:47-1; N.J.S.A. 2C:47-2.

4. If all three findings are made in the affirmative, the sentencing court must re-examine them and make and record its own findings on the judgment of conviction. N.J.S.A. 2C:47-3(a). If the court agrees with the findings, and the DOC so recommends, the court "shall" impose a sex offender sentence. N.J.S.A. 2C:47-3(b). Such a sentence may be either incarceration at the ADTC in accordance with N.J.S.A. 2C:47-3(h), or probation with outpatient psychological treatment. N.J.S.A. 2C:47-3(b).

5. If the DOC's report reveals that the offender's conduct was not repetitive and compulsive, or

that the offender is not amenable to sex offender treatment, the court shall not impose a sex offender sentence. N.J.S.A. 2C:47-3(d). Any sentence imposed on such an offender shall not be reduced by good behavior or work credits. N.J.S.A. 2C:47-3(d).

6. If the court finds that the offender's conduct was repetitive and compulsive, and that the offender is amenable to sex offender treatment but not willing to participate in such treatment, the court "shall" sentence the offender to a term of incarceration to be served in a facility designated by the Commissioner. N.J.S.A. 2C:47-3(f). Such a sentence shall not be reduced by good behavior or work credits. N.J.S.A. 2C:47-3(g).

7. An offender not serving an ADTC sentence shall become primarily eligible for parole in accordance with N.J.S.A. 2C:47-5, but not prior to the expiration of any judicial or statutory mandatory minimum term. N.J.S.A. 2C:47-3(f). Such an offender may also, on a biennial basis, request a transfer to the ADTC. N.J.S.A. 2C:47-3(f). If, after conducting a psychological examination, the Department of Corrections determines that the offender is amenable to and willing to participate in treatment, the offender may be transferred to the ADTC. N.J.S.A. 2C:47-3(f). In that event, the offender is entitled to good behavior or work credits for any year or fractional part of a year that he or she was incarcerated at the ADTC following the transfer. N.J.S.A. 2C:47-3(g).

8. Where an ADTC sentence is imposed, and the term is seven years or less, the offender shall be confined to the ADTC as soon as practicable. N.J.S.A. 2C:47-3(h)(1). However, where the term is greater than seven years, the offender is first confined to a facility designated by the Commissioner. N.J.S.A. 2C:47-3(h)(2).

9. The Commissioner is not required to provide for the treatment of any sex offender who is not incarcerated in the ADTC. N.J.S.A. 2C:47-3(k).

10. The Commissioner "shall" transfer out of the ADTC any offender who is not participating in or cooperating with sex offender treatment and any offender who is determined by the DOC to be no longer amenable to such treatment. N.J.S.A. 2C:47-4.1(a). Any offender so transferred may request, on a biennial basis, to be transferred back to the ADTC. N.J.S.A. 2C:47-4.1(b).

11. For a sex offender confined under Chapter 47 to be paroled, he or she must be recommended by a special classification review board as having achieved a satisfactory level of progress in sex offender treatment. N.J.S.A. 2C:47-5(a). The State Parole Board should then release the offender unless it determined by a preponderance of the evidence that the offender failed to cooperate in rehabilitation or that there is a reasonable expectation that the offender will violation conditions of parole. N.J.S.A. 2C:47-5(a).

12. Where a sex offender is not paroled in accordance with N.J.S.A. 2C:47-5(a) but is scheduled for release, the Attorney General and local prosecutor shall be so notified and shall be advised as to whether the offender is either "in need of involuntary commitment" or a "sexually violent predator." N.J.S.A. 2C:47-5(d).

13. Where a sex offender's parole is revoked, the DOC shall, within ninety days of revocation, complete a psychological examination of the offender to determine whether the parole violation reflects emotional or behavioral problems that cause the offender to be incapable of making any acceptable social adjustment in the community, and whether the offender is amenable to and willing to participate in sex offender treatment. N.J.S.A. 2C:47-5.1(a). If all three findings are made in the affirmative, the offender shall be confined in the ADTC. N.J.S.A. 2C:47-5.1(b). If the first two findings are made in the affirmative, but the offender is not willing to participate in sex offender treatment, he or she shall be confined in a facility designated by the

Commissioner. N.J.S.A. 2C:47-5.1(c). In either case, the offender shall be eligible for parole in accordance with Chapter 47. N.J.S.A. 2C:47-5.1(b) and (c).

14. If the offender's parole violation does not reflect problems as a sex offender or if the offender is not amenable to sex offender treatment, he or she shall be confined in a facility other than the ADTC and shall be eligible for parole in accordance with Title 30. N.J.S.A. 2C:47-5.1(d).

15. A term of imprisonment imposed on a person confined to the ADTC shall not be reduced by good time credits if the person failed to fully cooperate with all treatment offered to him or her during that time period. N.J.S.A. 2C:47-8. However, this restriction does not apply to those offenders entitled to credit under N.J.S.A. 2C:47-3(g).

B. General Rules Regarding Sex Offender Sentences

NOTE: Because the law on sex offender sentencing was amended significantly in 1998, "[c]are should be exercised in applying old cases: some principles still are valid, others not." Cannel, New Jersey Criminal Code Annotated, comment 2 on N.J.S.A. 2C:47-3 at 1118 (2006).

1. The actions of a court in sentencing a defendant to the ADTC implicate a liberty interest that is protected by the constitutional notion of due process because of the expectation that Avenel's parole standards and rehabilitation procedures will not be applied absent a finding of repetitiveness and compulsiveness, and because of the additional stigma that such a finding entails. State v. Howard, 110 N.J. 113, 127-29 (1988).

2. The prerequisite findings resulting in a commitment to Avenel do not need to be determined by a jury beyond a reasonable doubt. State v. Luckey, 366 N.J. Super. 79, 90-91 (App. Div. 2004). Rather, these findings may be made by a judge by a preponderance of the evidence. State

v. Howard, supra, 110 N.J. at 131; State v. Luckey, supra, 366 N.J. Super. at 90-91.

3. A defendant may deemed to have waived the due process right to the statutory finding of "repetitive and compulsive" by defying a court order that he or she submit to psychological testing and examination. State v. Logan, 262 N.J. Super. 128, 132 (App. Div.), certif. denied, 133 N.J. 446 (1993).

4. The ADTC does not define the terms "repetitive" and "compulsive," and the Legislature did not attach any special meaning to those terms. State v. N.G., 381 N.J. Super. 352, 359, 361 (App. Div. 2005). Since they are words of common understanding, they should be given their ordinary and well-understood meanings. Id. at 361. As such, they provide fair notice of the conduct that could subject a defendant to an ADTC sentence, and they do not render the statute unconstitutionally vague. Id. at 362-63.

   a. "Repetitive" means "to do, experience, or produce again." "Compulsive" means "caused by obsession or compulsion," with "compulsion" meaning "an irresistible impulse to act irrationally." Id. at 361-62.

   b. "Repetitive" and "compulsive" behavior is not limited to repetitive physical sexual acts or physical urges, but includes psychological conduct and urges as well, such as sexual fantasies or thoughts. State v. Hass, 237 N.J. Super. 79, 85-86 (Law Div. 1988).

5. A court should not compel a defendant to undergo an Avenel evaluation while other nonsex-related crimes are pending because such a decision would be repugnant to the constitutional right against self-incrimination. State v. Marrero, 239 N.J. Super. 119, 123 (Law Div. 1989).

6. A fixed term of years must be imposed on a sex offender who is to receive a custodial sentence

at the ADTC or elsewhere. State v. Dittmar, 188 N.J. Super. 364, 366-67 (App. Div. 1982), certif. denied, 97 N.J. 678 (1984).

7. Nothing in Chapter 47 prevents a court from imposing a mandatory minimum parole ineligibility period when a defendant is sentenced to the ADTC. State v. Chapman, 95 N.J. 582, 588 (1984). Also, a parole ineligibility term is allowed on a "discretionary" extended term to the ADTC under N.J.S.A. 2C:43-7(b). State v. Holmes, 192 N.J. Super. 458, 462 (App. Div.), certif. denied, 99 N.J. 144 (1984).

8. The Code permits a sex offender to be sentenced to consecutive ADTC and prison terms for sex- and nonsex-related charges arising from one incident. State v. Chapman, supra, 95 N.J. at 592. Also, if the ADTC and prison sentences are ordered to run concurrently, and if the defendant is released from the ADTC before the end of the prison term, he or she may be required to serve the remainder of the concurrent term in prison. Ibid.

9. An ADTC recommendation for probation with out-patient treatment must be considered in light of the Code's presumption of imprisonment for first and second degree offenses. State v. Hamm, 207 N.J. Super. 40, 44-45 (App. Div. 1986).

10. A defendant must be advised of the impact of a potential ADTC sentence upon his or her parole opportunities when pleading guilty to a sex offense. State v. Howard, supra, 110 N.J. at 124-25. See discussion of sentences associated with guilty pleas at Section VII.

11. The removal of good time credits from an inmate implicates a protected liberty interest. Bender v. New Jersey Dep't of Corrs., 356 N.J. Super. 432, 438 (App. Div. 2003).

    a. Notwithstanding N.J.S.A. 2C:47-8, which allows for the removal of credits if the inmate fails to participate in sex offender treatment, credits may not be reduced based

on an offender's refusal to disclose the details of prior sex offenses not the subject of convictions. Id. at 439-43.

b. A defendant does not lose this privilege against self-incrimination with respect to other sex offenses until after sentencing and all direct appellate remedies have been exhausted. Lewis v. Dep't of Corrs., 365 N.J. Super. 503, 506 (App. Div. 2004).

12. See N.J.S.A. 2C:14-10, effective April 26, 2005, for penalties to be assessed against all persons convicted of sex offenses as defined in N.J.S.A. 2C:7-2, payable to the Sex Crime Victim Treatment Fund.

C. Special Sentences of Community Supervision for Life

1. A court imposing sentence on a defendant who has been convicted of certain enumerated sexual offenses "shall" also include a special sentence of "community supervision for life." N.J.S.A. 2C:43-6.4(a). This is a mandatory provision. State v. Cooke, 345 N.J. Super. 480, 490 (App. Div. 2001), certif. denied, 171 N.J. 340 (2002). A court may not sentence such a defendant to probation. N.J.S.A. 2C:43-2(g) (effective January 14, 2004). The lifetime community supervision is "parole supervision." N.J.S.A. 2C:43-6.4(a) (as amended effective January 14, 2004).

2. As amended, the special sentence shall commence immediately upon the defendant's release from incarceration. Persons serving such a special sentence shall remain in the legal custody of the Commissioner of Corrections, shall be supervised by the Division of Parole of the State Parole Board, shall be subject to the standard provisions and conditions of parole, and shall be "subject to conditions appropriate to protect the public and foster rehabilitation." N.J.S.A. 2C:43-6.4(b) (as amended effective January 14, 2004).

3. The language in N.J.S.A. 2C:43-6.4(b), prior to its amendment in January 2004, that persons serving such sentences "shall be supervised as if on parole," required them to be treated in accordance with the laws and regulations pertaining to paroled persons. State v. Bond, 365 N.J. Super. 430, 438 (App. Div. 2003). Because this statute provided defendants with sufficient notice of what conduct would be deemed illegal, it was not unconstitutionally vague. Id. at 438-40. Nor did it constitute a violation of the doctrine of separation of powers. Id. at 440-43.

4. If the court suspends the imposition of sentence on a defendant who is convicted of any offense subject to parole supervision for life, the court may not suspend imposition of the special sentence. N.J.S.A. 2C:43-6.4(b) (as amended effective January 14, 2004). In such a case, the defendant is immediately placed in the custody and supervision of the State Parole Board. N.J.S.A. 2C:43-6.4(b) (as amended effective January 14, 2004).

5. The court may grant a release from a parole supervision sentence only upon proof by clear and convincing evidence that the defendant has not committed a crime for fifteen years since the last conviction or release from incarceration, whichever is later, and that the defendant is not likely to pose a threat to the safety of others. N.J.S.A. 2C:43-6.4(c) (as amended effective January 14, 2004).

6. A violation of a condition of a special sentence without good cause is a fourth degree offense. N.J.S.A. 2C:43-6.4(d). Effective January 14, 2004, any person sentenced pursuant to this subsection shall be sentenced to a term of imprisonment "unless the court is clearly convinced that the interests of justice so far outweigh the need to deter this conduct and the interest in public safety that a sentence to imprisonment would be a manifest injustice." N.J.S.A. 2C:43-6.4(d) (as amended).

7. A person who, while serving a parole supervision sentence, commits certain enumerated offenses shall be sentenced to an extended term of imprisonment. N.J.S.A. 2C:43-6.4(e). Effective January 14, 2004, such a term shall be served in its entirety prior to the person's resumption of the term of parole supervision for life. N.J.S.A. 2C:43-6.4(e) (as amended). See further discussion of extended terms at Section IV.

D. Megan's Law Provisions

1. See N.J.S.A. 2C:7-1 to -5 ("Megan's Law" provisions regarding registration of sex offenders); N.J.S.A. 2C:7-6 to -11 ("Megan's Law" provisions regarding community notification of released sex offenders); N.J.S.A. 2C:47-5(d) and (e) ("Megan's Law" provisions regarding notice to Attorney General and county prosecutor when sex offender is about to be released and may be in need of involuntary commitment).

2. For a discussion of the constitutionality of these provisions, see Doe v. Poritz, 142 N.J. 1 (1995).

3. For a discussion of the Attorney General's sex-offender classification guidelines (the Registrant Risk Assessment Scale), see In re C.A., 146 N.J. 71 (1996).

E. Second or Subsequent Sex Offenders

1. If a person is convicted of a second or subsequent offense of aggravated sexual assault, sexual assault, or aggravated criminal sexual contact, the sentence for the second or subsequent offense shall include a fixed minimum sentence of not less than five years during which the defendant shall not be eligible for parole. N.J.S.A. 2C:14-6.

2. The minimum period of parole ineligibility that must be imposed is five years. The maximum is one-half of the sentence actually imposed. State v. Chapman, supra, 95 N.J. at 589; State v. Holmes, supra, 192 N.J. Super. at 460.

3. An offense is considered a second or subsequent one if the actor has at any time been convicted under N.J.S.A. 2C:14-2 or N.J.S.A. 2C:14-3(a), or under any equivalent statute in any other state. N.J.S.A. 2C:14-6. This means that there must have been an earlier conviction already entered at the time this second offense was committed, i.e., a chronological sequence between the first conviction and second offense, because an offense cannot be characterized as a second or subsequent one unless, at the time it was committed, the defendant had previously been convicted. State v. Anderson, 186 N.J. Super. 174, 176 (App. Div. 1982), aff'd o.b., 93 N.J. 14 (1983).

XVIII. DETERMINATION OF TIME CREDITS

A. Credits For Presentence Custody ("Jail Credit")

1. General Rules

a. R. 3:21-8: A defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and imposition of sentence. This is known as "jail credit." Richardson v. Nickolopoulos, 110 N.J. 241, 242 (1988) (Richardson II). The credit is given for time served between the date of arrest and the imposition of sentence and is not dependent upon the date the State files a formal accusation or indictment. State v. Garland, 226 N.J. Super. 356, 362 (App. Div.), certif. denied, 114 N.J. 288 (1988).

b. R. 3:21-5: The judgment of conviction shall include the statement of credits received. If the Parole Board disagrees with a calculation of credits as stated in the judgment of conviction, it should notify the judge and the parties so that the judgment may be corrected. The Parole Board may not unilaterally disregard the allowance of jail credit stated. Glover v. New Jersey State Parole Bd., 271 N.J. Super. 420, 423-24 (App. Div. 1994).

c. A sentencing judge should give a statement of reasons, including findings of fact and conclusions of law, with respect to the subject of credits, where the issue is in dispute and has an impact on the sentence. State v. Alevras, 213 N.J. Super. 331, 339 (App. Div. 1986). The judge should also state the jail credits or amount of time the defendant has already served. N.J.S.A. 2C:43-2(f)(2).

d. The granting of such a credit is "at best discretionary" and not a matter of right or

due process. State v. Hill, 208 N.J. Super. 492, 495 (App. Div.), certif. denied, 104 N.J. 412 (1986). However, this has been interpreted to mean that when the rule does apply, the credit is mandatory, and that, where the rule does not apply because the defendant has not met its criterion, the credit may nevertheless be awarded based on considerations of fairness, justice, and fair dealing. State v. Grate, 311 N.J. Super. 544, 548 n.3, 549-50 (Law Div. 1997), aff'd, 311 N.J. Super. 456, 457-58 (App. Div. 1998).

e. Jail credits are "day-for-day" credits given to the inmate for time spent in custody prior to trial and sentencing and are subtracted from the original sentence. Buncie v. Dep't of Corrs., 382 N.J. Super. 214, 217 (App. Div. 2005), certif. denied, 186 N.J. 606 (2006). Commutation credits are awarded on the sentence reduced by these presentence jail credits. Id. at 218. The denial of commutation credits for presentence incarceration does not violate a defendant's equal protection or due process rights. Id. at 218-27.

2. Probationary sentences

a. Where a term of imprisonment is imposed as a condition of probation, upon revocation of probation any term served "shall" be credited toward service of a subsequently imposed sentence. N.J.S.A. 2C:45-1(e).

b. Although this provision is silent on how a court should treat time served on parole following release from a jail term imposed as a condition of probation, it has been held that calculation of a defendant's total maximum term of imprisonment should include any time served on parole. This is because, for the purpose of computing credit for a term of imprisonment, parole is the legal equivalent of imprisonment. State v. Rosado, 131 N.J. 423, 426-28 (1993). This

is true only where it is a defendant's probation, not parole, that has been revoked, i.e., where the defendant has already passed from parole supervision to probation supervision. Id. at 427.

c. Probationary supervision is not "custody" for the purpose of R. 3:21-8. State v. Evers, 368 N.J. Super. 159, 172-73 (App. Div. 2004).

   i. A defendant receives no credit for a probationary term served before being resentenced following an appellate remand. Id. at 170.

   ii. A probationer given a custodial sentence after revocation is not entitled to credit for any non-custodial time spent on probation. State v. Ryan, 171 N.J. Super. 427, 441 (App. Div. 1979), rev'd on other grounds, 86 N.J. 1, cert. denied, 454 U.S. 880, 102 S. Ct. 363, 70 L. Ed. 2d 190 (1981); State v. Braeunig, 135 N.J. Super. 89, 94 (Law Div. 1975), modified on other grounds, 140 N.J. Super. 245 (App. Div. 1976).

d. A defendant is entitled to credit for time spent in a county jail between arrest and sentencing to reduce a term of imprisonment imposed as a condition of probation. Such imprisonment is a custodial sentence against which credit must be given. State v. Carlough, 183 N.J. Super. 234, 235-36 (App. Div. 1982).

e. R. 3:21-8 also applies to a probationer sentenced to a custodial term for the first time following a revocation proceeding, i.e., such a defendant receives credit for time spent in custody after revocation but prior to imposition of sentence. State v. Fisher, 115 N.J. Super. 373, 379 (App. Div. 1971).

3. Credit for time spent in hospital, medical or other facility

a. Custody under R. 3:21-8 signifies an involuntary confinement in a penal or medical facility. For a defendant to be awarded credit for time spent at a residential drug program, he or she must show that the program was so confining as to be substantially equivalent to custody. Such a showing cannot usually be made where there are no physical restraints on the participant and where he or she retains the option to leave without committing an additional crime, such as escape. State v. Reyes, 207 N.J. Super. 126, 143-44 (App. Div.), certif. denied, 103 N.J. 499 (1986); State v. Ryan, supra, 171 N.J. Super. at 442; State v. Smeen, 147 N.J. Super. 229, 233 (App. Div.), certif. denied, 74 N.J. 263 (1977).

b. Voluntary confinement in a psychiatric hospital, even where such confinement is a "condition" of bail, is not sufficiently custodial so as to warrant a credit against a defendant's sentence. State v. Towey, 114 N.J. 69, 85-86 (1989). Cf. Reno v. Koray, 515 U.S. 50, 115 S. Ct. 2021, 2025-28, 132 L. Ed. 2d 46, 54-57 (1995) (time spent in community treatment center while released on bail is not equivalent of "official detention" under federal statute authorizing credit for time served).

c. Time spent by a defendant in a religious convent awaiting trial need not be credited where the restrictions on liberty are not so severe as to be the equivalent of jail or a state hospital. However, a court may consider these restrictions in determining what is a fair sentence under all the circumstances. State v. Mirakaj, 268 N.J. Super. 48, 52-53 (App. Div. 1993).

d. There is no entitlement to jail credit for time spent participating in an electronic

monitoring wristlet program as a condition of pretrial release. State v. Mastapeter, 290 N.J. Super. 56, 62-63 (App. Div.), certif. denied, 146 N.J. 569 (1996).

4. Applicability of credit in case of time spent on other charges

a. Although R. 3:21-8 should be liberally construed, it grants credit only for the particular offense for which there was incarceration or detention. State v. Black, 153 N.J. 438, 456 (1998); State v. DeRosa, 332 N.J. Super. 426, 429 (App. Div. 2000); Sheil v. New Jersey State Parole Bd., 244 N.J. Super. 521, 527 (App. Div. 1990), appeal dismissed, 126 N.J. 308 (1991); State v. Benedetto, 221 N.J. Super. 573, 577 n.1 (App. Div. 1987), certif. denied, 111 N.J. 559 (1988); State v. Richardson, 208 N.J. Super. 399, 413 (App. Div.), certif. denied, 105 N.J. 552 (1986) (Richardson I); State v. Hugley, 198 N.J. Super. 152, 160 (App. Div. 1985).

b. Even where the incarceration was the product of an illegal sentence, it may not be credited against penalties imposed for other criminal activities because credit should not be awarded against custodial sentences on wholly unrelated charges. State v. Hill, supra, 208 N.J. Super. at 495. A court, however, may "consider" the prior incarceration for purposes of sentencing. Id. at 496.

c. It would be against public policy to allow a defendant to artificially "bank" jail time against a later sentence to be imposed for committing a new crime. State v. Malave, 249 N.J. Super. 559, 564 (App. Div. 1991), certif. denied, 127 N.J. 559 (1992). N.J.S.A. 2C:44-5(f)(3), which provides that when a sentence of imprisonment in excess of one year is imposed, the service of such sentence shall be deemed to satisfy a suspended sentence on another count or prior

suspended sentence, overturns the common-law principle that time spent in custody is to be credited against only the sentence on the charge that brought about the custody. Ibid.

d. Time spent in confinement after a parole detainer is lodged against a defendant is deemed time attributable to the violation of parole, i.e., to the original sentence, not to the new offense. Hence, a defendant is not entitled to jail credit against his or her new sentence. State v. Harvey, 273 N.J. Super. 572, 574-76 (App. Div. 1994).

e. A defendant is not entitled to jail credits for time spent in jail directly attributable to a violation of federal probation. State v. Mercadante, 299 N.J. Super. 522, 531 (App. Div.), certif. denied, 150 N.J. 26 (1997).

f. When a parolee is taken into custody on a parole warrant, the confinement is attributable to the original offense on which parole was granted and not to any offense committed during the release. State v. Black, supra, 153 N.J. at 461.

   i. If parole is not revoked and the defendant is convicted of new charges based on the same conduct that led to the parole warrant, then jail time should be credited against the new sentence. Ibid.

   ii. If, however, parole is revoked, then the period of incarceration from confinement pursuant to the parole warrant until the revocation of parole should be credited against any period of reimprisonment ordered by the parole board. Any period of confinement following the revocation of parole but prior to sentencing on the new offense should be credited only against the original sentence,

unless the inmate has again become parole eligible on the original offense and remained incarcerated for the new offense. Ibid.

g. The criterion of R. 3:21-8 is not met where the defendant commits a second offense while out on bail on one offense and is then unable to meet the consolidated bail for both offenses. However, where the defendant is subsequently acquitted of the second offense but would have been entitled to "gap time" credit on the later sentence if convicted, a court may award jail credit as a matter of discretion. State v. Grate, supra, 311 N.J. Super. at 549-50, aff'd, 311 N.J. Super. at 457-58. Such credit may be applied to reduce a parole ineligibility term as well as the base term. Id. at 459.

h. A defendant is not entitled to credit pursuant to R. 3:21-8 for time he or she was incarcerated in New Jersey after being returned pursuant to the Interstate Agreement on Detainers Act, because that detention is attributable to the foreign sentence. State v. Dela Rosa, 327 N.J. Super. 295, 298 (App. Div.), certif. denied, 164 N.J. 191 (2000), overruled on other grounds by State v. Carreker, 172 N.J. 100 (2002).

5. Sex offenders

In the context of credit under R. 3:21-8, there is no difference between a custodial sentence and a custodial commitment to the Adult Diagnostic and Treatment Center. State v. Lee, 60 N.J. 53, 58 (1972). However, the same is not true for time spent by a juvenile sex offender in a residential program for treatment. State in the Interest of S.T., 273 N.J. Super. 436, 444-47 (App. Div. 1994).

6. Resentencing after an appeal

a. Where a defendant's conviction is reversed on appeal and the sentence is vacated, the defendant must be given credit against any new sentence imposed for time already served on the original sentence. North Carolina v. Pearce, 395 U.S. 711, 718-19, 89 S. Ct. 2072, 2077, 23 L. Ed. 2d 656, 665-66 (1969); State v. DeRosa, supra, 332 N.J. Super. at 432-33; State v. Lozada, 257 N.J. Super. 260, 278 (App. Div.), certif. denied, 130 N.J. 595 (1992). Cf. Curry v. New Jersey State Parole Bd., 309 N.J. Super. 66, 70-73 (App. Div. 1998) (when aggregating multiple sentences to determine primary parole eligibility date, parole board may not penalize defendant for having obtained reversal of conviction by ignoring credit earned on reversed conviction).

b. Where the State appeals a lenient sentence and wins, the defendant receives credit against any modified sentence for time already served. State v. Sanders, 107 N.J. 609, 621 (1987).

c. A defendant receives credit for time spent on parole prior to resentencing following an appellate remand. State v. Mercadante, supra, 299 N.J. Super. at 532-33. However, no credit should be awarded where the defendant was on probation prior to being resentenced. State v. Evers, supra, 368 N.J. Super. at 170.

B. Credit Due When Aggregating Multiple Sentences Imposed At Different Times ("Gap-Time Credit")

1. General Rules

a. When a defendant, previously sentenced to imprisonment, is subsequently sentenced to another term for an offense committed prior to the former sentence (other than for an offense committed while in custody), the defendant shall be credited with time served on the prior sentence "in determining the permissible aggregate length of the term or terms remaining to be served." N.J.S.A. 2C:44-5(b)(2). This is known as "gap-time credit." State v. Richardson II, supra, 110 N.J. at 242.

b. A three-prong threshold test must be met for this credit to apply: the defendant has been sentenced previously to prison; the defendant is subsequently sentenced to another prison term; and the subsequent sentence is for an offense that occurred prior to the imposition of the first sentence. State v. Franklin, 175 N.J. 456, 462 (2003); State v. Carreker, supra, 172 N.J. at 105.

c. Once these requirements are met, statutorily mandated gap-time credits must be awarded. State v. Franklin, supra, 175 N.J. at 462; State v. Carreker, supra, 172 N.J. at 105; Sheil v. N.J. State Parole Bd., supra, 244 N.J. Super. at 526.

d. As with other types of sentencing credits, gap-time credits must be determined by the court at sentencing. The Parole Board is not responsible for awarding these credits. Booker v. New Jersey State Parole Bd., 136 N.J. 257, 265 (1994).

2. Policy rationale

a. The policy behind this provision is to counteract any dilatory tactics of the prosecutor in pursuing a conviction of an earlier offense after the defendant has already been sentenced on another offense. State v. Franklin, supra, 175 N.J. at 462; State v. Carreker, supra, 172 N.J. at 105; State v. Guaman, 271 N.J. Super. 130, 133 (App. Div. 1994); State v. Edwards, 263 N.J. Super. 256, 260 (App. Div. 1993); State v. Hall, 206 N.J. Super. 547, 550 (App. Div. 1985). The purpose is to avoid manipulation of trial dates to the disadvantage of defendants and to put defendants in the same position as if the two offenses had been tried at the same time. State v. Franklin, supra, 175 N.J. at 462.

b. The absence of evidence of prosecutorial delay is not fatal to an award of gap-time credits, as long as the statutory criteria have otherwise been met. State v. Ruiz, 355 N.J. Super. 237, 243 (Law Div. 2002). While this may result in a windfall benefit to defendants in some cases, the gap-time statute provides a uniform, bright-line rule that avoids the need for explanations for the reasons for the delay or the parties' motives. State v. Franklin, supra, 175 N.J. at 463-64; State v. Ruiz, supra, 355 N.J. Super. at 246-47.

3. Special Applications of the Credit

a. N.J.S.A. 2C:44-5(b)(2) envisions that the prior offense be committed prior to imposition of the former sentence. Thus, there are no credits where the prior offense is merely committed prior to the start of the defendant's actual incarceration. State v. Hall, supra, 206 N.J. Super. at 550-51.

b. The gap-time provision does not apply to any portion of time served by a defendant on a foreign sentence. State v. Carreker, supra,

172 N.J. at 111. This is because the gap-time statute is directed at New Jersey sentencing authorities, who have no jurisdiction to "aggregate" out-of-state sentences. Ibid. Defendants who are serving out-of-state sentences are given adequate protections against prosecutorial delay under the relevant provisions of the Interstate Agreement on Detainers. Id. at 114; State v. Hugley, supra, 198 N.J. Super. at 157-59.

c. The argument has been rejected that gap-time credit should be applied at the "front end" of a sentence to reduce a judicial or statutory parole bar. State v. Richardson II, supra, 110 N.J. at 254-55; Meyer v. New Jersey State Parole Bd., 345 N.J. Super. 424, 428 (App. Div. 2001), certif. denied, 171 N.J. 339 (2002); Sheil v. Parole Bd., supra, 244 N.J. Super. at 527. This is true whether the sentences are concurrent or consecutive. Booker v. New Jersey State Parole Bd., supra, 136 N.J. at 268. While this position may result in similarly situated defendants who are sentenced at different times reaching their primary parole eligibility dates at different times, this can be dealt with through other flexible provisions of the Code's sentencing scheme. State v. Richardson II, supra, 110 N.J. at 250-52. This interpretation does not violate a defendant's equal protection rights. Lorenzo v. Edmiston, 705 F. Supp. 209, 215 (D.N.J.), aff'd, 882 F.2d 511 (3d Cir. 1989).

d. N.J.S.A. 2C:44-5(b)(2) does not reduce the authority of a court to impose a judicial parole disqualifier pursuant to N.J.S.A. 2C:43-6(b). Booker v. New Jersey State Parole Bd., supra, 136 N.J. at 262-63. Hence, a period of parole ineligibility is an absolute term against which there are to be no credits other than jail credits. Id. at 263.

e. Gap-time credits, however, do proportionately advance a defendant's primary parole eligibility date when neither a judicial nor a statutory parole bar has been imposed. Id. at 264-65. That is, once gap-time credits are awarded by a sentencing court, the Parole Board must compute a defendant's parole eligibility date on the basis of the reduced aggregate sentence. Id. at 265. This is true whether the sentences are concurrent or consecutive. Id. at 265-66.

f. Gap-time credit does not apply to reduce the 85% period of parole ineligibility mandated by the No Early Release Act (NERA). Meyer v. New Jersey State Parole Bd., supra, 345 N.J. Super. at 429.

g. With respect to a young adult offender serving an indeterminate term pursuant to N.J.S.A. 2C:43-5, gap-time credit reduces only the maximum length of the aggregate indeterminate term, not the actual time a defendant must serve before release on parole or the initial parole eligibility date. Mitnaul v. New Jersey State Parole Bd., 280 N.J. Super. 164, 166 (App. Div. 1995).

h. Gap-time credits include only the period of incarceration between imposition of the first and second sentences, not time spent in jail pending imposition of the earlier sentence. State v. Edwards, supra, 263 N.J. Super. at 258. See State v. Ruiz, supra, 355 N.J. Super. at 248 (time served before sentence is not a "sentence of imprisonment" for purpose of gap-time statute).

i. A defendant is entitled to gap-time credit for the period served in custody following an arrest for violation of parole until sentencing on the original underlying offenses. State v. Franklin, supra, 175 N.J. at 469-72. However, there is no entitlement to credit toward a sentence for

any new offense committed while on parole. Id. at 471-72; State v. Hunt, 272 N.J. Super. 182, 185 (App. Div.), certif. denied, 137 N.J. 307 (1994).

j. Where an offense for which a defendant is sentenced on a violation of probation occurred prior to the imposition of sentence on another violation of probation, a defendant may be entitled to gap-time credits for the interval between the resentencing on the first violation and the completion of that sentence. State v. Guaman, supra, 271 N.J. Super. at 131.

k. Gap-time credit may be awarded for time served in State prison on non-indictable offenses even when the earlier sentence was imposed in municipal court. State v. French, 313 N.J. Super. 457, 463-67 (Law Div. 1997).

l. A defendant need not be currently serving a sentence of imprisonment for gap-time to apply. That is, gap-time applies even where the defendant has completed serving the first sentence by the time of the second sentence. State v. Ruiz, supra, 355 N.J. Super. at 242.

XIX. SENTENCES AS CRUEL AND UNUSUAL PUNISHMENT

A. Sources of Prohibition Against Cruel and Unusual Punishment

U.S. Const. amend. VIII; N.J. Const. art. I, ¶ 12. Both provisions state that cruel and unusual punishments shall not be inflicted.

B. General Rules

1. The cruel and unusual punishment clause circumscribes the criminal process in three ways: it limits the kind of punishment that may be imposed on those convicted of crimes; it proscribes punishment that is grossly disproportionate to the severity of the crime; and it imposes substantive limits on what may be made criminal and punished as such. Ingraham v. Wright, 430 U.S. 651, 667, 97 S. Ct. 1401, 1410, 51 L. Ed. 2d 711, 727-28 (1977).

2. The standards for determining whether a sentence constitutes cruel and unusual punishment are whether the nature of the punishment shocks the general conscience and violates principles of fundamental fairness; whether the punishment is grossly disproportionate to the offense; and whether the punishment goes beyond what is necessary to accomplish a legitimate penal aim. State v. Johnson, 166 N.J. 523, 548 (2001); State v. Maldonado, 137 N.J. 536, 556-57 (1994); State v. Des Marets, 92 N.J. 62, 82 (1983); State v. Johnson, 206 N.J. Super. 341, 343 (App. Div. 1985), certif. denied, 104 N.J. 382 (1986).

3. In the case of challenges to sentences fixed by statute, the judiciary must respond to the legislative will and to the broad legislative power to fix maximum and minimum terms. State v. Johnson, supra, 206 N.J. Super. at 343. Courts will not interfere with a prescribed penalty unless it is so disproportionate to the offense as to transgress federal and State constitutional standards. The validity of a legislatively-fixed punishment will be presumed. State v. Smith, 58

N.J. 202, 211 (1971); State v. Johnson, supra, 206 N.J. Super. at 344. See Harmelin v. Michigan, 501 U.S. 957, 994-95, 111 S. Ct. 2680, 2701, 115 L. Ed. 2d 836, 864-65 (1991) (sentence that is not otherwise cruel and unusual does not become so simply because it is mandatory).

4. The Eighth Amendment contains a narrow proportionality principle that applies to noncapital sentences. Ewing v. California, 538 U.S. 11, 20, 123 S. Ct. 1179, 1185, 155 L. Ed. 2d 108, 117 (2003) (plurality opinion). Successful challenges to the propriety of particular sentences based on the cruel and unusual punishment clause are exceedingly rare outside the realm of capital punishment. Solem v. Helm, 463 U.S. 277, 289-90, 103 S. Ct. 3001, 3009, 77 L. Ed. 2d 637, 649 (1983).

5. In determining whether a sentence for a term of years violates the Eighth Amendment, the United States Supreme Court has not followed a clear or consistent path. Lockyer v. Andrade, 538 U.S. 63, 72, 123 S. Ct. 1166, 1173, 155 L. Ed. 2d 144, 155 (2003). However, the one governing legal principle has been that a "gross disproportionality" standard applies to such a sentence. Id. at 72, 123 S. Ct. at 1173, 155 L. Ed. 2d at 156. The Court has also exhibited a lack of clarity regarding what factors may indicate gross disproportionality. Ibid.

6. In Solem v. Helm, supra, 463 U.S. at 290-91, 103 S. Ct. at 3010, 77 L. Ed. 2d at 649-50 the Court proposed a three-prong analysis for purposes of proportionality review under the Eighth Amendment: (1) compare the inherent gravity of the offense committed to the sentence imposed; (2) compare the sentence imposed to those imposed for similar offenses in the same jurisdiction; and (3) compare the sentence imposed to those imposed for the same offense in other jurisdictions.

   a. But see Harmelin v. Michigan, supra, 501 U.S. at 965, 111 S. Ct. at 2686, 115 L. Ed. 2d at 846 (Scalia, J., with Rehnquist, C.J.,

joining) (Eighth Amendment contains no proportionality guarantee); 501 U.S. at 1005, 111 S. Ct. at 2707, 115 L. Ed. 2d at 871-72 (Kennedy, J., with O'Connor and Souter, J.J., joining) (only second and third Solem factors need be applied, and only in the rare case when there may be a "gross disproportionality" between the crime committed and the sentence imposed).

b. The proportionality principles distilled in Justice Kennedy's concurrence in Harmelin more recently guided the Court's application of the Eighth Amendment to a sentence imposed under a state's "Three Strikes" law. Ewing v. California, supra, 538 U.S. at 23-24, 123 S. Ct. at 1186-87, 155 L. Ed. 2d at 119 (plurality opinion).

C. Special Applications

1. Imposition of a Graves Act sentence does not ordinarily constitute cruel and unusual punishment. This is true even where the defendant is a youthful offender, State v. Des Marets, supra, 92 N.J. at 81-82, or a law enforcement officer who needs solitary or segregated confinement. State v. Muessig, 198 N.J. Super. 197, 203-04 (App. Div.), certif. denied, 101 N.J. 234 (1985). However, in some particular case the act as applied might amount to cruel and unusual punishment. State v. Des Marets, supra, 92 N.J. at 82.

2. The thirty-year period of parole ineligibility mandated by N.J.S.A. 2C:11-3(b) for murder does not constitute cruel and unusual punishment, as applied either to adults, State v. McClain, 263 N.J. Super. 488, 497 (App. Div.), certif. denied, 134 N.J. 477 (1993); State v. Johnson, supra, 206 N.J. Super. at 343, or to juveniles, State v. Pratt, 226 N.J. Super. 307, 324-26 (App. Div.), certif. denied, 114 N.J. 314 (1988).

3. A nine-month delay in transferring a sex offender to ADTC for treatment, during which time the defendant is incarcerated in county jail, does

not constitute cruel and unusual punishment. State v. Howard, 110 N.J. 113, 132-33 (1988).

4. The mandatory drug enforcement and demand reduction (DEDR) penalties of the Comprehensive Drug Reform Act do not constitute cruel and unusual punishment. State v. Lagares, 127 N.J. 20, 36-37 (1992).

5. N.J.S.A. 2C:35-9, providing for the absolute or strict liability of a drug-induced death, does not violate the federal or State constitutional prohibitions against cruel and unusual punishment. State v. Maldonado, supra, 137 N.J. at 556-60.

6. A sentence pursuant to the "Persistent Offenders Accountability Act," also known as the "Three Strikes and You're In" Law, N.J.S.A. 2C:43-7.1, does not constitute cruel and unusual punishment. State v. Oliver, 162 N.J. 580, 588-89 (2000).

7. The 85% parole ineligibility enhancement of the "No Early Release Act," N.J.S.A. 2C:43-7.2, does not violate the federal or State constitutional prohibitions against cruel and unusual punishment. State v. Johnson, supra, 166 N.J. at 548-49. This is so even when the act is applied to accomplices. State v. Rumblin, 166 N.J. 550, 557 (2001).

8. The statutorily required mandatory sentence of life imprisonment with twenty-five years of parole ineligibility pursuant to the "drug kingpin" statute, N.J.S.A. 2C:35-3, does not constitute cruel and unusual punishment even when the drug involved is only marijuana, as opposed to heroin or cocaine. State v. Kadonsky, 288 N.J. Super. 41, 45 (App. Div.), certif. denied, 144 N.J. 589 (1996).

9. Forfeiture of public employment upon conviction of a crime, pursuant to N.J.S.A. 2C:51-2, does not constitute cruel and unusual punishment. State v. Timoldi, 277 N.J. Super. 297, 298-301 (App. Div. 1994), certif. denied, 142 N.J. 449 (1995).

10. The enhanced sentencing provisions of the carjacking statute, N.J.S.A. 2C:15-2, do not constitute cruel and unusual punishment. State v. Zadoyan, 290 N.J. Super. 280, 286 (App. Div. 1996); State v. Williams, 289 N.J. Super. 611, 617-18 (App. Div.), certif. denied, 145 N.J. 375 (1996).

11. A restitution order, even where the defendant has entered into a civil settlement agreement with the victim, does not violate the federal or State constitutional prohibitions against cruel and unusual punishment. State v. DeAngelis, 329 N.J. Super. 178, 189-90 (App. Div. 2000).

XX. MERGER

A. Statutory Rule

1. A defendant may not be convicted of more than one offense if one is included in the other. N.J.S.A. 2C:1-8(a). An offense is included in another if it is established by proof of the same or less than all the facts required to establish the commission of the other offense. N.J.S.A. 2C:1-8(d)(1).

2. This is a codification with minor variations of the so-called Blockburger standard announced in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). State v. Fraction, 206 N.J. Super. 532, 538-39 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986). The Blockburger test to determine whether there are two separate offenses asks whether each provision requires proof of an additional fact which the other does not. 284 U.S. at 304, 52 S. Ct. at 182, 76 L. Ed. at 309. This test was reaffirmed in Rutledge v. United States, 517 U.S. 292, 297-98, 116 S. Ct. 1241, 1245-46, 134 L. Ed. 2d 419, 426 (1996).

3. For non-merger provisions applicable to specific offenses, see: N.J.S.A. 2C:11-5.1 (leaving scene of motor vehicle accident resulting in death); N.J.S.A. 2C:12-1.1 (leaving scene of motor vehicle accident resulting in serious bodily injury); N.J.S.A. 2C:12-1.2 (endangering an injured victim); N.J.S.A. 2C:12-2 (reckless endangerment by adulteration of food products); N.J.S.A. 2C:13-7 (luring adult by electronic or other means); N.J.S.A. 2C:14-9 (reproduction or disclosure of images of sexual contact); N.J.S.A. 2C:16-1 (bias intimidation); N.J.S.A. 2C:20-17 (use of juvenile in theft of automobiles); N.J.S.A. 2C:20-18 (leader of auto theft trafficking network); N.J.S.A. 2C:20-25 (computer related theft where victim is government agency); N.J.S.A. 2C:21-17.2 (exhibiting false government-issued document); N.J.S.A. 2C:21-27 (financial

facilitation of criminal activity); N.J.S.A. 2C:24-9 (use of juvenile to commit crime); N.J.S.A. 2C:30-6 (official deprivation of civil rights); N.J.S.A. 2C:30-7 (pattern of official misconduct); N.J.S.A. 2C:33-28 (solicitation of street gang members); N.J.S.A. 2C:35-3 (leader of narcotics trafficking network); N.J.S.A. 2C:35-4.1 (booby traps in manufacturing or distribution drug facilities); N.J.S.A. 2C:35-6 (employing juvenile in drug distribution scheme); N.J.S.A. 2C:35-7 (school zone drug offenses); N.J.S.A. 2C:35-7.1 (public property drug offenses); N.J.S.A. 2C:35-9 (drug-induced deaths); N.J.S.A. 2C:38-2 (terrorism); N.J.S.A. 2C:39-4.1 (possession of weapons during drug or bias crimes); N.J.S.A. 2C:39-16 (leader of firearms trafficking network).

B. Case Law

1. The statutory test has been criticized as "mechanical," State v. Truglia, 97 N.J. 513, 520 (1984), and our Supreme Court continues to prefer the more flexible pre-Code standard announced in State v. Davis, 68 N.J. 69 (1975). State v. Hill, 182 N.J. 532, 542-43 (2005); State v. Diaz, 144 N.J. 628, 637-38 (1996); State v. Miller, 108 N.J. 112, 116 (1987); State v. Truglia, supra, 97 N.J. at 521. However, the Court continues to rely on both tests when deciding merger issues. State v. Cole, 120 N.J. 321, 325-30 (1990).

2. The Davis approach is guided by considerations of fairness and reasonable expectations. A court decides whether separate offenses have been committed by examining numerous factors, including the time and place of each offense, whether a single act was part of a larger scheme, the intent of the defendant and the consequences of the criminal standards transgressed. Additional factors may be considered and accorded greater or lesser weight depending on the circumstances of each case. State v. Davis, supra, 68 N.J. at 81.

3. Merger may be inappropriate even when a single course of conduct violates two different criminal

statutes, if the statutes seek to protect different interests. State v. Miller, supra, 108 N.J. at 118.

4. A crime of greater degree or culpability may not merge into one of lesser degree or culpability. State v. Dillihay, 127 N.J. 42, 54 (1992); State v. Battle, 256 N.J. Super. 268, 283 (App. Div.), certif. denied, 130 N.J. 393 (1992). But where the lesser charge carries mandatory penalties, those penalties survive the merger. State v. Wade, 169 N.J. 302, 303 (2001); State v. Baumann, 340 N.J. Super. 553, 557 (App. Div. 2001).

5. Because merger occurs of convictions, not charges, it is inappropriate to merge an offense to which no guilty plea has been entered. State v. Martin, 335 N.J. Super. 447, 450 (App. Div. 2001).

6. A defendant may waive the right to merger in a plea agreement. Where it is apparent that a waiver occurred, that waiver may not be challenged on appeal. Where the issue was not referred to below or subject to a specific waiver, a defendant must establish merger. State v. Crawley, 149 N.J. 310, 317-18 (1997); State v. Truglia, supra, 97 N.J. at 523-24.

7. Where one set of facts would support merger and another nonmerger, and where neither the jury charge nor the verdict indicates which set the jury chose, a defendant should not be penalized. State v. Bull, 268 N.J. Super. 504, 516 (App. Div. 1993), certif. denied, 135 N.J. 304 (1994).

8. Special verdict forms should be used to allow a jury to designate which felony or felonies constitute the predicate crime for a felony murder conviction. If more than one felony is designated, the sentencing court should merge only the "first-in-time" predicate felony into the murder conviction. State v. Hill, supra, 182 N.J. at 548.

XXI. SENTENCING AMONG CODEFENDANTS

A. General Rules

1. One of the Code's stated purposes is to safeguard offenders against disproportionate or arbitrary punishment. N.J.S.A. 2C:1-2(b)(4). The central theme of the Code's sentencing provisions is the limitation of sentencing discretion to foster less arbitrary and more equal sentences. State v. Roach, 146 N.J. 208, 231-32, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996) (Roach I); State v. Roth, 95 N.J. 334, 345 (1984). A crucial element of the Code's sentencing procedures is a concentration on uniformity. State v. Roach I, supra, 146 N.J. at 232; State v. Gerns, 145 N.J. 216, 231 (1996); State v. Roth, supra, 95 N.J. at 361.

2. The sentence of one defendant that is otherwise permissible will not be rendered excessive or erroneous merely because a codefendant's sentence is lighter. State v. Roach I, supra, 146 N.J. at 232; State v. Tyson, 43 N.J. 411, 417 (1964), cert. denied, 380 U.S. 987, 85 S. Ct. 1359, 14 L. Ed. 2d 279 (1965); State v. Brunetti, 114 N.J. Super. 57, 62 (App. Div.), certif. denied, 58 N.J. 340 (1971).

3. When a comparison between sentences reveals "grievous inequities," the greater sentence may be deemed excessive and reduced. State v. Roach, 167 N.J. 565, 570 (2001) (Roach II); State v. Hicks, 54 N.J. 390, 391-92 (1969). The question is whether the disparity is justifiable. State v. Roach I, supra, 146 N.J. at 232-33. A disparate sentence based solely on the reason that the defendants, though similar, do not deserve similar sentences, is not justifiable. Id. at 233.

4. In exercising its broad discretion to avoid excessive disparity, the trial court should engage in the following analysis. First, the court should determine whether the codefendant is identical or substantially similar to the defendant regarding all relevant sentencing criteria. Second, the court should inquire into

the basis of the sentences imposed on the codefendant. Third, the court should consider the length, terms, and conditions of the codefendant's sentence. Finally, if the codefendant is "sufficiently similar," the court must give that codefendant's sentence "substantive weight" when sentencing the defendant in order to avoid excessive disparity. State v. Roach II, supra, 167 N.J. at 569; State v. Roach I, supra, 146 N.J. at 233.

B. Special Applications

1. While disparity among codefendants could impact on whether one defendant's sentence is considered "shocking," there may be cases where codefendants receive arguably disparate sentences--especially when imposed by different judges--but where each sentence is consistent with Code guidelines, is based on aggravating and mitigating factors supported by the record, and is not shocking to the judicial conscience. State v. Lee, 235 N.J. Super. 410, 415 (App. Div. 1989).

2. There is no invidious or arbitrary action where one defendant receives a statutorily mandated minimum term following conviction and an unsuccessful appeal of both the conviction and sentence, and where the codefendant receives a much lesser, albeit illegal, sentence following entry of a negotiated plea with the State. State v. Baker, 270 N.J. Super. 55, 78-79 (App. Div.), aff'd o.b., 138 N.J. 89 (1994).

3. Disparity must be evaluated in terms of "real time," taking into consideration parole ineligibility terms. State v. Salentre, 275 N.J. Super. 410, 425 (App. Div.), certif. denied, 138 N.J. 269 (1994).

4. Where the appellate record does not reflect the involvement, culpability, or criminal record of a codefendant, a claim of disproportionate treatment will not be sustained. Id. at 424 n.7, 425. Where, however, such information is before the appellate court, that court may independently

determine whether the sentence of one defendant is disproportionate to a significant degree. State v. Bessix, 309 N.J. Super. 126, 130-31 (App. Div. 1998).

5. Disparity is sometimes due to the fact that one defendant may have received a lenient sentence that is unappealable by the State. State v. Lee, supra, 235 N.J. Super. at 415. The fact of unappealability by the State makes it necessary for trial judges to impose the correct sentence in each case to assure that the goals of uniformity and lack of disparity are met. State v. Morant, 241 N.J. Super. 121, 142 (App. Div.), certif. denied, 127 N.J. 323 (1990).

6. There is no grievous inequity between a defendant's presumptive sentence and the sentence of a codefendant who is eligible to receive mitigating consideration under N.J.S.A. 2C:44-1(b)(12) because of his cooperation with law enforcement authorities. State v. Gonzalez, 223 N.J. Super. 377, 393 (App. Div.), certif. denied, 111 N.J. 589 (1988). A court may also consider a codefendant's "attitude toward the truth" in cooperating with the prosecution when considering that codefendant's prospects for redemption. State v. Williams, 317 N.J. Super. 149, 159 (App. Div. 1998), certif. denied, 157 N.J. 647 (1999). However, a court may not impose a greater sentence on a defendant merely to assure his cooperation at trial of a codefendant who has not yet been apprehended. State v. Henry, 323 N.J. Super. 157, 166-67 (App. Div. 1999).

TABLE OF AUTHORITIES