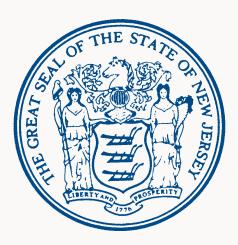
THE CRIMINAL LAW DIGEST



STATE OF NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY

JOHN J. FARMER, JR., ATTORNEY GENERAL

Prepared By: Division of Criminal Justice, Appellate Bureau



PREFACE

This volume is the fourth edition and complete revision of the **Criminal Law Digest**, prepared by the New Jersey Division of Criminal Justice, Appellate Bureau. The third edition was published in 1986, and supplemented with a pamphlet in 1988.

The **Criminal Law Digest** was originally envisioned as a ready reference desk manual for trial and appellate prosecutors and deputy attorneys general who need quick access to significant caselaw on most criminal law topics. It also serves as a convenient starting point for further legal research on complex issues. While the Digest endeavors to comprehensively treat the included topics, it is not intended to be an exhaustive study of the criminal law and particular issues, which are often fact sensitive, and it should not be relied upon as such.

Furthermore, the **Criminal Law Digest** is not intended to express the official position of the State of New Jersey or any of its departments, agencies or subdivisions on any particular issue or controversy. Rather, it is a compendium of the state of the law in New Jersey and includes a discussion of the caselaw and statutory references deemed pertinent on the included topics which the contributors feel will be of assistance to trial and appellate prosecutors.

The staff has devoted considerable time and energy to updating the Digest with cases decided and statutes enacted through February 1, 2001. Particularly noteworthy are developments in the law on bias crimes, capital punishment, constitutional law, evidence, habeas corpus, juveniles, Megan's Law, motor vehicles, search & seizure, self-incrimination, sentencing (3 Strikes Law and NERA), victim's rights and weapons.

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Published April 2001

c. 2001 Division of Criminal Justice Appellate Bureau

ACKNOWLEDGEMENTS

While many people provided assistance in preparing this fourth edition of the **Criminal Law Digest**, special recognition should be given to the following attorneys of the New Jersey Division of Criminal Justice who submitted contributions:

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Credit must also be given to the Appellate Bureau staff, Attorney Assistant Sarah Talpas and Paralegal June Collins, for coordinating the project and to Tina Stanley, Office Supervisor, and the secretarial staff of the Appellate Bureau who devoted hours of effort to preparing this document.

AAG RICHARD W. BERG, EDITOR

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I. STATUTORY BASIS

The statutory basis for accomplice liability is *N.J.S.A.* 2C:2-6. *N.J.S.A.* 2C:2-6b sets forth the situations in which one is legally accountable for the conduct of another. *N.J.S.A.* 2C:2-6c sets forth the modes and extent of complicity in criminal behavior.

The subject of vicarious accomplice liability is governed by different sections of the Code than vicarious conspiratorial liability and consequently must be separately analyzed. N.J.S.A. 2C:2-6b(3) provides that "[a] person is legally accountable for the conduct of another person when ... [h]e is an accomplice of such other person in the commission of an offense." Under N.J.S.A. 2C:2-6c(1)(a) and (b), an accomplice is a person who, with the purpose of promoting or facilitating another person in the commission of an offense, aids or agrees or attempts to aid the other person in planning or committing the offense or solicits the other person to commit the offense. Thus, to be found guilty under a theory of accomplice liability, a defendant must not only have the purpose of promoting or facilitating the commission of a crime but also must have "at least indirectly participated in the commission of the criminal act." State v. Fair, 45 N.J. 77, 95 (1965); accord, State v. Williams, 263 N.J. Super. 620, 631 (App. Div. 1993), certif. denied, 134 N.J. 477 (1993). In other words, even though a defendant may be found guilty under a theory of conspiratorial liability based solely on an agreement to commit a crime, a defendant must be shown to have engaged in conduct designed to aid another in the commission of a crime to be found guilty under a theory of accomplice liability, See State v. Norman, 151 N.J. 5, 32 (1997).

II. DEFINITION

"By definition, an accomplice must be a person who acts with the *purpose* of promoting or facilitating the commission of <u>the</u> substantive offense for which he is charged as an accomplice." *State v. White*, 98 *N.J.* 122, 129 (1984) (emphasis in original). For a defendant to be culpable as an accomplice, he must have the "conscious object or design of facilitating" the crime charged. *State v. Weeks*, 107 *N.J.* 396, 404 (1987).

A defendant may be found guilty even if the jurors cannot agree on whether the defendant is a principal,

accomplice, or a co-conspirator. *State v. Roach*, 146 *N.J.* 208, 223 (1996).

Accomplice liability need not be alleged in the indictment. If the facts and evidence presented during a trial indicate a rational basis for an instruction on accomplice liability, the trial judge can charge accordingly. Neither party need request such a charge, so long as the court indicates its intention to charge accomplice liability before summations. *State v. Hakim*, 205 *N.J. Super.* 385 (App. Div. 1985).

The aggregate of these principles of accomplice liability are that, if a defendant acts in concert with others, the evidence with its legitimate inference can be sufficient to establish extortion despite the fact that the defendant did not personally threaten or assault the victim who is the object of the extortion. *State v. Taccetta*, 301 *N.J. Super.* 227, 243-44 (App. Div. 1997), *certif. denied*, 152 *N.J.* 187, 188 (1997).

The owner of a car who hires someone to burn that car may be held legally accountable as an accomplice to the arsonist. Under pre-Code law an owner could not be held criminally liable for burning his own car and defendant here claimed that since he could not be liable as a principal, he could not be liable as an accomplice. The Appellate Division noted that even if the pre-Code law survived the Code, which it doubted, the Legislature was free to prohibit the owner from soliciting or aiding another in burning the car even if it did not prohibit the owner from burning the car himself. *State v. Williams*, 263 *N.J. Super*. 620 (App. Div. 1993).

A private person may be an accomplice to official misconduct. *State v. Hinds*, 143 *N.J.* 540, 549-50 (1996); *State v. Bryant*, 257 *N.J. Super*. 63 (App. Div. 1992).

Because both principal and accomplice are equally guilty of purposeful or knowing murder under New Jersey's statutory scheme, accomplice liability murder is an alternative and not lesser-included form of murder. *State v. Feaster*, 156 *N.J.* 1, 39 (1998).

To ameliorate the harshness of accomplice liability for a felony murder, the Code affords a defendant the affirmative defense that he had "no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury," *N.J.S.A.* 2C:11-3a(3)(d). *State v. McClain*, 263 *N.J. Super.* 488, 495-96 (App. Div. 1993), *certif. denied*, 134 *N.J.* 477 (1993).

III. "MERE PRESENCE"

While it is true that "mere presence" at the scene of the crime does not in itself conclusively prove guilt, it is a circumstance to be considered with the other evidence in determining accomplice status under *N.J.S.A.* 2C:2-6c(1). *State v. Dale*, 271 *N.J. Super.* 334, 338 (App. Div. 1994). Nor does the failure of a spectator to interfere make him a participant in the crime. *State v. Bielkiewicz*, 267 *N.J. Super.* 520, 531 (App. Div. 1993).

IV. AIDING AND ABETTING

Under the Code, an aider and abettor is treated as an accomplice. *N.J.S.A.* 2C:2-6c(1)(b).

Defendant who drove the getaway vehicle could be convicted of aiding and abetting an armed robbery, even if the defendant was unaware that his companions were carrying a gun or about their plans for robbery until they committed robbery and returned to his vehicle. *State v. Baker*, 303 *N.J. Super.* 411 (App. Div. 1997), *certif. denied*, 151 *N.J.* 470 (1997).

A person cannot be an accomplice to a crime that has already been completed. Thus, a defendant could not be convicted of possession of cocaine or possession of cocaine with the intent to distribute under a theory of accomplice liability, because all of his activities in furtherance of the drug conspiracy occurred after the codefendant's criminal possession of the cocaine had ended as a result of its seizure by the State Police. *State v. Roldan*, 314 *N.J. Super.* 173, 189 (App. Div. 1998).

An accessory after the fact may face prosecution for obstruction, *N.J.S.A.* 2C:29-1, or hindering apprehension or prosecution of another, *N.J.S.A.* 2C:29-3.

V. RELATIONSHIP TO CAPITAL MURDER

The United States Supreme Court has upheld capital murder statutes permitting a sentence of death for felony murder based on accomplice liability. Those strict liability crimes occurred without the capitally convicted defendants sharing the intent to kill or the intent to inflict serious bodily injury upon the victims. *See Tison v. Arizona*, 481 *U.S.* 137, 107 *S.Ct.* 1676, 95 *L.Ed.*2d 127 (1987); *Enmund v. Florida*, 458 *U.S.* 782, 102 *S.Ct.* 3368, 73 *L.Ed.*2d 1140 (1982).

In New Jersey, however, accomplice liability murder, as well as serious bodily injury murder and felony murder, is a noncapital form of murder that does not subject a defendant to a penalty-phase trial even though the jury has convicted the defendant of murder. *State v. Cooper*, 151 *N.J.* 326, 419 (1997); *State v. Moore*, 113 *N.J.* 239, 300-03 (1988). With the exceptions of murder for hire or the "drug kingpin," a conviction based on a theory of vicarious liability cannot subject the defendant to death-penalty proceedings. *State v. Chew*, 150 *N.J.* 30, 74 (1997).

Accomplice liability murder is an alternative and not a lesser included form of murder. As such, in capital cases that present a jury question whether a defendant is guilty of death-eligible own-conduct murder or accomplice liability murder, the trial court, after it instructs the jury on the elements of the charged offenses, must instruct the jury to first determine whether defendant is guilty of purposeful or knowing murder. Only if the jury unanimously finds defendant guilty of that offense should it then determine whether defendant committed the murder "by his own conduct" or, alternatively, as an accomplice. Because those alternatives are mutually exclusive, the jury should consider them simultaneously, rather than acquitting defendant of one before considering the other. The trial court must also make clear to the jury that it need not be unanimous on the own-conduct determination and that it must inform the jury of the legal consequences of the own-conduct finding. State v. Feaster, 156 N.J. 1 (1998).

VI. POSSESSION

Possession for purposes of criminal liability can be actual or constructive. Constructive possession can be shared jointly and does not require physical control. State v. Brown, 80 N.J. 587 (1979); State v. Shipp, 216 N.J. Super. 662 (App. Div. 1987). Ordinarily, "mere presence" of a person is insufficient to constitute criminal possession. The court will look to the total circumstances to find possession. In Shipp, supra, the Appellate Division found that defendant's presence in the car with his stepmother, who possessed heroin in her handbag, was sufficient to prove possession. See also State v. Miller, 273 N.J. Super. 192 (App. Div. 1994); State v. Whyte, 265 N.J. Super. 518 (App. Div. 1992), aff'd o.b. 133 N.J. 481 (1993); State v. Jackson, 326 N.J. Super. 276 (App. Div. 1999).

In contrast, the Supreme Court found that the record in *State v. Palacio*, 111 *N.J.* 543 (1988) allowed several permissible inferences by which the jury could have convicted defendant, *i.e.*, the large quantity of contraband; the great monetary value and purity; the existence of a secret compartment in the car; and a piece of incriminating paper in defendant's wallet. *See also State v. Hurdle*, 311 *N.J. Super.* 89 (App. Div. 1998); *State v. Johnson*, 274 *N.J. Super.* 137, 157 (App. Div. 1994), *certif. denied*, 138 *N.J.* 265 (1994).

Accomplice liability does not appear to apply to all possessory weapons offenses. State v. Jackmon, 305 N.J. Super. 274, 295 (App. Div. 1997), certif. denied, 153 N.J. 49 (1998); State v. Cook, 300 N.J. Super. 476, 489-90, (App. Div. 1977). In State v. Williams, 315 N.J. Super. 384 (Law Div. 1998), the Law Division ruled that generally accomplice liability does not apply to simple weapons possession charges in addition to and apart from the liability that might result from constructive possession on the part of a non-weapon bearing car passenger in a case also involving kidnaping and armed Constructive possession already imposes robberv. liability where no physical control of a prohibited item exists but where a defendant intends to exercise control over it. Here the accomplice liability charge had no meaningful place in the context of the weapons possession offenses charged.

VII. JURY INSTRUCTIONS

A. Generally

The standard for charging accomplice liability is whether the record contains sufficient evidence from which the jury could have inferred that someone else killed the victim. The trial court, however, has no duty to charge a possible offense unless the facts clearly indicate the charge is appropriate. Although the standard for an accomplice liability charge is minimal, where the defendant fails to meet even that low threshold, the trial court may properly refuse to give an accomplice liability charge. *State v. Timmendequas*, 161 *N.J.* 515, 621-22 (1999).

An accomplice liability charge that speaks in generalities only and does not tailor the charge to the facts of the case may be reversible error. *State v. Tucker*, 280 *N.J. Super*. 149, 151-52 (App. Div. 1995). But, where defendant presents a "mere presence" defense, trial court need not tailor the charge to account for defendant's theory of the case. A "mere presence" defense does not present facts that are so complex or confusing as to require

an intricate discussion in the charge, nor does it require the jury to distinguish among several possible mental states of the accused. *State v. Morton*, 155 *N.J.* 383, 422 (1998).

A jury must be instructed "that to find a defendant guilty of a crime under a theory of accomplice liability, it must find that he 'shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act." State v. Bielkiewicz, 267 N.J. Super. at 528, citing State v. Fair, 45 N.J. 77, 95 (1965). When lesser included offenses are submitted to the jury, the court has an obligation to "carefully impart to the jury the distinctions between the specific intent required for the grades of the offense." State v. Weeks, 107 N.J. 396, 410 (1987); Bielkiewicz, 267 N.J. Super. at 528. If both parties enter into the commission of a crime with the same intent and purpose each is guilty to the same degree; but each may participate in the criminal act with a different intent. Each defendant may thus be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind. State v. Fair, 45 N.J. 77, 95 (1965).

See State v. Reese, 288 N.J. Super. 133 (App. Div. 1996), where the jury instructions adequately guided the jury on the issue of accomplice liability and on the difference between reckless conduct manifesting extreme indifference to the value of human life and reckless conduct not manifesting such extreme indifference as they related to aggravated assault.

- B. Distinguishing Principle From Accomplice
 - 1. Error Found

Jury instructions on accomplice liability which fail to specifically require the jury to consider and determine (a) whether defendant facilitated the codefendant's attack without intent to cause serious injury or death and (b) defendant's liability separate from that of the codefendant based on the states of mind of each, are plain error meriting reversal when there is evidence that defendant acted as an accomplice. *State v. Phillips*, 322 *N.J. Super.* 429 (App. Div. 1999); *State v. Harrington*, 310 *N.J. Super.* 272 (App. Div. 1998), *certif. denied*, 156 *N.J.* 387 (1998); *State v. Jackmon*, 305 *N.J. Super.* 274 (App. Div. 1997), *certif. denied*, 153 *N.J.* 49 (1998); *State v. Cook*, 300 *N.J. Super.* 476 (App. Div. 1997); *see also, State v. Hogan*, 297 *N.J. Super.* 7, 22 (App. Div. 1997), *certif. denied*, 149 *N.J.* 142 (1997) (robbery). That defendant was tried alone and that he denied any participation in co-defendant's beating of victim did not ameliorate prejudice from inadequate jury instructions on accomplice liability. *State v. Cook*, 300 *N.J. Super.* 476 (App. Div. 1996).

2. No Error Found

In State v. Dudley Rue, 296 N.J. Super. 108 (App. Div. 1996), certif. denied, 148 N.J. 463 (1997), the Appellate Division affirmed defendant's conviction for first degree murder and related offenses ruling that, under the circumstances of this case, the failure to instruct the jury that an accomplice may be found guilty of a lesser offense even where the principal committed purposeful or knowing murder could not have led the jury astray. The evidence in this case supported only the conclusion that defendant was a principal in the crime, not an accomplice or, if defendant was to be believed, did not commit a crime at all. The jury simply had no evidence from which it could conclude that defendant had the mental state for a lesser crime than the other participants. Therefore, the omission of the accomplice charge under State v. Bielkiewicz was not error. See also State v. Norman, 151 N.J. 5, 38-39 (1997); State v. Crumb, 307 N.J. Super, 204, 221-22 (App. Div. 1997), certif. denied, 153 N.J. 215 (1998); State v. Oliver, 316 N.J. Super. 592, 596-97 (App. Div. 1998), aff'd 162 N.J. 580 (2000); State v. Eure, 304 N.J. Super. 469, 472-73 (App. Div. 1997), certif. denied, 152 N.J. 193 (1997); State v. Scherzer, 301 N.J. Super. 363, 472-75 (App. Div. 1997), certif. denied, 151 N.J. 466 (1997); State v. Williams, 298 N.J. Super. 430, 440-42 (App. Div. 1997), certif. denied, 150 N.J. 27 (1997).

Error in accomplice liability charge on intentional murder was harmless when defendant was only found guilty of the lesser included offense of aggravated manslaughter. *State v. Mance*, 300 *N.J. Super.* 430, 441 (App. Div. 1997), *certif. denied*, 150 *N.J.* 27 (1997).

Error in the accomplice liability charge as to intentional murder will not require reversal of a defendant's felony murder conviction where the accomplice liability charge as to the predicate offense underlying the felony murder is correct or, if incorrect, constitutes harmless error. *State v. Jackmon*, 305 *N.J. Super.* 274, 295-96 (App. Div. 1997), *certif. denied*, 153 *N.J.* 49 (1998).

Bielkiewicz has no applicability to a charge of possession of a weapon for an unlawful purpose because that crime does not include the possibility of conviction

for lesser offenses. Further, as a matter of logic, the Bielkiewicz errors in the accomplice charge on murder could not have affected the possessory weapons conviction because, even if Cook merely intended to rob the victim and not to seriously injure or kill him, the requisite unlawful purpose for conviction on the possession offense would nevertheless have been established. Cook, 300 N.J. Super. at 489. In the end, the propriety of an accomplice liability instruction for a simple possessory offense is fact-sensitive. It is not to be eschewed in all cases. On the other hand, it should not be routinely given in all cases either. If other crimes charged require an accomplice instruction, the jury should be told clearly whether it applies to the possessory offenses or not. Obviously, if the court is not explicit, a reviewing court would have to assume that the jury applied the instruction to all of the offenses in the indictment. State v. Williams, 315 N. J. Super. 384, 395 (Law Div. 1998).

C. Model Jury Charge On Accomplice Liability

The present Model Criminal Jury Charge on accomplice liability, as revised May 22, 1995, included two changes relevant to the *Bielkiewicz* decision. First, it dropped the following sentence: "However, one cannot be held to be an accomplice unless you find that (he/she) possessed the same criminal state of mind that is required to be proved against the person who actually committed the criminal act." Second, the revision added the following reminder: "(Again, remind the jury to consider the accomplice status separately as to each charge)."

Note that there are two accomplice liability model jury charges. Charge Number One (Revised May 22, 1995), is given where a defendant is charged as an accomplice but no lesser included offenses are charged. Charge Number Two (Revised May 22, 1995) is given where a defendant is charged as an accomplice and the jury is instructed as to lesser included offenses.

D. The "Accomplice Rule"

The status of a witness as an accomplice or codefendant invites special consideration. *State v. Gross*, 121 *N.J.* 1, 16 (1990). The so-called "accomplice rule" calls for a specific cautionary instruction "that the evidence of an accomplice must be carefully scrutinized and assessed in the context of his specific interest in the proceeding ... which might lead to influencing his testimony, because of some involvement in the criminal

situation out of which the indictment and the trial of the defendant arises." *State v. Begyn*, 34 *N.J.* 35, 54 (1961).

A trial court's failure to give an "accomplice rule" charge is not reversible error in a capital murder case because defendant attacked the witness' credibility thoroughly during the course of the trial and because other witnesses provided ample evidence to implicate defendant as the actual shooter. *State v. Harris*, 156 *N.J.* 122, 178-82 (1998).

VIII. SENTENCING

A. Graves Act - Liability Of Unarmed Accomplice

An unarmed defendant can be subject to the Graves Act by virtue of being an accomplice to a crime where the weapon is in the possession of a confederate. *State v. Mancine*, 124 *N.J.* 232, 259-60 (1991); *State v. Wooters*, 228 *N.J. Super.* 171, 178-79 (App. Div.1988). In *State v. White*, 98 *N.J.* 122 (1984), the Court held that if an accomplice is found guilty of an armed Graves Act offense he is subject to sentencing under that Act. The court went further, however, and found that if an accomplice is convicted only of an unarmed offense, but the trial court finds that the unarmed accomplice knew of his cohort's possession of a firearm, the accomplice is likewise subject to Graves Act sentencing. *Id.*

To constitute possession of a firearm for purposes of the Graves Act, constructive possession is sufficient. The presence of a firearm in a vehicle containing several people is presumptive evidence of possession by everyone in the car. *State v. Stewart*, 96 *N.J.* 596 (1984).

In the case of an unarmed accomplice whose constructive possession of a firearm is not clear-cut, Graves Act terms may be imposed "when the evidentiary hearing conducted by the sentencing judge disclosed that the defendant knew or should have known firearms were to be used in the commission of the crime. *State v. Gantt*, 101 *N.J.* 573, 580 (1986).

B. "No Early Release Act"

The "No Early Release Act," *N.J.S.A.* 2C:43-7.2 (NERA), applies to accomplices. *State v. Rumblin*, 166 *N.J.* 550, 766 (2001). The word "actor" as used in the NERA statute "is intended as a synonym for a defendant regardless of whether he or she acts as a principal or accomplice." *Ibid.*

ALIBI

I. GENERALLY

In asserting the defense of alibi, a defendant is alleging that he was elsewhere at the time the crime was committed and, therefore, could not have committed it. This defense does not include testimony merely denying that a defendant was at the scene of the crime, even though such testimony inferentially suggests defendant was elsewhere. *State v. Baldwin,* 47 *N.J.* 379 (1966), *cert. denied,* 385 *U.S.* 980 (1966); *State v. Volpone,* 150 *N.J. Super.* 524 (App. Div. 1974), *aff'd,* 75 *N.J.* 543 (1977).

II. BURDEN OF PROOF

Alibi is not a "separate" defense; it is part of a direct denial of the State's charge whenever defendant's physical presence at a given time and place is a critical part of the case. Accordingly, defendant does not have any burden of proving where he was at the relevant time. Any evidence offered regarding this issue is to be considered with all the proofs in deciding whether there is reasonable doubt as to guilt. *State v. Garvin,* 44 *N.J.* 268 (1965); *State v. Mucci,* 25 *N.J.* 423 (1957).

III. NOTICE OF ALIBI

A. Requirement to Provide Notice

After a written demand by the prosecutor, defendant must provide within ten days a signed alibi, stating the specific place or places at which the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom defendant intends to rely to establish such alibi. On written demand, the prosecutor must provide the names and addresses of the witnesses upon whom he intends to rely to establish defendant's presence at the scene of the offense within ten days after receipt of such alibi. R. 3:12-2(a).

The requirement that a defendant provide notice of an alibi does not violate the privilege against selfincrimination. *Williams v. Florida*, 399 U.S. 78 (1970); *State v. Irving*, 114 N.J. 427 (1989); *State v. Angeleri*, 51 N.J. 382 (1968); *State v. Lumumba*, 253 N.J. Super. 375 (App. Div. 1992). That requirement is not designed to compel a defendant to say anything, but is for discovery purposes only to avoid surprise at trial by the sudden introduction of a factual claim which cannot be investigated unless the trial is continued. *State v. Gross*, 216 *N.J. Super.* 92 (App. Div.), *certif. denied*, 108 *N.J.* 194 (1987). It does not require a disclosure which defendant does not wish to make, but merely advances the time of his making such disclosures. *State v. Baldwin*, 47 *N.J.* 379 (1966), *cert. denied*, 385 *U.S.* 980 (1966).

Also, such requirement does not violate any due process rights because of the reciprocity of discovery. *See Wardius v. Oregon*, 412 *U.S.* 470 (1973).

B. Failure to Provide Notice

Where either defendant or the State has failed to provide adequate notice, the court has the discretion to preclude defendant's alibi testimony, preclude either party's alibi witnesses, grant an adjournment or brief continuance of trial to allow the other party to investigate the alibi, or make such other order as the interest of justice requires. *R.* 3:12-2(b).

Exclusion of a defendant's alibi is an appropriate remedy when defendant fails to give notice of alibi prior to trial. State v. Gonzalez, 223 N.J. Super. 377 (App. Div. 1988) (proper to exclude defendant's alibi testimony which was brought out for the first time during direct examination of defendant without any prior notice to the State and would result in an indeterminate continuance to accommodate an investigation); State v. Francis, 128 N.J. Super. 346 (App. Div. 1974) (proper to exclude defendant's alibi testimony where defendant failed to respond to two requests to furnish alibi particulars and did not indicate prior to trial that he would offer alibi testimony); State v. Woodard, 102 N.J. Super. 419 (App. Div. 1968), certif. denied, 53 N.J. 64 (1968), cert. denied, 395 U.S. 938 (1969) (proper to exclude alibi witness where State informed of witness' existence at the close of its case and continuance of trial to permit the State to investigate the witness and his information at this eleventh hour would be impractical).

However, preclusion of evidence is a drastic sanction for a violation of discovery rules, and the court should use alternative sanctions whenever feasible. *State v. Caffee*, 220 *N.J. Super.* 34 (App. Div.), *certif. denied*, 107 *N.J.* 640 (1987) (error to preclude alibi witnesses where other alternatives available and State had received notice one month before trial); *State v. Volpone*, 150 *N.J. Super.* 524 (App. Div.), *aff^{*}d*, 75 *N.J.* 543 (1977) (error to preclude alibi witness where court did not explore the feasibility of a continuance and the State had waited a week to object to the late notice given on first day of trial); *State v. Mitchell*, 149 *N.J. Super.* 259 (App. Div. 1977) (error to preclude alibi witnesses where the State had receive notice six months before trial and the State did not object until trial); *State v. Harris*, 117 *N.J. Super*. 83 (App. Div. 1971), *certif. denied*, 63 *N.J.* 557 (1973) (error to preclude alibi witness where State made aware of witness' identity and possibility of defendant's reliance on her testimony by a letter to the prosecutor).

The language "other order" encompasses procedural alternatives to ameliorate the problem of the late alibi witness, such as revision in the ordinary order of witnesses. *State v. Baldwin*, 47 *N.J.* 379 (1966) (proper to order State to provide pretrial statement of witness and not call that witness to testify until the following week of trial to afford defense an opportunity to investigate). It does not, however, contemplate substantive alternatives. *State v. Sutton*, 237 *N.J. Super.* 221 (App. Div. 1989) (error for court to substantively charge that defendant is required to give notice within a specified time period and that lateness of notice may be considered in determining the alibi defense).

IV. CROSS-EXAMINATION

A. Failure to Inform the State of Alibi

Failure of defendant to inform the State of an alibi defense, including prior to filing an alibi notice, may not be used in cross-examination of defendant to impeach his credibility or in summation. *State v. Aceta*, 223 *N.J. Super.* 21 (App. Div. 1988); *State v. Deatore*, 70 *N.J.* 100 (1976); *State v. Alston*, 70 *N.J.* 95 (1976).

Failure of an alibi witness, other than defendant, to inform the State about the alibi may be used in crossexamination to show that the witness' actions were inconsistent with what a reasonable person would have done. State v. Plowden, 126 N.J. Super. 228 (App. Div. 1974), certif. denied, 64 N.J. 504 (1974). However, the court must first conduct a hearing and find that the State has demonstrated "the existence of circumstances that legitimate the inquiry," *i.e.*, that the witness was aware of the charges, realized he had exculpatory information, had a motive to exculpate defendant, and knew how to communicate that information. Further, the prosecution is barred from impeaching the witness' credibility or commenting in summation about any such pretrial silence for the time period after the service of an alibi notice which lists the name of that witness. State v. Silva, 252 N.J. Super. 622, 628 (App. Div. 1991), aff'd, 131 *N.J.* 438 (1993).

B. Use of Prior Inconsistent Statement

The State may offer an inconsistent statement, made by defendant at the time of his arrest, to rebut the alibi which defendant presents at trial. *State v. Deatore*, 70 *N.J.* 100 (1976). The State may use the alibi notice in crossexamination as a prior inconsistent statement where defendant testifies. *State v. Irving*, 114 *N.J.* 427 (1989). However, if a defendant does not testify, the State may not refer to defendant's alibi notice or comment on defendant's failure to produce any of the witnesses named therein. *Irving, supra, State v. Lumumba*, 253 *N.J. Super.* 375 (App. Div. 1992); *State v. Gross*, 216 *N.J. Super.* 92 (App. Div.), *certif. denied*, 108 *N.J.* 194 (1987).

V. EVIDENCE

It is clear that a State's investigator cannot testify as to the fact of conversations with persons not listed as alibi witnesses and not called as witnesses by either party in order to raise the inference that they would negate defendant's alibi. *State v. Robinson*, 139 *N.J. Super.* 58 (App. Div. 1976), *certif. denied*, 75 *N.J.* 534 (1977).

Evidence, such as a diary, is not admissible for the purpose of bolstering the credibility of an alibi witness' testimony regarding defendant's whereabouts on the day of the crime. *State v. Spano*, 69 *N.J.* 231 (1976).

VI. JURY INSTRUCTIONS

A model jury charge for alibi does exist and should be given, even though older case law suggests that an alibi charge is not specially required. *Model Criminal Jury Charges, Alibi* (5/19/97); *see State v. Edge*, 57 *N.J.* 580 (1971); *State v. Garvin,* 44 *N.J.* 268 (1965).

VII. BIFURCATED TRIAL

A bifurcated trial is not required where defendant voluntarily raises inconsistent defenses, such as alibi and insanity. *State v. Haseen,* 191 *N.J. Super.* 564 (App. Div. 1983).

ANTITRUST

I. STATUTORY PROVISIONS

The substantive provisions of the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1, *et seq.*, are patterned after those of the federal antitrust laws, 15 *U.S.C.* § 1, *et seq.* (the Sherman Antitrust Act) and 15 *U.S.C.* § 12, *et seq.* (the Clayton Antitrust Act). *See Bruce D. Greenberg and Gary K. Wolinetz,* 25 *Years of The New Jersey Antitrust Act,* 26 *Seton Hall L. Rev.* 637 (1996). The more significant provisions of the Act are as follows:

Section 3. Prohibits "[e]very contract, combination...or conspiracy in restraint of trade or commerce in this State..." *See*,15 *U.S.C.* § 1.

Section 4. Prohibits monopolization, attempts to monopolize and combinations or conspiracies to monopolize any relevant market within this State. See, 15 U.S.C. § 2. This section also prohibits stock acquisitions or mergers whenever the effect thereof "may be to substantially lessen competition within this State...or to restrain such commerce in any section or community of this State, or tend to create a monopoly of any line of commerce within this State." See, 15 U.S.C. § 18.

Section 5. Provides exemptions for various regulated industries and other organizations and activities.

Section 6. Defines the duty of the Attorney General to investigate and prosecute violations of the Act.

Sections 7 & 8. Authorizes the Attorney General to seek the revocation or suspension of corporate charter rights of a domestic corporation (§7) or suspension of the right of a foreign corporation to do business within this State (§ 8) for violations of the Act.

Section 9. Confers administrative subpoena power on the Attorney General or his designee and authorizes the Attorney General to compel testimony and confer use immunity.

Section 10. Provides for mandatory and prohibitory injunctive relief for violations of the Act and allows the recovery of costs and attorneys fees to a successful plaintiff. *See*,15 *U.S.C.* §§ 25 and 26. It also allows the Attorney General to recover civil penalties.

Section 11. Provides criminal penalties for knowing violations of the Act. By amendment effective April 18,

2000, any violation "involving or affecting trade or commerce of a value" less than \$1,000,000 is a crime of the third degree. If the affected commerce is valued greater than \$1,000,000, it is a crime of the second degree. Bid rigging of public contracts is a crime of the second degree, regardless of the value of commerce involved. The section also provides for enhanced fines.

Section 12. Allows any person injured in his "business or property" to recover treble damages plus costs and attorneys fees. *See*,15 *U.S.C.* § 15. The State and its subdivisions are persons within the meaning of this section.

Section 13. Final judgments in civil or criminal proceedings brought by the State, except for damage actions filed by the State under § 12, constitute *prima facie* evidence against the defendants in any action brought by any other party for the same violation. *See*, 15 *U.S.C.* § 16(a).

Section 14. Provides a four year statute of limitations running from the date of discovery. See, 15 U.S.C. § 16(I).

Section 15. The running of the statute of limitations is suspended as to private rights of action during the pendency of any action brought by the State, except one for treble damages, and for a period of one year thereafter. See, 15 U.S.C. § 16(I).

Section 18. The "act shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes..."

Section 19. This section creates a revolving fund to pay the Attorney General's cost of enforcing the Act.

II. CRIMINAL CASES

In *State v. New Jersey Trade Waste Assn.*, 96 *N.J.* 8 (1985), fifty seven individuals and companies were indicted for a conspiracy in restraint of trade to enforce so-called "property rights." Property rights were a form of horizontal market allocation, that is, the exclusive right to provide garbage collection services at a particular location free from competition from other collectors. Three of the defendants were reputed organized crime figures who had engaged in an extortionate scheme in order to force a garbage collector to sell his business to a party of their choosing. The indictment alleged this to be part of the conspiracy in restraint of trade. The trial court dismissed

the indictment as to the three on the ground that it was duplicitous.

After reviewing the "totality of the circumstances," the Supreme Court in Trade Waste found the extortionate scheme to be a part of the conspiracy in restraint of trade. The Court further held that: (1) a conspiracy in restraint of trade offense is made out by proof of the offending agreement; no overt acts need to be proven or alleged; (2) a "rule of reason" violation requires proof of both intent and agreement, whereas a per se violation only requires proof of agreement; (3) the fact that these defendants did not engage in the garbage business and thus were not competitors of the other conspirators was irrelevant; (4) the fact that the extortionate scheme might have been separately indicted did not make the indictment duplicitous where it is shown that under the "totality of the circumstances" test this scheme was part of and in furtherance of the conspiracy in restraint of trade; (5) the factors considered under the "totality of the circumstances" test include the degree of interdependence required by the overall scheme, the extent to which the allegedly separate acts shared common goals, the time periods involved, the location of the acts, commonality of operating methods, and the number of overt acts which are common to both schemes; and (6) a person is guilty of an offense under N.J.S.A. 56:9-11 if he is shown to have either knowingly entered into the prohibited agreement or that he knowingly aided and advised in such agreement.

The defendant in State v. Lawn King, 84 N.J. 179 (1980), was a franchiser. The distributors were the intermediaries between the corporation and its dealers. The franchise sold by Lawn King to its distributors and dealers was territorial. The trial court applied the per se rule and found the defendant guilty of illegal restraints of trade. The Appellate Division reversed the conviction. The Supreme Court affirmed. It held that the state Antitrust Act is not pre-empted by federal antitrust enactments, but should be interpreted in accordance with federal precedents. The Court further ruled that horizontal territorial restraints, bid rigging and vertical price restraints are per se unlawful. Non-price vertical restraints ancillary to or an integral part of price fixing schemes are also *per se* unlawful. Other non-price vertical restraints are subject to the rule of reason and are actionable if the restraint has an adverse effect on interbrand competition or the restraint lacks any "redeeming virtues."

Lawn King further held that it is *per se* unlawful for a manufacturer or franchiser to participate in or

coordinate a restraint which is either imposed or enforced horizontally. Tying arrangements are *per se* unlawful and are subject to a two prong test: (a) The party effectuating the tie must possess sufficient economic power; and (b) it must be demonstrated that the arrangement has a "not insubstantial" effect on the market. *Per se* unlawful tying arrangements may be subject to certain affirmative defenses.

The exceptions to the rule that illegal price restraints are *per se* invalid are generally subsumed under the *Colgate* doctrine. *United States v. Colgate & Co.*, 250 *U.S.* 300 (1919). That principle permits a manufacturer to suggest a resale price coupled with a prior announcement of a "refusal to deal" with any party not abiding by the suggested price.

In *State v. Arace Bros.*, 230 *N.J. Super.* 22 (App. Div. 1989), the Deputy Attorney General who presented the matter to the grand jury could not have continued access to grand jury materials without first obtaining court order upon showing of particularized need. However, the Deputy Attorney General could simultaneously participate in both civil and grand jury investigations of suspected antitrust violations.

In *State v. Scioscia*, 200 *N.J. Super.* 28 (App. Div.), *certif. denied*, 101 *N.J.* 277 (1985), the defendant argued that solid waste collectors are public utilities subject to the jurisdiction of the Board of Public Utilities and, as such, were exempt from prosecution for antitrust violations. The court held that the purpose of the public utilities exemption to the Antitrust Act was to avoid a utility being faced with conflicting conduct standards under the antitrust laws and the public utility laws. Since the Board of Public Utilities did not authorize or permit the conduct alleged in the indictment, it would serve no valid public purpose to confer antitrust immunity on these defendants.

As a result of an antitrust indictment, three defendants, garbage collectors, in *State v. New Jersey Trade Waste Assn. and County of Somerset,* 194 *N.J. Super.* 90 (1984), *certif. denied,* 97 *N.J.* 688 (1985), agreed to plead guilty to monopolization in violation of the Solid Waste Utility Control Act, *N.J.S.A.* 48:13a-10(A). In addition to incarceration, the court imposed fines which totaled \$130,000. The trial court ruled that, pursuant to *N.J.S.A.* 2C:46-4b(1), Somerset County was entitled to the fines since its claim was superior to that of the State under *N.J.S.A.* 56:9-19. The Appellate Division reversed, finding the State's claim to be superior. The fact that the defendants were allowed to plead guilty to a non-

antitrust offense did not affect the results, since the fines levied were "derived from litigation instituted by the Attorney General under [the Antitrust Act]."

III. CIVIL CASES

Generally speaking, the same legal principles apply under the Antitrust Act whether the remedies sought are civil or criminal. Therefore, the following New Jersey and United States Supreme Court civil cases may be of some assistance.

Fraser v. Bovino, 317 N.J. Super. 23 (App. Div. 1998), certif. denied, 160 N.J. 476 (1999); Shapiro v. Middlesex County Mun. Joint Ins. Fund, 307 N.J. Super. 453 (App. Div. 1998); E Z Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc., 307 N.J. Super. 546 (Ch. Div. 1996), aff'd o.b., 307 N.J. Super. 438 (App. Div. 1997); Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140 (App. Div.), certif. denied, 141 N.J. 99 (1995); G & W, Inc. v. Borough of East Rutherford, 280 N.J. Super. 507 (App. Div. 1995); Fanelli v. City of Trenton, 135 N.J. 582 (1994); Van Natta Mechanical Corp. v. Di Staulo, 277 N.J. Super. 175 (App. Div. 1994); Petrocco v. Dover General Hosp. and Medical Center, 273 N.J. Super. 501, (App. Div. 1994); Boardwalk Properties, Inc. v. BPHC Acquisition, Inc., 253 N.J. Super. 515 (App. Div. 1991); Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987); Monmouth Chrysler Plymouth, Inc. v. Chrysler Corp., 203 N.J. Super. 281 (1985), modified 102 N.J. 485 (1986); Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc., 196 N.J. Super. 262 (App. Div.1984), certif. denied, 99 N.J. 234 (1985); Pomanowski v. Monmouth County Bd. of Realtors, 89 N.J. 306, cert. 459 U.S. 908 (1982); Glasofer Motors v. Osterlund, Inc., 180 N.J. Super. 6 (App. Div. 1981); California Dental Assn. v. F.T.C., 526 U.S. 756 (1999); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998); State Oil Co. v. Khan, 522 U.S. 3 (1997); Brown v. Pro Football, Inc., 518 U.S. 231 (1996); Professional Real Estate Inv., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993); Spectrum Sports, Inc. v. McQuillen, 506 U.S. 447 (1993); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991); City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991); Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990); Kansas v. Utilicorp

United, Inc., 497 U.S. 199 (1990); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); California v. American Stores Co., 495 U.S. 271 (1990); F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); California v. ARC America Corp., 490 U.S. 93 (1989).

APPEALS

(See also, COURTS, DOUBLE JEOPARDY)

I. INTRODUCTION

A. Right to Appeal

There is no federal constitutional right to state appellate review of a state criminal conviction. State v. Bianco, 103 N.J. 383, 391 (1986); Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983); Abney v. United States, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038, 52 L.Ed.2d 651 (1977); Estelle v. Dorrough, 420 U.S. 534, 536, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975); In re Livolsi, 85 N.J. 576, 592 (1981); State v. Leonardis, 71 N.J. 85, 108 (1976). Since appellate review of a final judgment by a state court in a criminal matter is not a necessary element of due process of law, a state may grant such review upon such terms as it deems Application of Boyer, 226 F.Supp. 888, 891 proper. (D.N.J. 1963), aff'd 328 F.2d 620 (3d Cir.), cert. denied, 377 U.S. 937 (1964). A criminal defendant, however, has the right to appeal as guaranteed by the N.J. Const.1947, Art. 6, § 5, ¶ 2. A state that confers a right to appeal, though not required to confer such a right, must establish appellate procedures that satisfy the due process clause. Bianco, supra; Evitts v. Luce, 469 U.S. 387, 105 S.Ct. 830, 838-39, 83 L.Ed.2d 821, 833 (1985).

In Bianco the defendant complained that he was denied due process because he received an abbreviated form of appeal when it was assigned to the Excessive Sentence Oral Argument program, providing for argument without briefing when the sole issue was a claim of excessive sentence. The Court rejected the argument that a written brief was essential to effectively challenge the sentence. Furthermore, lack of a formal opinion did not indicate that the Appellate Division gave less than adequate consideration to the matter. The Court also rejected Bianco's claim that he was denied equal protection insofar as a subclass of indigent defendants were being denied full review, since the classification of cases included in the program was rationally related to a legitimate state interest in clearing the inordinate delays in appellate review.

B. Procedural Aspects

The procedural aspects of appeals from the Law Division are set forth in Part II of the Rules Governing the Courts of New Jersey. Appeals from courts of limited jurisdiction, including quasi-criminal matters from municipal courts, are governed by R. 3:23 and 24, and 7-13, except in extraordinary cases and in the interest of justice, when *R*. 2:2-3(b) may apply. See State v. Mazurek, 237 N.J. Super. 231, 233-34 (App. Div. 1989), certif. denied, 121 N.J. 623 (1990). The Appellate Division has also exercised original jurisdiction to entertain an interlocutory appeal of a municipal court ruling pursuant to a rule relaxation under R. 1:1-2 where an issue of widespread public importance requiring expeditious disposition is involved and the parties consented. See State v. Maure, 240 N.J. Super. 269 (App. Div. 1990), aff'd o.b. 123 N.J. 457 (1991).

C. Record on Appeal

The content of the record is governed by *R.* 2:5-4. Essentially, the record consists of all papers on file in the court below, all docket entries, and the transcripts of the proceedings. *R.* 2:6-1(a) lists the record material that must be included in the appendix. The court will not consider evidentiary material which is not in the record below. *State v. Harvey*, 151 *N.J.* 117, 201-02 (1997); *State v. Giordano*, 283 *N.J. Super.* 323, 330 (App. Div. 1995); *State v. Sidoti*, 120 *N.J. Super.* 208, 211 (App. Div. 1972).

In State v. Casimono, 280 N.J. Super. 22 (App. Div. 1997), the court reversed denial of PCR and remanded for reconstruction of the record of the hearing with participation of counsel and defendant, criticizing the trial court for reconstructing the record on its own without notice to any party. In State v. Izaguirre, 272 N.J. Super. 51 (App. Div. 1994), the court upheld defendant's conviction for murder, rejecting the contention that loss of the court reporter's notes of the trial deprived him of due process of law because it limited the issues he could raise on appeal. The judge learned of the loss two weeks after the trial and promptly set forth procedures for reconstruction of the entire record. In the absence of any argument that the reconstruction or any portion of it was not a reasonably accurate and complete portrayal of what occurred at trial, the Appellate Division concluded that due process was satisfied.

In *Johnson v. N.J. Dept. of Corrections*, 298 *N.J. Super.* 79 (App. Div. 1997), the court reversed and remanded to the DOC in part because the record was almost totally illegible and because the DOC failed to follow its own procedures and document why a witness that the defendant claimed to have relevant information was not called at his disciplinary hearing.

D. Briefs on Appeal

Where no contemporaneous objection was made below and the issue is raised for the first time on appeal, *R.* 2:6-2(a)(1) requires that the party raising the issue flag that it was not raised below in the point heading. This requirement is mandatory and failure to comply is improper. State v. Kyles, 132 N.J. Super. 397, 400 (App. Div. 1975). *Kyles* also holds that "[w]hile an attorney should zealously advance the cause of his client, the piecemeal selection so as to create a putative issue is to be condemned. It is improper for an attorney to present an issue unless it can be done in good faith. Simply because an indigent defendant has the right to be represented by counsel and the right to an appeal without cost does not obligate his counsel to urge specious arguments so as to satisfy that right. No party has the right to have advanced on his behalf contentions that are palpably and clearly unmeritorious. It is a disservice to all litigants when the court's time is consumed by such contentions." Id. at 400-401.

If a party raising an issue fails to support it from the record, it is not the duty of the appellate court to search the record for error. State v. Marchese, 14 N.J. 16, 22 (1953); State v. Cooper, 10 N.J. 532, 563 (1952), citing Shade v. Colgate, 4 N.J. Super. 356, 362 (App. Div. 1949); State v. Ingenito, 169 N.J. Super. 524, 529 (App. Div. 1979), rev'd o.g. 87 N.J. 204 (1981); State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977). In State v. Melton, 136 N.J. Super. 378 (App. Div. 1975), the reviewing court held that if a party objects to an adverse ruling, he must set forth the precise grounds for his objection if he is to avoid the necessity for reliance on plain error. While a judge is expected to deal with issues which come (or might be expected to come) to his attention, the reviewing courts will not impose on the trial judge "the duty to sort through the advocacy of inquiry of witnesses to speculate as to the precise defenses being framed, especially since a simple statement by counsel will suffice. We have long since repudiated 'subtle disguise or concealment of unsuspected * * * defenses."" (citing Edwards v. Wyckoff Electrical Supply Co., 42 N.J. Super. 236, 240 (App. Div. 1956).

It is also inappropriate to fail to include any citations in support of the arguments proffered. *State v. Perlstein*, 206 N.J. Super. 246, 248 (App. Div. 1985); State v. Calgon, Inc., 35 N.J. Super. 319 (App. Div. 1955).

Appellate courts generally decline to consider issues not fully presented at trial unless the issues are jurisdictional or concern matters of great public interest. Matter of Board of Educ. of Town of Boonton, 99 N.J. 523, 536 (1985) (refusing to consider newly-raised issue with "an insufficient factual basis" in the record); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); Matter of Kovalsky, 195 N.J. Super. 91, 99 (App. Div. 1984) ("An issue which is raised for the first time on appeal and is not supported by the record is not properly before this When the issue is of sufficient public court."). importance, however, the reviewing court may consider it even if it is raised for the first time on appeal. State v. Churchdale Leasing, Inc., 115 N.J. 83, 100 (1989). This is generally true of constitutional issues, although such questions raised for the first time on appeal do not have to be considered if the matter can be disposed of in another way. Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 247 (1988); City of Newark v. Twp. of Hardyston, 285 N.J. Super. 385, 397 (App. Div. 1995), certif. denied, 143 N.J. 518 (1996).

It is also inappropriate to raise legal issues on appeal in footnotes, and ordinarily they would not be considered unless properly made under appropriate point headings. Nevertheless, the court may elect to consider the contention. *State v. Mays*, 321 *N.J. Super.* 619, 636 (App. Div. 1999). As to the impropriety of raising an issue for the first time in a reply brief, *see State v. Smith*, 55 *N.J.* 476, 488 (1970); *Warren Twp. v. Suffness*, 225 *N.J. Super.* 399, 412 (App. Div.), *certif. denied*, 113 *N.J.* 640 (1988).

II. APPEALS AS OF RIGHT

A. Appeals to the Appellate Division

Appeals may be taken as of right to the Appellate Division pursuant to *R.* 2:2-3(a): (1) from final judicial determinations, i.e. judgments of the Superior Court trial divisions and in summary contempt proceedings in all trial courts except municipal courts, (2) to review administrative agency determinations, and (3) in such cases as are provided by law. Appeals may be taken only from judgments and not from opinions, informal written decisions, or a correct result based on a wrong reason. Consequently, the State does not need to file a cross-appeal in order to argue alternative grounds for an affirmance. *See State v. Guzman*, 313 *N.J. Super.* 363, 371 n. 1 (App. Div.), *certif. denied*, 156 *N.J.* 424 (1998).

The form of the notice of appeal is prescribed by the Director of the A.O.C. in Appendix IV of the rules and is also available online at *www.judiciary.state.NJ.us/ appdiv/index.htm*. In addition, appeals may be filed electronically at *www.judiciary.state.NJ.us/appdiv/e-file/ appfile.htm*.

"Final judgments" are those which adjudicate all claims raised in an action. While there can be no appeal from an oral opinion, only from a formal judgment, the reviewing court usually ignores the defect if a judgment is entered after the Notice of Appeal is filed. An order granting a new trial following a jury finding of guilt is interlocutory, and the State may seek leave to appeal not only from an order based on a question arising outside or collateral from the record, but also new trials based on alleged errors of law on the record or factual errors. State v. Sims, 65 N.J. 359, 362 (1974), clarifying dictum in State v. LaFera, 42 N.J. 97 104 (1964); accord, State v. Piscopo, 131 N.J. Super. 257 (App. Div. 1974). If a trial court enters a pretrial order dismissing the indictment against some but not all defendants, the matter is not final and the State must file an interlocutory appeal. Dismissal of all charges in an indictment, however, would be a final order.

The judgment in a criminal matter must set forth the plea, the verdict or findings, the adjudication and the sentence, a statement of reasons for such sentence and a statement of credits received. *R.* 3:21-5. Thus, a criminal matter is not final until sentence is imposed. If the defendant is acquitted or for any other reason is entitled to be discharged, however, judgment is entered accordingly. *Id.* At the time of sentencing the court must advise the defendant of his right to appeal. *R.* 3:21-4(h).

An order entered pursuant to *R.* 5:22-2 referring a juvenile for trial as an adult offender is now considered interlocutory, requiring a motion for leave to appeal. *State in the Interest of R.L.*, 202 *N.J. Super.* 410 (App. Div.), *certif. denied*, 102 *N.J.* 357 (1985).

A trial court may reconsider a sentence pursuant to R. 3:21-10 during pendency of the appeal upon notice to the Appellate Division. R. 3:21-10(d).

Motions for change of custodial sentence for entry into the Intensive Supervision Program are addressed to the discretion of the three judge panel assigned to hear such matters, and there is no appeal provided. *R.* 3:21-10(e). Also, there is no pretrial review of the denial of entry into pretrial intervention except by leave granted under *R.* 2:2 in cases where the designated judge or assignment judge reverses the prosecutor for denying consent to enrollment of defendant. *R.* 3:28(f). An order enrolling a defendant in PTI over the prosecutor's objection is final for purposes of appeal by the State, and is automatically stayed for fifteen days and thereafter pending appellate review. *Id.*

Appeals from denial by the State Police of an application to make a gun purchase under a previously issued gun purchaser card are taken to the designated gun permit judge in the vicinage. R. 2:2-3(a).

B. Appeals to the Supreme Court

The limitations on appeals as of right to the Supreme Court are set forth in R. 2:2-1, which provides four grounds:

1. cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State;

2. cases where there is a dissent in the Appellate Division, limited to those issues in the dissent;

3. directly from the trial court in cases where the death penalty was imposed and from post conviction proceedings in such cases;

4. in such cases as are provided by law.

To qualify as substantial under the first ground, the question must be substantial and not colorable. In re East Windsor Mun. Util. Auth. v. Shapiro, 57 N.J. 168 (1970). The question must not have been the subject of a conclusive judicial determination, the standard is not met if the issues involve an analysis of a particular factual situation and application of those facts to statutory and constitutional criteria under established principles. See, Piscataway Association, Inc. v. Twp. of Piscataway, 73 N.J. 546, 549 (1977). It would be prudent, if the constitutional issue may not meet the substantiality criterion, to also file a petition for certification, although an order denying certification also serves to summarily dismiss the appeal. R. 2:12-9. See, Deerfield Estates, Inc. v. Twp. of East Brunswick, 60 N.J. 115 (1972).

With respect to the second ground, a petition for certification should be filed to raise any issue not subsumed within the dissenting opinion. A motion for summary disposition may also be filed pursuant to R. 2:8-3(a), and such a motion will toll the time for further briefing. A dissenting vote from denial of motion for

rehearing does not qualify to create a right of appeal, even where a constitutional issue is belatedly raised. *State v. Smith*, 59 *N.J.* 297 (1971).

The third ground is cases in which the death penalty has been imposed, *(see also,* CAPITAL PUNISHMENT, this Digest). It is also the subject of *N.J.S.A.* 2C:11-3e, requiring every death penalty imposed "shall be appealed, pursuant to the Court Rules, to the Supreme Court." *See State v. Koedatich,* 98 *N.J.* 553 (1984); *See also State v. Martini,* 144 *N.J.* 603, 607 (1996). Under the statute the Supreme Court must also review the penalty in terms of proportionality if requested. *See In re Proportionality Rev. Project,* 161 *N.J.* 71 (1999); *State v. Loftin,* 157 *N.J.* 253 (1999); *State v. Ramseur,* 106 *N.J.* 123, 324-31 (1987). The Supreme Court on April 5, 1989 also issued a Directive respecting procedures in death cases, reproduced at 123 *N.J.L.J.* 970 (1989).

III. APPEALS TO THE SUPREME COURT BY CERTIFICATION

Ordinarily, review by the Supreme Court of New Jersey is discretionary and application is by petition for certification pursuant to R. 2:12. The grounds for certification are specified in R. 2:12-4. Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or higher court or calls for the exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. It is not allowed from final judgments of the Appellate Division except for "special reasons." Id. It is up to four justices to decide what the Court wants to hear. The petition must be signed by counsel with a certification that it presents a substantial question and is filed in good faith and not for purposes of delay. R. 2:12-7(a). Respondent may seek affirmative relief only by cross-petition. R. 2:12-11.

Where issues are raised on a cross-petition for certification which were not reached by the Appellate Division because it reversed a criminal defendant's conviction on a different issue, and the Supreme Court grants certification and reverses the judgment of the Appellate Division, the issues not reached by the Appellate Division are preserved by the grant of certification and may be considered by the Appellate Division on remand from the Supreme Court. *State v. Cameron*, 104 *N.J.* 42, 58-59 (1986).

A. To the Appellate Division

Appeals from non-final, or interlocutory orders of the trial courts can be taken on the filing of a motion for leave to appeal pursuant to R. 2:2-3(b) and 2:2-4. The application must be filed within 20 days after the date of service of the order, unless a motion is made to the trial court for reconsideration within 20 days after service of the order, in which event the time for filing is extended for a period of 20 days following the date of service of the order deciding the motion for reconsideration. R. 2:5-6(a). Applications for leave to cross-appeal are governed by the same time limitations, i.e. 20 days after service of the court order or after disposition of the motion for reconsideration. R. 2:5-6(b). If an appeal from an interlocutory order is allowed, an application for leave to cross-appeal may be made by motion within 10 days after the date of service of the order of the appellate court allowing the appeal. Id. The time for interlocutory appeal may be extended for a period not exceeding an additional 15 days. R. 2:4-4(b)(1).

R. 2:2-4 provides the standard for review: the Appellate Division may grant leave "in the interest of justice." This power to grant relief has been described as "highly discretionary" and "exercised only sparingly." State v. Reldan, 100 N.J. 187, 205 (1985). It is granted in the interests of justice to consider a fundamental claim which would infect the trial and would otherwise be irremediable in the ordinary cause. See also Appeal of Pennsylvania Railroad Co., 20 N.J. 398 (1956); Golden Estates v. Continental Cas., 317 N.J. Super. 82, 88 (App. Div. 1998); State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997). The movant should apply to the trial court for a stay of proceedings pending the appeal, and if unsuccessful, apply for a stay of the lower court proceedings to the Appellate Division. R. 2:9-3. If appellant files a notice of appeal rather than the required motion for leave, the Appellate Division may grant leave nunc pro tunc upon a showing of good cause and the absence of prejudice, provided that the appeal was in fact taken within the time for final judgments. R. 2:4-4(b).

Denial of leave to appeal does not foreclose or prejudice further review of the issue on appeal of the final judgment. *See In re Contempt of Carton,* 48 *N.J.* 9 (1966) (appeal from final judgment raises validity of all interlocutory orders).

B. To the Supreme Court

R. 2:2-2 provides that appeals may be taken to the Supreme Court by leave from interlocutory orders of the trial court where the death penalty has been imposed, and of the Appellate Division "when necessary to prevent irreparable injury." The rule also provides for petition for certification to the Supreme Court from interlocutory appeals pending unheard in the Appellate Division.

V. TIME TO APPEAL

R. 2:4 governs the time for appeal, although there are references in other appellate rules to time limitations. The notice of appeal from final judgment must be filed within 45 days of the entry of judgment, R. 2:4-1(a), which in criminal cases means from the date of sentencing when the judgment is signed by the judge and entered by the clerk. R. 3:21-5. A cross-appeal must be filed within 15 days after service of the notice of appeal. R. 2:4-2. If the prosecutor appeals from the judgment, e.g., from the sentence pursuant to N.J.S.A. 2C:44-1f(2), before the defendant, and defendant files the cross-appeal, the clerk should be notified to switch the designations of appellant to the defendant and cross-appellant to the State to facilitate filing transcripts and scheduling. A notice of appeal filed out of time must ordinarily be accompanied by a motion to file *nunc pro tunc*, although the clerk will ordinarily accommodate the Office of the Public Defender and routinely allow such filings up to 6 months out of time without formal motion. See also State v. Altman, 181 N.J. Super. 539 (App. Div. 1981).

In *State v. Fletcher*, 174 *N.J. Super.* 609 (App. Div. 1980), *certif. denied* 89 *N.J.* 444 (1982), the court held that the 45 day period does not begin to run until the defendant has been advised by the trial court of his right to appeal and, if he is indigent, of his right to apply for counsel. This advice by the trial court is required by *R.* 3:21-4(h).

R. 2:4-3 provides for the tolling of the time for appeal in certain circumstances: (a) by the death of the aggrieved party, or by the death, disbarment, resignation or suspension of the attorney of record for such party, but the time runs anew from the date of that occurrence; (b) by the filing of a motion for reconsideration to the Appellate Division, but the time runs anew from the date of entry of the order denying such application; $^{(C)}$ in criminal actions by the timely filing and service of a motion to the trial court for judgment of acquittal *n.o.v.* or after the jury is discharge without having reached a verdict pursuant to *R.* 3:18-2 or for a new trial pursuant to R. 3:20, or in arrest of judgment pursuant to R. 3:21-9, or for a rehearing or to amend or make additional findings pursuant to R. 1:7-4, but the remaining time shall begin to run from the disposition date of such motion; (d) in criminal actions by the insanity of the defendant, but the time shall begin to run from the date of the removal of such disability.

The time limits for interlocutory appeals are discussed in \P IV, \S A above.

R. 2:9-2 states that the time fixed by the rules of any proceeding on appeal or certification may not be extended by consent of the parties, but may be granted by the court for good cause shown unless otherwise provided by the rules. The time limits may be accelerated on the court's own motion or on motion of a party.

VI. APPEALS BY DEFENDANTS

R. 2:3-2 provides that in any criminal action, any defendant, the defendant's legal representative, or other person aggrieved by the final judgment of conviction entered by the Superior Court, including a judgment imposing a suspended sentence, or by an adverse judgment in a post-conviction proceeding attacking a conviction or sentence or by an interlocutory order or judgment of the trial court, may appeal, or where appropriate, seek leave to appeal.

In the event the defendant dies before or during the pendency of an appeal, his legal representative may be substituted as the aggrieved party. Beginning with the holding in Newark v. Pulverman, 12 N.J. 105 (1953), which was subsequently codified in R. 2:3-2, New Jersey provided that in any criminal action after the death of the defendant an appeal may be prosecuted by the defendant's legal representative. In State v. Gartland, 149 N.J. 456 (1997), the Court modified the holding in *Pulverman*, explaining that the power to review a criminal appeal of a dead defendant is rarely exercised. Our courts will entertain a case that has become moot when the issue is of significant public importance and is likely to recur. But this power should be sparingly exercised, and a conviction should not be set aside unless the record shows palpably that there has been a fundamental miscarriage of justice, an error that cut mortally into the substantive rights of the defendant or impaired his ability to maintain a defense on the merits. Such caution is required, according to Gartland, because there is an intrinsic imbalance since the defendant cannot be retried and the State is realistically deprived of the opportunity to vindicate the public interest if the conviction is set aside.

R. 3:8-2 governs representation of joint or multiple defendants and requires permission of the court. This rule also applies to appeals. *See State v. Bellucci*, 87 *N.J.* 531, 539 (1980) (attorney's position as an advocate for his client should not be compromised before, during or after trial.)

Denial of defendant's suppression motion may be appealed notwithstanding that judgment is entered following a plea of guilty. *R.* 3:5-7(d). Other issues, such as admissibility of identification and confessions and other evidence, may be waived by a guilty plea unless preserved by conditional plea. *R.* 3:9-3(f). The prosecutor's position on conditional pleas should be explicit to obviate having the appellate court construe silence as tacit consent. See State v. Matos, 272 N.J. Super. 6 (App. Div. 1996). Conditional pleas in municipal court are governed by R. 7:6-2(c). See State v. Giordano, 281 N.J. Super. 150 (App. Div. 1995). Plea agreements in municipal cases are also controlled by the Guidelines and Official Commentary issued by the Supreme Court which are annexed to the court rules as an Appendix to Part VII. But see L. 2000, c. 75, adopted June 8, 2000, amending Title 2B and Title 39.

A criminal appeal is subject to dismissal where the defendant becomes a fugitive. State v. Rogers, 90 N.J. 187 (1982).*Rogers* cited with approval the Appellate Division decision in State v. Prince, 140 N.J. Super. 418 (App. Div. 1976). In Prince the Appellate Division dismissed appeal because defendant was a fugitive. On application of defendant who was recaptured 19 days after the dismissal, the Appellate Division denied reinstatement but the Supreme Court remanded for hearing on the merits. State v. Prince, 71 N.J. 347 (1976). This result reflects the discretion to reinstate a dismissed appeal if the defendant surrenders or is apprehended within a short time of dismissal, and where there is no prejudice to the State and arguably meritorious issues alleged by the appellant. In State v. Canty, 278 N.J. Super. 80 (App. Div. 1976), however, the reviewing court held that defendant's escape and fugitive status, making him unavailable for a hearing on a motion to suppress, did not warrant the sanction of dismissing the motion with prejudice. The court should either postpone the hearing and place the case on the inactive list, or proceed in absentia.

VII. APPEALS BY THE STATE

The State is authorized by *R*. 2:3-1 to appeal or seek leave to appeal where appropriate in a criminal action (a) to the Supreme Court from final judgment of the

Appellate Division pursuant to R. 2:2-2(b) and 2:3-2; and (b) to the appropriate appellate court from (1) a judgment of the trial court dismissing an indictment, accusation or complaint, where not prohibited by the constitution; (2) a pretrial order of the trial court in accordance with R. 3:5 (search warrants); (3) a judgment of acquittal *n.o.v.* following a jury verdict of guilty; (4) a judgment in a post conviction proceeding collaterally attacking a conviction or sentence; (5) an interlocutory order entered before, during or after trial, or (6) as otherwise provided by law.

A. Dismissal of Indictment, Accusation or Complaint

Whether the State may appeal from such dismissal is usually governed by whether the appeal will violate the Double Jeopardy clause, a subject dealt with in the topic on **DOUBLE JEOPARDY**.

B. Appeal from Judgment of Acquittal

Again, the appeal from a judgment of acquittal is governed by double jeopardy principles, and are normally not allowed unless the matter can be construed as civil. Even though a sanction may be labeled civil, that does not foreclose the possibility that it has a punitive character and may be considered quasi-criminal in nature. The factors used to determine whether a case is criminal are listed in *State v. Widmaier*, 157 *N.J.* 475 (1999), which held that a charge of refusal to take a Breathalyzer test is quasi-criminal, and the State was barred from appealing an acquittal.

C. Appeal from the Grant of New Trial

The appealability of the grant of a new trial is dependent on the basis for the action. As long as the reason is not based on the sufficiency of the evidence, but rather on the weight of the evidence or newly discovered evidence, *R.* 3:20-1, there is no double jeopardy preclusion. *See State v. Sims*, 65 *N.J.* 359 (1974); *compare Tibbs v. Florida*, 457 *U.S.* 31 (1982) with *Hudson v. Louisiana*, 450 *U.S.* 40 (1981) and *Burks v. United States*, 437 *U.S.* 1(1978).

D. Appeal from Sentence

The State may not appeal from lenient but lawful sentences imposed on third or fourth degree crimes. *State v. Davidson,* 225 *N.J. Super.* 1 (App. Div. 1988), *certif. denied,* 111 *N.J.* 594 (1988). It may, however, appeal from a downgraded sentence one degree lower imposed for crimes of the first or second degree pursuant to

N.J.S.A. 2C:44-1f, provided that it files the appeal within 10 days; otherwise the right of appeal is lost. State v. Farr, 183 N.J. Super. 463 (App. Div. 1982); State v. Watson, 183 N.J. Super. 481 (App. Div. 1982). While stay is mandatory (and possibly automatic) under the statute and R. 2:9-3(d), the rule requires that bail pursuant to R. 2:9-4 shall be established as appropriate To obviate double jeopardy under the circumstances. preclusion, the prosecutor should expressly state on the record at sentencing an intent to appeal in order to place defendant on actual notice, and the appeal papers should Furthermore, the prosecutor be filed expeditiously. should facilitate the granting of bail, and notwithstanding the statute, obtain a stay of the judgment from the trial court, or if necessary from the Appellate Division. If a non-custodial sentence is imposed, the prosecutor should also take steps to notify probation of the appeal to prevent the defendant from commencing probation before the appeal is perfected. Pursuant to R. 2:9-3(d), however, the defendant may elect to execute the sentence stayed by the State's appeal In State v. Sanders, 107 N.J. 609 (1987), the Supreme Court upheld that the State's right to appeal pursuant to N.J.S.A. 2C:44-1f, concluding that it does not violate double jeopardy, despite the fact that defendant remains incarcerated for up to ten days while the State perfects its appeal. Because the Code of Criminal Justice expressly provides for such appeal of a lenient sentence, a defendant cannot legitimately expect the sentence is final when Consequently, the defendant is not pronounced. automatically entitled to bail pursuant to R. 2:9-3(d) during the ten day period within which the State is required to perfect its appeal. Sanders overruled the decision in State v. Williams, 203 N.J. Super. 513 (App. Div. 1985) (holding that defendant must be apprized at sentencing of the State's right to appeal and the applicability of the election and waiver provisions of R. 2:9-3(d)). See State v. Christensen, 270 N.J. Super. 650, 656 (App. Div. 1994).

The State cannot appeal as lenient a sentence that it has recommended, or where it has waived its right to take a position at sentencing, or waived its right to appeal. *State v. Morant*, 241 *N.J. Super.* 121, 142 (App. Div.), *certif denied*, 127 *N.J.* 323 (1990); *State v. Partusch*, 214 N.J. Super. 473, 476 (App. Div. 1987); *See also State v. Ferrara*, 197 *N.J. Super.* 1 (App. Div. 1984); *State v. Paterna*, 195 *N.J. Super.* 124, 126 (App. Div. 1984). *Partusch* permits the State to appeal when a probationary or non-custodial term is imposed where the plea bargain involved a downgrade from a second to a third degree offense. The State may not, however, appeal from juvenile sentences. In *State in the Interest of R.P.*, 198 *N.J.*

Super. 105 (App. Div. 1984), the Appellate Division stated that *N.J.S.A.* 2C:44-1f(2) applies only to sentences imposed upon "conviction of crime" and under both the old and new juvenile laws, a juvenile may be adjudged "delinquent" but not a "criminal."

If the State seeks to increase an illegal sentence, it is necessary to file a cross-appeal (nunc), *State v. Heisler*, 192 *N.J. Super.* 586 (App. Div. 1984), but the prosecutor should be sensitive to the restrictions of *North Carolina v. Pearce*, 395 *U.S.* 711, 89 *S.Ct.* 2072 (1969). *See also State v. Eigermann*, 280 *N.J. Super.* 331, 339 (App. Div. 1995); *State v. Sheppard*, 125 *N.J. Super.* 332 (App. Div. 1973); *State v. Rhoda*, 206 *N.J. Super.* 584 (App. Div.), *certif. denied*, 105 *N.J.* 524 (1986) (permitting increase in amount of restitution following remand for lack of proper procedures and hearing at time of sentencing).

In addition, *R.* 2:3-1(b)(5) permits the State to appeal an order reducing or modifying a sentence pursuant to *R.* 3:21-10(b). *State v. Giorgianni*, 189 *N.J. Super.* 220 (App. Div.), *certif. denied*, 94 *N.J.* 569 (1983); *State v. Stanley*, 149 *N.J. Super.* 326 (App. Div.), *certif. denied*, 75 *N.J.* 21 (1977); *State v. Williams*, 139 *N.J. Super.* 290 (App. Div. 1976), *aff'd o.b.* 75 *N.J.* 1 (1977).

The State may appeal from an improper merger of offenses, and such a claim is not barred by double jeopardy. *State v. Gross,* 216 *N.J. Super.* 92, 97 (App. Div.), *certif. denied,* 108 *N.J.* 194 (1987). When the defendant's underlying convictions are interdependent, justifying merger, the appellate court, vacating one of these sentences on the vacated conviction, can also in its sound discretion vacate the sentence on the remaining conviction when the sentences as imposed were interdependent and remand for imposition of an increased sentence, but the new aggregate sentence cannot be in excess of the sentence originally imposed. *State v. Rodriguez,* 97 *N.J.* 263 (1984).

The State may appeal a decision of the Resentencing Panel based on legal error. *State v. Johnson*, 176 *N.J. Super.* 1, 7 (App. Div. 1980), summarily remanded to Resentencing Panel, 87 *N.J.* 335 (1981). The State may also appeal a decision of the State Parole Board. *In re Trantino Parole Application*, 89 *N.J.* 347 (1982); *In re Hawley*, 192 *N.J. Super.* 85, 89-90 (App. Div. 1983), *aff* d 98 *N.J.* 108 (1984).

VIII. STAYS PENDING APPEAL

R. 2:9-3 governs the granting of stay pending review of a criminal action. A stay is automatic in death penalty cases if an appeal is taken unless the court orders otherwise. In all other criminal actions the filing of the notice of appeal will not automatically stay the sentence. A sentence to pay a fine or an order placing defendant on probation may be stayed by a trial court on appropriate terms if an appeal or Notice of Petition for Certification is filed. If the court denies a stay, it must briefly state it reasons, and the application can be renewed before the appellate court. *Id.* According to *R.* 2:9-3(b), a sentence of imprisonment may not be stayed, but defendant may be admitted to bail pursuant to *R.* 2:9-4. *See* BAIL, *supra.*

When the State appeals from a sentence pursuant to N.J.S.A. 2C:44-1f(2), a stay is mandatory. *See* discussion in § VII, above.

A stay in a summary contempt matter is automatic with the filing of an appeal. *R.* 1:1-10; *see also R.* 2:9-5(a).

IX. STANDARDS OF REVIEW ON APPEAL

For a general overview, *see* Ellen T. Wry, New Jersey Standards of Appellate Review (July 1999). *See also*, Sentencing, Sixth Amendment (Ineffective Assistance of Counsel, Speedy Trial), Prosecutors (Misconduct), Contempt, Juveniles, pretrial Intervention, Post Conviction Relief, Municipal Courts, Probation & Parole.

Standards for appellate review are guidelines used by the reviewing courts to decide whether error has occurred in the trial court or administrative agency, and whether reversal or other action is warranted.

A. Reasons for Decision

An appeal lies not from a written or oral decision of a court, but only from a judgment or order. *Heffner v. Jacobson*, 100 *N.J.* 550, 553 (1985); *State v. Guzman*, 313 *N.J. Super.* 363, 371 n. 1 (App. Div.), *certif. denied*, 156 *N.J.* 424 (1998); *Mills v. J. Daunoras Const., Inc.*, 278 *N.J. Super.* 373, 378-79 (App. Div. 1995). An order or judgment will be affirmed on appeal if it is correct, even though the trial judge gave the wrong reasons for it. *Isko v. Planning Bd.*, 51 *N.J.* 162, 175 (1968); *GNOC, Corp. v. Dir., Div. of Taxation*, 328 *N.J. Super.* 467, 474 (App. Div. 2000); *Gerber ex rel. Gerber v. Springfield Bd. of Educ.*, 328 *N.J. Super.* 24, 40 (App. Div. 2000); *State v.* DeLuca, 325 N.J. Super. 376, 389 (App. Div. 1999), certif. granted 163 N.J. 79 (2000).

B. Constitutional Issue

Subsumed within the doctrine of judicial restraint is the maxim that courts should not reach constitutional questions unless necessary to the disposition of the litigation. George Harms Construction Co., Inc. v. N.J. Turnpike Auth., 137 N.J. 8, 28 (1994); Murray v. Lawson, 136 N.J. 32, 50 (1994); O'Keefe v. Passaic Valley Water Comm'n., 132 N.J. 234, 240 (1993); Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971); State v. Zucconi, 50 N.J. 361, 364 (1967); J.B. v. M.B., 331 N.J. Super. 223, 23 (App. Div. 2000); State v. Manning, 234 N.J. Super. 147, 157 (App. Div.), certif. denied, 117 N.J. 657 (1989); State v. Smith, 130 N.J. Super. 442, 446 (Law Div. 1974) (Court should not reach and determine a constitutional issue unless absolutely imperative in disposition of litigation). When faced with the choice between finding a statute unconstitutional or construing it in a way to free it from constitutional doubt or defect, the court should choose the latter. Abbott v. Burke, 153 N.J. 480, 507 (1998), citing In re Kimber Petroleum Corp., 110 N.J. 69, 83 (1988).

C. Plain Error and Harmless Error

The general rule on trial errors is R. 1:7-5, which provides that an error or omission which does not prejudice a substantial right shall be disregarded, but the court may notice any error of such a nature as to have been clearly capable of producing an unjust result, even though such error was not brought to its attention by a party. The appellate rule on notice of trial errors is R. 2:10-2, which provides that an error or omission shall be disregarded unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court. This rule provides a judicially developed definition of plain error, i.e. error that is clearly capable of producing an unjust result. Error, whether raised or not, i.e. whether harmless error or plain error, respectively, is governed by the same standard, but the reviewing court has discretion not to consider an issue not raised at trial. State v. Macon, 57 N.J. 325, 337-38 (1971). The Court in *Macon* analyzed the language of the plain error standard as compared with the federal harmless error standard and saw no practical distinction, but noted that the federal standard is binding with respect to timely claims of constitutional error.

Not any possibility of an unjust result will cause reversal of a conviction. The possibility of an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result ir otherwise would not have reached." *State v. Clausell*, 121 *N.J.* 298, 371 (1990); *State v. Melvin*, 65 *N.J.* 1, 18-19 (1974); *State v. Bankston*, 63 *N.J.* 263, 273 (1973). Even if the error is of constitutional dimension, it will be held "harmless" if it is clear beyond a reasonable doubt that the jury verdict would have been the same absent the error. *United States v. Hastings*, 461 *U.S.* 499, 103 *S.Ct.* 1974, 1981 (1983); *Chapman v. California*, 386 *U.S.* 18, 23-24 (1967); *Macon, supra; State v. Scherzer*, 301 *N.J. Super.* 363, 441 (App. Div. 1997), *certif. denied*, 151 *N.J.* 466 (1997).

However, errors which impact substantially and directly on fundamental procedural safeguards are not considered amenable to harmless error rehabilitation. State v. Shomo, 129 N.J. 248, 260 (1992) (sentence on partial, or less than unanimous verdict); State v. McCloskey, 90 N.J. 18, 30-31 (1982); State v. Czachor, 82 N.J. 392, 404 (1980); State v. Haley, 295 N.J. Super. 471, 476-77 (App. Div. 1996). Such errors have included the Allen charge, State v. Czachor, supra; coerced confessions, Payne v. Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); total deprivation of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); and lack of impartial trial judge, Tuney v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927). In Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (applying harmless-error analysis to improperly admitted coerced confession), however, the United States held that "most constitutional errors can be harmless." If defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any constitutional errors that may have occurred are subject to harmless-error analysis, with the exception of "structural" error, defined as structural defect in the constitution of the trial mechanism, or a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. See Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999) (jury instruction that omits element of offense); Johnson v. United States, 520 U.S. 461, 468, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718, 728 (1997); State v. Purnell, 161 N.J. 44, 60 (1990); State v. Scherzer, supra at 453. A structural error affects the legitimacy of the entire trial, rather than an isolated error that occurs during a certain part of the trial process and does not contaminate the trial as a whole. Purnell, supra. Accordingly, the Supreme Court in Johnson, has found that structural error to exist "only in a very limited class

of cases." 520 U.S. at 468. Examples of such cases include Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 24 L.Ed.2d 182 (1993) (finding erroneous reasonable doubt instruction to jury); Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (finding unlawful exclusion of grand jurors of defendant's race); Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (finding right to public trial); McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (finding right to self-representation at trial); Gideon, supra; Tumey, supra. State cases applying such harmless-error analysis include State v. Burton, 309 N.J. Super. 280 (App. Div.), certif. denied, 156 N.J. 407 (1998)(error in admitting photographic array of defendant in prison garb harmless); State v. Bohuk, 269 N.J. Super. 581, 595 (App. Div.), certif. denied, 136 N.J. 29, cert. denied, 513 U.S. 865, 115 S.Ct. 183, 130 L.Ed.2d (1994); State v. Tucker, 265 N.J. Super. 296, 328 (App. Div. 1993), aff'd 137 N.J. 259 (1994), cert. denied, 513 U.S. 1090, 115 S.Ct. 751, 130 L.Ed.2d 651 (1995); see also State v. Marshall, 123 N.J. 1, 121 (1991) (applying harmless-error analysis to violations of defendant's privilege against self-incrimination).

Certain types of jury instructions are so crucial to the jury's deliberations that errors are presumed to be reversible. Failure to charge the jury on an element of the offense is presumed to be prejudicial, even in the absence of a request by defense counsel. State v. G.V., 162 N.J. 252, 262 (2000); State v. Afanador, 151 N.J. 41, 56 (1997); State v. Jordan, 147 N.J. 409, 428-29 (1997); State v. Martin, 119 N.J. 2, 15 (1990); State v. Vick, 117 N.J. 288, 291 (1989); State v. Federico, 103 N.J. 169, 176 (1986); State v. Grunow, 102 N.J. 133, 148 (1986); State v. Simon, 79 N.J. 191, 206 (1979) ("Errors impacting directly upon these sensitive areas of a criminal trial are poor candidates for rehabilitation" under the plain error rule); State v. Green, 86 N.J. 281 (1981); State v. Speth, 323 N.J. Super. 67, 85 (App. Div. 1999); State v. Blanks, 313 N.J. Super. 55 (App. Div. 1998) (if evidence does not support charge, then any error in charge is harmless); State v. Allen, 308 N.J. Super. 421, 431 (App. Div. 1998) (absence of credibility, inconsistent statement and deliberation charges warranted reversal).

Where the error has not been raised below, there may be consequences on appeal other than governed by the plain error rule. For example, the failure to raise an error below may be interpreted to mean counsel did not consider the error sufficiently prejudicial in the context of the trial. *State v. Wilson*, 57 *N.J.* 39, 50-51 (1970); *State v. Macon, supra*, at 321. Errors which counsel created or acquiesced in will not ordinarily be grounds for reversal. *State v. Harvey*, 151 N.J. 117, 219 (1997); *State v. Schneiderman*, 20 *N.J.* 422 (1956); *State v. Douglas*, 204 *N.J. Super.* 265, 274 (App. Div. 1985); *State v. Mack*, 131 *N.J. Super.* 542 (App. Div. 1974); *State v. Mack*, 130 *N.J. Super.* 358 (App. Div. 1974); *State v. Slocum*, 130 *N.J. Super.* 270, 276-77 (App. Div.), *certif. denied*, 65 *N.J.* 574 (1974); *State v. Byra*, 128 *N.J.L.* 429 (Sup. Ct. 1942), *aff'd* 129 *N.J.L.* 384 (E. & A. 1943), *cert. denied*, 324 *U.S.* 884, 65 *S.Ct.* 1025, 89 *L.Ed.* 1434 (1944).

Should the reviewing court apply a procedural bar, it is prudent to ask that the court plainly state to that effect, to preserve the procedural bar in the event of a habeas petition. *Harris v. Reed*, 489 *U.S.* 255, 261-62, 109 *S.Ct.* 1038, 103 *L.Ed.*2d 308 (1989).

D. Fact Findings By The Trial Court

When an error in a fact finding by a trial court sitting without a jury, the scope of appellate review is extremely narrow. The seminal case on this subject, State v. Johnson, 42 N.J. 146 (1964), held that the appellate tribunal must review the record in light of the contention raised, but not initially from the point of view of how it would decide the matter if it were the court of first instance. It should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy. The aim of the review at the outset is rather to determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record. This involves consideration of the proofs as a whole. When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete. But if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction, then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions. In short, the reviewing court must have the conviction that the judge went so wide of the mark, a mistake must have been made. Accord, State v. Locurto, 157 N.J. 463, 470-71 (1999)(appellate court should not have engaged in independent assessment of evidence as if it were court of first instance); see State v. Simon, 161 N.J. 416, 445 (1999); *State v. King*, 44 *N.J.* 346, 353-54 (1965); *State in the Interest of S.B.*, 333 *N.J. Super.* 236, 241 (App. Div. 2000); *State v. Maryland*, 327 *N.J. Super.* 436, 447 (App. Div. 2000); *see also, Mechinsky v. Nichols Yacht Sales, Inc.*, 110 *N.J.* 464, 475 (1988) (holding that a trail court's factual findings made pursuant to *R.* 1:7-4(a) should not ordinarily be disturbed where "there is substantial evidence to support [its] implicit finding[s]."). On the other hand, a trial judge's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. *State in the Interest of S.B.*, 333 *N.J. Super.* at 241.

E. Reviewing Actions of Appellate Division Passing on A Claim That Trial Court's Fact Findings Were Wrong.

The initial inquiry is whether the Appellate Division initially approached the review correctly, and if not, the Supreme Court approaches the case as the intermediate court should have. If it did approach the case correctly, then Supreme Court's review is more limited because a reviewing court has already considered the matter and the question is whether the Appellate Division was right or wrong in sustaining or upsetting the trial court's findings. *State v. Johnson*, 42 *N.J.* 146, 163 (1964).

F. Motion for New Trial - Weight of the Evidence

The appellate court will not consider an argument that a jury verdict was against the weight of the evidence unless the appellant moved for new trial on that ground. R. 2:10-1; State v. McNair, 60 N.J. 8, 9 (1972); State v. Baker, 303 N.J. Super. 411, 414-15 (App. Div.), certif. denied, 151 N.J. 470 (1997); State v. Warmbrun, 277 N.J. Super. 51, 66 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995); State v. Ross, 249 N.J. Super. 246, 253 (App. Div. 1991); State v. Johnson, 203 N.J. Super. 127, 133 (App. Div.), certif. denied, 102 N.J. 312 (1985); but see Fiore v. Riverview Medical Center, 311 N.J. Super. 361, 363 n. 1 (App. Div. 1998) (noting that application of *R*. 2:10-1 to bar a criminal defendant from arguing that a guilty verdict is against the weight of the evidence may implicate constitutional rights which are not at stake in a civil appeal). However, the reviewing court may proceed to the merits in the interest of justice. State v. Smith, 262 N.J. Super. 487, 511-12 (App. Div.), certif. denied, 134 N.J. 476 (1993); State v. Pickett, 241 N.J. Super. 259 (App. Div. 1990); see also State v. Saunders, 302 N.J. Super. 509, 524 (App. Div.), certif. denied, 151 N.J. 470 (1997).

The standard for granting a motion for new trial is set forth in R. 3:20-1. The trial judge "shall not set aside a

jury verdict as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law." This same standard is essentially the same on appellate review. State v. Brown, 118 N.J. 595, 603 (1990). R. 2:10-1 provides that "whether a jury verdict was against the weight of the evidence shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." The standard is whether "reasonable minds might accept the evidence as adequate to support the jury verdict." State v. Conway, 193 N.J. Super. 133, 150 (App. Div.), certif. denied, 97 N.J. 651 (1984), citing Dolson v. Anastasia, 55 N.J. 2, 6 (1969). Jurors are free to accept or reject, in part or in whole, any aspect of testimonial evidence based on credibility. State v. Conway, supra, citing State v. Coleman, 46 N.J. 16, 43 (1965), cert. denied, 383 U.S. 950, 86 S.Ct. 1210, 16 L.Ed.2d 212 (1966).

The reviewing court must "weigh heavily" the trial court's views on "credibility of witnesses, their demeanor, and [the trial court's] general 'feel of the case." State v. Sims, 65 N.J. 359, 373 (1974). If the trial court acts under a misconception of the applicable law, however, the appellate court need not give such deference. State v. Brown, 118 N.J. at 603, citing State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966); see also Baxter v. Fairmont Food Co., 74 N.J. 588, 598-600 (1977) (judge must have pervading sense of "wrongness" in overturning jury verdict; "feel of the case" factor does not control appellate review when trial court's "subjective conclusions" are not supported by the record). Moreover, Brown holds that to the extent that the weight of the evidence is germane to its decision, the trial court ought not to engage in a weighing of the persuasiveness of that evidence but only of its sufficiency. The trial judge's decision is not entitled to any special deference where it rests upon a determination as to worth, plausibility, consistency, or other tangibles considerations apparent from the face of the record with respect to which the trial judge is no more peculiarly situated to decide than the appellate court. 118 N.J. at 603.

If the reviewing court grants a motion for new trial on the ground that the verdict is against the weight of the evidence, acquittal is not required, even though a reversal based on insufficient evidence would require acquittal. *Tibbs v. Florida.* 457 *U.S.* 31, 42-43, 102 *S.Ct.* 2211, 2218, 72 *L.Ed.*2d 652 (1982);

G. Denial of Motion for Judgment of Acquittal

The standard governing a motion for judgment of acquittal at the close of the State's case is set forth in R. 3:18-1. The court must deny the motion if viewing the State's evidence, both direct and circumstantial, in its entirety, and giving the State the benefit of all reasonable inferences, a reasonable jury could find guilt beyond a reasonable doubt. State v. Reyes, 50 N.J. 454, 458-59 (1967); see State v. Thomas, 132 N.J. 247, 256-57 (1993); State v. Palacio, 111 N.J. 543, 549 (1988). The *Reves* standard is consistent with the sufficiency articulated in Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2788-89, 61 L.Ed.2d 560, 573-74 (1979). State v. Kittrell, 145 N.J. 112, 130 (1996). Our courts recognize that in that approach a jury may draw an inference from a fact whenever it is more probable than not that the inference is true; the veracity of each inference need not be established beyond a reasonable doubt. State v. Brown, 80 N.J. 587, 592 (1979); State v. Taccetta, 301 N.J. Super. 227, 240 (App. Div.), certif denied, 152 N.J. 187 (1997). Circumstantial evidence need not preclude every other hypothesis in order to establish guilt beyond a reasonable doubt. Id.; citing State v. Mayberry, 52 N.J. 413, 436 (1968), cert. denied, 393 U.S. 1043, 89 S.Ct. 673, 21 L.Ed.2d 593 (1969). Additionally, it is a jury function, not the function of the reviewing court, to evaluate witness credibility and the weight and worth of the evidence. See State v. Ingenito, 87 N.J. 204, 211 (1981). Appellate review is limited to the correction of injustice resulting from a plain and obvious failure of the jury to perform its duty. State v. Taccetta, supra.

When the motion for judgment of acquittal notwithstanding the verdict (*n.o.v.*) is made after the jury verdict, the same standard applies, i.e., only the State's evidence will be considered. State v. DeRoxtro, 327 N.J. Super. 212, 224 (App. Div. 2000); State v. Speth, 323 N.J. Super. 67, 81 (App. Div. 1999); State v. Sugar, 240 N.J. Super. 148, 152-53 (App. Div. 1990); State v. Kluber, 130 N.J. Super. 336, 341-42 (App. Div. 1974), certif. denied, 67 N.J. 72 (1975). If a defendant has been convicted of a lesser included offense, and makes a motion for judgment of acquittal n.o.v., a different standard applies. Because defendant has had the benefit of submission of the lesser included charge to the jury based on proofs adduced in the defense case, then the sufficiency of the evidence is tested by the whole record, not just the State's proofs, in deciding whether the conviction for the lesser included offense can be sustained. State v. Sugar, supra, at 153.

In reviewing a denial of a motion for judgment of acquittal pursuant to *R.* 3:18-1, or a motion for judgment of acquittal *n.o.v.* pursuant to *R.* 3:18-2, the appellate court applies the same test as was used by the trial court. *State v. Moffa*, 42 *N.J.* 258 (1964); *State v. Johnson*, 287 *N.J. Super.* 247, 268 (App. Div.), *certif. denied*, 144 *N.J.* 587 (1996); *State v. Kluber, supra.*

Reversal on the ground that the evidence was insufficient to warrant a conviction requires acquittal. *Hudson v. Louisiana*, 450 *U.S.* 40, 43, 101 *S.Ct.* 970, 972, 67 *L.Ed.*2d 30, 33 (1981); *Burks v. United States*, 437 *U.S.* 1, 98 *S.Ct.* 2141, 57 *L.Ed.*2d 1 (1978).

F. Guilty Pleas

R. 3:9-2 sets forth the steps a trial court must take in order to properly accept a guilty plea. (See also, GUILTY PLEAS and PLEA BARGAINING, this Digest). If the record shows that the judge failed to take the required steps to accept a guilty plea, the appellate court can remand for new trial or a new plea. State v. Rhein, 117 N.J. Super. 112, 121 (App. Div. 1971)(if bargained guilty plea is set aside, defendant should not emerge free of the collaterally dismissed charges but only of the bargain); see also State v. Gibson, 68 N.J. 499, 512 (1975); State v. Nichols, 71 N.J. 358, 361 (1976); State v. Dishon, 222 N.J. Super. 58, 62 (App. Div. 1987). No action is required if the failure to comply with any requirement is deemed harmless. The court has the discretion to refuse to accept a guilty plea. See State v. Daniels, 276 N.J. Super. 483, 487 (App. Div. 1994), certif. denied, 139 N.J. 443 (1995), rejecting limitations on judicial discretion set forth in State v. Blise, 244 N.J. Super. 20, 30 (Law Div. 1990). The standard of review is whether the judge abused his discretion, not whether the recommended bargain constituted an abuse of prosecutorial discretion. Daniels, supra.

G. Waiver by Guilty Plea

Entry of an unconditional plea of guilty to the charge constitutes a waiver of any non-jurisdictional constitutional challenge. *Tollett v. Henderson*, 411 *U.S.* 258, 267, 93 *S.Ct.* 1602, 36 *L.Ed.*2d 235 (1973); *State v. Crawley*, 149 *N.J.* 310, 316 (1997); *State v. Szemple*, 332 *N.J. Super.* 322, 328 (App. Div. 2000); *State v. Smith*, 307 *N.J. Super.* 1, 7 (App. Div. 1997), *certif. denied*, 153 *N.J.* 216 (1998); *State v. Morales*, 182 *N.J. Super.* 502 (App. Div. 1981), *certif. denied*, 89 *N.J.* 421 (1982). As stated by the United States Supreme Court in *Tollett.* "A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal

defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Those constitutional rights include the privilege against compulsory self-incrimination, the right to trial by jury, the right to confront one's accusers, and the right to a speedy trial. State v. Crawley, 149 N.J. at 316 (defendants can waive right to merger in plea agreements). Waiver of such rights necessitates that the knowing and voluntary nature of the plea be demonstrated in the record so that it can be reviewed on appeal. State v. Simon, 161 N.J. 416, 442-43 (1999). See State v. Davis, 116 N.J. 341, 368-69 (1989) (while the factual basis requirement might be waivable where a defendant pleads guilty to a lesser included offense to avoid the death penalty, a factual basis for a capital conviction cannot be sufficient when defendant's statements contradict the required intent of knowing and purposeful murder).

The United States Supreme Court has recognized an exception to the general waiver rule where the defendant's claimed right is "the right not to be haled into court at all upon felony charges." United States v. Broce, 488 U.S. 563, 574-75, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989); Menna v. New York, 423 U.S. 61, 62-63 n. 2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); Blackledge v. Perry, 417 U.S. 21, 30-31, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); State v. Barnes, 84 N.J. 362, 368-69 (1980); State v. Truglia, 97 N.J. 513, 523 (1984); State v. Garoniak, 164 N.J. Super. 344 (1978), certif. denied, 79 N.J. 481 (1979). (See also, DOUBLE JEOPARDY, this Digest). Broce held that collateral attack is barred when the indictment and the existing record on its face do not demonstrate a constitutional violation. The *Blackledge* exception should not be read too broadly, for example, to encompass the claim that the court lacks jurisdiction when preceded by a juvenile waiver hearing defective under the Kent-Gault rule. See State v. Lueder, 74 N.J. 62, 80-82 (1977).

Where the issue involves the sentence imposed subsequent to the entry of the plea, the waiver principle does not apply. *State v. Vasquez*, 129 *N.J.* 189, 193-95 (1992); *State v. Szemple, supra*, at 329; *State v. Gonzalez*, 253 *N.J. Super.* 300, 303-04 (App. Div. 1992); *State v. Carey*, 230 *N.J. Super.* 402, 404 n. 1 (App. Div. 1989).

There are three additional exceptions to the waiver rule: (1) by virtue of R. 3:5-7(d), which permits an appeal from denial of motion to suppress; (2) from denial

of entry into pretrial intervention pursuant to *R.* 3:28(g), and (3) when the defendant enters a conditional plea with the consent of the court and approval of the prosecutor pursuant to *R.* 3:9-3(f). See State v. Smith, supra, 307 N.J. Super. at 8; State v. Giordano, 281 N.J. Super. 150, 154-55 (App. Div. 1995) (*R.* 3:9-3(f) not applicable to municipal court)); State v. Robinson, 224 N.J. Super. 495, 499 (App. Div. 1988).

While the Court in State v. Gibson, 68 N.J. 499 (1975), held that mere inclusion in a plea bargain of an agreement not to appeal a conviction would not support post conviction relief in the absence of any coercion or undue pressure, it held as a matter of judicial policy that notwithstanding such agreement A timely appeal will be permitted. Nevertheless, a defendant who has obtained sentence or charge concessions in consideration of an appeal-waiver is subject to revocation of the plea at the State's option, immediately upon filing of the appeal. In Gibson there was no showing of coercion and no proper basis for granting post conviction relief on an application untimely filed ten months after the imposition of sentence. In State v. Sainz, 107 N.J. 283, 294 (1987), the Court disagreed with the Appellate Division's suggestion that it was either necessary or wise for the State to encourage defendants to waive their rights of appeal as part of a negotiated plea agreement, stating that waiver should rarely be needed, given the presumption of reasonableness that attaches to criminal sentences imposed on plea bargain defendants.

In State v. Johnson, 230 N.J. Super. 583 (App. Div. 1989), the question was the time within which the State must move to annul the plea agreement if the defendant waived appeal as part of a plea agreement but then filed an appeal. The Appellate Division concluded that a motion must be made in a reasonable time, noting Justice Schreiber's concurrence in Gibson, and held that a motion filed after defendant's appeal has been argued and decided comes too late. However, the motion need not be filed immediately upon the filing of the appeal, since the State is entitled to the opportunity to know the basis for the appeal and some time to evaluate defendant's arguments. As a result of Gibson, R. 3:9-3(d) was adopted to require that defendant be advised of his right to take an appeal and the prosecutor's option to annul the agreement, and the rule was amended after Johnson to provide that the State must exercise its right to annul no later than seven days prior to the date scheduled for oral argument or submission without argument.

ARREST

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

I. DEFINITIONS

"In criminal law an arrest is the taking of a person into the custody of the law in order that he may be held to answer for a criminal offense or be prevented from committing one." *State v. Harbatuk,* 95 *N.J. Super.* 54, 59-60 (App. Div. 1967), citing *Schlosser, Criminal Law* of New Jersey § 11:1 (3d ed. 1970).

The test for determining whether a defendant was arrested is that of the objective reasonable person. The inquiry is, after "considering all the surrounding circumstances," would a reasonable person conclude that he or she is not free to leave. *State v. Craig*, 237 *N.J. Super.* 407, 412 (App. Div. 1989), *certif. denied*, 121 *N.J.* 662 (1990). It is not necessary to announce an arrest in formal language. Rather, restraint of the person and restriction of liberty are the important factors. *State v. Evans*, 181 *N.J. Super.* 455, 458 (App. Div. 1981).

II. PROBABLE CAUSE FOR ARREST

In order to effectuate an arrest, the police must have probable cause to believe that an offense has been or is being committed. See, e.g., State v. Contursi, 44 N.J. 424, 428-29 (1965). There is no precise definition of the concept of "probable cause." Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000); State v. Davis, 50 N.J. 16, 23 (1967), cert. denied, 389 U.S. 1054, 88 S.Ct. 805, 19 L.Ed.2d 852 (1968). Probable cause is more than mere suspicion but less than the legal evidence necessary to convict. State v. Mark, 46 N.J. 262, 271 (1966); Sanducci v. City of Hoboken, 315 N.J. Super. 475 (App. Div. 1998); State v. Judge, 275 N.J. Super. 194, 200 (App. Div. 1994). It is a reasonable basis for the belief that a crime has been or is being committed. Wildoner, 162 N.J. at 389; State v. Waltz, 61 N.J. 83, 87 (1972); State v. Burnett, 42 N.J. 377, 386 (1964); Sanducci, 315 *N.J. Super.* at 481.

A reasonable belief may be supported in part by evidence inadmissible in a courtroom, including hearsay and prior convictions. *State v. Burnett,* 42 *N.J.* at 387. Whether there was probable cause to arrest is judged by examining the practical considerations of everyday life as tested by reasonably prudent persons. *Brinegar v. United States,* 338 *U.S.* 160, 175, 69 *S.Ct.* 1302, 93 *L.Ed.* 1879

(1949); Wildoner, 162 N.J. at 389; State v. Waltz, 61 N.J. at 87; State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984). The reviewing court can rely upon a police officer's "common and specialized experience" when dealing with everyday evolving conflicts on the streets. Wildoner, 162 N.J. at 390; Sanducci, 315 N.J. Super. at 481. There is no discernible difference in the standard for determining probable cause for searches and arrest. State v. Smith, 155 N.J. 83, 92, cert. denied, 525 U.S. 1033, 119 S.Ct. 576, 142 L.Ed.2d 480 (1998); State v. Sims, 75 N.J. 337 (1978).

III. WARRANTLESS ARRESTS BY POLICE OFFICERS

A. Adults

A police officer has the authority to arrest without a warrant if he has a reasonable basis to believe that a crime, punishable by imprisonment for more than one year in state prison, has been or is being committed by the person to be apprehended, whether or not the crime was committed in the officer's presence. State v. Henry, 133 N.J. 104, 110, cert. denied, 510 U.S. 484, 114 S.Ct. 486, 126 L.Ed.2d 436 (1993); State v. Doyle, 42 N.J. 334, 349 (1964); N.J.S.A. 40A:152.1. Police officers also are empowered by statute to arrest a person for breach of the peace or any disorderly offense committed in their presence. N.J.S.A. 40A:14-152. See, State v. Vonderfecht, 284 N.J. Super. 555, 558 (App. Div. 1995) (police can arrest a person without warrant for any petty or disorderly conduct when committed in the officer's presence); State v. Hurtado, 219 N.J. Super. 12, 27-28 (App. Div. 1987) (Skill man, J.A.D., dissenting), rev'd on dissent, 113 N.J. 1 (1988)(littering or potentially not responding to summons is not a breach of peace and therefore invalid warrantless arrest). Police officers are empowered by statute to engage "in fresh pursuit" of any suspect whom the officer reasonably believes committed a high misdemeanor or for any criminal offense in the officer's presence. N.J.S.A. 2A:156-1.

"Presence" has been defined as the requirement that the officer knew of the event by the use of his senses. *State v. Smith*, 37 *N.J.* 481, 495 (1962), *cert. denied*, 374 *U.S.* 835, 83 *S.Ct.* 1879, 10 *L.Ed.*2d 1055 (1963). *See, State v. Judge*, 275 *N.J. Super.* at 202 (smell of burnt marijuana in motor vehicle that violated motor vehicle laws established probable cause). An admission to the police that an offense was committed satisfies the "presence" requirement. *State v. Morse*, 54 *N.J.* 32, 36 (1969). *See also State v. Dickens*, 130 *N.J. Super.* 73, 76-77 (App. Div. 1974); *State v. Macuk*, 57 *N.J.* 1, 8 (1970). Arresting officers can also rely upon the facts and circumstances within their knowledge, and upon the totality of the circumstances. *Schneider v. Simonini*, 163 *N.J.* 336, 361 (2000), *cert. denied*, <u>U.S.</u>, 69 *U.S.L.W.* 3399 (2001). An otherwise legal warrantless arrest does not become illegal because a warrant could have been obtained. *State v. Henry*, 133 *N.J.* at 111.

The Motor Vehicle Act specifically requires a violation to have occurred in an officer's presence to support a warrantless arrest. *See, N.J.S.A.* 39:5-25; *Sanducci,* 315 *N.J. Super.* at 475; *State v. Judge,* 275 *N.J. Super.* at 200. *See also, State v. O'Donnell,* 192 *N.J. Super.* 128 (App. Div. 1983) (arrest proper when motor vehicle violation occurred within presence of officer notwith-standing that violation occurred beyond officer's territorial jurisdiction); *State v. Seymour,* 289 *N.J. Super.* 80 (App. Div. 1996) (where trooper signaled driver to stop and driver attempted to elude trooper vehicle, arrest was proper).

The probable cause necessary to support an arrest does not require that the officer actually see the vehicle in motion. *See State v. Garbin,* 325 *N.J. Super.* 521 (App. Div. 1999) (warrantless arrest warranted under *N.J.S.A.* 39:4-50, where defendant was in truck in his garage with tires spinning and truck pushing up against garage), *certif. denied,* 164 *N.J.* 560 (2000).

Police may arrest a suspect in his or her home without a warrant when in "hot pursuit" and under "exigent circumstances." *State v. Jones*, 143 *N.J.* 4, 19 (1995). However, it is unreasonable for police in hot pursuit to follow an individual suspected of committing disorderly persons offenses into a residence to make a warrantless arrest. *Welsh v. Wisconsin*, 466 *U.S.* 740, 104 *S.Ct.* 2091, 80 *L.Ed.*2d 732 (1984) (police cannot make warrantless in-home arrest for traffic offense); *Payton v. New York*, 445 *U.S.* 573, 100 *S.Ct.* 1371, 63 *L.Ed.*2d 639 (1980) (invalidated New York law that permitted warrantless inhome arrests for felonies); *State v. Bolte*, 115 *N.J.* 579, *cert. denied*, 493 *U.S.* 936, 110 *S.Ct.* 330, 107 *L.Ed.*2d 320 (1989) (cannot make warrantless in-home arrest for traffic violations).

B. Juveniles (See also, JUVENILES, this Digest)

Juveniles are subject to the same criteria for lawful arrest as adults, supplemented by additional rules of court pertaining to juvenile offenses. *State ex rel. J.B.*, 131 *N.J. Super.* 6, 14 (J. & D. R. Ct. 1974); *State v. Torres*, 313 *N.J. Super.* 129, 145 (App. Div.) ("[o]ur Legislature has accorded juveniles all rights given to adults charged

with a crime"), certif. denied, 156 N.J. 425 (1998); State v. Ferguson, 255 N.J. Super. 530 (App. Div. 1992); see, N.J.S.A. 2A:4A-40 (defenses available to adults are also available to juveniles). A law enforcement officer may take into custody without process a juvenile whom the officer has probable cause to believe is delinquent as defined by N.J.S.A. 2A:4A-23. See R. 5:21-1; N.J.S.A. 2A:4A-31a. The taking of a juvenile into custody is not to be construed as an arrest. It is instead considered "a measure to protect the health, morals and well-being of the juvenile." N.J.S.A. 2A:4A-31c; R. 5:21-1. Probable cause in delinquency cases is exactly the same as in adult offenses. State ex rel. J.B., 131 N.J. Super. at 14.

There is no requirement that a police officer obtain an arrest warrant before going to a dwelling to question the occupants concerning the whereabouts of a juvenile delinquent. *State v. Cooper,* 211 *N.J. Super.* 1 (App. Div. 1986).

C. Nature and Source of Information

An ordinary citizen who reports a crime occupies a different status as a source of information for a warrantless arrest than the traditional police informer. Wildoner v. Borough of Ramsey, 162 N.J. at 390; State v. Davis, 104 N.J. 490, 506 (1986); Sanducci v. City of Hoboken, 315 N.J. Super. at 482; State v. Canola, 135 N.J. Super. 224, 230 (App. Div. 1975), modified on other grounds, 73 N.J. A citizen informer may generally be 206 (1977). regarded as trustworthy and motivated by factors consistent with law enforcement. Wildoner, 162 N.J. at 391 (citizens who report criminal activity have indicia of reliability)); State v. Lakomy, 126 N.J. Super. 430, 435 (App. Div. 1974) (citizens who report crime do not expect monetary gain in exchange for information). Accordingly, there is no need to verify the credibility and reliability of this individual before appropriate police action is undertaken. State v. Canola, 135 N.J. Super. at 230. Information from a known citizen who was merely unidentified by name can provide probable cause for a warrantless arrest. State v. Sibilia, 330 N.J. Super. 496 (App. Div. 2000) (unnamed citizen who told police of illegal narcotics sales, described defendant, escorted police and pointed out defendant).

To satisfy a finding of probable cause, the citizen's information should come from personal observation or knowledge. *State v. Gagen*, 162 *N.J. Super.* 105, 113 (App. Div. 1978); *see, Wildoner*, 162 *N.J.* at 391 (after overhearing defendant threaten wife, citizen telephoned police and then "waited at scene and confirmed her report

to police"); *Sanducci*, 315 *N.J. Super.* at 482 (citizen gave sworn statement and was victim of crime).

Information received from informants, however, is treated differently. An informant's veracity and knowledge are two critical factors. *State v. Caldwell*, 158 *N.J.* 452, 460 (1999) (although a reliable informant, information about suspect's race and sex alone was "clearly inadequate"); *State v. Smith*, 155 *N.J.* at 83 (informant's tip evaluated under "totality of the circumstances" test and bolstered by police independent corroboration) (citing *Illinois v. Gates*, 462 *U.S.* 213, 103 *S.Ct.* 2317, 76 *L.Ed.*2d 527 (1983). Another important factor to support the tip is whether the details are corroborated by police. *Smith*, 155 *N.J.* at 95-96. (*See also,* **SEARCH** and **SEIZURE**, this Digest).

IV. WARRANTLESS ARRESTS BY PRIVATE CITIZENS

A private citizen can arrest a disorderly person if the offense is committed in his or her presence. *N.J.S.A.* 2A:169-3. When an arrest is made without a warrant, the prisoner must be taken without unnecessary delay before the nearest available judge, a complaint should be filed and a warrant issued. *R.* 3:4-1; *State v. Ferraro,* 81 *N.J. Super.* 213, 218 (Cty. Ct. 1963).

At common law, a private person may arrest another where a felony has been committed and the citizen had probable cause to believe that the person arrested committed the crime. *Rueck v. McGregor*, 32 *N.J.L.* 70, 74 (Sup. Ct. 1866); *see also, Barletta v. Golden Nugget Hotel Casino,* 580 *F. Supp.* 614, 619 (*D.N.J.* 1984); *State v. McCarthy,* 123 *N.J. Super.* 513, 517 (County Ct. 1973). If no felony has been committed, the arresting citizen may be sued for false arrest. *Rueck v. McGregor,* 32 *N.J.L.* at 70.

By statute, certain citizens have been given the authority to "cause the arrest" of a person under specified circumstances. *See N.J.S.A.* 2C:20-11e (A merchant, who has probable cause to believe that a person has shoplifted, and where the merchant can recover the merchandise by taking the person into custody, may take the person into custody and detain the person in a reasonable manner for a reasonable time.); *Horn v. Village Supermarkets, Inc.,* 260 *N.J. Super.* 165 (App. Div. 1992), *certif. denied,* 133 *N.J.* 435 (1993); *Carollo v. Supermarkets General Corp.,* 251 *N.J. Super.* 264 (App. Div. 1991), *certif. denied,* 127 *N.J.* 559 (1992).

In addition, licensed casino employees, who have probable cause to believe that a person violated *N.J.S.A.* 5:12-113 to 5:12-116 of the Casino Control Act, may take such a person into custody. The suspect may be detained only in a reasonable manner for a reasonable length of time for the purpose of notifying law enforcement or casino control commission authorities. *N.J.S.A.* 5:12-121. See Pantalone v. Bally's Park Place Casino Hotel, 228 N.J. Super. 121 (App. Div. 1988). *N.J.S.A.* 5:12-121, however, does not apply to card counters. Bartolo v. Boardwalk Regency Hotel Casino, Inc., 185 N.J. Super. 534 (Law Div. 1982).

V. PROCEDURE AFTER A WARRANTLESS ARREST

When a suspect is lawfully arrested without a warrant, the arrested person must be taken to a police station. Depending upon the nature of the crime, the police prepare a Complaint-Warrant form (CDR2) or Complaint-Summons form (CDR1). R. 3:3-1(c); R.3:4-1. Where the crime involved is any of the serious crimes set forth in R. 3:3-1[©] or is a conspiracy or attempt to commit these crimes, a Complaint-Warrant form is prepared and a judicial officer must make a probable cause determination. See Powell v. Nevada, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994) (a delay of more than 48 hours between a warrantless arrest and a judicial determination of probable cause is presumptively unreasonable under the Fourth Amendment); State v. Tucker, 137 N.J. 259 (1994) (probable cause determination should be made within twelve hours of arrest), cert. denied, 513 U.S. 1090, 115 S.Ct. 751, 130 L. Ed. 2d 651 (1995). If probable cause is found, a warrant is issued and bail set within twelve hours after arrest. R. 3:4-1(a)(2); 3:4-1(b).

Similarly, a warrant may be issued for other offenses if various other factors, including the person's failure to respond to a prior summons, are present. R. 3:3-1c(2)-(6).

If a judicial officer finds probable cause that an offense has been committed which is not listed as one of the serious offenses in the rule, and that the person will respond to a summons, a summons will be issued. R. 3:3-1(b), -1(c)(2) and (c)(6); 3:4-1(a)(2). If a Complaint-Summons form is prepared or issued, a suspect may be detained only for the purpose of completing all of the post-arrest identification procedures required by law. R. 3:4-1(c). Thereafter, the defendant will then be brought before a court to set bail according to R. 3:4-2, or within 72 hours if the defendant is in custody. See, e.g., Connor

v. Powell, 162 *N.J.* 397, 410-411 (1998), *cert. denied*, *U.S.*, 120 *S.Ct.* 2220, 147 *L.Ed.* 2d 251 (2000); *Sanducci v. City of Hoboken*, 315 *N.J. Super.* at 484-85 (in both cases, defendant should have been issued a Complaint-Summons and released on a plain reading of *R.* 3:4-1(b)).

VI. ARRESTS WITH WARRANTS

A. Who May Issue

An arrest warrant is issued from the municipality or city where the offense is alleged to have been committed or where the defendant is found. In that location, a municipal judge, clerk, deputy clerk administrator, deputy administrator, can issue an arrest warrant upon a finding of good cause. *R.* 3:2-3; *R.* 3:3-1; *N.J.S.A.* 2B:12-21. A police officer can issue a complaint summons for an offense without the requirement that probable cause be found by a judicial officer. *R.* 3:3-1(b)(2); *State v. Kennison,* 248 *N.J. Super.* 126 (App. Div. 1991).

The probable cause determination in issuing a warrant must be made by an impartial, neutral judicial officer. Wong Sun v. United States, 371 U.S. 471, 481-82, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); see State v. Jones, 143 N.J. at 4; see also Illinois v. Gates, 462 U.S. at 213, 103 S.Ct. at 2332, 76 L.Ed.2d at 527, holding that the task of the magistrate issuing a search warrant is to make a practical, common-sense decision, given all the circumstances in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, as to whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. Court clerks and deputy court clerks possess the necessary neutrality and qualifications to issue warrants. Shadwick v. Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1968); State v. Ruotolo, 52 N.J. 508 (1968); R. 3:3-1(a)(1).

B. Form and Content of Warrant

An arrest warrant is made on a Complaint-Warrant form (CDR2). *R.* 3:2-3. The warrant must contain the defendant's name, or if unknown, "any name or description which identifies the defendant with reasonable certainty." The warrant shall also set forth the offense charged in the complaint and shall be signed by the judge, clerk, deputy clerk, municipal court administrator or deputy administrator. *Id. See also, R.* 3:3-1 (issuance of an arrest warrant or summons by

complaint). When probable cause is found, the arrest warrant or summons must state so on its face. *R.* 3:3-1(a).

C. Execution

An arrest warrant shall be executed by an "officer authorized by law." R. 3:3-3(a). The officer need not have the warrant in his possession at the time of arrest. R. 3:3-3(c). It is sufficient for the officer to inform the defendant that a warrant has been issued and the exact offense charged. If requested by defendant, the officer should show the warrant to the defendant as soon as possible. R. 3:3-3(c).

Where a criminal complaint is not signed by a complainant while under oath in the presence of a judicial officer, the arrest warrant issued pursuant to the complaint is defective. State v. Bobo, 222 N.J. Super. 30 (App. Div. 1987). See State v. Gonzalez, 114 N.J. 592. (1989) (officer's failure to sign traffic summons was not fatal defect); State v. Brennan, 229 N.J. Super. 342 (App. Div. 1988) (officer's failure to sign summons within thirty days of issuance was fatal defect); State v. Latorre, 228 N.J. Super. 314 (App. Div. 1988) (whether officer's failure to sign DWI summons rises to level of fatal defect depends upon circumstances such as fundamental fairness or prejudice to defendant). In Bobo, the complainant gave the relevant information to a police officer who typed up the complaint and went, without the complainant, to a deputy court clerk who issued the warrant. Such a procedure was held to violate the Fourth Amendment and the New Jersey Constitution.

In State v. Egles, 308 N.J. Super. 124 (App. Div. 1998), the Appellate Division reversed a dismissal of a complaint charging disorderly conduct and resisting arrest. The court noted that an arrest warrant could be based upon a disorderly conduct complaint, but here the warrant itself was not issued until after the police had arrested defendant. The court ruled that the trial court should have granted the State's request to amend the Complaint-Warrant to a Complaint-Summons pursuant to R. 3:3-4, since the complaint remained the same and only the means of process changed. Dismissing the complaint was too drastic an action for a mere defect of process which could have been cured by amending the complaint to a Complaint-Summons. The appropriate remedy for an improper arrest is suppression of any evidence seized in connection with that arrest, not dismissal of the entire complaint.

Note, according to the Vienna Convention, whenever a foregin national is arrested, the foreign national should be informed of the right to contact the consulate. *State v. Cevallos-Bermeo*, 333 *N.J. Super*, 181 (App. Div.), *cert. denied*, 165 *N.J.* 607 (2000).

VII. GEOGRAPHICAL LIMITATIONS ON ARRESTS

A. Warrantless Arrests

Ordinarily a police officer can make a warrantless arrest only within his or her own municipality. *N.J.S.A.* 40A:14-152; *State v. Williams*, 136 *N.J. Super.* 544, 548 (Law Div. 1975); *State v. McCarthy*, 123 *N.J. Super at* 517. However, an officer can pursue persons who have committed or are suspected of having committed felonies to other states which have signed the Uniform Law on Fresh Pursuit, *N.J.S.A.* 2A:155-1 *et seq.*

Police officers also may make warrantless arrests beyond their municipal boundaries when in fresh pursuit of persons they reasonably believe have committed a high misdemeanor. See State v. White, 305 N.J. Super. 322 (App. Div. 1997) (statute did not prevent municipal police officers from conducting consent search outside jurisdiction); State v. Montalvo, 280 N.J. Super. 377, 381 (App. Div. 1995) (authority extended to municipal police responding to another municipality's call for mutual aid). In addition, municipal officers are entitled to pursue and arrest persons throughout the State when the offense is committed in the officer's presence. See N.J.S.A. 40A:14-152.1. Other exceptions to the rule include: motor vehicle violations committed in the police officer's presence, N.J.S.A. 39:5-25 (see, supra at § III), and a police officer's making a citizen's arrest in accordance with the rules governing civilian arrests. State v. Cohen, 139 N.J. Super. 561, 564-65 (App. Div. 1976), aff'd with modification, 73 N.J. 331 (1977).

B. Execution of Arrest Warrants

N.J.S.A. 40A:14-152 establishes that police officers "shall have the power to serve and execute process issuing out of the courts having local criminal jurisdiction in the municipality...." This statute has been interpreted to allow police officers to execute warrants only in their own municipalities except in cases of fresh pursuit. *See, State v. Gadsden,* 303 *N.J. Super.* 491, 503 (App. Div.), *certif. denied,* 152 *N.J.* 187 (1997) (defendant's arrest for armed robbery by officers beyond municipality violated *N.J.S.A.* 40A:14-152, but violation was procedural or technical and did not violate defendant's constitutional rights warranting suppression of evidence). The State

Police, however, can execute warrants throughout the State. *N.J.S.A.* 53:2-1.

C. Port Authority Police

Port Authority Police have jurisdiction throughout the entire Port District (defined in *N.J.S.A.* 32:1-3). *State v. Cohen,* 73 *N.J.* 331 (1977).

VIII. ARREST AND DWELLINGS

"For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York,* 445 *U.S.* at 603, 100 *S.Ct.* at 1388, 63 *L.Ed.*2d at 661 (*quoted in State v. Jones,* 143 *N.J.* at 4). In the absence of exigent circumstances or consent, however, a search warrant is necessary before a law enforcement officer may enter the home of a third party to execute an arrest warrant. *Steagald v. United States,* 451 *U.S.* 204, 101 *S.Ct.* 1642, 68 *L.Ed.*2d 38 (1981).

A warrantless, non-consensual entry into a suspect's home, in order to make a felony arrest, is prohibited absent probable cause and exigent circumstances. *See State v. Bolte*, 115 *N.J.* at 585-86; *State v. Henry*, 133 *N.J.* at 104.

An important factor to consider in determining whether exigent circumstances exist is the gravity of the underlying offense. See Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (warrantless entry upheld when police reasonably believed that third party had right to consent to police entry); Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (no exigent circumstances shown to satisfy warrantless arrest and entry where defendant staying in friend's home); Welsh v. Wisconsin, 466 U.S. at 740, 104 S.Ct. at 2091, 80 L.Ed.2d at 732 (disapproving a warrantless nighttime entry into a private dwelling, without consent, to make an arrest for a non-criminal drunk driving offense); State v. Bolte, 115 N.J. at 579 (officer who observed motorist's motor vehicle offenses could not enter motorist's home to make warrantless arrest).

If a valid arrest warrant is issued and executed at a suspect's home, and the police reasonably believed that the person who was present was the suspect, the arrest is valid even if the person arrested is the wrong person. *See e.g.*, *Hill v. California*, 401 *U.S.* 797, 91 *S.Ct.* 1106, 28

L.Ed.2d 484 (1971); State v. Green, 318 N.J. Super. 346 (App. Div. 1999), aff'd, 163 N.J. 140 (2000).

A suspect may not take advantage of the stringent requirements for warrantless home arrests by retreating into a home when the warrantless arrest has been set in motion in a public place. *United States v. Santana,* 427 *U.S.* 38 (1976); *see also, State v. Josey,* 290 *N.J. Super.* 17 (App. Div.) (warrantless arrest and entry proper where police observed defendant's sale of cocaine outside and defendant fled into apartment), *certif. denied,* 146 *N.J.* 497 (1996).

When a person is lawfully arrested in his home, the police have an absolute right to remain with the accused to monitor his or her movements. *See, Washington v. Chrisman,* 455 *U.S.* 1, 5, 102 *S.Ct.* 3106, 69 *L.Ed.*2d 969 (1982); *State v. Bruzzese,* 94 *N.J.* 210, 230 (1983), *cert. denied,* 465 *U.S.* 1030, 104 *S.Ct.* 1295, 79 *L.Ed.*2d 695 (1984). The police, however, may not use an arrest warrant as an excuse to conduct an exploratory search of the suspect's home. *See Bruzzese,* 94 *N.J.* at 235; *State v. Seiss,* 168 *N.J. Super.* 269 (App. Div. 1979). The police monitoring of the arrested person's movements must be conducted in an objectively reasonable fashion. *Bruzzese,* 94 *N.J.* at 234. (*See also,* **SEARCH** and **SEIZURE**, this Digest).

Notwithstanding a valid arrest warrant and lawful entry into a home by police, the Fourth Amendment is violated when news reporters, photographers or other third parties, "who rode along," enter the defendant's home. *Wilson v. Layne*, 526 *U.S.* 603, 119 *S.Ct.* 1692, 1699, 143 *L.Ed.*2d 818 (1999).

The "knock and announce rule" requires police officers to demand admittance and explain their purpose prior to breaking into a dwelling for the purpose of making an arrest. The "knock and announce" rule is a component of the Fourth Amendment reasonableness inquiry. *Wilson v. Arkansas,* 514 *U.S.* 927, 115 *S.Ct.* 1914, 131 *L.Ed.*2d 976 (1995) (police should knock and announce except under certain circumstances). Three exceptions to this rule are when: 1) immediate action is necessary to preserve evidence, 2) the officer's peril would be increased, or 3) the arrest would be frustrated. *State v. Jones,* 143 *N.J.* at 4; *State v. Love,* 233 *N.J. Super.* 38 (App. Div. 1989), *certif. denied,* 118 *N.J.* 188 (1989) (failure to knock and announce did not invalidate arrest where evidence could be destroyed).

IX. DETENTION ON LESS THAN PROBABLE CAUSE

A. Stop and Frisk

When a police officer has a reasonable basis to believe that criminal activity might be afoot and that the individuals with whom he is dealing might be armed and presently dangerous, then the officer has the right to stop defendant and, for protective purposes, to conduct a carefully limited search of the outer clothing of defendant in order to discover any weapon. Although the "frisk" or "pat down" is a "seizure" within the meaning of the Fourth Amendment, the police officer needs only an articulable reasonable basis to justify the search. *See Illinois v. Wardlow*, 120 *S.Ct.* 673, 145 *L.Ed.*2d 570 (2000); *Terry v. Ohio*, 392 *U.S.* 1, 88 *S.Ct.* 1868, 20 *L.Ed.*2d 889 (1968); *State v. Caldwell*, 158 *N.J.* at 458; *State v. Citarella*, 154 *N.J.* 272, 278 (1998).

In determining whether a police officer has reasonable cause for a stop and frisk, the "totality of the circumstances" are considered. United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); State v. Caldwell, 158 N.J. at 459. The standard to review an investigatory stop is "if the officer's observations, in 'view of the officer's experience and knowledge, taken together with rational inferences drawn from those facts,' warrant a 'limited intrusion upon the individual's freedom.'" State v. Caldwell, 158 N.J. at 459 (citation omitted). Based on the totality of the circumstances, an informant's tip may support a finding of good cause to warrant a stop and frisk. State v. Caldwell, 158 N.J. at 452; State v. Zutic, 155 N.J. 103 (1998); State v. Smith, 155 N.J. at 83. See also Florida v. J. L., 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (anonymous call alone identifying defendant as having a gun does not justify stop and frisk of juvenile). (See also, SEARCH AND SEIZURE, this Digest).

B. Motor Vehicle Stop

New Jersey has a compelling interest in maintaining safe highways with safe drivers. *State v. Donis*, 157 *N.J.* 44, 51 (1998). A police officer may stop a motor vehicle if the officer has a reasonable articulable suspicion that the driver has committed a motor vehicle offense. *State v. Locurto*, 157 *N.J.* 463, 470 (1999).

Except where there is a reasonable articulable suspicion to believe a motorist is unlicensed or a vehicle is unregistered or that the vehicle or occupant is otherwise subject to seizure for violation of the law, the stopping of an automobile and detaining of the driver to check his license and registration are improper under the Fourth Amendment. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); State v. Zapata, 297 N.J. Super. 160 (App. Div. 1997), certif. denied, 156 N.J. 405 (1998). A motor vehicle stop is always justified where the police have probable cause to believe that the motorist has violated the law. Whren v. United States, 517 U.S. 806, 817, 116 S.Ct. 1769, 135 L.Ed.2d 89, 100 (1996) (in high drug area, plain clothes police in unmarked car observed youthful driver in new car with temporary plates driving at unreasonable speed); State v. Dickey, 152 N.J. 468, 475-76 (1998) (driving thirty four miles per hour on interstate in middle lane, driver had blood shot eyes, trembling hands, could not produce insurance or car registration, could not say who car belonged to or where he was coming from); State v. Donis, 157 N.J. at 44 (police may use "mobile data terminal" to inquire about motorist's license plate number, before police observe motor vehicle violation). But see State v. Lark, 163 N.J. 294, 296 (2000) (driving without a license is insufficient grounds for custodial arrest).

The individual states, however, are not precluded from developing procedures for spot checks that are not totally discretionary. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (following a balancing test, the Court upheld DWI roadblock briefly stopping each vehicle as minimal intrusion versus state interest to prevent drunk driving). Sobriety roadblocks are valid if properly put in place. State v. Mazurek, 237 N.J. Super. 231, 238 (App. Div. 1989), certif. denied, 121 N.J. 623 (1990) (following balancing test, DWI check point was a properly targeted location that was efficacious). (See also, SEARCH and SEIZURE this Digest.)

If a motorist is stopped for a suspected traffic violation, an officer may request that the driver exit the vehicle as a safety precaution. *Pennsylvania v. Mimms*, 434 *U.S.* 106, 98 *S.Ct.* 330, 54 *L.Ed.*2d 331 (1997); *Maryland v. Wilson*, 519 *U.S.* 408, 117 *S.Ct.* 882, 137 *L.Ed.*2d 41 (1997); *State v. Smith*, 134 *N.J.* 599 (1994); *State v. Lund*, 119 *N.J.* at 35.

If an officer has a reasonable suspicion based upon specific articulable facts that a vehicle is occupied by illegal aliens, he may stop the vehicle, question its occupants about their citizenship and immigration status and ask them to explain suspicious circumstances. *United States v. Brignoni-Ponce*, 422 *U.S.* 873, 881, 95 *S.Ct.* 2574, 45 *L.Ed.*2d 607 (1975). Further detention must be based upon consent or probable cause that criminal activity is afoot.

In certain cases, police may stop a vehicle based on an informant's tip. *See Alabama v. White*, 496 *U.S.* 325, 110 *S.Ct.* 2412, 110 *L.Ed.*2d 301 (1990) (corroborated, anonymous tip could justify investigatory stop of vehicle); *State v. Williams*, 317 *N.J. Super.* 149 (App. Div. 1998), *certif. denied*, 157 *N.J.* 647 (1999) (stop of vehicle upheld based on known citizen tip that defendants had a gun).

In some circumstances, the police may stop a car under the police's community caretaking function. *State v. Cryan,* 320 *N.J. Super.* 325 (App. Div. 1999) (slow driving insufficient suspicion to justify stop); *State v. Martinez,* 260 *N.J. Super.* 75 (App. Div. 1992) (slow driving at 2:00 a.m. in residential neighborhood justified stop).

C. Investigatory Detention

While a stop may be lawful, the length of the period of detention may transform the stop into an illegal detention. Whether the period of detention is reasonable depends upon whether it was "reasonably related in scope to the circumstances which justified the interference in the first place." *State v. Dickey*, 152 *N.J.* at 476 (quotation omitted). There is no hard and fast rule governing length of time. *United States v. Sharpe*, 470 *U.S.* 675, 105 *S.Ct.* 1568, 84 *L.Ed.*2d 605 (1985); *State v. Dickey*, 152 *N.J.* at 476. The detention must be no more than necessary and must be only minimally intrusive. *State v. Dickey*, 152 *N.J.* at 478.

The reasonableness of the investigative detention itself depends upon "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brown v. Texas*, 443 *U.S.* 47, 50, 99 *S.Ct.* 2637, 61 *L.Ed.*2d 357, 361 (1979).

1. Police Station

In the absence of probable cause or an arrest warrant an individual may not be detained at the police station for the purposes of custodial interrogation. *Dunaway v. New York,* 442 *U.S.* 200, 99 *S.Ct.* 2248, 60 *L.Ed.*2d 824 (1979) (seizure of suspect who was involuntarily taken to police station was indistinguishable from an arrest and required probable cause and not just reasonable suspicion); *Brown v. Illinois,* 422 *U.S.* 590, 95 *S.Ct.* 2254, 45 *L.Ed.*2d 416 (1975) (individual brought to police station without probable cause or warrant for custodial interrogation was illegally "arrested" and incustody statements were not admissible despite intervening *Miranda* warnings); *State v. Johnson*, 118 *N.J.* 639 (1990) (custodial interrogation for ten hours illegal); *State v. Hurtado*, 219 *N.J. Super.* at 23 (transportation of defendant who violated a municipal ordinance to verify defendant's identity was a valid detention, but warrantless arrest and detention on misdemeanor was unlawful).

However, a person may be brought to the police station to verify identity. *Illinois v. Lafayette*, 462 *U.S.* 640, 103 *S.Ct.* 2605, 77 *L.Ed.*2d 65 (1983); *State v. Lark*, 163 *N.J.* at 294; *Hurtado*, 219 *N.J. Super.* at 23. Police may also bring a person to the police station for questioning for a limited time. *State v. Smith*, 307 *N.J. Super.* 1, 9 (App. Div. 1997), *certif. denied*, 153 *N.J.* 216 (1998). Unlike custodial interrogation, *Miranda* rights do not attach in an investigatory detention. *Ibid*; *see also State v. Timmendequas*, 161 *N.J.* 515, 615 (1999).

2. On-The-Street

Police can approach people on the street for a "field inquiry" without having specific grounds for suspicion. *State v. Maryland*, 327 *N.J. Super.* 436 (App. Div. 2000), *certif. granted*, A-118-99, _____ *N.J.* ____ (2000); *State v. Contreras*, 326 *N.J. Super.* 528 (App. Div. 1999); *State v. ex. rel. J. G.*, 320 *N.J. Super.* 21 (App. Div. 1999).

A police officer may not stop and detain an individual against his or her will for the purpose of requiring that person to prove identification, unless he has a reasonable suspicion that the person is or was engaged in criminal activity. *See Brown v. Texas*, 443 *U.S.* at 47, 99 *S.Ct.* at 2637, 61 *L.Ed.*2d at 357; *State v. Lark*, 319 *N.J. Super.* 618 (App. Div. 1999), *aff*'d, 163 *N.J.* 294 (2000); *State v. Alexander*, 191 *N.J. Super.* 573 (App. Div. 1983), *certif. denied*, 96 *N.J.* 267 (1984). A statute requiring that persons who loiter or wander on the streets must provide "credible and reliable" identification is unconstitutionally vague although the initial detention may be justified. *Kolender v. Lawson*, 461 *U.S.* 352, 103 *S.Ct.* 1855, 75 *L.Ed.*2d 903 (1983).

3. Airports

Where an involuntary detention of an individual exceeds the limits imposed by *Terry*, the individual's consent to search his luggage may be tainted by the illegal detention. In *United States v. Mendenhall*, 446 *U.S.* 544

100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the Court ruled that defendant was not "seized" within the meaning of the Fourth Amendment as her airline ticket and identification were returned after inspection by federal Her consent to the search of her luggage, agents. therefore, was voluntary. In light of all the circumstances, a reasonable person would have believed she was free to leave. Cf. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (where defendant's ticket and identification were not returned, his luggage was seized and he was not advised that he need not consent to the search of his baggage, the defendant was illegally detained in violation of *Terry*, since there was no probable cause to arrest). See United States v. Sokolow, 490 U.S. at 1, 109 S.Ct. at 1581, 104 L.Ed.2d at 1 (agents had reasonable basis to stop suspect as drug courier who paid \$2,100 for tickets in cash, possessed in excess of \$4,000 in cash, had unchecked luggage, spent less than 48 hours in city and traveled under possible alias).

4. Dwellings

A search warrant for contraband carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. *Michigan v. Summers*, 452 *U.S.* 692, 101 *S.Ct.* 2587, 69 *L.Ed.*2d 340 (1981). *See also State v. Hall,* 253 *N.J. Super.* 84 (Law Div. 1990), *aff'd,* 253 *N.J. Super.* 32 (App. Div. 1991); *State v. Meighan,* 173 *N.J. Super.* 440 (App. Div. 1980), *certif. denied,* 85 *N.J.* 122 (1980); *State v. Galvin,* 161 *N.J. Super.* 524 (Law Div. 1978).

5. R. 3:5A Investigative Detention

Before a formal criminal complaint is filed against an individual, the County Prosecutor or Attorney General may ask a judge of the Superior Court to issue an Order compelling a suspect to submit to nontestimonial identification procedures in order to obtain evidence of physical characteristics. *R.* 3:5A-1 to 5A-9. These physical characteristics include fingerprints, palm prints and blood samples.

The suspect is given 36 hours prior notice of an application for an Order of temporary detention unless the judge finds the application is emergent. *R.* 3:5A-3. To obtain such an order the State must demonstrate that: (a) a crime was committed and is under investigation, and (b) there is reasonable and well-grounded suspicion that the suspect committed the crime, and $^{\odot}$ the results obtained will "significantly advance" the investigation and determine if the suspect committed the crime, and (d) there is no other practical way to obtain the suspect's

samples. *R.* 3:5A-4; *See State v. Johnson*, 309 *N.J. Super.* 237 (App. Div.) (good faith use of *R.* 3:5A to obtain physical evidence of suspected murder, kidnaping and aggravated sexual assault from defendant), *certif. denied*, 156 *N.J.* 387 (1998); *State v. Rolle*, 265 *N.J. Super.* 482 (App. Div.) (conviction reversed where confession and evidence obtained exceeded scope of *R.*3:5A detention), *certif. denied*, 134 *N.J.* 562 (1993).

6. Motor Vehicles

A police officer's suspicions concerning a motorist's responses to inquiries may justify a period of detention. State v. Dickey, 152 N.J. at 479-80; State v. Chapman, 332 N.J. Super. 452 (App. Div. 2000). However, detaining motorists for over two hours, without articulable suspicion that the automobile contained drugs, was unwarranted. State v. Dickey, 152 N.J. at 486. See United States v. Sharpe, 470 U.S. at 675, 686-88, 105 S.Ct. at 1568, 1575-77, 84 L.Ed.2d at 605, 615-17 (twenty minute detention of vehicle was reasonable especially since delay was mostly defendant's fault); State v. Chapman, 332 N.J. Super. 452 (forty-five minute detention following stop was proper); see State v. Lark, 163 N.J. at 294 (where driver is without license and offers false information in response to reasonable inquiry, driver can be detained to discover identity, and if driver persists in concealment, driver can be taken into custody).

X. RESISTING ARREST (See also, OBSTRUC-TION OF JUSTICE and RESISTING ARREST, thisDigest)

N.J.S.A. 2C:29-2 provides that a person is guilty of resisting arrest if he purposely prevents a law enforcement officer from effecting a lawful arrest. *See, State v. Parsons,* 270 *N.J. Super.* 213 (App. Div. 1994). If the officer was acting in his official capacity and announced his intention to arrest prior to the resistence, it is no defense that the arrest was illegal. *N.J.S.A.* 2C:29-2a; *State v. Seymour,* 289 *N.J. Super.* at 85.

It is a disorderly persons offense to resist arrest where the accused flees from a police officer to prevent arrest even though he did not use physical force against the police officer. 2C:29-2(a); *Parsons*, 270 *N.J. Super*. at 213. The crime of resisting arrest becomes a fourth degree crime if the suspect threatens to use physical force or violence against the police or another person. *N.J.S.A.* 2C:29-2 a(1)-(2); *State v. Parsons*, 270 *N.J. Super*. at 213. The crimes of resisting arrest and aggravated assault do not merge. *Parsons*, 270 *N.J. Super*. at 222; *State v. Battle*, 256 N.J. Super. 268 (App. Div.), certif. denied, 130 N.J. 393 (1992).

The crime of eluding arrest by use of motor vehicle or boat is a crime of third degree and becomes a crime of second degree upon risk of bodily injury or death to any person. *State v. Wallace*, 158 *N.J.* 552 (1999); *State v. Green*, 318 *N.J. Super.* at 361 (second degree offense where defendant struck police officer with car and fled on foot). 'Injury' in the second degree crime of eluding is defined as risk of "bodily injury." *State v. Wallace*, 158 *N.J.* at 558.

If a citizen resists arrest, the police officer has the right and duty to employ the force reasonably necessary to overcome the resistence and make the arrest. *State v. Mulvihill*, 57 *N.J.* 151, 156 (1970). If the police officer uses excessive and unnecessary force in making an arrest, the citizen may counter with the use of force which is no greater than reasonably appears necessary. *Id.* at 156; *N.J.S.A.* 2C:3-4b(1)(a). If the person knows that his or her submission to the arrest will result in the police officer's ceasing to use unlawful excessive force, he or she must desist from the physically defensive actions or lose the privilege of self-defense. *State v. Mulvihill*, 57 *N.J.* at 157.

XI. USE OF FORCE IN MAKING ARREST (See also, POLICE and DEFENSES, this Digest)

If a police officer uses excessive force in effecting an arrest, with the purpose of injuring the suspect, the officer may be charged with official misconduct in office under N.J.S.A. 2C:30-2. State v. Lore, 197 N.J. Super. 277 (App. Div. 1984). See N.J.S.A. 2C:3-7 (limitations on use of force); N.J.S.A. 2C:3-9 (defense of use of force not justified where reckless or negligent and/or causes injury to innocent party, or erroneous underlying arrest); Graham v. Conner, 490 U.S. 386, 443 S.Ct. 1865, 104 L.Ed.2d 109 (1989) (the use of excessive force is measured by objective reasonableness under totality of circumstances); Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (deadly force may not be used unless it is necessary to prevent an escape and the police officer has probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, or poses a threat of serious physical harm either to the officer or other).

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

I. ARSON: SCOPE OF THE OFFENSE

Under *N.J.S.A.* 2C:17-1, a person is guilty of arson when he causes a fire or an explosion that injures the property or person of another, confers or receives a benefit for causing a fire, or fails to combat a fire when he has a duty to do so.

In *State v. Williams*, 263 *N.J. Super* 620 (App. Div.), *certif. denied*, 134 *N.J.* 477 (1993), the Appellate Division held that the owner of a car who hires someone to burn that car may be held legally accountable as an accomplice to the arsonist. Under pre-Code law an owner could not be held criminally liable for burning his own car, and defendant here claimed that since he could not be liable as a principal, he could not be liable as an accomplice. The Appellate Division noted that even if the pre-Code law survived the Code, which it doubted, the Legislature was free to prohibit the owner from soliciting or aiding another in burning the car, which was determined to be a "structure," even if it did not prohibit the owner from burning the car himself.

II. EVIDENCE

In State in the Interest of M.C., 335 N.J. Super. 325, No. 5799-98T1 (App. Div. Dec. 5, 2000), the Appellate Division reversed defendant's convictions for arson, N.J.S.A. 2C:17-1b, failure to report a dangerous fire, N.J.S.A. 2C:17-1c(2), recklessly causing widespread damage, N.J.S.A. 2C:17-2b, and criminal mischief, N.J.S.A. 2C:17-3, because defendant was unaware of the fire set by his codefendant, and therefore did not share codefendant's purpose, even though he saw some smoke afterwards. Slip op. at 4-6. The Court also concluded that spraying aerosol cans into disposable lighters creating blow torches that projected into the air alone was incapable of satisfying the mental or causation requirements of the "purposely starts a fire" element as proscribed by N.J.S.A. 2C:17-1b. Slip op at 2-4.

Likewise, in *State in the Interest of M.N.*, 267 *N.J. Super.* 482 (App. Div. 1993), the Appellate Division concluded that the finding that the juvenile "purposely" lit a match does not in the circumstances of the case satisfy the requirements of "purposely starts a fire" as proscribed in *N.J.S.A.* 2C:17-1b. Purposely lighting a match, in the

absence of an additional act or omission by the accused, could not in these circumstances have "[t]hereby recklessly plac[ed]" the structures of another in danger. *N.J.S.A.* 2C:17-1b(2). As a matter of fundamental fairness, the State could not represent to the trial court the charge of third-degree criminal mischief upon which the trial court had failed to make a determination.

In State v. Krieger, 193 N.J. Super. 568 (App. Div. 1983), rev'd and aff'g dissent below, 96 N.J. 256, cert. denied, 469 U.S. 1017, 105 S.Ct. 431, 83 L.Ed.2d 358 (1984), the trial court properly denied defendant's motion for judgement of acquittal at the close of the State's case on the ground that the State presented sufficient independent proofs to corroborate defendant's confession to arson. These corroborative proofs included the factual circumstances — such as the time, place, and method used to ignite the flames — surrounding the two fires which defendant admitted setting. See also State v. Lucas, 30 N.J. 37 (1959); but cf. State in the Interest of J.F., 286 N.J. Super. 89 (App. Div. 1995).

In State v. Parton, 251 N.J. Super. 230 (1991), certif. denied, 127 N.J. 560 (1992), affirming defendant's conviction for arson, defendant was found near the fire laughing shortly after an abortive date with a woman who lived in the blazing building. Defendant was arrested for soliciting near the building for victims of the fire the day after the fire. Defendant provided inconsistent statements regarding his whereabouts, and defendant volunteered inculpatory motives, *e.g.*, hatred of landlords and jealousy of the woman from the abortive date. Bloodhound evidence tracking defendant from his residence to the building was also properly admitted.

Evidence that defendant visited the grave of one of the victims after the fire and displayed deep remorse was held to be probative of consciousness of guilt in *State v. Mills*, 51 *N.J.* 277, 286, *cert. denied,* 393 *U.S.* 186, 89 *S.Ct.* 105, 21 *L.Ed.*2d 104 (1968).

Acting as a lookout knowing the intentions of the fire starter was sufficient proof to sustain a count of conspiracy to commit arson. *State v. Grey*, 281 *N.J. Super.* 2, 11 (App. Div. 1995), *rev'd on other grounds*, 147 *N.J.* 4 (1996).

The owner of a building who solicited another to burn the building and further provided the potential arsonist with building plans and specifications and fire department information was properly convicted for attempted arson, even though the plan was contingent upon obtaining insurance. *State v. Jovanovic*, 174 *N.J.* Super: 435, 440 (Resent. Panel 1980), aff'd, 181 N.J. Super. (App. Div. 1981).

A promise to pay suffices for an arson-for-hire conviction. The arson-for-hire statutory language is broader than the murder-for-hire statutory language. State v. Chiarulli, 234 N.J. Super. 192, 194-95 (App. Div.), certif. denied, 117 N.J. 643 (1989). Defendant was not entitled to the reversal of his conviction for attempted arson, where the State's destruction of the Molotov cocktail was not done in bad faith, the evidence had no apparent exculpatory value, and the expert who conducted a test on the flammable device was available for cross-examination. State v. Serrett, 198 N.J. Super. 21, 27 (App. Div. 1984), certif. denied, 101 N.J. 217 (1985).

III. DEFENSES

Intoxication is not a defense when the statute defendant was charged with violating did not require a specific intent to burn. State v. Kinlaw, 150 N.J. Super. 70, 74 (App. Div. 1977).

IV. SEARCH

The prompt on-the-scene investigation of an uninhabitable dwelling following a suspicious fire which caused death of a child was not a Fourth Amendment search requiring a search warrant. State v. Vader, 114 N.J. Super. 260, 262 (App. Div. 1971), certif. denied, 63 N.J. 252 (1973).

Although no warrant is required to permit firefighters to enter premises in order to control a blaze and conduct an immediate investigation, any subsequent entry into the building in order to gather evidence for a possible arson prosecution must be governed by a showing of probable cause. Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978).

Defendant, who was suspected of arson using gasoline as an accelerant, and whose car was properly stopped, was subjected to a proper search of the trunk, since, as the defendant stepped from the car, a strong odor of gasoline emanated. State v. Schubert, 235 N.J. Super. 212, 225 (App. Div. 1989), certif. denied, 121 N.J. 597, cert. denied, 496 U.S. 911, 110 S.Ct. 2600, 110 L.Ed.2d 280 (1990).

V. MERGER

In State v. Lewis, 223 N.J. Super. 145 (App. Div.), certif. denied, 111 N.J. 584 (1988), defendant was convicted of first-degree aggravated manslaughter, second-degree aggravated arson, six counts of seconddegree aggravated assault, and one count of second-The Appellate Division rejected degree burglary. defendant's argument that the offenses should have been merged for purposes of sentencing and held that aggravated manslaughter (N.J.S.A. 2C:11-4a) and aggravated arson (N.J.S.A. 2C:17-1a(1)) are separate crimes which require different proofs and, therefore, are inappropriate for merger.

In a felony murder prosecution, where arson was the predicate felony, the Court must instruct the jury regarding the predicate felony first, followed by a necessary contingency instruction regarding a finding of felony murder. State v. Grey, 147 N.J. 4, 16-17 (1996). In Grey, the jury acquitted defendant of arson and convicted him of felony murder. The Supreme Court vacated the felony murder conviction because of the absent necessary contingency instruction.

Failure to instruct the jury on causation, where it is a central issue, will result in the reversal of an arson felonymurder conviction. State v. Martin, 119 N.J. 2, 34 (1990).

Where there is a rational basis, criminal mischief (N.J.S.A. 2C:17-3) and improper behavior (N.J.S.A. 2C:33-2a) are lesser included offenses to arson. State v. Figueroa, 237 N.J. Super. 215 (App. Div. 1989), certif. denied, 121 N.J. 643 (1990).

VI. DOUBLE JEOPARDY

The State was not precluded on principles of double jeopardy or mandatory joinder from trying defendant for arson after he was convicted in municipal court of filing a false report (N.J.S.A. 2C:28-4b), a disorderly persons offense. The matter was remanded to the trial court, however, for a determination of whether the trial violated principles of fundamental fairness. State v. Yoskowitz, 116 N.J. 679, 709-10 (1989).

The State was not precluded on principles of double jeopardy from trying defendant for arson after he was acquitted in federal court of mail fraud, a crime which involved the collection of insurance proceeds for the illicit burning of the same property which was the subject of the state indictment. State v. DiVentura, 187 N.J. Super.

165, 170 (App. Div. 1982), certif. denied, 93 N.J. 261 (1983).

VII. CAUSING OR RISKING WIDESPREAD INJURY OR DAMAGE *(See also,* ENVIRON-MENTAL PROSECUTIONS, this Digest)

A. It is a second-degree crime to knowingly or purposely cause an explosion, a flood, an avalanche, a collapse of a building or the release of gas or radioactive material, or to cause widespread injury in any manner. *N.J.S.A.* 2C:17-2.

B. Proof that a defendant knowingly released chemical waste into a river is sufficient; when the State proves one of the specific acts enumerated in the statute, proof that widespread injury resulted is not required. *State v. Iron Oxide Corp.*, 178 *N.J. Super.* 303, 309 (Law Div. 1981).

C. It is a third-degree crime to recklessly cause widespread injury or damage. *N.J.S.A.* 2C:17-2b.

D. Proof that a defendant abortively attempted to move toxic barrels with another and then subsequently successfully solicited several laborers to move several 55-gallon drums of hazardous waste to the rear of an adjacent property lot suffice for a conviction of risking widespread injury or damage. *State v. Sunzar*, 331 *N.J. Super.* 248 (Law Div. 1999).

E. It is a fourth-degree crime to recklessly create a risk of widespread injury even if no such injury occurs. *N.J.S.A.* 2C:17-2c.

F. Consequently, evidence that a juvenile offender placed a smoke bomb in his vacant high school locker during school hours was sufficient to adjudicate him delinquent for the fourth-degree offense of creating widespread injury. *State in the Interest of D.B.*, 181 *N.J. Super.* 586, 595 (J. & D.R. 1981).

G. Widespread injury is defined as:

- 1. Serious bodily injury to 10 or more people, or
- 2. Damage to 10 or more habitations, or

3. Damage to a building normally containing 50 or more persons. *N.J.S.A.* 2C:17-2e.

H. The fourth-degree offense of creating widespread injury is not a lesser-included offense of second degree

aggravated assault where defendant had been hurling firecrackers into the air; defendant's act did not jeopardize the safety of more than 10 people as required by the statute. *State v. Hunter*, 194 *N.J. Super.* 177, 180 (App. Div. 1984).

VIII. CRIMINAL MISCHIEF

A. Scope of the Offense. N.J.S.A. 2C:17-3.

1. Criminal mischief is the purposeful or knowing injury to the property of another, or the reckless injury to property in the employment of fire, explosives or other dangerous means, or the purposeful or reckless tampering with property so as to endanger persons or property.

2. The grading of the offense depends upon the amount of pecuniary damage of the property. It is a third-degree crime to cause a pecuniary loss of \$2,000 or more, a fourth-degree crime to cause damage amounting to more than \$500 but less than \$2,000 and disorderly persons offense to cause a loss of less than \$500. Effective July 10, 1998, a person commits a fourth-degree crime if he impairs or interferes with any device that serves air traffic control. It is a third-degree crime if the actor recklessly cause bodily injury or damage to property. It is a second-degree crime if the actor recklessly causes death. *N.J.S.A.* 2C:17-3b(4), b(5). Effective May 3, 1999, it is a third-degree crime to tamper with a grave or crypt with the intent to desecrate, destroy, or steal human remains. *N.J.S.A.* 2C:17-3b(6).

B. Evidence

In *State v. Davidson,* 225 *N.J. Super.* 1 (App. Div. 1988), *certif. denied,* 111 *N.J.* 594 (1988), the Appellate Division affirmed the trial judge's ruling to admit as evidence of "other crimes" the fact that defendant poured rice or sugar into the victim's car gas tank prior to committing a later act of criminal mischief upon the same victim's house. Pursuant to *Evid. R.* 55 (*N.J.R.E.* 404 (b)), such prior acts were relevant for purposes of showing the defendant's intent and state of mind in the commission of the act of criminal mischief.

C. Severance of the Indictment

It was not error for the trial court to deny severance of various counts charging defendant with malicious mischief and assault and battery, where the charges involved the same victim and the defendant's motive to injure the victim for engaging in a love affair with defendant's wife -- constituted a common scheme or plan. *State v. Maddox,* 153 *N.J. Super.* 201, 207 (App. Div. 1977).

D. Double Jeopardy (*See also*, **DOUBLE JEOPARDY**, this Digest)

It was error for the trial court to grant defendant's motion for dismissal of the complaints at the close of State's case, inasmuch as the evidence that the juvenile defendant threw a stone through the window of the victim's building constituted a violation of *N.J.S.A.* 2C:17-3a(1); furthermore, the State is not precluded from reprosecution on double jeopardy grounds. *State in the Interest of S.Z.*, 177 *N.J. Super.* 32, 35-36 (App. Div. 1981).

Defendant was not subjected to double jeopardy where he was found guilty by a jury of the indictable offense of atrocious assault and battery following a conviction in municipal court for malicious injury to property, inasmuch as the acts of damaging a door and stabbing the victim were separate and distinct and constituted two offense. *State v. Dutton*, 112 *N.J. Super.* 402, 405 (App. Div. 1970), *certif. denied*, 57 *N.J.* 434 (1971).

IX. TRAFFIC SIGN ALTERATION

As of July 10, 1998, a person who purposely, knowingly, recklessly, or negligently removes, injures, or defaces a traffic sign or signal is guilty of a disorderly persons offense. *N.J.S.A.* 2C:17-3.1.

X. MOTOR VEHICLE IDENTIFICATION ALTERATION

A person who for an unlawful purpose removes, defaces, alters, changes, destroys, or obliterates any motor vehicle trademark or identification number is guilty of a third-degree crime. *N.J.S.A.* 2C:17-6.

XI. DAMAGE TO NUCLEAR PLANTS

A person who purposely or knowingly damages or tampers with a nuclear plant with either the intent to release radiation or which results in the release of radiation commits a crime. *N.J.S.A.* 2C:17-7 *et seq.*

ASSAULT

(For sexual assaults, see SEX OFFENSES, this Digest)

I. INTRODUCTION

N.J.S.A. 2C:12-1 encompasses the offenses of simple assault, aggravated assault, assault by auto or vessel, simple assault by certain persons against an institutionalized elderly individual and simple assault committed because of race, color, religion, gender, handicap, sexual orientation or ethnicity. The offense of assault can be committed purposely, knowingly, recklessly or negligently.

II. TYPES OF ASSAULT AND THE CONSTITU-ENT ELEMENTS

A. Simple Assault [*N.J.S.A.* 2C:12-1a(1)-(3)]

A person is guilty of simple assault if he or she: "(1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (2) Negligently causes bodily injury to another with a deadly weapon; or (3) Attempts by physical menace to put another in fear of imminent serious bodily injury."

Bodily injury means physical pain, illness or any impairment of physical condition. *N.J.S.A.* 2C:11-1a. Deadly weapon includes any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury or which in the manner it is fashioned would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury. *N.J.S.A.* 2C:11-1c. Serious bodily injury is bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. *N.J.S.A.* 2C:11-1b.

Simple assault is a disorderly persons offense, unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense. *See N.J.S.A.* 2C:43-8.

Although "[n]ot much is required to show bodily injury," an offensive touching will not always rise to the level of intentional assaultive behavior, and all surrounding facts and circumstances must be considered. The striking of a politician's chin by an opponent politician, incidental to waving a political flier in the air during a heated confrontation, did not amount to assaultive criminal behavior. *State v. Cabana*, 315 *N.J. Super.* 84 (Law Div. 1997), *aff'd*, 318 *N.J. Super.* 259 (App. Div. 1999)

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

There are eleven separate circumstances constituting aggravated assault.

1. *N.J.S.A.* 2C:12-1b(1) provides that a person is guilty of second degree aggravated assault if he or she "[a]ttempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury...."

The trial judge did not err in denying a judgment of acquittal on attempted aggravated assault, because the jury could have found that defendant attempted to cause serious bodily injury by driving his car towards a police officer, striking him, and accelerating while the officer hung onto the car through the broken window, causing the officer to roll off the car onto the ground. However, the aggravated assault conviction was ultimately reversed because the trial court failed to limit the jury's consideration to attempted aggravated assault because the victim did not suffer serious bodily injury. *State v. Green*, 318 *N.J. Super.* 361, 371-72 (App. Div. 1999), *aff'd o.b.*, 163 *N.J.* 140 (2000)

Testimony that defendant, without provocation, smashed a beer stein directly and with full force in the face of a female bar patron would support a verdict of aggravated assault. The jury could find that defendant's conduct was knowing or purposeful or reckless under circumstances manifesting extreme indifference to the value of human life, and that the victim's injuries, which consisted of stitches, root canal and repair of a chipped tooth, constituted "serious bodily injury" as opposed to mere "bodily injury." Moreover, the guilty verdicts of second degree aggravated assault, negligently causing bodily injury with a deadly weapon and third degree possession of a weapon for an unlawful purpose were not inconsistent, as the elements of each charge differed and none of the jury's findings on one charge negated an element of another. Defendant may have been recklessly indifferent to the value of human life in striking a forceful blow to the victim aside from the use of any weapon. The jury also may have found that defendant's use of the weapon was culpable but not to the same degree as his recklessly injuring the victim. Finally, the jury may have found that defendant's unlawful purpose in using the beer stein was to strike a blow but not to cause bodily injury. *State v. Villar*, 150 *N.J.* 503 (1997).

Affirmed the defendant's conviction of aggravated assault pursuant to *N.J.S.A.* 2C:12-b(1), for attacking a county jail officer, the Appellate Division held that although the trial court would have had a rational basis to charge simple assault as a lesser included offense if defendant had requested it, it was not error to fail to do so *sua sponte* because it may have been defendant's strategic decision not to request the charge. *State v. Doss*, 310 *N.J. Super.* 450 (App. Div. 1998).

Accused of firing a shotgun at a member of the Keansburg Police Department, defendant admitted at the time of arrest that he and a friend had been throwing "M-80" firecrackers which apparently made a great deal The trial court acquitted defendant of of noise. aggravated assault but found him guilty of "causing or risking widespread injury," contrary to N.J.S.A. 2C:17-2c. In reversing the defendant's conviction the Appellate Division held that causing or risking widespread injury is not a lesser included offense of aggravated assault. N.J.S.A. 2C:17-2c requires proof that the defendant created a risk of injury or damage to ten or more people or to ten or more buildings which contained 50 or more people and assault requires only proof of endangering at least one person. Even if N.J.S.A. 2C:17-2c were a lesser included offense of aggravated assault, the facts failed to support any such conviction for causing or risking widespread injury. State v. Hunter, 194 N.J. Super. 177 (App. Div. 1984).

In State v. Williams, 197 N.J. Super. 127 (App. Div. 1984), certif. denied, 99 N.J. 233 (1985), the Appellate Division held that under the Code, only the seriousness of the injury distinguishes aggravated assault from simple assault. Over a four month period, defendant committed an "intermittent course of bodily assaults" on his daughter, the victim. Although the assaults were committed in a sexually humiliating and degrading manner, the only permanent mark on the victim's body was a scar left by handcuffs. Thus, in downgrading the defendant's conviction from aggravated to simple assault, the Appellate Division held that "no matter how outrageous the attending circumstances," the "barely perceptible mark on the girl's wrist" cannot support a conviction for aggravated assault contrary to N.J.S.A. 2C:12-1b(1).

Expert testimony by a psychiatrist is unnecessary to establish that a victim experienced mental or nervous shock, which constitutes actual bodily harm. *State v. Diaz*, 188 *N.J. Super.* 504 (App. Div. 1983).

In State in the Interest of A.W.S., 182 N.J. Super. 334, 340 (J. & D.R.Ct. 1980), aff'd 182 N.J. Super. 278 (App. Div. 1981), a conviction for aggravated assault with an automobile was sustained where the defendant drove recklessly, manifesting an extreme indifference to the value of human life and where injury was sustained by the victim. Furthermore, no double jeopardy violation existed where the defendant was prosecuted for aggravated assault after having been found guilty in municipal court for reckless driving.

(2) *N.J.S.A.* 2C:12-1b(2), provides that a person is guilty of third degree aggravated assault if he "attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon."

Aggravated assault with a machete is not a lesser included offense of aggravated assault with a firearm. Rather, they are the same crime committed with different instrumentalities. A defendant could be found guilty of one even if the indictment only charged the other, and it was not error to instruct the jury on both. However, defendant's conviction of possession of a revolver with the purpose to use it unlawfully against the victim was not sustainable because the jury acquitted defendant of aggravated assault with the revolver, the only purpose the jury was instructed to consider on that count. *State v. Whittaker*, 326 *N.J. Super* 252 (1999).

Where a person does not cause serious bodily injury but only attempts to do so, he is guilty of *N.J.S.A.* 2C:12-1b, second degree aggravated assault, only if the attempt to cause that result is purposeful. *See State v. Battle*, 209 *N.J. Super.* 255 (App. Div. 1986), *certif. denied*, 105 *N.J.* 560 (1986); *State v. McAllister*, 211 *N.J. Super.* 355 (App. Div. 1986).

In *State v. Berrios*, 186 *N.J. Super.* 198 (Law Div. 1982), the court held that *N.J.S.A.* 2C:12-1b(3) (recklessly causing bodily injury with a deadly weapon) is a lesser included offense of *N.J.S.A.* 2C:12-1b(1) and (2), and can be so charged, at least where there is notice in the indictment relating to the deadly weapon. *N.J.S.A.* 2C:1-8d(1), (3)(e). On the other hand, possession of a knife under circumstances not manifestly appropriate for such lawful use as it may have, contrary to *N.J.S.A.* 2C:39-5d, is not necessarily a lesser included offense to recklessly causing bodily injury with a deadly

weapon contrary to *N.J.S.A.* 2C:12-1b(3), because each conviction required proof of a fact that the other did not and the proofs revealed possession beyond and unrelated to the assault.

(3) *N.J.S.A.* 2C:12-1b(3), provides that recklessly causing bodily injury with a deadly weapon constitutes a fourth degree offense.

(4) *N.J.S.A.* 2C:12-1b(4), provides that it is a crime of the fourth degree to knowingly, under circumstances manifesting extreme indifference to the value of human life, point a firearm as defined in *N.J.S.A.* 2C:39-1f, at or in the direction of another, whether or not the actor believes it to be loaded.

In *State v. Henries*, 306 *N.J. Super.* 512 (App. Div. 1997), there was no factual basis for a guilty plea as an accomplice to aggravated assault pursuant to *N.J.S.A.* 2C:12-1b(4) where the defendant testified only that "he would say" codefendant had a gun and pointed it at another individual.

In *State v. Orlando*, 269 *N.J. Super.* 116 (App. Div. 1993), *certif. denied*, 136 *N.J.* 30 (1994), the court held that an inoperable antique firearm supported a charge of aggravated assault because the weapon had not completely and permanently lost the characteristics of a real gun. Moreover, the weapon did not have to be recovered or produced in court to sustain the conviction.

In *State v. Robinson*, 253 *N.J. Super.* 346 (App. Div.), *certif. denied*, 130 *N.J.* 6 (1992), the court held that there was sufficient evidence defendant acted knowingly under circumstances manifesting extreme indifference to human life where defendant gave a gun to codefendant yet claimed he believed the gun to be inoperable.

A person can be guilty of committing aggravated assault under *N.J.S.A.* 2C:12-1b(4), only if he is aware that it is practically certain that his conduct will result in the pointing of a firearm at or in the direction of another person. It is reversible error where the trial court failed to instruct the jury that to find defendant guilty, it had to first find that defendant was aware that he was pointing the firearm at persons other than the shooting victim. *State v. Clausell*, 121 *N.J.* 298 (1990)

In *State v. Bill*, 194 *N.J. Super.* 192, 198 (App. Div. 1984), the Appellate Division held that a gun need not be loaded in order for a perpetrator to be convicted of fourth degree aggravated assault contrary to *N.J.S.A.*

2C:12-1b(4). The Court expressly disapproved the contrary holding in *State v. Diaz*, 190 *N.J. Super*. 639 (Law Div. 1983). The phrase "whether or not the actor believes the gun to be loaded," does not refer to the condition of the gun, but rather merely negates the "possible defense that because the actor believed the gun was unloaded he cannot be found to have the required culpability, knowledge."

In State v. Carlos, 187 N.J. Super. 406 (App. Div. 1982), certif. denied, 93 N.J. 297 (1983), the Court held that fourth degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(4) is a lesser included offense of first degree robbery contrary to N.J.S.A. 2C:15-1. Carlos held that the robbery conviction should be molded and reduced to a conviction for aggravated assault since the conviction for the greater offense was not justified and no prejudice to defendant would result even though the lesser included offense was not charged to the jury. Further, the improper conviction on two counts of robbery because of a lack of a taking from two individuals present at the robbery of two others, did not taint the guilty verdicts for aggravated assault, attempted aggravated assault and possession of a handgun without a permit.

Convictions for aggravated assault by knowingly pointing and discharging a firearm and attempting to cause serious bodily injury, contrary to *N.J.S.A.* 2C:12-1b(1) and 2C:12-1b(4), do not merge with possession of a handgun with the purpose of using it unlawfully against another, contrary to *N.J.S.A.* 2C:39-4a. *State v. Truglia*, 97 *N.J.* 513, 517 (1984).

(5) A person is guilty of aggravated assault, contrary to *N.J.S.A.* 2C:12-1b(5), if he commits a simple assault upon a variety of persons, including law enforcement officer, paid or volunteer fireman, any person engaged in emergency first aid or medical services, school bus driver, a school board member, employee, administrator, teacher or other employee of the school board, any employee of the Division of Youth and Family Services, any Justice of the Supreme Court, judge of the Superior Court, Tax Court or municipal judge or any operator of a motorbus while such person is in uniform or is otherwise identifiable as being on duty. A defendant is guilty of a third degree crime if the victim suffers bodily injury and is guilty of a fourth degree crime if the victim does not.

In *State v. Doss*, 310 *N.J. Super.* 450 (App. Div.), *certif. denied*, 155 *N.J.* 589 (1998), the court held that a self-defense charge, in support of a claim that police used

excessive force, was unwarranted because the record failed to support the defense. The court left open the possibility of raising self defense in response to a claim of excessive police force.

State v. Casimono, 250 *N.J. Super.* 173 (App. Div. 1991), *certif. denied*, 127 *N.J.* 558 (1992), held that an unconstitutional detention or search would not bar a conviction for an assault, escape or other offense committed in response to unlawful police action, as it would give defendants an intolerable *carte blanche* to commit further offenses.

In distinguishing between simple assault, contrary to N.J.S.A. 2C:12-1a(1) and aggravated assault, contrary to N.J.S.A. 2C:12-1b(5)(a), the court held that the status of the victim as a police officer is the pivotal difference. *State* v. DiCosmo, 188 N.J. Super. 298, 300-301 (Law Div. DiCosmo also held that where the indictable 1982). offense of aggravated assault, contrary to N.J.S.A. 2C:12-1b(5)(a), is administratively downgraded to the disorderly persons offense of simple assault, the defendant is ineligible for pretrial intervention. See also State v. Moll, 206 N.J. Super. 257 (App. Div. 1986) (the trial court erred in omitting from his charge the second sentence of N.J.S.A. 2C:2-2b(1), since an awareness of the attendant circumstance that the victim is a law enforcement officer acting in the performance of duty while in uniform or exhibiting evidence of his authority is an essential element of the offense).

In *State v. Murphy*, 185 *N.J. Super.* 72 (Law Div. 1982), defendant was charged with, *inter alia*, committing an aggravated assault upon a police officer, contrary to *N.J.S.A.* 2C:12-1b(5)(a). The Law Division held that it was proper to alternatively charge both recklessness and knowledge, as reckless conduct constitutes a lesser type of culpability than purposeful and knowing conduct.

A defendant's use of force or infliction of injury upon a police officer, while that defendant is in the course of committing a burglary and theft inside the victim's home, elevates the theft to robbery contrary to *N.J.S.A.* 2C:15-1. Since identical proofs were utilized to sustain the aggravated assault charge contrary to *N.J.S.A.* 2C:12-1b(1) and the first degree robbery charged contrary to *N.J.S.A.* 2C:15-1, the same physical acts necessarily gave rise to the distinct grade of both offenses, and the "predominate legislative purpose of both offenses is to punish violent thefts," aggravated assault contrary to *N.J.S.A.* 2C:12-1b(1) was deemed to merge into first degree robbery contrary to *N.J.S.A.* 2C:15-1. Had the aggravated assault charge been based upon the assault of a law enforcement officer, contrary to *N.J.S.A.* 2C:12-1b(5), the offenses would not merge because: (1) there would be no necessity to prove serious bodily injury; and (2) an additional fact to be proved would be the status of the victim as a police officer; and (3) the legislative concern for the status of the police evidences a specific intent to fractionalize the offense. Assault of a law enforcement officer contrary to *N.J.S.A.* 2C:12-1b(5) is a lesser degree offense than aggravated assault contrary to *N.J.S.A.* 2C:12-1b(1). This distinction also suggests a different "merger consideration." *State v. Mirault*, 92 *N.J.* 492 (1983).

An officer may exhibit evidence of his authority by means other than wearing his uniform or presenting his shield. In *State v. DeGrote*, 136 *N.J. Super.* 525, 531-532 (Law Div. 1975), *aff'd o.b.*, 153 *N.J. Super.* 479 (App. Div. 1977), the police officer was not in uniform and did not display his shield. However, testimony revealed that the officer knew the defendant and was known by the defendant to be a police officer, and that the officer exited from a marked police vehicle with its revolving light, was accompanied by a uniformed officer, and informed the defendant that he was under arrest. This evidence was held sufficient to overcome the defendant's motion for judgment of acquittal at the conclusion of the State's case. *See also State v. DeSanto*, 172 *N.J. Super.* 27 (App. Div. 1980).

Police officers from other states who pursued suspects into this State pursuant to the provisions of the Uniform Law on Fresh Pursuit, N.J.S.A. 2A:155-1 et seq., were deemed to be law enforcement officers within the meaning of N.J.S.A. 2A:90-4a, the pre-code statute prohibiting assault upon public officials. This holds true even though the pursuit may not be legal according to the Uniform Law, so long as there is no claim of bad faith. In State v. DeGrote, 136 N.J. Super. at 528-531, two New York Police officers pursued the defendant into New Jersey because he was wanted for a New York offense which, in New Jersey, would constitute a disorderly person offense. Once the defendant was stopped in New Jersey, he committed an assault on both officers and was indicted for a violation of N.J.S.A. 2A:90-4a. The Court held that the pursuit into New Jersey was illegal, since the Uniform Law sanctions such pursuit only in connection with more serious offenses. Nevertheless, it sustained the sufficiency of the State's case, and held that the officers had acted "in the performance of [their] duties" within the meaning of the statute.

(6) A person is guilty of second degree aggravated assault, contrary to *N.J.S.A.* 2C:12-1b(6), if he causes bodily injury to another while fleeing or attempting to elude a law enforcement officer in violation of *N.J.S.A.* 2C:29-2b (fleeing or attempting to elude any law enforcement officer after having received a signal from the officer to bring the vehicle to a full stop) or while operating a motor vehicle in violation of *N.J.S.A.* 2C:20-10c ("joyriding"), imposing a strict liability standard. *See State v. Dorko,* 298 *N.J. Super.* 54 (App. Div.), *certif. denied,* 150 *N.J.* 28 (1997).

This subsection was amended in 1993 to eliminate the requirement of "serious bodily injury," which was substituted with "bodily injury." *See State v. Wallace*, 158 *N.J.* 552 (1999), holding that this subsection, read in conjunction with *N.J.S.A.* 2C:29-2 (eluding), suggests that the Legislature intended both second degree offenses to require "bodily injury" rather than "serious bodily injury" and that in eluding cases, the term "injury" must be defined for the jury.

(7) A person is guilty of aggravated assault, contrary to N.J.S.A. 2C:12-1b(7) if he attempts to cause significant bodily injury to another or causes significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes such significant bodily injury.

"Significant bodily injury" is defined as bodily injury which creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses. *N.J.S.A.* 2C:11-1d.

(8) A person is guilty of aggravated assault, contrary to *N.J.S.A.* 2C:12-1(8), if he causes bodily injury by knowingly or purposely starting a fire or causing an explosion in violation of *N.J.S.A.* 2C:17-1 (arson and related offenses) which results in bodily injury to any emergency services personnel involved in fire suppression activities, rendering emergency medical services resulting from the fire or explosion or rescue operations, or rendering any necessary assistance at the scene of the fire or explosion, including any bodily injury sustained while responding to the scene of a reported fire or explosion.

"Emergency services personnel" includes, but is not limited to, any paid or volunteer fireman, any person engaged in emergency first-aid or medical services and any law enforcement officer. This subsection imposes strict liability for anyone convicted of violating *N.J.S.A.* 2C:17-1 which resulted in bodily injury to any emergency services personnel.

N.J.S.A. 2C:12-1b(8) constitutes a crime of the third degree if the victim suffers bodily injury, and is a crime of the second degree if the victim suffers significant bodily injury or serious bodily injury.

(9) A person is guilty of third degree aggravated assault if he knowingly, under circumstances manifesting extreme indifference to human life, points or displays a firearm at or in the direction of a law enforcement officer, N.J.S.A. 2C:12-1b(9).

(10) A person is guilty of third degree aggravated assault, contrary to *N.J.S.A.* 2C:12-1b(10), if he knowingly points, displays or uses an imitation firearm at a law enforcement officer with the purpose to intimidate, threaten or attempt to put the officer in fear of bodily injury or for any unlawful purpose.

(11) A person is guilty of third degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(11) if he uses or activates a laser sighting system or device or a system/ device which would cause a reasonable person to believe that it is a laser sighting system/device at a law enforcement officer acting in the performance of his duties while in uniform or exhibiting evidence of authority.

Laser sighting system or device means any system or device that is integrated with or affixed to a firearm and emits a laser light beam that is used to assist in the sight alignment or arming of a firearm.

A person is guilty of assault by auto or vessel, pursuant to *N.J.S.A.* 2C:12-1c, if he drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another. "Vessel" is defined as a means of conveyance for travel on water and propelled otherwise than by muscular power.

Assault by auto or vessel is a crime of the second degree if serious bodily injury results from the defendant operating the auto or vessel while in violation of *N.J.S.A.* 39:4-50 or *N.J.S.A.* 39:4-50.4a while on school property used for school purposes owned or leased to any elementary or secondary school or school board or within 1,000 feet of such school property; or while driving through a school crossing (*N.J.S.A.* 39:1-1) designated as

such by a municipal ordinance or resolution; or driving through a school crossing knowing that juveniles are present.

Assault by auto or vessel is a crime of the third degree if the person drives the vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another or if the person drives the vehicle while in violation of *N.J.S.A.* 39:4-50 or 39:4-50.4a and serious bodily injury results. It is a crime of the fourth degree of serious bodily results or if the person drives the car while in violation of *N.J.S.A.* 39:4-50 or 39:4-50.4a and bodily injury results. It is a disorderly persons offense if bodily injury results.

N.J.S.A. 2C:12-1c constitutes a crime of the fourth degree if serious bodily injury results, and is a disorderly persons offense if bodily injury results.

In *State v. Kromphold*, 162 *N.J.* 345 (2000), the Supreme Court held that the trial court properly instructed the jury that they could consider defendant's level of intoxication as evidence of recklessness, but erred in double counting the level of intoxication as an aggravating factor.

State v. Caliguiri, 305 *N.J. Super.* 9 (App. Div.), *aff'd and modified*, 158 *N.J.* 28 (1997), held that a prosecutor's categorical denial of entry into the Pre-Trial Intervention Program (PTI) based upon assaults by automobiles involving alcohol, rather than consideration of relevant, case specific factors, was a patent mistaken exercise of discretion and offended the PTI Guidelines.

In *State v. Kotter*, 271 *N.J. Super*. 214 (App. Div.), *certif. denied*, 137 *N.J.* 313 (1994), the court held that evidence in furtherance of defendant's diminished capacity was properly excluded when defendant was charged only with crimes involving reckless culpability, including assault by auto.

A defendant's drunken state may be used as evidence of his reckless driving. Drunk driving does not necessarily equate with reckless driving but it is a circumstance to be considered by the jury. *State v. Labrutto*, 114 *N.J.* 187 (1989).

A person is guilty of fourth degree assault, pursuant to *N.J.S.A.* 2C:12-1d, if he is employed by a facility defined in P.L. 1977, c.239 (C.52:27G-2) and commits a simple assault as defined in paragraph (1) or (2) in subsection a. of this statute upon an institutionalized

elderly person as defined in P.L. 1977, c.239 (C.52:27G-2).

A person is guilty of fourth degree assault, pursuant to N.J.S.A. 2C:12-1e, if he commits a simple assault as defined in subsection a. of this statute and acts with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity.

In *State v. Crumb*, 277 *N.J. Super*. 311 (App. Div. 1994), *certif. denied*, 153 *N.J.* 215 (1998), the court held that *N.J.S.A.* 2C:12-1e is inapplicable if a defendant is convicted of a greater offense than simple assault.

With regard to extended term sentences for biased crimes, *see N.J.S.A.* 2C:44-3e and *State v. Apprendi*, 304 *N.J. Super.* 147 (App. Div. 1997).

III. LESSER INCLUDED OFFENSES, MERGER AND INTERRELATIONSHIP WITH OTHER CRIMES (See also, MERGER, this Digest)

A. Merger

A conviction for terroristic threats should be merged into an aggravated assault conviction. *State v. Doss*, 310 *N.J. Super*: 450 (App. Div.), *certif. denied*, 155 *N.J.* 589 (1998).

In *State v. Mance*, 300 *N.J. Super.* 37 (App. Div. 1997), the court held that it was not error to decline to merge a possession of a weapon for an unlawful purpose conviction into an aggravated assault conviction where the unlawful purpose was broader than the specified assault.

A conviction for second degree aggravated assault did not merge into a conviction for first degree robbery because a finding of serious bodily injury was not an element to the robbery conviction. *State v. Oliver*, 298 *N.J. Super*. 538 (Law Div. 1996), *aff'd* 316 *N.J. Super* 592 (App. Div. 1998), *aff'd*, 162 *N.J.* 580 (1998).

In *State v. Montague*, 55 *N.J.* 387 (1970), modifying 101 *N.J. Super.* 483 (App. Div. 1968), the State's evidence demonstrated that the defendant resisted an arresting officer, scuffled with him, removed his gun, pointed it at the officer and threatened to shoot him. Defendant was charged with both assault and battery upon a police officer and with threatening to take the life

of another. The court disagreed with his argument that the latter offense was preempted by the more specific statute, which condemned assault upon a police officer, and held that the two offenses were separate crimes which did not merge.

B. Included Offenses

In *State v. Whittaker, supra*, the court held that aggravated assault with a machete is not a lesser included offense of aggravated assault with a firearm. Rather, they are the same crime with different instrumentalities. A defendant could be found guilty of one even if the indictment only charged the other and it was not error to instruct the jury on both.

It was not error for the trial court to fail to charge *sua sponte,* simple assault as a lesser included offense of aggravated assault because it may have been defendant's strategical decision not to request the charge. *State v. Doss, supra,* 310 *N.J. Super.* 450 (App. Div. 1998).

In *State v. Farrell*, 250 *N.J. Super*. 386 (App. Div. 1991), the court held that simple assault should be charged as a lesser included offense of aggravated assault whenever there is a rational basis to do so.

Harassment, *N.J.S.A.* 2C:33-4, is a lesser included offense of simple assault. *State v. Berka*, 211 *N.J. Super.* 717 (Law Div. 1986). That a less serious injury, *i.e.*, alarm as opposed to fear, suffices to establish its commission confirms its lesser included status.

In *State v. Jones*, 214 *N.J. Super.* 68 (App. Div. 1986), *certif. denied*, 107 *N.J.* 102 (1987), the defendant challenged his conviction due to the trial court's supplemental instruction charging fourth degree aggravated assault, *N.J.S.A.* 2C:12-1b(3), after the jury had deliberated for seven hours and announced its deadlock on the original charge of second degree aggravated assault, *N.J.S.A.* 2C:12-1b(1). The Appellate Division held that the fourth degree crime was not a lesser included offense of the second degree crime as the former, but not the latter, requires that the bodily injury be inflicted with a deadly weapon.

In *State v. Graham*, 223 *N.J. Super.* 571 (App. Div.), *certif. denied*, 111 *N.J.* 620 (1988), a different panel of the Appellate Division, which criticized the Court's analysis in *Jones*, held that fourth degree aggravated assault, *N.J.S.A.* 2C:12-1b(3), is a lesser included offense of second degree aggravated assault, *N.J.S.A.* 2C:12-

1b(1), where the facts of a particular case are such that the State is required to prove that the second degree aggravated assault, *N.J.S.A.* 2C:12-1b(1) was committed with a weapon. The Court in *Graham* called the analysis the Court in *Jones* used to determine the lesser included offense issue "flawed" because it focused upon the "elements" of the offenses rather than applying the standard contained in *N.J.S.A.* 2C:1-8d, which requires that the lesser offense be established by proof of the same or less than all the "facts."

In *State v. Sloane*, 111 *N.J.* 293 (1988) *reversing* 217 *N.J. Super.* 417 (App. Div. 1987), the New Jersey Supreme Court, overturned defendant's conviction for second degree aggravated assault contrary to *N.J.S.A.* 2C:12-1b(1), where, despite defendant's request, the trial court had refused to charge the jury on any assault offense other than that of causing serious bodily injury to another, *N.J.S.A.* 2C:12-1b(1). The Supreme Court held that the resolution of the degree of injury on the facts before it was at least "rationally debatable" and therefore presented a jury question requiring submission of third degree aggravated assault contrary to *N.J.S.A.* 2C:12-1b(2) (attempts to or causes, knowingly or purposely, bodily injury with a deadly weapon) to the jury.

In resolving the lesser included offense issue in *Sloane* the Supreme Court relied upon *N.J.S.A.* 2C:1-8d(3), which provides that an offense is an included offense when it differs from the offense charged only in the respect that it involved "a less serious injury or risk of injury" or a "lesser kind of culpability, and concluded that this provision permitted the inclusion of third degree aggravated assault contrary to *N.J.S.A.* 2C:12-1b(2) where defendant had been charged with second degree aggravated assault contrary to *N.J.S.A.* 2C:12-1b(1).

In reaching this conclusion, the Court noted that the Commentary to the Model Penal Code, from which the lesser included offense doctrine is drawn, recognized that in some instances an offense that differs by lesser degree of injury "may require proof of an element that may not be necessary to establish the greater offense."

See also, State v. Hunter, 194 N.J. Super. at 177 (risking widespread injury is not a lesser included offense of aggravated assault, contrary to N.J.S.A. 2C:1b(1)); State v. Berrios, 186 N.J. Super. at 198 (N.J.S.A. 2C:12-1b(3) constitutes a lesser included offense of N.J.S.A. 2C:12-1b(1), but N.J.S.A. 2C:39-1(5) is not necessarily a lesser included offense of N.J.S.A. 2C:12-1b(3)); State v. Carlos, 187 N.J. Super. at 417 (N.J.S.A. 2C:12-1b(4) constitutes a lesser included offense of first degree robbery)); State v. Truglia, 97 N.J. at 517 (N.J.S.A. 2C:12-1(b)(1) and N.J.S.A. 2C:39-4a do not merge)); State v. Murphy, 185 N.J. Super. at 75-76 (reckless conduct constitutes a lesser included culpability of purposeful and knowing conduct); State v. Mirault, 92 N.J. at 495, 499 (aggravated assault contrary to N.J.S.A. 2C:12-1b(1) merges with first degree robbery contrary to N.J.S.A. 2C:15-1 but assault upon a police officer, contrary to N.J.S.A. 2C:12-1b(5) does not merge with N.J.S.A. 2C:15-1)); State v. Mincey, 202 N.J. Super. 548 (Law Div. 1985) (third degree aggravated assault under N.J.S.A. 2C:12-1b(2) is not a lesser included offense of second degree aggravated assault under N.J.S.A. 2C:12-1b(1) since former requires proofs relating to deadly weapon while latter does not).

IV. DEFENSES (See also, DEFENSES, this Digest)

A. In General

It was permissible for a defendant to assert both selfdefense and accident defenses to a charge of second degree aggravated assault, even though they would be inconsistent, alternative defenses, because it would be impossible to determine which facts the jury would credit. *State v. Moore*, 158 *N.J.* 292 (1999).

In *State v. Colon*, 298 *N.J. Super.* 569 (App. Div.), *certif. denied*, 150 *N.J.* 27 (1997), the court held that any error in failing to charge the jury on imperfect self-defense was harmless because defendant was convicted only of reckless aggravated assault, and imperfect self-defense would only have protected defendant against a purposeful and knowing finding.

In prosecution for second degree aggravated assault, contrary to *N.J.S.A.* 2C:12-1b(1), bifurcation is not required where a defendant voluntarily chooses to present inconsistent defenses, such as insanity and alibi. *State v. Haseen*, 191 *N.J. Super.* 564 (App. Div. 1983).

B. Intoxication

In *State v. Green*, 318 *N.J. Super*. 361 (App. Div. 1999), *aff'd* 163 *N.J.* 140 (2000), the court held that the trial judge properly declined to charge the jury on intoxication in defense to an aggravated assault charge because no rational basis existed to conclude that defendant's faculties were so prostrated that he was incapable of forming the intent to commit the crime.

In *State v. Kotter*, 271 *N.J. Super*. 214 (App. Div.), *certif. denied*, 137 *N.J.* 313 (1994), the court held that defendant was not entitled to a diminished capacity defense against a charge of reckless aggravated assault because defendant's actions were actually due to her voluntary ingestion of drugs and alcohol rather than her mental condition, and when recklessness establishes an element of the offense, unawareness of a risk due to self-induced intoxication is immaterial.

Mixing medication with alcohol was held to be "self induced" so that recklessness was not negated in simple assault prosecutions. *State v. Holtzman*, 176 *N.J. Super.* 590 (Law Div. 1980). Furthermore, the affirmative defense of "pathological intoxication" was not available where there was no proof that the defendant suffered from some underlying organic condition which caused severe intoxication.

C. Consent

Consent, previously a common law defense, is a defense under N.J.S.A. 2C:2-10 when the conduct causes or threatens bodily harm, if (1) the bodily harm consented to or threatened by the conduct consented to is not serious; or (2) the conduct and the harm are reasonably foreseeable hazards of joint participation in a concerted activity of a kind not forbidden by law; or (3) the consent establishes a justification for the conduct under chapter 3 of the code. The express requirements that the bodily harm consented to not be serious appears to be consistent with pre-Code law. State v. Brown, 143 N.J. Super. 571 (Law Div. 1976), aff'd o.b. 154 N.J. Super. 511 (App. Div. 1977) (The Appellate Division found no necessity to consider whether and under what circumstances consent might be a defense to simple assault and battery, inasmuch as the defendant had been charged with and convicted of atrocious assault and battery).

D. Defense of Premises or Personal Property

Protection of premises or personal property, previously a common law defense, is now codified by the Code in *N.J.S.A.* 2C:3-6. Under the pre-code common law, a person who was in possession of real or personal property had the right to protect that possession if it was actual and not merely constructive. However, when one had parted with possession he could not regain it by means of an assault. *See State v. Rullin*, 79 *N.J. Super.* 221, 229-231 (App. Div. 1963).

A constable attempting to serve process in a civil action is not a trespasser when he enters the defendant's home or business premises, and the defendant is not entitled to use reasonable force to eject him. *In re Burroughs*, 125 *N.J. Super.* 221 (App. Div. 1973). *See N.J.S.A.* 2C:3-3.

E. Self Defense: *N.J.S.A.* 2C:3-4a and b (*See also,* **SELF DEFENSE**, this Digest)

Even if defendant's beliefs about use of force at the time were unreasonable, they may negate purposeful or knowing culpability requirement but not one for which recklessness or negligence may suffice. *State v. Murphy*, 185 *N.J. Super.* 72, 75 (Law Div. 1982).

ATTEMPT

(See also, COMPLICITY, CONSPIRACY, this Digest)

I. INTRODUCTION

The common law concept of criminal attempt is codified in *N.J.S.A.* 2C:5-1. It criminalizes conduct which is designed to culminate in the commission of a substantive offense but has either failed to do so or has not yet achieved its culmination because something remains to be done by the actor or another person.

N.J.S.A. 2C:5-1a provides that a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

1. Purposely engages in conduct which would constitute the crime...;

2. [w]hen causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his part; or

3. [p]urposely does or omits to do anything which ... is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

On its face *N.J.S.A.* 2C:5-1 creates three separate categories of attempt, two of which incorporate a reasonable-person standard — subsections (1) and (3) — and one of which looks only to defendant's own purpose — subsection (2). *State v. Smith*, 262 *N.J. Super.* 487, 503 (App. Div. 1993), *certif. denied*, 134 *N.J.* 476 (1993).

II. REQUIRED MENTAL STATE

The inchoate crime of attempt requires proof of the mental state set out in the definition of criminal attempt; the State must prove the defendant "[p]urposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be." *N.J.S.A.* 2C:5-1a(1). An attempt must be purposeful and no lesser mental state will suffice even if some other mental state could establish the underlying crime. *State v. Sette,* 259 *N.J. Super.* 156, 190 (App. Div. 1992), *certif. denied,* 130 *N.J.* 597 (1992); *see also State in the Interest of S.B.,* 333 *N.J.*

Super.236, 242 (App. Div. 2000). Attempted murder thus requires that a "defendant must have purposely intended to cause the particular result that is the necessary element of the underlying offense - death." *State v. Rhett*, 127 *N.J.* 3, 7 (1992).

An instruction which stated that defendant could be convicted of attempted murder if he attempted to commit a purposeful or knowing murder constituted reversible error, given that attempted murder requires that defendant purposely intended to cause death. *State v. Rhett*, 124 *N.J.* 3 (1992); *see also State v. Jackmon*, 305 *N.J. Super*. 274, 298-99 (App. Div. 1997), *certif. denied*, 153 *N.J.* 49 (1998); *State v. Williams*, 298 *N.J. Super* 430, 437-38 (App. Div. 1997), *certif. denied*, 156 *N.J.* 407 (1998).

III. DEFINITION

A. Generally

An "attempt" to commit a crime is an act done with intent to commit, beyond mere preparation but falling short of its actual commission. The overt act or acts must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself. *State v. Tropiano*, 154 *N.J. Super.* 452 (App. Div. 1977); *State v. O'Leary*, 31 *N.J. Super.* 411 (App. Div. 1954).

The Code encompasses in its definition of attempt those situations where the offense, if completed, would be a crime. There can be no conviction for an attempt to commit a crime unless the attempt, if completed, would have constituted a crime. *See State v. Weleck*, 10 *N.J.* 355 (1952); *State v. Meisch*, 86 *N.J. Super.* 279 (App. Div. 1965), *certif. denied*, 44 *N.J.* 583 (1965); *State v. Perlman*, 169 *N.J. Super.* 190 (Law Div. 1979).

Attempted passion/provocation manslaughter is cognizable under the Code as a lesser included offense of attempted murder. *State v. Robinson*, 136 *N.J.* 476, 489 (1994).

Attempted robbery is a crime under the Code, and a robbery conviction can be molded into a lesser included inchoate crime of criminal attempt to commit robbery. *State v. Farrad*, 164 *N.J.* 247 (2000).

Failure to instruct on "attempt" was plain error in a felony murder prosecution in which the state failed to offer evidence that the defendant robbed the victim; although the judge defined "purposeful conduct," he did so in conjunction with robbery charge, and the court failed to instruct on the concepts of purposeful conduct and substantial step. *State v. Gonzalez*, 318 *N.J. Super.* 527, (App. Div. 1999), *certif. denied*, 161 *N.J.* 148 (1999); *compare State v. Smith*, 322 *N.J. Super.* 385, 399-400 (App. Div. 1999), *certif. denied*, 162 *N.J.* 489 (1999) (distinguishing *Gonzalez* because the judge fully and accurately instructed the jury on the elements of attempt, albeit during an explanation of the law relating to another offense, the attempt to sell a weapon).

B. Preparation Distinguished From Attempt

N.J.S.A. 2C:5-1a(3) sets forth the test to be used in New Jersey to distinguish mere preparation from the crime of attempt. New Jersey has rejected other tests, *i.e.*, the "probable desistance test," in favor of the approach stated in the Code. Under 2C:5-1, an attempt can be distinguished from preparation by showing (1) the requisite criminal purpose; (2) the act must be a "substantial step" in the course of conduct and (3) the act must be "strongly corroborative" of criminal purpose. *N.J.S.A.* 2C:5-1b.

The legislative history of *N.J.S.A.* 2C:5-1 indicates that New Jersey follows the minority position that mere solicitation of criminal conduct, unaccompanied by any overt act in furtherance, rises to the level of an attempt. *State v. Sunzar*, 331 *N.J. Super.* 248 (Law Div. 1999).

Though mere preparatory steps may constitute attempt, very remote preparatory acts are excluded from the definition of attempt. *State v. Sharp*, 283 *N.J. Super*. 368, 370 (Law Div. 1993), *aff'd* 283 *N.J. Super*. 296 (App. Div. 1995), *certif. denied*, 142 *N.J.* 458 (1995); *see also State v. Moretti*, 52 *N.J.* 182 (1968), *cert. denied*, 313 *U.S.* 952 (1968)(mere preparation is an inadequate basis for conviction regardless of intent.

While mere preparation may be an inadequate basis for conviction, where there is sufficient evidence for the jury to find that defendant had taken "substantial steps which were strongly corroborative of the 'firmness' of his purpose" to carry out a plan, then the conviction will stand. Moreover, it would be improper for the court to charge the jury that mere preparation is not an attempt. Some preparation may be sufficient; it is a matter of degree. *State v. Fornino*, 223 *N.J. Super*. 531, 538 (App. Div. 1988).

IV. SUBSTANTIAL STEP

The Code further provides that:

b. Conduct shall not be held to constitute a substantial step under subsection a.(3) ... unless it is strongly corroborative of the actor's criminal purpose.

The "substantial step" requirement is satisfied if a defendant acts in a way that is strongly corroborative of the firmness of his purpose to carry out the crime. *State v. Farrad, 164 N.J.* at 258; *see also State v. Sharp,* 283 *N.J. Super.* 296, 299-300 (App. Div. 1995), *certif. denied,* 142 *N.J.* 458 (1995); *State v. Fornino,* 223 *N.J. Super.* 531, 538, 540 (App. Div. 1988), *certif. denied,* 111 *N.J.* 570 (1988), *cert. denied,* 488 *U.S.* 859, 109 *S.Ct.* 152, 102 *L.Ed.*2d 123 (1988). Thus, a defendant can be convicted of robbery, even if the theft is unsuccessful, if he or she (1) purposely takes a substantial step (2) to exercise unlawful control over the property of another (3) while threatening another with, or purposely placing another in fear of, immediate bodily injury. *State v. Farrad,* 164 *N.J.* at 258.

In the case of witness tampering, where the attempt is illegal, the criminal act is completed regardless of whether the result is achieved. Defendant was not entitled to "substantial step" jury instruction to supplement the attempt charge in prosecution for witness tampering, despite his claim that he merely requested a meeting with witness. Defendant's request for a meeting was accompanied by offer of a reward to the witness if she saw things his way, as defendant made it clear that if there were meeting and the investigation of defendant were dropped, then criticisms of the witness by a citizens' action organization would stop. A "substantial step" charge was not necessary here where the attempted tampering was complete upon the offer of the quid pro quo. State v. Speth, 323 N.J. Super. 67, 87 (App. Div. 1999).

V. INDICTMENT

A defendant may be convicted of attempt even though he was indicted for the substantive offense. *State v. McCoy*, 114 *N.J. Super.* 479 (App. Div. 1971). Hence, a trial court may charge attempt as a lesser included offense. *State v. Carlos*, 187 *N.J. Super.* 406, 416 (App. Div. 1982), *certif. denied*, 93 *N.J.* 297 (1983) (theft); *State v. France*, 153 *N.J. Super.* 428 (App. Div. 1977) (obtaining money by false pretenses).

VI. RENUNCIATION OF CRIMINAL PUR-POSE, N.J.S.A. 2C:5-1d

To be voluntary, the abandonment of criminal conduct must reflect a change in the defendant's purpose or a change of mind that is not influenced by outside circumstances. To be complete the abandonment must be permanent, not temporary or contingent. And, of course, the claimed renunciation must have resulted in avoidance of the crime. *State v. Alston*, 311 *N.J. Super*. 113, 121-22 (App. Div. 1998).

VII. DEFENSES

Impossibility of commission of the offense itself by reason of some condition unknown to perpetrator at the time of the offense is not a defense. See State v. Tropiano, 154 N.J. Super. 452 (App. Div. 1977); see also State v. Moretti, 52 N.J. 182, 188 (1968), cert. denied, 313 U.S. 952 (1968). Thus, in State v. Meisch, supra, 86 N.J. Super. 279, the Court found that it was not essential for the State to show that there was some item of personal property in the desk drawer into which the defendant thrust his hand in order to establish that the defendant was guilty of attempted larceny.

Defendant, who had tested positive for HIV, could be found guilty of attempted murder upon proof that he intended to kill a corrections officer by biting him, regardless of whether it is medically possible for bite to transmit HIV; under the statute governing criminal attempts, it was sufficient that defendant himself believed he could cause death by biting his victim and that he intended to do so. *State v. Smith*, 262 *N.J. Super.* 487, 505 (App. Div. 1993), *certif. denied*, 134 *N.J.* 476 (1993).

It would appear that voluntary intoxication may be a defense to an attempted sexual assault, according to *dicta* in *State v. Stasio*, 78 *N.J.* 467, 482 (1979).

VIII. SENTENCING

Pursuant to *N.J.S.A.* 2C:1-8d(2), a defendant may be convicted of an offense included in an offense charged whether or not the included offense is an indictable offense. An offense is so included when it consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein. *State v. Velez,* 176 *N.J. Super.* 136 (App. Div. 1980), *certif. denied,* 85 *N.J.* 504 (1981).

An attempt will merge into and is an included offense of the completed conduct. For example, attempted theft is an included offense of theft because it contemplates the conduct which goes beyond mere preparation to commit theft but stops short of completion. For purposes of punishment, no distinction is made. *State v. Russo*, 243 *N.J. Super.* 383, 410-411 (App. Div. 1990), *certif. denied*, 136 *N.J.* 322 (1991); *State v. Carlos*, 187 *N.J. Super.* 406, 416 (1982), *certif. denied*, 93 *N.J.* 297 (1983).

Pursuant to *N.J.S.A.* 2C:5-4, an attempt to commit a crime of the first degree is a crime of the second degree, except that an attempt to commit murder is a crime of the first degree. All other inchoate crimes are of the same degree as the most serious crimes attempted.

The unlikelihood of an attempt to culminate in the commission of a crime may be considered by the sentencing judge in imposing sentence for a crime of a lower grade or degree if neither the particular conduct charged nor the defendant presents a public danger. N.J.S.A.~2C:5-4b.

Convictions for attempted aggravated sexual assault and attempted sexual assault do not provide the requisite foundation to require the enhanced penalties under *N.J.S.A.* 2C:13-1c(2) (kidnaping). For the enhanced penalty section to apply, the defendant must have committed an enumerated crime against the victim; attempts to commit such crimes are not included within the statute. *State v. Smith,* 279 *N.J. Super.* 131, 142 (App. Div. 1995).

An attempt to cause death or serious bodily injury, without causing either, and without the use or threatened use of a deadly weapon, does not meet the statutory definition of violent crime and thus is insufficient to subject a defendant to a "No Early Release Act" sentence, *N.J.S.A.* 2C:43-7.2. *State v. Staten*, 327 *N.J. Super.* 349, 354 (App. Div. 1999).

IX. SCOPE OF APPELLATE REVIEW

The scope of appellate review of factual determinations of the trial court is "extremely narrow," but a trial judge's interpretation of the law and legal consequences that flow from established facts are not entitled to any special deference. *State in the Interest of S.B.*, 333 *N.J. Super.* 236, 241 (App. Div. 2000). Thus, the Appellate Division will review the entire record to determine whether there is sufficient credible evidence to support an adjudication of guilt of committing an aggravated assault based on the attempt to cause bodily injury upon a teacher. *Ibid.*

ATTORNEYS

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

I. FORMER PROSECUTOR OR COUNTY OFFICIAL - CONFLICT OF INTEREST

Former assistant prosecutor retained to represent defendants who had been indicted on charges growing out of a lengthy investigation conducted by county prosecutor's office during time attorney was employed there should not have represented defendants. Furthermore, he is precluded from representing defendants by virtue of his association in the practice of law with another attorney who had been employed in the county prosecutor's office during the investigation of defendants. *State v. Rizzo*, 69 *N.J.* 28 (1975).

In *State v. Morelli*, 152 *N.J. Super.* 67 (App. Div. 1977) a firm may not represent any defendant who was investigated or under indictment during the time an associate of the firm was on the staff of the county prosecutor. In such cases, defense counsel is to be disqualified even though the attorney-former assistant prosecutor did not take part in the investigation leading to the defendant's indictment.

Higgins v. Advisory Committee of N.J., 73 *N.J.* 123 (1977) held that an attorney who is a member of the board of chosen freeholders may not ethically represent a criminal defendant indicted for a crime in the county in which the freeholder-attorney holds office.

In *Ross v. Canino*, 93 *N.J.* 402 (1983), a law firm, in which a former Attorney General was a partner, could represent plaintiffs in a civil suit, although one or more divisions in the Department of Law and Public Safety, during the Attorney General's term, investigated matters relating to the suit. However, the former Attorney General could not participate in the case. *See also Knight v. Margate*, 86 *N.J.* 374 (1981).

In Re Advisory Opinion on Professional Ethics No. 361, 77 N.J. 199 (1978), held that an assistant prosecutor, upon leaving public office, should refrain from handling any matter or representing any client based on guidelines set out by the court. If an assistant county prosecutor has investigated or participated in an investigation in any manner, he should be foreclosed from representing in that or any related matter any person who was a subject of that investigation or was indicted or tried as a result thereof. Moreover, a county prosecutor should not represent anyone in a criminal matter which has been pending, whether in the investigatory stage or otherwise, in the office while he was a prosecutor. Finally, even if not otherwise disqualified, an assistant county prosecutor should not appear in any criminal matter in any capacity against the State and County in which he served for a period of six months from the date of termination of his public employment.

See also Matter of Petition for Review of Opinion No. 569, 103 N.J. 325 (1986) (same six-month period imposed on former deputy attorneys general respecting practice before agencies they represented).

State v. Medina, 201 N.J. Super. 565 (App. Div. 1985), certif. denied, 102 N.J. 298 (1985), upheld the disqualification of a former county assistant prosecutor from representing a defendant on narcotics charges involving cocaine, of which he acquired knowledge while an assistant prosecutor. The attorney, while with the prosecutor's office, had not participated in the investigation of the defendant but had knowledge of it and had been present while the cocaine seized from defendant was field tested. The attorney was aware that the test indicated that the substance was a narcotic and at some point in time understood the significance of that knowledge, although not necessarily at the time of the test. Moreover, the attorney had also represented one of the police officers connected to the investigation and arrest of the defendant on an unrelated criminal matter. The Court concluded that the aforementioned clearly had the appearance of impropriety and warranted disqualification of the attorney.

II. DEFENSE COUNSEL - CONFLICT OF INTEREST

A defense counsel's representation, in an unrelated matter and with the defendant's knowledge, of two codefendants, at whose trial before the same judge the attorney made disparaging remarks about the defendant, did not result in a conflict of interest that rendered the guilty plea, negotiated by the defense attorney's partner, involuntary. *Dukes v. Warden*, 406 *U.S.* 250, 92 *S.Ct.* 1551 (1972), *reh. denied* 407 *U.S.* 934 (1972).

In *Holloway v. Arkansas*, 435 *U.S.* 475, 98 *S.Ct.* 1173 (1978), petitioners, codefendants at trial, made timely motions at the state criminal trial for appointment of separate counsel based on the representations of their appointed public defender that, because of confidential information received from the codefendant, the interests of his clients conflicted, and he could not therefore

provide effective assistance for each client. The trial court denied the motions without taking adequate steps to ascertain whether the risk of conflict of interest was too remote to warrant separate counsel, and defendants were convicted.

Holloway held that requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of the Sixth Amendment. The Supreme Court also determined that whenever a trial court improperly requires joint representation over a timely objection, reversal is required, and prejudice is presumed in such case regardless of whether it was independently shown. *See also, Glasser v. U.S.*, 315 *U.S.* 60, 75-76, 62 *S.Ct.* 457, 467 (1942).

In *Cuyler v. Sullivan*, 446 *U.S.* 335, 100 *S.Ct.* 1708 (1980), two codefendants were acquitted at separate trials, while the third, Sullivan, was convicted. Sullivan brought a habeas corpus action, alleging ineffective assistance of counsel on the ground that his attorneys had a conflict of interest. The Supreme Court held that defense attorneys have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.

The Court also held that a defendant who shows that a conflict of interest actually affected the adequacy of his representation, need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

In *Flanagan v. United States*, 465 *U.S.* 259, 104 *S.Ct.* 1051 (1984), the district court prior to trial disqualified a law firm, which was to jointly represent four defendants, from representing any of the four defendants. The Court held that this disqualification order was interlocutory and not reviewable prior to entry of a final judgment in the criminal case.

Burger v. Kemp, 483 *U.S.* 776, 107 *S.Ct.* 3114 (1987), held that, while there is great potential for a conflict of interest when two law partners represent coindictees and cooperate in the planning of trial strategy, even if defendants were tried separately, prejudice will be presumed only if the defendant

demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.

Nix v. Whiteside, 475 *U.S.* 157, 106 *S.Ct.* 988 (1986), held that when a defendant informs counsel that defendant will perjure himself on the stand, it is proper conduct, and clearly not ineffective assistance of counsel, to attempt to dissuade defendant from such conduct, to inform the client that the attorney would be obligated to inform the court if such conduct occurred, and to seek to withdraw as counsel if defendant insists on perjuring himself. The Court found that such warnings by counsel in no way violated defendant's right to testify in his own behalf, or his right to counsel. Here, the only conflict of interest was between defendant's proposal to testify falsely, and counsel's ethical obligations.

State v. Land, 73 N.J. 24 (1977), held that the joint representation by a single attorney of a husband and wife charged with narcotics violations deprived the defendants of effective assistance of counsel. The Court noted that it is the attorney's obligation when he first meets with his prospective clients to advise them of possible conflicts and of their constitutional rights. Land also held that in all cases where an attorney represents more than one defendant, the trial court ought to advise the parties of their constitutional rights. This should be accomplished as soon as the trial court is alerted to the existence of multiple representation and feasibly may bring the matter to the attention of the defendants and counsel. The defendants may waive those rights, but the trial judge must make certain on the record that the defendants understandingly and knowingly have decided to forego separate counsel.

The Court further determined that the preferable rule is that, in the absence of waiver, if a potential conflict of interest exists, prejudice will be presumed resulting in a violation of *N.J. Const. 1947*, Art. I, ¶ 10, guaranteeing assistance of counsel.

In *State v. Bellucci*, 81 *N.J.* 531 (1980), the Supreme Court again addressed the issue of joint representation which involved the pretrial representation of several codefendants by one attorney. *Bellucci* held that the attorney should be barred from representing any one of them. In addition, the Court held that it was an improper conflict for an attorney to represent one defendant while a partner or assistant in the same firm represents other criminal codefendants. The Court again found that actual prejudice need not be demonstrated, and it adhered to the principle that once a potential conflict exists, prejudice will be presumed in the absence of waiver, even if associated private attorneys are involved instead of the same attorney. (Note that this decision was held to be retroactive in *State v. Rogers, supra,* 177 *N.J. Super.* 365.

See also State v. Oliver, 320 N.J. Super. 405 (App. Div. 1999) (the prophylactic rule of *Bellucci* not applicable where there is no conflict of interest among codefendants, none of the defendants denied the conduct at issue and the legal arguments pertained to the constitutionality of ordinances); *State v. Scherzer*, 301 *N.J. Super.* 363 (App. Div. 1997), *certif. denied*, 151 *N.J.* 466 (1997) (harmless error for a codefendant's attorney to stand in for another codefendant's attorney because the trial was a long trial and because codefendants had same interest and pursued a common strategy).

In State v. Bell, 90 N.J. 163 (1982), two defendants were represented at trial by two staff attorneys from the same Public Defender's Office. The Court held that in this case, there is no presumed or "per se" rule of conflict of interest where deputy public defenders represent multiple defendants. The Court, however, noted that should the circumstances demonstrate a potential conflict of interest and a significant likelihood of prejudice, the presumption of both an actual conflict of interest and actual prejudice will arise without the necessity of proving such prejudice. When a claim of conflict arises suddenly during trial, the issue is best left to the sound discretion of the trial court. The Court also ordered that the procedures set forth in R. 3:8-2 be followed whenever multiple defendants are to be represented by separate public defenders from the same office. The trial court should explore the situation on the record before trial, and if defense counsel perceives a potential conflict, this judgment should be accorded substantial deference. The Court also recommended that in such cases the assignment of the defense of codefendant to out-side pool counsel be the norm, or where unavailable, assign deputy public defenders from an adjoining county. (Note: R. 3:8-2 was amended in 1995 to prescribe a time frame for the making of the jointrepresentation motion, which is no later than the arraignment/states conference. However, the rule provides that the trial court may entertain such a motion at anytime on good cause shown).

In *In Re Garber*, 95 *N.J.* 597 (1984), an attorney represented a "gangland style" murder eyewitness in proceedings leading to that witness' recantation of his identification of a person whom the attorney represented in the past and presently represented in matters

unrelated to the murder indictment. The attorney also maintained social and business relationships with the uncle of the person identified, the uncle reputedly being connected with organized crime. *Garber* held that the attorney was clearly and convincingly guilty of an actual and acute conflict of interest, and acted in a patently unethical manner. The attorney also committed an ethical violation because he fostered the appearance of such a conflict.

In Matter of Inquiry to Advisory Committee, 130 N.J. 431 (1992), a full-time police officer in the Township of Cherry Hill was also a member of the New Jersey and Pennsylvania bars. The issue before the Court was whether an appearance of impropriety arose from the police officer joining a law firm and the firm representing criminal defendants in cases originating in Cherry Hill. The Court ruled that the firm could not represent private clients in such criminal matters. Because the officer intended to remain a full-time police officer during his association with the law firm and because police officers are visible components of the administration of justice in their respective communities, the question posed virtually answered itself -- as long as the police officer remained a Cherry Hill police officer, no firm with which he is associated may represent private clients in Cherry Hill Municipal Court or in criminal matters arising in Cherry Hill.

In State v. Norman, 151 N.J. 5 (1997), two attorneys who were involved in representing the defendants shared office space, eventually became partners, and were paid their fees by one of the defendants. One defendant's attorney appeared at the other defendant's arraignment, and representation of one defendant on direct appeal continued after the formation of the attorney's partnership. When the conflict of issue claim arose on post-conviction relief, one Appellate Division panel granted the defendant before it a new trial; another panel denied relief to the other defendant. The Supreme Court held that while no partnership existed during the defendants' trials, it found a substantial risk of prejudice to one defendant paying attorney fees for both himself and his codefendant. The Court reversed the denial of PCR to that defendant whose attorney was paid by the codefendant. See also, State v. Murray, 162 N.J. 240, 249-251 (2000) (even though defendant's PCR application time-barred, he was entitled to an evidentiary hearing on whether an actual conflict on the part of trial counsel existed).

In *State v. Clark*, 162 *N.J.* 201 (2000), defendant was represented by designated counsel at his jury trial.

Defense counsel also worked as a part-time municipal prosecutor in the same county as that in which defendant was indicted. Although nothing in the court rules or decisional law prevented defense counsel from acting as a municipal prosecutor and as a defense counsel in the Superior Court of the same county, the Supreme Court amended R. 1:15-3(b) to preclude a municipal prosecutor from simultaneously serving as defense counsel in the Superior Court in the same county in which he or she serves as municipal prosecutor.

In State v. Reddy, 137 N.J. Super. 32 (App. Div. 1975), two defendants were charged with first degree murder and were represented by the public defender for a considerable period of time. Representation continued without objection until two weeks before trial, when defendants applied for a continuance of a suppression hearing in order to obtain private counsel. Although an accused has the right to the assistance of counsel, this right is defined as a fair opportunity to secure and consult a counsel of his own choice. However, there is no absolute right to a particular attorney, reasonable diligence must be utilized in choosing. Therefore, a failure to act expeditiously in obtaining any attorney will permit the trial court in its discretion to do what is reasonably necessary to meet the situation.

In State v. Jaquindo, 138 N.J. Super. 62 (App. Div. 1975), aff'd sub. nom. State v. Rizzo, 69 N.J. 28 (1975), some of the charges against defendants were based upon alleged acts which occurred after their attorney had left the city prosecutor's office. This did not preclude a finding of a conflict of interest, or appearance of conflict, as to disqualify the attorney where much of the information relevant to the crimes charged was gathered while the attorney was an assistant prosecutor and where the crimes charged in one of the indictments involved alleged manipulation or cover-up of previously gathered evidence. Jaquindo held that defendants are entitled to retain qualified counsel of their own choice, but they have no right, however, to demand to be represented by an attorney disgualified because of an ethical requirement. See also State v. Morelli, 152 N.J. Super. 67 (App. Div. 1977); In re Ethics Opinion 361, 75 N.J. 199 (1978).

In *State v. Canery*, 144 *N.J. Super.* 527 (App. Div. 1976), *certif. denied*, 74 *N.J.* 259 (1977), defendant and his accomplice were charged with assault with intent to rob, robbery, and being armed while committing these offenses. At trial, it was discovered that one investigator had been assigned by the Public Defender for both defendants and had interviewed the victim on behalf of both of those parties. On appeal, defendant claimed that

his conviction was invalid by virtue of the investigator's conflict of interest. The court held that the use of an investigator who (because of a conflict of interest) would curtail the scope of his investigation could negate the right of a defendant to have adequate and effective legal services. The same standard should be applied to an investigator as to an attorney in the dual representation of a case. The applicable test is whether the investigator was forced to compromise his investigation on behalf of one defendant in order to shield the defense strategy on behalf of the other.

State v. Boone, 154 *N.J. Super.* 36 (App. Div. 1976), *certif. denied,* 77 *N.J.* 493 (1978), held that a defendant, whose attorney was representing defendant's employer, was denied his constitutional right to effective counsel where the conflict of interest was not made apparent at trial. The associated attorney had an absolute duty to disclose to defendant the potential for conflict of interest resulting from dual representation.

In *State v. Rogers*, 177 *N.J. Super.* 365 (App. Div. 1981), *app. dismissed* 90 *N.J.* 187 (1982), three staff attorneys of the same public defender's office, represented three defendants at trial. The Court held that such joint or dual representation, without more does not constitute a denial or impairment of the defendants' right to counsel. The Court further decided that *State v. Bellucci*, 81 *N.J.* 531 (1980) was retroactive. The Court refused to reverse defendant's conviction because there was no suggestion of actual conflict in the theory and presentation of the defense or any possibility of prejudice as the trial unfolded.

State v. Pych, 213 N.J. Super. 446 (App. Div. 1986), held that attorneys who are under indictment are not prohibited from practicing law or from serving as trial counsel unless their representation of the defendant may be materially limited by the attorney's own interests. *R.P.C.* 1.7(b)(1), (2). Further, the attorney is not obligated to disclose the fact of his indictment to defendant. In applying the two prong test enunciated in State v. Bell, 90 N.J. 163 (1982), concerning the conflict of interest, the Appellate Division in Pych held that the matter for which defendant's attorney was under indictment while representing defendant did not present a potential conflict of interest. Assuming that such potential existed, there was no significant likelihood of prejudice to defendant that would warrant a finding of a constitutional infirmity in the attorney's representation of defendant, because each was indicted by and prosecuted in different counties before different trial courts, there was no evidence that the trial court knew of the attorney's indictment while trying defendant's case, the attorney did not enter into a plea bargain in his own behalf with the prosecutors trying defendant's case during the pendency of defendant's trial, and the attorney was highly competent in the area of criminal law for which he was representing a defendant.

In *State v. Catanoso*, 222 *N.J. Super.* 641 (Law Div. 1987), the trial court disqualified an attorney from representing defendant when such representation presented a conflict of interest with the attorney's previous representation of the State's chief witness. Defendant's interests were materially adverse to the interests of the former client because the current representation might have necessitated the disclosure of certain confidences made by the former client to the attorney. *R.P.C.* 1.9(a)(1). Such representation also would give rise to the appearance of impropriety. *R.P.C.* 1.7(c)(2).

In *State v. Sanders*, 260 *N.J. Super.* 491 (App. Div. 1992), defendants were tried jointly and an attorney who had represented Sanders at a bail proceeding was permitted, over Sanders' objection, to represent Sanders' codefendant at trial. The Appellate Division found that the attorney's representation of defendant at the bail hearing constituted "representation" under *R.P.C.* 1.9. Thus, the attorney could not act as counsel for the codefendant in the same proceeding. The preferable rule is that when there is a conflict under *R.P.C.* 1.9, prejudice is presumed.

In *State v. Muniz*, 260 *N.J. Super.* 309 (App. Div. 1992), the trial court granted the State's application to disqualify the Office of the Public Defender as counsel for defendant in a homicide prosecution because the office had represented the homicide victim in another criminal matter. The trial court had directed the Public Defender to "pool" defendant's case to outside counsel. The Appellate Division ruled that the Public Defender's Office was not disqualified.

In *State v. Salentre*, 275 *N.J. Super.* 410 (App. Div. 1994), *certif. denied*, 138 *N.J.* 269 (1994), the prosecutor notified the defense that five of its witnesses against defendant could be his codefendants, who all had pled guilty. One codefendant did testify, and all of the codefendants had been represented by the Office of the Public Defender. Defendant's attorney made a motion to be relieved as counsel, citing a perceived conflict. The Appellate Division upheld the trial court's denial of the motion. There were no grounds for automatic

disqualification, and defendant presented no evidence of actual conflict.

State v. Bruno, 326 *N.J. Super.* 322 (App. Div. 1999), affirmed the denial of the State's motion to disqualify a law firm from representing the defendant. The law firm had represented the lead detective in defendant's criminal trial in a prior civil matter. The Appellate Division found that when defendant hired the law firm, the detective was not a current client of the firm, so there was no actual conflict of interest. There was no appearance of impropriety because the firm's representation of the detective was limited, and no evidence from the civil trial could be used to cross-examine the detective at defendant's criminal trial.

In *State v. Needham*, 298 *N.J. Super.* 100 (Law Div. 1996), the trial court found a conflict on the part of defense counsel who had represented the State's principal witness, a police officer, in an internal affairs investigation. The court found that the public's confidence in the system would be undermined since it might view the officer as unfairly aiding the defendant or that defense counsel would not vigorously cross-examine his former client or that defense counsel would use confidential information.

III. FIRST AMENDMENT - COMMENTS BY ATTORNEYS ON PENDING CASE

State v. Carter, 143 N.J. Super. 405 (App. Div. 1976), after remand rev'd, 144 N.J. Super. 302 (App. Div. 1976), was a murder prosecution retrial, where the trial court issued an order limiting public comment by "defendants, all attorneys, associates of the attorneys preparing for trial, agents, servants and employees," It was held invalid for (1) failure to include exception in DR7-107, which permits quotations from or references to public record, and (2) failure to make adequate showing of need. Specific findings that there is a reasonable likelihood of prejudicial publicity which would make empaneling an impartial jury difficult was held to be necessary prior to entry of order. See also R.P.C. 3.6.

IV. PRIVILEGE

In *Tower v. Glover*, 467 *U.S.* 914, 104 *S.Ct.* 2820 (1984), an Oregon prisoner brought an action for punitive damages under federal law against an Oregon public defender who represented him at one of his trials and against another Oregon public defender who

represented him on appeal from that and another conviction. The action alleged that the public defenders conspired with various state officials, including the trial and appellate judges, to secure the prisoner's conviction. The Court concluded that the Public Defenders were not immune from the liability action, as it alleged intentional misconduct by virtue of the conspiracy claims.

According to *Ferri v. Ackerman*, 444 *U.S.* 193, 100 *S.Ct.* 402 (1979), federal law does not provide attorneys appointed to represent indigents in federal criminal trials with absolute immunity from malpractice suits filed by their former clients in state courts. The Supreme Court held that state courts are free to determine whether state law provides for such immunity in state causes of action.

In *State v. Stroger*, 97 *N.J.* 391 (1984), *cert. denied*, 469 *U.S.* 1193, 105 *S.Ct.* 971 (1985), our Supreme Court held that when records are validly obtained from an attorney by the disciplinary review board (DRB) in the course of an ethics audit or an investigation, and the prosecutor learns of possible criminal implications in an attorney's conduct, the DRB, upon proper notice to the attorney, does not violate mandates of confidentiality, nor attorney's constitutional rights, in release to law enforcement authorities of the attorney's required records.

In *In Re Kozlov*, 79 *N.J.* 232 (1979), an attorney appealed an order holding him in contempt in *facie curiae* for refusal to disclose his client's identity who had knowledge of improper juror conduct. The Court held that the attorney was entitled to professional shield of attorney-client privilege where trial court had a less intrusive source of information available to determine whether juror's alleged misconduct warranted a new trial in a criminal case.

In *State v. Mingo*, 77 *N.J.* 576 (1978), defendant's expert, who defendant had decided not to call as a witness, was allowed to testify as a witness for the State, after the State learned of him from discovery provided by defendant. Held: the discovery denied defendant the effective assistance of counsel. To safeguard counsel's ability to provide effective assistance, he must be permitted full investigation latitude, without risk a "potentially crippling revelation" to the State of information that he uncovers and chooses not to utilize at trial.

In the Matter of Joseph L. Nackson, Esq., 114 N.J. 527 (1989), held that the attorney-client privilege barred the grand jury from compelling the attorney to answer

questions concerning the whereabouts of his client who was under investigation, when the grand jury had already returned an indictment charging the client as a fugitive, when there were other means through which to obtain the information that the client was a fugitive and to develop a record in support of an indictment or a presentment, and when the prosecutor had employed the grand jury as an investigative arm to obtain information unrelated to the indictment.

V. PRO HAC VICE

Leis v. Flynit, 439 U.S. 438, 99 S.Ct. 698 (1979), held that there is no federal right that permits an out-ofstate lawyer to appear in state court without meeting the state's bar requirements. The Supreme Court upheld a trial court's refusal to allow two out-of-state lawyers to represent defendants in a pending state criminal obscenity case, stating that the right of an out-of-state attorney to appear *pro hac vice*, to be enforceable, must be derived from statute, legal rule or through a mutually explicit understanding.

According to State v. Chappee, 211 N.J. Super. 321 (App. Div. 1986), certif. denied, 107 N.J. 45 (1986), rev'd on habeas, Fuller v. Diesslin, 868 F.2d 604 (3d Cir. 1989), cert. denied, 493 U.S. 873 (1989), while defendant, pursuant to the Sixth Amendment, is guaranteed the right to counsel, he is not assured an absolute right to counsel of his choice. As long as the State is able to provide defendant with effective counsel, there is no constitutional right to select an attorney who is not a member of the New Jersey Bar. Moreover, the Court held that the risk that the presence of out of state counsel might hinder the orderly processing of the case was a sufficient countervailing State interest to justify the court's decision not to grant counsel of defendant's The trial court, therefore, did not abuse its choice. discretion, pursuant to R. 1:21-2, in denying admission of defendant's counsel pro hac vice.

VI. CONTEMPT/DISCIPLINARY ACTION

In *Matter of Imbriani*, 149 *N.J.* 521 (1997), a former Superior Court Judge pled guilty to theft under *N.J.S.A.* 2C:20-9. Although acknowledging the respondent's exemplary judicial career, the Court ordered his disbarment because he pled to an offense based on personal gain, because the amount of theft was substantial and the act of theft was not an isolated incident. In *Matter of Magid*, 139 *N.J.* 449 (1995), a First Assistant Prosecutor was charged with an act of domestic violence. The assistant prosecutor was later convicted of simple assault in municipal court pursuant to a plea bargain. The Court noted that, as a prosecutor, the respondent had a duty to combat domestic violence, not commit it. The Court noted that respondent's assault was an isolated one, and that the respondent had suffered professionally as a result of negative publicity. The Court ordered a public reprimand, but it cautioned that in the future the Court will ordinarily suspend an attorney convicted of an act of domestic violence. *Accord Matter of Principato*, 139 *N.J.* 456 (1995).

Criminal convictions are given conclusive effect in disciplinary proceedings and underlying facts in support of convictions need not be individually reviewed in order to determine whether a breach of ethics has occurred. The facts may be considered, however, in assessing the appropriateness of discipline and the severity of the sanction to be imposed. When an ethical violation so patently offends the elementary standards of a lawyer's professional duty, it *per se* warrants disbarment. *Matter of Conway*, 107 *N.J.* 168 (1987); *see also, State v. McCann*, 110 *N.J.* 496 (1988).

An attorney may be subject to a disciplinary hearing and subsequent sanctions, including disbarment, if there is clear and convincing evidence that the attorney's conduct violated the Rules of Professional Conduct, notwithstanding that he was acquitted on criminal charges arising out of that same conduct. *Matter of Rigolosi*, 107 *N.J.* 192 (1987); *see also, State v. Scher*, 278 *N.J. Super.* 249 (App. Div. 1994), *certif. denied*, 140 *N.J.* 276 (1995); *State v. McCoy*, 261 *N.J. Super.* 202 (Law Div. 1992).

VII. HYBRID REPRESENTATION

A trial court, in its discretion, may permit hybrid representation, *i.e.* both *pro se* and legal counsel. *State v. Long*, 216 *N.J. Super.* 269 (App. Div. 1987); *State v. McCleary*, 149 *N.J. Super.* 26 (1977). Such joint representation, however, is to be avoided whenever possible. *State v. Pratts*, 145 *N.J. Super.* 79, 89 (App. Div. 1975), *aff'd* 71 *N.J.* 399 (1976). *Accord, State v. Roth*, 289 *N.J. Super.* 152 (App. Div. 1996), *certif. denied*, 146 *N.J.* 68 (1996). When a defendant is given hybrid representation, he cannot claim prejudice or attack the representation on constitutional grounds. *State v. Cook*, 330 *N.J. Super.* 395, 414 (App. Div.), *certif. denied*, _____ *N.J.* ____ (2000).

VIII. INTERVIEWING JURORS AFTER TRIAL

In *State v. Riley*, 216 *N.J. Super.* 383 (App. Div. 1987), the Court held that an attorney did not violate *R.* 1:16-1, which prohibits litigants, their attorneys, or agents from engaging in post-trial interviews with jurors because the initial, chance meeting was not a deliberate, willful investigatory effort, notwithstanding the attorney's arrangement to meet with the juror again. Further, the Court held that even if the attorney had violated *R.* 1:16-1, the information obtained during the meeting would not be inadmissible *per se* in a hearing to determine whether defendant was denied a fair trial.

In *State v. Scher*, 278 *N.J. Super.* 249 (App. Div. 1994), *certif. denied*, 140 *N.J.* 276 (1995), a defense investigator flagrantly violated *R.* 1:16-1 and a trial court order when he interviewed two jurors following defendant's jury trial. Defendant then used the information to impeach the jury's verdict. Although acknowledging defense counsel's ethical violation, the Appellate Division ruled that counsel still could use the information to impeach the verdict.

I. BEFORE CONVICTION

A. Sources

There are two primary sources governing bail - constitution and court rule:

1. N.J. Const. 1947, Art.I, ¶ 11.

All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.

2. *R.* 3:26-1(a).

All persons, except those charged with crimes punishable by death when the prosecutor presents proof that there is a likelihood of conviction and reasonable grounds to believe that the death penalty may be imposed, shall be bailable before conviction on such terms as, in the judgment of the court, will ensure their presence in court when required.

B. Standards for Fixing Bail

The New Jersey Supreme Court has established eight criteria for evaluating a defendant's motion for bail in non-capital cases. *State v. Johnson*, 61 *N.J.* 351, 364-365 (1972); *R.* 3:26-1(a)(1)-(8). Bail also may be issued in certain circumstances upon a failure to indict or failure to move an indictment or accusation for trial, *R.* 3:26-1(b),(c), and in extradition proceedings. *R.* 3:26-1(d).

Fixing bail is a "critical stage" in criminal proceedings requiring courts to honor a defendant's constitutional rights to counsel, to appear in person, and to due process. *State v. Fann*, 239 *N.J. Super.* 507 (Law Div. 1990).

C. Sources of Information in Bail Hearing

1. Grand Jury Transcripts

Sealed grand jury transcripts and affidavits may be used by the trial court in its consideration of motion for bail. *State v. Campisi*, 64 *N.J.* 120 (1973); *See State v. Engel*, 99 *N.J.* 453 (1985), regarding the admissibility of hearsay evidence in capital bail hearings.

2. Hearsay confession of codefendant may be used in evaluating a defendant's bail motion. *See* Subsection E., Crimes Punishable By Death, *infra*.

In any county, with the approval of the Assignment Judge, a program may be instituted for the deposit in court of cash in the amount of 10 percent of the amount of bail fixed.

1. Standards

(a) Bail may not be set in such a manner as to compensate for the 10 percent cash deposit program. The 10 percent cash deposit program, as it is now operative, is not to be utilized in lieu of reasonable bail. Rather, it is to empower the trial judge, in counties where the program has been approved by the assignment judge, to permit the posting of 10 percent of the amount of bail fixed. This avoids the necessity of paying for a surety bond and enables a defendant to get back his deposit upon compliance with the terms of the recognizance. *State v. Singleton*, 182 *N.J. Super.* 87 (App. Div. 1981); *State v. McNeil*, 154 *N.J. Super.* 479, 481 (App. Div. 1977).

Like any other contract, a bail bond should be construed to effectuate the reasonable intentions of the parties. *State v. Giordano*, 283 *N.J. Super.* 323, 329 (App. Div. 1995).

(b) The mandatory provisions of R. 3:26-5 on justification of sureties are not automatically applicable to the 10 percent cash deposit program. Compliance with R. 3:26-4(f), requiring an affidavit as to lawful ownership of the cash, is all that is necessary when bail is posted by someone other than defendant. *State v. Moncrieffe*, 158 *N.J. Super.* 528 (App. Div. 1978).

2. Reduction of Bail.

See State v. McNeil, 154 N.J. Super. 479, 481 (App. Div. 1977); Mecom v. United States, 434 U.S. 1340, 98 S.Ct. 19, 54 L.Ed.2d 49 (1977).

3. Effect of Revocation of Bail.

In *State v. Sutton*, 132 *N.J.* 471 (1993) the New Jersey Supreme Court held that pursuant to *N.J.S.A.* 2C:44-5, the sentencing court has the discretion of whether to impose a consecutive or concurrent sentence following a revocation of probation, parole, or bail for an offense committed while a defendant was released. The *Sutton* Court ruled that the imposition of a consecutive sentence was not automatic.

4. Cash Deposit, *R.* 3:26-4(f).

State v. Recanati, 318 N.J. Super. 569 (App. Div. 1999) (discussing request for remission of cash bail deposit to person other than defendant when terms of recognizance have been fulfilled); State v. Giordano, 283 N.J. Super. 323, 328-29 (App. Div. 1995) (unless bail agreement states otherwise, bail cannot be used to satisfy a defendant's restitution obligation without consent of third party who posted bail).

- E. Crimes Punishable By Death. R. 3:26-1(a).
 - 1. Prior Case Law

The New Jersey Constitution authorizes denial of bail in murder cases where proof is evident or the presumption great. This is satisfied where the application discloses a fair likelihood that the defendant is in danger of a first degree murder verdict. State v. Konigsberg, 33 N.J. 367 (1960), modified as to the admissibility of hearsay evidence in capital bail hearing, State v. Engel, 99 N.J. 453 (1985). At a capital bail hearing the burden is on the State to demonstrate that there is a fair likelihood that the defendant is in danger of a first degree murder verdict, but that does not mean that the issue before the court is guilt or innocence. State v. Obstein, 52 N.J. 516, 521-522 (1968), modified as to the admissibility of hearsay in a capital bail hearing, State v. Engel, 99 N.J. 453 (1985).

2. Title 2A Death Penalty Overturned

In State v. Funicello, 60 N.J. 60 (1972), cert. denied, 408 U.S. 942, 98 S.Ct. 2849, 33 L.Ed.2d 766 (1972), the New Jersey Supreme Court declared the death penalty unconstitutional for first degree murder in N.J.S.A. 2A:113-1, thus making it no longer a capital offense. With elimination of death penalty, first degree murder was no longer a capital offense, and a defendant indicated for murder was entitled to bail on the same terms as any other defendant. State v. Johnson, 61 N.J. 351 (1972).

3. Legislative Re-enactment of the Death Penalty in Title 2C.

In 1982, the death penalty was reinstated by the Legislature. *N.J.S.A.* 2C:11-3c(1). *R.* 3:26-1(a) also was amended on September 28, 1982, to substitute the phrase "capital offenses" with "crimes punishable by death" to comply with *State v. Johnson, supra.* Currently, a person charged with a crime punishable by death is not

entitled to bail where the "prosecutor presents proof that there is a likelihood of conviction and reasonable grounds to believe that the death penalty may be imposed." R. 3:26-1(a).

4. Evidence Admissible at Capital Bail Hearing

In a bail hearing in a case of capital murder, hearsay evidence, in the form of a codefendant's confession, may be considered in determining whether the State has met its burden to demonstrate that the defendant should be denied bail. *State v. Engel*, 99 *N.J.* 453 (1985). The State is required to show that a codefendant's confession is the most probative evidence available and that it is sufficiently trustworthy. The prosecutor must also demonstrate that the substance of the codefendant's confession will be admissible at trial. *Id.*

F. Detention Without Bail for Persons Under Probation or Suspended Sentence for Another Offense.

1. *N.J.S.A.* 2C:45-3a(3) provides:

a. At any time before the discharge of the defendant or the termination of the period of suspension or probation: . . .

(3) The court, if there is probable cause to believe that defendant has committed another offense or if he has been held to answer therefor, may commit him without bail, pending a determination of the charge by the court having jurisdiction thereof.

2. Standard

The constitutional provision for bail explicitly applies only to bail "before conviction." *N.J.S.A.* 2C:45-3a(3) is not mandatory but permits a court, in its discretion, to withhold bail. *State v. Garcia*, 193 *N.J. Super.* 334, 339 (App. Div. 1984).

- G. Forfeiture of Bail
 - 1. R. 3:26-6(b) provides

that "[t]he court may direct that a forfeiture be set aside if its enforcement is not required in the interest of justice upon such conditions as it imposes." *See State v. Peace*, 63 *N.J.* 127 (1973); *State v. Mieles*, 199 *N.J. Super.* 29, 41-42 (App. Div.), *certif. denied*, 101 *N.J.* 265 (1985). The factors for the trial court to consider in determining whether forfeiture should be remitted in whole or in part are listed in *State v. Hyers*, 122 *N.J. Super.* 177, 180 (App. Div. 1973). "Final determination" releasing surety of contractual obligation to state does not occur until dismissal on merits, acquittal, or sentence after conviction. *R.* 3:26-4(a); *State v. Ryu*, 259 *N.J. Super.* 87 (Law Div. 1992)

2. Burden of Proof

"The party seeking to set aside or remit a forfeiture bears the burden of proving that 'it would be inequitable to insist upon forfeiture and that forfeiture is not required in the public interest." *State v. Mercado*, 329 *N.J. Super.* 265, 269-70 (App. Div. 2000) (quoting *State v. Childs*, 208 *N.J. Super.* 61 (App. Div.), *certif. denied.* 104 *N.J.* 430 (1986)).

3. Standard of Review

The determination whether to relieve a bond obligor of a forfeiture lies within the sound discretion of the trial court.

Peace, 63 *N.J.* at 129; *Mercado*, 329 *N.J. Super.* at 270; *State v. Poon*, 244 *N.J. Super.* 86, 97 (App. Div. 1990); *R.* 3:26-6.

In State v. Childs, 208 N.J. Super. 61 (App. Div. 1986), certif. denied, 104 N.J. 430 (1986), defendant, although having failed to appear for trial on several designated occasions, appealed from the trial court's denial of his motion to vacate the forfeiture of \$15,000 bail posted by his mother to secure his release pending trial. In affirming the trial court's denial, the Appellate Division after weighing the factors set forth in State v. Hyers, 122 N.J. Super. 177, 180 (App. Div. 1973), held "[t]hat defendant's mother was not a commercial bondsman did not relieve her of her supervisory responsibility over defendant during his release or her obligation to have aided the police in his apprehension and return to custody." Based upon a consideration of the Hyers factors, as well as the intangible element of injury to the public interest, the trial court was justified in concluding that enforcement of forfeiture was required in the interest of justice.

II. BAIL PENDING APPEAL

- A. Rules of Court Governing
 - 1. Procedure To Be Followed

The procedure to be followed for bail pending appeal is governed by R. 2:5-1(a) which provides in pertinent part: "In criminal matters when bail pending appeal is sought, the party seeking bail shall present to the sentencing judge a copy of the notice of appeal with a certification thereon that the original has been filed with the appellate court."

2. Standards To Be Followed

The standard to be applied in an Application for Bail Pending Appeal is set forth in R. 2:9-4 which provides in pertinent part: "the defendant in criminal actions shall be admitted to bail . . . only if it appears that the case involves a substantial question that should be determined by the appellate court, and that the safety of any person or of the community will not be seriously threatened if the defendant remains on bail and that there is no significant risk of defendant's flight."

In no cases, however, shall a defendant who received a death sentence be admitted bail. *R.* 2:9-4.

3. Burden of Proof

R. 2:9-4 expressly places the burden on defendant to demonstrate that the case involves a substantial question and that safety of the community or any person will not be seriously threatened. *In Re Manna*, 124 *N.J. Super.* 428, 434 (App. Div.), *certif. denied*, 64 *N.J.* 158 (1973). *See Truong Dinh Hung v. United States*, 439 *U.S.* 1326, 99 *S.Ct.* 16, 58 *L.Ed.*2d 33 (1978).

4. Stay of Sentence

R. 2:9-3(b) provides that a sentence of imprisonment "shall not be stayed by the taking of an appeal or by the filing of a notice of petition for certification, but the defendant may be admitted to bail as provided in *R.* 2:9-4."

In *State v. Sanders*, 107 *N.J.* 609 (1987), the Court, reversing 212 *N.J. Super.* 599 (App. Div. 1986), held that the right of appeal provided to the State by *N.J.S.A.* 2C:44-1f(2) does not violate the Fifth Amendment's Double Jeopardy clause, despite the fact that a defendant may remain incarcerated for up to ten days while the State

perfects its appeal. The clear and unambiguous terms of the statute remove any expectation of finality that a defendant may vest in his sentence; its stay provisions ensure that he will not begin serving that sentence until the State's notice of appeal is filed. Of course, bail must be established by the trial court in accordance with R. 2:9-3(d) within a reasonable period after the State's appeal is taken.

5. Obligation of Surety

a. *R.* 2:9-4 contemplates new bail, not continued bail. *State v. Vendrell*, 197 *N.J. Super.* 232 (App. Div. 1984).

b. A judicial determination to admit defendant to post conviction bail cannot by itself extend a surety's obligation to provide bail. *State v. Vendrell, supra, R.* 2:9-4.

6. Bail Pending Resentencing Hearing

No provision is made for bail on application for resentencing under *N.J.S.A.* 2C:1-1d(2). After conviction defendant has no right to bail unless specifically provided pursuant to *R.* 2:9-4. *State v. Cavanaugh*, 174 *N.J. Super.* 90 (Resentencing Panel 1979). *See State v. Love*, 233 *N.J. Super.* 38, 46 (App. Div. 1989) (discussing continuance of bail pending appeal after the conclusion of appeal so that defendant could file a motion for reconsideration), *certif. denied*, 118 *N.J.* 188 (1989).

7. Revocation of Bail Pending Appeal.

See State v. Korecky, 333 N.J. Super. 78 (App. Div. 2000) (trial court properly revoked bail for violation of "no contact" provision, but erred in ordering forfeiture); State v. Maccioli, 110 N.J. Super. 352 (Law Div. 1970).

III. ENLARGEMENT UPON RECOGNIZANCE (pending Petition for Habeas Corpus) (See also, HABEAS CORPUS, this Digest)

A. Rules of Court Governing

Fed.R.App.P.23(b) and (c)

Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or the Supreme Court, or to a judge or justice of either court.

Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or judge or justice of either court shall otherwise order. *See United States v. Dansker*, 561 *F.*2d 485 (3d Cir. 1977).

B. Authority of Federal Courts to Grant

1. Although federal district courts have authority, as part of their general habeas corpus jurisdiction, to release state prisoners at any time before a habeas corpus becomes final, *United States ex rel. Thomas v. New Jersey*, 472 *F.*2d 735, 743 (3d Cir.), *cert. denied.* 414 *U.S.* 878, 94 *S.Ct.* 121 (1973); *United States ex rel. Slough v. Yeager*, 449 *F.*2d 755, 756 (3d Cir. 1971), the power is exercised sparingly.

2. Standards Governing

a. While addressing the motion of a federal prisoner seeking release on bail, Justice Douglas, provided the standard which should also govern bail applications by state prisoners in Habeas Corpus actions:

This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. He now attacks his conviction in a collateral proceeding. It is obvious that a greater showing of special reasons for admission to bail pending review should be required in this kind of case than would be required in a case where applicant has sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt. . . . In this kind of case it is therefore necessary to inquire whether, in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice. *Aronson v. May*, 85 *S.Ct.* 3, 5, 13 *L.Ed.*2d 6 (1964).

See Landano v. Rafferty, 970 *F.*2d 1230 (3d Cir.), *cert. denied*, 506 *U.S.* 955, 113 *S.Ct.* 412, 121 *L.Ed.*2d 336 (1992); *United States v. Smith*, 835 *F.*2d 1048 (3d Cir. 1987); *United States v. Messerlian*, 793 *F.*2d 94 (3d Cir. 1986).

b. The strictness of this standard reflects the notion that "bail incident to a filing of a petition for habeas

corpus is sought by one who no longer enjoys the presumption of innocence." *Canford v. Davenport*, 350 *F.Supp.* 1020, 1026 (D.N.J. 1972).

3. Standards Governing Pending State's Appeal

Hilton v. Braunskill, 481 *U.S.* 770, 107 *S.Ct.* 2113, 95 *L.Ed.*2d 724 (1987). In determining whether to stay a district court order granting relief to a habeas petitioner pending the state's appeal, federal courts are not restricted to considering only petitioner's risk of flight, but are authorized to consider traditional stay factors including the risk that petitioner would pose a danger to the public if released, the state's interest in continuing custody and rehabilitation, interest of the habeas petitioner in release pending appeal and likelihood of the state's success on the merits of the appeal, thereby abrogating *Carter v. Rafferty*, 781 *F.*2d 993 (3d Cir. 1986). *See Love v. Morton*, 944 *F. Supp.* 379, 391-92 (D.N.J. 1996), *aff'd*, 112 *F.*3d 131 (1997).

IV. BAIL PENDING EXTRADITION PROCEEDINGS PURSUANT TO THE UNIFORM CRIMINAL EXTRADITION LAW, *N.J.S.A.* 2A:160-6et seq. (See also, EXTRADITION, this Digest)

The courts of the rendering state retain authority to admit a defendant to bail after the governor's arrest warrant has issued pending defendant's pursuit of his habeas corpus remedy. *Matter of Basto*, 108 *N.J.* 480 (1987); *State v. Morel*, 253 *N.J. Super.* 470 (App. Div. 1992).

See also State v. Arundell, 278 N.J. Super. 202, 206-07 (Law Div. 1994) (inclusion of waiver of extradition is a reasonable condition of bail); State v. Maglio, 189 N.J. Super. 257 (Law Div. 1983).

V. OTHER BAIL-RELATED ISSUES

A. Bail Jumping.

Bail Jumping as an Offense under *N.J.S.A.* 2C:29-7

See State v. Smith, 253 N.J. Super. 145 (App. Div. 1992); State v. Meltzer, 239 N.J. Super. 110 (Law Div. 1989) (discussing statute of limitations for bail jumping); State v. Garland, 226 N.J. Super. 356, 442 (App. Div.) (discussing imposition of consecutive

sentence of bail jumping offense), *certif. denied*, 114 *N.J.* 288 (1988).

2. Federal Cases

See United States v. Muhammad, 146 F.3d 161 (3d Cir. 1998) (sentencing for bail jumping under federal law); United States v. Sanchez, 995 F.2d 468 (3d Cir. 1993) (same).

B. Bail and Jail Credits. R. 3:21-8

See State v. De Rosa, 332 N.J. Super. 426 (App. Div. 2000) (Defendant not entitled to jail credits against sentence for murder for period prior to trial when he was serving sentence for assault and receiving, either because no bail had been set or because he was unable to meet bail); State v. Mirakaj, 268 N.J. Super. 48, 52 (App. Div. 1993); State v. Grate, 311 N.J. Super. 544 (Law Div. 1997), aff'd, 311 N.J. Super. 456 (App. Div. 1998); State v. Williams, 266 N.J. Super. 154 (Law Div. 1993).

C. Bail Reform Act. 18 U.S.C.A. §§ 3141-50

See United States v. Montalvo-Murillo, 495 U.S. 711, 110 S.Ct. 2072, 109 L.Ed.2d 720 (1990); United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

As to bail and jail credits under Bail Reform Act law, see Reno v. Koray, 515 U.S. 50, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995); Ferrante v. United States Bur. of Prisons, 990 F. Supp. 367 (D.N.J. 1998) (discussing retroactive effect of Koray).

BIAS CRIMES

I. EXTENDED TERM SENTENCING

A. Statutory Provision:

N.J.S.A. 2C:44-3 provides that the court "shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, other than a violation of *N.J.S.* 2C:12-1a., *N.J.S.* 2C:33-4, or a violation of *N.J.S.* 2C:14-2 or 2C:14-3 if the grounds for the application is purpose to intimidate because of gender, to an extended term if it finds, by a preponderance of the evidence ..." that "[t]he defendant in committing the crime acted with a purpose to intimidate because of race, color, religion, sexual orientation or ethnicity."

B. Constitutionality

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), rev'g State v. Apprendi, 159 N.J. 7 (1999).

The Court held that "[0]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Thus, *N.J.S.A.* 2C:44-3e is unconstitutional because it authorizes an increase in the maximum prison sentence based upon a trial judge's finding, by a preponderance of the evidence, that defendant acted with the requisite purpose to intimidate because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

II. HARASSMENT

A. Statutory Provision:

N.J.S.A. 2C:33-4d elevates the petty disorderly persons offense of harassment to a crime of the fourth degree "if in committing the offense, the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity."

B. Constitutionality:

The statute survived constitutional attack in *State v. Mortimer*, 135 *N.J.* 517 (1994). In particular, the Court held that the prosecution of defendant under the

harassment statute did not violate defendant's right to freedom of speech; nor did it impermissibly enhance defendant's punishment on basis of motive. In addition, the Court held that the statute did not violate the Equal Protection Clause and could be interpreted in such a way that it was not unconstitutionally vague.

III. ASSAULT

A. Statutory Provision:

N.J.S.A. 2C:12-1e elevates the disorderly persons offense of simple assault to a crime of the fourth degree if the person acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation, or ethnicity."

B. Severance:

In *State v. Crumb*, 277 *N.J. Super.* 311 (App. Div. 1994), the Appellate Division affirmed a trial court's order severing a charge of assault under *N.J.S.A.* 2C:12-1e from murder and weapons charges. In particular, the Court explained that trying the bias count with the murder count would compel the admission of inflammatory and highly prejudicial evidence of defendant's racist beliefs.

BIGAMY

I. STATUTORY BASIS

The statutory basis of bigamy is set forth in N.J.S.A. 2C:24-1. Bigamy is a disorderly persons offense, and it occurs if a married person contracts or purports to contract another person in marriage. The other person involved is also guilty of bigamy if he contracts or purports to contract marriage with an individual while knowing that the person is married. There are four exceptions in which bigamy does not occur: (1) if the actor believes that the prior spouse is dead; (2) if the actor and the prior spouse have been living apart for five consecutive years throughout which the prior spouse was not known by the actor to be alive; (3) if a court entered a judgment purporting to terminate or annual any prior disqualifying marriage, and the actor does not know that judgment is invalid; or (4) if the actor reasonably believes that he is legally eligible to remarry.

I. JURISDICTION

Bigamy prosecutions must ordinarily be brought in the jurisdiction where the second marriage -- the crime -- took place. *State V. Ishaque*, 312 *N.J. Super.* 207 (Law Div. 1997). This is based on the principle that jurisdiction over crimes is local, and no state can punish for a crime committed in another state. *Id.* at 210. In *State v. Ishaque*, defendant married his first wife in New Jersey, then later traveled to Pakistan and married his second wife. After defendant returned to New Jersey, his second wife charged him in municipal court with bigamy. The court held that the "place where the second marriage is entered into or solemnized is the jurisdiction which determines if a criminal offense has occurred." *Id.* at 210. *See N.J.S.A.* 2C:1-3, "Territorial applicability."

III. REASONABLE BELIEF IN ELIGIBILITY TO MARRY

An honest belief, reasonably entertained by defendant, that he was legally free to marry may constitute a valid defense to a bigamy prosecution in New Jersey. *State v. De Meo*, 20 *N.J.* 1 (1955). However, this must be a realistic belief. In *State v. De Meo*, defendant remarried on the basis of a Mexican mail order divorce. The court noted that the general public recognizes the "valueless character of mail order divorces." *Id.* at 14, quoting from *State v. Najjar*, 1 *N.J. Super.* 208 (App. Div.) quoting from *Caldwell v. Caldwell*, 298 *N.Y.* 146, 81 *N.E.*2d 60 (N.Y. 1948), *aff'd*, 2 *N.J.* 208 (1949).

Further, in *State v. De Meo*, defendant did not testify that he took any steps to ascertain the legal validity of the divorce. *State v. De Meo*, 20 *N.J.* at 14. As such, he had no defense to a bigamy prosecution. *Id. See State v. Najjar*, 1 *N.J. Super* 208. *But cf., Heuer v. Heuer*, 152 *N.J.* 226 (1998) (While not directly addressing issue of bigamy, the Court examined the validity of wife's earlier out-of-state divorce, in light of current husband's attempt to annul their marriage with a claim that her prior divorce was not valid. The Court held that defendant/husband was estopped from attacking validity of the marriage, in his attempt to escape financial support duties to the family.); *Danes v. Smith*, 30 *N.J. Super.* 292 (App. Div. 1954).

IV. ACTOR BELIEVES THE PRIOR SPOUSE IS DEAD

The presumption of death after an unexplained absence does not arise where the supposed decedent has been heard from and there is reliable information that he was alive within the past four years. *Spiltoir v. Spiltoir*, 72 *N.J. Eq.* 50 (*N.J.* Ch. 1906).

V. EVIDENCE

In a bigamy prosecution, evidence that man and woman lived together, had a child together, and he presented her as his wife, justified a finding that defendant had entered into a common-law marriage with a woman before marrying another. *State v. Thompson*, 76 *N.J.L.* 197 (1908). *Accord, State v. Cromwell*, 6 *N.J. Misc.* 221 (Sup. Ct. 1928).

I. SOURCES

U.S. Const., Article I, § 9., "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const., Article I, § 10, "No State shall . . . pass any Bill of Attainder, ex post facto Law" N.J. Const. of 1947, Art. IV, § VII, ¶ 3, "The Legislature shall not pass any bill of attainder"

II. DEFINITION

A Bill of Attainder has been defined as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Service Systems v. Minnesota Public Interest Research Group,* 468 *U.S.* 841 (1984).

III. HISTORY

A bill of attainder technically refers to a special act of the Legislature which attainted a named individual of a felony or high treason without benefit of a trial and imposed the sentence of capital punishment. A bill imposing a penalty less that capital punishment without a trial was called a bill of pains and penalties. The term as used in the U.S. Constitution includes the lesser bills of pains and penalties. *Fletcher v. Peck*, 6 *Franch* 87, 138 *L.Ed.* 162 (1810). *Cummings v. Missouri*, 4 *Wall* 377, 18 *L.Ed.* 356 (1867); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

The concept of a bill of attainder was further expanded to include laws which punished an identifiable class of persons without benefit of a trial, and not merely an identifiable individual. *Cummings v. Missouri*, 4 *Wall* 277, 18 *L.Ed. 356 (1867); United States v. Brown*, 381 *U.S.* 437 (1965).

Bills of attainder were common in the 16th, 17th and 18th centuries as a means by which the English Parliament dealt with those who threatened or attempted to overthrow the government. During the American Revolution, the legislatures of all thirteen colonies passed bills of attainder against Torries. *United States v. Brown, supra.* The prohibition against bills of attainder in the U.S. Constitution was an attempt on the part of the framers to curb potential abuses of legislative power as was the prohibition against *ex post facto* laws. *United States v. Brown, supra.*

IV. EXAMPLES

A. Laws Struck as Bills of Attainder

Cummings v. Missouri, A. *Wall.* 277, 18 *L.Ed.* 356 (1867). An 1865 amendment to the Missouri Constitution required all clergy to swear to a test oath that deponent did not support the confederacy in the Civil War and promising continued loyalty to the Union and Missouri. The plaintiff, a Catholic priest, refused to take the oath. Held: the oath was a bill of attainder because it disqualified the individual from office as a punishment.

Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366 (1867). An 1865 Act of the United States Congress prescribed a test oath that deponent had never voluntarily borne arms against the United States as a qualification for the admission of an attorney to practice before the United States Supreme Court. Petitioner, who had been admitted to practice before the Supreme Court in 1860 by fulfilling all of the requirements then required, subsequently became a representative and senator from Arkansas in the Confederate Congress. Petitioner received a pardon from the President of the United States but was excluded from practice before the Supreme Court. Held: exclusion from a profession for past conduct is a punishment: therefore, the act of Congress was a bill of attainder.

United States v. Lovett, 328 U.S. 303 (1946). The respondents Lovett, Watson and Dodd were employees of the federal government when the United States Congress passed a law which denied the respondents, by name, any compensation from the government, except for jury duty or service in the armed forces, unless they were reappointed by the President and approved by the Senate. Held: the law was a bill of attainder because it legislatively imposed a punishment without benefit of a trial.

United States v. Brown, 381 U.S. 437 (1965). The United States Congress passed a law, § 504 of the Labor-Management Reporting and Disclosure Act of 1959, making it a crime for a member of the Communist party to serve as an officer or employee of a labor union. Respondent, an avowed Communist and member of the Executive Board of the Longshoreman's Union was indicted, tried and convicted under § 504. Held: § 504 was a bill of attainder because it automatically punished a person for membership in the Communists party alone, thus punishing a member of an identifiable group without a determination of guilt at any time.

B. Laws Not Bills of Attainder

Nixon v. Administrator of General Services, 433 *U.S.* 425 (1977). Congress passed a law, the Presidential Recordings and Materials Preservation Act, which deprived Richard Nixon, by name, of his presidential papers and put them into the custody of the General Services Administration. Held: The Act was not a bill of attainder because: 1) while the Act refers to Richard Nixon by name, he constitutes a "legitimate class of one"; and 2) the act was not punitive.

In re Disciplinary Proceedings Against Schmidt, 79 N.J. 344 (1979). A New Jersey law provided that an applicant for a liquor license could not be disqualified or discriminated against due to conviction for a crime, unless the crime adversely affected the business for which the license was sought. Pflaumer, sole stockholder and president of defendant corporation, had pled guilty to transporting improperly labeled beer as a result of which defendant's corporation lost its liquor license. Held: a statutory exclusion made on the basis of prior criminal conviction is no further implication of guilt than the original criminal conviction.

Matter of Corruzzi, 95 *N.J.* 557 (1984). The New Jersey Legislature amended the statute mandating judicial removal, *N.J.S.A.* 2A:1B-5, to permit the Supreme Court to continue withholding judge's salaries pending completion of removal actions, beyond the 90-day period under prior statute. Defendant, a judge removed from office for accepting bribes, challenged the statute as a bill of attainder. Held: the mere fact that the judge's case prompted the Legislative action does not invalidate the statute as a bill of attainder.

Selective Service Systems v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984). Congress passed a law which denied financial assistance to male college students who fail to register for the draft, but provided a hearing to determine whether applicant had registered. The United States Supreme Court established the following three-part test to determine if a statute is a bill of attainder: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type of severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.' Id. at 643. Held: Statute does not meet the above criteria and, therefore, is not a bill of attainder.

Coalition of New Jersey Sportsmen, Inc. v. Whitman, 44 *F.Supp.*2d 666, 692-693 (D.N.J. 1999). New Jersey's assault firearms ban does not constitute a bill of attainder.

Doe v. Poritz, 142 *N.J.* 1, 76-77 (1995). New Jersey's Registration and Community Notification Laws (*N.J.S.A.* 2C:7-1 to -5 and *N.J.S.A.* 2C:7-6 to -11, respectively), requiring certain convicted sex offenders to register with law enforcement authorities and providing for notice of the presence of such offenders in the community, do not violate the Bill of Attainder Clause. *See also Artway v. Attorney General of New Jersey*, 876 *F.Supp.* 666, 683-684 (D.N.J. 1995).

State v. Bey, 129 *N.J.* 557, 619 (1992). In 1985, the Legislature amended *N.J.S.A.* 2C:11-3c(4)(a) (the "prior murder" aggravating factor provision of the New Jersey Death Penalty Statute) to allow the State to introduce, at a penalty phase trial, a prior murder conviction still on appeal. Held: The statute, as amended, does not constitute a bill of attainder. Although the amendment was a response to decisions affecting two particular defendants, including defendant Bey, it changed the law for all capital defendants and did not affect legislative determinations of guilt for any particular defendant or group of defendants.

Ayers v. New Jersey Department of Corrections, 251 *N.J. Super.* 223, 229-230 (App. Div. 1991). Forfeiture of public employment as a result of a criminal conviction, pursuant to *N.J.S.A.* 2C:51-2, is not a bill of attainder.

United States ex rel. Conklin v. Beyer, 678 F.Supp. 1109 (D.N.J. 1988). While in prison, petitioner was charged and found guilty of stabbing another inmate at the prison. After a disciplinary hearing, a parole board hearing officer imposed a one-month extension on petitioner's parole ineligibility. Subsequently, petitioner was found guilty of other disciplinary charges, including possession of a weapon and threatening. After another disciplinary hearing, the parole board extended petitioner's parole ineligibility for six more months. Petitioner argued that a parole board's decision to increase a parole ineligibility period violates the Constitution as a bill of attainder. In rejecting this argument, the court noted that the parole board does not take action until guilt has been established at a disciplinary proceeding, and that "the parole board does not find petitioner guilty again in its proceedings."

Rather, the board simply "gives *res judicata* effect to the findings at the disciplinary proceedings.

In re Scioscia, 216 N.J. Super. 644 (App. Div.), certif. denied, 107 N.J. 652 (1987). Petitioner, the manager and part owner of a solid waste disposal firm, was convicted of price rigging and other offenses. In response, the Board of Public Utilities issued an order prohibiting petitioner from participating in the solid waste business. Held: The exclusion of petitioner from the solid waste business is comparable to the revocation of a license to engage in a particular profession or occupation and is not subject to constitutional attack.

BRIBERY AND CORRUPT

INFLUENCES (See also, FRAUD (COM-

- MERCIAL BRIBERY); MISCONDUCT IN OFFICE; THEFT; PERJURY AND FALSIFICATION, this Digest)
- I. BRIBERY (N.J.S.A. 2C:27-2)
- A. Elements

Directly or indirectly offering, conferring or agreeing to confer upon another, or soliciting, accepting or agreeing to accept from another, any benefit as consideration for:

a. a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election (*N.J.S.A.* 2C:27-2a);

b. a decision, vote, recommendation or exercise of official discretion in a judicial or administrative proceeding (*N.J.S.A.* 2C:27-2b);

c. a violation of an official duty of a public servant or party official (*N.J.S.A.* 2C:27-2c); or

d. the performance of official duties (*N.J.S.A.* 2C:27-2d).

While penal statutes must be strictly construed, strict construction does not prevent the statute's being read in relation to the evil sought to be eradicated or from giving effect to the terms of the statute which will accord with their fair and natural meaning. By enacting the bribery statute, the Legislature intended to proscribe conduct which denigrates the integrity of our public institutions. *State v. Schenkolewski*, 301 *N.J. Super.* 115, 139 (App. Div. 1997), *certif. denied*, 151 *N.J.* 77 (1997).

B. Definitions and Related Issues

1. Offering or Conferring or Agreeing to Confer, Soliciting, Accepting, or Agreeing to Accept.

The broad language of subsection (d) expanded the common law definition of bribery with respect to the kinds of governmental action to which bribery relates. The giving of a benefit in exchange for even a lawful, required action is made criminal under the Code. *Cannel, Criminal Code Annotated,* (Gann 2000), Comment 2C:27-2, §3 at 650. Under the common law,

the mere solicitation of a bribe by or on behalf of an officer, without payment being made, did not constitute bribery. *State v. Begyn*, 34 *N.J.* 38, 48 (1961). Under precode law, this result was statutorily modified in certain instances to make clear that a mere offer, by itself, or a mere solicitation, by itself, constitutes bribery, even if money or other consideration is not paid. *II Final Report of the New Jersey Criminal Law Revision Commission*, "Commentary" (1971) at 263, 264; *accord, United States v. Walsh*, 700 *F.*2d 846, 855 (2d Cir. 1983), *cert. denied*, 464 *U.S.* 825 (1983); *State v. Carminati*, 162 *N.J. Super.* 234, 247 (Law Div. 1978).

The offense is reciprocal in that "[b]oth the offeror and the recipient are guilty of the offense...." *State v. Begyn, supra,* 34 *N.J.* at 48; *see II Final Report of the New Jersey Criminal Law Revision Commission,* "Commentary" (1971) at 263. Moreover, "it makes no difference whether the official action bargained for thereafter actually takes place." *State v. Begyn, supra.*

Each actor must be judged by what the actor thought he was doing and what he meant to do, not by how the actions were viewed by the other party. *State v. Schenkolewski*, 301 *N.J. Super.* at 140.

The offer may relate to affairs outside of New Jersey. In *State v. Carminati*, 162 *N.J. Super.* 234 (Law Div. 1978), defendants who offered \$1,000 to a police officer in exchange for confidential information compiled by the New York State Police were properly charged with bribery. The court noted that while a police officer has no authority to act in the capacity of a police officer outside New Jersey (except in fresh pursuit circumstances), his duty to enforce the law includes a duty to refrain from interfering with the enforcement of law in another jurisdiction, as well as the duty not to aid or abet others in another jurisdiction to avoid or evade the process of law.

2. "Benefit" means

Gain or advantage, or anything regarded by the beneficiary as gain or advantage, including a pecuniary benefit or a benefit to any other person or entity in whose welfare he is interested. (*N.J.S.A.* 2C:27-1a).

This broad definition of "benefit" surely includes the acceptance of money or the appointment to a public job. *State v. Woodward*, 298 *N.J. Super.* 390, 394 (App. Div. 1997).

A jury is free to conclude that any material object, however small its value, constitutes the offer to confer a "benefit" under the bribery statute; for the intended recipient is to receive some thing not previously possessed. *State v. Jenkins*, 255 *N.J. Super.* 482, 485 (App. Div. 1992), *certif. denied*, 130 *N.J.* 14 (1992).

By employing this definition, the Code carries forth precode law which held that a bribery is committed even if the money paid went to a recipient other than the solicitor, but in whose welfare the solicitor was interested. *State v. Sherwin*, 127 *N.J. Super.* 370, 385 (App. Div. 1974), *certif. denied*, 65 *N.J.* 569 (1974); *State v. Smagula*, 39 *N.J. Super.* 187 (App. Div. 1956).

The same proofs cannot establish both the "benefit" element of bribery under *N.J.S.A.* 2C:27-2 and the "harm" element of the offense of threats in official matters under *N.J.S.A.* 2C:27-3. *State v. Scirrotto*, 115 *N.J.* 38, 48-49 (1989).

3. "Benefit as consideration" means

Any benefit not authorized by law. (*N.J.S.A.* 2C:27-2)

The crime of bribery does not apply to situations where the law explicitly contemplates payment of fees for services rendered by a public servant. *II Final Report of the New Jersey Criminal Law Revision Commission*, "Commentary" (1971) at 264.

By using the word "consideration," the Legislature apparently intended to carry forth the precode law which held that, with respect to the offeror, the State must prove his intent to subject the official action of the recipient to the influence of personal gain or advantage rather than public welfare; and, with respect to the donee, the State must prove his intent to use the opportunity to perform a public duty as a means of acquiring unlawful personal benefit or advantage. *II Final Report of the New Jersey Criminal Law Division Commission*, "Commentary" (1971) at 265; *see State v. Begyn*, 34 *N.J.* 35, 48 (1961).

Moreover, according to the Commentary, *supra*, the use of the term "consideration" was intended to "prevent ... application of the bribery sanction to situations where gifts are given in the mere hope of influence, without any agreement by the donee." II *Final Report of the New Jersey Criminal Law Revision Commission*, "Commentary" (1971) at 265. However, this portion of the commentary was premised upon a preliminary draft of the statute

which did not contain the explicit definition of "benefit as consideration" which is now set forth in N.J.S.A. 2C:27-2. See I Final Report of the New Jersey Criminal Law Revision Commission, "Report and Penal Code" (1971) at That is, the new definition of "benefit as 94. consideration," namely, "any benefit not authorized by law" may eviscerate the significance of the term "consideration" and may, therefore, be construed also to eviscerate those portions of the commentary which discuss the term "consideration." In any event, the payment of gifts to public officials, with or without "consideration," is regulated and generally proscribed by other provisions of the Code, e.g., N.J.S.A. 2C:27-4, N.J.S.A. 2C:27-6. See discussion of these sections, infra.

4. Party official; public servant

The terms "party official" and "public servant" are defined in *N.J.S.A.* 2C:27-1e and *N.J.S.A.* 2C:27-1g, respectively. The term "public servant" is broadly defined, and encompasses all officers and employees of government, including legislators and judges, and any person participating as a juror, advisor, consultant or otherwise in performing a governmental function; but the term does not include "witnesses," since the crime of tampering with a witness is separately dealt with in *N.J.S.A.* 2C:28-5.

As the statute proscribes conferring a benefit "upon another," or agreeing to accept a benefit "from another," neither the offeror nor the recipient of the bribe needs to be a public official to prove bribery. It is sufficient if the recipient created the understanding that he could influence matters in connection with an official duty, whether or not he was capable of actually effecting such a result. *State v. Schenkolewski*, 301 *N.J. Super.* at 138-139. This result is consistent with pre-Code law. *See State v. Ferro*, 128 *N.J. Super.* 353 (App. Div. 1974), *certif. denied* 65 *N.J.* 566 (1974).

- C. Statutorily Proscribed Defenses
 - 1. Inability of Bribee to Act

The third paragraph of *N.J.S.A.* 2C:27-2 provides:

It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason. This provision generally codifies pre-Code law, except that, with respect to the question whether the offense may apply to an officer who has not yet assumed office, this provision overrules pre-Code law. *E.g., State v. Ellis,* 33 *N.J.L.* 102 (Sup. Ct. 1868); *State v. Sherwin,* 127 *N.J. Super.* 370. "It is not necessary that the act requested be one which the official has authority to do. Sufficient is it if he has official power, ability, or *apparent* ability to bring about or contribute to the desired end." *State v. Begyn, supra,* 34 *N.J.* at 47-48 (emphasis added). *See also,* discussions at I.B.1., and 4., *supra.*

2. Extortion and Coercion

In any prosecution under this section of an actor who offered, conferred or agreed to confer, or who solicited, accepted or agreed to accept a benefit, it is no defense that he did so as a result of conduct by another constituting theft by extortion or coercion or an attempt to commit either of these crimes. (*N.J.S.A.* 2C:27-2)

This provision did not exist in pre-Code law. It was adopted from the New York Code under the rationale that such extortion must be reported to the authorities, rather than be paid. II *Final Report of the New Jersey Criminal Law Revision Commission*, "Commentary" (1971) at 265.

D. Evidential Questions

Evidence of sudden acquisition of money is permissible. In *State v. Smollok*, 148 *N.J. Super*. 382 (App. Div. 1977), *certif. denied* 74 *N.J.* 274 (1977), the State introduced evidence that the defendant had made a number of large deposits in a personal checking account during the period that he was alleged to have received bribes. The court held that such evidence may properly be admitted in a bribery prosecution.

Multiple charges of bribery may properly be joined for one trial if there is a common conspiratorial relationship or common evidential strings. In *State v. Coruzzi*, 189 *N.J. Super.* 273, 300-301 (App. Div. 1983), *certif. denied* 94 *N.J.* 531 (1983), the Appellate Division held that the trial court did not err by failing to sever charges of bribery and official misconduct which arose from three criminal transactions because there was a common conspiratorial relationship, and also because the multiple acts of misconduct were important to the case in terms of explaining the defendant's nonchalance in accepting one of the cash payments.

In *State v. Jenkins*, 255 *N.J. Super.* 482, the Court held that a defendant who engaged in a single effort to bribe a police officer could not be convicted of both soliciting the performance of an official duty and soliciting the violation of an official duty, even though the defendant repeated his solicitation three times. When the defendant commits separate acts, however, separate offenses may be charged, even though there is a temporal overlap in the offenses and the defendant's modus operandi was similar. *State v. Catanoso*, 269 *N.J. Super.* 246 (App. Div. 1993), *certif. denied*, 134 *N.J.* 563 (1993).

E. Civil Remedies

In Hyland v. Simmons, 152 N.J. Super. 569 (Ch. Div. 1977), aff'd 163 N.J. Super. 137 (App. Div. 1978), certif. denied, 79 N.J. 479 (1979), the court held that, under the common law of New Jersey, a municipal official who accepts a bribe pertaining to the performance of his official duties can be compelled to place the amount of the bribe into a constructive trust for the benefit of the The Attorney General is both an municipality. appropriate plaintiff for such an action and also an appropriate trustee for such a trust. Because the action is purely equitable, it is not properly cognizable in the Law Division and should be heard in the Chancery Division. Also, because the action is purely equitable, the general statute of limitations does not apply, and the discretionary doctrine of laches governs whether the action should be dismissed for tardiness. The corpus of the trust may properly include not only the amount of the bribes received, but also punitive damages.

F. Collateral Liabilities Imposed Upon Those Who Commit Bribery

1. Judges

A judge who commits bribery must be removed from office. His conviction conclusively establishes the underlying facts in the removal proceedings. *Matter of Coruzzi*, 95 *N.J.* 557 (1984), *appeal dismissed* 469 *U.S.* 802 (1984).

2. Professional Planners

A professional planner's conviction for bribery may be evidential of his misconduct, thus supporting a revocation of his license, despite his procurement of a certificate of rehabilitation pursuant to the Rehabilitated Convicted Offenders Act. Moreover, the planner's conviction may be used conclusively to establish the facts underlying the judgment of conviction. *Hyland v. Kehayas*, 157 *N.J. Super.* 258 (App. Div. 1978).

3. Lawyers

An attorney's conviction for bribery or for a conspiracy to bribe a public official should normally result in disbarment. The judgment of conviction will be deemed conclusively to establish the facts underlying the judgment. *In re Hughes*, 90 *N.J.* 32, 36 (1982).

An attorney who has been tried for bribery and acquitted still may be compelled to face disciplinary proceedings based upon the same alleged misconduct. *In re Hyett*, 61 *N.J.* 518 (1972).

4. Government Contractors

The Commissioner of Transportation has the power to debar a corporation from participating as material men in State contracts because of the majority stockholder's conviction for bribery and obstructing justice. *Trap Rock Industries, Inc. v. Kohl,* 63 *N.J.* 1 (1973), *cert. denied* 414 *U.S.* 860 (1973); *see also, Trap Rock Industries, Inc. v. Sagner,* 69 *N.J.* 599 (1976).

G. Grading

The last paragraph of N.J.S.A. 2C:27-2 provides:

Any offense proscribed by this section is a crime of the second degree. If the benefit offered, conferred, agreed to be conferred, solicited, accepted or agreed to be accepted is of the value of \$200 or less, any offense proscribed by this section is a crime of the third degree.

The Legislature has chosen to grade four offenses - namely bribery (*N.J.S.A.* 2C:27-2), compensation for past official behavior (*N.J.S.A.* 2C:27-4), unlawful compensation of a public servant (*N.J.S.A.* 2C:27-7), and compounding (*N.J.S.A.* 2C:29-4) -- in precisely the same manner. In each instance the Legislature has specified the interdicted conduct to be an offense of the second degree. In certain instances, however, the conduct is a crime of only the third degree. To fall within this lenient grading, the benefit must be pecuniary in nature, and must be capable of being measured, by an objective standard, to have a value of \$200 or less. Unless the benefit is pecuniary in nature, and regardless of how significant the benefit may be, the conduct constitutes a crime of the second degree. *State v. Phelps*, 187 *N.J. Super.* 364, 372-376 (App. Div. 1983), *aff'd* 96 *N.J.* 500 (1984).

II. THREATS AND IMPROPER INFLUENCES IN OFFICIAL AND POLITICAL MATTERS (*N.J.S.A.* 20:27-3).

A. Elements

Directly or indirectly threatens:

1. unlawful harm to any person with purpose to influence a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election ,*N.J.S.A.* 2C:27-3a(1);

2. harm to any public servant with purpose to influence a decision, opinion, recommendation, vote or exercise of discretion in a judicial or administrative proceeding, *N.J.S.A.* 2C:27-3a(2); or

3. harm to any public servant or party official with purpose to influence him to violate his official duty, N.J.S.A. 2C:27-3a(3).

B. Definitions

1. "Harm" means:

Loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any person or entity in whose welfare he is interested, *N.J.S.A.* 2C:27-1c.

Threats of political opposition, a public official's threat to discharge a subordinate, or a threat to arrest or bring criminal prosecution does not constitute "threatening harm" within the meaning of the statutory language. *II Final Report of the New Jersey Criminal Law Revision Commission*, "Commentary" (1971) at 267.

The harm threatened need not be unlawful with respect to N.J.S.A. 2C:27-3a(2) and (3), where the purpose is to influence a judicial or administrative proceeding or to influence a public servant or party official to violate an official duty. In *State v. Scirrotto*, 115 N.J. 38 (1989), the Court concluded that a teacher's threat to disclose unfavorable information about the school unless he was given tenure was a threat of "harm"

contrary to N.J.S.A. 2C:27-3. See also, MacDougall v. Weichert, 144 N.J. 380, 400-03 (1996).

C. Statutorily Proscribed Defenses

The last paragraph of *N.J.S.A.* 2C:27-3 provides:

It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office or lacked jurisdiction, or for any other reason.

See discussion in I.C. 1, supra.

D. Grading

N.J.S.A. 2C:27-3b provides that an offense under this section is a crime of the third degree.

III. COMPENSATION FOR PAST OFFICIAL BEHAVIOR (N.J.S.A. 2C:27-4)

N.J.S.A. 2C:27-4 proscribes unlawful benefits for official behavior. Specifically, this section provides:

a. A person commits a crime if the person, as a public servant:

(1) directly or indirectly, knowingly solicits, accepts or agrees to accept any benefit from another for or because of any official act performed or to be performed by the person or for or because of a violation of official duty;

(2) directly or indirectly, knowingly receives any benefit from another who is or was in a position, different from that of a member of the general public, to benefit, directly or indirectly, from a violation of official duty or the performance of official duties; or

(3) directly or indirectly, knowingly receives any benefit from or by reason of a contract or agreement for goods, property or services if the contract or agreement is awarded, made or paid by the agency that employs the person or if the goods, property or services are provided to the government agency that employs the public servant.

b. A person commits a crime if the person offers, confers or agrees to confer a benefit, acceptance of which is prohibited by this section.

L. 1999, c. 440 § 98 rewrote the section as part of a comprehensive legislative effort to strengthen the laws on public contracts. The new provision was approved on January 18, 2000. The grading provision, *N.J.S.A.* 2C:27-4c, is unchanged from prior law. *See* discussion in *I.G., supra.*

In *Fleming v. UPS*, 255 *N.J. Super.* 108, 148 (Law Div. 1992), the court ruled that it was not a violation of the bribery statutes, nor of the rules governing Attorney Ethics, for United Parcel Service (UPS) to have paid a municipal prosecutor for prosecuting a UPS employee for theft in municipal court, and summarily dismissed the employee's claim on this ground.

IV. RETALIATION FOR PAST OFFICIAL ACTION (N.J.S.A. 2C:27-5)

N.J.S.A. 2C:27-5 provides:

A person commits a crime of the fourth degree if he harms another by any unlawful act with purpose to retaliate for or on account of the service of another as a public servant.

The term "public servant" is defined in *N.J.S.A.* 2C:27-1g. *See* discussion in I.B.4., *supra*.

V. GIFTS TO PUBLIC SERVANTS (*N.J.S.A.* 2C:27-6)

A. Elements

This statute also was amended by L. 1999, c. 440 as part of the Legislature's comprehensive revision of the laws on public contracts. The statute now provides, in subsection a., that a public servant commits a crime if the person knowingly and under color of office directly or indirectly solicits, accepts or agrees to accept any benefit not allowed by law, adding the provision "for that person or another." *N.J.S.A.* 2C:27-6a.

Subsection b. provides that a person commits a crime if the person, directly or indirectly, confers or agrees to confer any benefit not allowed by law to a public servant. There are exceptions to both provisions for lawful fees and benefits, gifts and benefits conferred on account of kinship or other relationship independent of official status, or for trivial benefits involving no risk that the public servant would perform official duties in a biased manner. *N.J.S.A.* 2C:27-6d. Subsection c, the provision of the prior statute containing a presumption of capacity to influence a public servant under certain conditions, was deleted, as was that element itself from subsections a. and b. Thus the element of intent to influence the performance of official duties, critical under the former statute, has been eliminated.

B. Grading

An offense under this section is a crime of the third degree, *N.J.S.A.* 2C:27-6e, unless the gift is valued at \$200 or less, in which case the offense is of the fourth degree.

C. Benefit

In *State v. Woodward*, 298 *N.J. Super.* 390, the defendant's argument that his offer to withdraw his candidacy for city counsel and endorse the incumbent did not constitute a "benefit not allowed by law" was rejected. While acknowledging that a candidate is free to withdraw from the race and support another, the Court noted that he is not free to do so for "money or other valuable consideration." 298 *N.J. Super.* at 395, citing *N.J.S.A.* 19:34-38e. The Court rejected Woodward's attempt to dissect his conduct into discrete episodes, and concluded that he was properly charged with violating the prior statute. 298 *N.J. Super.* at 395.

VI. COMPENSATING PUBLIC SERVANT FOR ASSISTING PRIVATE INTERESTS IN RELA-TION TO MATTERS BEFORE HIM (N.J.S.A. 2C:27-7)

This section was repealed by L. 1999, c. 440, § 108.

VII. PUBLIC SERVANT TRANSACTING BUSI-NESS WITH CERTAIN PERSONS (*N.J.S.A.* 2C:27-9)

A. Elements

A public servant, while performing his official functions on behalf of a governmental entity, knowingly transacts any business with himself, a member of his immediate family, or a business organization in which the public servant or an immediate family member has an interest.

The above section, also enacted by *L*. 1999, c. 440, as part of the Legislature's comprehensive effort to

strengthen the laws on public contracts, proscribes a public servant from transacting business with himself or a family member, or a business organization in which either has an interest, while performing his official functions on behalf of a governmental entity.

B. Applies to ownership interests greater than one percent

The statute does not apply to small capital holdings of one percent or less of an interest in the capital or equity of the business organization.

C. Need for special effect on public servant

Nor does the offense apply when the public servant or his family derive no particular benefit from the business transaction.

D. Grading

This is a fourth-degree offense.

BURGLARY AND BURGLAR'S TOOLS

I. SCOPE OF THE OFFENSE

Burglary is committed when someone (1) enters a private structure or research facility or hides or remains in a public structure or research facility when not permitted, (2) to commit an offense. *N.J.S.A.* 2C:18-2 Burglary is a third degree crime. *N.J.S.A.* 2C:18-2b.

Burglary becomes a second degree crime when defendant, while committing the burglary (1) "purposely, knowingly or recklessly" threatens, attempts or actually inflicts bodily injury to another, or (2) is armed with or displays explosives or a deadly weapon. N.J.S.A.~2C:18-2.

If the actor has the requisite intent to commit an offense, the act of burglary is complete upon entry. *State v. Jijon,* 264 *N.J. Super.* 405, 407 (App. Div. 1993), *aff'd,* 135 *N.J.* 471 (1994). *See, e.g., State v. Robinson,* 289 *N.J. Super.* 447, 453 (App. Div. 1996), *certif. denied,* 146 *N.J.* 497 (1996). The intended offense does not have to be actually committed to constitute a burglary. *State v. Robinson,* 289 *N.J. Super.* at 453; *State v. Jijon,* 264 *N.J. Super.* at 407.

A structure is defined as any building, room, motor vehicle, boat, airplane, and any place of "overnight accommodation" or business. *N.J.S.A.* 2C:18-1. The act of breaking into a car for unlawful joyriding is a burglary offense. *State v. Jijon,* 264 *N.J. Super* at 408; *State v. Martes,* 266 *N.J. Super.* 117 (Law Div. 1993) (car is a structure). A coin-operated laundry room of an unlocked apartment complex was not open to the public and constituted a private structure under the burglary statute. *State v. Berkley,* 267 *N.J. Super.* 124 (Law Div. 1993).

The element of intent to commit an offense can be satisfied with "any offense." *State v. Robinson,* 289 *N.J. Super.* at 453. A disorderly persons or petty disorderly persons offense satisfies the intent element of burglary. *State v. Jijon,* 264 *N.J. Super.* at 407; *State v. Martes,* 266 *N.J. Super. at* 117. The offense can be inferred from the circumstances "that defendant's purpose in entering the premises was 'inconsistent with [any] lawful conduct." *State v. Robinson,* 289 *N.J. Super.* at 454 (*quoting State v. Tassiello,* 75 *N.J. Super.* 1, 6 (App. Div. 1962), *aff'd,* 39 *N.J.* 282 (1963)); *see State v. Robinson,* 289 *N.J. Super.* at 447 (with lookout outside, defendant found entering

through a forced window and discarding a screwdriver); *State v. Williams*, 229 *N.J. Super*. 179, 181-83 (App. Div. 1988) (evading police because of drug transaction and breaking into apartment satisfied "any offense" element of burglary.); *State v. Tassiello*, 75 *N.J. Super*. at 1 (defendants found in restaurant after business hours with lookout outside); *compare with State v. Marquez*, 277 *N.J. Super*. 162, 169 (App. Div. 1994) (intent not shown by defendant's entry into apartment contrary to Domestic Violence restraining order), *certif. denied*, 141 *N.J.* 99 (1995).

The crime of burglary is elevated to second degree armed burglary if a defendant enters a private residence and steals rifles. *State v. Merrit*, 247 *N.J. Super.* 425 (App. Div.), *certif. denied*, 126 *N.J.* 336 (1991). In *Merrit*, the Appellate Division defined the term "armed" as not having mere possession of firearms, but having "immediate access to a weapon." The court held that if firearms are obtained in the course of a burglary "a weapon may be as readily accessible to the perpetrator as if he had brought it to the scene initially."

II. PRE-TRIAL PROCEDURES

A. Consolidation of Indictments

State v. Rosen, 110 *N.J. Super.* 212, 214 (App. Div. 1968), held that it was not error for the court to consolidate for trial one indictment charging breaking and entering with intent to commit larceny with a second indictment charging possession of burglar's tools.

B. Consolidation of Offenses

In *State v. Greer*, 107 *N.J. Super.* 92, 93 (App. Div. 1969), it was not error for the trial court to refuse severance of an indictment charging attempted breaking and entering with intent to steal and another indictment charging possession of a knife because both offenses were connected by a common scheme.

III. TRIAL

A. Evidence

The evidence of defendant's fingerprints on the victim's golf clubs, which had been moved, was sufficient to support conviction of burglary. *State* v. *Love*, 245 *N.J. Super*. 195, 198 (App. Div.), *certif. denied*, 126 *N.J.* 321 (1991). The evidence of defendant's fingerprints on outside column, not accessible to public or inadvertent touching, supported burglary conviction. *State* v.

Watson, 224 *N.J. Super.* 354, 361 (App. Div.) (denial of judgment of acquittal for burglary not in error where sole evidence was fingerprints), *certif. denied,* 111 *N.J.* 620, *cert. denied,* 488 *U.S.* 983, 109 *S.Ct.* 353, 102 *L.Ed.* 2d 566 (1988). Video evidence of a defendant can be used to support a burglary conviction. *State v. Loftin,* 287 *N.J. Super.* 76 (App. Div.), *certif. denied,* 144 *N.J.* 175 (1996). Where defendant was seen hanging from forced open window at 11:30 p.m. discarding a screwdriver, the evidence was sufficient to permit jury to find beyond a reasonable doubt that defendant's conduct did not indicate a lawful basis for entry. *State v. Robinson,* 289 *N.J. Super.* at 447.

B. Lesser Included Offense

Criminal trespass is a lesser included offense of burglary. *State v. Singleton,* 290 *N.J. Super.* 336, 341 (1996) (where State may not be able to prove element of purpose to commit an offense therein, a lesser included offense is criminal trespass). Criminal mischief is a lesser included offense of attempted burglary. *State v. Clarke,* 198 *N.J. Super.* 219, 225-26 (App. Div. 1985) (where state may not be able to prove element of intent to commit offense in attempted burglary a lesser charge is criminal mischief).

C. Jury Instructions/Charges

Jury charge defective where judge did not define offense in connection with unlawful entry. *State v. Cuni*, 303 *N.J. Super.* 584, 604 (App. Div. 1997) ("The judge did not specifically tell the jury that the defendant could not be found guilty of burglary if the defendant entered with a purpose to have consensual sexual relations with a person who was not mentally defective and was capable of consenting."), *aff'd*, 159 *N.J.* 584 (1999).

It was not error for the judge to instruct the jury that it had to find the defendant guilty of the burglary offense before considering evidence of defendant's insanity. *State v. Delibero*, 149 *N.J.* 90, 93 (1997).

Limiting instruction not warranted where defendant told victim that he needed money to purchase drugs. *State v. Candelaria*, 311 *N.J. Super.* 437, 451 (App. Div.), *certif. denied*, 155 *N.J.* 587 (1988).

When no objection was made, judge did not err by not defining the specific offense that defendant intended to commit after he entered the building. *State v. Robinson,* 289 *N.J. Super.* at 454-55 (defendant gave no explanation why he was in building and defendant's conduct suggested criminal activity).

It was not error for trial judge to define "armed," in the context of armed burglary, as possessing a deadly weapon or "was furnished or equipped with a deadly weapon; that is, that was available for his use." *State v. Merritt,* 247 *N.J. Super.* at 431 (App. Div. 1991) (emphasis omitted) (defining "armed" as having "immediate access to a weapon").

Reversible error where trial judge did not read complete charges on second degree burglary, *inter alia*, did not orally define the offense of theft, or explain mental state and expected jurors to read a "cut and paste" sheet but did not tell them to read it. *State v. Lindsey*, 245 *N.J. Super.* 466, 474 (App. Div. 1991) ("At the minimum, the entire instructions should be read to jury").

IV. DEFENSES

"Involuntary intoxication is a complete defense if the level of intoxication is so high that the defendant is not aware of the nature or quality of his acts or is not aware that those acts are wrong." State v. Bauman, 298 N.J. Super. 176, 194-95 (App. Div.), certif. denied, 150 N.J. 25 (1997) (Voluntary or self-induced intoxication is a defense if intoxication is so extremely high that an element of the offense is negated. No voluntary or involuntary defense charge warranted for burglary and other charges, where defendant consumed two Valium tablets). See also State v. Delvecchio, 142 N.J. Super. 359, 361 (App. Div.) (voluntary intoxication is a defense to breaking and entering if defendant is so intoxicated that he is "unable to form a specific intent to steal."), certif. denied, 71 N.J. 501 (1976); see N.J.S.A. 2C:2-8 (codifying case law intoxication defense).

Diminished capacity is a defense when defendant had a mental disorder that affects defendant's "cognitive capacity to form the mental state necessary for the commission of the crime." *State v. Bauman,* 298 *N.J. Super.* at 197-99 (*quoting State v. Galloway,* 133 *N.J.* 631, 647 (1993)) (no diminished capacity charge warranted for burglary and other charges where defendant did not know acts were wrong, but did understand "nature and quality of acts"). *see generally State v. Delibero,* 149 *N.J.* at 98 (defining diminished capacity). Insanity is a defense to burglary when defendant suffered from a disability and did not know his actions were wrong or understand the nature and quality of his actions. *State v. Delibero*, 149 *N.J.* at 99.

V. SENTENCING

A. Generally

Possession of a firearm during a burglary or in the immediate flight after invokes the mandatory sentencing scheme under the *Graves Act, N.J.S.A.* 2C:43-6c, notwithstanding defendant's lack of intent to use the firearm. *State v. Des Marets,* 92 *N.J.* 62, 70 (1983). *See State v. Stewart,* 96 *N.J.* 596, 605-06 (1984) (In the crime of burglary, a court is required "to determine whether defendant used or possessed a weapon" and if that weapon is a firearm.); *State v. Camacho,* 153 *N.J.* 54, *cert. denied,* 525 U.S. 864, 119 S.Ct. 153, 142 L.Ed. 2d 125 (1998) (trial court should hold hearing to determine if *Graves Act* applies to *N.J.S.A.* 2C:39-4a conviction.).

Up to five years of parole ineligibility can be imposed on separate ten year sentences for attempted aggravated sexual assault and second degree burglary. *State v. Adams*, 227 *N.J. Super.* at 68.

Trial judge can impose concurrent sentences for burglary and theft of burglarized vehicle. *State v. Pantuso*, 330 *N.J. Super.* at 451 (where crimes of burglary and theft of burglarized vehicle did not merge).

B. Merger

The crime of burglary is distinct and does not merge with the separate crime of theft of burglarized vehicle. *State v. Pantusco*, 330 *N.J. Super.* 424, 449-51 (App. Div. 2000); *State v. Martes*, 266 *N.J. Super.* at 121; *State v. Jijon*, 264 *N.J. Super.* 405; *State v. Subin*, 222 *N.J. Super.* 227, 236 (App. Div. 1988), *certif. denied*, 111 *N.J.* 580 (1988).

The crime of burglary is distinct and does not merge with the separate crime of theft. *State v. Mangrella*, 214 *N.J. Super.* 437, 441 (App. Div. 1986) (acquittal on theft offense does not require set aside of burglary offense); *State v. Pyron*, 202 *N.J. Super.* 502, 504 (App. Div. 1985).

The crimes of burglary and kidnaping do not merge. *State v. Hampton,* 61 *N.J.* 250 (1972) (crimes of burglary and kidnaping are separate offenses where defendant forcibly removed victim from home into car). The crimes

of aggravated manslaughter and burglary do not merge. *State v. Lewis*, 223 *N.J. Super.* 145, 151-53 (App. Div.), *certif. denied*, 111 *N.J.* 584 (1988). The crimes of burglary and intentional murder do not merge. *State v. Loftin*, 287 *N.J. Super.* 76, 113 (App. Div.), *certif. denied*, 144 *N.J. Super.* 175 (1996).

Only two Appellate Division opinions have found that the second degree crime of burglary and aggravated sexual assault merge. *State v. Ramos*, 217 *N.J. Super.* 530, 539 (App. Div. 1987) (unlawful entry is element of aggravated sexual assault); *State v. Sempsey*, 141 *N.J. Super.* 317, 325 (App. Div. 1976), *certif. denied*, 74 *N.J.* 272 (1977). Recent courts reject the *Ramos* merger, and hold "that the Legislature intended to and did create separate and distinct offenses for burglary and sexual assault." *State v. Adams*, 227 *N.J. Super.* 51, 63-67 (App. Div.), *certif. denied*, 113 *N.J.* 642 (1988); *State v. Lozada*, 257 *N.J. Super.* 260, 278 (App. Div.), *certif. denied*, 130 *N.J.* 595 (1992); *See also State v. Mosch*, 214 *N.J. Super.* 457, 462-65 (App. Div. 1986), *certif. denied*, 107 *N.J.* 131 (1987).

VI. POSSESSION OF BURGLAR'S TOOLS

According to *N.J.S.A.* 2C:5-5, it is unlawful to manufacture or possess a tool or device that facilitates any *N.J.S.A.* 2C:20-1 *et seq.* crime or "forcible entry into premises" when the actor knew that the device or tool can be used or adapted for such a criminal purpose, and the actor purposely used or gave to another the device or tool for that criminal purpose. *N.J.S.A.* 2C:5-5a. See State v. Gertrude, 309 N.J. Super. 354, 358 (App. Div. 1998) (conviction under *N.J.S.A.* 2C:5-5 "requires an assessment of intent or state of mind").

It is also unlawful to publish instructions or plans on how to make or use burglar tools or devices when the actor knew that the publication or plan would be used to commit any *N.J.S.A.* 2C:20-1 *et seq.* crime or "forcible entry into premises." *N.J.S.A.* 2C:5-5b. A manufacturer, publisher or user of a burglar tool or device is subject to a fourth degree crime. Other offenders are subject to a disorderly persons offense.

The statute defines a burglar tool to include "any engine, machine, tool or implement." Screwdriver, hammers and chisels have been found to be burglar tools. *State v. Grawe*, 327 *N.J. Super.* 579, 587 (App. Div. 2000), *certif. denied* 164 *N.J.* 560, (2000) (hand held hammer used to smash jewelry case), *certif. denied*, 164 *N.J.* 560 (2000); *State v. Jenkins*, 299 *N.J. Super.* 61, 63-64 (App. Div. 1997) (hammer); *State v. Klein*, 91 *N.J.*

Super. 509 (App. Div. 1966) (screwdriver); *State v. Robinson*, 289 *N.J. Super.* at 447 (screwdriver); *State v. Young*, 57 *N.J.* 240, 255 (1970) (chisel), *cert. denied*, 402 *U.S.* 929, 91 *S.Ct.* 1527, 28 *L.Ed.* 2d 863 (1971); *State v. Delibero*, 149 *N.J.* at 93 (chisel, two pry bars and police scanner).

A conviction for the crime of breaking and entering does not merge with the offense of possession of burglar's tools. Hence, a defendant may receive consecutive sentences. *State v. Craig,* 48 *N.J. Super.* 276, 279 (App. Div. 1958).

CAPITAL PUNISHMENT

I. CONSTITUTIONALITY

A. Federal Standards

In 1972, the United States Supreme Court invalidated capital punishment statutes around the country because the existing practice of absolute jury discretion in capital sentencing resulted in arbitrary and discriminatory infliction of the death penalty. *Furman v. Georgia*, 408 *U.S.* 238, 92 *S.Ct.* 2726, 33 *L.Ed.*2d 346 (1972).

In response, states enacted a variety of statutes in an attempt to satisfy the Supreme Court's requirements that channeled discretion exist in death penalty schemes. In Gregg v Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court upheld Georgia's statute against constitutional attack. The Court found that the procedure set forth in the statute, including separate guilt and penalty phases, a requirement that the State prove at least one aggravating factor beyond a reasonable doubt before death could be imposed and the automatic appellate review of all death sentences by the Georgia Supreme Court, provided objective standards to guard against the arbitrary imposition of the death penalty. Id. at 196-98, 96 S.Ct. at 2936-37, 49 L.Ed.2d 859.

Similarly, in *Jurek v. Texas*, 428 *U.S.* 262, 273-75, 96 *S.Ct.* 2950, 2957-58, 49 *L.Ed.*2d 929 (1976), the Supreme Court upheld as constitutional a scheme which requires a jury which convicts a defendant of capital murder to answer a series of questions before imposing a death sentence.

In contrast, the Court consistently has rejected as unconstitutional statutory schemes which mandate a death penalty upon conviction of murder. *Summer v. Shuman*, 483 *U.S.* 66, 77, 107 *S.Ct.* 2716, 2724, 97 *L.Ed.*2d 56 (1987) (statute which mandates death penalty for prison inmate convicted of murder while serving sentence of life without parole is unconstitutional because it does not allow individualized consideration of defendant); *Roberts v. Louisiana*, 428 *U.S.* 325, 333-34, 96 *S.Ct.* 3001, 3005-06, 49 *L.Ed.*2d 974 (1976) (statute unconstitutional because it mandated death once jury convicted defendant of first degree murder); *Woodson v. North Carolina*, 428 *U.S.* 280, 291-96, 96 *S.Ct.* 2978, 2985-87, 49 *L.Ed.*2d 944 (1976) (same). Moreover, the Court has ruled that a statute which permits the death penalty to be imposed for a crime less than death is unconstitutionally disproportionate, *Coker v. Georgia*, 433 *U.S.* 584, 592, 97 *S.Ct.* 2861, 2866, 53 *L.Ed.*2d 982 (1977) (death sentence for rape), as is a statute which permits the imposition of the death penalty upon a person less than 16 years of age. *Thompson v. Oklahoma*, 487 *U.S.* 815, 108 *S.Ct.* 2687, 101 *L.Ed.*2d 702 (1988); *Stanford v. Kentucky*, 492 *U.S.* 361, 109 *S.Ct.* 2969, 106 *L.Ed.*2d 306 (1989).

A defendant must be given notice that the State is going to seek the death sentence. *Lankford v. Idaho*, 500 *U.S.* 110, 119-20, 111 *S.Ct.* 1723, 1729-30, 114 *L.Ed.*2d 173 (1991) (due process violated when judge sentenced defendant to death even though State had filed pretrial notice that it was not seeking the death penalty).

To be constitutional, a death penalty scheme must require the trier of fact to convict the defendant of murder, which may include felony murder. A death sentence based upon a felony murder conviction is a disproportionate penalty, however, where the individual did not actually commit the homicidal act unless he or she had the intent to participate in or facilitate a murder. *Enmund v. Florida*, 458 *U.S.* 782, 798-99, 102 *S.Ct.* 3368, 3377, 73 *L.Ed.*2d 1140 (1982), or unless his or her participation in the felony was major and he or she demonstrated reckless disregard for the value of human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death. *Tison v. Arizona*, 481 *U.S.* 137, 157-58, 107 *S.Ct.* 1676, 1688, 95 *L.Ed.*2d 127 (1987).

The trier of fact must be required to find at least one aggravating circumstance or its equivalent, either at the guilt phase or at the penalty phase. The aggravating circumstance may be contained in the definition of the crime or in a separate aggravating factor. Lowenfeld v. Phelps, 484 U.S. 231, 244-46, 108 S.Ct. 546, 554-55, 98 L.Ed.2d 568 (1988) (death penalty may be imposed under statute in which aggravating factor found at sentencing phase is identical to an element of capital murder); State v. Ramseur, 106 N.J. 123 (1987) (adopts Lowenfeld). The aggravating circumstance must meet two requirements: it cannot apply to every defendant convicted of murder but only to a "subclass" of murderer, Arave v. Creech, 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993) (if sentencer reasonably could conclude that aggravating circumstance applies to every defendant eligible for death penalty, then aggravating circumstance is unconstitutional), and it cannot be unconstitutionally vague. *Id.* at 471, 113 *S.Ct.* at 1541, 123 *L.Ed.*2d 188.

At the penalty phase, the jurors must be permitted to receive all evidence which will allow them to make an individualized determination regarding sentence based on the character of the defendant and the circumstances of the crime. Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750 (1994). That "requirement" is met when the jury is permitted to consider any relevant mitigating evidence about the defendant. Blystone v. Pennsylvania, 494 U.S. 299, 307, 110 S.Ct. 1078, 1083, 108 L.Ed.2d 255 (1990). A state may not employ their rules of evidence or procedure to prevent a defendant from presenting relevant mitigating evidence. Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151-52, 60 L.Ed.2d 738 (1979) (Georgia evidence law which prevented defendant from using statement of codefendant which exonerated defendant of shooting the victim violated defendant's constitutional rights); State v. Bey III, 129 N.J. 557, 587 (1992) (trial court violated Green by refusing to admit into evidence psychiatric report prepared by State's non-testifying witness).

B. New Jersey Death Penalty Statute

The New Jersey death penalty statute, *N.J.S.A.* 2C:11-3c, which became effective August 6, 1982, has been upheld repeatedly against federal and state constitutional challenges by the New Jersey Supreme Court. *See, e.g., State v. Timmendequas,* 161 *N.J.* 515, 639 (1999); *State v. Feaster,* 156 *N.J.* 1, 92-93 (1998); *State v. Loftin I,* 146 *N.J.* 295, 333 (1996); *State v. Harris,* 141 *N.J.* 525, 574 (1995); *State v. Brown,* 138 *N.J.* 481 (1994); *State v. Ramseur,* 106 *N.J.* 123, 185 (1987). The New Jersey Supreme Court has rejected claims that the death penalty law violates international customary law, *State v. Nelson,* 155 *N.J.* 487, 512 (1998), *cert. denied,* 525 *U.S.* 1114 (1999), because the United States has not adopted any international human rights conventions invalidating the death penalty.

In order to be death eligible, a defendant must have committed the murder by his or her own conduct (BYOC), or as an accomplice procured the murder by payment or promise of payment, or as a "drug kingpin," *N.J.S.A.* 2C:35-3, commanded or solicited the murder in furtherance of the drug trafficking conspiracy. *N.J.S.A.* 2C:11-3c.

In State v. Gerald, 113 N.J. 40 (1988), the Supreme Court ruled on state constitutional grounds that it would be cruel and unusual punishment, N.J. Const., Art. I, ¶ 12, to subject a defendant convicted of committing serious bodily injury which resulted in death (SBI murder) to the death penalty. Id. at 69, 89. Rather, only those who intended to kill were death eligible. Id. In response to Gerald, Art. I, ¶12 was amended in 1992 by the voters to permit an SBI murderer to be sentenced to the death penalty. The Legislature then amended N.J.S.A. 2C:11-3 to provide that the term "homicidal act" included serious bodily injury murder. N.J.S.A. 2C:11-3i. That statutory amendment became law on The Supreme Court has held that May 5, 1993. December 3, 1992, is the operative date for making SBI murderers eligible for the death penalty. State v. Cooper I, 151 N.J. 326, 376 (1997), overruling State v. Yothers, 282 N.J. Super. 86 (App. Div. 1995).

In addition, the statute requires the State to prove one of the aggravating factors set forth beyond a reasonable doubt but it does not place any burden upon the defendant to prove mitigating evidence. *N.J.S.A.* 2C:11-3c(2)(a). *But see, Walton v. Arizona,* 497 *U.S.* 639, 110 *S.Ct.* 3047, 111 *L.Ed.*2d 511 (1990) (it does not violate the federal constitution to place a burden on a defendant to establish mitigation). To impose the death penalty, the jury must find beyond a reasonable doubt that the aggravating factors outweigh any mitigating factors found.

In New Jersey, the death penalty cannot be imposed upon a juvenile who murders. Rather, juveniles waived to adult court and convicted of murder must be sentenced to a term of years. *State v. Bey I*, 112 *N.J.* 45, 51 (1988); *N.J.S.A.* 2C:11-3g.

II. GUILT PHASE

A. Charging a Capital Offense

A crime punishable by death must be prosecuted by indictment. *R.* 3:7-2. An indictment for murder must specify whether it alleges purposeful or knowing murder or felony murder as well as whether the defendant committed the murder by his or her own conduct, procured the murder by payment or promise of payment, or as a drug kingpin commanded or solicited the murder in furtherance of a drug conspiracy. *R.* 3:7-3b.

The State can indict two defendants for capital murder and require the jury to determine who committed the murder BYOC so long as there is

sufficient evidence to make out a prima facie case of capital murder against each defendant. *State v. Simon*, 161 *N.J.* 416, 440-41 (1999).

If a defendant does not actively or directly participate in the infliction of injuries which resulted in the victim's death, then the defendant is not death eligible. *State v. Moore*, 113 *N.J.* 239, 302 (1988). The BYOC component does not require that a defendant's conduct be the exclusive cause of a victim's death. The relevant inquiry is whether the defendant actively or directly participated in the homicidal act. *State v. Morton I*, 155 *N.J.* 383, 424 (1998); *State v. Gerald*, 113 *N.J.* at 96-97.

Because aggravating factors only enlarge available sentencing options for certain defendants and are not elements of the offense of murder, they need not be found by the grand jury and set forth in the indictment. *State v. Martini I*, 131 *N.J.* 176, 222-24 (1993).

The prosecutor must provide the defendant with the list of aggravating factors alleged in a capital case as well as discovery bearing on these factors. The list of aggravating factors must be given at the arraignment unless the time to do so is enlarged for good cause. R. 3:13-4(a). See N.J.S.A. 2C:11-3c(2)(e) (prosecutor must provide notice of aggravating factors which the State intends to prove at sentencing proceeding prior to penalty phase or when it has knowledge of existence of aggravating factors).

A defendant has the right to challenge, in a pretrial proceeding, the aggravating factors filed by the State. Because there is a presumption that the State has acted properly in alleging the aggravating factor, to succeed in vacating the factor, the defendant must prove that evidence is clearly lacking to support the charge. *State v. McCrary*, 97 *N.J.* 132, 142 (1984); *State v. Menter*, 293 *N.J. Super*. 330, 334 (Law Div. 1995). This proceeding contemplates the trial judge's performing a summary review of the evidence in support of the aggravating factor with the State able to rely on hearsay evidence. In rare circumstances, the trial court may order testimony. *State v. McCrary*, 97 *N.J.* at 144-46.

If an aggravating factor is stricken, the State may reassert it if additional evidence arises. If such evidence arises during trial and the aggravating factor is not stricken, then the penalty phase takes place before a death-qualified jury. If a guilty verdict has been returned by a non-death qualified jury, then the court would have to death qualify a second jury for the penalty phase, as this would constitute "good cause" for a second jury as required by *N.J.S.A.* 2C:11-3c(1). *State v. McCrary*, 97 *N.J.* at 144-45.

If the State alleges the aggravating factors of *N.J.S.A.* 2C:11-3c(4)(f) (escape apprehension) or *N.J.S.A.* 2C:11-3c(4)(g) (felony murder), it should provide the specific offenses on which the State intends to base the factors. If a defendant is charged with more than one murder, the State should set forth which factors apply to each murder. *State v. Brown*, 138 *N.J.* at 551-52.

B. Change of Venue Based on Pretrial Publicity

The standard to be applied by a trial court in determining whether to change venue is whether a change is necessary to overcome a realistic likelihood of prejudice from pretrial publicity. State v. Marshall I, 123 N.J. 1, 76 (1991); State v. Biegenwald II, 106 N.J. 13, 33 (1987); State v. Williams I, 93 N.J. 39, 63 (1983). If the trial atmosphere is so corrupted and poisoned by pretrial publicity, then prejudice may be presumed. State v. Biegenwald II, 106 N.J. at 33. If pretrial publicity is extensive but less intrusive, the determinative issue is the actual effect of the publicity on the impartiality of the jury panel. *Id.* To determine whether a change of venue is necessary, the trial court should consider the nature and extent of the media coverage, the size of the community, the nature and gravity of the offense and the respective standings of the defendant and the victim(s) in the community. State v. Koedatich I, 112 N.J. 225, 271 (1988), cert. denied, 489 U.S. 1017 (1989). Rarely is prejudice presumed; it will occur only in cases where the community and media reaction has been so hostile and apparent that it is readily obvious that no voir dire could assure an impartial jury. State v. Harris, 156 N.J. 122, 143 (1998); State v. Koedatich I, 112 N.J. at 269. Change of venue motions should be granted liberally in capital cases. Id. at 282.

When there is a reasonable likelihood that the trial of a capital case will be surrounded by presumptively prejudicial media publicity, the trial court must transfer the case to another county. *State v. Harris*, 156 *N.J.* at 133-34, 147-48.

When a change of venue or foreign jury application is granted, the court should consider the nature and extent of pretrial publicity in the proposed venue; the relative burdens on the respective courts in changing to the proposed venue; the hardships to prospective jurors in traveling from their home county to the site of trial and the burden imposed upon the court in transporting the jurors; the racial, ethnic, religious and other relevant demographic characteristics of the proposed venue insofar as they may effect the likelihood of a fair trial by an impartial jury; and any other factor which may be required by the interests of justice. *State v. Timmendequas*, 161 *N.J.* at 557-58; *State v. Harris*, 282 *N.J. Super.* 409 (App. Div. 1995).

Although racial characteristics always should be considered, in cases in which the victim and defendant are of the same race, this factor should not be given preemptive weight. *State v. Timmendequas, 161 N.J.* at 561.

The trial judge may take into account any hardships on the victim's survivors in selecting the venue so long as the defendant's right to a fair trial is not infringed. *Id.* at 555-56.

C. Mid-Trial Publicity

As a matter of course, trial courts admonish jurors not to read about or listen to reports about the case. These publicity-related warnings may not be sufficient when inherently prejudicial information has been released or published during trial. *State v. Harris*, 156 *N.J.* at 151; *State v. Bey I*, 112 *N.J.* at 81.

When a trial court is confronted with a mid-trial request to question the jury about its exposure to trial publicity, it should conduct a two-part inquiry. It must examine the information disseminated to determine whether it has the capacity to prejudice defendant. If the court determines that it does, the court must determine whether there is a realistic possibility that the jurors are aware of it. That requires considering the extent, notoriety and prominence of the media coverage.

If a trial court decides that there is a realistic possibility that the jurors know of the publicity, then it must conduct a *voir dire* of the jurors, preferably *in camera* and individually, to learn what, if anything, jurors have read or heard and whether they nonetheless are able to fulfill their fact-finding duties in a bias-free manner. *State v. Bey I*, 112 *N.J.* at 81-87. When there is no evidence of jurors' exposure to publicity, a collective *voir dire* may be sufficient rather than individual questioning of jurors. *State v. Harris*, 156 *N.J.* at 153-54.

D. Jury Voir Dire

It is constitutional to "death qualify" a jury, *i.e.*, to exclude individuals who cannot impose the death penalty from both the guilt and penalty phase. *Wainwright v.*

Witt, 469 *U.S.* 412, 105 *S.Ct.* 844, 83 *L.Ed.*2d 841 (1985); *State v. Ramseur*, 106 *N.J.* at 248-53.

A juror may not be challenged for cause based on his or her views about capital punishment unless those views would prevent or substantially impair the potential juror's duties as a juror in accordance with the trial court's instructions and the juror's oath. *Wainwright v. Witt*, 469 *U.S.* at 424-25, 105 *S.Ct.* at 852-53, 83 *L.Ed.*2d 841; *State v. Koedatich I*, 112 *N.J.* at 296; *State v. Ramseur*, 106 *N.J.* at 255-56. This standard applies to both pro and anti-death penalty prospective jurors. *State v. DiFrisco II*, 137 *N.J.* 434, 464 (1994). Juror bias need not be shown with unmistakable clarity because some potential jurors cannot articulate their beliefs that eloquently. *State v. Koedatich I*, 112 *N.J.* at 293.

The purpose of *voir dire* is to determine if potential jurors have biases or predispositions about a particular case to be tried. *State v. Moore*, 122 *N.J.* 420, 448 (1991). The court should allow open-ended questions on the issue of the victim's status (*e.g.*, victim a child or a pregnant woman) to expose potential prejudices which would prevent a fair evaluation of the case at the guilt or penalty phase. *Id.* at 451. Suspicion of a defendant's criminal record is not automatic grounds for excusal. If a potential juror indicates that the information can be put aside and will deliberate fairly, then the trial judge has the discretion to allow the juror to remain on the venire. *State v. Timmendequas*, 161 *N.J.* at 572.

When insanity or mental disease or defect will play a part in the trial, the court should ask questions to screen out any prospective jurors who would not consider those defenses. *State v. Moore*, 122 *N.J.* at 454. With regard to the "essentials" of the trial, like presumption of innocence, burden of proof and reasonable doubt, a court has the option either of orienting potential jurors about these concepts and then asking if any potential jurors have reservations about these basic principles or of using the jury questionnaire to set forth these principles and then asking the potential jurors about their ability to comply with these requirements. *Id.* at 456.

During death qualification, a court should give prospective jurors an overview of the death penalty statute, explaining the concept of capital murder, bifurcated proceedings and aggravating and mitigating factors. *State v. Papasavvas*, 163 *N.J.* 565, 584-85 (2000). This overview will provide jurors with a common base of understanding from which to answer questions. It is "unwise" for a trial judge to tell prospective jurors what will excuse them from jury service. *State v. Williams II*, 113 *N.J.* 393, 412 and n.5 (1988). A judge must inquire into whether a juror could consider mitigating evidence if the State established that defendant committed a certain type of crime such as aggravated sexual assault, *id.* at 417, or kidnapping. *State v. Martini I*, 131 *N.J.* 176, 212 (1993).

When a defendant is a member of a minority group, a more probing inquiry on racial prejudice should be conducted if requested. *State v. Williams II*, 113 *N.J.* at 427-28. A capital defendant charged with an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Turner v. Murray*, 476 *U.S.* 28, 37, 106 *S.Ct.* 1683, 1689, 90 *L.Ed.*2d 27 (1986). A capital defendant who does not specifically request more extensive *voir dire* on racial prejudice cannot complain on appeal when the trial judge does not *sua sponte* more thoroughly question the jury on this issue. *State v. Loftin I*, 146 *N.J.* at 340-42.

There is no constitutional right to attorneyconducted *voir dire, State v. Biegenwald II*, 106 *N.J.* at 28-29; *State v. Hunt*,115 *N.J.* 330, 347-48 (1989), and there is no rule that requires excusal for cause of any potential juror who has read or heard about the case. *State v. Timmendequas*, 161 *N.J.* at 572; *State v. Koedatich I*, 112 *N.J.* at 285.

A struck jury system, *i.e.*, using peremptory challenges only when an adequate number of potential jurors, *i.e.*, enough jurors to permit the defendant to exercise 20 challenges, the State to exercise 12 jurors and for 12 jurors to sit, *State v. Bey II*, 112 *N.J.* 123, 151 (1988), is a valid method of seating jurors in capital cases since it allows parties to exercise peremptory challenges with a better perception of the total jury composition. However, failing to employ a struck jury system is not constitutional error. *Id.* at 150-51; *State v. Ramseur*, 106 *N.J.* at 241-42.

A juror who expresses qualms about the death penalty possesses a view that the State may find antagonistic to its goals at trial and, therefore, the State properly can utilize a peremptory challenge to remove the juror. *State v. McDougald*, 120 *N.J.* 523, 556 (1990).

When a trial court erroneously fails to excuse a juror for cause, the defense then expends a peremptory challenge to remove the juror and the defense eventually uses all its allotted peremptory challenges, a reversal of the conviction will occur only if the defendant proves prejudice, *i.e.*, that he or she was tried by a jury which included at least one partial juror. *State v. DiFrisco II*, 137 *N.J.* at 466-67, 470-71. A claim that a juror who sat on the jury was biased will be rejected if the defendant did not challenge the juror for cause or expend a peremptory challenge when one was available. *Id.* at 471.

In order to establish a *prima facie* equal protection violation regarding the composition of grand or petit juries in a county, a defendant must identify a constitutionally cognizable group, prove substantial under-representation of that group over a significant period of time and demonstrate a discriminatory purpose for that under-representation. To establish a violation of the fair cross-section requirement, defendant must identify a constitutionally cognizable group which has unfairly and unreasonably been under-represented over time and systematically excluded. *State v. Bey III*, 129 *N.J.* at 583-84. A *prima facie* case cannot be based upon the affidavits of public defenders setting forth their personal observations of jury pools in the county. *Id.*

The Court has ruled that challenges to a juror for cause based upon bias or partiality should be asserted at sidebar. *State v. Biegenwald II*, 106 *N.J.* at 26-27.

E. When Two Juries Are Needed

When the State alleges the aggravating factor of prior murder, *N.J.S.A.* 2C:11-3c(4)(a), the guilt and penalty phases must proceed before two juries. *State v. Loftin I*, 146 *N.J.* at 334; *State v. Erazo*, 126 *N.J.* 112, 133 (1991); *State v. Biegenwald IV*, 126 *N.J.* 1, 44-45 (1991). With regard to the guilt phase jury, individualized voir dire is not required. *State v. Loftin I*, 146 *N.J.* at 339. However, unless waived by defense counsel, the trial judge should give a guilt phase jury a "severely restricted" death qualification, specifically not informing the jury of defendant's prior murder conviction. *Id.* at 336.

Such a procedure "commends itself" whenever the guilt phase evidence is so prejudicial that the same jury could not sit fairly on both phases of the trial. *State v. Erazo*, 126 *N.J.* at 133. A defendant may choose to waive the protection of the two juries for strategic reasons. In that circumstance, one court suggests that the trial judge conduct an *in camera* inquiry of the defendant regarding the decision to forego the two juries and ascertain whether that decision was made knowingly and voluntarily. The State would not be present at the hearing and the record would be sealed until appellate review. *State v. Parker*, 256 *N.J. Super.* 336, 339-41 (Law Div. 1992).

In circumstances in which the aggravating factor of prior murder is not alleged, a motion for separate guilt phase and penalty phase juries should be decided by the trial court at the conclusion of the guilt phase. That is when the trial court can assess whether prejudicial evidence has been presented to the jury. *State v. Harris*, 156 *N.J.* at 159-60.

F. Jury Charges at Guilt Phase

The Legislature did not create a "unified murder" statute in New Jersey. Rather, knowing or purposeful murder is not the moral equivalent of felony murder and therefore, a trial court should not give the jury a murder charge which combines knowing or purposeful homicide and felony murder and which would allow a non-unanimous felony murder, non-death verdict. *State v. Cooper I*, 151 *N.J.* at 356-63.

When the State seeks a capital conviction based on SBI murder, the jury must be instructed that to obtain a conviction, the State must prove beyond a reasonable doubt that the defendant caused the victim's death or SBI resulting in death, that the defendant did so purposely or knowingly and that causing the death or SBI was within the design or contemplation of the defendant. Serious bodily injury is defined as bodily injury that creates a substantial risk of death. A substantial risk of death exists where it is highly probable that the injury will result in death. *State v. Cruz*, 163 *N.J.* 403, 417-18 (2000). The jury need not agree unanimously on whether defendant committed the murder knowingly or purposefully since those mental states are morally equivalent. *Id.* at 420; *State v. Bey III*, 129 *N.J.* at 582.

The BYOC provision is a triggering mechanism which makes a defendant death-eligible. Charging the jury at the conclusion of the guilt phase, the trial court should advise the jury that a failure to reach a unanimous verdict on the BYOC component is a permissible final verdict that will result in a non-capital murder conviction. *State v. Brown*, 138 *N.J.* at 514.

When there is a jury question about whether defendant is guilty of murder as a principal or as an accomplice, the trial judge, after charging the jury on the elements of murder, should instruct the jury first to determine whether the defendant is guilty of knowing or purposeful murder. If the jury unanimously finds defendant guilty of murder, it should then deliberate on whether defendant committed the murder BYOC or as an accomplice. The jury should be told to consider these alternatives simultaneously and that it need not be unanimous on the BYOC determination, with a nonunanimous finding resulting in a conviction of noncapital murder. *State v. Feaster*, 156 *N.J.* at 42.

When the State asserts as an aggravating factor that the murder was committed in the course of a felony, *N.J.S.A.* 2C:11-3c(4)(g), the jury must be given the opportunity to consider felony murder in the guilt phase. *State v. Purnell*, 126 *N.J.* 518, 523 (1992). That is so even if felony murder is not included in the indictment.

An improper instruction which requires the jury to acquit defendant of knowing or purposeful homicide before considering felony murder does not require reversal if the evidence overwhelmingly demonstrates that the jury could not have convicted defendant of felony murder without also convicting defendant of knowing or purposeful homicide. *State v. Harvey II*, 151 *N.J.* 117, 154 (1997).

So long as defendant is on notice about the aggravating factors alleged, the sentencing jury can find the aggravating factor without unfairness even if not found at the guilt phase. For example, the State need not indict defendant for hindering apprehension as a predicate for alleging the hindering apprehension aggravating factor. *State v. Purnell*, 126 *N.J.* at 533.

If the State chooses a theory regarding an aggravating factor, it cannot change that theory during the penalty phase. *State v. Menter*, 293 *N.J.Super.* at 348 (State must be bound by its theory that defendant interrupted in course of committing aggravated sexual assault; cannot change theory during trial).

The trial court should not instruct the jury at the guilt phase about the potential sentences defendant would face if convicted of non-capital homicide or other serious crimes. Instead, the trial court should charge the jury that the non-capital homicide charges are extremely serious offenses and carry severe prison sentences without informing the jury about the actual terms. The jury also should be told not to concern itself with these potential sentences but to determine only whether the State has proven defendant's guilt beyond a reasonable doubt. Finally, the court should inform the jury that if there is a penalty phase, then it will learn what potential sentences defendant faces for each non-capital offense. *State v. Cooper I*, 151 *N.J.* at 378-79.

A. General Principles

At the penalty phase, the State has the right to open and close because it bears the burden of proving that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt to obtain a death sentence. *State v. Ramseur*, 106 *N.J.* at 318 n.81.

The State is limited to proving the statutory aggravating factors. It cannot refer to any non-statutory aggravating factors as supporting the death penalty. *Cf. State v. Pitts*, 116 *N.J.* 580, 603 (1989). Moreover, in summation, the prosecutor is limited to arguing the existence or not of the aggravating and mitigating factors. *State v. Coyle*, 119 *N.J.* 194, 231 (1990).

While the jury must be unanimous in finding an aggravating factor, the constitution precludes requiring unanimity with regard to mitigating factors. *Mills v. Maryland*, 486 *U.S.* 367, 375, 108 *S.Ct.* 1860, 1866, 100 *L.Ed.*2d 384 (1988); *State v. Bey II*, 112 *N.J.* at 159.

The death penalty statute allows a defendant to make a motion to have a trial judge conduct the penalty proceeding. The defendant, however, must obtain the consent of the prosecutor for such an action. *N.J.S.A.* 2C:11-3c(1). This procedure has been upheld against constitutional attack by the Supreme Court which has made clear that the only constitutional right which cannot be abridged is the right to trial by jury. *State v. Biegenwald II*, 106 *N.J.* at 48.

If a defendant faces a resentencing (*i.e.*, a second penalty phase proceeding), there must be a new jury selected. Where witnesses are available, the State must present their testimony. A defendant has the option of using either transcripts or live witnesses. If the State presents rebuttal evidence, it may employ either live witnesses or transcripts. *Id.* at 70-71.

At this resentencing proceeding, the only evidence that can be admitted is that relevant to the penalty phase. *Id.* at 71. Both the State and defense are free to present different witnesses than those presented at the original hearing and the jury is free to reach different conclusions on the aggravating and mitigating factors. *Id.* at 72.

The State will not be foreclosed from introducing new aggravating factors at a resentencing in those rare occasions in which to do so would not offend due process or fundamental fairness. That requires the State to prove to the trial court that it has discovered new evidence to establish an aggravating factor that was unavailable and undiscoverable by diligent efforts. *State v. Biegenwald III*, 110 *N.J.* 521, 541-42 (1988). The State cannot introduce new aggravating factors under the guise of rebutting mitigating factors. *Id.* at 543.

The constitution does not require a specific and detailed instruction on aggravating or mitigating factors so long as there is no reasonable possibility that the jury misunderstands its role in a capital sentencing proceeding. *State v. Bey II*, 112 *N.J.* at 169.

The fact that the same evidence supports two aggravating factors does not necessarily mean that defendant will be prejudiced because the jury finds two aggravating factors instead of one. Any potential prejudice can be avoided by the trial court charging the jury to be aware that the same facts were being used for more that one aggravating factor. This prevents giving undue weight to the *number* of factors. *State v. Bey II*, 112 *N.J.* at 175-76.

The guilt and penalty phases of a capital trial are distinct and if a juror is replaced at the penalty phase, the guilt phase guilty verdict is not vacated. Rather, the replacement juror deliberates solely on the issue of punishment. *State v. Moore*, 113 *N.J.* at 305-06.

Under the inability-to-continue standard of R. 1:8-2(d). the only justification for excusing a deliberating juror is for circumstances "exclusively personal" to the juror. If the misconduct which leads the trial court to excuse the juror is not based on personal circumstances, but rather, is related to the case and to the juror's interactions with the other jurors, the trial judge cannot remove the offending juror. *State v. Hightower II*, 146 *N.J.* 239, 254-56 (1996).

When "serious juror misconduct occurs" in a death penalty trial, "prejudice will be presumed." *Id.* at 265. In *Hightower II*, the Court determined that the excused juror's disclosure to the other jurors that the victim had three children, information which the parties had agreed to keep from the jury, had the clear capacity to prejudice defendant and, as a result, the trial court abused its discretion in denying defendant's request for a mistrial. 146 *N.J.* at 265-66.

If the defendant places his or her relationship to the victim in issue at the penalty phase, the State may present evidence that disputes defendant's version so long as the jury is instructed that evidence of the victim's state of mind is not offered as an aggravating factor but merely as rebuttal to defendant's claim. *State v. Davis*, 116 *N.J.* 341, 365 (1989).

While non-capital counts of an indictment may be tried with the capital counts in one trial, particularly where evidence of those other crimes would be admissible under *N.J.R.E.* 404(b), evidence relating to the non-capital murder count(s) cannot be considered as an aggravating factor at the penalty phase and the jury should be so advised. *State v. Pitts*, 116 *N.J.* at 599-603.

When the State uses a defendant's confession to establish aggravating factors, the trial court must determine whether there is sufficient corroboration in law to permit the sentencer to consider the confession. If that hurdle is passed, the jury may consider the presence or absence of corroborating proofs offered by the State in determining the existence and weight to be accorded the aggravating factor. When no extrinsic corroboration of the aggravating factors exists, the jury must be instructed that it must be satisfied beyond a reasonable doubt that the confession itself is sufficient to establish aggravating factors beyond a reasonable doubt. *State v. DiFrisco I*, 118 *N.J.* 253, 275 (1990). The State need not prove the credibility of defendant's statement beyond a reasonable doubt. *State v. Chew I*, 150 *N.J.* 30, 82 (1997).

It does not violate due process or fundamental fairness to allow the State to resubmit, at a second sentencing hearing, aggravating factors not found unanimously at the first sentencing hearing. The non-unanimity of aggravating factors merely constitutes a finding that the aggravating factor(s) does not exist at *that* proceeding. *State v. Koedatich II*, 118 *N.J.* 513, 526 (1990). Resubmission of these aggravating factors at the second sentencing hearing is consistent with the basic premise that all relevant evidence on the individual characteristics of the defendant and his offense should be considered by the jury. *Id.* at 532.

B. Aggravating Factors

1. Prior Murder (*N.J.S.A.* 2C:11-3c(4)(a))

As originally enacted in 1982, *N.J.S.A.* 2C:11-3c(4)(a) provided that it was an aggravating factor if the defendant "has previously been convicted of murder." The Supreme Court interpreted the provision to require that the prior conviction had been affirmed on direct appeal. *State v. Bey,* 96 *N.J.* 625, 628 (1984). In response, the Legislature amended *N.J.S.A.* 2C:11-3c(4)(a) in 1985 to define a prior murder conviction as

final once sentence was imposed. This amended aggravating factor can be applied to a murder which occurred before the 1985 amendment. *State v. Bey III*, 129 *N.J.* at 618.

A defendant may contest a prior murder conviction resulting from a *non vult* plea entered at a time when it precluded a death sentence and the record suggests that the defendant did not commit the murder. *State v. Ramseur*, 106 *N.J.* at 278. A final murder conviction that took place after a defendant's original capital trial but before a resentencing hearing may be asserted as an aggravating factor by the prosecutor. *State v. Biegenwald III*, 110 *N.J.* at 529-30.

The prior murder alleged by the State need not have occurred in New Jersey. Rather, so long as the judgment of conviction indicates that the defendant was convicted of murder, then the conviction can be admitted. *State v. Simon*, 161 *N.J.* at 459-60.

Under *N.J.S.A.* 2C:11-3c(2)(f), with regard to the prior murder, the State may present evidence about the identity and age of the victim, the manner of death and the victim's relationship, if any, to the defendant. The trial judge should advise the jury that evidence of the prior murder is being admitted only to determine whether the death penalty should be imposed for the present murder and not the prior murder. *State v. Erazo*, 126 *N.J.* at 135-36.

2. Grave Risk of Death (*N.J.S.A.* 2C:11-3c(4)(b))

Where, in a multiple murder situation, a victim is already dead, a defendant cannot be charged with the aggravating factor of grave risk of death. *State v. Johnson*, 120 *N.J.* 263, 301 (1990). Moreover, for this aggravating factor to apply, the defendant must be aware of the presence of others. *State v. Clausell*, 121 *N.J.* 298, 344 (1990).

3. Murder Outrageously, Wantonly Vile (*N.J.S.A.* 2C:11-3c(4)(c))

To save this aggravating factor from vagueness, the Supreme Court in *Ramseur* narrowed its scope. With regard to torture and aggravated assault, the Court defined 4c to apply to those murders in which a defendant intended to and did cause extreme physical or psychological pain or suffering to the victim prior to death, with the severity measured by the intensity or duration of pain or the combination of both. 106 *N.J.* at

211. Defendant's state of mind must be purposeful, *i.e.*, wanting the suffering to occur. *Id.*

With regard to depravity of mind, the Court defined it to reach those murders without purpose or meaning. It isolates conduct that causes the greatest abhorrence and terror in society, a killer who kills because he likes it. *Id.* at 209. Multiple stab wounds might in certain cases indicate an intent to inflict pain in addition to causing death. *State v. Hunt*, 115 *N.J.* at 389.

Where the State does not concede that defendant had any motive other than sheer pleasure derived from stalking and executing his prey, then depravity of mind is sufficiently alleged. *State v. Coyle*, 119 *N.J.* at 235. However, the State cannot alter its theory of 4c (*i.e.*, from torture to depravity of mind) when it had all the evidence at the time of trial and consciously chose one alternative over another. *Id.* at 236-38. While a prior incident involving violence or abuse against the victim may establish intent to kill or SBI, that is insufficient to show the intent to cause extreme physical or mental suffering beyond death needed to prove the aggravating factor. *State v. Matulewicz*, 115 *N.J.* 191, 199 (1989).

Reference to the means used to commit the murder is insufficient to prove this aggravating factor. *State v. Perry*, 124 *N.J.* 128, 173 (1991). Where there is a motive for the murder, depravity of mind should not be submitted to the jury. *Id.* at 175. A defendant's intent to cause a third party who was not a victim of the crime psychological suffering falls within the scope of the 4c aggravating factor. *State v. Menter*, 293 *N.J.Super.* at 361-67.

4. Murder For Pecuniary Motives (*N.J.S.A.* 2C:11-3c(4)(d) and (e)).

Aggravating factor 4(d), that the murder was committed as consideration for the receipt or in expectation of the receipt of anything of pecuniary value, is not limited to murder committed by hired killers. Rather, a defendant who murders another for future gain, *e.g.*, insurance proceeds, falls within the statute's provisions. *State v. Chew I*, 150 *N.J.* at 55. However, the pecuniary gain aggravating factor is limited to those circumstances in which the killing is the "essential prerequisite" to the receipt of the gain. *Id.* at 56.

Even though procuring a murder makes a defendant death eligible and also constitutes an aggravating factor, that does not create a constitutional problem. *Lowenfeld v. Phelps*, 484 *U.S.* at 244-46, 108 *S.Ct.* at 554-55, 98

*L.Ed.*2d 568; *State v. Marshall I*, 123 *N.J.* at 138-39. However, the trial court should advise juries that the guilt and sentencing phases are separate and that whenever the State relies upon guilt phase evidence to prove an aggravating factor, the jury must deliberate anew on the issue. *Id.* at 139.

5. Escape Detection (*N.J.S.A.* 2C:11-3c(4)(f))

This aggravating factor refers to a defendant committing a murder to escape detection, apprehension, trial, punishment or confinement for "another offense." The other offense need not have been committed before the murder for which defendant is presently on trial. Rather, the aggravating factor seeks to address the silencing of potential witnesses and could be directed at the underlying crime being committed. *State v. Hightower I*, 120 *N.J.* 378, 420-21 (1990).

The State must present evidence from which a jury could infer that at least one of the purposes motivating the killing was the defendant's desire to avoid subsequent detection and apprehension. *Id.* at 422; *State v. Loftin I*, 146 *N.J.* at 376-78; *State v. Martini I*, 131 *N.J.* 282. The evidence to support the aggravating factor may be wholly circumstantial. *Id.* at 282-83. However, evidence of actions taken to conceal the murder cannot be used to prove this aggravating factor. *State v. Hightower I*, 120 *N.J.* at 422.

6. Murder in Course of Felony (*N.J.S.A.* 2C:11-3c(4)(g))

The felony murder aggravating factor applies to a defendant who commits a murder in the course of, attempt to or flight from a murder, robbery, sexual assault, arson, burglary or kidnapping or the crime of contempt in violation of *N.J.S.A.* 2C:29-9b. With regard to multiple murders, the statute does not rely on the temporal sequence of murders for its applicability. It applies to murders committed during, before or after the commission of the felony, so the time sequence of the murders is irrelevant. *State v. Moore*, 122 *N.J.* at 469-71.

This aggravating factor applies in situations where the intent to kill was formed before, during or after the commission of the felony, *State v. Brown*, 138 *N.J.* at 550-51, and is not limited to commission of a felony against the eventual murder victim. *State v. Harris*, 141 *N.J.* at 569-70. When the State asserts that several felonies were committed, the jury should be instructed that it must be in unanimous agreement regarding the existence of the specific underlying felony. *Id.; State v.* *Brown*, 138 *N.J.* at 553. However, counsel may request separate verdicts on the existence of the underlying felony. *State v. Harris*, 141 *N.J.* at 564.

While claim of right is not a defense to robbery and should not be charged at the guilt phase, *id.* at 557-59, it may be asserted at the penalty phase as both a mitigating factor (catch-all) and to reduce the weight the jury placed on the felony murder aggravating factor. *State v. Mejia*, 141 *N.J.* 475, 500 (1995).

C. Mitigating Factors

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

The fact that the mitigating factor speaks in terms of "extreme" mental or emotional disturbance does not constitutionally circumscribe the jury's evaluation of this mitigating factor, *State v. Martini I*, 131 *N.J.* at 301-08, particularly since the jury instruction on *N.J.S.A.* 2C:11-3c(5)(h) (catch-all) ensures that the jury considers all mitigating evidence. *Id.* 305-07 The extreme mental or emotional disturbance must have influenced defendant to commit the murder. *State v. Harris*, 141 *N.J.* at 568-69. The mitigating factor does not require that the defendant be suffering from a mental disease or defect. *State v. Loftin I*, 146 *N.J.* at 373-74.

2. Age of Defendant at Time of Murder (*N.J.S.A.* 2C:11-3c(5)(c))

The age of the defendant should be recognized as a mitigating factor only when defendant is relatively young or old. *State v. Ramseur*, 106 *N.J.* at 295. This mitigating factor requires the jury to consider both defendant's chronological age and his or her maturity in determining the applicability of the mitigating factor. A defendant's young age does not mean that the jury must find the presence of this mitigating factor. *State v. Bey III*, 129 *N.J.* at 613.

3. No Significant History of Criminal Activity (*N.J.S.A.* 2C:11-3c(5)(f))

This mitigating factor is not limited to criminal convictions; therefore, the State can rebut this mitigating factor by demonstrating a defendant's involvement in criminal activity that did not result in convictions. *State v. Rose I*, 112 *N.J.* 454, 537 (1988).

4. Defendant Rendered Substantial Assistance to the State in Prosecuting Another Person for the Crime of Murder (N.J.S.A. 2C:11-3c(5)(g))

The fact that the mitigating factor speaks in terms of "substantial" assistance to the State does not constitutionally circumscribe the jury's evaluation of this mitigating factor, *State v. Martini I*, 131 *N.J.* at 299-300, particularly since the jury instruction on *N.J.S.A.* 2C:11-3c(5)(h) (catch-all) ensures that the jury considers all mitigating evidence. *Id.* at 300-01.

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

This mitigating factor is an expansive one but still has restrictions. For example, the "circumstances of the offense" are limited to those surrounding the commission of the crime itself. *State v. Gerald*, 113 *N.J.* at 103-04. Also, testimony from clergy or others on the deterrent effect of the death penalty or on the humaneness of lethal injection execution is not relevant to a defendant's record or character. *State v. Rose II*, 120 *N.J.* 61, 64-65 (1990); *N.J.S.A.* 2C:11-3h.

A witness may not give an opinion on the appropriate punishment to be given to a defendant. *State v. Moore*, 122 *N.J.* at 479. If a defendant alleges this mitigating factor, it may be rebutted by instances of defendant's specific conduct. *State v. Rose I*, 112 *N.J.* at 502-03.

The fact that the defendant might die in prison if sentenced to a life term is not a mitigating factor. *State v. Loftin I*, 146 *N.J.* at 371. The possible effect of defendant's execution on his or her relatives is not mitigating evidence and should be excluded. *Id.* at 367-69; *State v. DiFrisco II*, 137 *N.J.* at 505-06. The potential parole ineligibility period that a defendant would receive if a non-death sentence were imposed is not a mitigating factor. *State v. Morton I*, 155 *N.J.* at 466; *State v. Cooper I*, 151 *N.J.* at 405. Similarly, pleas of mercy by relatives may be admitted in the discretion of the trial judge. *State v. DiFrisco II*, 137 *N.J.* at 506; *State v. Moore*, 122 *N.J.* at 479-80.

Under this mitigating factor, any factor submitted for consideration, and that could be established by reliable evidence, should be listed on the jury verdict form. The jury should be advised that these factors are non-exclusive and that mitigating factors other than those listed may be found and considered. *State v. Biegenwald IV*, 126 *N.J.* at 46-47. "Double counting" the mitigating factor is avoided by advising the jury that the same evidence may be used to prove multiple mitigating factors. *Id.* at 48; *State v. Pennington*, 119 *N.J.* 547, 599 (1990).

A court need not submit, as separate mitigating factors, a list of occurrences in a defendant's life that defendant has submitted under the catch-all. *State v. Harris*, 156 *N.J.* at 187. Similarly, the jury need not separately vote on each occurrence. *Id.* However, the court must make sure that the jury understands the purpose of mitigating evidence. *Id.* If a defendant submits, under the catch-all, disparate and wholly unrelated mitigating factors, the trial court should not combine them. *State v. Nelson*, 155 *N.J.* at 511.

Whenever a defendant presents evidence of his character or record under the catch-all mitigating factor, the State is permitted to present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors. *N.J.S.A.* 2C:11-3c(6) (victim impact evidence).

The defense must be advised prior to commencement of the penalty phase about whether the State intends to introduce victim impact evidence, and the State must provide defendant with the names of the witnesses it intends to call so that the defense will have an opportunity to interview them. Before a family member will be allowed to testify, the trial court should hold an *N.J.R.E.* 104 hearing to decide the admissibility of the proffered evidence.

The proposed testimony, which should be reduced to writing to allow the judge to review it, should provide a general factual profile of the victim, including information about the victim's family, employment, education and interests and can describe generally the impact of the victim's death on the family. The court should weigh each specific point of the proffered testimony to ensure its probative value is not substantially outweighed by prejudice, with the recognition that there is a strong presumption that the evidence is admissible. Usually only one witness should testify and children should not testify unless they are the closest surviving family member. *State v. Muhammad*, 145 *N.J.* 23, 54-55 (1996).

After the victim impact evidence is admitted, the trial court should instruct jurors that if any one of them has found the catch-all, that juror(s) may consider the victim and survivor evidence in determining the weight to give the catch-all factor. *Id.*

6. Miscellaneous

The sentence defendant is now serving or the sentences or dispositions of codefendants are not mitigating factors. *State v. Brown*, 138 *N.J.* at 554-57; *State v. DiFrisco II*, 137 *N.J.* at 504-05; *State v. Bey III*, 129 *N.J.* at 602; *State v. Biegenwald IV*, 126 *N.J.* at 49; *State v. Gerald*, 113 *N.J.* at 101-03. However, at the defendant's request or upon a jury inquiry, the trial court should inform the jury about defendant's prior sentences. If defendant is appealing his prior sentences, the jury should be advised that the sentences are not final. Moreover, the jury must be instructed that these prior sentences are neither aggravating nor mitigating factors and should not be considered in the "life or death" decision. *State v. Bey III*, 129 *N.J.* at 603.

Similarly, if the defense or jury asks for instructions on potential sentences defendant will receive for convictions arising from the same trial as the capital conviction, it should be informed of the sentencing options available and that the determination of the sentences to be imposed on the other counts, and whether they will be concurrent or consecutive, is one made by the court. The jury also must be told that the potential sentence(s) for any other charge is irrelevant to its determination of defendant's sentence on the capital murder count. *State v. Martini I*, 131 *N.J.* at 313.

If the trial judge believes that, if the jury does not impose a death sentence that it will sentence defendant to a term to be served consecutively to any other sentence defendant is presently serving, it should so inform the jury. *State v. Loftin I*, 146 *N.J.* at 372.

After providing the jury information on these potential sentences, the trial court should make clear that the jury's decision with regard to whether death is the appropriate punishment should not be influenced by the potential sentences the court could impose on the other convictions or on the fact that a defendant will face a longer confinement than others might. Rather, a defendant's worthiness for life should depend only on the circumstances of the offense and the aggravating and mitigating factors that have been presented. *State v. Nelson*, 155 *N.J.* at 505.

A defendant has a non-constitutional right of allocution at the sentencing phase to make an unsworn personal statement in mitigation of death. Before such a statement is made, the defendant should be instructed by the court outside the presence of the jury, about the limited nature of the right. *State v. Zola*, 112 *N.J.* 384, 431-32 (1988), *cert. denied*, 489 *U.S.* 10 (1989); *State v. DiFrisco II*, 137 *N.J.* at 478. A defendant can exercise this allocution right to *ask* for the death penalty. The same procedures established in *Zola* should be followed and the court "might" suggest to the jurors that only their opinion, and not defendant's, about the appropriate penalty controls. *State v. Hightower I*, 120 *N.J.* at 414-16. The jury should be instructed that a defendant's allocution should be considered insofar as it impacts on one or more mitigating factor. *State v. DiFrisco II*, 137 *N.J.* at 479-80.

If a defendant improperly exceeds the scope of the allocution right, the trial court may strike the improper portion of the statement and issue a curative instruction. *State v. Loftin I*, 146 *N.J.* at 360-63.

A jury need not accept as a mitigating factor any statutory factor on which defendant presented proof and which the State has failed to disprove. Whether a mitigating factor exists is a qualitative judgment. *State v. Zola*, 112 *N.J.* at 438. Moreover, the State has no burden to disprove the defendant's mitigating factors. *State v. Cooper I*, 151 *N.J.* at 395-96.

Therefore, a jury should not be instructed that it *must* find a statutory mitigating factor for which there is reliable evidence. *State v. Harris*, 141 *N.J.* at 567. The Court has indicated, however, that with regard to certain objective mitigating factors, such as "no significant history of criminal activity," which are undisputed, it might be appropriate to instruct the jury to consider the mitigating factor. *Id.* at 566.

The total exclusion of penalty phase evidence to support a mitigating factor should occur only in circumstances in which the trial court is convinced that the admission of the evidence, in conjunction with the effects of cross-examination, rebuttal and curative instructions, would frustrate rather than advance society's interest in a fair trial. *State v. Pitts*, 116 *N.J.* at 635.

If a mitigating factor is not submitted to the jury, a defendant must show that the mitigating factor is one that the jury reasonably could have deemed to have mitigating value, that there was sufficient evidence of the existence of the factor and that, considering the case as a whole, exclusion of the factor resulted in prejudice to defendant. *State v. Martini I*, 131 *N.J.* at 299.

A defendant cannot prevent the presentation of mitigating evidence on his or her behalf at the penalty phase. The trial court must explore methods of handling the situation that are sensitive to the attorney-client relationship. *State v. Koedatich I*, 112 *N.J.* at 331.

IV. JURY DELIBERATION ISSUES

For the death penalty to be imposed, all aggravating factor(s) must outweigh all mitigating factor(s) beyond a reasonable doubt. *State v. Bey II*, 112 *N.J.* at 158-59. Each juror must independently determine the existence of a mitigating factor and then individually decide whether aggravating factor(s) outweigh the mitigating factor(s) beyond a reasonable doubt. *Id.* at 161.

The court should expressly instruct the jury that the decision on punishment is not merely a counting of aggravating and mitigating factors. Rather, the jury's verdict must constitute a belief that the death penalty was a fitting and appropriate punishment. *Id.* at 164.

The verdict sheet should explicitly ask the jury whether any of the listed aggravating factors or combinations of aggravating factors outweigh the mitigating factors. This type of verdict sheet "allows for more effective and efficient appellate review" and would allow the court to assess whether errors with regard to the aggravating factor(s) requires reversal of a death sentence. *State v. Cooper I*, 151 *N.J.* at 444-45 n.4 (Handler, J., dissenting).

A trial judge must adequately explain mitigating factors in the context of the whole charge and make sure that the jury does not misunderstand the function of these factors. *State v. Bey II*, 112 *N.J.* at 169-70. A proper instruction on mitigating factors will assure that the jury does not misunderstand the proper use of feelings of sympathy and mercy and will make unnecessary an instruction on sympathy. *Id.* at 172.

Instructing the jury that it should attempt to reach unanimity with regard to the existence or not of mitigating factors is not error so long as the jury is aware, from the court's instructions and also the verdict sheet, that unanimity is not required. *State v. Cooper I*, 151 *N.J.* at 399; *State v. Loftin I*, 146 *N.J.* at 376.

When the court receives a note from the jury about possible deadlock, it should inquire whether delibera-

tions have progressed sufficiently and reached a genuine stalemate or whether more time is needed. *State v. Hunt*, 115 *N.J.* at 380. The trial court cannot charge the jury at the penalty phase on the importance of reaching a unanimous verdict. Rather, since the purpose of deliberations is simply to deliberate, the court must tell the jury, if it indicates that it cannot agree, that a decision to disagree is acceptable. *Id.* at 382-85. However, the court is under no obligation to ask the jury whether it is at an impasse when it clearly is not. *State v. DiFrisco II*, 137 *N.J.* at 487.

V. MISCELLANEOUS

When the victim's character has no bearing on the substantive issue of guilt or the penalty to be imposed, the prosecutor may not comment on the evidence in a manner that serves only to highlight the victim's virtues in order to inflame the jury. *State v. Williams II*, 113 *N.J.* at 51-52. Similarly, the prosecutor may not comment on the effect of the murder on the victim's family in order to persuade the jury to impose a death sentence. *State v. Coyle*, 119 *N.J.* at 231.

If an expert witness testifies that he or she did not rely upon certain documents, he or she cannot be questioned about the contents of those documents if they are not in evidence. *State v. Pennington*, 119 *N.J.* at 578-79. Similarly, if the expert has not relied upon hearsay evidence, that evidence may not be employed in crossexamination. *Id.* at 583.

VI. APPELLATE REVIEW

By statute, all murder convictions which have resulted in a death sentence must be appealed to the Supreme Court. N.J.S.A. 2C:11-3e. In reviewing claims of error, the Supreme Court will not employ a different standard in capital cases. State v. Bey II, 112 N.J. at 92. Rather, it exercises heightened scrutiny of the record and independence in making its own findings with respect to trial court rulings and determinations. Id. at 92-93. If there is error found at the guilt or sentencing phase, reversibility will be based on a qualitative determination that considers, in the context of the entire record, whether the error was clearly capable of affecting either the verdict or sentence. Id. at 94-95. The sole exception involves errors that cast so much doubt about the fairness of the trial that as a matter of law they can never be considered harmless. Id. at 95.

The Court also has rejected a "heightened" standard for claims of incompetency of counsel in capital cases.

State v. Davis, 116 N.J. at 352-56. Rather, a defendant must satisfy the two-prong test set forth in *Strickland v.* Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) and adopted in State v. Fritz, 105 N.J. 42, 58 (1987). Under the first prong, defendant must show that counsel's performance was deficient, *i.e.*, that counsel made errors so serious that counsel was not functioning as the counsel guaranteed defendant by the sixth amendment. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2063, 80 L.Ed.2d 674; State v. Marshall III, 148 N.J. 89, 156 (1997), cert. denied, 522 U.S. 850 (1997). To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that but for counsel's errors, there would have been a different result. Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d 674.

In the capital sentencing context, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, "the jury's penalty-phase deliberations would have been affected substantially." *State v. Marshall III*, 148 *N.J.* at 250. That equates to "a probability sufficient to undermine confidence in the outcome." *Id.*

VII. PROPORTIONALITY

A. Individual Proportionality Review

Statutory proportionality review is intended solely to determine whether a death sentence, otherwise valid because supported by the record, is nonetheless unacceptable because disproportionate to the punishment imposed on others convicted of the same crime. *State v. Ramseur*, 106 *N.J.* at 325. In *State v. Marshall II*, 130 *N.J.* 109 (1992), the Court established the "universe" and the procedure for reviewing whether a particular death sentence is disproportionate. The universe of cases includes all cases that are death-eligible even if not prosecuted capitally. *Id.* at 137.

In 1992, the Legislature amended the statute to limit the universe of cases for proportionality review to defendants who received a death sentence. *N.J.S.A.* 2C:11-3e. The Court has refused to apply the amended statute because it might interfere with the Court's right to appellate review. *In re Proportionality Review Project I*, 161 *N.J.* 71 (1999); *State v. Loftin II*, 157 *N.J.* 253 (1999), *cert. denied*, 120 *S.Ct.* 229 (1999).

To be death-eligible, the record must demonstrate that defendant committed a knowing or purposeful homicide by his or her own conduct or as an accomplice procured the murder and at least one aggravating factor must exist. All death-sentenced defendants are included in the universe, even if the death sentence subsequently was reversed. *State v. Bey IV*, 137 *N.J.* 334, 347-48 (1994).

The defendant's death sentence is reviewed under a frequency analysis and under a precedent-seeking method. Frequency analysis is a statistical review of defendant's death sentence using the salient factors test which groups defendants into categories based upon aggravating factors, *e.g.*, prior murder. It measures the relative frequency of death sentences in factually similar cases. *State v. Morton II*, 165 *N.J.* 235, 244 (2000).

The precedent-seeking method employs the same comparison groups as that used in the salient factors test. *Id.* at 254. It requires the Court to examine death eligible cases similar to the defendant's to determine whether the defendant's death sentence is aberrant when compared to the sentences received by defendants in those other cases. *State v. Chew II*, 159 *N.J.* 183,210 (1999), *cert. denied*, 120 *S.Ct.* 593 (1999); *State v. Marshall II*, 130 *N.J.* at 131. In determining which cases should be compared to the defendant's, cases that fall within the defendant's salient factors group, *i.e.*, prior murder, are presumptively included within defendant's comparison group. Conversely, cases outside the salient factors group should be presumptively excluded from the comparison group. *State v. Morton II*, 165 *N.J.* at 256.

To gain a reduction to a life term, a defendant bears the burden of showing that the death sentence was disproportionate. *State v. DiFrisco III*, 142 *N.J.* at 162; *State v. Martini II*, 139 *N.J.* at 47. A death sentence is considered disproportionate if other defendants in the jurisdiction who have similar characteristics commit similar offenses and receive life sentences. *State v. Marshall II*, 130 *N.J.* at 131.

Under precedent seeking review, the Court uses all relevant aggravating and mitigating factors rooted in traditional sentencing guidelines. *Id.* at 159. Comparison cases are selected from the death-eligible universe based on the aggravating factors present in defendant's case and evaluations are based only on objective criteria actually presented to the jury or trial judge. *State v. Bey IV*, 137 *N.J.* at 368.

The Court will discount cases where the facts are significantly dissimilar even if the same aggravating factor is arguably similar. However, with regard to the catchall factor, the Court recognizes that the jury may have been influenced by evidence presented in support of a specific statutory mitigating factor that it rejected. *Id.*

B. Systemic Proportionality

When a defendant claims that the death penalty has been imposed because of some unconstitutional factor, such as the race of the victim or the race of the defendant, he or she is making a systemic proportionality challenge. The study of system-wide discrimination requires the use of statistical techniques in socio-political settings. To determine whether the system is operating in a discriminatory manner, the Court will utilize a multifaceted approach, including bivariate analysis, regression analysis and case-sorting analysis. In re Proportionality Project II, 165 N.J. 206 (2000). The Court will not rely upon any single methodology to determine if race had an invidious impact on the death penalty; rather, the defendant has to relentlessly document the risk of racial disparity and do so by showing a consistent finding using multiple techniques. Id. at 225.

VIII. POST-CONVICTION RELIEF

The New Jersey Supreme Court has ruled that "the public interest" requires that a post-conviction relief petition must be filed in capital cases. When a capital defendant does not wish to pursue this remedy, a special, truncated procedure for post-conviction relief is to take place. *State v. Martini III*, 144 *N.J.* 603 (1996).

The Public Defender or designated counsel must file a petition within 30 days after learning that the defendant does not wish to file. The unwilling defendant also should be assigned standby counsel. The Assignment Judge of the vicinage must assign the petition to a judge who will conduct the hearing on a continuous day to day basis. Moreover, the court must be provided with a computer-assisted court reporter so that transcripts may be generated simultaneously with the proceedings. At the conclusion of the hearing, the trial judge must certify the record to the Supreme Court and issue either an oral or written opinion. An "aggrieved party" must file its notice of appeal and supplemental brief within 15 days thereafter, and the Supreme Court must issue its decision within 45 days after the appeal is filed or 30 days after oral argument. Id. at 613-16.

The Court has condemned a defendant's attempt to fragment claims raised in post-conviction relief to escape the procedural bars of *R*. 3:22-4 and 3:22-5, *State v. Marshall III*, 148 *N.J.* at 144, but also indicated that it

preferred the trial court to adjudicate post-conviction relief claims on their merits, especially in capital cases. *Id.* at 147-54.

With regard to evidentiary hearings on postconviction relief petitions, such a hearing should be held only if a defendant has made a *prima facie* case in support of post-conviction relief, *i.e.*, demonstrated a reasonable likelihood that the claim will ultimately succeed on the merits. *Id.* at 157-58. A hearing need not be held if the court perceives that it will not aid the trial court's analysis of the entitlement to relief or if the defendant's allegations are too vague, conclusory or speculative to warrant a hearing. *Id.* at 158.

A defendant has no right -- constitutional, statutory or common law -- to inspect the State's file during postconviction proceedings. *Id.* at 272-75. However, a trial court has the inherent right to compel discovery during these proceedings, but it should be exercised only "in the unusual case," since the filing of a post-conviction relief petition "is not license to obtain unlimited information from the State. . . ." *Id.* at 270. Any discovery order should be appropriately narrow and limited; a defendant should identify the specific documents sought for production, and the court may view the documents *in camera* before determining whether to issue a discovery order. *Id.* at 270-71.

R. 1:16-1, which prevents post-trial contact with jurors without the approval of the court, does not violate a defendant's First Amendment rights. The compelling public interest in protecting jurors and their deliberations amply justifies restrictions on contacting jurors without good cause. *Id.* at 280. When a defendant raises an incompetency of counsel claim and defense counsel testifies, the defendant waives the attorney-client privilege. *State Bey V*, 161 *N.J.* 233, 296 (1999). Moreover, the attorney client privilege does not extend to communications relevant to incompetency of counsel claims. *Id.*

CARJACKING

A defendant who, in the course of committing an unlawful taking of a motor vehicle, (1) inflicts bodily injury or uses force upon an occupant or person in possession or control of a motor vehicle; (2) threatens an occupant or person in control of the vehicle with, or purposely or knowingly puts an occupant or person in control of the motor vehicle in fear of immediate bodily injury; or (3) commits or threatens to commit any crime of the first or second degree; or (4) operates or causes the vehicle to be operated with the person who was in possession or control or was an occupant of the motor vehicle at the time of the taking remaining in the vehicle is guilty of carjacking. *N.J.S.A.* 2C:15-2a.

An act is deemed "in the course of committing an unlawful taking of a motor vehicle" if it occurs during an attempt to commit the unlawful taking or during an immediate flight after the attempt or commission. *Id.*

While carjacking is a crime of the first degree, nonetheless the ordinary term of imprisonment is between 10 and 30 years. A person convicted of carjacking who is sentenced to a term of imprisonment must receive a term of at least five years of parole ineligibility. *N.J.S.A.* 2C:15-2b.

In *State v. Williams*, 289 *N.J. Super*. 611, 616 (App. Div. 1996), the Court pointed out that the carjacking statute does not require that the defendant use force against an occupant of a vehicle only when the victim is within the actual structure of the vehicle. Rather, the broad aim of the statute is to deal with persons who use force or intimidation to gain possession of a motor vehicle. Thus, under the statute whether the occupant or person in possession or control over the automobile is actually situated within the structure of the vehicle when force is employed or threatened is irrelevant.

However, for purposes of a lesser included offense determination, robbery and theft are not within the four corners of a carjacking indictment when the theft underlying the robbery was the undisputed wrongful taking of the victim's automobile directly from the occupant. *State v. Garretson*, 313 *N.J. Super.* 348, 359 (App. Div. 1998).

When a defendant does not request a jury charge on a lesser-included offense or offenses, such as robbery, assault and theft from the person, the trial court is not required to provide such an instruction. *State v. Matarama*, 306 *N.J. Super.* 6, 21 (App. Div. 1997), *certif.* *denied*, 153 *N.J.* 50 (1998). But if there is a rational basis for an affirmative defense of renunciation -- *see N.J.S.A.* 2C:5-1d, *N.J.S.A.* 2C:5-2e, and *N.J.S.A.* 2C:2-6e(3) -- when a defendant requests such a charge, the trial court must instruct the jury on this defense. *State v. Alston*, 311 *N.J. Super.* 113, 121 (App. Div. 1998).

Under the statute, the proximity of the victim to his or her vehicle is significant, since under N.J.S.A. 2C:15-2a(2), "the State must present evidence on the issue of proximity to prove that the victim was either an 'occupant or in control of' the vehicle." State v. Jenkins, 321 N.J. Super. 124, 131 (App. Div. 1999). See N.J.S.A. 2C:15-2a(2). Therefore, the victim's proximity to the vehicle "clearly bears on the victim's capacity to control the vehicle, either in terms of the victim's own ability to operate it or to bar entry by others, and also to establish that the defendant's actions exposed the victim to a particular risk of harm beyond mere loss of the vehicle. To sustain a conviction under N.J.S.A. 2C:15-2a(2), the State must prove the "occupant or person in control" of the vehicle was placed within a "heightened zone of danger" with relationship to the car. A victim's constructive possession of a vehicle, which he or she did not occupy or control at the time of the assault, is insufficient to support a carjacking conviction under *N.J.S.A.* 2C:15-2a(2).

The use of the carjacked vehicle in the commission of a crime cannot be used as an aggravating factor in determining sentence because it would result in double counting, since the vehicle used was the victim's. *State v. Henry*, 323 *N.J. Super.* 157, 165 (App. Div. 1999).

CAUSATION

I. HISTORY

N.J.S.A. 2C:2-3 substantially changed the way in which problems of causation were dealt with under prior Pre-Code law required that when causing a law. particular result was a material element of the offense, the State had to prove that the defendant's conduct was both the actual and the proximate cause of the result with which he had been charged. See State v. Weiner, 41 N.J. 21, 36 (1963) (conviction reversed for prosecution's failure to prove which proposed theory of alleged criminally negligent conduct actually caused victims' deaths); State v. Reitz, 86 N.J.L. 407 (Sup. Ct. 1914) (death must be "the natural and proximate result ...; criminal responsibility depends upon whether or not the injury which caused the death was the regular, natural and likely consequence of defendant's conduct").

Under the Code, the actual "but for" causal relationship is regarded as sufficient and issues involving proximate causation, such as knowledge or forseeability, become relevant to the actor's culpability (i.e. his purpose, knowledge, recklessness or negligence). The reasoning behind the change goes to the issue of double "When concepts of 'proximate causation' counting. disassociate the actor's conduct from a result of which it was a but-for cause, the reason always inheres in the judgment that the actor's culpability with reference to the result ... was such that it would be unjust to permit the result to influence his liability or the gravity of the offense of which he is convicted." II Final Report of New Jersey Criminal Law Revision Commission: Commentary (1971) at 49-50.

Also, the Code abolished the common law limitation on murder prosecutions where the deceased had to have died no later than one year after the homicidal attack. *See e.g. State v. Young,* 77 *N.J.* 245 (1978); *see also N.J.S.A.* 2C:11-2.1.

II. DEFINITION

Conduct is the cause of a result when (1) it is the antecedent but for which the result in question would not have occurred; and (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense. *N.J.S.A.* 2C:2-3a.

This provision lays out two requirements for establishing the requisite causal connection between a defendant's conduct and the resulting harm to the Cannel, Criminal Code Annotated, N.J.S.A. victim. 2C:2-3, comment 2 (Gann 2000). First, there is the "but for" requirement that is satisfied if the result in question would not have occurred without the defendant's conduct. State v. Jamerson, 153 N.J. 318, 335-36 (1998). Second, the "but for" requirement must be interpreted in the context of the mental culpability required by the Code for each offense. Id. at 336; see also State v. Martin, 119 N.J. 2, 11 (1990); State v. Lassiter, 197 N.J. Super. 2, 11 (App. Div. 1984); State v. Whitted, 232 N.J. Super. 384-388-90 (App. Div. 1989). Thus, "causation" is a term of art which means one thing when a crime is committed purposely or knowingly and something else for a crime of strict liability such as felony murder. State v. Martin, 119 N.J. at 11; see also N.J.S.A. 2C:2-3b and N.J.S.A. 2C:2-3e.

Where brain death resulted from defendant's action in striking the victim in the back of the head during a robbery, the brain death of the victim was held to be "death in fact" and the victim's family's subsequent action in switching off the victim's respirator did not constitute a supervening cause of death. *State v. Watson*, 191 *N.J.* Super. 464, 466 (App. Div.), *certif. denied*, 95 *N.J.* 230 (1983).

Where two defendants who acted separately in engaging their motor vehicles in a game of "cat and mouse" on a public highway and caused the death of the driver of a third vehicle, each could potentially be found to have caused the result. *State v. Brown*, 219 *N.J. Super.* 412, 418-19 (Law Div. 1987); *see also State v. Brown*, 118 *N.J.* 565, 607 (1990).

III. CULPABILITY

A. Purposeful or Knowing Conduct

When an offense requires that the defendant purposely or knowingly cause a particular result, the actual result must be within the design or contemplation of the actor, or, if not, it must involve the same kind of injury or harm as that designed or contemplated. *N.J.S.A.* 2C:2-3b. The actual result must not be too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of the offense. *Id.; see also State v. Thomas*, 224 *N.J. Super.* 221, 226-28 (App. Div. 1988).

A jury could find that a defendant purposely or knowingly caused the death of an intoxicated victim who had been attending a party in a three-story, wood-framed apartment building where the defendant deliberately set a fire on a stairway between the landings of the building, knowing that a number of people were drinking alcoholic beverages therein. *State v. Martin*, 119 *N.J.* 2, 9-15 (1990).

A defendant could be convicted of murder on the theory that the victim's death, which resulted from jumping from an eleventh story window after being severely and mercilessly beaten by defendant, was "purposefully" and "knowingly" caused by defendant's conduct. *State v. Lassiter*, 197 *N.J. Super.* 2, 13-14 (1984). The victim's behavior was held to have been provoked entirely by defendant's abuse and coercion and was unrelated to any suicidal purpose. *Id.* at 13.

A claim of accidental discharge of a gun is a viable defense to a charge of second-degree aggravated assault because it negates the requisite purposeful or knowing mental states for the crime. *State v. Moore*, 158 *N.J.* 292, 301-302 (1999). However, such a claim precludes and renders inconsistent a claim of non-deadly force self-defense, due to the fact of the gun discharge. *Id.* at 301.

In conspiracy cases, questions of causation arise that differ from other crimes which require proof of purposeful This is because culpability for vicarious behavior. conspirator liability does not require the specific mental state required for other forms of accomplice liability crimes. State v. Bridges, 133 N.J. 447, 466-67 (1993). Rather, a co-conspirator may be liable for the commission of substantive criminal acts that are not within the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy. Id. Thus, in Bridges, supra, three gun-toting conspirators, who went to a birthday party with the intent to commit a fourth degree aggravated assault, could be convicted of the subsequent murder which resulted from one of them firing a gun into the crowd, since just such an occurrence could have been anticipated. Id. at 469.

When the issue is whether substantive criminal acts were within the scope of a conspiracy, jury instructions will be difficult and fact sensitive. *Id.* at 468. Jurors must be given a three-fold instruction to consider: (1) whether the commission of the substantive crime was beyond the scope of the original conspiracy, and if so, (2) whether it was objectively foreseeable or was reasonably to be anticipated that the crime would be committed in view of the obvious risks surrounding the attempts to execute the conspiracy, and (3) whether the crime was committed in a manner too far removed or too remote from the objectives of the original conspiracy. *Id.*

B. Reckless or Criminally Negligent Conduct

When an offense requires that the defendant recklessly or criminally negligently cause a particular result, the actual result must be within the risk of which the actor is aware, or, in the case of criminal negligence, of which he should be aware. *N.J.S.A.* 2C:2-3c.

If the actual result is not within the risk of which the actor is or should be aware, it must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of the offense. *Id.*

In *Jamerson, supra*, defendant was convicted of reckless manslaughter based, in part, on operating an automobile while intoxicated. 153 *N.J.* at 324. At trial, defendant tried to show that he did not satisfy the reckless standard because the victim's vehicle ran a stop sign. *Id.* On appeal, defendant challenged as reversible error testimony presented by a forensic expert that defendant was driving recklessly at the time of the incident. *Id.* The Appellate Division held that the expert's testimony was harmless error. However, the New Jersey Supreme Court reversed, holding that the forensic expert was not qualified to give such testimony, and that the victim's intervening act of failing to stop at a stop sign, if proved, would have broken the requisite causal link. *Id.* at 336.

However, in an aggravated manslaughter case, where another defendant, who was driving while intoxicated, rear-ended the victim's vehicle and killed him, the Appellate Division held that the victim's failure to wear his seatbelt at the time was within the risk of which defendant should have been aware and, while it may have been a contributing cause, it did not absolve defendant of his responsibility. *State v. Radziwil*, 235 *N.J. Super.* 557, 570 (App. Div. 1989), *aff'd o.b.*, 121 *N.J.* 527 (1990).

In a death by auto case, where two co-defendants engaged their vehicles in a game of "cat and mouse", resulting in the death of a third driver, a jury had to find that the recklessness of either co-defendant must have proximately caused the death in order to hold them criminally responsible. *State v. Brown* 228 *N.J. Super.*

211, 224-25 (App. Div.), reversed on other grounds, 118 N.J. 595 (1988).

IV. TRANSFERRED INTENT

A defendant is not relieved of responsibility for causing a result if the only difference between what actually occurred and what was designed, contemplated or risked is that a different person or property was injured, or that a less serious or less extensive injury occurred. *N.J.S.A.* 2C:2-3d.

A defendant who shoots and kills one victim with the intent to cause that victim's death, and in the course of that conduct also kills another, unintended victim, can be found guilty of murdering the unintended victim. *State v. Worlock*, 117 *N.J.* 596, 615-17 (1990). "[T]ransferred intent" does not apply solely to situations in which only the unintended victim is harmed. *Id.* at 617.

The general principle that the intent of an act determines the legal character of its consequences, though they operate upon a different person than the one intended, applies to statutory as well as common-law crimes. *State v. Gallagher*, 83 *N.J.L.* 321 (1912).

A juvenile who intended to kick another student, but who instead kicked a teacher trying to break up the fight, was not guilty of aggravated assault against the teacher because he did not have the specific intent to assault a teacher engaged in the performance of his duties pursuant to *N.J.S.A.* 2C:12-1b(5)(d). *State in the Interest of S.B.*, 333 *N.J. Super.* 236 (App. Div. 2000). However, the juvenile could be adjudicated delinquent on a charge of simple assault, if committed by an adult, as a lesser included offense. The juvenile could not avoid criminal responsibility merely because his intended victim was the other juvenile rather than the teacher. *Id.*

V. STRICT LIABILITY CRIMES

When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element of causation is not established unless the actual result is a probable consequence of the actor's conduct. *N.J.S.A.* 2C:2-3e.

Historically, there have been only two strict liability crimes: felony murder and drug-induced deaths. However, in 1992, the Legislature added three others. *Id.* The first is the addition of a third category to

manslaughter concerning causing the death of another while fleeing or attempting to elude a law enforcement officer while operating a motor vehicle. *See N.J.S.A.* 2C:11-4a(3). The second and third are additional categories of aggravated assault. They involve the causing of serious bodily injury and bodily injury while operating a motor vehicle in the course of fleeing or attempting to elude a law enforcement officer. *See N.J.S.A.* 2C:12-1b(6); *N.J.S.A.* 2C:12-1b(7).

A. Felony Murder

Felony murder, *N.J.S.A.* 2C:11-3a, is a strict or absolute liability crime under *N.J.S.A.* 2C:2-3e; *see also, State v. Martin,* 119 *N.J.* at 11. The defendant is, therefore, only responsible for the results which are the "probable consequences" of his conduct. *Id.* at 26. A probable consequence is one which is not "too remote, accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the defendant's culpability." *Id.* at 33. *See also State v. McClain,* 263 *N.J. Super.* 488, 494 (App. Div.), *certif. denied,* 134 *N.J.* 477 (1993); *State v. Mujahid,* 252 *N.J. Super.* 100, 113 (App. Div. 1991), *certif. denied,* 127 *N.J.* 561 (1992).

In a felony murder case involving robbery, it was held that the trial court's failure supplement its reference to "probable consequence" in the jury charge with the "not too remote" language" was not plain error in a situation where such supplemental language was not requested. *State v. McClain*, 263 *N.J. Super.* at 494-96.

In felony murder cases involving multiple perpetrators, the focus should be on the relationship between the victim's death and the felony, not the individual roles of the various perpetrators. *State v. Martin,* 119 *N.J.* at 33. Hence, an otherwise culpable accomplice may be liable for the death of the victim even if he or she was merely a lookout for the driver of a getaway car. *Id.* The point is that a defendant should be exculpated only when a death occurs in a manner that is so unexpected or unusual that he or she could not justly be found culpable as a result. *Id.*

The majority of cases in this area involve allegations of improper jury instructions. A proper jury charge as to causation in felony-murder cases must include the two statutory elements of *N.J.S.A.* 2C:2-3e: (1) the "antecedent but for" element; and (2) a finding that the result was a "probable consequence of the actor's conduct." *State v. Smith,* 210 *N.J. Super.* 43, 55-56 (App. Div.), *certif. denied,* 105 *N.J.* 582 (1986) (failure to

charge both elements was plain error where fleeing robber, driving at a high rate of speed through a stop sign, struck another vehicle whose driver had a pre-existing heart condition); *State v. Whitted*, 232 *N.J. Super.* 384, 390 (App. Div. 1989) (failure to charge probable consequence element was plain error where expert testimony indicated that the stress and excitement of a burglary caused the heart diseased victim to expire during the course thereof).

In cases where the issue of causation is disputed, both the defendant and the state are entitled to a jury charge consistent with their respective versions of the facts. *State v. Martin*, 119 *N.J.* at 16-17.

In State v. Green, 318 N.J. Super. 361 (App. Div. 1999), aff'd., 163 N.J. 140 (2000), three police officers in a police car followed defendant as he drove his vehicle from a known crack house to a nearby parking lot and one of the officers approached defendant on foot at defendant's driver's side window. Id. at 367. Defendant threw his car into reverse and then moved it forward, hitting the police officer's leg and bruising it. Id. at 368. The officer then punched his hand through defendant's driver's side window in an attempt to turn off the ignition, and injured his hand in the process. Id. On appeal, defendant asserted that since the officer's injuries could have been caused by his own conduct, the trial court's failure to charge the jury on causation was plain error. Id. at 366. The Appellate Division agreed, holding that where, as in this case, a factual issue existed regarding causation, the trial court's failure to give a fact-specific causation charge was plain error. Id. at 373.

However, in a felony-murder case involving arson where the issue of causation was not in dispute (i.e. that there was no question that the deaths were caused by the deliberately set fire and defendant offered only a complete denial), a causation instruction was not required. *State v. Mujahid*, 252 *N.J. Super.* at 113.

B. Drug-Induced Death

N.J.S.A. 2C:35-9, the Code section which defines the strict liability offense for drug-induced deaths sets forth the causation requirement to be proven. That statute expressly states that the causation provisions of *N.J.S.A.* 2C:2-3 do not apply to this section. *N.J.S.A.* 2C:35-9b. The State must prove two elements under this section. First the State must prove that the defendant's act of manufacture, distribution or dispensing is an antecedent but for which the death would not have occurred. *N.J.S.A.* 2C:35-9b(1). In addition, the State must prove that either (a) the death was not so remote in its occurrence as not to have a just bearing on the defendant's liability, *N.J.S.A.* 2C:35-9b(2)(a), or (b) the death was so dependent on the conduct of another person unrelated to the injection, inhalation, or ingestion of the substance or its effect as not to have a just bearing on the defendant's liability. *N.J.S.A.* 2C:35-9b(2)(b).

This statute was held to be constitutional in all respects. *See State v. Maldonado*, 137 *N.J.* 536 (1994); *State v. Ervin*, 242 *N.J. Super.* 584 (App. Div.), *certif. denied*, 122 *N.J.* 400 (1990).

While the Legislature retained the "not too remote" defense, the defense differs from that of felony-murder in that the victim's volitional actions in using the drugs may not be considered. *State v. Maldonado*, 137 *N.J.* at 572. However, in cases where the victim's action in taking the drugs are not voluntary or volitional, a remoteness defense may lie. *Id.* at 572, n.5.

In a juvenile case where the defendant purchased, prepared and distributed PCP to the victim and then left her lying in a stupor on railroad tracks where she was later killed by a train, it was held that sufficient evidence existed for finding probable cause that the juvenile caused the victim's death. *State in the Interest of A.J.*, 232 *N.J. Super.* 274, 282-90 (App. Div. 1989).

COMPLICITY (See also, ACCOMPLICE LIABILITY, CONSPIRACY, this Digest)

Complicity under N.J.S.A. 2C:2-6 imposes liability upon one person for the conduct of another person under circumstances where one is accountable for the other's conduct. State v. Ishaque, 312 N.J. Super. 207, 211 (App. Div. 1997). Unlike conspiracy which is defined as an independent crime under N.J.S.A. 2C:5-2, there exists no independent crime of complicity under the code. To the contrary, N.J.S.A. 2C:2-6 expresses a general principle of criminal liability. An individual indicted under N.J.S.A. 2C:2-6, in conjunction with the substantive offense, is provided appropriate notice of the factual theory underlying the charges. An individual adjudicated guilty under such a charge is guilty of the substantive offense, and liable for punishment as if he were the principle perpetrator. State v. Bram, 246 N.J. Super. 200, 207 (Law Div. 1990).

Although N.J.S.A. 2C:2-6 sets forth "the different modes of complicity in an offense * * * [i]t does not * * * contemplate that such distinctions should have a procedural significance." Accordingly, the alternative theories of criminal-conduct responsibility do not constitute elements of a crime. Ordinarily, indictments need not specify a theory of criminal-conduct responsibility. Although murder indictments must specify whether the murder is alleged to have been committed by the defendant's own conduct, R. 3:7-3(b), the purpose of that requirement is only to indicate whether the alleged crime is one punishable by death. Accordingly, the accepted view is that to return a criminal conviction, a jury need not be unanimous on the theory of criminal-conduct responsibility if the alternative theories apply to commission of the same criminal act and each of them supports conviction of the same offense. State v. Brown, 138 N.J. 481, 520 (1994).

In a capital murder prosecution, the jury's verdict that defendant was guilty of the purposeful and knowing murder required the jury to have determined that defendant was responsible for the murder beyond a reasonable doubt, either by his own conduct, as an accomplice, or as a co-conspirator, but did not require unanimity on the specific theory of liability. Thus, the possibility of a non-unanimous verdict on the ownconduct requirement remained a possibility after the jury decided defendant's guilt on the murder charges. *State v. Brown*, 138 *N.J.* 481, 522 (1994). A defendant adjudicated or convicted under a charge of *complicity* in the commission of a chapter 35 offense is subject to the mandatory penalties authorized by the Comprehensive Drug Reform Act. *State v. Bram*, 246 *N.J. Super*. 200, 207 (Law Div. 1990). But, the imposition of mandatory penalties under the Comprehensive Drug Reform Act of 1986 cannot be based on a conviction or delinquency adjudication for a *conspiracy* to commit drug offenses. *State in the Interest of W.M.*, 273 *N.J. Super*. 111, 116-17 (App. Div. 1989).

CONSPIRACY (See also, ACCOMPLICE, COMPLICITY, EVIDENCE, this Digest)

I. DEFINITION

N.J.S.A. 2C:2-6b(4) provides that "[a] person is legally accountable for the conduct of another person when ... [h]e is engaged in a conspiracy with such other person." Under this statute, a conspirator is responsible for all criminal acts committed in furtherance of the conspiracy. *State v. Bridges,* 133 *N.J.* 447, 454 (1993).

Under *N.J.S.A.* 2C:5-2a, conspiracy is defined as acting with another person or persons with the purpose of promoting or facilitating the commission of a crime by (1) agreeing with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agreeing to aid such person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

In general, the aim in criminalizing conspiracies is to prosecute the agreement itself, thus punishing jointly planned criminal activity quite apart from any underlying offense involved in the conspiracy. State v. Hardison, 99 N.J. 379, 383 (1985); see State v. Stefanelli, 78 N.J. 418, 428-429 (1979); State v. Kamienski, 254 N.J. Super. 75 (App. Div. 1992), certif. denied, 130 N.J. 18 (1992). The gist of a conspiracy is the "actual agreement for the commission of the substantive crime ... [and] one may be liable as [an accomplice] even though no conspiracy existed between him and the immediate perpetrator of the substantive crime." State v. Madden, 61 N.J. 377, 394 (1972); see State v. La Fera, 35 N.J. 75, 86 (1961). "The agreement is an advancement of the intention which each has conceived in his mind; the mind proceeds from a secret intention to the overt act of mutual consultation and agreement." State v. Carbone, 10 N.J. 329, 337 (1952). To establish an agreement, the State must prove there was a meeting of the minds of the parties "in an understanding way with the single design to accomplish a common purpose...." Martin v. United States, 100 F.2d 490, 495 (10th Cir. 1938), cert. denied, 306 U.S. 649, 59 S.Ct. 590, 83 L.Ed. 1047 (1939).

The agreement need not be formal or express. *State v. Kamienski, supra.* An implicit or tacit agreement may be inferred from the facts and circumstances. *State v. Dennis,* 43 *N.J.* 418, 423 (1964); *State v. Yormark,* 117

N.J. Super. 315, 330 (App. Div.1971), *certif. denied*, 60 *N.J.* 138 (1972).

Frequently, it is the most difficult task for a jury to determine whether an illicit agreement has been made and whether one acted in furtherance of the conspiracy. This is so, primarily, because "silence, furtiveness and secrecy shroud the conduct and speech of coconspirators." *State v. Phelps*, 96 *N.J.* 500, 509 (1984). Therefore, a jury verdict that there was no conspiracy to rob or to murder quite conceivably resulted from a belief that the State failed to establish an illicit agreement. *See State v. Hardison, supra*, 99 *N.J.* at 383.

"[T]he gravamen of the crime of conspiracy is the criminal agreement." *State v. Ball*, 141 *N.J.* 142, 178 (1995). A conspiracy conviction does not turn on 'doing the act, nor effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement....'" *Id.*, citing *State v. Carbone*, 10 *N.J.* 329, 337 (1952).

A conspiracy is distinct from the substantive offense committed pursuant to the conspiracy. Both the conspiracy and object offense may be charged in an indictment. *State v. Cormier*, 46 *N.J.* 494, 501 (1966); *State v. Coruzzi*, 189 *N.J. Super.* 273 (App. Div. 1983), *certif. denied*, 94 *N.J.* 531 (1983). Note, however, that a defendant may not be convicted of both the conspiracy to commit only one substantive offense and that substantive offense. *N.J.S.A.* 2C:1-8a(2). *See also State v. Hardison*, 99 *N.J.* 379 (1985) (if a conspiracy has multiple objectives, the conspiracy conviction should not merge with a conviction for one of the completed object offenses.)

The offense of conspiracy is complete upon agreement to commit the offense; it is irrelevant whether or not the substantive offense is completed. *N.J.S.A.* 2C:5-2a; *State v. LaFera*, 35 *N.J.* 75, 86 (1961).

II. SCOPE OF THE CONSPIRACY

A. Generally

A conspirator is liable for all acts in furtherance of the conspiracy. *State v. Louf*, 64 *N.J.* 172, 176 (1973).

If a conspirator knows that a person with whom he has conspired to commit a crime has conspired with

another person(s) to commit the same crime, he is guilty of conspiracy with such other persons, whether or not he knows their identity. *N.J.S.A.* 2C:5-2b; *State v. New Jersey Trade Waste Ass'n*, 96 *N.J.* 828 (1984); *State v. Carbone*, 10 *N.J.* 329, 338 (1954).

Conspirators do not have to know each other, they need not have personal knowledge of the outcome of the plan, and they do not have to join in the common purpose at the same time. *State v. Ball*, 141 *N.J.* at 178-79. The agreement does not have to be formal or express and may be inferred from the facts and circumstances. *State v. Kamienski*, 254 *N.J. Super.* at 94; *see also, State v. General Restoration Co.*, 42 *N.J.* 366, 375-76 (1964).

Thus, as under pre-Code law, "[i]t may be that the alleged conspirators have never seen each other, and have never corresponded. One may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement." *State v. Roldan*, 314 *N.J. Super.* 173, 180 (App. Div. 1998), quoting *State v. Carbone*, 10 *N.J.* at 338.

B. Unilateral Conspiracy

N.J.S.A. 2C:5-3a provides in pertinent part that "it is immaterial to the liability of a person who conspires with another to commit a crime that (1) ... the person with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if [the alleged conspirator] believes that [the purported co- conspirator] does; or (2)[t]he person with whom he conspires ... has an immunity to prosecution or conviction for the commission of the crime." This definition "departs from the traditional notion of conspiracy as an entirely bilateral or multilateral relationship.... Attention is directed instead to each individual's culpability by framing the definition in terms of the conduct that suffices to establish the liability of any given actor, rather than the conduct of a group of which he is charged to be a part-an approach that the Drafters of the [Model Penal] Code designate as 'unilateral.'" State v. Roldan, 314 N.J. Super. at 180, quoting State v. Del Fino, 100 N.J. 154, 160 (1985). Under this unilateral approach to conspiratorial liability, a person may be guilty of conspiracy even though the other party to the criminal agreement is an undercover police officer or police informant who has no intention of actually committing a crime. See State v. Urcinoli, 321 N.J. Super. 519, 538 (App. Div.), certif. denied, 162 N.J. 132 (1999); State v.

Conway, 193 N.J. Super. 133, 159 (App. Div. 1984), certif. denied, 97 N.J. 650 (1984).

C. Chain Conspiracy

In a "chain" conspiracy, "there is successive communication and cooperation between A and B, B and C, C and D, and so on." New Jersey Penal Code, Volume II: Commentary, Final Report of the New Jersey Criminal Law Revision Commission, comment 13 on > N.J.S.A. 2C:5-2 (1971). "Under the chain analysis, the government need not prove a direct connection between all the conspirators." United States v. Tarantino, 846 F.2d 1384, 1392 (D.C. Cir. 1988), cert. denied, 488 U.S. 867, 109 S.Ct. 174, 102 L.Ed.2d 143 (1988). "[T]he liability of members of the distribution chain is predicated upon the notion that participants at different levels in the chain know that the success of those at each level hinges upon the success of the others and therefore cooperate for their mutual benefit." United States v. Townsend, 924 F.2d 1385, 1391 (7th Cir.1991); see also State v. Roldan, 314 N.J. Super. at 181; see generally, Wayne R. LaFave and Austin W. Scott, Jr., 2 Substantive Criminal Law, S 6.5d(2) (1986).

Such a drug distribution conspiracy falls outside of the general rule that a simple agreement to buy drugs is insufficient to establish a conspiracy between the seller and the buyer. State v. Roldan, 314 N.J. Super. at 182. The essential rationale of the general rule, commonly referred to as Wharton's rule, is that where an agreement between two parties is inevitably incident to the commission of a crime, such as a sale of contraband, "conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained." Id. quoting Iannelli v. United States, 420 U.S. 770, 773, 95 S.Ct. 1284, 1288, 43 L.Ed.2d 616, 620 (1975). However, when the evidence shows that two or more parties have entered into an agreement to engage in concerted criminal activity which goes beyond the kind of simple agreement inevitably incident to the sale of contraband and consequently "makes possible the attainment of ends more complex than those which one criminal could accomplish," Iannelli v. United States, 420 U.S. at 778, 95 S.Ct. at 1290, 43 L.Ed.2d at 623, the participants may be found guilty of conspiracy. State v. Roldan, 314 N.J. Super. at 183.

Classic examples of Wharton's rule offenses are: dueling, bigamy, adultery, pandering, gambling, buying and selling contraband goods, giving and receiving bribes. *State v. Roldan*, 314 *N.J. Super.* at 182 n.2; LaFave and Scott, *supra*, 2 Substantive Criminal Law S 6.5(g)(4).

D. "Totality of Circumstances" Test

In *New Jersey Trade Waste Ass'n*, 96 *N.J.* at 24, 25, the Court adopted a "totality of the circumstances" test. Under that test, each case is decided on a case-by-case basis after examining all of the circumstances. Some of the relevant factors are the degree of interdependance needed for the overall plan to succeed, the extent to which the conspiracies share a common objective, the time period during which the acts took place, the location in which the acts took place, similarity in methods of operation and number of acts in common. *Id.*

E. "Wishful Thinking"

The mere knowledge, acquiescence, or approval of the substantive offense, without an agreement to cooperate, is not enough to establish one as a participant in a conspiracy. There must be intentional participation in the activity with a goal of furthering the common purpose; mere association is inadequate. Thus, wishful thinking does not rise to the level of a conspiracy. Where defendant's girlfriend "wished" her husband were dead, such evidence presented could not support a legitimate belief that "with the purpose of promoting or facilitating its commission," N.J.S.A. 2C:5-2a, the girlfriend agreed with defendant that defendant should shoot her husband or agreed to aid defendant in planning or committing the crime. Whatever wishes she may have harbored concerning her husband's death and whatever discussions she may have had with defendant on that subject, they never rose to the level of an agreement between them. State v. Abrams, 256 N.J. Super. 390, 399 (App. Div. 1992).

III. CONSPIRACIES WITH MULTIPLE OBJEC-TIVES

N.J.S.A. 2C:5-2c ("Conspiracy with multiple objective") provides in pertinent part, "If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship." "Whether the evidence in a particular case establishes single or multiple conspiracies is generally a question of fact to be resolved by the jury." *State v. Ball*, 268 *N.J. Super.* 72, 109 (App. Div. 1993), *aff'd*, 141 *N.J.* 142 (1995).

"A 'single crime of conspiracy may include several unlawful objects of that conspiracy,' as long as the acts relate to a single transaction or common plan." *State v. New Jersey Trade Waste Association*, 96 *N.J.* 8, 21 (1984), citing *State v. Witte*, 13 *N.J.* 598, 605 (1953); *see also State v. Coruzzi*, 189 *N.J. Super.* 273, 299 (App. Div. 1983), *certif. denied*, 94 *N.J.* 531 (1983).

IV. OVERT ACTS

When the State prosecutes a defendant for conspiracy to commit a first or second degree crime, it need not prove that a defendant committed an overt act in pursuance of the conspiracy. *N.J.S.A.* 2C:5-2d. Thus, when the defendant is convicted of conspiracy to commit first and second degree crimes, the sufficiency of the evidence as to the commission of an overt act is not at issue. *Id.* The only question is whether a reasonable jury, viewing the State's evidence in its most favorable light, could find beyond a reasonable doubt that defendants, acting with a purposeful state of mind, agreed to commit, attempted to commit, or aided in the commission of an aggravated sexual assault. *State v. Scherzer*, 301 *N.J. Super.* 363, 401 (App. Div. 1997), *certif. denied*, 151 *N.J.* 466 (1997).

When a defendant is charged with conspiracy to commit third and fourth degree offenses, the Criminal Code additionally requires that the State prove that defendant or a person with whom he conspired committed an overt act in pursuance of such conspiracy. *N.J.S.A.* 2C:5-2d; *State v. LeFurge*, 101 *N.J.* 404, 412-13 (1986); *State v. Newell*, 152 *N.J. Super.* 460, 466 (App. Div. 1977). The wording of the conspiracy statute requires only one overt act need be proven. *N.J.S.A.* 2C:5-2d; *cf. United States v. Blackwell*, 954 *F.Supp.* 944, 958 (D.N.J. 1997) (under federal law the government is under no obligation to prove every overt act alleged in the indictment).

V. FORESEEABILITY

There is no requirement of subjective foreseeability of criminal consequences as a basis for vicarious coconspirator liability based on an objective standard of reasonable foreseeability. The objective foreseeability requirement for imposition of vicarious liability on a coconspirator does not eliminate all requirements of culpability; the objective foreseeability rule attempts to limit the scope of such foreseeability to consequences that were closely connected with the original conspiracy. A coconspirator may be liable for the commission of substantive criminal acts that are not within the scope of a conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy. *State v. Bridges*, 133 *N.J.* 447 (1993).

A conspirator can be held liable for the acts of others that constitute a reasonably foreseeable risk arising out of criminal conduct undertaken to effectuate conspiracy, and occurring as the necessary or natural consequences of conspiracy; the substantive crime must be reasonably and closely connected to conspiracy, even though those crimes may not have been within the actual contemplation of conspirators or within the scope of the conspiracy as originally planned. Thus, in Bridges, supra, the evidence would fairly permit a jury to determine beyond a reasonable doubt that the defendant was guilty of the substantive crime of murder based on his participation in the conspiracy to commit aggravated assault, possess firearms for an unlawful purpose and Although the possess firearms without a permit. conspiracy did not have murder as an objective conspiratorial plan, under the circumstances presented it could be anticipated that a weapon might be fired at the crowd and that hostilities might escalate in course of carrying out the conspiracy.

VI. RENUNCIATION OF PURPOSE

Renunciation of the conspiracy is an affirmative defense which defendant must prove by a preponderance of the evidence. To establish renunciation, defendant must prove that after entering a conspiracy, he informed the authorities of the conspiracy and his participation, thwarted or caused to be thwarted the commission of any offense in furtherance of the conspiracy, and the circumstance manifest complete and voluntary renunciation of defendant's criminal purpose.

Defense of renunciation, pursuant to *N.J.S.A.* 2C:5-2e, presupposes an acknowledgment by the actor that he actually conspired to commit a crime. *State v. Hughes*, 215 *N.J. Super.* 295, 298 (App. Div. 1986). Renunciation posits prior participation and a defendant cannot renounce a conspiracy he had not joined. *Id.*

Once the prosecution demonstrates the defendant's involvement in a conspiracy, the defendant's continued involvement is presumed until the defendant proves termination or withdrawal. A defendant withdraws from a conspiracy only when he or she acts inconsistent with the object of the conspiracy and communicates his or her withdrawal in a manner reasonably calculated to reach his or her co-conspirators. *State v. Taccetta*, 301 *N.J. Super*.

227, 253 (App. Div. 1997), certif. denied, 152 N.J. 187, 188 (1997).

VII. TRIAL ISSUES

A. Joinder

Charged conspiracy and overt acts of knowing and unlawful storage and transportation of hazardous wastes and reckless storage and transportation of such wastes did not involve the same conduct and the same episode as offenses forming the basis of an earlier indictment, and circumstances did not warrant finding that fairness and fulfillment of defendants' reasonable expectations required joinder of offenses. *State v. Colbert*, 245 *N.J. Super*. 53, 57-60 (App. Div. 1990).

B. Variance

When a defendant claims variance between the object(s) of the conspiracy charged in the indictment and the object(s) of the conspiracy proven at trial, "the inquiry is whether the variance between the proof adduced at trial substantially affected the rights of defendant by hindering the preparation of his defense or by subjecting him to another prosecution for the same offense." *State v. Burgess*, 97 *N.J. Super.* 428, 433 (App. Div. 1967). A variance claim raised for the first time after conviction is subject to plain error review. *Id.*

C. Jury Instructions

Defendant's conviction of possession of cocaine could not be sustained on appeal on basis of vicarious liability under theory of conspiracy, where jury was not charged that it could find defendant guilty of possession counts on basis of vicarious liability as accomplice or as conspirator, but was only charged on conspiracy as substantive crime. *State v. Schmidt*, 110 *N.J.* 258 (1988).

D. Sufficiency of Evidence

In *State v. Fornino*, 223 *N.J. Super.* 531 (App. Div. 1988), *certif. denied*, 111 *N.J.* 570 (1988), defendant challenged the sufficiency of the evidence supporting his convictions for conspiracy to commit escape and murder, attempted murder, and attempted escape. Defendant was an outside agent involved in the escape plans of a Rahway inmate that never came to fruition. The court held that the evidence presented was sufficient to support a conspiracy charge. Although it presented a more difficult question, the evidence also supported defendant's conviction for attempted murder and

attempted escape, the court considering in part defendant's acceptance of payment for his part in the plan.

E. Lesser Included Offenses

Under *N.J.S.A.* 2C:1-8d(2), an offense includes the lesser offense if "[i]t consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein[.]"

Conspiracy to commit armed robbery is a lesser included offense of armed robbery, but a general conspiracy to commit armed robbery is not a lesser included offense of a charged armed robbery of a victim specifically named in the indictment. *State v. Neal*, 229 *N.J. Super.* 28, 34-35 (App. Div. 1988).

F. Juveniles

Where defendant was charged as an adult for a conspiracy which continued for three and one-half years beyond his eighteenth birthday, during which time defendant's participation was substantial, defendant was responsible for his own acts and those of his co-conspirators once he joined the conspiracy. That defendant participated as a conspirator before his eighteenth birthday does not immunize his conduct as an adult. Age in these circumstances does not constitute an element of the offense, nor does it pose a jurisdictional bar. *State v. Salentre*, 275 *N.J. Super.* 410, 423-24 (App. Div. 1994), *certif. denied*, 138 *N.J.* 269 (1994).

G. Coconspirator Exception To Hearsay Rule (*See also,* **EVIDENCE**, this Digest)

VIII. RACKETEERING

In order to be convicted of "conspiracy" to violate state Racketeer Influenced and Corrupt Organizations (RICO) Act, *N.J.S.A.* 2C:41-2d, defendant need not agree to commit personally at least two acts of racketeering but, rather, defendant's agreement that others will commit predicate acts is sufficient. *State v. Ball,* 141 *N.J.* 142 (1995).

Conspiracy can provide a basis, or "predicate act," for racketeering, under *N.J.S.A.* 2C:41-1a. *State v. Bisaccia*, 319 *N.J. Super*. 1, 20 (App. Div. 1999); *see also*, *N.J.S.A.* 2C:5-2g; *State v. Ball*, 141 *N.J.* at 174.

A. Grading

N.J.S.A. 2C:5-4a provides, in pertinent part, "conspiracy is a crime of the same degree as the most serious crime which is the object of the conspiracy." Thus, to determine gradation the court must consider the object of the conspiracy only, without reference to any substantive offenses that may or may not be charged in other counts of the indictment. Although an acquittal on the substantive offense suggests that the contemplated crime was not committed, "[t]his would not alone prevent a conviction of conspiracy since the conspiracy may well have been an inchoate part of the crime and, ordinarily, could stand independently...." *State v. Malone,* 269 *N.J. Super.* 414, 418 (Law Div. 1993).

Conspiracy is generally a crime of the same degree as the most serious crime which is the object of the conspiracy. An exception to this general rule exists for a conspiracy to commit a crime of the first degree, in which case conspiracy is a second-degree crime. *N.J.S.A.* 2C:5-4a; *State in the Interest of W.M.*, 273 *N.J. Super.* 111, 115 (App. Div. 1989).

The commission of a crime can occur without completion of the substantive offense contemplated by the conspiracy, and if the substantive offense is a crime of the first degree, the conspiracy offense is graded as a second-degree crime. *N.J.S.A.* 2C:5-4; *State v. Brown*, 138 *N.J.* 481, 529 (1994).

B. Merger

In State v. Hardison, 99 N.J. 379, 380 (1985), the Supreme Court held that "if the conspiracy proven has criminal objectives other than the criminal offense proven, the offenses will not merge." Attempt and conspiracy are inchoate aspects of contemplated and consummated crime, which gives rise to problems of merger where both attempt or conspiracy and consummated crime are both in indictment and in evidence. Conspiracy encompasses a variety of substantive crimes charged, not just one, and, thus, conspiracy merges with all of substantive crimes which resulted in the conviction; the fact that conspiracy embraced more objects than any single other count was irrelevant. An acquittal on one of components of official misconduct, *i.e.*, tampering with public records, did not justify separate sentencing on conspiracy or prevent merger concept from applying, because it would have been anomalous to subject defendant to greater exposure when acquitted than would have resulted if he were convicted. *State v. Malone*, 269 *N.J. Super*. 414 (Law Div. 1993).

In the context of merger, generally if in the execution of a conspiracy the substantive crime committed falls short of the crime planned, the conspiracy survives merger because the substantive crime committed will be of a lower degree and therefore of "a lesser kind of culpability" than the conspiracy. *State v. Connell*, 208 *N.J. Super.* 688, 695 (App. Div. 1986).

Conspiracy for which defendant was convicted did not have criminal objective beyond thefts charged in separate count, and thus should have been merged into theft counts, even though conspiracy count charged conspiracy to commit forgery and falsify records as well as conspiracy to commit theft; alleged forgery and falsification of records conspiracies were not part of independent scheme, but rather integral part of theft. *State v. Jurcsek*, 247 *N.J. Super*. 102, 109-10 (App. Div. 1991), *certif. denied*, 126 *N.J.* 333 (1991).

C. Consecutive Sentences

Because the offense of bringing stolen property in New Jersey was one of the overt acts committed in furtherance of conspiracy for which defendant was sentenced to a maximum extended term, and because neither crime involved any element of violence or threat of violence, defendant should not have received a consecutive term for the offense of bringing stolen property into the State. *State v. Streater*, 233 *N.J. Super*, 537, 545-46 (App. Div. 1989), *certif. denied*, 117 *N.J.* 667 (1989).

CONTEMPT

Generally, contempt can be classified as either criminal contempt, which includes indictable and punitive contempt, or civil (coercive) contempt. Both indictable contempt and punitive contempt seek to punish the contemnor for his or her act, whereas coercive contempt seeks to compel compliance with an injunction, judgment or order.

The Penal Code, while abolishing common law crimes, preserves the judicial power to punish for contempt. *N.J.S.A.* 2C:1-5c. The power is further defined by statute, *N.J.S.A.* 2A:10-1 to -8, and in the court rules, *R.* 1:10-1 *et seq.* With the advent of the Prevention of Domestic Violence Act of 1991, *N.J.S.A.* 2C:25-17 to 33, the crime of contempt has expanded with the prosecution of domestic violence incidents. A person may be found guilty of a fourth degree crime of contempt if he or she knowingly or purposefully disobeys a court order entered under the Act and the conduct which constitutes the violation is a crime or a disorderly persons offense. *N.J.S.A.* 2C:29-9b.

A charge of indictable contempt has also been extended to persons violating the Drug Offender Restraining Order Act of 1999, *N.J.S.A.* 2C:35-5.4 to 5.8, which essentially prohibits individuals charged with drug distribution or gun-related offenses from returning to the place where the offense occurred.

When a court seeks to summarily punish contemptuous conduct it may employ the punitive power of contempt. The punitive power of contempt may take two forms, contempt in *facie curaie*, codified in R. 1:10-1, and contempt outside the presence of the court, codified in R. 1:10-2. Punitive contempt in *facie curaie*, also referred to as direct contempt, is a tool that allows a judge to act summarily without notice to preserve the dignity of the court and efficacy in the administration of justice.

Punitive contempt outside the presence of the court, or indirect contempt, also may be adjudicated by way of a summary proceeding. However, unlike direct contempt, it provides the contemnor with procedural protections such as notice, a hearing and adjudication by a different judge.

The court rules do not use the term "civil contempt," but view the process as one of relief to litigants. The coercive power of contempt, codified in R. 1:10-3, allows

litigants, usually in a civil action, a remedy to compel compliance with an injunction, judgment, or order of the court or administrative body. The contemnor in a coercive contempt case can usually purge himself or herself by complying with the terms of the injunction, judgment or order.

I. INDICTABLE CONTEMPT

A. Rules Governing Indictable Contempt.

See generally, N.J.S.A. 2C:29-9 - fourth degree indictable contempt

1. A charge of contempt under *N.J.S.A.* 2C:29-9 is an indictable offense. In a prosecution for contempt, defendants are entitled to the full panoply of due process protections. *In re Buehrer*, 50 *N.J.* 501, 513 (1967).

2. Fourth degree contempt is a separate and distinct crime from the underlying offense, and a conviction may lie for contempt regardless of the final disposition of the underlying offense. *State v. Roberts*, 212 *N.J. Super.* 476 (App. Div. 1986).

3. When the charge of contempt and the underlying offense arise from the same criminal event, upon motion by defendant the trial should be severed if evidence of an order, a necessary element to prove the contempt charge, is prejudicial to the trial of the underlying offense. *State v. Chenique-Puey*, 145 *N.J.* 334, 343 (1996).

B. Current Examples of Indictable Contempt

1. In a criminal contempt proceeding, evidence that the order in effect at the time of the offense but which was subsequently vacated *ex post facto* was not a defense in defendant's contempt hearing. *State v. Sanders*, 327 *N.J. Super.* 385 (App. Div. 2000).

2. Court orders must be obeyed unless and until they are changed or rescinded, and parties may not gamble on a temporary order's final outcome to justify committing an interim violation of its restraints. *State v. Washington*, 319 *N.J. Super.* 681 (Law Div. 1998).

3. Because the order remains in effect until a court sets it aside, if reconciliation occurs the proper course is to apply to the court to vacate the order. *Mohamed v. Mohamed*, 232 *N.J. Super.* 474 (App. Div. 1989).

4. A woman was found not in contempt of an order that prohibited harassment as defined by *N.J.S.A.* 2C:33-4a by the mere yelling of offensive words to her

former husband. *State v. L.C.*, 283 *N.J. Super.* 441 (App. Div. 1995), *certif. denied*, 143 *N.J.* 325 (1996).

5. Two mailings of torn-up support orders did not constitute harassment under *N.J.S.A.* 2C:33-4a. However, it did constitute contempt under *N.J.S.A.* 2C:29-9b, because the conduct violated the final domestic violence restraining order prohibiting contact by defendant. *State v. Hoffman*, 149 *N.J.* 564 (1997).

6. Even if defendant's conduct in returning the children to the front door, in returning a car seat to his wife, and in requesting the lawn mower in an effort to comply with the *pendente lite* order did violate the final restraining order, it was nevertheless *de minimus* and so trivial as to be non-actionable. *State v. Krupinski*, 321 *N.J. Super.* 34, 38 (App. Div. 1999).

C. Drug Offender Restraining Order Act of 1999 (*N.J.S.A.* 2C:35-5.4 to 5.8)

This Act mandates the issuance of court orders prohibiting, notwithstanding certain exceptions, persons charged with drug distribution or gun-related offenses from returning to the place where the criminal offense occurred. Persons who violate the conditions of the order shall be subject to civil contempt; criminal contempt; revocation of bail, probation or parole; or any combination of these sanctions.

II. PUNITIVE CONTEMPT

A. Contempt in *Facie Curiae*

1. Definition

Contempt in the face of the court is defined as misconduct in open court, in the presence of a judge, which disturbs the court's business and where immediate punishment is essential to prevent demoralization of the court's authority before the public. *In re Daniels*, 118 *N.J.* 51, 62, *cert. denied*, 498 *U.S.* 951 (1990); *In re Oliver*, 333 *U.S.* 257, 275 (1948); *Cooke v. United States*, 267 *U.S.* 517, 536 (1925).

2. Rules Governing Contempt in Facie Curiae

The order of contempt shall recite the facts and contain a certification by the judge that he or she saw or heard the conduct constituting the contempt and that the contemnor was willfully contumacious. R. 1:10-1.

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

a. A judge may act summarily, without notice or order to show cause, when a person's conduct in the actual presence of the court has the capacity to undermine the court's authority and to interfere or obstruct the orderly administration of justice. *In re Daniels*, 118 *N.J.* at 61.

b. This extraordinary power should be exercised sparingly and only in the rarest of circumstances. *Id.*

c. An adjudication of contempt absent a recitation of facts and certification is procedurally defective. *State v. Quintana*, 270 *N.J. Super.* 676, 682 (App. Div. 1994).

4. Rationale for Summary Proceedings

Summary proceedings, in the case of contempt in *facie curiae*, are justified when conduct in the actual presence of the court has the capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice. *In re Daniels*, 118 *N.J.* at 61. Summary contempt, punishment imposed without the familiar procedures that ordinarily attend the criminal law, is an extraordinary power to be exercised sparingly and only in the rarest of circumstances. Necessity not only justifies the summary contempt power, but also limits that power by defining both settings for its exercise and procedural safeguards. *Id.* at 60-62.

5. Scope of Appellate Review

Every summary conviction by a court for contempt shall be reviewable on the law and facts. The appellate court shall render such judgment and order for enforcement thereof as it deems just under the circumstances. *R.* 2:10-4; *see In re Duane, Morris & Hecksher*, 315 *N.J. Super.* 304, 311 (App. Div. 1998) (holding in a contempt case that the court must review the record and make a *de novo* determination).

6. Mens Rea

Defendant's infraction must be "knowing and willful" and "the minimum standard is one of a voluntary action known by the actor to be wrongful or one that he reasonably should have been aware was wrongful. *Matter of Daniels*, 118 *N.J.* at 69, citing *In re Dellinger*, 461 *F.*2d 389, 400 (7th Cir. 1972).

7. Examples of Contempt in Facie Curiae

The conduct may run the gamut from the obvious frontal assault on the system, Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888) (lawyer who assaulted marshal); to the demeaning of the system, In re Yengo, 84 N.J. at 127 (An attorney's absence from court in the middle of trial, coupled with an inadequate excuse, constitutes contempt in the presence of the court); the deception of the system, Kerr Steamship Co. v. Westoff, 204 N.J. Super. 300 (Law Div. 1985), aff'd as modified, 215 N.J. Super. 301 (App. Div. 1987) (witness who lied blatantly before the court); the flouting of the system, In re Carton, 48 N.J. 9 (1966) (lawyer who disobeyed a lawful court order); and degrading the system by insult to the court, In re Daniels, 118 N.J. at 67 (Attorney's mocking gestures, including laughing, rolling his head, and throwing himself into the back of his seat in response to the court's rulings constituted contempt in facie curiae); In re DeMarco, 224 N.J. Super. 105, 121-22 (App. Div. 1988) (Contempt was warranted by an attorney's pattern of abusive behavior directed at the trial judge that exceeded the bounds of colloguy and constituted rude, uncalled-for attacks upon the objectivity and integrity of the judge, thus disrupting trial proceedings).

Defendant's nonappearance for sentencing on criminal charges does not warrant an adjudication of contempt in *facie curiae* when he or she was not afforded an opportunity to explain the absence. *State v. Quintana*, 270 *N.J. Super.* at 683.

8. Maximum Penalties

Punitive contempt is punishable by not more than six months in jail or a fine of \$1,000 or both. *In re Yengo*, 84 *N.J.* at 121 (citing *In re Buehrer* 50 *N.J.* at 516).

B. Contempt Outside the Presence of the Court

1. Definition

An act committed not in the presence of the court, but at some distance therefrom. *In re Yengo*, 84 *N.J.* at 123 (citing *In re Bozorth*, 38 *N.J. Super.* 184, 188-89 (Ch. Div. 1955).

2. Rules Governing Contempt Outside the Presence of the Court

A proceeding to punish for contempt other than proceedings under R. 1:10-1 shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The contemnor shall be released on his or her own recognizance pending the hearing unless the judge determines that bail is reasonably necessary to assure appearance, and the matter shall not be heard by the judge who instituted the prosecution if the appearance of objectivity requires trial by another judge. *R.* 1:10-2

When the contempt is not in open court the contemnor shall be advised of the charges against him or her, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his or her behalf. *Matter of Daniels*, 219 *N.J. Super.* 550, 580 (App. Div. 1987), *aff'd* 118 *N.J.* 51 *cert. denied*, 498 *U.S.* 951 (1990).

When the result of a contemptuous act committed outside the presence of the court reflects upon the integrity of a judge, such judge should disqualify himself or herself from hearing the contempt proceeding. *Matter of Daniels*, 118 *N.J.* at 68; *Van Sweringen v. Van Sweringen*, 22 *N.J.* 440, 447 (1956).

3. Examples of Contempt Outside the Presence of the Court

An attorney's attempt to introduce a defense witness in the middle of a murder trial, when she had failed to supply a witness list to the court or State, did not warrant a contempt proceeding under *R.* 1:10-1 since the attorney's explanation had some "semblance of adequacy." *In re Lependorf,* 212 *N.J. Super.* 284, 290 (App. Div. 1986) (citing *In re Yengo*, 84 *N.J.* at 127). The proper procedure is to conduct a contempt hearing under *R.* 1:10-2 after defendant's trial and before a different judge where the attorney presents witnesses. *In re Lependorf,* 212 *N.J. Super.* at 293.

Defendant's statement that he did not intend to comply with an order to testify at some future time did not warrant a charge of contempt. *In re Matos*, 273 *N.J. Super.* 6, 17 (App. Div. 1994). Under *N.J.S.A.* 2A:81-17.3 there must be a "criminal proceeding before a court or grand jury" and the person must refuse "to answer a question" before that person may be held in contempt. *Id.* at 18.

A. Definition

The coercive power of contempt does not seek to punish, but rather seeks to compel compliance with an injunction, judgment or order of the court or administrative body. The contemnor in a coercive contempt case can purge himself or herself of the contempt by complying with the terms of the injunction, judgment or order.

B. Rules Governing Coercive Contempt

Notwithstanding that an act or omission may also constitute contempt of court, a litigant in an action may seek relief by an application in the action. A judge shall not be disqualified because he or she had signed the order sought to be enforced. An order for confinement must be terminable upon a party's compliance with the order disobeyed.

C. Procedures for Dealing with Coercive Contempt

An application by a litigant may be tried with a proceeding under R. 1:10-2(a) only with the consent of all parties and subject to the provisions of R. 1:10-2(c). R. 1:10-3.

D. Rationale for Coercive Power of Contempt

The purpose of coercive power of contempt is to afford supplemental relief to a litigant to enforce a court's order. Unlike a contempt proceeding under *R.* 1:10-1 and *R.* 1:10-2, punishment is not the objective, though a sanction imposed by the court to compel compliance may inflict punishment's sting. *East* Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n, 235 N.J. Super. 417, 422 (App. Div. 1989).

E. Examples of Coercive Power of Contempt

There is a line of civil contempt cases in which persons have been incarcerated for refusal to testify before grand juries and other investigative bodies. *See, e.g., Catena v. Seidl,* 68 *N.J.* 224 (1975); *In re Zicarelli,* 55 *N.J.* 249 (1970), *aff'd* 406 *U.S.* 472, 92 *S.Ct.* 1670, 32 *L.Ed.*2d 234 (1972); *In the Matter of State Grand Jury Investigation re Acceturo,* 242 *N.J. Super.* 281 (App. Div.), *certif. denied,* 127 *N.J.* 324 (1990); *In re Manna,* 124 *N.J. Super.* 428 (App. Div.), *certif. denied,* 64 *N.J.* 158 (1973); *see also Anyanwu v. Anyanwu,* 333 *N.J. Super.*

345 (App. Div. 2000); *Marshall v. Matthei*, 327 *N.J. Super.* 512 (App. Div. 2000).

F. Maximum Penalties

Relief under *R.* 1:10-3, whether it be the imposition of incarceration or a sanction, is not for the purpose of punishment, but rather is a coercive measure to facilitate the enforcement of a court order. *Ridley v. Dennison*, 298 *N.J. Super.* 373, 381 (App. Div. 1997).

The court in structuring the sanction must consider the offending party's ability to pay and the sanction's impact on that party in light of income, status and objectives, as well as the sanction's impact on innocent third parties. *Franklin Tp. Bd. of Educ. v. Quakertown Educ. Ass'n, 274 N.J. Super.* 47, 56 (App. Div. 1994) (citing *East Brunswick Bd. of Educ. v. East Brunswick Educ. Ass'n, 235 N.J. Super.* at 422-23). Since incarceration under this rule is intended to compel rather than punish, a party must be released when the coercive purpose has failed; continued incarceration would only serve a punitive purpose. *Marshall v. Matthei, 327 N.J. Super.* at 527.

CONTROLLEDDANGEROUSSUBSTANCES(See also, SEARCH AND

SEIZURE, this Digest)

I. OVERVIEW

A. Comprehensive Drug Reform Act

The "Comprehensive Drug Reform Act of 1986" is a compilation of three chapters in Title 2C of the New Jersey Statutes: Chapter 35 "Controlled Dangerous Substances," Chapter 36 "Drug Paraphernalia," and Chapter 36A "Conditional Discharge for Certain First Offenders."

Chapter 35 contains all of the major offenses which involve the use, possession or distribution of controlled dangerous substances. Some of the offenses codified in this chapter closely parallel the language from predecessor laws in Title 24, other offenses are patterned after preexisting laws, and other offenses are new. Chapter 35 also contains procedural sections which govern, for example, the waiver of mandatory minimum terms of parole ineligibility (2C:35-12), the imposition, collection and disposition of cash penalties and laboratory fees (2C:35-15, 2C:35-20), the use of sworn laboratory certificates designed to streamline the evidentiary process at trial (2C:35-19), and the destruction of bulk seizures of controlled dangerous substances (2C:35-21).

Chapter 36 governs prosecutions for the illegal sale, possession, use, and the like of drug paraphernalia. This chapter is taken nearly verbatim from predecessor statutes found at *N.J.S.A.* 24:1-46 through 21-53.

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

Overall, the policy behind the Act seeks to wage an aggressive "war on drugs" at every level of the drug distribution chain. In this vein it is designed to provide for strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders, while at the same time facilitate where feasible the rehabilitation of drug dependent persons, and to afford special protection to children from the perils of drug trafficking.

B. Anti-Drug Profiteering Act

Chapter 35A constitutes the "Anti-Drug Profiteering Act" of 1997. It establishes another monetary penalty for certain persons convicted of certain offenses, including, but not limited to, drug offenses by virtue of the 1999 amendment to section 2C:35A-3 which expanded its scope to include gang-related activities as defined in subsection h. of *N.J.S.A.* 2C:44-3. The Act seeks to impose an enhanced punishment upon those "professional criminals" who engage in drug trafficking activities for a profit and thereby remove the economic incentives inherent therein. *N.J.S.A.* 2C:35A-2.

There are five classes of drug offenders against whom the monetary penalty under this Act are applicable: (1) a defendant convicted (a) as a leader of narcotics trafficking network under *N.J.S.A.* 2C:35-3, (b) as a leader of organized crime under subsection g. of *N.J.S.A.* 2C:5-2 or $^{\odot}$ of a racketeering offense which involves the manufacture, distribution, possession with intent to distribute or transport of any CDS; (2) where the defendant is a drug profiteer; (3) where the defendant is a wholesale drug distributor; (4) where the defendant is a professional drug distributor; and (5) where the defendant was involved in criminal street gang-related activity. *N.J.S.A.* 2C:35A-3b(1) to (5).

N.J.S.A. 2C:35A-4 provides the means for calculating the anti-drug profiteering penalty. *N.J.S.A.* 2C:35A-5 prohibits the court from modifying or revoking the penalty except in accordance with *N.J.S.A.* 2C:35-12.

N.J.S.A. 2C:35A-6 authorizes the court, upon a showing of good cause, to allow the anti-drug profiteering penalty be paid in installments pursuant to a payment schedule. The penalty is to be imposed and

paid in addition to other penalties assessed, *N.J.S.A.* 2C:35A-7a, and shall be in addition to and not in lieu of forfeiture. *N.J.S.A.* 2C:35A-7b. *See also N.J.S.A.* 2C:35A-8.

II. CONSTITUTIONALITY

A. 2C:35-4

In State v. Kittrell, 145 N.J. 112 (1996), the Supreme Court ruled that N.J.S.A. 2C:35-4, maintaining or operating a controlled dangerous substance production facility, was constitutional. The Court reasoned that to establish "maintenance," there must be some evidence of continuity of the suspect's use of the facility to manufacture controlled dangerous substances. Where a person is apprehended the first time he/she operates such a facility, the State must present some evidence that the defendant intended to operate the manufacturing facility on more than one occasion. The Court also rejected defendant's claim that the statute was unconstitutional because the same conduct could be prosecuted under N.J.S.A. 2C:35-4 as a first degree offense or under N.J.S.A. 2C:35-5 (manufacturing and distribution) as a third degree offense.

B. 35-5(b)

In *State v. Williams*, 310 *N.J. Super.* 92 (App. Div.), *certif. denied,* 156 *N.J.* 426 (1998), the Appellate Division determined that *N.J.S.A.* 2C:35-5b(2) was not facially vague because the statute's plain meaning included consideration of the weight of any adulterants and dilutants added to the controlled dangerous substance, and not just the weight of the drug itself.

C. 2C:35-7

State v. Brown, 227 *N.J. Super*. 429 (Law Div. 1988); *State v. Rodriguez*, 225 *N.J. Super*. 466 (Law Div. 1988); *State v. Morales*, 224 *N.J. Super*. 72 (Law Div. 1987).

In these cases, the trial courts addressed several constitutional challenges lodged against *N.J.S.A.* 2C:35-7, the statute which penalizes drug distribution within 1,000 feet of school property. The trial courts rejected defendants' vagueness challenge, noting that the language was quite specific, that 1,000 feet is an easily measured and readily determinable distance, and that school property and a school bus are ascertainable entities to the average layman.

Also, the Morales defendants claimed that the lack of a mens rea requirement as to one's proximity to the school zone violated the due process clause because N.J.S.A. 2C:35-7 provides that "it shall be no defense that the actor was unaware that the prohibited conduct took place while the actor was on or within 1,000 feet of any school property." Adopting the reasoning in *State v. Des Marets*, 92 N.J. 62 (1983), the Morales court held that the Legislature may remove the element of intent if it is necessary to achieve a proper legislative goal. Given the Legislature's goal of protecting school children through the creation of a 1,000 foot "drug-free zone," the court found the removal of an intent requirement to be a proper exercise of legislative authority that did not violate defendant's due process rights. Also in State v. Rodriguez, supra, the court held that N.J.S.A. 2C:35-7 was not vulnerable to a substantive due process attack since the statute was reasonably related to a legitimate legislative purpose and was neither arbitrary nor discriminatory. Since no fundamental rights are affected by the operation of the statute, the court properly applied a rational basis standard.

Further, all three cases quickly disposed of defendants' overbreadth challenge. Noting that the overbreadth doctrine is specifically directed to governmental controls that encroach upon protected rights, the *Morales* court specifically rejected defendants' challenge, since "[t]he dealing in drugs, and the use of drugs as controlled dangerous substances is illegal in New Jersey." *State v. Morales, supra* at 474.

Further, defendants in each of the three cases claimed that N.J.S.A. 2C:35-7 violated the Equal Protection Clause in that it unconstitutionally affected their right to live where they pleased. Here again the trial courts rejected such a claim. Noting that there is no constitutional right to distribute or possess with intent to distribute controlled dangerous substances, the *Rodriguez* court found that "[a]ny effect this statute has on one's right to freely choose a residence is most indirect and most insubstantial." State v. Rodriguez, at 225 N.J. Super. 470. It found a rational basis existed for the Legislature's decision to enhance punishment for those distributing narcotics within 1,000 feet of school property while failing to provide enhanced punishment for individuals who assault children within the protected zone. The court reasoned that equal protection of the laws is not denied because a penal statute might have gone farther than it did or might have included classes of persons who were excluded. The equal protection Clause

does not require the Legislature to punish or regulate all persons in exactly the same way.

The court similarly rejected defendant's contention that their Equal Protection rights were violated because the law was alleged to have a greater impact upon innercity drug traffickers, most of whom are members of racial minorities. The statute is neutral on its face, served a legitimate governmental end, and was not shown to have been motivated by a discriminatory purpose. In so holding, the court was guided by two federal cases addressing similar issues that had arisen under the federal "schoolyard statute." *United States v. Holland*, 810 *F.*2d 1215 (D.C. Cir. 1997), *cert. denied*, 107 *S.Ct.* 2199 (1987); *United States v. Agilar*, 779 *F.*2d 123 (2d Cir. 1985), *cert. denied*, 106 *S.Ct.* 1385 (1986).

Likewise in *State v. Brown, supra*, the court rejected an equal protection challenge predicated upon the contention that the statute "punish[es] more severely conduct on one side of the street than it does similar conduct on the other side of the street by randomly drawing a theoretical line at an arbitrary distance from school property." *State v. Brown,* 227 *N.J. Super*, at 436. The court found a rational relationship between the hazards of drug activity occurring within 1,000 feet of school property and the goal of protecting school children from the direct and indirect hazards of narcotics trafficking. *Id.* at 436-37.

D. 2C:35-9

In *State v. Maldonado*, 137 *N.J.* 536 (1994), the Supreme Court upheld the constitutionality of *N.J.S.A.* 2C:35-9, which imposes strict liability for drug-induced deaths. The Court rejected defendants' arguments that the statute was vague, violated due process and constituted cruel and unusual punishment. The Court also found that codefendant Rodriguez's conviction for distribution in a school zone under *N.J.S.A.* 2C:35-7 did not merge with the conviction for drug-induced death, but that his conviction for manufacturing, distributing and dispensing under *N.J.S.A.* 2C:35-5 did merge with the drug induced death provision.

In an earlier decision, *State v. Ervin*, 242 *N.J. Super.* 584 (App. Div. 1990), the Appellate Division upheld *N.J.S.A.* 2C:35-9 against challenges of due process and cruel and unusual punishment, based on a finding that the statute limited such strict liability to deaths which were proximate consequences of inherently dangerous illegal activities.

E. 2C:35-10

In *State v. Patton*, 133 *N.J.* 389 (1993), the Supreme Court upheld the constitutionality of *N.J.S.A.* 2C:35-10c, which requires persons in possession of controlled dangerous substances to surrender the substances to the police. The Court construed the statute to grant use and derivative-use immunity upon one complying with its provisions, and found that so construed, it did not violate the privilege against self incrimination.

In an interlocutory appeal, the Appellate Division in *State v. Gredder*, 319 *N.J. Super.* 420 (App. Div. 1999), affirmed the trial court's determination that defendant was not entitled to immunity pursuant to statute and caselaw when he answered police questions and admitted possessing drugs when confronted. Suspecting that defendant was transporting drugs to Newark from Florida on a train, officers approached him after he exited the train. He agreed to speak with them, and when they asked if they could look in his luggage defendant further agreed, admitting that he had marijuana. The police during their search found a small amount of marijuana and two bricks of cocaine, and a grand jury indicted defendant for possessing the latter.

Although N.J.S.A. 2C:35-10c provides that one who illegally possesses drugs and does not voluntarily deliver them to the police is a disorderly person, the court held that this subsection provides transactional immunity for section 10 offenses to persons complying with its provisions and use and derivative-use immunity as to other offenses because a "voluntary" delivery originates with the possessor, and the court found that capitulation to police requests did not constitute such a delivery under the statute. The court concluded that defendant voluntarily consented to a search after the police confronted him during their investigation; he did not "voluntarily deliver" any drug. Even if he had voluntarily delivered the marijuana, he never did so as to the cocaine, and also was never prosecuted for marijuana possession.

F. 2C:35-7, 12, 14 and 15

State v. Todd, 238 N.J. Super. 445 (App. Div. 1990); State v. Blow, 237 N.J. Super. 184 (App. Div. 1989), rev'd o.g., 123 N.J. 472 (1991); State v. Ogar, 229 N.J. Super. 459 (App. Div. 1989); State in the Interest of L.M., 229 N.J. Super. 88 (App. Div. 1988); State v. Brown, 227 N.J. Super. 429 (Law Div. 1988).

N.J.S.A. 2C:35-7,-12,-14,-15 were upheld against constitutional challenges concerning separation of

powers, equal protection, cruel and unusual punishment, principles of double jeopardy and vagueness, and claims that they were unenforceable because they operated to coerce guilty pleas.

G. 2C:35-19

State v. Roberson, 246 N.J. Super. 597 (App. Div.), appeal dismissed, 126 N.J. 330 (1991).

The legislature did not unconstitutionally invade the domain of the Supreme Court by enacting *N.J.S.A.* 2C:35-19, in that it establishes a pretrial procedure for rendering admissible the results of a chemical analysis of suspected CDS. Because the statute is not a rule of evidence, it was not subject to the process whereby the Supreme Court is required to initiate its adoption.

III. SUFFICIENCY OF EVIDENCE

A. Possession Generally

Possession is an act, within the meaning of the Code, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession. *N.J.S.A.* 2C:2-1(c). Possession is to be construed strictly as signifying intentional control and dominion, *State v. McCoy*, 116 *N.J.* 293, 299 (1989), the ability to affect physically and care for the item during a span of time, *State v. Davis*, 68 *N.J.* 69, 82 (1975); *State v. Labato*, 7 *N.J.* 137, 148 (1951), accompanied by knowledge of its character. *State v. McCoy, supra. See State v. Pena*, 301 *N.J. Super*, 158, 162-63 (App. Div.), *certif. denied*, 151 *N.J.* 465 (1997).

The law recognizes two kinds of possession, actual possession and constructive possession. A person is in actual possession of a particular article or thing when he knows what it is, he has knowledge of its character, and he knowingly has it on his person at a given time. State v. Montesano, 298 N.J. Super. 597, 612 (App. Div.), certif. denied. 150 *N.J.* 27 (1997). Constructive possession means possession in which the person does not physically have the property. Although not physically on one's person, he is aware of the presence of the property, and is able to exercise intentional control and dominion over it. Id. at 613. Thus, physical or manual control of the proscribed item is not required as long as there is an intention to exercise control over it manifested in circumstances where it is reasonable to infer that the capacity to do so exists. State v. Brown, 80 N.J. 587, 597

(1979). Moreover, possession can be jointly shared by several persons. *Id.*

B. Constructive Possession/Circumstantial Evidence

The leading cases in this area are *State v. Palacio*, 111 *N.J.* 543 (1988), and *State v. Brown*, 80 *N.J.* 587 (1979).

In each of these cases the Supreme Court found sufficient evidence from which a jury could reasonably infer that defendant was in constructive possession of CDS.

In State v. Palacio, supra, defendant was a passenger in a car where drugs were secreted. Based on the large quantity of drugs seized, their purity and extraordinary monetary value, the Court found that it was reasonable, indeed likely, that the driver would travel with a knowledgeable companion, defendant, rather than an innocent passenger or stranger. The inference that the driver was a drug smuggler was supported not only by the large quantity, purity and value of the drugs, but by the existence of a secret storage compartment in the car and a slip of paper found in the driver's wallet indicative of a drug transaction. The court found further evidence of complicity between the driver and the defendant passenger based on their attempts to converse privately, which supported the inference that the parties knew one another, and based on the fact that since the driver was from South Carolina and defendant had a Florida driver's license, they were traveling together.

The court distinguished State v. Shipp, 216 N.J. Super. 662 (App. Div. 1987), a case factually similar to Palacio, but in which the defendant's stepmother, a passenger in the rear seat, was found in personal possession of the CDS. The Appellate Division reversed defendant's conviction in *Shipp*, holding that defendant's presence in the automobile did not "suffice to authorize an inference that he was sharing in the intentional control and dominion over the contraband The Palacio Court rejected defendant's material." reliance on Shipp, supra, noting that, unlike Shipp, in which defendant's mother had the drugs in her handbag, a location that suggested no knowledge on the part of defendant, the CDS at issue in Palacio was stored in an area of the car to which any occupant had free access.

Likewise in *State v. Brown, supra*, the Court held that there was sufficient evidence from which a jury could find defendant constructively possessed CDS contained in a pocket of a dress located in a bedroom closet. In so ruling, it overruled *State v. Sapp*, 144 *N.J. Super.* 455 (App. Div.

1975), rev'd o.b., 71 N.J. 476 (1976), to the extent that Sapp failed to give appropriate weight to the availability of the inferences to be drawn from all of the surrounding circumstances. The Court in *Brown* stated that weight should be given to the following inculpatory circumstances: that defendant resided in the dwelling, that he had control over the premises and there was no showing that defendant shared the apartment with persons other than his wife, the presence of narcotics in the bedroom, the close proximity of defendant to the narcotics, the incriminatory potential of the drugs, and the contemporaneous occurrence of other drug-related activity. The Court rejected as dispositive defendant's lack of ownership of the dress where the heroin was discovered, reasoning that possession can be constructive rather than actual. As long as there is an intention to exercise control over the item manifested under circumstances where it is reasonable to infer that the capacity to do so exists, then a person may be found to be in constructive possession.

In State v. Cofield, 127 N.J. 328 (1992), the Supreme Court found that there was no abuse of discretion by the trial court in ruling that evidence of a subsequent illegal drug incident was relevant and admissible for establishing defendant's constructive possession of illegal drugs during an earlier incident for which defendant was on trial. There was sufficient relevance between the two incidents in that they occurred in the same location, were similar in kind, and were connected closely enough in time so as to allow the jury to make the connection regarding the element of possession. See also State in the Interest of J.M., 57 N.J. 442 (1971); State v. Hurdle, 311 N.J. Super. 89 (App. Div. 1998); State v. Binns, 222 N.J. Super, 583 (App. Div.), certif. denied, 111 N.J. 624 (1988); State v. Meneses, 219 N.J. Super. 483 (App. Div. 1987), certif. denied, 110 N.J. 156 (1988).

However, in *State v. Schmidt*, 110 *N.J.* 258 (1988), the Court found insufficient evidence that defendant constructively possessed drugs found in the trunk of a car driven by a drug courier. Although defendant was an alleged leader in a Tampa, Florida-based narcotics operation that transported cocaine from Florida to New York, the Court found that the State in this case had only established a casual relationship between the defendant and the courier, namely that the courier had worked on defendant's boat, and that he had simply been instructed to drive a car from Florida to New York which was insufficient to impute knowledge to defendant of the existence of the drugs. While acknowledging that a charge of constructive possession may be premised on a defendant's control of a companion who actually possesses the contraband, the Court found lacking evidence of the kind of control over the cocaine that "our cases and examples contemplate." The Court further held that defendant's conviction for possession of cocaine could not be upheld on the basis of vicarious liability under a theory of conspiracy, where the jury was not instructed that it could find defendant guilty of possession as an accomplice or a conspirator, but was solely charged on conspiracy as a substantive crime. *See also State v. Roldan*, 314 *N.J. Super.* 173 (App. Div. 1998); *State v. Miller*, 273 *N.J. Super.* 192 (App. Div. 1994); *State v. Whyte*, 265 *N.J. Super.* 518 (App. Div. 1992), *aff'd*, 133 *N.J.* 481 (1993); *State v. Milton*, 255 *N.J. Super.* 514 (App. Div. 1992); *State v. Jackson*, 326 *N.J. Super.* 276 (App. Div. 1999).

IV. TRIAL-RELATED ISSUES

A. Elements/Basis for Prosecution

1. School zone offense

In State v. Ivory, 124 N.J. 582 (1991), the Supreme Court held that where the park in which defendant possessed narcotics was owned by the school board, and contained athletic fields regularly used for public and parochial school athletics, it constituted a "school property used for school purposes" within meaning of N.J.S.A. 2C:35-7, notwithstanding that the property was leased by the municipality, and was also used for nonschool recreational purposes. Also, § 7 does not require that defendant intend to distribute the narcotics on or within 1,000 feet of school property in order to be found guilty of this offense. See also State v. Bethea, 243 N.J. Super. 280 (App. Div.), certif. denied, 122 N.J. 401 (1990), where it was held that a defendant did not have to intend to distribute the drugs within the school zone in order to be convicted under N.J.S.A. 2C:35-7.

But compare, State v. Belnavis, 311 N.J. Super. 195 (App. Div. 1998), where the appellate court found that it did not constitute "school property . . . owned by or leased to any . . . school or school board" pursuant to N.J.S.A. 2C:35-7 where the property was neither owned, leased nor used exclusively by the school but was merely used by a school board for school activities. The court concluded that no proof existed that defendant's conduct occurred within 1,000 feet of property regularly, consistently, and actually used for school purposes, and ownership or leasing is a prerequisite under the statute.

Likewise, in *State v. Tarver*, 272 *N.J. Super.* 414 (App. Div. 1994), the Appellate Division ruled that the

trial court should have granted defendant's motion for judgment of acquittal on the charge of possession with intent to distribute CDS within 1,000 feet of a school given the unrebutted testimony of a defense witness that the school in question had been shut down. Thus, a reasonable jury could not conclude beyond a reasonable doubt that the property was being used for school purposes on the date in question. The prosecutor had chosen to rely upon the submission of the map and ordinance pursuant to *N.J.S.A.* 2C:35-7 and did not introduce any other evidence on the use of the building for school purposes.

Then in State v. Thomas, 132 N.J. 247 (1993), the Supreme Court again held that the admission of a drugfree school zone map, coupled with the existence of the school and the police officer's testimony that the possessory offense occurred within 1,000 feet of a school, was sufficient for the jury to draw the inference that the school was used for school purposes. The Court rejected the notion of the dissenting judge in the Appellate Division that the State was required to present direct evidence that the school was used for school purposes and not merely owned by the educational authorities. The Court also discussed the statutory presumption that the map, if properly authenticated and supported by an ordinance of the municipality or county approving the map as an official record and location of the boundaries of the 1,000 foot school zone, was prima facie evidence that the school was used for school purposes. The Court noted that such a "presumption" was merely a permissive inference and that a jury should be charged accordingly. The Court also pointed out that a prosecutor need not rely on the statutory presumption but may use any other evidence to establish that the school was used for school purposes.

In *State v. Haskins*, 131 *N.J.* 643 (1993), use of a steel tape measure by police to calculate the distance between a drug transaction and school property was proper.

2. Imitation controlled dangerous substance

In *State in the Interest of M.G.*, 307 *N.J. Super.* 348 (App. Div.), *certif. denied*, 154 *N.J.* 607 (1998), the Appellate Division affirmed a juvenile's adjudication of delinquency on charges of possessing an imitation controlled dangerous substance. Possession of saranwrapped sheets of blotter paper perforated into 100 separate sections, each with a "smiley face," which is a conventional LSD medium but which was devoid of the drug, constitutes possession of such a substance. The imitation drug statute, *N.J.S.A.* 2C:35-11, by its plain

language and in view of the context of the odorless, colorless drug involved, makes that paper an imitation controlled dangerous substance, because it was packaged in a manner normally used for unlawfully transferring LSD and would lead a reasonable person to believe that it contained that substance.

3. Quantity

Neal v. United States, 116 *S.Ct.* 763 (1996), held that a sentencing court is required to take into account the actual weight of blotter paper laced with LSD in determining whether to impose the mandatory minimum sentence.

State v. Moore, 304 N.J. Super. 135 (App. Div. 1997); State v. Torres, 236 N.J. Super. 6 (App. Div. 1989), certif. denied, 122 N.J. 153 (1990); State v. Edwards, 257 N.J. Super. 1 (App. Div. 1992). These cases held that in prosecutions under N.J.S.A. 2C:35-5 and N.J.S.A.2C:35-10, in addition to proving that defendant knew he possessed the CDS at issue, the State must prove facts which, although not elements, establish how much defendant possessed in order to satisfy the grading of the offense or the sentence imposed, and the jury has to so find beyond a reasonable doubt, but it need not establish that the defendant knew of the quantity or quality. The particular substance possessed is relevant only for grading and is not part of the description of the prohibited conduct in the definition of the offense.

So long as the amount of the controlled dangerous substance can be identified by laboratory analysis, possession of even a trace amount of narcotics is sufficient to sustain a conviction for possession, and therefore is not subject to dismissal as a de minimis infraction. *State v. Wells*, 336 *N.J. Super.*, 139 (Law Div. 2000).

In State v. Gosa, 263 N.J. Super. 527 (App. Div.), certif. denied, 134 N.J. 477 (1993), defendant was charged with possession, possession with intent to distribute, and possession with intent to distribute in a school zone based on 180 vials of cocaine found in a locked toolbox in his home. At trial, the expert testified that she had tested only fifteen of the 180 vials, and that she calculated the total weight of cocaine in all the vials to be 43.58 grams. Defendant moved for a judgment of acquittal on the basis that the State failed to present testimony from which a reasonable jury could conclude that the remaining vials contained CDS. The trial court rejected this claim and the Appellate Division affirmed. It found that since defendant had 180 vials of a white powdery substance in a locked toolbox in his bedroom, fifteen of which were randomly selected and tested positive for cocaine, then the clear inference is that the other 165 vials, if tested, would also be found to contain cocaine. The court also found no error resulted from the trial court's failure to charge the affirmative defenses in N.J.S.A. 2C:35-7, that the offense occurred entirely in a private residence, that no one seventeen years or younger was present, and that the prohibited conduct did not involve an intent to distribute.

State in the Interest of J.H., 244 N.J. Super. 207 (App. Div. 1990) held that admission of a certified laboratory report to prove the composition of the substance found in a juvenile's possession was drugs without requiring the State to make a preliminary showing of reliability violated the juvenile's rights under the Confrontation Clause. To establish an adequate foundation for such admission, the State must satisfy tests of reliability set forth in *State v. Matulewicz*, 101 *N.J.* 27 (1985), and present evidence regarding differences between field and laboratory tests performed on the substance in order to explain the disparate results produced by those tests.

State v. Land, 136 *N.J. Super.* 354 (App. Div. 1975), *rev'd o.g.*, 73 N.J. 24 (1977), the court concluded that the stalks and seeds of marijuana are adulterants and may be included in the weight of marijuana charged.

4. Manufacture

In *State v. Miles*, 231 *N.J. Super.* 27 (App. Div. 1989), the Appellate Division found the definition of "maintaining or operating a controlled dangerous substance production facility" under *N.J.S.A.* 2C:35-4, was clear and thus found no need to go beyond the four corners of the statute to determine the legislative intent. Based on the statute's "plain meaning," the court concluded that diluting a bulk quantity of drugs and repackaging them into smaller units constituted the "manufacture" of the substances within the meaning of *N.J.S.A.* 2C:35-4.

5. Distribution

In the aptly-named *State v. Roach*, 222 *N.J. Super*. 122 (App. Div. 1987), *certif. denied*, 110 *N.J.* 317 (1988), the court held that a conviction for distribution of CDS may be predicated upon evidence that defendant had shared a marijuana cigarette with another, even where defendant did not supply the marijuana. In so holding, the court relied on *State v. Sainz*, 210 *N.J. Super*. 17 (App. Div. 1986), *aff'd*, 107 *N.J.* 283 (1987), in which the court observed that "distribution under the Act is present 'whether the intent is merely to share cocaine casually with a friend or to control a widespread network of illicit distribution and sale.'"

6. Employing a Juvenile

In State v. S.C., 289 N.J. Super. 61 (App. Div.), certif. denied, 145 N.J. 373 (1996), the Appellate Division rejected defendant's claim that there was not an adequate factual basis to sustain his guilty plea to employing a juvenile in a drug distribution scheme, contrary to N.J.S.A. 2C:35-6. Defendant admitted placing a threeyear-old child in his car on a trip from Delaware to New York City to buy heroin for the purpose of reducing the likelihood of police detection. The court rejected defendant's attempt to attribute a narrow meaning to the word "use" and relied on both the plain meaning of that word and the legislative commentary to conclude that N.J.S.A. 2C:35-6 is violated by an adult who "uses children in any way to facilitate the distribution of Thus, active participation by the minor is drugs." irrelevant so long as the adult acts with the requisite purpose. The court also found the child's young age to be irrelevant to defendant's culpability, and further found the evidence of a distribution scheme sufficient since defendant's purpose was to share the heroin with his fiancee in Delaware.

State v. Collins, 262 *N.J. Super.* 230 (App. Div. 1993) - where one of the elements of the offense of employing a juvenile in a drug distribution scheme under *N.J.S.A.* 2C:35-6 is that defendant was at least 18 years of age at the time he/she engaged in the conduct alleged, and where the State failed to offer any proof of defendant's age, defendant's conviction thereon must be vacated.

B. Expert Testimony

The leading cases on this issue are *State v. Odom*, 116 *N.J.* 65 (1989), and *State v. Berry*, 140 *N.J.* 280 (1995). In *State v. Odom*, 116 *N.J.* 65 (1989), the Supreme Court held not only was it proper for an expert to testify about the quality and quantity of drugs, their packaging, street value, and characteristics, but the expert may also render testimony concerning the subject of intent or purpose in connection with the possession of unlawful drugs because such subject is beyond the understanding of average persons. The Court also found that as long as the expert does not express his opinion of defendant's guilt but simply characterizes defendant's conduct based on the facts in evidence in light of his specialized knowledge, the opinion is not objectionable even though it embraces the ultimate issues the jury must decide.

Later, in *State v. Berry*, 140 *N.J.* 280 (1995), the Court held that the State may introduce expert testimony in drug distribution prosecutions to explain methods commonly used by drug dealers in their operations provided the trial court is satisfied that the testimony will assist the jury in resolving material factual issues. To avoid excessive prejudice to the defendant, however, the trial court should carefully instruct the jury in the context of the evidence about its duty to decide whether to accept or reject the expert opinion. *See also State v. Jackson*, 278 *N.J. Super.* 69 (App. Div. 1994).

Relying on State v. Berry, supra, the court in State v. Baskerville, 324 N.J. 245 (App. Div. 1999), certif. denied, 163 N.J. 10 (2000), concluded that the opinion evidence rendered in this case went "too far" on the issue of possession. Here, the expert gave particular details in the form of opinion testimony of drug transactions that had occurred between defendant and others, when the only issue before the jury was whether defendant had distributed drugs. The court found that the jury did not need expert testimony on this issue. It did note, however, that had the issue in the case been whether the surveillance officers had a valid articulable suspicion, based on what they had observed, to make a stop or full search of defendant, the expert's opinion would have been appropriately received to establish the indicia of drug trafficking and the reasonableness of the officers' impressions. It thus concluded that while an expert's testimony describing typical methods used by drug distributors was proper, opinion characterizing the interaction between defendant and others that drug transactions had in fact occurred went beyond the scope of expert testimony and usurped the fact-finder's function. It further stated that the State may not use expert opinion testimony on the ultimate issue to enhance its proofs on a case where insufficient proofs exist. See also State v. Singleton, 326 N.J. 351 (App. Div. 1999), where, although reversing the intent to distribute charges based on Baskerville, the court found the expert testimony harmless with respect to the simple possession charges based on independent testimony that supported these convictions.

However, in *State v. Sharpless*, 314 *N.J. Super.* 440 (App. Div. 1998), the Appellate Division found that the trial court had correctly permitted the State to introduce expert testimony, in response to a hypothetical question, that defendant possessed the heroin with intent to distribute. It found that defendant waived the issue on appeal because of his failure to have objected to the hypothetical posed. It further found that even if the expert's testimony exceeded the proper scope of such

evidence under *State v. Berry*, 140 *N.J.* 280 (1995), defendant was not denied a fair trial. Defendant's failure to request a special instruction on how to consider the expert's testimony indicated that the trial court's general credibility instruction was sufficient.

C. Jury Instructions

In *State v. Pleasant*, 158 *N.J.* 149 (1999), the Supreme Court affirmed the Appellate Division ruling which found the model jury charge adequate to explain the elements of *N.J.S.A.* 2C:35-6, the statute proscribing employing a juvenile in a drug distribution scheme, and thereby affirmed defendant's conviction for this offense. The trial court had refused defendant's requested charge that would have told the jurors that defendant was not guilty of violating *N.J.S.A.* 2C:35-6 if he had no intent to manufacture, distribute, or dispense the drugs. While the Court noted that the statute was potentially ambiguous, and that therefore the trial court should have granted the defense-requested charge, it nonetheless concluded that the charge as a whole accurately informed the jury of the relevant law.

State v. Florez, 134 N.J. 570 (1994); State v. Roberson, 246 N.J. Super. 597 (App. Div.), appeal dismissed, 126 N.J. 330 (1991), both held that because the weight of the CDS is a material element of the offense of possession with intent to distribute, failure to charge the jury on the weight as an element constitutes reversible error. However, the State need not prove that defendant had to know the quantity he possessed. See State v. Moore, supra, 304 N.J. Super. at 145-46; State v. Torres, 236 N.J. Super. at 13; State v. Edwards, 257 N.J. Super. at 5.

In State v. Montesano, 298 N.J. Super. 597 (App. Div.), certif. denied, 150 N.J. 27 (1997), defendant was stopped by police after the officers corroborated a call from a confidential informant that defendant and others were involved in drug trafficking. After conviction for possession and possession with intent to distribute marijuana, defendant claimed error in the trial court's refusal to charge on "mere presence." The court's charge explained possession and constructive possession only. Relying on State v. Palacio, 111 N.J. 543 (1988), the Appellate Division ruled that the charge as a whole, combined with the evidence in the case, was sufficient to permit the jury to find that "mere presence" was insufficient to find defendant guilty of possession. The evidence showed that defendant had rented the car and was driving it, had made an inculpatory statement after the marijuana was discovered evidencing knowledge that the drugs were there, and possessed the same drug in a bag which he admitted belonged to him.

The court also rejected defendant's claim, raised for the first on appeal, that the court had failed to charge an element of the offense by failing to state specifically that the weight of the marijuana was an element of the crime to be determined by the jury. Although the charge failed to specifically so state, the appellate court determined no plain error resulted. Not only was there never any dispute that the substance in the suitcase was 14.8 pounds of marijuana, but based on the overall charge and the jury verdict sheet which specifically required the jurors to answer whether the amount of marijuana was more than five pounds, the court concluded that the element was established. Finally, the court rejected the claim that the expert improperly testified that defendant possessed the marijuana with the intent to distribute, finding State v. Odom, 116 N.J. 65, 77 (1989), dispositive on this issue.

State v. Cordero, 293 N.J. Super. 438 (App. Div. 1996), certif. denied, 147 N.J. 577 (1997), held that it was harmless error to omit a jury instruction on the weight to be accorded to and assessment of expert testimony on the issue of whether drugs involved were possessed with intent to distribute. Compare State v. Jackson, 278 N.J. Super. 69 (App. Div. 1994), where the court stated that a police officer in a drug case may properly testify both as an expert witness and a fact witness, but the court should clarify those dual roles in the instruction to the jury to prevent confusion.

D. Drug Kingpin

In *State v. Ricci*, 250 *N.J. Super.* 39 (App. Div.), *certif. denied*, 127 *N.J.* 547 (1991), the Appellate Division considered the constitutionality of defendant's conviction for violation of the "kingpin" statute, *N.J.S.A.* 2C:35-3. It found plain error based on the trial judge's failure to have charged the jury that it must find that defendant committed overt acts in the conspiracy after the effective date of the "kingpin" statute to be convicted thereunder. It also found the sentence violated the *ex post facto* clause in that the conspiracy allegedly began before the effective date of the kingpin statute and continued until after its effective date.

Then, in the leading case of *State v. Afanador(I)*, 134 *N.J.* 162 (1993), the Supreme Court held that the drug kingpin statute was not unconstitutionally vague, either facially or as applied in this case. It found that inclusion of the word "organizer" in conjunction with the terms "supervisor, financier or manager" unambiguously

indicated that a defendant violated the statute only if he or she exercised some ability to control the conduct of others in the drug distribution scheme. The Court also found that the terms "leader" or "network" need not be defined by the trial judge since they are not elements of the offense.

However, the charge issue was revisited in State v. Alexander, 136 N.J. 563 (1994), where the Supreme Court concluded that the status of the defendant is a material element of the drug kingpin statute and consequently, a jury can understand the elements of the offense only if instructed to consider matters found in another part of Title 35. Incorporating the legislative statement of purpose in N.J.S.A. 2C:35-1.1, the Court held that in a prosecution under the drug kingpin statute, the trial court should instruct the jury that it must find that the defendant occupies a high-level position, *i.e*, a position of superior authority and control over other persons, in a scheme or organization of illegal drug distribution, manufacturing, dispensing or transporting, and that in that position the defendant exercised supervisory power or control over others engaged in an organized drug trafficking network.

State v. Alexander, supra, was reaffirmed in State v. Wright, 143 N.J. 580 (1996), where the Supreme Court held that it was proper for the Appellate Division to reverse defendant's drug kingpin conviction since the trial court did not adequately instruct the jury on elements of leading narcotics trafficking network, did not define or explain the role of the leader or drug kingpin, and failed to indicate the necessity of determining that defendant preformed such a role.

Putting more teeth into its earlier decision, the Supreme Court in State v. Afanador (II), 151 N.J. 41 (1997), ruled that the decision in State v. Alexander, 136 N.J. 563 (1994), which set forth the jury instructions necessary in drug kingpin cases was fully retroactive because Alexander did not promulgate a new rule of law but merely "clarified ambiguities in the statute." As such, the Court ruled that Afanador should be granted post-conviction relief and the reversal of his drug kingpin The Court reviewed the criteria for conviction. retroactivity and decided that each factor supported making Alexander retroactive. The Court held that since Alexander involved proper instructions to the jury, it was intended to foster the reliability of the truth-finding process and supported complete retroactivity. Second, the Court held that, given the lack of definitive case law regarding the issue before Alexander, the government could not have relied unduly upon prior precedent.

Third, the Court decided that the administration of justice would not be adversely impacted by making *Alexander* retroactive because only 29 convictions could be affected.

Finally, the Court rejected the argument that, even if the instruction was faulty, the error was harmless because of the arguments of counsel that defendant was not the kingpin. The incorrect instructions in this "close" case led the Court to determine that the absence of an *Alexander* charge could have led the jury to an unjust result.

In State v. Burgess, 154 N.J. 181 (1998), the Supreme upheld the Appellate Division's reversal of Court defendant's drug kingpin conviction because the trial judge's jury instruction on the crime did not conform with State v. Alexander, 136 N.J. 563 (1994). Burgess did not raise the Alexander issue on direct appeal, although he included it in a petition for certification, which was denied. He then raised it again in his petition for post-conviction relief. The Appellate Division, in a split opinion, had reversed the denial of collateral relief, finding that defendant's Alexander claim was not procedurally barred and that the error deprived him of a fair trial because an evidentiary basis existed for finding defendant not guilty of the kingpin charge. The Court held that R. 3:22-4 did not apply to Burgess' claim because he raised the Alexander issue in his petition for On the merits, the Court found the certification. Alexander error in the trial judge's charge to be prejudicial and not cured by defense counsel's summation, and the Court held that the arguments of counsel cannot substitute for correct jury instructions. Finally, the Court concluded that a properly charged jury could reasonably have concluded that defendant was not guilty under N.J.S.A. 2C:35-3.

In *State v. Kadonsky*, 288 *N.J. Super.* 41 (App. Div.), *certif. denied,* 144 *N.J.* 589 (1996), the Appellate Division affirmed defendant's unconditional guilty plea to the drug kingpin statute. Reaching the merits of defendant's claims despite *R.* 3:9-3f, the court acknowledged the Supreme Court's holding in *State v. Afanador (I),* 134 *N.J.* 162 (1993), that the drug kingpin statute was constitutional. The court rejected defendant's argument that the statute's mandatory life sentence with a 25 year parole disqualifier constituted cruel and unusual punishment when marijuana, not cocaine or heroin, was involved. The Appellate Division further ruled that defendant had given a more than

adequate factual basis indicating that he was the leader of a narcotics trafficking network.

E. Defenses

State v. Tate, 102 *N.J.* 64 (1986), held that the defense of medical necessity may not serve as justification for possession of marijuana since the Legislature rejected that possibility. The only exception is possession obtained with a valid prescription order, and the Court is without authority to fashion an alternative exception. Furthermore, defendant had not demonstrated the absence of an available alternative.

In State v. McCague, 314 N.J. Super. 254 (App. Div.), certif. denied, 157 N.J. 542 (1998), the Appellate Division affirmed defendants' convictions for furnishing or giving a hypodermic needle or syringe to another. Defendants, who were well aware of the law, were members of a non-profit corporation that promoted community health by preventing the spread of disease among intravenous drug users, particularly by exchanging clean needles for dirty ones. Irrelevant was defendants' professed purpose of seeking to save lives by halting the spread of disease: no statutory requirement exists in N.J.S.A. 2C:36-6 that defendants have some "evil purpose," and the Legislature was empowered to impose criminal liability regardless of a defendant's motives in an attempt to combat the scourge of drug use. Here defendants' conduct was clearly unlawful.

Moreover, no "medical necessity" pursuant to N.J.S.A. 2C:3-2a justified defendants' actions since their conduct was not permitted by law but, rather, was specifically outlawed by N.J.S.A. 2C:36-6. The facts, too, involved not merely a needle exchange but also the supply of paraphernalia, *i.e.*, tie-offs and cookers, to assist in injecting controlled dangerous substances. Furthermore, the distribution of needles prohibition as applied violates no one's right to life because no fundamental right exists to obtain a clean needle to inject oneself with illegal drugs and because the proffered right does not encompass the use of prohibited substances at a reduced health risk. Defendants were not entitled to the rule of lenity to reverse their conviction, nor had they committed mere de minimis infractions of the law. See also State v. Sorge, 249 N.J. Super. 144 (Law Div. 1991), holding that defendant's conduct was criminal under N.J.S.A. 2C:36-6, and was neither "trivial" nor absurd to warrant application of the *de minimis* infraction statute. Finally, the *McCague* court concluded that any change

involving *N.J.S.A.* 2C:36-6 must come from the Legislature.

F. Double Jeopardy

In *State v. Capak*, 271 *N.J. Super.* 397 (App. Div.), *certif. denied*, 137 *N.J.* 164 (1994), defendant's conviction for attempt to acquire a controlled dangerous substance by fraud, contrary to *N.J.S.A.* 2C:5-1 and 2C:35-13, was not barred on double jeopardy grounds by virtue of her prior guilty plea in municipal court to the offense of theft of a prescription note sheet and using that sheet in a fraudulent manner, contrary to *N.J.S.A.* 2C:20-3.

V. SENTENCING

A. In General

1. Sentencing Alternatives/Options

State v. Soricelli, 156 *N.J.* 525 (1999), held that under *N.J.S.A.* 2C:35-14, residential drug treatment as an alternative to incarceration is limited to "drug dependent" defendants and is not available to those defendants who have overcome their drug addiction as a result of residential and out-patient treatment.

In *State v. Diggs*, 333 *N.J.* 7 (App. Div. 2000), the court held that a defendant serving a sentence pursuant to *N.J.S.A.* 2C:35-7 cannot be transferred to a drug treatment program until the expiration of the minimum term because the parole ineligibility period thereunder is mandatory.

State v. Velez, 229 *N.J. Super.* 305 (App. Div. 1988), held that a defendant may request to be sentenced under the Comprehensive Drug Reform Act for an offense committed prior to its effective date, but he is not automatically entitled to have that request granted.

2. Pre-trial Intervention

State v. Baynes, 148 *N.J.* 434 (1997), held that rejection of a pretrial intervention application based merely on policy of denying enrollment for those charged with a drug offense in a school zone constitutes a "patent and gross abuse of discretion." *But see State v. Staruch*, 326 *N.J. Super.* 245 (App. Div. 1999), where the court declined to extend *Baynes* in the context of post-conviction relief.

In *State v. Caliguiri*, 308 *N.J. Super.* 214 (App. Div. 1998), *aff'd and mod.*, 158 *N.J.* 28 (1999), the Supreme

Court invalidated that section of the Attorney General's Supplemental Directive for Prosecuting Cases Under the Comprehensive Drug Reform Act (January 6, 1997), which required prosecutors to object to pretrial intervention program ("PTI") admission for persons charged under N.J.S.A. 2C:35-7. The Court rejected the State's position that persons so charged are categorically ineligible for PTI admission. The Court did hold, however, "that prosecutors may treat N.J.S.A. 2C:35-7 as equivalent to a second-degree offense and consider PTI presumptively unavailable", and that such defendant must show "compelling reason" to rebut the presumption.

3. Suspension of Driving Privileges

In State in Interest of T.B., 134 N.J. 382 (1993), the Supreme Court held that under N.J.S.A. 2C:35-16, which mandates suspension of driving privileges on conviction for drug offenses, the trial court must impose concurrent, rather than consecutive, suspensions on an offender being sentenced on the same date for multiple drug offenses. Furthermore, where the person is less than 17 years old at the time of sentence, the period of the suspension of driving privileges shall commence on the day the sentence is imposed and shall run for a period of not less than six months or more than two years after the day the person reaches the age of 17 years. Finally, if the person's license is under revocation, suspension, or postponement at the time of conviction or adjudication of delinquency for a violation of any offense in Chapters 35 or 36, the revocation, suspension, or postponement period imposed shall commence as of the date of termination of the existing revocation, suspension or postponement.

4. Intensive Supervision Program

In *State v. Stewart*, 136 *N.J.* 174 (1994), the trial court improperly admitted a defendant convicted of possession of CDS within a school zone into the county Intensive Probation Supervision Program because *N.J.S.A.* 2C:35-12 expressly prohibits a court from imposing a lesser term of imprisonment than that provided by the plea agreement.

5. Mandatory Minimum Term

In *State v. Bridges*, 131 *N.J.* 402 (1993), the defendant entered into an agreement with the State whereby in exchange for his guilty plea to third degree possession of cocaine with intent to distribute in a school zone, the State, under *N.J.S.A.* 2C:35-12, would waive

the mandatory minimum term and recommend that defendant receive probation with 364 days in jail. Defendant claimed that the court had discretion under section 12 to reduce the custodial part of his sentence. The Supreme Court rejected defendant's claim and held that where a negotiated plea agreement provides for a specified term of imprisonment, the sentencing court may not impose a lesser term than provided for in the agreement because it would undermine the clear legislative purpose expressed in N.J.S.A. 2C:35-12. Therefore, to promote cooperation between drug offenders and law enforcement, section 12 must be read to limit a court's discretion to sentence below the agreedupon term of imprisonment. Accord, State v. Leslie, 269 N.J. Super. 78 (App. Div.), certif. denied, 136 N.J. 29 (1993). But see State v. Cengiz, 241 N.J. Super. 482 (App. Div.), certif. denied, 122 N.J. 402 (1990), in which defendant, who pled guilty to various drug offenses including distribution within a school zone, was entitled to a remand on whether there was an agreement with the State regarding relief from the mandatory parole ineligibility, and whether the agreement was breached.

State v. Barber, 262 N.J. Super. 157 (App. Div.), certif. denied, 133 N.J. 441 (1993), held that because first-degree possession with intent to distribute statutorily mandates a period of parole ineligibility, N.J.S.A. 2C:35-5(b)(1), the trial judge is required to impose a period of parole ineligibility despite downgrading defendant's sentence to a second-degree offense and imposing a five-year term.

6. Extended Terms

State v. Irrizary, 328 N.J. Super. 198 (App. Div.), certif. denied, 164 N.J. 562 (2000) - the sentencing court is statutorily required to impose an extended term sentence on defendant as a repeat drug offender pursuant to N.J.S.A. 2C:43-6f. In accordance with the Attorney General Guidelines, however, waiver of the extended term is authorized where the prior conviction is "extremely remote." But see State v. Kirk, 145 N.J. 159 (1996).

State v. Hill, 327 *N.J. Super.* 33 (App. Div. 2000), held that *N.J.S.A.* 2C:43-6f, the provision mandating enhanced sentence for repeat drug offenders, does not require chronological order of convictions, and therefore is applicable so long as defendant was previously convicted of the predicate offense at the time of sentencing.

7. Accomplice

In *State v. Bram*, 246 *N.J. Super.* 200 (Law Div. 1990), the court held that an individual convicted as an accomplice in the commission of a drug offense is subject to the mandatory penalties authorized under the Act as if he were the principal perpetrator. *But see State in Interest of W.M.*, 237 *N.J. Super.* 111 (App. Div. 1989), where it was held that imposition of the mandatory penalties for a drug offense cannot be based on conviction or delinquency adjudication for conspiracy to commit a drug offense.

B. Plea Agreements/Attorney General Guidelines/ Cooperation Agreements

In State v. Lagares, 127 N.J. 20 (1992), the Supreme Court considered a separation of powers challenge to N.J.S.A. 2C:43-6f, which requires a court to impose an extended term with a period of parole ineligibility for a repeat drug offender. Although the sentence is mandatory under the statute, whether an extended term is imposed depended upon the prosecutor because section 6f takes effect only on his or her application. The defendant asserted that the statute impermissibly delegated judicial sentencing powers to the prosecutor. The Supreme Court stated that as it was currently written, section 6f would be unconstitutional because it lacked any guidelines and avenues for effective judicial review. To cure the constitutional defect, the Supreme Court interpreted the statute to require that guidelines be adopted to assist prosecutorial decision-making with respect to applications for enhanced sentences under N.J.S.A. 2C:43-6f. Also, to permit effective review of prosecutorial sentencing decisions, prosecutors were required to state on the trial record the reasons for seeking an extended term. Further, to protect against arbitrary action, the Court held that an extended term may be denied or vacated where defendant has established that the prosecutor's decision to seek the enhanced sentence was an arbitrary and capricious exercise of prosecutorial discretion. Defendants must show clearly and convincingly their entitlement to relief under that standard. See also State v. Press, 278 N.J. Super. 589 (App. Div.), certif. denied, 140 N.J. 328-29 (1995), appeal dismissed, 144 N.J. 373 (1996).

State v. Vasquez, 129 N.J. 189 (1992); State v. Peters, 129 N.J. 210 (1992) - In these companion cases, the Supreme Court addressed whether the court on resentencing a defendant for violation of probation resulting from a conviction for distributing drugs in a school zone is required to impose a mandatory period of parole ineligibility, and whether the prosecutor, having originally waived the parole disqualifier, has the authority at resentencing to demand the imposition of the period of parole ineligibility. The Court also addressed the issue of whether the prosecutor's exercise of discretion to waive the period of parole ineligibility, thereby binding the court's sentencing power, violates the separation of powers doctrine.

Defendants each pled guilty to school zone offenses under N.J.S.A. 2C:35-7, and by virtue of their negotiated plea agreements pursuant to N.J.S.A. 2C:35-12, the prosecutor agreed to waive the three-year mandatory minimum term. They held that a guilty plea did not bar the right to appeal a sentence imposed at a violation of probation hearing when the sentence was based on the court's understanding that it was bound to impose a parole disgualifier because the prosecutor would not again waive the term under section 12. Relying on Lagares, the Court interpreted § 12 to require guidelines for channeling the exercise of prosecutorial discretion. Thus, it reasoned that under the separation of powers provision of Art. III, para. 1, of the New Jersey Constitution, N.J.S.A. 2C:35-12 must be interpreted "to require prosecutors to adopt guidelines to channel the exercise of prosecutorial discretion" and "to state on the record the reasons for their decision to waive or not to waive the parole disgualifier, thereby allowing effective judicial review of the reason." Where a defendant shows clearly and convincingly that the prosecutor's exercise of discretion was arbitrary and capricious, he would be entitled to judicial relief.

Also, the Court held that the sentencing court is not compelled to impose a mandatory period of parole ineligibility under section 7 on resentencing because of a probation violation when the prosecutor has waived the parole disqualifier at the time of initial sentencing in conjunction with a plea agreement pursuant to section 12. The Court reasoned that once waived, the parole disqualifier is no longer "mandatory" for purposes of resentencing for a violation of probation. Furthermore, the prosecutor retains no sentencing authority on resentencing with regard to a parole disqualifier. The Court did note, however, that as a matter of judicial discretion the sentencing court may impose a period of parole ineligibility in conjunction with the imposition of a presumptive custodial term. See also, State v. Gonzalez, 254 N.J. Super. 300 (App. Div. 1992), upholding N.J.S.A. 2C:35-12 against a separation of powers challenge, and State v. Perez, 304 N.J. Super. 609 (App. Div. 1997), remanding to the trial court to determine whether the prosecutor had arbitrarily refused to negotiate a sentence recommendation, and to permit the prosecutor to state reasons for non-waiver of the mandatory minimum term.

In State v. Shaw, 131 N.J. 1 (1993), the Supreme Court considered the validity of a plea agreement under which a prosecutor's waiver of the period of parole ineligibility mandated by N.J.S.A. 2C:35-7 is conditioned upon the defendant voluntarily appearing for sentencing. The Court concluded that such an agreement is valid because it "fosters ... several law enforcement purposes set forth in the [Comprehensive Drug Reform] Act, including facilitation, where feasible, of the rehabilitation of drug-dependent persons, minimization of pretrial delay, prompt disposition of drug-related criminal charges, and swift imposition of fair and certain punishment." However, the Court also concluded that not every violation of the waiver conditions by an accused defendant will result in automatic imposition of a mandatory sentence. Instead, the trial court must consider the explanation for the nonappearance in the context of all the circumstances, and whether in light of those circumstances, the breach is material to the plea and therefore warrants revocation of the prosecutor's waiver of mandatory sentence. The Court concluded that to be valid, guidelines for the prosecutor's inclusion of "no appearance/no waiver" provisions in plea bargain offers must be "integrated under the Vasquez.

In *State v. Gerns*, 145 *N.J.* 216 (1996), the Supreme Court held that it was neither arbitrary nor capricious for the prosecutor to base his or her decision to recommend a waiver of the mandatory sentence required by *N.J.S.A.* 2C:35-7 on the value of the cooperation received from a defendant. However, the Court requested the Attorney General to review statewide sentencing practices and experience under the Attorney General Guidelines promulgated pursuant to *State v. Vasquez*, 129 *N.J.* 189 (1992), because the Court was concerned that allowing the counties to adopt their own guidelines in conjunction with significant prosecutorial discretion could lead to disparity in sentencing.

In *State v. Kirk*, 145 *N.J.* 159 (1996), the New Jersey Supreme Court held that the Warren County Prosecutor did not abuse his discretion or contravene the Attorney General's Guidelines pursuant to *Lagares* in refusing to waive an extended term sentence for a repeat drug offender. The Court rejected the Appellate Division's conclusion that defendant was entitled to waiver because he had not served a prison term for two prior New York drug convictions and was simply passing through New Jersey on an interstate highway at the time of the present

offense, explaining that the statute refers only to previous convictions and makes no exceptions for a conviction that does not result in a prison term. Upholding the Attorney General's Guidelines, the Court rejected as contrary to the legislative goal the Public Defender's contention that the Guidelines should incorporate an "interests of justice" standard. It noted that the Guidelines incorporate some of the spirit of that standard in the "catch-all" clause which authorizes prosecutors to waive enhanced sentencing based on the existence of compelling extraordinary circumstances, which did not exist in this case. But see State v. Irrizary, supra (remanded because the sentencing court failed to properly articulate reasons for setting parole ineligibility at one-half of the presumptive term of 50 years incarceration).

In State v. Jimenez, 266 N.J. Super. 560 (App. Div. 1993), the Appellate Division reversed the trial court's grant of the defendant's post-conviction relief motion on the ground that the prosecutor abused his discretion in failing to engage in post-conviction negotiations with defendant under N.J.S.A. 2C35-12, and held that the Attorney General's guidelines were unconstitutional because they permitted prosecutors to agree to a waiver of the mandatory sentence only if the defendant cooperated with law enforcement officials in ferreting out criminal The Appellate Division held that the conduct. prosecutor's guidelines, both facially and as applied, were constitutional and that the defendant failed to satisfy the heavy burden of demonstrating that the State's failure to offer leniency was an arbitrary and capricious exercise of discretion. The court further found that the application of the guidelines does not offend any of the policies that underlie the ex post facto prohibition.

In *State v. Reyes*, 325 *N.J. Super.* 166 (App. Div. 1999), the Appellate Division affirmed defendant's drug convictions. The court held that the February 1998 *Attorney General Interim Guidelines* governing plea offers in Chapter 35 drug cases applied to January 1998 crimes defendant had committed, and did not violate the coextensive *ex post facto* clauses of the federal and state constitutions. Those guidelines were to apply to all pending cases, of which defendant's was one, without regard to the date the offenses occurred. *Ex post facto* considerations, moreover, are generally directed at legislative -- not executive -- action, and here the Attorney General neither enacted any "law" nor was given the power to increase the penal consequences of defendant's actions.

In *State v. Brimage*, 153 *N.J.* 1 (1998), the Supreme Court of New Jersey ruled that the Attorney General's

Guidelines involving N.J.S.A. 2C:35-12 do not promote uniformity in sentencing -- one of the Code's fundamental goals -- because each county has discretion to adopt its own standard plea offers and policies. While recognizing the need for some flexibility among the different counties due to resources, caseloads, backlogs, and local concerns, the Court held that the statute's plea agreement guidelines must be consistent throughout the State. The Court required the Attorney General to adopt within 90 days specific, universal standards that all prosecutors must follow in waiving mandatory minimum sentences in Chapter 35 matters, which also must spell out both permissible ranges of plea offers for particular crimes and permissible bases for upward and downward departures. The Guidelines may also take into consideration resources and backlog, must allow for individual characteristics of the crime and defendant, and require prosecutors to state on the record their reasons for choosing to waive or not to waive the mandatory minimum period of parole ineligibility and reasons for departing from the Guidelines, (Attorney General Directive 1998-1), if they do, to permit effective judicial review. The Court made its ruling prospective only except for this case and all cases pending on direct appeal.

Finally, the Court held that for all pending school zone cases disposed of by plea agreements, that version of the Guidelines in effect when the crime occurred should be followed. The Attorney General's recommended plea standards are to be utilized, not the county's standardized plea arrangement.

In *State v. Castaing*, 321 *N.J. Super.* 292 (App. Div. 1999), the court found that the holding in *State v. Brimage*, 153 *N.J.* 1 (1998), applies to post-conviction sentencing agreements. Thus defendants convicted after trial are "entitled to the *Brimage* goal of statewide uniformity in post-conviction sentence agreements" even though here the prosecutor would not engage in any such negotiations. However, because the record revealed no information concerning whether or not defendant could provide substantial cooperation to law enforcement pursuant to Part X of the *Attorney General's Guidelines for Negotiating Cases under N.J.S.A.* 2C:35-12, the court vacated defendant's sentence and remanded the matter so that the parties could conduct post-conviction sentencing negotiations.

The Appellate Division in *State v. Coulter*, 326 *N.J. Super.* 584 (App. Div. 1999), held that defendant had waived his right to challenge the prosecutor's actions for purposes of the *N.J.S.A.* 2C:35-12 *Plea Negotiation Guidelines* under *State v. Brimage*, 153 *N.J.* 1 (1998),

where defendant never disputed the State's designation of the applicable aggravating factors or the absence of any mitigating factors at the time of plea or at sentencing. The existing record failed to establish plain error in determining the relevant plea negotiation factors, and the prosecutor's conclusions involved no patent and gross abuse of discretion.

In State v. Veney, 327 N.J. Super. 458 (App. Div. 2000), the Appellate Division dismissed the State's appeal, concluding that the State had no statutory right to appeal the sentence. The State had appealed from the denial of a motion to vacate a plea offer after it realized its sentence recommendation was based on a miscalculation under the Attorney General's Guidelines as required in State v. Brimage, 153 N.J. 1 (1998), and which would have increased the base sentence and mandatory minimum term. The appellate court did note in dictum, however, that because mistakes in applying the Brimage Guidelines do not promote the goal of uniformity, the State should be permitted to withdraw the offer where the mistake is "honest" and the application is made prior The court also rejected the State's to sentencing. argument that defendant's sentence was illegal.

In State v. Rolex, 329 N.J. Super. 220 (App. Div.), certif. granted, 165 N.J.486 (2000), the court addressed the issue of the impact Brimage had upon the "no appearance/no waiver" plea agreement approved in State v. Shaw, 131 N.J. 1 (1993). Defendant argued that the guidelines set forth in Attorney General Directive No. 1998-1 violate Brimage by allowing for similarly situated defendants in different counties to receive disparate sentences. He argued that it would be "impossible" to formulate guidelines concerning "no appearance/no waiver" plea offers that would comply with Brimage, and that Brimage implicitly overruled Shaw and consequently, a prosecutor may no longer insist upon a "no appearance/no waiver" provision in a plea agreement that is subject to the Attorney General guidelines. While noting that the "vague" guidelines under this directive do give an individual county prosecutor wide discretion to determine the circumstances under which to include a "no appearance/no waiver" provision in a plea offer, the Appellate Division stopped short of declaring it invalid. Instead, the court remanded the case to the trial court to afford the Attorney General an opportunity to participate in the appeal, to address the question whether it is feasible to devise more specific guidelines than are set forth in the directive, and assuming "no appearance/no waiver" plea agreements remain valid after Brimage to consider whether there is a need for statewide guidelines regarding no waiver provisions, and if so whether those guidelines should provide that, under some circumstances, a defendant's failure to appear may result in a sentence which includes a period of parole ineligibility that is longer than the period provided in the plea agreement, but shorter than the full three years mandated by $N.J.S.A.\ 2C:35-7.$

C. Merger

State v. Dillihay, 127 N.J. 42 (1992); State v. Brana, 127 N.J. 64 (1992) - In these companion cases, the Supreme Court considered the validity of the anti-merger provision of N.J.S.A. 2C:35-7, which prohibits distribution of controlled dangerous substances within a school zone, as applied to a defendant who has first- and second-degree violations of committed N.J.S.A. 2C:35-5, the provision that prohibits the manufacturing, distribution, or dispensing of controlled dangerous substances. The Court held that based on principles of double jeopardy, convictions for schoolzone offenses must merge into convictions for related first- or second-degree Section 5 offenses. However, in order to fulfill the legislative intent, the mandatory minimum required by the school-zone statute "survives" the merger of these offenses.

State v. Blow, 123 *N.J.* 472 (1991); *State v. Gonzalez*, 123 *N.J.* 462 (1991) - In these companion cases, the Supreme Court considered the anti-merger provision of *N.J.S.A.* 2C:35-7, distribution within a school zone, as applied to a defendant who has committed third- and fourth-degree violations of *N.J.S.A.* 2C:35-5, prohibiting the manufacturing, distribution, or dispensing of controlled dangerous substances. Relying on the dissent of Judge Skill man, J.A.D., the Court held that based on general principles of merger, Section 5 convictions merge into convictions for related third- and fourth-degree Section 7 offenses.

In *State v. Milligan*, 71 *N.J.* 373 (1976), the Court explained that the Legislature intended each of certain specified components of a transaction leading to and including the distribution of a controlled dangerous substance to be a distinct and separate offense. Thus, the offense of possession with intent to distribute and distribution of a controlled dangerous substance do not merge.

State v. Davis, 68 *N.J.* 69 (1975), held that distribution and possession are distinct criminal offenses, not only in terms of the length of each lasts, but also in terms of what particular stage of drug trafficking each represents. Simple possession of drugs looks to

acquisition and retention by a possessor of a controlled substance whether he be seller or user, while distribution concentrates on the final transfer to a particular party. Therefore these convictions do not merge.

In *State v. Strecko*, 244 *N.J. Super.* 463 (App. Div. 1990), simultaneous possession of more than one controlled dangerous substance in violation of the same statute merged for purposes of imposition of sentence where there was no intent to distribute. Compare *State v. Jordan*, 235 *N.J. Super.* 517 (App. Div.), *certif. denied*, 118 *N.J.* 224 (1989), where the court held that simultaneous possession of three different drugs with intent to distribute constituted three separate crimes and therefore did not merge.

State v. Land, 136 N.J. Super. 354 (App. Div. 1975), rev'd o.g., 73 N.J. 24 (1976) held that the offenses of possession of controlled dangerous substance and possession with intent to distribute such substance did not merge where identifiable separate quantities of controlled dangerous substances were found at different locations in defendant's house, under circumstances which raised inference that one quantity was intended for distribution, while another was intended for personal use.

State v. Fariello, 133 *N.J. Super*. 114 (App. Div. 1975), *aff'd in part, rev'd in part o.g.*, 71 *N.J.* 552 (1976). *See State v. Selvaggio*, 206 *N.J. Super*. 328 (App. Div. 1985) (Where no distinction of purposes among various quantities of marijuana residue and hashish was made when the items were offered into evidence, the charge of possession of marijuana was a lesser included offense within the charge of possession with intent to distribute).

State v. Booker, 86 *N.J. Super.* 175, 178 (App. Div. 1965), held that where the defendant's control over the contraband is "fleeting and shadowy in its nature," then defendant's convictions for possession of heroin would merge into a conviction for sale of heroin. Where, however, the possession antedated and was separate and distinct from the sale, then these are separate crimes. *State v. Booker, supra.*

1. *State v. Parker*, 335 *N.J. Super.* (App. Div. 2000). Although possession of a controlled dangerous substance with intent to distribute within a school under *N.J.S.A.* 2C:35-7 and possession of a controlled dangerous substance with intent to distribute within 500 feet of a public park under *N.J.S.A.* 2C:35-7.1 are technically different offenses, under the "flexible" approach regarding merger, these two offenses must merge. However, the parole ineligibility period under the school zone offense survives the merger.

2. State v. Tahir Gregory, ____ N.J. Super. ____ 2001 W.L. 65065 (App. Div. 2001). Defendant's conviction for third degree possession of a controlled dangerous substance with intent to distribute under N.J.S.A. 2C:35-5a(1) and - 5b(3), merges with his second degree possession of a controlled dangerous substance with intent to distribute within 500 feet of a public park under N.J.S.A. 2C:35-7.1.

D. DEDR Penalty

In *State v. Monzon*, 300 *N.J. Super.* 173 (App. Div. 1997), defendant's Drug Enforcement and Demand Reduction ("DEDR") penalty was properly vacated based on defendant's participation in a drug program where payment for the costs of the program was made through reduction of compensation earned during the course of that program. Such reduction satisfied the statutory criteria of *N.J.S.A.* 2C:35-15 and defendant "actually paid" for the costs of the program.

State v. Williams, 225 *N.J. Super*. 462 (Law Div. 1988) held that where defendant pleads guilty to a second drug offense but is sentenced to a term one degree lower to a third degree offense, the mandatory DEDR penalty appropriate to a second degree offense must still be imposed.

VI. MISCELLANEOUS

State v. Lester, 271 *N.J. Super.* 289 (App. Div. 1994), *certif. denied*, 142 *N.J.* 453 (1995), held that maintaining a dwelling house as a narcotics nuisance in violation of *N.J.S.A.* 24:21-21a(6), had not been impliedly repealed by the enactment of Chapter 35 of Title 2C. This provision of Title 24 was saved from repeal by the language of *N.J.S.A.* 2C:35-1.2 because no statute similar to this specific Title 24 violation was enacted in the Comprehensive Drug Reform Act of 1987.

The court in *State in the Interest of A.A.M.*, 228 *N.J. Super*. 9 (Law Div. 1988), held that possession with intent to distribute CDS within a drug free school zone constitutes a "Chart 1" offense for purpose of juvenile waiver.

CORPORATIONS

I. CRIMINAL LIABILITY OF CORPORATIONS

At common law, a corporation could not be indicted for a criminal act. *State v. Morris and E.R. Co.,* 23 *N.J.L.* 360, 364 (Sup. Ct. 1852). *See also New York Central and H.R.R. Co. v. United States,* 212 *U.S.* 613, 621 (1908). Today, any domestic or foreign corporation doing business in the State may be liable for almost any criminal act. *N.J.S.A.* 2C:2-7; *N.J.S.A.* 2C:1-14g; *In the Matter of Opinion 668 of the Advisory Committee on Professional Ethics,* 134 *N.J.* 294, 301 (1993). *See Kathleen F. Brickey, Rethinking Corporate Liability Under the Model Penal Code,* 19 *Rutgers L.J.* 593, 632 (1988). *See also United States v. Wise,* 370 *U.S.* 405, 82 *S.Ct.* 1354 (1962); *United States v. Sain,* 141 *F.*3d 463 (3d Cir. 1998).

N.J.S.A. 2C:2-7a specifically defines the scope of potential corporate enterprise liability. The statute provides that a corporation may be criminally liable for: (1) unlawful conduct of an agent of the corporation acting within the scope of his/her employment and on behalf of the corporation, unless the statute defining the offense indicates a legislative intent not to impose liability on corporations; (2) conduct constituting an omission to discharge a specific duty where the law requires such action; (3) illegal conduct authorized, engaged in, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and on behalf of the corporation. The terms "corporation," "agent" and "high managerial agent" are defined in N.J.S.A. 2C:2-7b. See State v. Pennsylvania R.R. Co., 84 N.J.L. 550, 554 (Sup. Ct. 1913). See also American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982); American Tel. and Tel. Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421 (3d Cir. 1994); United States v. Hilton Hotels Corp. 467 F.2d 1000 (9 Cir. 1972), cert. denied., 409 U.S. 1125 (1973); 19 C.J.S. § 736 (1990).

A corporation may be liable for the acts of its agents, if the acts are within the scope of the agents' apparent authority, even if such acts were actually contrary to the corporation's instructions. United States v. Investment Enterprises, Inc., 10 F.3d 263 (5th Cir. 1993); United States v. Basic Construction Co., 711 F.2d 570, 572 (4th Cir. 1983); United States v. Hilton Hotels Corp. 467 F.2d 1000 (9 Cir. 1972), cert. denied,, 409 U.S. 1125 (1973); United States v. American Radiator & Standard Sanitary

Corp., 433 F.2d 174, 204-05 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); 19 C.J.S. § 738 (1990).

Liability of the corporation may be found even if the agents themselves have been acquitted. United States v. Dotterweich, 320 U.S. 277, 279 (1943); United States v. Cargo Service Stations, Inc., 657 F.2d 676, 684 (5th Cir. 1981); American Medical Association v. United States, 130 F.2d 233, 253 (3d Cir. 1942), aff'd 317 U.S. 519 (1942); United States v. LBS Bank-New York, Inc., 757 F.Supp. 496, 502 (E.D.Pa. 1990).

Corporations have been held liable for a wide variety of crimes, including manslaughter, State v. Central R.R. Co. of New Jersey, 102 N.J.L. 475, 479 (Sup. Ct. 1926); State v. Lehigh Valley R.R. Co. of New Jersey, 90 N.J.L. 372 (Sup. Ct. 1892); see David J. Reilly, Comment, Murder, Inc.: The Criminal Liability of Corporations for Homicide, 18 Seton Hall L. Rev. 378, (1988), theft, State v. Graziani, 60 N.J. Super. 1 (App. Div. 1959) (corporation obtained money under false pretenses), aff'd o.b., 31 N.J. 538, cert. denied, 363 U.S. 830 (1960); Joseph L. Sigretto and Sons, Inc. v. State, 127 N.J.L. 578 (Sup. Ct. 1942) (same), maintaining a disorderly house, State v. Western Union Tel. Co., 12 N.J. 468 (1953), nuisance, State v. Pennsylvania R.R. Co. 84 N.J.L. 550 (Sup. Ct. 1913); State v. Uvalde Asphalt Paving Co., 68 N.J.L. 512 (Sup. Ct. 1902), causing or risking widespread injury or damage, contrary to N.J.S.A. 2C:17-2, State v. Iron Oxide Corp., 178 N.J. Super. 303 (Law Div. 1980) (disposal of chemical wastes); State v. Collingswood Sewerage Co., 85 N.J.L. 567 (Sup. Ct. 1913), aff'd o.b. 86 N.J.L. 703 (E & A 1914), conspiracy, State v. New Jersey Trade Waste Assn., 96 N.J. 8 (1985) (conspiracy in restraint of trade); State v. Continental Purchasing Co., 119 N.J.L. 257 (Sup. Ct.), aff'd o.b. 121 N.J.L. 76 (E & A 1938) (conspiracy to enforce collection of money by means of intimidation), requiring an employee to take a lie detector test, State v. Community Distibutors, Inc., 64 N.J. 479 (1974); State v. Berkey Photo Inc., 150 N.J. Super. 56 (App. Div. 1977), misrepresentation of mileage of motor vehicles, Krigler v. Banner Pontiac-Buick Opel, Inc. 120 N.J. Super. 572, 576 (Ch. Div. 1972), distribution of obscene materials, State v. Manchester News, 118 N.H. 255, appeal dism. 439 U.S. 949 (1978) and espionage, United States v. American Socialist Soc'y, 260 F. 885 (S.D.N.Y. 1919).

II. CRIMINAL LIABILITY OF CORPORATE AGENTS AND EMPLOYEES

Agents, officers or directors of a corporation are exposed to personal criminal liability as a result of

corporate acts as well as separate individual criminal acts. For example, in *State v. Paone*, 290 *N.J. Super.* 494 (App. Div. 1996), defendant, a corporate president convicted of failing to remit unemployment insurance contributions, was required to pay restitution regardless of whether he received pecuniary gain himself. The New Jersey Legislature intended that corporate officers who criminally defraud public trust funds be required to make good the loss. *Id.* at 495-96. *See also Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 *F.*3d 1358, 1367 (11th Cir. 1999) (owners can be personally liable for criminal acts of corporation).

To be liable for a corporate wrong, an agent must have been personally responsible by act or authority for the wrong and must have the requisite criminal intent. *State v. Damiano*, 322 *N.J.* Super. 22 (App. Div. 1999), *certif. denied*, 163 *N.J.* 396 (2000); *State v. Pincus*, 41 *N.J. Super.* 454 (App. Div. 1956) ("It is well settled that a corporate officer or agent may be criminally liable for his own acts, although done in his official capacity, if he participates in the unlawful act, either directly, or as aider, abettor or accessory."); 19 *C.J.S.* §§ 552; 553 (1990).

An agent need not have been acting in a representative capacity to be liable. *United States v. Wise*, 370 *U.S.* at 416. Indeed, an agent may be found guilty of the very same wrong of which the corporation was acquitted. *United States v. Dotterweich*, 320 *U.S.* 277 (1943).

By virtue of their positions within a corporation, agents may be liable for various individual crimes, separate and apart from any corporate wrongs. For example, an agent may be held liable for "Misconduct by Corporate Official" under N.J.S.A. 2C:21-9. That statute provides that a director commits misconduct when, knowingly, with purpose to defraud, the director unlawfully pays a dividend or capital stock or buys corporate stock on behalf of the corporation, receives evidence of debt for capital stock actually called in and required to be paid or receives evidence of debt to enable a stockholder to withdraw money paid on stock. N.J.S.A. 2C:21-9a. Additionally, a director or officer commits misconduct when, with purpose to defraud, he or she issues an increase in capital stock beyond the amount of capital stock or unlawfully sells shares. N.J.S.A. 2C:21-9b. Finally, it is a crime when any person "knowingly or purposely uses, controls or operates a corporation for the furtherance of any criminal object." N.J.S.A. 2C:21-9c. If the benefit derived is in excess of \$75,000, it is a crime of the second degree, if the benefit derived is between \$1,000 and \$75,000, it is a crime of the third degree and if the benefit derived is less than \$1,000, then it is a crime of the fourth degree.

An agent also may be liable for embezzlement and other theft related crimes. See N.J.S.A. 2C:20-2, 20-4, 20-9; N.J.S.A. 2C:21-1 et seq. For example, in State v. Manthey, 295 N.J. Super. 26 (App. Div. 1996), defendant failed to remit sales and withholding taxes and was indicted for theft, N.J.S.A. 2C:20-9, misapplication of entrusted property, N.J.S.A. 2C:21-15 and failure to pay or turn over taxes, N.J.S.A. 54:52-9. In State v. Paone, 290 N.J. Super. 494 (App. Div. 1996), the corporate president was convicted of failing to remit unemployment insurance contributions. He was required to pay restitution regardless of whether he received any pecuniary gain himself. See also State v. Daly, 38 N.J. 1 (1962) (embezzlement); State v. Palumbo 137 N.J. Super. 13 (App. Div. 1975) (embezzlement); State v. Telek, 90 N.J. Super. 61 (App. Div. 1966) (theft of documents containing trade secrets); State v. Cronin, 86 N.J. Super. 367 (App. Div. 1965) (false entries in sales invoices with purpose to defraud insurance company and others); State v. Pincus, 41 N.J. Super. 454 (App. Div. 1956) (defendant criminally liable for criminal act done in obtaining trade acceptance upon false representation).

III. DEFENSES

There are defenses which can be raised regarding corporate liability, in addition to defenses particular to the crime in question. For example, *N.J.S.A.* 2C:2-7c states that it is a defense to any charge brought under *N.J.S.A.* 2C:2-7a(1) that a high managerial agent who has supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. *See N.J.S.A.* 2C:2-7b(3) for the definition of a "high managerial agent."

A corporation may also contend that its agents were acting to advance, not the interests of the corporation, but their own personal interests. See N.J.S.A. 2C:2-7a(1). See also United States v. One Parcel of Land Located at 7326 Highway 45 North, Three Lakes, Oneida County, Wis., 965 F.2d 311, 316 (7th Cir. 1992); United States v. Cincotta, 689 F.2d 238 (1st Cir.), cert. denied, 103 S.Ct. 347 (1982); Standard Oil Co. of Texas v. United States, 307 F.2d 120 (5th Cir. 1962). It can also be argued that the act by an agent was unauthorized or ultra *vires. See Vicksburg Furn, Mfg. Ltd. v. Aetna,* 625 *F.*2d 1167, 1170 (5th Cir. 1980). In appropriate circumstances, a claim can also be made that the corporation was authorized by law to perform the act. *See State v. Riggs,* 91 *N.J.L.* 456 (Sup. Ct. 1918), *error dismissed,* 92 *N.J.L.* 575, (E. & A. 1919).

IV. PROCEDURES

A. Investigations

The Fifth Amendment privilege against selfincrimination does not apply to corporations, partnerships, or sole proprietorships with regard to the production of records. *Matter of Grand Jury Proceedings of Guarino*, 104 *N.J.* 218 (1986); *In re Siegel*, 208 *N.J. Super*. 588 (App. Div.), *certif. denied.*, 105 *N.J.* 568 (1986); *In re Doe*, 294 *N.J. Super*. 108, 128 (Law Div. 1996), *aff'd, In the Matter of John Doe and Roe Corporation*, 302 *N.J. Super*. 255 (App. Div. 1997). *See also United States v. Doe*, 465 *U.S.* 605 (1984); *Fisher v. United States*, 425 *U.S.* 391 (1976); *United States v. White*, 322 *U.S.* 694, 698 (1944).

In *In the Matter of John Doe and Roe Corporation*, 302 *N.J. Super.* 255 (App. Div. 1997), the court upheld the constitutionality of *N.J.S.A.* 2C:41-5f, which allows the Attorney General to use investigative interrogatories to enforce the racketeering laws. The court further noted that, if leaked information was found to have come from a state employee, *N.J.S.A.* 2C:41-5f itself provided the exclusive remedy. Suppression of the interrogatories was not the appropriate remedy.

The issue presented in *In the Matter of Opinion 668* of the Advisory Committee on Professional Ethics, 134 N.J. 294 (1993) and State v. CIBA-GEIGY Corp., 247 N.J. Super. 314 (App. Div.), appeal dismissed, 130 N.J. 585 (1992), was the applicability of RPC 4.2 to the *ex parte* interviewing of current and former employees of a corporate litigant. At that time, RPC 4.2 provided,

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

As a result of *Opinion 668*, the question was referred to a special joint committee of the Civil and Criminal Practice Committees for study and recommendations. In 1996, *RPC* 4.2 was amended to clarify that a lawyer could not speak about a matter with a represented corporate party, including members of an organization's litigation control group as defined by RPC 1.13. RPC 1.13 defines an organization's litigation control group as "current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter in question, whether or not in litigation, provided, however, that 'significant involvement' requires involvement greater, and other than, the supplying of factual information or data respecting the matter." In State v. Bisaccia, 319 N.J. Super. 1 (App. Div. 1999), the court held that RPC 4.2 "applies in the criminal context only after adversarial proceedings have begun by arrest, complaint or indictment on the charges which are the subject of the communication." Id. at 22.

B. Instituting Suit Against A Corporation

1. Summons or Warrant

An individual shall be served by summons unless a warrant is justified by one of the factors set forth in R. 3:3-1(b). A corporate defendant, on the other hand, can only be served by summons. R. 3:3-1(a).

2. Service

R. 3:7-10 (Superior Court) and *R.* 7:2-3(b) (municipal court), both provide that a corporation shall be served in accordance with R. 4:4-4. R. 4:4-4(a)(6) states that the summons may be served on an officer, director, trustee, or managing or general agent of a corporation; any person authorized by appointment or law to receive service of process on behalf of the corporation; or a person in charge at the corporation's registered office; or if none of the above is possible, a person in charge at the principal place of business in New Jersey; or if there is none, any servant of the corporation within the state acting in discharge of his duties. If after diligent effort, a foreign corporation cannot be served as set forth above, then service may be made by mail. However, such service is effective only if the defendant makes an appearance in response thereto. R. 4:4-4(c)(1).

If a summons is returned "not served" and the court is satisfied the summons could not be served, then the court will order the defendant to appear and plead. The order is to published in a newspaper. If the corporate defendant then does not appear on the date specified in the order, an appearance and a "not guilty" plea will be entered and the case may proceed. *R.* 3:7-10(d).

3. Failure to Appear

If a corporate defendant is served and does not appear, a not guilty plea will be entered and the case may proceed to trial and judgment. *R.* 3:3-1(c); *R.* 3:7-10(c); *R.* 7:6-2(a)(2).

C. Appearance

A corporation may appear or plead to an indictment or accusation only by an attorney. *R.* 3:16; *R.* 3:7-10(c). In municipal court, however, a corporation may enter a plea by an agent and may appear by agent or officer if the appearance is consented to in writing by the corporation and the court finds that the interests of justice would not require appearance of counsel. *R.* 7:8-7(a); 7:6-2(a)(2).

D. Residence

For venue purposes, a corporation resides in the county in which its registered office is located or in any county in which it is actually doing business. *R.* 4:3-2(b).

E. Rights

As with an individual defendant, a corporation has the same rights to fair trial and to conviction only after proof beyond a reasonable doubt. *See City of Englewood v. G.M. Brewster and Son, Inc., 77 N.J. Super.* 248 (App. Div. 1962) (State had no right to appeal acquittal).

F. Penalties

N.J.S.A. 2C:43-4a provides that, upon conviction, a court may suspend the imposition of sentence or may sentence a corporate defendant to pay a fine of up to three times the fine provided for in *N.J.S.A.* 2C:43-3 or make restitution as authorized by *N.J.S.A.* 2C:44-2. Judgment on the conviction may be enforced in the same manner as a judgment in a civil action. *N.J.S.A.* 2C:46-2; *R.* 3:21-6; *R.* 7:9-2(b).

N.J.S.A. 2C:43-4b states that when a corporation or a "high managerial agent" of a corporation, as defined in *N.J.S.A.* 2C:2-7, is convicted of an offense committed in conducting the affairs of the corporation, the court may request the Attorney General to institute suit to dissolve the corporation, forfeit its charter, revoke any franchises held by it, or to revoke the certificate authorizing the corporation to conduct business in the State. In addition to a fine, restitution or dissolution, a corporation may be placed on probation with appropriate conditions of probation placed upon it. *See N.J.S.A.* 2C:43-2; *N.J.S.A.* 2C:1-14g; *United States v. John Scher Presents, Inc.,* 746 *F.*2d 959 (3d Cir. 1984); *United States v. Missouri Valley Constr. Co.,* 741 *F.*2d 1542, 1546-51 (8th Cir. 1984); *United States v. Mitsubishi Int. Corp,* 677 *F.*2d 785 (9 Cir. 1982).

N.J.S.A. 2C:51-2f provides that, unless otherwise ordered by the Attorney General, a corporation, or anyone holding more than 5% of its stock, shall be barred from doing business with any public entities, as a result of a conviction for: bribery or other public corruption offenses (N.J.S.A. 2C:27-2, 2C:27-4, 2C:27-6 and 2C:27-7), official misconduct or abuse of office (N.J.S.A. 2C:30-2 and 2C:30-3), or compounding a crime (N.J.S.A. 2C:29-4). The period of debarment is 10 years for a crime of the second degree and 5 years for a third degree offense. See Trap Rock Industries, Inc., v. Kohl, 63 N.J. 1, cert. denied, 414 U.S. 860 (1973), where the Supreme Court held that the Commissioner of Transportation had the power to bar a corporation from bidding on State contracts because of a major stockholder's conviction for bribery and obstruction of justice. See also Matter of Inter County Refuse Service, Inc., 222 N.J. Super. 258 (App. Div.), appeal dismissed, 114 N.J. 485 (1989); State v Musto, 187 N.J. Super. 264 (Law Div. 1982).

COSTS

(See also, INDIGENTS, PUBLIC DEFENDER, thisDigest)

I AT THE TRIAL LEVEL

The county must meet the cost of criminal prosecutions. *N.J.S.A.* 2A:158-7. *See State v. Hermanns,* 278 *N.J. Super.* 19 (App. Div. 1994) (in an appeal from a municipal court ordinance violation, municipality required to pay for transcript for indigent defendant).

If a change of venue is ordered, the costs of trial shall be certified to the Assignment Judge of the county in which the indictment was found or the accusation was filed. R. 3:14-4.

The Office of the Public Defender is obligated to pay all expenses necessary for the defense of indigents it represents, as well as ancillary services for defendants who retain private counsel, but are deemed indigent.

N.J.S.A. 2A:158A-5 provides in part that "all necessary services and facilities of representation (including investigation and other preparation) shall be provided in every case." *See Matter of Cannady*, 126 *N.J.* 486 (1991); *Matter of Kaufman*, 126 *N.J.* 499 (1991); *State v. Arenas*, 126 *N.J.* 504 (1991).

The case of *State v. Womack*, 145 *N.J.* 576 (1996), discussed costs in the context of a civil sanction, which was later followed by a criminal penalty. The Court held that if the sanction were punitive in nature, rather than remedial, then double jeopardy could bar a criminal action in the same matter. *State v. Womack*, 145 *N.J.* at 585.

The only costs that the clerk will award or impose against the defendant in a municipal court matter are those set forth in *N.J.S.A.* 22A:3-4. Fees allowed for violations of *N.J.S.A.* 39:1-1 *et seq.* or of traffic ordinances, at the discretion of the court, may reach thirty dollars, but no more. For all other cases, at the discretion of the court, court costs may reach, but not exceed, thirty dollars. In municipal court proceedings, the court imposes court costs of two dollars for every violation of any statute or ordinance. For each fine, penalty and forfeiture imposed and collected under authority of law for any violation of *N.J.S.A.* 39:1-1 *et seq.* or any other motor vehicle or traffic violation in the state, the sum of \$.50 is imposed. *N.J.S.A.* 22A:3-5 provides that any fees/costs due must be paid within thirty days. According to *N.J.S.A.* 22A:3-6, any person who defaults on his or her payment may be imprisoned for one day for each dollar owed.

I. TAXED COSTS IN CRIMINAL APPEALS

Taxed costs on appeal are governed by R. 2:11-5. The clerk of the Appellate Division can award taxed costs either upon the court's direction in an opinion or order or upon the application of the prevailing party. An affidavit or certification from the attorney is required.

The clerk will not award costs against the State of New Jersey. It is well settled that costs do not run against the state in favor of a defendant in a criminal case in the absence of a specific statute. *See State v. Mulvaney*, 61 *N.J.* 202 (1972); *State v. Welch*, 46 *N.J.* 57 (1965); *State v. Tilton*, 131 *N.J.L.* 264 (Sup. Ct. 1944); *State v. Borg*, 9 *N.J. Misc.* 261 (Sup. Ct. 1931); *State v. Kohns*, 121 *N.J. Super.* 284 (App. Div. 1972). There is no provision in the New Jersey Code of Criminal Justice, *N.J.S.A.* 2C:1-1 *et seq.*, or any other state statute which authorizes a criminal defendant to collect costs from the State.

COURTS

I. PRETRIAL PROCEDURES

A. Probable Cause Hearing

A defendant may not be retained in custody in the absence of probable cause. *Gerstein v. Pugh*, 420 *U.S.* 103 (1975). The sole issue for determination in a pretrial probable cause hearing is whether the facts and circumstances are sufficient to warrant a prudent person to believe that the suspect has committed an offense. *Id.* at 120. A suspect who is detained before trial may challenge the probable cause for confinement. *Id.* at 119. However, a subsequent conviction will not be vacated on the ground that defendant was improperly detained pending trial because illegal detention alone is an insufficient ground upon which to attack a conviction. *Id.*

R 3:4-3 sets forth the procedures to follow in this State. A probable cause hearing may be waived by defendant. If defendant does not waive this hearing and if before the hearing an indictment has not been returned, after notice to the county prosecutor, the court shall hear the State's evidence and defendant may crossexamine witnesses against him. The issue to be determined by the court is whether "there is probable cause to believe that an offense has been committed and defendant has committed it." R. 3:4-3(a).

A probable cause hearing is not a constitutionally guaranteed stage of the prosecution and may be superseded by the grand jury's prior return of an indictment. *See State v. Mitchell,* 164 *N.J. Super.* 198 (App. Div. 1978); *State v. Cox,* 114 *N.J. Super.* 556 (App. Div. 1971), *certif. denied,* 58 *N.J.* 93 (1971).

Probable cause may be established on the basis of hearsay evidence. *State in Interest of B.T.*, 145 *N.J. Super.* 268, 272-73 (App. Div. 1976), *certif. denied*, 73 *N.J.* 49 (1977). The judge may not draw an adverse interest against the State for not calling witnesses with knowledge to testify at the hearing. *State in Interest of J.L.W.*, 236 *N.J. Super.* 336, 345-47 (App. Div. 1989).

B. Venue

In general, an offense shall be prosecuted in the county in which it is committed. *R*. 3:14-1. In addition, *R*. 3:14-1 sets forth eleven special rules to which reference should be made if there are specific venue problems. *See*,

e.g., State v. Farlow, 176 N.J. Super. 548 (1980), certif. denied, 87 N.J. 320 (1981), holding that where a murder victim was shot in another state, defendant, pursuant to *R*. 3:14-1(d), may be prosecuted in the county of the victim's death. The county of venue for purposes of trial of indictments returned by a State Grand Jury is designated by the Assignment Judge appointed to impanel and supervise the State Grand Jury pursuant to *R*. 3:6-11(b). *R*. 3:14-1(k). See N.J.S.A. 2A:73A-1, 8; State v. Mullen, 126 N.J. Super. 355 (App. Div. 1974).

Venue is not jurisdictional and the improper laying of venue is a technical defect in the institution of proceedings required to be raised by a pretrial motion or may be deemed to have been waived. *State v. DiPaolo,* 34 *N.J.* 279, 288 (1961), *cert. denied,* 368 *U.S.* 880 (1961); *State v. Greco,* 29 *N.J.* 94 (1959).

R. 3:14-2 authorizes a change of venue or trial by a foreign jury "if the court finds that a fair and impartial jury cannot otherwise be had."

A motion to empanel a foreign jury may be made by any party. *R.* 3:14-2. See State v. Harris, 282 N.J. Super. 409, 421 (App. Div. 1995), appeal after remand, 156 *N.J.* 122 (1997). For guidelines in selecting the county for venue or the source of a foreign jury, see State v. *Timmendequas*, 161 N.J. 515, 557-58 (1999).

A motion for change of venue may be made only by a defendant, *R.* 3:14-2, and is addressed to the sound discretion of the court. *State v. Belton*, 60 *N.J.* 103, 107 (1972); *State v. Wise*, 19 *N.J.* 59, 73 (1955); *State v. Gary*, 229 *N.J. Super.* 102, 111 (App. Div. 1988). "The test is whether an impartial jury could be obtained from among the citizens of the county or whether they are so aroused that they would not be qualified to sit as a jury to try the case." *Id.* at 110. Defendant must establish "clear and convincing proof that a fair and impartial trial cannot be had before a jury in the county in which the indictment was found." *State v. Wise*, 19 *N.J.* at 73-74; *State v. Gary*, 229 *N.J. Super.* at 110.

In a capital trial, the test is different. The test is whether a change of venue is necessary to overcome a realistic likelihood of prejudice from pretrial publicity. *State v. Harris*, 156 *N.J.* 122, 133-34 (1998); *State v. Marshall I*, 123 *N.J.* 1, 76 (1991). *See generally, State v. Timmendequas*, 161 *N.J.* at 557-58 and CAPITAL PUNISHMENT, this Digest.

Note that where there is a realistic likelihood that the trial of a capital case will be surrounded by presumptively

prejudicial publicity, the court should change the venue of the trial. *State v. Harris*, 156 *N.J.* at 147.

As to a motion for change of venue where the indictment is returned by a State Grand Jury, *See State v. Mullen, supra.* (motion is heard by the assignment judge designated under the State Grand Jury Act and not by the judge assigned to preside over the trial or by the assignment judge of the assigned county).

C. Trial Calendar (*See also*, **JOINDER** and **SEVERANCE** and **SIXTH AMENDMENT**, this Digest)

The trial judge exercises discretion over pretrial decisions including requests for continuances. State v. Bowens, 108 N.J. 622, 637 (1987); State v. Mance, 300 N.J. Super. 37, 53 (App. Div. 1997) (no abuse of discretion in case involving attack on prison guards in denial of continuance because of ongoing prison hostage situations in another state); State v. Jackson, 289 N.J. Super. 43, 49 (App. Div. 1996), certif. denied, 148 N.J. 462 (1997) (no abuse in denial of continuance where defendant claimed fatal shooting of police officer in courthouse 5 days before defendant's trial was prejudicial); State v. Rodriguez, 264 N.J. Super. 261, 274 (App. Div. 1993), aff'd 135 N.J. 3 (1994) (no abuse in denying continuance because of illness of victim); State v. Kyles, 132 N.J. Super. 397, 402 (App. Div. 1975) (no abuse of discretion in refusing continuance for nonappearance of defense witnesses, who were relatives of defendant, where defense counsel did not request issuance of bench warrant to compel their appearance); State v. Smith, 66 N.J. Super, 465, 468 (App. Div. 1961), aff'd 36 N.J. 307 (1962) (continuance should normally be granted to procure alibi witness); State v. Gallicchio, 51 N.J. 313, 318 (1968), cert. denied, 393 U.S. 912 (1968) (no error in failing to grant continuance based upon alleged prejudicial publicity, when trial date was eight months after the crime and six months after newspaper article appeared). Cf. State v. Jasuilewicz, 205 N.J. Super. 558 (App. Div. 1985) (failure to adjourn trial of defendant, who proceeded with insanity defense, after substantial pre-verdict publicity concerning Hinckley trial was reversible error), See State v. Audette, 201 N.J. Super. 410, 414-415 (App. Div. 1985) (rather than granting defendant's motion to suppress, trial court should have granted State's motion for adjournment of suppression hearing).

When a defendant applies for an adjournment to enable him to substitute counsel, the granting of a continuance rests within the sound discretion of the trial court, and the exercise of that discretion will not constitute reversible error in the absence of a showing of an abuse of discretion causing defendant a manifest wrong or injury. State v. McLaughlin, 310 N.J. Super. 242, 258-59 (App. Div. 1998), certif. denied, 156 N.J. 381 (1998); State v. Furguson, 198 N.J. Super. 395, 402 (App. Div. 1985), certif. denied, 101 N.J. 266 (1985); State v. Lamb, 125 N.J. Super. 209, 213 (App. Div. 1973); State v. Smith, 87 N.J. Super. 98. 105 (App. Div. 1965). "[T]he trial court must strike a balance between its inherent and necessary right to control its own calendar and the public's interest in the orderly administration of justice, on the one hand, and the defendant's constitutional right to obtain counsel of his own choice, on the other." State v. Furguson, supra (no abuse of discretion in failure of trial court to grant defendant's request for adjournment where defendant's request would have further delayed the trial, where need for adjournment arose from private attorney's and defendant's neglect in giving notice of attempted substitution of counsel and where defendant had competent, experienced counsel available and prepared to try case and no complaint was raised that attorney's representation was inadequate). See also Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 1616 (1983) (no abuse of discretion when trial court denied motion for continuance which was based on ground that substitute counsel had inadequate preparation time where counsel said he was ready for trial and his performance was adequate).

The granting of a continuance for health reasons is also a matter for the discretion of the trial judge. *State v. Kaiser,* 74 *N.J. Super.* 257, 271 (App. Div. 1962), *certif. denied,* 38 *N.J.* 310 (1962). In the exercise of discretion, the trial judge should consider the following factors: (1) medical reports, (2) personal observations of the accused, (3) the effect of a continuance upon the State's ability to present evidence and (4) whether or not the accused will be better able to stand trial at a later date. *Id.*

The court rules also provide that an adjournment may be granted where either defendant or State fail to provide alibi information, *R.* 3:12-2(b); where defendant fails to give written notice of specific criminal code defenses, *R.* 3:12-1; and either defendant or the State fails to make timely discovery, *R.* 3:13-3(g). *See State v. Utsch*, 184 *N.J. Super.* 575 (App. Div. 1982) (approving adjournment where the prosecution failed to make timely discovery).

Courts have the inherent power to control cases on its own calendar, *See State v. Slobisk*, 100 *N.J. Super*. 590,

594 (App. Div. 1968) (dismissal of indictment following a 3-year delay was upheld as proper exercise of court's inherent power to control its own calendar). However, courts are "loath" to dismiss cases "because the demands of justice require adjudications on the merits to the greatest extent possible." *State v. Farrell*, 320 *N.J. Super*. 425, 447 (App. Div. 1999).

D. Appointment of Defense Experts for Indigent Defendants

The Due Process Clause requires that a State provide access to a psychiatrist's assistance when an indigent defendant has made a preliminary showing that his sanity at the time of his offense is likely to be significant factor at trial. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985). Three factors are relevant to the determination of whether, and under what conditions, the participation of a psychiatrist is important enough to the preparation of a defense: (1) the private interest in the accuracy of a criminal proceeding, (2) the governmental interest that will be affected if the psychiatric assistance is to be provided and (3) the probable value of the psychiatric assistance sought and the risk of error in the proceeding if such assistance is not offered. Id. at 79-80, 105 S.Ct. at 1094. The Court noted, however, that while an indigent defendant has a constitutional right to psychiatric assistance where his sanity is an issue, he does not have a right to choose a psychiatrist of his personal liking or to receive funds to hire one. Id. at 83, 105 S.Ct. at 1096. Finally, the court noted that the states will decide the implementation of this right. Ibid.

In New Jersey, before the State will finance an indigent defendant's expert services, the facts of the case must "warrant" the need for expert testimony. State v. Manning, 234 N.J. Super. 147, 161 (App. Div. 1988), certif. denied, 117 N.J. 657 (1989) (given that defendant maintained at trial that he shot trooper, defendant did not demonstrate need for ballistic and trace evidence experts); State v. Green, 55 N.J. 13, 18 (1969) (in a forgery prosecution, where crucial issue is whether defendant signed check, the court on application of an indigent defendant should order the appointment of a handwriting expert); State v. Williams, 46 N.J. 427 (1966) (in prosecution for entering with intent to steal, trial court properly authorized retention of toxicologist). A municipal court has the power to appoint an expert at public expense upon assigned counsel's representation as to his need for an expert witness in order to prepare an adequate defense. State v. Ryan, 133 N.J. Super. 1 (Cty. Ct. 1975). However, an indigent defendant who chooses not to be represented by the Public Defender is not entitled to the services of an expert witness at the expense of the county or the State. *In re State v. Stockling*, 160 *N.J. Super.* 486 (App. Div. 1978); *See also N.J.S.A.* 2A:158A-5; *State in the Interest of R.G.D. and W.T.P.*, 108 *N.J.* 1 (1987) (a juvenile who retained private counsel was not entitled to any services available through public defender's office). Moreover, the New Jersey Supreme Court has noted, "[i]t is doubtful that a juvenile has a constitutional right to a psychiatrist at a juvenile waiver hearing." *Id.* at 18. In a waiver hearing, guilt or innocence is not at issue; rather the focus is on determining which court should hear the case.

II. MANAGEMENT OF THE TRIAL

A. Public Trial - Access of the Press (*See also*, **FREEDOM OF PRESS** and **SIXTH AMENDMENT**, this Digest)

It is generally accepted that the public enjoys a First Amendment right to attend criminal trials. *Richmond Newspapers, Inc. v. Virginia,* 448 *U.S.* 555, 100 *S.Ct.* 2814 (1980). However, the right of access is not absolute and can be abrogated if closure is necessary to serve a compelling state interest and narrowly tailored to serve that interest. *Id.* at 607, 100 *S.Ct.* at 2620.

In *Globe Newspaper Co. v. Superior Court,* 457 *U.S.* 596, 102 *S.Ct.* 2613 (1982), the Court reaffirmed its decision in *Richmond* Newspapers and struck as unconstitutional a state statute mandating that the testimony of minor victims in criminal cases involving certain sex offenders be taken in closed proceedings. Although the Court concluded that "safeguarding the physical and psychological well-being of a minor" was a compelling state interest, that interest could not "justify a mandatory closure rule." The Court concluded that the state statute was not narrowly tailored to serve the compelling state interest in protecting the welfare of minor victims.

The Supreme Court has also extended this right of access to include a right to attend the jury selection process in criminal trials, *Press-Enterprise Co. v. Superior Court,* 464 *U.S.* 501, 104 *S.Ct.* 819 (1984) and to preliminary hearings similar to a trial before a magistrate in criminal cases, *Press-Enterprise Co. v. Superior Court,* 478 *U.S.* 1, 106 *S.Ct.* 2735 (1986).

The Sixth Amendment's right to a public trial is at least as strong as the First Amendment's. *Waller v. Georgia*, 467 *U.S.* 39, 46, 104 *S.Ct.* 2210 (1984) ("there can be little doubt that the explicit Sixth Amendment

right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."). Before a trial court may close a courtroom, four conditions must be satisfied: (1) the party seeking closure must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. See R. 1:2-1 - "All trials, hearings of motions and other applications, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute".

In State v. Williams, 93 N.J. 39, 59 (1983), the Court held that the State Constitution provides the public and press "a protectible right to be present during the conduct of criminal pretrial proceedings and, further, that these rights as recognized under the State Constitution are fully consistent with those that are found under and protected by the First Amendment." The Court concluded that the public and media must have access to pretrial proceedings except in those cases "in which the trial court is clearly satisfied that as a result of adverse pretrial publicity, a realistic likelihood exists that a defendant will be unable to secure a fair trial before an impartial jury if the pretrial proceeding is conducted in open court." Defendant has the burden to establish by a preponderance of the evidence that open proceedings will threaten his right to a fair trial. The Court also noted that the press has a right to be heard. Finally, in making the determination as to closure, the trial judge must consider the availability and efficacy of other protective techniques such as change of venue, use of a foreign jury and careful voir dire of prospective jurors. See State v. Marshall, 199 N.J. Super 502, 508 (App. Div. 1985); State v. Halsey, 218 N.J. Super. 149 (Law Div. 1987). See also State v. Sugar (II), 100 N.J. 214, 243 (1985) (the prosecutor also has the right to move for closure); New Jersey Div. of Youth and Family Services v. J.B. 120 N.J. 112, 127 (1990) ("the court must balance the public's right of access to judicial proceedings against the State's interest in protecting children from the possible detrimental effects.").

B. Control of Attorneys' Misconduct at Trial (*See also*, **CONTEMPT**, this Digest)

The trial judge has responsibility to ensure that defendant receives a fair trial. Nevertheless, the judge also

has responsibility to see that a trial is conducted in an orderly and expeditious fashion. *State v. Laws*, 50 *N.J.* 159, 181 (1967), *mod. o.g.* 51 *N.J.* 494 (1968), *cert. denied*, 393 *U.S.* 971 (1978); *State v. Guido*, 40 *N.J.* 191, 208 (1963).

The trial court has the right to admonish counsel for arguing after an objection has been overruled and for directing comments to the prosecutor rather than to the court. So long as the trial judge's comments do not constitute unfair criticism nor disclose an intent to humiliate counsel, no error is committed. *State v. Knight*, 63 *N.J.* 187, 192 (1973). Nevertheless, when a trial court is dissatisfied with the conduct of an attorney during the course of a criminal trial, any reprimands should ordinarily be made outside the presence of the jury. *State v. Rowe*, 57 *N.J.* 293, 303 (1970).

C. Handling Disruptive Defendants

A trial judge has broad discretion in imposing restraints on disruptive or potentially disruptive defendants. *Illinois v. Allen*, 397 *U.S.* 337, 90 *S.Ct.* 1057 (1970); *State v. Morton*, 155 *N.J.* 383, 434 (1997). *See also Holbrook v. Flynn*, 475 *U.S.* 560, 106 *S.Ct.* 1340 (1986) (deployment of security officers in courtroom did not violate defendant's rights); *State v. Martini*, 131 *N.J.* 176, 235 (1993); *State v. Rose*, 112 *N.J.* 454, 543 (1988).

Although the Sixth Amendment guarantees a defendant the right to confront any witnesses against him, defendant waives that right if he continues to disrupt the proceedings after a warning from the trial judge. *Illinois v. Allen, supra.* Moreover, defendant's "right of self-representation is not a license to abuse the dignity of the courtroom." *Faretta v. California,* 422 *U.S.* 806, 836 n.46, 95 *S.Ct.* 2525, 2541 n.46. (1975).

In *State v. Wiggins*, 158 *N.J. Super.* 27 (App. Div. 1978), the Appellate Division found that when a trial judge is faced with an uncooperative and obstructive defendant who rejects assigned counsel and refuses to represent himself, the judge should order counsel to participate once it is clear that defendant is not going to conduct his own defense. *Id.* at 31. The court noted that "[t]he right of the trial judge to control the proceeding and insure a trial of a defendant which comports with due process concepts is not at odds with the right of self-representation...." *Id.* at 32-33.

In *State v. Mance*, 300 *N.J. Super*. 37, 50-51 (App. Div. 1997), a seven-defendant case involving attacks on

prison guards, all defendants were physically restrained throughout the trial by individual arm and leg chains. The Appellate Division held that given the potential for violence, the trial court soundly exercised its discretion in ordering the restraints. The Court emphasized that a trial court must hold a hearing on the question and set forth on the record the reasons for ordering restraints.

See also State v. Reddy, 137 N.J. Super. 32 (App. Div. 1975); State v. Roberts, 86 N.J. Super. 159 (App. Div. 1965) (where in course of trial there is evident danger of defendant's escape or restraint is necessary to protect others from attack by defendant, trial judge has discretion to order defendant restrained).

In *State v. Roscus*, 16 *N.J.* 415, 428 (1954), defendant made frequent outbursts during the tenth day of a murder trial and had threatened that he would not return to the courtroom for the remainder of the trial. On the 11th day of trial defendant appeared in court in a restraining belt but the belt was removed before the jury appeared. The court held that defendant's right to a fair trial was not impaired.

In *State v. Spivey*, 122 *N.J. Super*. 249 (App. Div. 1973), *rev'd on other gds*. 65 *N.J.* 21 (1974), the court held that if neither a contempt citation nor binding and gagging nor any other reasonable disciplinary measure serves to control defendant in an adequate manner, defendant may be removed from the courtroom and the trial proceed in his absence until he agrees to behave appropriately.

In *State v. Carrion-Collazo*, 221 *N.J. Super*. 103 (App. Div. 1987), *certif. denied*, 110 *N.J.* 171 (1988), the Appellate Division reversed an order granting postconviction relief based on defendant's wearing prison garb at trial and held that the trial court was not obligated to make inquiry concerning defendant's voluntary waiver of his right to wear civilian clothes at trial. The Appellate Division, however, advised trial courts, in the interests of justice, to question future defendants personally concerning the right to appear in civilian clothing. *Id.* at 112. The court also noted that when a request for civilian clothing or a precautionary voir dire or jury charge is made by defendant or counsel, such requests should be honored. *Id.* at 113.

D. Conduct of Trial Judge

A trial judge has broad discretion to conduct a fair trial by controlling the clear and orderly presentation of evidence. Reversal of a conviction is warranted only if defendant can demonstrate that the conduct of the trial judge, in the context of the entire trial, prejudiced defendant in the eyes of the jury. *State v. Guido*, 40 *N.J.* at 208. A trial judge has broad discretion in determining the proper limitations of cross-examination of a witness whose credibility is in issue. *State v. Harvey*, 151 *N.J.* 117, 188 (1997), *cert. denied*, 120 *S.Ct.* 811 (2000); *State v. Martini I*, 131 *N.J.* 176, 263 (1993), *cert. denied*, 519 *U.S.* 1063 (1997); *State v. Scherzer*, 301 *N.J. Super.* 363, 415 (App. Div. 1997), *certif. denied*, 151 *N.J.* 466 (1997).

1. Judge's Authority to Examine Witnesses

Although a trial judge should not unduly interfere with the manner of counsel's presentation of evidence, State v. Walls, 138 N.J. Super. 445 (App. Div. 1976), at times such an exercise of discretion is necessary. State v. Cohen, 211 N.J. Super. 544, 552 (App. Div. 1986), certif. denied, 107 N.J. 115 (1987). For instance, in a rape case, the New Jersey Supreme Court held the trial judge properly questioned the victim at length where it appeared that her mental anguish called for the intercession. State v. Riley, 28 N.J. 188, 200-205 (1958), appeal dismissed, 359 U.S. 313, cert. denied, 361 U.S. 879 (1959). A trial judge has discretion to ask leading questioning. Id. at 204-205; See also State in Interest of B.G., 289 N.J. Super. 361, 370-71 (App. Div. 1996), certif. denied, 145 N.J. 374 (1996) (leading and suggestive questioning by court permissible when witness of tender age). In addition, a judge may question witnesses to clarify evidence. State v. Guido, 40 N.J. at 208; State v. Cohen, 211 N.J. Super. at 553. Nevertheless, through his questioning, the judge should not become an advocate. State v. Ross, 80 N.J. 239, 248-249 (1979); State v. Ray, 43 N.J. 19, 25 (1964); State v. Chaney, 160 N.J. Super. 49 (App. Div. 1978), certif. denied, 78 N.J. 405 (1978).

2. *Ex Parte* Communications Between Judge and Jurors or Witnesses

In *Rushen v. Spain*, 464 *U.S.* 114, 104 *S.Ct.* 453 (1983), the Supreme Court emphatically disagreed with the Ninth Circuit's conclusion that an unrecorded ex parte communication between the judge and a juror can never be harmless. Instead the Court took the position that, while an ex parte communication relating to some aspect of the trial generally should be disclosed to counsel for all parties, the particular *ex parte* communication in question was innocuous because the judge and juror did not discuss any fact in controversy or any law applicable to the case. *See also State v. Brown*, 275 *N.J. Super*. 329,

332-33 (App. Div. 1994), *certif. denied*, 138 *N.J.* 269 (1994) (trial judge's improper entry into jury room does not require reversal of conviction if it can be shown that judge's ex parte communication with jury was not prejudicial); *State v. Vergilio*, 261 *N.J. Super.* 648, 653-54 (App. Div. 1993), *certif. denied*, 133 *N.J.* 443 (1993) (trial court did not act improperly in speaking with distraught juror who asked to see judge when defense counsel left for day),

3. Remarks and Conduct of Trial Judge

A trial judge has the right, and oftentimes the duty, to review the testimony and comment upon it, so long as it clearly leaves to the jury the ultimate determination of the facts and the rendering of a just and true verdict on the facts as the jury finds them. *State v. Ramseur*, 106 *N.J.* 123, 280 (1987); *State v. Laws*, 50 *N.J.* 159 (1967), *reargued* 51 *N.J.* 494, *cert. denied*, 393 *U.S.* 971 (1968).

Ordinarily the trial judge should "mold" the jury instructions to the facts adduced at trial in situations in which the statement of relevant law, when divorced from the facts, may be potentially confusing or misleading to the jury. *State v. Robinson*, 165 *N.J.* 32, 42 (2000); *State v. Sexton*, 160 *N.J.* 93, 106 (1999); *State v. Pleasant*, 158 *N.J.* 149, 150 (1999); *State v. Morton*, 155 *N.J.* 383, 422 (1997); *State v. Concepcion*, 111 *N.J.* 373, 379-80 (1988).

Under State v. Hampton, 61 N.J. 250 (1972), a trial judge must instruct the jury to disregard defendant's statements if they find the statements to be untrue. State v. Morton, 155 N.J. at 428. The judge, however, has no duty to instruct the jury that it must find defendant's statements credible beyond a reasonable doubt. Id, State v. Chew, 150 N.J. 30, 82-83 (1997), cert. denied, 120 S.Ct. 593 (1999). State v. Kociolek, 23 N.J. 400, 421 (1957), directs that the judge must instruct the jury of the inherent weaknesses of oral statements. State v. *Morton*, 155 *N.J.* at 428. It is not proper for a trial judge to indicate his belief or disbelief in a witness's testimony. State v. Walker, 33 N.J. at 595; State v. Corbo, 32 N.J. 273 (1960); State v. R.W., 200 N.J. Super. 560, 569-70 (App. Div. 1985), aff'd and mod. o.g., 104 N.J. 14 (1986).

In *State v. Harold*, 183 *N.J. Super*. 485 (App. Div. 1982), defendant attempted at trial to call as a defense witness a nine-year-old child who, after testifying for the State, recanted her testimony, but the trial judge refused. On appeal, the Appellate Division reversed defendant's conviction and held that the trial judge misconstrued his role and thereby usurped the jury's role to weigh the

credibility of the recantation testimony offered by defendant. Where recantation testimony is offered during trial, the jury, not the judge, has the function to weigh credibility. *See State v. Wolf*, 44 *N.J.* 176, 191-92 (1965) (refusal of trial court to reopen proceedings, after jury had retired to deliberate, for further testimony after receiving notice that State's witness-coparticipant in the murder wanted to recant, was reversible error).

In *State v. O'Connor*, 42 *N.J.* 502, 510-11 (1964), *cert. denied*, 379 *U.S.* 916 (1964), the New Jersey Supreme Court held that defendant's motion for mistrial on the ground that the court was severe in questioning defendant and that the court's facial expressions at various times showed disgust, amusement, disbelief of defendant, annoyance and temper was properly denied. There was no abuse of discretion in denying defendant's motion where trial judge stated that he was unaware of any such facial expressions or use of severe questioning and where the court cautioned jury with respect to trial court's actions or conduct during trial. *Accord, State v. Christie*, 91 *N.J. Super.* 420 (App. Div. 1966).

In *State v. Knight,* 63 *N.J.* 187, 192 (1973), in response to defendant's objection to a question asked of a witness, the trial judge responded, "I don't I will permit it," and to another objection responded, "Well, you can object. Your objection is noted but the jury is entitled to know." The Court held that the judge's comments did not constitute unfair criticism or an attempt to humiliate counsel.

In *State v. Vassos*, 237 *N.J. Super.* 585, 590-91 (App. Div. 1990), the court held that the trial judge's interruption of a key defense witness' testimony to warn him that his testimony could subject him to perjury arising from inconsistent statements he made in connection with his guilty plea for the same offense, and then striking the testimony where he refused to testify further, violated defendant's due process rights to a fair trial.

Not all improper comments by a trial judge lead to a reversal. *See State v. Salaam,* 225 *N.J. Super.* 66 (App. Div. 1988) (trial court's reference to defendant's alias following robbery victim's identification of defendant and during final instructions was harmless error); *State v. Pemberthy,* 224 *N.J. Super.* 280, 302 (App. Div. 1988) (comment by trial judge, after determining trooper was qualified as an expert in narcotics investigations, that he was impressed with trooper's qualifications, did not require reversal in light of curative instruction following denial of defendant's motion for mistrial); *State v.* *Meneses,* 219 *N.J. Super.* 483 (App. Div. 1987), *certif. denied,* 110 *N.J.* 156 (1988) (trial court's improper comment that a defendant "can go" to the grand jury if he requests, made during defense counsel's opening, was harmless error).

E. Mistrial (*See also*, **DOUBLE JEOPARDY**, this Digest)

The standard for granting a mistrial is whether or not the error is such that manifest injustice would result from continuance of the trial. State v. Harvey, 151 N.J. 117, 205 (1995), cert. denied, 120 S.Ct. 811 (2000); State v. DiRienzo, 53 N.J. 360, 383 (1969); State v. Ribalta, 277 N.J. Super. 277, 291 (App. Div. 1994), certif. denied, 139 N.J. 442 (1995). The decision on whether to grant a mistrial is within the sound discretion of the trial judge. State v. Winter, 96 N.J. 640, 646-647 (1984). "A mistrial is an extraordinary remedy and should be resorted to only to prevent an obvious failure of justice." State v. Ribalta, 277 N.J. Super. at 291. The trial court should determine whether the error can be cured by a cautionary instruction or other curative measures. Ibid. See State v. LaPorte, 62 N.J. 312 (1973) (prosecutor's mention of defendant's prior arrest did not warrant mistrial in light of instructions to the jury).

If the court declares a mistrial without defendant's consent after the jury is sworn, a retrial is barred by double jeopardy unless there was a "manifest necessity" for the mistrial or the "ends of public justice" would be defeated by an acquittal. State v. Loyal, 164 N.J. 198 (2000); State v. Barnes, 261 N.J. Super. 441, 445 (App. Div. 1993); see also State v. Gallegan, 117 N.J. 345, 353 (1989); State v. Rechtschaffer, 70 N.J. 395 (1976); State v. Love, 282 N.J. Super. 590 (App. Div. 1995), certif. denied, 142 N.J. 572 (1995); State v. Dunns, 266 N.J. Super. 349 (App. Div. 1993), certif. denied, 134 N.J. 567 (1993); State v. Leonard, 234 N.J. Super. 183 (App. Div. 1989); State in the Interest of D.P., 232 N.J. Super. 8 (App. Div. 1989). Whether "manifest necessity" or the "ends of justice" require declaration of a mistrial depends on the unique facts of each case and the sound discretion of the trial court. State v. Loyal, supra (defense counsel's prior representation of a material, recanting State's witness on drug charges constituted appearance of impropriety and ends of public justice necessitated mistrial). A trial court's failure to consider less drastic alternatives to a mistrial is a factor in the assessment of the propriety of the trial judge's declaration of a mistrial. State v. Love, 282 N.J. Super. at 598; State v. Barnes, 261 N.J. Super. at 444.

Note that the Code permits retrial following termination if defendant consents to the termination or waives the right to assert double jeopardy, *N.J.S.A.* 2C:1-9d(1); or if retrial is the necessary result of a hung jury, *N.J.S.A.* 2C:1-9d(2); or where there is "a sufficient legal reason and a manifest or absolute or overriding necessity," *N.J.S.A.* 2C:1-9d(3). *State v. Love*, 282 *N.J. Super.* at 596-97.

The considerations that guide the trial court's decision in deciding a motion to dismiss an indictment following multiple hung juries are set forth in *State v. Abbati*, 99 *N.J.* 418 (1985). Five factors *must* be carefully considered by the court in making this decision: (1) the number of prior mistrials and the outcome of the juries' deliberations, if known; (2) the character of prior trials in terms of length, complexity and similarity of evidence presented; (3) the likelihood of any substantial difference in a subsequent trial, if allowed; (4) the trial court's evaluation of the relative strength of each party's case; and (5) the professional conduct and diligence of respective counsel, particularly of the prosecuting attorney. *State v. Abbati*, 99 *N.J.* 418, 435 (1985). *See also State v. Simmons*, 331 *N.J. Super.* 512 (App. Div. 2000).

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

R. 3:18-1 governs motions for a judgment of acquittal. The standard for reviewing a claim that the evidence is insufficient to support the jury's guilty verdict for an appellate court and a trial court is "whether viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Palacio, 111 N.J. 543, 550 (1988); State v. Reyes, 50 N.J. 454, 459 (1967); State v. Scherzer, 301 N.J. Super. 363, 400 (App. Div.), certif. denied, 151 N.J. 466 (1997). In applying the Reves standard, no consideration is given to evidence adduced in defendant's case. State v. Milton 255 N.J. Super. 514, 520 (App. Div. 1992). The approach is the same whether the evidence is direct or circumstantial. State v. Taccetta, 301 N.J. Super. 227, 240 (App. Div.), certif. denied, 152 N.J. 187 (1997)

"A jury may draw an inference from a fact whenever it is more probable than not that the inference is true; the veracity of each inference need not be established beyond a reasonable doubt in order for the jury to draw the inference." *State v. Martinez*, 97 *N.J.* 567, 572 (1984); *State v. Brown*, 80 *N.J.* 587, 592 (1979). Note, however, that the State's right to the benefit of reasonable inference cannot be used to reduce the State's burden of establishing the essential elements of the offense charged beyond a reasonable doubt. *Id.* at 592.

A determination of the sufficiency of evidence of constructive possession is fact sensitive and requires an examination of the totality of the circumstances. *State v. Hurdle*, 311 *N.J. Super.* 89, 96-97 (App. Div. 1998) (and cases cited therein).

New Jersey courts reject the view that when the State's evidence is circumstantial, all of the circumstances not only must concur to indicate a defendant's guilt but also must be inconsistent with any other rational hypothesis consistent with innocence. *State v. Mayberry*, 52 *N.J.* 413, 436-37 (1968), *cert. denied*, 393 *U.S.* 1043 (1969).

Considerations of "fundamental fairness" prohibit a retrial on a speeding charge when it merely afforded the State an opportunity to produce evidence of the applicable speed limit that the State had failed to produce originally. *State v. Tropea*, 78 *N.J.* 309, 315-316 (1978). *Cf. State v. Lynch*, 79 *N.J.* 327, 343 (1979) (judicial error as to sufficiency of evidence needed to withstand motion for judgment of acquittal following opening statements nevertheless bars retrial when acquittal is entered). A reversal by an appellate court based on insufficient evidence requires an acquittal. *Tibbs v. Florida*, 457 *U.S.* 31, 102 *S.Ct.* 2211 (1982); *Hudson v. Louisiana*, 450 *U.S.* 40, 101 *S.Ct.* 970 (1981); *State v. Leonard*, 234 *N.J. Super.* 183, 191 (App. Div. 1989).

G. Instructions to the Jury (*See also*, **PRESUMPTIONS**, this Digest)

1. Requests to Charge

R. 1:8-7 controls requests to charge the jury. *R.* 1:8-7(a) requires requests to charge, except as to issues not then anticipated, to be submitted to the court at or before the commencement of the trial. The court must rule on these requests before closing arguments.

R. 1:8-7(b) mandates a charge conference on the record prior to closing arguments in all criminal cases. "At the conference the court shall advise counsel of the offenses, defenses, and other legal issues to be charged and shall rule on requests made by counsel." *R.* 1:8-7(b).

When the subject matter of a request for instruction involves essential and fundamental issues and substantially material points, requests for instructions should be honored. If, however, the request does not fall within those two categories, the court may exercise broad discretion in deciding whether to grant a request. State v. Green, 86 N.J. 281, 290 (1981) (a specific instruction regarding identification is required when that issue is essential to the case); see also State v. Pierce, 330 N.J. Super. 479 (App. Div. 2000) (charge on identification plain error when it failed to satisfy minimum requirements of State v. Green). No party is entitled to have the jury charged in his or her own words. If the subject matter is adequately covered in the charge as a whole, no prejudicial error results. State v. Thompson, 59 N.J. 396, 411 (1971).

A defendant is not entitled to an instruction which contains an erroneous or improper legal statement. *State v. Green,* 86 *N.J.* at 290; *State v. Gelb,* 212 *N.J. Super.* 582, 590 (App. Div. 1986), *certif. denied,* 107 *N.J.* 633 (1987).

2. Content - In General

Appropriate and proper charges to a jury are essential for a fair trial. State v. Robinson, 165 N.J. 32, 40 (2000); State v. Burgess, 154 N.J. 181, 185 (1998); State v. Green, 86 N.J. at 287. Each element of the offense must be properly defined for the jury. State v. Wallace, 158 N.J. 552, 558 (1999). Failure to charge an element of an offense is presumed to be prejudicial error, even in the absence of a request. State v. Burgess, 154 N.J. at 186; State v. Rhett, 127 N.J. 3, 7 (1992); State v. Vick, 117 N.J. 288 (1989). The need for special cautionary instructions relating to the jury's consideration of particular kinds of evidence depends on the nature of the evidence presented at trial. State v. Baldwin, 296 N.J. Super. 391, 396 (App. Div.), certif. denied, 149 N.J. 143 (1997). See, e.g., State v. Fertig, 143 N.J. 115 (1996) (hypnotically refreshed testimony); State v. Gross, 121 N.J. (1990) (prior inconsistent statements); State v. Sinclair, 57 N.J. 56 (1970) (prior criminal convictions); State v. Cromedy, 158 N.J. 112 (1999) (cross-racial identifications); State v. Green, 86 N.J. 281 (1981) (identifications); State v. Hampton, 61 N.J. 250 (1972) (confessions); State v. Kociolek, 23 N.J. 400 (1957) (oral statements); State v. Begyn, 34 N.J. 35 (1961) (accomplice testimony).

Model jury instructions, while helpful, may not always provide appropriate jury instructions for all cases. *State v. Hackett*, 323 *N.J. Super.* 460, 480 (App. Div.

1999). Ordinarily, the better practice is to "mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case." State v. Concepcion, 111 N.J. 373, 379 (1988); State v. Damiano, 322 N.J. Super. 22, 36 (App. Div. 1999), certif. denied, 163 N.J. 396 (2000). "That requirement has been imposed in various contexts in which the statement of relevant law, when divorced from the facts, was potentially confusing or misleading to the jury." State v. Robinson, 165 N.J. at 42. However, that requirement does not include summarizing the strengths and weaknesses of the evidence, a task more appropriately left for counsel. Id. at 45. Moreover, a trial court's failure to relate its explanation of the law to the specific facts of the case is not reversible error if the reviewing court concludes that the model jury instruction adequately explained the law, particularly in the absence of objection. State v. Walker, 322 N.J. Super. 535, 548 (App. Div.), certif. denied, 162 N.J. 487 (1999).

Trial courts should endeavor clearly and correctly to convey their instructions to the jury concerning the law to be applied to the case. However, in considering the propriety of a set of instructions, it does not suffice to examine a small portion thereof standing in isolation. Rather, the charge in its entirety must be reviewed so as to determine its overall effect. *State v. Jordan*, 147 *N.J.* 409, 422 (1997); *State v. Wilbely*, 63 *N.J.* at 420 (1973). Our courts consider as well the lawyers' argument, *State v. Marshall*, 123 *N.J.* 1, 145 (1991), the evidence which was adduced at trial, *State v. Thomas*, 103 *N.J. Super*. 154, 158 (App. Div. 1968), the lack of objection below, *State v. Wilbely*, 63 *N.J.* at 422, and any other relevant information gleaned from the record of the trial as a whole.

The jury should not be instructed on an offense which is not sustained by the proofs. For example, where the proofs do not indicate a first degree murder issue, then that issue should not be contained in the charge. However, giving a charge which is correct on the law, but is inapplicable to the facts or issues before the jury, *i.e.*, overcharging, does not require reversal absent prejudice to the defendant. *State v. Thomas*, 76 *N.J.* 344 (1978), clarifying and modifying the court's earlier holding in *State v. Christener*, 71 *N.J.* 55, 69 (1976); *State v. Moore*, 330 *N.J. Super.* 535, 541 (App. Div. 2000); *State v. Brown*, 325 *N.J. Super.* 447, 454 (App. Div. 1999), *certif. denied*, 163 *N.J.* 76 (2000).

A trial court may not direct a verdict of guilty against a defendant in a criminal case. *State v. Collier*, 90 *N.J.* 117, 122 (1982) (in rape prosecution where trial court directed a verdict of guilty on charge of contributing to delinquency of minor, error was not harmless as it contributed to guilty verdict on rape charge). See State v. Ragland, 105 N.J. 189 (1986) (in conducting successive trials before same jury on charges of unlawful possession of weapon and possession of a weapon by convicted felon, jury must be instructed to consider evidence previously admitted but to disregard its previous verdict). See State v. Coyle, 119 N.J. 194 (1990) (ruling that sequential charge of successive crime improper because it can prevent jury from fully considering each charge); cf. State v. Mack, 131 N.J. Super. 542, 545-546 (App. Div. 1974) (there is no objection to a court removing from the jury's consideration an uncontroverted fact, even when that fact constitutes an element of the crime charged).

Special interrogatories to the jury are not looked upon with favor because of their potential to dilute the jury's exclusive responsibility to deliberate upon the issue of guilt or innocence free of extraneous influences. *State v. Simon,* 79 *N.J.* 191, 199 (1979); *see also State v. M.L.*, 253 *N.J. Super.* 13, 26-27 (App. Div. 1991), *certif. denied*, 127 *N.J.* 560 (1992) (special interrogatories are disfavored, yet not prohibited); *State v. McAllister*, 211 *N.J. Super.* 355, 363 (App. Div. 1986).

3. Lesser-Included Offenses

A court may charge the jury on a lesser-included offense when the facts provide "a rational basis for a verdict convicting the defendant of the included offense" instead of the offense charged in the indictment. *N.J.S.A.* 2C:1-8e; *see also State v. Pantusco*, 330 *N.J. Super.* 424, 445 (App. Div. 2000), *certif. denied*, 165 *N.J.* 527 (2000). In order to charge a lesser-included offense, there must be a basis for finding the defendant not guilty of the greater offense, as well as guilty of the lesser offense. *State v. Brent*, 137 *N.J.* 107, 115-17 (1994); *State v. Braxton*, 330 *N.J. Super.* 561, 565 (App. Div. 2000). A court should not submit a lesser-included offense which invites the jury to engage in speculation. *State v. Mendez*, 252 *N.J. Super.* 155, 159 (App. Div. 1991), *certif. denied*, 127 *N.J.* 560 (1992).

If the defendant does not request a charge on a lesserincluded offense, "[t]he trial court does not . . . have the obligation on its own meticulously to sift through the entire record . . . to see if some combination of facts and inferences might rationally sustain [the] charge" on the lesser offense. *State v. Choice*, 98 *N.J.* 295, 299 (1985). "It is only when the facts 'clearly indicate' the appropriateness of that charge that the duty of the trial court arises." *Id.*; *State v. Brent*, 137 *N.J.* at 115-18. Failure to give such a charge *sua sponte* is generally not error where the omission of instruction on a lesserincluded offense is part of the defense strategy. *See State v. Perry*, 124 *N.J.* 128, 162 (1991); *State v. Pantusco*, 330 *N.J. Super.* at 445. "In addition, at least where the lesser offense has an element not included in the greater, *see N.J.S.A.* 2C:1-8, the court cannot charge the lesser offense without defendant's consent." *Id.* at 446.

Moreover, even where the trial court does err in not giving a charge on a lesser offense, such error may be harmless. See State v. Mendez, 252 N.J. Super. at 164; State v. Vujosevic, 198 N.J. Super. 435, 444-46 (App. Div.), certif. denied, 101 N.J. 247 (1985); State v. Mujahid, 252 N.J. Super. 100, 118 (App. Div. 1991), certif. denied, 127 N.J. 561 (1992).

4. Intoxication (See also, DEFENSES, this Digest)

See generally, N.J.S.A. 2C:2-8. Voluntary intoxication is not a valid defense unless it negates an element of the offense. State v. Johnson, 309 N.J. Super. 237, 266 (App. Div. 1998), certif. denied, 156 N.J. 387 (1998). The intoxication must be of an "extremely high level." Id. Jury instruction is required only when the facts "clearly indicate" a rational basis for a conclusion that defendant suffered a "prostration of faculties" to render him incapable of forming the requisite mental state to commit the crime. State v. Mauricio, 117 N.J. 402, 418-19 (1990); State v. Cameron, 104 N.J. 42, 58 (1986); State v. Green, 318 N.J. Super. 361, 370 (App. Div. 1999), aff'd 163 N.J. 140 (2000); State v. Johnson, 309 *N.J. Super.* at 266. The determination of a particular defendant's intoxication is fact specific. State v. Bauman, 298 N.J. Super. 176, 194 (App. Div. 1997), certif. denied, 150 N.J. 25 (1997).

Voluntary intoxication is not a defense to a reckless state of mind. The jury must be specifically advised that intoxication is not a defense to manslaughter or aggravated manslaughter in a murder trial. *State v. Warren*, 104 *N.J.* 571 (1986); *State v. Klich*, 321 *N.J. Super.* 388, 396-97 (App. Div. 1999).

For discussion of involuntary intoxication, *See State v.* Sette, 259 N.J. Super. 156 (App. Div.), certif. denied, 130 N.J. 597 (1992); State v. Bauman, 298 N.J. Super. at 194.

5. Further Deliberations

In *State v. Czachor*, 82 *N.J.* 392 (1980), the Court disapproved the traditional *Allen* charge, *See Allen v. United States*, 164 *U.S.* 492 (1986), adopting instead the

American Bar Association's standards which provide that when the court perceives the jury has been unable to agree, the court may require the continuation of deliberations. *State v. Ramseur*, 106 *N.J.* 123, 302-315 (1987). The court may not, however, "require the jury to deliberate for an unreasonable length of time." *Id.* at 302. *See also State v. Childs*, 204 *N.J. Super.* 639 (App. Div. 1985), where the trial court's instruction to the jury to continue their deliberations was held to be neutral and in accord with *Czachor*.

6. Curative Instruction

The overwhelming case law in New Jersey is that the prompt sustaining of an objection and an admonition to disregard is sufficient to cure any error in a question, answer, or argument before the jury. State v. Papasavvas, 163 N.J. 565 (2000); State v. Timmendequas, 161 N.J. 515, 578, 580 (1999); State v. Winter, 96 N.J. 640, 646-649 (1984); State v. La Porte, 62 N.J. 312, 318 (1973); State v. Hawkins, 316 N.J. Super. 74, 79 (App. Div. 1998), certif. denied, 162 N.J. 489 (1999); State v. Ribalta, 277 N.J. Super, 277, 292 (App. Div. 1994), certif. denied. 139 N.J. 442 (1995); State v. Darrian, 255 N.J. Super. 435, 455 (1992), certif. denied, 130 N.J. 13 (1992); State v. Perez, 218 N.J. Super, 478, 487 (App. Div. 1987). A curative instruction will be deemed insufficient only in extreme cases where there is pronounced and persistent deliberate misconduct having a probable cumulative effect upon the jury. State v. Frost, 158 N.J. 76, 86 (1999); State v. Witte, 13 N.J. 598, 612 (1953), cert. denied, 347 U.S. 951 (1954); State v. W.L. 292 N.J. Super. 100, 116 (App. Div. 1996).

When weighing the efficacy of curative instructions, courts may infer from the absence of objection that the instructions were adequate in the context of trial. *State v. Brown*, 325 *N.J. Super*. 447, 452 (App. Div. 1999), *certif. denied*, 163 *N.J.* 76 (2000).

Where no request for curative instruction has been made, defendant must show that the failure to give such an instruction *sua sponte* constitutes an error clearly capable of producing an unjust result. *See State v. Mays*, 321 *N.J. Super*. 619, 632 (App. Div.), *certif. denied* 162 *N.J.* 132 (1999); *State v. Nelson*, 318 *N.J. Super*. 242, 254 (App. Div. 1999), *certif. denied*, 158 *N.J.* 687 (1999).

When evidence is admitted pursuant to *N.J.R.E.* 404(b), the jury must be instructed as to the limited purpose of the evidence and the restricted significance they can attach to it. *State v. Angoy*, 329 *N.J. Super.* 79,

88-89 (App. Div. 2000); *see also State v. Fortin*, 162 *N.J.* 517, 534 (2000); *State v. Marrero*, 148 *N.J.* 469, 495 (1997). The court's limiting instruction should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence. *State v. Cofield*, 127 *N.J.* 328, 341 (1992).

7. Defendant's Election Not to Testify

In *Carter v. Kentucky*, 450 *U.S.* 288, 101 *S.Ct.* 1112 (1981), the Supreme Court held that a judge must, if the defendant asks, instruct the jury that no adverse inference is to be drawn from defendant's failure to testify. Thus, a trial judge must give a "no-adverse-inference" instruction if the defendant so requests. *See State v. Haley*, 295 *N.J. Super.* 471, 475 (App. Div. 1996) (error in failing to give such a charge when requested is *per se* reversible error). Although such an instruction should only be given at the request of defendant, it is not constitutional error to submit the charge over defendant's objection. *Lakeside v. Oregon*, 435 *U.S.* 333, 98 *S.Ct.* 1091 (1978); *State v. Lynch*, 177 *N.J. Super.* 107 (App. Div. 1981), *certif. denied*, 87 *N.J.* 347 (1981).

In a joint trial, where one co-defendant requests such an instruction and the other objects, the instruction should be given despite the objection. *State v. Jackson*, 204 *N.J. Super*. 13, 21 (App. Div. 1983), *aff'd on other* grounds, 99 *N.J.* 379 (1985); *see also State v. McNeil*, 164 *N.J. Super*. 27 (App. Div. 1978), *certif. denied*, 79 *N.J.* 497 (1979).

8. Voluntariness of Defendant's Confession

When a defendant's confession is introduced at trial, the jury must be apprised of its duty to decide whether in view of all of the circumstances the defendant's confession is true, without any knowledge that the court has already determined the issue of voluntariness. *State v. Hampton*, 61 *N.J.* 250, 272 (1972). If the jury finds that the confession is not true, then they must disregard it when considering defendant's guilt. *Id.*

The *Hampton* rule is codified in *N.J.R.E.* 104° which provides an pertinent part: "[i]f the judge admits the statement the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible."

In *State v. Jordon*, 147 *N.J.* 409, 425 (1997), the Supreme Court ruled that the *Hampton* charge is required, whether requested or not, whenever a

defendant's oral or written statements, admissions, or confessions are introduced into evidence. The omission of a *Hampton* charge is not *per se* reversible error. It is reversible error only where the omission is clearly capable of producing an unjust result. *See State v. Harris*, 156 *N.J.* 122, 183 (1998); *State v. Crumb*, 307 *N.J. Super*. 204, 250 (App. Div. 1997), *certif. denied*, 153 *N.J.* 215 (1998).

9. Reasonable Doubt

In State v. Medina, 147 N.J. 43 (1996). cert. denied, 520 U.S. 1190 (1997), the Supreme Court adopted a reasonable doubt charge from which trial courts may not deviate. See State v. Dreher, 302 N.J. Super. 408, 468 (App. Div. 1997), certif. denied, 152 N.J. 10 (1997), cert. denied, 524 U.S. 943 (1998). The Court in Medina strongly stated that deviations from this standard "reasonable doubt" charge should not be used. See State v. Fuqua, 303 N.J. Super. 40, 45 (App. Div. 1997).

However, deviation from the standard charge is not necessarily reversible error. *State v. Dreher*, 302 *N.J. Super*. at 468-69. *See State v. Medina*, 147 *N.J.* at 53 (because charge as a whole conveyed State's burden, it did not constitute plain error).

10. After Substitution of a Juror

R. 1:8-2(d)(1) mandates that after the substitution of an alternate juror the trial judge instruct the jury to recommence deliberations. *State v. Trent*, 79 *N.J.* 251, 257 (1979). The failure to comply with this rule constitutes plain error. *State v. Anderson*, 173 *N.J. Super.* 75 (App. Div.), *certif. denied*, 85 *N.J.* 124 (1980).

H. Questions by the Jury

1. As to Jury Instructions

A trial judge has a duty to respond to questions asked by the jury. *State v. Middleton*, 299 *N.J. Super*. 22, 30 (App. Div. 1997); *State v. Marcus*, 294 *N.J. Super*. 267, 291 (App. Div. 1996), *certif. denied*, 157 *N.J.* 543 (1998) (proper response when jury asks about irrelevant matter); *State v. Conway*, 193 *N.J. Super*. 133, 157 (App. Div. 1984), *certif. denied*, 97 *N.J.* 650 (1984). When a jury requests clarification, the trial judge is obligated to clear the confusion. *State v. Graham*, 285 *N.J. Super*. 337, 342 (App. Div. 1995); *State v. Conway, supra*. Depending upon the question propounded, the court may respond affirmatively or negatively, or opt to recharge the jury on selected portions of the instructions. State v. Parsons, 270 N.J. Super. 213, 221 (App. Div. 1994); State v. Lawrence, 142 N.J. Super. 208, 216 (App. Div. 1976). Note also that if the jury sends an inquiry, the judge should consult counsel before responding and should respond in open court. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091 (1975); State v. Graham, 285 N.J. Super. at 341.

2. Reading Testimony to the Jury

The rules governing the reading of testimony at the jury's request are set forth in *State v. Wilson*, 165 *N.J.* 657 (2000) and *State v. Wolf*, 44 *N.J.* 176, 185-186 (1965); *see also State v. Wilkerson*, 60 *N.J.* 452, 460 (1972). The grant of such a request is in the discretion of the trial judge, but the judge should readily accede when the jurors request to hear testimony read, absent some unusual circumstances. *State v. Wilson*, 165 *N.J. at 660; State v. Garrigan*, 126 *N.J. Super.* 442, 446 (App. Div. 1973), *aff'd o.b.*, 64 *N.J.* 287 (1974). The burden of time is not such an unusual circumstance. *State v. Lamb*, 134 *N.J. Super.* 575, 582 (App. Div. 1975), *aff'd*71 *N.J.* 545 (1976).

"[A]s a general rule, if a jury requests a readback of the testimony of a witness, the readback should include both direct and cross-examination." *State v. Wilson*, 165 *N.J.* at 660. However, where a request is clearly circumscribed, it is proper to allow a readback of only a portion of a witness's testimony. *Id.* at 661. "But if the scope of the jury's request is unclear or if something occurs during the readback to raise a question about the extent of the testimony sought, the obligation of the trial court is to ascertain the will of the jury." *Ibid.*

The rule that the judge should accede to a jury's request to have testimony read back to it is not any different where the proceedings are sound recorded rather than stenographically transcribed. *State v. Middleton*, 299 *N.J. Super.* at 31.

See State v. Reddy, 137 N.J. Super. 32, 37 (App. Div. 1975) (where stenographer who had taken requested testimony was on reserve duty during jury deliberations, trial court committed no error in its instruction to the jury that it should first consult its collective recollection and then if it still required the read back, arrangements would be made to have the stenographer return on the following day).

I. Receiving the Jury's Verdict

1. Consistency

It is a well established principle first pronounced in *Dunn v. United States*, 284 *U.S.* 390, 52 *S.Ct.* 189 (1932), and later reaffirmed in *United States v. Powell*, 469 *U.S.* 57, 105 *S.Ct.* 471 (1984) that consistency in verdicts is not required. In *Powell*, the United States Supreme Court explained that inconsistent verdicts - even verdicts that acquit on a predicate offense while convicting on the compound offense - should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. *Id.* at 65, 105 *S.Ct.* at 476.

New Jersey follows the *Dunn/Powell* rule in cases in which the reason for the inconsistent verdict cannot be established. State v. Grey, 147 N.J. 4 (1996); State v. Ellis, 299 N.J. Super. 440, 456 (App. Div.), certif. denied, 151 N.J. 74 (1997). The Grey Court explained: the Dunn and Powell decisions are not binding but the Court agrees with their logic. So long as the evidence is sufficient to support a conviction on the substantive offense beyond a reasonable doubt, such verdicts are normally permitted. The Dunn/Powell rule permitting inconsistent verdicts should apply when the reason for the inconsistent verdicts cannot be determined. In such cases, the court should not speculate as to whether the verdicts resulted from jury lenity, compromise, or mistake not adversely affecting the defendant. Id. at 10-11. However, in Grey, because the Court found the inconsistent verdict was an obvious result of jury instructions which misled the jury, the court reversed defendant's felony murder conviction. *Id.* at 17.

2. Molding the Verdict (*See also*, **THEFT**, this Digest)

A judgment of conviction for a lesser included offense may be entered where the jury verdict, of necessity, constitutes a finding that all the elements of lesser included offense have been properly established, and no prejudice to the defendant will result. This rule applies even though the jury was not instructed on the lesser included offense if (1) the defendant has been given his day in court, (2) all the elements of the lesser included offense are contained in the more serious offense, and (3) defendant's guilt of the lesser included offense is implicit in, and a part of, the jury verdict. *State v. Hauser*, 147 *N.J. Super.* 221, 228 (App. Div. 1977), *certif. denied*, 75 *N.J.* 27 (1977). In *State v. Moore*, 330 *N.J. Super.* 535 (App. Div. 2000), the jury was charged with receiving stolen property and the lesser included offense of joyriding, and convicted defendant of the more serious offense. Following trial, the court acknowledged error in the State's proofs on receiving stolen property; it vacated the jury's verdict and reduced defendant's conviction to joyriding. The Appellate Division, relying on *State v. Hauser, supra,* found the error could be cured by reversing that conviction and substituting the lesser offense as the trial court did. *Id.* at 542-43.

In *State v. Gallagher*, 286 *N.J.* 1, 14 (App. Div. 1995), *certif. denied*, 146 *N.J.* 569 (1996), the Appellate Division found that molding the verdict to the lesser included offense of attempted aggravated assault was not appropriate where the jury was improperly charged on the convicted offense of aggravated sexual assault by anal penetration, because the appellate court did not know which lesser-included offense the jury might have found defendant committed.

A verdict cannot be molded to a crime, other than, but related, to the crime for which he was convicted if the crime actually proved was not charged in the indictment. *State v. Burden*, 203 *N.J. Super.* 149, 157 (Law Div. 1985). In *State v. Mergott*, 140 *N.J. Super.* 126, 133 (App. Div. 1976), the jury returned guilty verdicts against the defendants for the crime of assault with intent to kill but the Appellate Division held that there was insufficient evidence to sustain the convictions. In response to the State's suggestion that the verdicts should be molded to the offense of assault with a dangerous weapon, the court refused and noted that the jury had no opportunity to consider the weapons offense.

However, a guilty verdict under an incorrect statutory designation may be molded after conviction so long as the defendant would not be harmed or prejudiced. Thus, molding a verdict is proper where the evidence presented to the grand jury, the proofs at trial and the procedure followed would all have been the same even if the proper statute had been charged. *State v. Gledhill*, 129 *N.J. Super.* 113, 117 (App. Div. 1974), *mod. on other gds.* 67 *N.J.* 565 (1975). *See also State v. Fariello*, 133 *N.J. Super.* 114, 121 (App. Div. 1975), *rev'd other gds.* 71 *N.J.* 552 (1976).

Moreover, the jury's verdict cannot be molded to conform with its evident intention where it has rendered a legally unsustainable verdict. *See State v. McCoy*, 114 *N.J. Super.* 479 (App. Div. 1971) (rejecting jury's verdict of guilty of robbery and holding that a new trial was required on the attempt charge, the court rejected the State's argument that the jury, having convicted defendant of robbery, would surely have found him guilty of the attempt had it been properly charged).

In *State v. Carlos*, 187 *N.J. Super.* 406 (App. Div. 1982), the Appellate Division noted that a guilty verdict on a greater offense may be molded and reduced by a court to convict on a lesser included offense on a finding that the conviction for the greater offense was not justified. *See also State v. Singleton*, 308 *N.J. Super.* 407, 414 n.1 (App. Div. 1998).

III. POST-TRIAL MOTIONS

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

The standard to be applied by the trial court in determining the motion is the same as that applicable to a motion for acquittal made at end of State's case or at end of the entire case, that is, "whether the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt. . . . On such a motion the trial judge is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. Kluber, 130 N.J. Super. 336, 341-342 (App. Div. 1975), certif. denied, 67 N.J. 72 (1975); See also State v. Kleinwaks, 68 N.J. 328 (1975); State v. DeRoxtro, 327 N.J. Super. 212, 224 (App. Div. 2000); State v. Speth, 323 N.J. Super. 67, 81 (App. Div. 1999); State v. Rodriguez, 141 N.J. Super. 7, 11-12 (App. Div. 1976), certif. denied, 71 N.J. 495 (1976) (distinguishing standard under this rule from standard applicable to new trial motion under R. 3:20-1).

- B. Motion for New Trial
 - 1. Procedural Questions

Pursuant to *R.* 3:20-2, a motion for new trial based on the ground of newly discovered evidence may be made at any time. A motion for new trial based on a claim that defendant did not waive his or her appearance for trial must be made prior to sentencing. A motion for new trial based on any other ground shall be made within 10 days after the verdict or finding of guilty, or within such further time as the court fixes during the 10-day period.

Where an appeal is pending and defendant moves for a new trial on the ground of newly discovered evidence, the merits of the motion should first be considered by the trial court but after the disposition of the appeal. *State v. Cappadona*, 127 *N.J. Super.* 555, 559-60 (App. Div. 1974), *certif. denied*, 65 *N.J.* 574 (1974), *cert. denied*, 419 *U.S.* 1034 (1974).

A motion for new trial based on the ground that the verdict was against the weight of the evidence must be made in the trial court in order to preserve that ground on appeal. *R.* 2:10-1. *See State v. McNair*, 60 *N.J.* 8, 9 (1972); *State v. Smith*, 262 *N.J. Super.* 487 (App. Div.), *certif. denied*, 134 *N.J.* 476 (1993); *State v. Pickett*, 241 *N.J. Super.* 259, 266 (App. Div. 1990); *State v. Johnson*, 203 *N.J. Super.* 127, 133 (App. Div.), *cert. denied*, 102 *N.J.* 312 (1985).

2. Based Upon Weight of the Evidence

A trial judge shall not "set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law." 3:20-1. The standard is whether R. "reasonable minds might accept the evidence as adequate to support the jury verdict." Dolson v. Anastasia, 55 N.J. 2, 6 (1969). In ruling on such a motion, the objective is not to second-guess the jury but to correct an injustice that would result from an obvious jury error. State v. Saunders, 302 N.J. Super. 509, 524 (App. Div.), certif. denied, 151 N.J. 470 (1997). The weight of the evidence argument only applies to jury trials. State in Interest of *R.V.*, 280 *N.J. Super.* 118, 121 (App. Div. 1995).

Under *R.* 2:10-1, a new trial motion must be made in the trial court to preserve for appeal the weight of the evidence issue. Nonetheless, an appellate court may consider the merits of defendant's argument in the interest of justice. *State v. Scherzer*, 301 *N.J. Super.* 363, 407 (App. Div.), *certif. denied*, 151 *N.J.* 466 (1997).

3. Based Upon Subsequent Recantation by Trial Witnesses

Our courts regard recantation of testimony as inherently suspect. *State v. Carter*, 69 *N.J.* 420, 427 (1976); *State v. Engel*, 249 *N.J. Super.* 336, 385-87 (App. Div.), *certif. denied*, 130 *N.J.* 393 (1991). The appropriate test is "whether the testimony given at the trial was probably false" and whether "on that account there is a substantial possibility of [a] miscarriage of justice." *Id.* at 386, quoting *State v. Baldwin,* 47 *N.J.* 379, 400 (1966), *cert. denied,* 385 *U.S.* 980 (1966). The credibility determination of recantation testimony is peculiarly a question for the trial judge. *State v. Carter,* 69 *N.J.* at 427; *State v. Engel,* 249 *N.J. Super.* at 386. Appellate courts should defer to trial judges on this issue. *Id.*

4. Based Upon Newly Discovered Evidence

Newly discovered evidence warrants a new trial only if the evidence is: (1) material to the issue and not merely cumulative, impeaching or contradictory; (2) discovered since trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted. State v. Bey, 161 N.J. 233, 287 (1997), cert. denied, 120 S.Ct. 2693, 147 L.Ed.2d 964 (2000); State v. Carter, 85 N.J. 300, 314 (1981); State v. Russo, 333 N.J. Super. 119, 136-37 (App. Div. 2000); State v. Henries, 306 N.J. Super. 512, 529 (App. Div. 1997). All three requisites of this tripartite test must be met. State v. Engel, 249 N.J. Super. at 402. Moreover, where the credibility of newly proffered testimony is at issue, deference should be accorded the trial judge's assessment of the proffered evidence and his first-hand familiarity with the case. State v. Puchalski, 45 N.J. 97, 108 (1965). Courts are skeptical of after-acquired statements from witnesses with an interest in the outcome of the case. Id.

A new trial on the ground of newly discovered evidence cannot be granted where the evidence on which defendant relies was either discoverable by reasonable diligence prior to trial or consisted of hearsay. *State v. Hall*, 183 *N.J. Super.* 224 (App. Div. 1982), *aff'd*, 93 *N.J.* 552 (1983), *cert. denied, sub. nom. Hall v. New Jersey*, 464 *U.S.* 1008 (1983).

5. Based Upon Alleged Violation of *Brady v. Maryland*, 373 *U.S.* 83 (1963)

See State v. Russo, 333 N.J. Super. at 134. See also **DISCOVERY**, this Digest.

IV. RESTRICTIONS PLACED UPON JUDGES

A. Disqualification

Both a court rule, *R.* 1:12-1, and a statute, *N.J.S.A.* 2A:15-49, govern the potential disqualification of a

judge on the court's own motion. *Magill v. Casel,* 238 *N.J. Super* 57, 62 (App. Div. 1990). In *State v. Horton,* 199 *N.J. Super.* 368 (App. Div. 1985), the court analyzed both provisions and concluded that, since a single standard should be understood, the provisions of the rule should apply. There, the trial judge formerly represented defendant in a juvenile matter. Although the court noted that technically there would be no disqualification under *R.* 1:12-1(c), there was disqualification under subsection (f). The court directed that since the matter was remanded for retrial that the retrial be held before a different judge.

R. 1:12-1 sets forth six instances of mandatory disqualification by a judge. Case law has interpreted some of the proscriptions set forth in the rule. *See generally State v. Marshall*, 148 *N.J.* 89, 275 (1997).

As to paragraph (b), *see State v. Connolly*, 120 *N.J. Super.* 511 (App. Div. 1972), holding that a trial judge must disqualify himself from a criminal trial by the county prosecutor's office if he bears the stipulated degree of relationship (is by blood or marriage the first cousin of or more closely related) to an assistant prosecutor, whether or not that relative has in any way participated in the case. However, no reversible error was found in the trial judge's failure to have so done because his failure was inadvertent, and defendant neither objected to his sitting nor thereafter claimed prejudice.

As to paragraph (d), *see State v. Marshall*, 148 *N.J.* at 278 ("the effect of paragraph (d) is directed primarily at statements outside of the declarant's role as a judge.").

Paragraph (f) mandates disqualification "when there is any other reason which might preclude a fair and unbiased hearing and judgement, or which might reasonably lead counsel or the parties to believe so." For example, the following instances were held to come within the proscription of the provision. See State v. Tucker, 264 N.J. Super. 549 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994) (judge who as assistant prosecutor presented case which involved defendant to a grand jury was required to recuse himself; denial of reversal motion resulted in reversal of conviction); State v. Horton, supra, (judge disqualified by prior representation of defendant in different action); State v. Utsch, 184 N.J. Super. 575 (App. Div. 1982) (municipal court judge properly disqualified himself on his own motion following an unwarranted personal attack by defendant's attorney.)

The following instances were held not to come within the proscription of (f). State v. Marshall, 148 N.J. at 279 (none of the alleged examples of bias or prejudice warranted disqualification of same PCR judge who had presided over defendant's trial); State v. Bisaccia, 319 N.J. Super 1, 21 (App. Div. 1999) (fact that wiretap authorization judge had previously, as county prosecutor, defended appeals and habeas corpus in a separate earlier appeal brought by defendants did not require suppression of wiretaps); State v. Salentre, 275 N.J. Super 410 (App. Div.), certif. denied, 138 N.J. 269 (1994) (judge's rejection of plea agreement does not disqualify him from presiding over ensuing trial); State v. Leverette, 64 N.J. 569 (1974) (holding that trial judge is not disqualified by having expressed displeasure with defense counsel who failed to appear for five successive calendar calls).

In *State v. McNamara,* 212 *N.J. Super.* 102, 108-110 (App. Div. 1986), *certif. denied,* 108 *N.J.* 210 (1987), the Appellate Division held that the fact that the trial judge had been the first assistant prosecutor of the county at the time that the indictment was returned did not require his recusal, relying upon a directive issued by the Administrative Director of the Courts regarding disqualification of trial judges in criminal matters. The Court noted that any relief must be sought from the Supreme Court.

The court rules also provide for disqualification of a judge on a party's motion before trial or argument. *R.* 1:12-2. This motion must be made directly before the judge being sought to be disqualified. *Bonnett v. Stewart,* 155 *N.J. Super.* 326, 330 (App. Div. 1978), *certif. denied* 77 *N.J.* 468 (1978).

"Fundamental to any consideration of possible judicial disqualification is a showing of prejudice or potential bias." *State v. Marshall,* 148 *N.J.* at 276. "An error by a court in the previous proceeding does not necessarily justify an inference of bias and will not, by itself, furnish a ground for disqualification." *Ibid.*

B. Discipline and Removal of Judges

The New Jersey Constitution grants the Supreme Court the authority to remove Superior Court Judges "in such a manner as shall be provided by law." *N.J. Const. 1947,* Art. 6, §6, ¶ 4. The Superior Court also has "jurisdiction over the admission to the practice of law and the discipline of persons admitted." Art. 6, §2, ¶ 3. The Judicial Removal Act, *N.J.S.A.* 2B:2A-1 (formerly *N.J.S.A.* 2A:1B-1) was enacted in 1970 to "implement

removal procedures as authorized generally under the Constitution." *Matter of Yaccarino*, 101 *N.J.* 342, 350 (1985). The Act leaves "much to the Supreme Court's discretion, both by implication - by failing to define proceedings in more detailed and restrictive terms - and explicitly - by providing that [e]xcept as otherwise provided in this act, proceedings shall be governed by rules of the Supreme Court." *In re Coruzzi*, 95 *N.J.* 557, 570 (1984), *appeal dismissed*, 469 *U.S.* 802 (1984).

The New Jersey Supreme Court has promulgated rules regarding the discipline of judges. *R.* 2:14 and *R.* 2:15. *See Hunter v. Supreme Court of New Jersey*, 951 *F. Supp.* 1161, 1164 (D.N.J. 1996), *aff'd*, 118 *F.*3d 1575 (3d Cir 1997). As to removal, *see Matter of Imbriani*, 139 *N.J.* 262 (1995); as to suspension, *See Matter of Seaman*, 133 *N.J.* 67 (1993); as to discipline, *see Matter of Sodofski*; 98 *N.J.* 434 (1985).

CREDIT CARDS

(See also, FORGERY, this Digest)

I. PROVISIONS OF THE STATUTE

N.J.S.A. 2C:21-6c provides that it is a fourth-degree crime for any person to take, obtain, use, retain, receive, sign, sell, transfer, or accept a credit card with the intent to obtain or provide property or services if that person knows that the card is stolen, forged, lost, revoked, cancelled, expired or that the use is, for any other reason, unauthorized by the issuer or owner of the card.

It is also a fourth-degree crime to knowingly make a false statement in procuring the issuance of a credit card. *N.J.S.A.* 2C:21-6b.

N.J.S.A. 2C:21-6c(5) provides that is a third-degree crime to make, falsely emboss, or utter such a credit card with the intent to obtain property or services.

N.J.S.A. 2C:21-6d provides that it is a third-degree crime for a person with fraudulent intent to use a forged, expired, or non-issued credit card with knowledge of its nature to obtain property or services.

N.J.S.A. 2C:21-6e(1) provides that it is a thirddegree crime for a person authorized by the issuer to furnish property or services with fraudulent intent to furnish property or services upon presentation of an unauthorized credit card, with knowledge of its forged, expired, or revoked nature.

N.J.S.A. 2C:21-6e(2) provides that it is a fourthdegree crime for a person authorized by the issuer to furnish property or services with fraudulent intent to fail to furnish property or services upon presentation of a credit card, while reporting in writing to the issuer that he has furnished property or services.

N.J.S.A. 2C:21-6f provides that it is a third-degree crime for a person other than the cardholder to possess two or more incomplete credit cards or reproduction instruments with knowledge of their character with intent to complete or reproduce without consent of the issuer.

N.J.S.A. 2C:21-6g provides that it is a fourth-degree crime to receive property or services with the knowledge that such property or services were obtained in violation of this section.

N.J.S.A. 2C:21-6h provides that is a third-degree crime for a person with fraudulent intent to knowingly use a counterfeit, fictitious, altered, forged, lost, stolen or fraudulently obtained credit card to obtain property or services. It is also a third-degree crime for a person with unlawful or fraudulent intent to furnish, acquire, or use an actual or fictitious credit card, whether alone or together with names of credit card holders, or other information pertinent to a credit card account in any form.

II. OVERLAPPING STATUTES

In *State v. Gledhill*, 67 *N.J.* 565 (1975), the question presented in this pre-Code case was whether one who utters a false or forged credit card with intent to damage or defraud another may be prosecuted under *N.J.S.A.* 2A:109-1b, a section of the forgery statute, or whether prosecution had to come under *N.J.S.A.* 2A:111-43, a section of the credit card act. The Supreme Court held that the fact that both *N.J.S.A.* 2A:109-1b and *N.J.S.A.* 2A:111-43 would apply to the same type of conduct and that the credit card act was a later enactment dealing specifically with offenses stemming from the possession of use of credit cards does not mandate a conclusion that prosecution under *N.J.S.A.* 2A:109-1b was precluded. Specific conduct may violate more than one statute.

III. UNAUTHORIZED USE OF A CREDIT CARD

Where the owner of the credit card had no knowledge of its use in a car rental transaction, and where the rental agency, unaware of the perpetrated fraud, furnished the automobile to the user, such unauthorized use amounted to a conversion and a criminal offense. *Zuppa v. Hertz Corporation*, 111 *N.J. Super.* 419, 421, 423 (Cty. Ct. 1970). Unauthorized use may also result in disbarment even without a criminal conviction. *In re Maurello*, 121 *N.J.* 466, 479-82 (1990).

CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment of the United States Constitution and Article I, ¶ 12 of the New Jersey Constitution both prohibit the imposition of "cruel and unusual" punishment. This provision is irrelevant to situations which do not involve the imposition of penal sanctions. *In re Quinlan*, 70 *N.J.* 10, 37 (1976).

The state and federal constitutions impose a three part test to determine whether a punishment is cruel and First, does the punishment for the crime unusual. conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective? Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); State v. Oliver, 162 N.J. 580, 588 (2000); State v. Maldonado, 137 N.J. 536, 556-57 (1994). Using this analysis, the United States Supreme Court has determined that imposition of the death penalty for a crime less than murder violates the Eighth Amendment, Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977) (death sentence for rape), as is a statute which permits the imposition of the death penalty upon a person less than 16 years of age. Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988); Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

I. KINDS OF PUNISHMENT IMPOSED

The legislature has broad authority to determine the types of and limits on punishment imposed for crimes. United States v. Bajakajian, 524 U.S. 321, 336, 118 S.Ct. 2028, 2036, 141 L.Ed.2d 314 (1998); Solem v. Helm, 463 U.S. at 290, 103 S.Ct. at 3009, 77 L.Ed.2d 637; State v. Schad, 160 N.J. 156, 184 (1999). Few punishments are judged to be so severe as to violate the cruel and unusual punishment clause. In Solem v. Helm, however, the Supreme Court determined that a life sentence without possibility of parole imposed upon a defendant convicted of uttering a bad check under a recidivist statute was grossly disproportionate to the offense committed. In making its determination, the Court analyzed (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, i.e., whether more serious crimes were subjected to the same penalty or less serious penalties and (3) the sentences imposed for the commission of the same crime in other jurisdictions.

In Harmelin v. Michigan, 501 U.S. 957, 961-95, 111 S.Ct. 2680, 2684-2701, 115 L.Ed.2d (1991), several justices argued that the Eighth Amendment does not require proportionate punishments. However, in United States v. Bajakajian, 524 U.S. at 336-37, 118 S.Ct. at 2037-38, 141 L.Ed.2d 314, the Court "adopted" the standard of gross disproportionality for determining, under the "excessive fines" clause of the Eighth Amendment, whether the amount of forfeiture ordered is grossly disproportional to the gravity of the defendant's offense. See also Austin v. United States, 509 U.S. 602, 609-10, 113 S.Ct. 2801, 2805, 125 L.Ed.2d 488 (1993) (Excessive Fines Clause limits the government's power to extract payments as punishment for an offense); State v. Schad, 160 N.J. at 184 (applying proportionality test to fines).

The New Jersey Supreme Court has "avoided entering the debate" about the scope of the Eighth Amendment, *State v. Oliver*, 162 *N.J.* at 588, and has continued to apply the three part test for judging whether a particular punishment is cruel and unusual.

Using this criteria, the New Jersey courts have upheld against constitutional attack: the No Early Release Act, N.J.S.A. 2C:43-7.2, State v. Johnson 166 N.J. 523, 766 (2001); the Three Strikes Law, N.J.S.A. 2C:43-7.1a, State v. Oliver, 162 N.J. at 588-89; the Graves Act, N.J.S.A. 2C:43-6, State v. DesMarets, 92 N.J. 62 (1983); the victim impact provision of the death penalty statute, N.J.S.A. 2C:11-3c(6), State v. Muhammad, 145 N.J. 23, 36 (1996); registration of sex offenders, N.J.S.A. 2C:7-1 et seq., Doe v. Poritz, 142 N.J. 1, 73-74 (1995); the mandatory Drug Enforcement and Demand Reduction (DEDR) penalty, N.J.S.A. 2C:35:15, State v. Lagares, 127 N.J. 20, 36-37 (1992); the strict liability for drug induced death statute, N.J.S.A. 2C:35-9, State v. Maldonado, 137 N.J. at 537-38; forfeiture of office upon conviction of a crime, N.J.S.A. 2C: 51-2a, State v. Timoldi, 277 N.J.Super. 297, 299-302 (App. Div. 1994); and the 30 year mandatory sentence for conviction of murder, N.J.S.A. 2C:11-3b, State v. Johnson, 206 N.J.Super. 341 (App. Div. 1985).

I LIMITATIONS ON CONDUCT WHICH MAY BE CRIMINALIZED

In *Robinson v. California*, 370 *U.S.* 660, 666-67, 82 *S.Ct.* 1417, 1420-21, 8 *L.Ed.*2d 758 (1962), the Court ruled that the legislature could not criminalize and

punish a person for his or her status, It therefore found unconstitutional a statute which authorized a conviction for the "crime" of being a heroin addict. However, such a "status" does not immunize the chronic alcoholic or addict. Rather, states may criminalize an action which goes beyond the individual's status. In State v. Margo, 40 N.J. 188, 190-91 (1963), the Supreme Court upheld a conviction for being under the influence of drugs, rejecting the claim that the statute punished the defendant's status. See also State v. Fearick, 69 N.J. 33, 40 (1976) (mandatory jail term for defendant who was driving with suspended sentence and was involved in accident resulting in physical injury constitutional even if defendant was not at fault); State v. Housman, 131 N.J.Super. 478, 480-81 (App. Div. 1974) (mandatory imprisonment for drunken driving not unconstitutional even if defendant is a chronic alcoholic).

A conviction for illegal reentry into the United States does not punish status. *United States v. Hernandez-Landaverde*, 65 *F.Supp.*2d 567, 570 (S.D. Tex. 1999).

III. DEATH PENALTY (See also, CAPITAL PUNISHMENT, this Digest)

IV. CONDITIONS OF CONFINEMENT

A. Generally

The Constitution "does not mandate comfortable prisons", *Rhodes v. Chapman*, 452 *U.S.* 337, 349, 101 *S.Ct.* 2392, 2400, 69 *L.Ed.*2d 59 (1981) (double-celling or overcrowded conditions not per se violations Eighth Amendment violations). However, deprivations of basic human needs, which include habitable shelter, food, medical care, sanitation and exercise, *Wilson v. Seiter*, 501 *U.S.* 294, 304-05, 111 *S.Ct.* 2321, 2327-28, 115 *L.Ed.*2d 271 (1991), or conditions which cause an increase in violence among inmates or create other conditions intolerable for prison confinement do violate the Eighth Amendment. *Rhodes v. Chapman*, 452 *U.S.* at 348, 101 *S.Ct.* at 2400, 69 *L.Ed.*2d 59; *Ingalls v. Florio,* 968 *F.Supp.* 193, 197-98 (D.N.J. 1997).

Prison officials may not use excessive physical force against prisoners, *Hudson v. McMillan*, 503 *U.S.* 1, 112 *S.Ct.* 995, 117 *L.Ed.*2d 156 (1992), and have a duty to protect prisoners from violence at the hands of other prisoners, *Farmer v. Brennan*, 511 *U.S.* 825, 832, 114 *S.Ct.* 1970, 1977, 128 *L.Ed.*2d 811 (1994).

In order to make out an Eighth Amendment claim in prison condition cases, an inmate must show that prison officials acted with deliberate indifference to a substantial risk of harm to inmate health or safety. Farmer v. Brennan, 511 U.S. at 834, 834, 114 S.Ct. 1977, 128 L.Ed.2d 811; Ingalls v. Florio, 968 F.Supp. at 198. The "deliberate indifference" standard is inapplicable to cases in which prison officials are accused of using excessive physical force. In these situations, where the decisions of prison officials are made "in haste, under pressure, and frequently without the luxury of a second chance," Hudson v. McMillan, 503 U.S. at 6, 112 S.Ct. at 998, 117 L.Ed.2d 156, an Eighth Amendment claim must show that officials applied force "maliciously and sadistically" for the very purpose of causing harm. Id.; Ingalls v. Florio, 968 F.Supp. at 199.

B. Medical Care

Denial of medical care resulting in pain and suffering that serves no penological purpose violates the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976). Failure to provide medical care to a person in custody rises to the level of a constitutional violation only if the failure constitutes a deliberate indifference to an inmate's serious medical needs. Ingalls v. Florio, 968 F.Supp. at 201. A medical need is "serious" (1) if it is one diagnosed by a physician as requiring treatment or is one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention; (2) if unnecessary and wanton infliction of pain results as a denial or delay in giving medical care; or (3) where denial or delay causes an inmate to suffer a life-long handicap or permanent loss. Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988).

C. Legal Access

Prisoners have a fundamental right of access to the courts which requires prison authorities to provide adequate law libraries or adequate assistance from persons trained in the law. *Bounds v. Smith*, 430 *U.S.* 817, 97 *S.Ct.* 1491, 52 *L.Ed.*2d 72 (1977). An inmate must demonstrate "actual injury" from the denial of access, which is defined as a hindrance to an inmate's efforts to pursue a non-frivolous legal action. *Lewis v. Casey*, 518 *U.S.* 343, 116 *S.Ct.* 2174, 2180-81, 135 *L.Ed.*2d 606 (1996). Actual injury can be shown only if the legal action is a direct or collateral attack upon the inmate's

sentence or is a challenge to the conditions of confinement. *Id.* at 355-56, 116 *S.Ct.* 2181-82, 135 *L.Ed.*2d 606. Even where actual injury is shown, valid penological interests, such as heightened restrictions on prisoners in disciplinary lockdown, may properly impinge upon the inmate's right of access. *Id.* at 361, 116 *S.Ct.* at 2185, 135 *L.Ed.*2d 606.

D. Religious Access

When a prison regulation impinges on an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The factors to consider in deciding whether the regulations are reasonable are 1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. If not, the regulation is unconstitutional. The remaining three factors must be balanced together: (2) whether there are alternative means of exercising the right that remain open to prison inmates, (3) the impact that accommodation of the asserted right will have on guards and other inmates and on the allocation of prison resources generally and (4) whether there are ready alternatives available that accommodate the inmate's rights at a minimal cost to valid penological interests. Id. at 90-91, 107 S.Ct. at 2262, 96 L.Ed.2d 64; Spies v. Voinovich, 173 F.3d 398, 493 (6th Cir. 1999). These same considerations apply when the prison regulation impacts upon the free exercise of religion. O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987).

The Congress attempted to overrule *Shabazz* by enacting the Religious Freedom Restoration Act (RFRA), but the Supreme Court ruled the statute unconstitutional. *City of Boerne v. Flores,* 521 *U.S.* 507, 117 *S.Ct.* 2157, 138 *L.Ed.*2d 624 (1997).

I. INTRODUCTION

Prior to the adoption of the New Jersey Code of Criminal Justice, virtually no statutes discussed the general principles of criminal law, such as concepts of culpability. The drafters of the Criminal Code recognized the need for provisions on such topics as culpability, responsibility, justification and excuse to modernize and rationalize the penal laws. I Final Report of the New Jersey Criminal Law Revision Commission, at pp. v to ix (1971). The new code sought to match the degree of the offense with the actual culpability. Thus, one of the purposes of the Code is "to differentiate on reasonable grounds between serious and minor offenses." N.J.S.A. 2C:1-2a(5). By sufficiently defining forbidden conduct, the Code gives fair warning of the nature of the conduct proscribed and creates a foundation for a fair sentencing *N.J.S.A.* 2C:1-2a(4). The Code's general system. requirements of culpability are set forth in N.J.S.A. 2C:2-2, and this section is central to the entire Code. See Cannel, Criminal Code Annotated, comment N.J.S. 2C:2-2, (Gann 2000).

II. MENS REA REQUIREMENTS UNDER THE CODE OF CRIMINAL JUSTICE

N.J.S.A. 2C:2-2b(1)-(4) sets forth four mental states: purpose; knowledge; recklessness; and negligence. Under N.J.S.A. 2C:2-2b(1), a person acts "purposely" with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. Certain crimes in the Code (*i.e.*, purposeful or knowing murder, 2C:11-3, and aggravated assault, 2C:12-b(1)), have "equivalent expressions" of moral culpability, State v. Cooper (I), 151 N.J. 326, 360 (1997), quoting State v. Bey (III), 129 N.J. 557, 582 (1992), meaning either a purposeful or a knowing mental state will suffice for conviction. But, with other crimes, such as the crime of attempt, purposeful action is required. State in the Interest of S.B., 333 N.J. Super. 236, 242 (App. Div. 2000). Hence, the requirement of a "conscious object" becomes key. See State v. McAllister, 211 N.J. Super. 355, 362 (App. Div. 1986). The requirement of purposeful action is required even if the substantive crime which is the object of the attempt requires less than purposeful conduct. Thus, purposeful action is required for the crime of attempted murder, even though the lesser culpable mental state of knowingly will suffice for purposeful or knowing murder. State v. Rhett, 127 N.J. 3, 6 (1992). See also State v. Jackmon, 305 N.J. Super. 274 (App. Div. 1997), certif. denied, 153 N.J. 49 (1998); State v. Sette, 259 N.J. Super. 156 (App. Div. 1992), certif. denied, 130 N.J. 597 (1992).

A defendant's "conscious object" to engage in certain conduct or to cause a particular result may be inferred from the nature of the criminal conduct, such as where the defendant's attack was so brutal that the jury could have concluded only that defendant's purpose, or "conscious object," was to kill. E.g., State v. Harvey (II), 151 N.J. 117, 150 (1997); State v. Harris, 141 N.J. 525, 547 (1995); State v. Bey (III), 129 N.J. at 580; State v. Biegenwald (IV), 126 N.J. 1, 18 (1991); State v. McDougald, 120 N.J. 523, 558-560 (1990); State v. Rose (II), 120 N.J. 61, 63-64 (1990); State v. Pitts, 116 N.J. 580, 617-618 (1989). The State also may use evidence under Evid. R. 404(b) to prove that defendant acted purposely. See State v. Nance, 148 N.J. 376 (1997) (defendant's bad conduct against third party, former girlfriend, relevant to defendant's motive for killing victim about whom defendant was jealous). In a related context, the Supreme Court has noted that there are no legal rules as to what inferences may be drawn from the evidence, except that it is a question of "logic and common sense." State v. Powell, 84 N.J. 305, 314 (1980).

Under section 2C:2-2b(2), a person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. Similarly, a person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. With respect to the result of conduct, the Supreme Court in State v. Clausell, 121 N.J. 298, 316 (1990), ruled that the defendant's convictions for knowing aggravated assault could not be sustained unless defendant knew he was pointing his gun at the non-decedent victims or near them when he fired his gun. However, in State v. Zeidell, 154 N.J. 417, 434 (1998) the Court construed "tender-years-sexual assault" under 2C:14-2b, to require that defendant engage in sexual touching "in view of" an underage child who defendant knows to be present. The underage child does not have to observe defendant's conduct. Id. As with purposeful conduct, a defendant's knowledge that a result is "practically certain" to occur may be inferred from the facts and circumstances of the crime. State v. Rose (I), 112 N.J. 454, 484 (1988).

Under N.J.S.A. 2C:2-2b(3), a person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. A defendant acts recklessly under the Code's definition when he disregards a risk known to him; he must "consciously disregard" the risk. See State v. Niemeyer, 195 N.J. Super. 559, 562 (Law Div. 1994) (recklessness requires some measure of awareness or knowledge of risk). Thus, in State v. Parsons, 270 N.J. Super. 213 (App. Div. 1994), the court ruled that in order to be guilty of recklessly causing injury to a police officer under 2C:12-1, defendant had to disregard the risk of injury, and defendant had to know the victim was an officer.

In determining whether a defendant acted recklessly, the jury may take into account all of the relevant conduct. *State v. Powell*, 84 *N.J.* at 320-324. Defendant's support for an instruction based on recklessness only need be plausible; it need not be the most probable explanation. *Id.* at 322. Note that for aggravated manslaughter, 2C:11-4(a), and aggravated assault, 2C:12-1(b)(1), the Code requires a higher degree of recklessness than that in 2C:2-2b(3) -- that is, the defendant must act recklessly under circumstances manifesting extreme indifference to the value of human life. *See generally, State v. Farrell*, 250 *N.J. Super.* 386, 390 (App. Div. 1991); *State v. Curtis*, 195 *N.J. Super.* 354, 364-365 (App. Div. 1984), *certif. denied*, 99 *N.J.* 212 (1984).

Under *N.J.S.A.* 2C:2-2b(4), a person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

III. CONSTRUCTION OF STATUTES WITH RESPECT TO CULPABILITY REQUIREMENTS

The Code contains specific provisions regarding statutory interpretation of culpability requirements. *N.J.S.A.* 2C:2-2c(1), (2), (3).

If a statute includes a prescribed kind of culpability but fails to distinguish among the material elements of the offense, the indicated kind of culpability applies to all of the material elements unless a contrary purpose plainly appears. *N.J.S.A.* 2C:2-2c(1).

The definition of "material element of an offense" appears in N.J.S.A. 2C:1-14i, and it pertains to the harm or evil, incident to conduct, sought to be prevented by the law defining the offense or to the existence of a justification or excuse for such conduct. Thus, the mens rea requirement for the statute at issue must relate to every aspect of the defendant's conduct, the surrounding circumstances and the results. For example, in State v. Florez, 134 N.J. 570, 595 (1994), the Supreme Court held that the quantity of drugs possessed by a defendant is a material element under N.J.S.A. 2C:35-5, possession with intent to distribute. However, the Appellate Division has ruled that defendant's knowledge of the weight of the drugs in his possession is not a material element. State v. Moore, 304 N.J. Super. 135, 146 (App. Div. 1997); State v. Torres, 236 N.J. Super. 6, 9-13 (App. Div. 1989). The activities that define a leader of a narcotics-trafficking network under 2C:35-3 have been deemed to be material elements. State v. Burgess, 154 N.J. 181, 185 (1998). See also State v. Moll, 206 N.J. Super. 257, 259-260 (App. Div. 1986), certif. denied, 103 N.J. 498 (1986).

When the law provides that a particular kind of culpability suffices to establish an element of an offense, this element is also established if a person acts with a higher kind of culpability. *N.J.S.A.* 2C:2-2c(2). The rule of this subsection is simple: if the Legislature requires a particular culpability level, then that level or any higher level will satisfy the requirement. *Cannel, Criminal Code Annotated,* Comment *N.J.S.* 2C:2-2 (Gann 2000). In a related vein, if alternative kinds of mental states were proscribed for an offense, pleading the most serious culpability state suffices for submitting lesser kinds of culpability to the jury. *State v. Murphy,* 185 *N.J. Super.* 72, 76 (Law Div. 1982).

Although a statute fails to express a culpable mental state, it may nevertheless be required if the proscribed conduct necessarily involves such a culpable mental state.

Unless the Legislature clearly indicates an intent to impose strict liability, a criminal statute that does not indicate the culpable mental state is presumed to include "knowledge" as the appropriate level of culpability. N.J.S.A. 2C:2-2c(3). See State v. Sewell, 127 N.J. 133 (1992). This provision differs from the gap filler section of the Model Penal Code, M.P.C. § 2.02(3), which requires that a person must be at least reckless with respect to circumstance and result elements and at least knowing with respect to conduct elements. See Note: "Implied Culpability Terms in an Offense Definition: Problems with the 'Gap Filler' Provisions of the New Jersey Code of Criminal Justice," 13 Rutgers L.J. 775 (Summer 1982). In State v. Kiejdan, 181 N.J. Super. 254 (App. Div. 1981), the defendant was charged with violating a municipal ordinance requiring the owner of a multi-unit residential property to provide tenants with heat. In response, the defense attempted to excuse the conduct by showing that vandals continually frustrated efforts to repair the heating system. The court, however, found a clear legislative intent to impose strict liability as part of a regulatory scheme to protect public health and safety. It held that the code section, *N.J.S.A.* 2C:2-2c(3), does not prohibit penal strict liability legislation but rather recognizes the legislative authority to enact such legislation, provided only its intent to do so is clearly stated. See also State v. Resorts International Hotel, Inc., 173 N.J. Super. 290, 299 (App. Div. 1980), certif. denied, 84 N.J. 466 (1980); State v. Feintuch, 150 N.J. Super. 414 (App. Div. 1977); State v. Hofford, 152 N.J. Super. 283 (Law Div. 1977); State v. Michalek, 207 N.J. Super. 340 (Law Div. 1985).

IV. IGNORANCE AND MISTAKE (See also, DEFENSES, this Digest)

Ignorance as to whether the conduct constitutes an offense or as to the meaning or application of the law determining the offense is no excuse unless the definition of the offense so prescribes. *N.J.S.A.* 2C:2-2d; *State v. Savoie*, 67 *N.J.* 439, 458-459 (1979). Consciousness of wrongdoing or intention to commit a crime are not required absent a statute clearly specifying such mental states. *N.J.S.A.* 2C:2-2d. While knowledge of the criminal law is not a requisite element of an offense, reasonable ignorance or mistake as to a legal relationship established as a statutory element of the offense may negate the required mental culpability. *Id.; see N.J.S.A.* 2C:2-4.

V. CULPABILITY AS DETERMINANT OF GRADE OF OFFENSE

When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or criminally negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense. *N.J.S.A.* 2C:2-2e.

DEFENSES

(See also, ALIBI, INSANITY/DIMINISHED CAPACITY, INTOXICATION, SELF-DEFENSE, this Digest)

I. GENERALLY

N.J.S.A. 2C:2-5 provides that all defenses which existed prior to the Code and are not covered by it survive. *N.J.S.A.* 2C:1-13 defines a defense as affirmative when either the Code so provides or it relates to an offense defined by a statute other than the Code and the statute so provides.

II. PLEADINGS

Pursuant to R. 3:12-2, a defendant who intends to rely in any way on an alibi, within ten days after a written demand by the prosecutor, must furnish a signed notice of alibi, stating the specific place or places at which the defendant claims to have been at the time of the offense and the names and addresses of the witnesses on whom defendant intends to rely.

Pursuant to R. 3:12-1, a defendant who intends to claim the defense of ignorance or mistake, 2C:2-4c; accomplice: renunciation terminating complicity, 2C:2-6e(3); intoxication, 2C:2-8d; duress, 2C:2-9a; entrapment, 2C:2-12b; general principles of justification, 2C:3-1 to 2C:3-11; insanity, 2C:4-1; lack of requisite state of mind, 2C:4-2; criminal attempt (renunciation of criminal purpose), 2C:5-1d; conspiracy (renunciation of criminal purpose), 2C:5-2e; murder (affirmative defense, felony murder), 2C:11-3a(3); criminal restraint, 2C:13-2b; theft by extortion, 2C:20-5; perjury (retraction), 2C:28-1d; false swearing (retraction), 2C:28-2b; or controlled dangerous substances near or on school property, 2:35-7, must serve written notice on the prosecutor no later than seven days before the arraignment/status conference and, if defendant requests or has received discovery, shall furnish the prosecutor with discovery pertaining to the defense at that time.

III. MISTAKE OF FACT OR LAW

A. Generally

The ignorance or mistake defense provided for by N.J.S.A. 2C:2-4 is available to a defendant who lacks the culpable mental state required for the commission of the crime. It is also available in certain instances to a

defendant who, while having the requisite mental state, was unaware of the criminality of his conduct.

B. Ignorance or Mistake Negating An Element Of The Offense

Ignorance or mistake as to a matter of fact or law provides a defense when it negates the culpability of a particular offense. *N.J.S.A.* 2C:2-41. However, if the defendant would have been guilty of another crime had the situation been as he believed, then the ignorance or mistake of the defendant shall reduce the grade and degree of the offense to those of the offense of which he would have been guilty if the situation had been as he supposed. *N.J.S.A.* 2C:2-4b.

Mistake of fact may constitute a defense to reckless manslaughter if the mistake negates the culpable mental state. In this case, the defendant alleged as a mistake of fact that he believed that the gun which he fired at the victim was not loaded. The nature of the mistake must be carefully analyzed in relationship to the culpable mental state required for the offense. The opinion contains a suggested jury charge to explain how the offered defense relates to the culpability requirement for Significantly, when defendant raises a the offense. mistake of fact defense, the State does not have to disprove it beyond a reasonable doubt. State v. Sexton, 160 N.J. 93 (1999). Of course, the State may never be relieved of its burden to prove each element of an offense, including the requisite mental state, beyond a reasonable doubt. Thus, where a defendant introduces evidence of a mistake of fact which, if believed, would negate an element of the offense, defendant has no burden to prove the defense. See also Wilson v. Tard, 593 F. Supp. 1091 (1984). In recognizing that a negligent or reckless mistake may serve to negate the culpable mental state, this opinion calls into question the statutory requirement that to constitute a defense, a mistake must be "reasonably" arrived at.

In *State v. Pelleteri*, 294 *N.J. Super.* 330 (App. Div. 1996), *certif. denied*, 148 *N.J.* 461 (1997), the defendant's failure to inspect the weapon or read the owner's manual, either of which would have revealed that the firearm fell within the statutory definition of an assault firearm, was unreasonable as a matter of law, and the trial court's refusal to submit the issue of mistake of fact to the jury was not error. The "reasonable" requirement contained in the statute was subsequently called into question by *State v. Sexton, supra.* This aspect of the *Pelleteri* decision is dictum however, since knowledge of the character of the weapon is not an element of the crime of knowing possession of an assault

firearm and thus a mistake of fact regarding the character of the weapon could never constitute a defense.

Defendant has no defense of mistake of fact where the particular type of substance possessed is irrelevant for conviction of possession of a controlled dangerous substance, but only relevant for grading of the offense, and where defendant believed the substance possessed was a different controlled dangerous substance than it actually was. *State v. Edwards*, 257 *N.J. Super.* 1 (App. Div. 1992).

C. Ignorance Due To Unavailable Law Or Misplaced Reasonable Reliance On Misstatement Of the Law

Ignorance of the law excuses conduct which would otherwise be criminal if the statute outlining the offense is unknown to the defendant, has not been published or otherwise reasonably made available, and the actor reasonably believes that such conduct is lawful. *N.J.S.A.* 2C:2-4c(1).

A defendant's conduct may also be excused if he acts in reasonable reliance upon an official statement of the law which subsequently turns out to be invalid or erroneous. The defendant must establish that he did not believe his conduct was unlawful.

The mistake defense may also be utilized where a defendant has diligently pursued all available means to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not a violation of the law. *N.J.S.A.* 2C:2-4c(3). This provision expands the availability of the defense and is a substantial departure from the common law.

The defense of mistake of law is inapplicable where there was no clear statement of law relied upon by defendants which was subsequently determined to be invalid or erroneous. The defendants' reading of a single applicable court opinion was insufficient to constitute clear and convincing evidence to demonstrate diligent investigation of the law as required to claim the defense of ignorance of the law. *State v. Guice*, 262 *N.J. Super*. 607 (Law Div. 1993).

Where the language of the statute at issue was neither vague nor unclear, there is no question of a defendant "diligently pursu[ing] all means available to ascertain the meaning and application" of the statute and the defense of mistake of law was not an issue for the jury to consider. State v. Grimes, 235 N.J. Super. 75 (App. Div.), certif. denied, 118 N.J. 222 (1989).

D. Procedural Issues and Burden of Proof

Where the defendant introduces evidence of a mistake of fact which, if believed, would negate an element of the offense, he has no burden to prove the defense. The State, however, need not disprove the defense beyond a reasonable doubt. The State's burden is to prove each element of the offense, including the requisite mental state, beyond a reasonable doubt. *State v. Sexton*, 160 *N.J.* 93 (1999).

IV. DURESS

A. Generally

N.J.S.A. 2C:2-9 provides that it is an affirmative defense to a crime where the actor engaged in the conduct because he was coerced to do so by the use of, or threat to use, unlawful force against his person or that of another. The standard is objective, *i.e.*, whether a person of reasonable firmness in the accused's situation would have been unable to resist. State v. Toscano, 74 N.J. 421, 443 (1977). While the accused's "situation" excludes the idiosyncracies of the individual's temperament, it permits the jury to consider his "attributes," such as the accused's age, health, etc. Id. Elements to consider in assessing the viability of the defense include the nature of the threat, its immediacy and gravity; the seriousness of the crime committed; the identity of the person endangered; the possibility of escape or resistance; and the opportunity to avoid the act by seeking official assistance. Id.

Several limitations have been placed on this defense. It is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress; it is also unavailable if the actor was criminally negligent in placing himself in such a situation, whenever criminal negligence suffices to establish culpability for the offense charged. *N.J.S.A.* 2C:2-9b. While the defense is available in a prosecution for murder, duress, if established, will only serve to reduce the crime to manslaughter. *N.J.S.A.* 2C:2-9b.

The Code abolishes the common law presumption that criminal acts performed by a married woman in the presence of her husband were coerced. *N.J.S.A.* 2C:2-9c.

Motor vehicle violations are not offenses under the Code so that Code defenses are not applicable. Common-

law defenses, however, may be available provided they have not been precluded by the statute defining the offense. *State v. Fogarty*, 128 *N.J.* 59, 70 (1992).

Police ordering defendant, who was intoxicated, to get into his truck and leave the scene of a fight was the exercise of legitimate law-enforcement authority, not the threat or use of unlawful force, to preclude establishment of the common-law defense of duress. Moreover, fear of being arrested, rather than fear of death or serious bodily injury, does not establish duress under common law. *State v. Fogarty*, 128 *N.J.* 59, 70 (1992).

In a prosecution for escape, where the defendant had contacted local police officers in Washington, D.C., but had failed to contact any New Jersey authorities or the Federal Bureau of Investigation to turn himself in, he was precluded from asserting the defense of duress as a matter of law. *State v. Stewart*, 196 *N.J. Super.* 138 (App. Div.), *certif. denied*, 99 *N.J.* 212 (1984).

"Unpleasant" prison conditions do not create a situation so life-threatening to permit a defendant to assert the defense of duress in a prosecution for escape. Moreover, *N.J.S.A.* 2C:29-5d bars assertion of a defense based on irregularities in confinement, which includes general complaints of prison conditions. *State v. Morris*, 242 *N.J. Super.* 532 (App. Div.), *certif. denied*, 122 *N.J.* 408 (1990).

The failure of escapees to make a *bona fide* effort to surrender or return to custody as soon as they escaped the alleged hazardous conditions of prison barred assertion of the duress defense. *State v. Saxon*, 226 *N.J. Super*. 653 (Law Div. 1988), *aff'd sub nom State v. Morris*, 242 *N.J. Super*. 532 (App. Div.), *certif. denied.*, 127 *N.J.* 321 (1990). *Saxon* suggests in dicta that duress is available as a defense to a charge of escape only where there is an immediate threat of death, serious bodily injury, or forcible sexual attack and not for conditions such as overcrowding or poor medical care. 226 *N.J. Super.* at 657.

B. Procedural Issues and Burden of Proof

Where the defendant or the State has come forward with evidence to support the defense of duress, the State must disprove the defense beyond a reasonable doubt. *State v. Galiyano*, 178 *N.J. Super.* 393 (App. Div.), *certif. denied*,, 87 *N.J.* 424 (1981).

It is proper to conduct a pretrial hearing to determine whether a defendant will be permitted to assert the defense of duress or necessity. *State v. Morris*, 242 *N.J. Super.* 532 (App. Div.), *certif. denied.*, 122 *N.J.* 408 (1990).

V. CONSENT

A. Generally

The defense of consent, *N.J.S.A.* 2C:2-10, takes several forms. Consent is a valid defense when:

1. it negates an element of the offense; or

2. it precludes the infliction of the harm or evil sought to be prevented by the law defining the defense; or

3. it operates to justify or excuse the threat and/or infliction of bodily harm under certain circumstances, specifically, the bodily harm is not serious; or the conduct or harm are reasonably foreseeable hazards of joint participation in a lawful activity; or the consent establishes legally sufficient justification under the Code.

Consent, if it is mutual, operates to downgrade a simple assault from a disorderly persons offense to a petty disorderly persons offense. *N.J.S.A.* 2C:12-1a.

Consent is ineffective, unless otherwise provided, if it is given by a person who is induced by force, duress, or deception, or by a person who is legally incompetent or otherwise unable to judge the harmfulness of the conduct. *N.J.S.A.* 2C:2-10c.

The juvenile victim's consent was not a defense to charges of sexual assault based on the victim's detention in an institution and the defendant's supervisory or disciplinary power over the victim by virtue of his legal, professional, or occupational status since the law defining the offense, *N.J.S.A.* 2C:14-2c(3), recognizes the unequal positions of power and inherent coerciveness of the situation which could not be overcome by evidence of the victim's apparent consent. *State v. Martin*, 235 *N.J. Super.* 47, 56-58 (App. Div.), *certif. denied*, 117 *N.J.* 669 (1989).

B. Procedural Issues and Burden of Proof

Consent is an "ordinary" defense and, as such, must be disproved by the State with no burden on the defendant to produce any evidence in support of the defense. There still must be a rational basis in the evidence to justify a jury charge on the defense. *See* *Cannel, Criminal Code Annotated, Comment 3, N.J.S.A.* 2C:1-13b.

VI. DE MINIMIS INFRACTIONS

A. Generally

N.J.S.A. 2C:2-11 provides the assignment judge with the power to dismiss certain criminal prosecutions if, after examining the nature of the conduct charged and the nature of the attendant circumstances, he finds that the defendant's conduct:

a. was within a customary license or tolerance not expressly negated by the victim nor inconsistent with the law; or

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

c. presents other extenuating and mitigating factors which lead to the conclusion that the legislature would not have intended that such conduct be criminalized.

Prior to any such dismissal, the prosecutor must be given notice and an opportunity to be heard. The prosecutor also has a right to appeal any dismissal. N.J.S.A.~2C:2-11c.

Statute permitting dismissal of prosecution of *de minimis* infractions can be used to protect against frivolous prosecutions under the harassment statute. *State v. Hoffman*, 149 *N.J.* 564, 586-87 (1997).

Prosecution under disorderly persons statute for distributing clean hypodermic needles in a needle exchange program to combat the spread of the humanimmunodeficiency virus (HIV) was not absurd nor could that conduct be deemed trivial in light of the zero tolerance drug policy of the State so as to warrant dismissal of the prosecution as a *de minimis* infraction. *State v. McCague*, 314 *N.J. Super.* 254, 266-67 (App. Div.), *certif. denied*, 157 *N.J.* 542 (1998); *State v. Sorge*, 249 *N.J. Super.* 144 (Law Div. 1991).

The zero tolerance drug policy of the State likewise precluded dismissal of a prosecution for possession of even a trace amount of cocaine as a de minimis infraction. *State v. Wells*, 336 *N.J. Super*. 139 (Law Div. 2000).

Where the defendant was convicted of theft by deception of under \$200 as a result of padding his

expense account in an amount of at least \$42.15, his claimed *de minimis* defense was properly rejected. *State v. Stern*, 197 *N.J. Super.* 49 (App. Div. 1984).

After the defendant student was told by the principal and vice-principal that he was to leave the school at the conclusion of his last class, and after he was advised by a teacher two times that he was not permitted to be in the building at that particular hour, defendant's claim of "customary tolerance or license" under *N.J.S.A.* 2C:2-11 to warrant dismissal of the complaint against him for defiant trespass was without merit. *State v. Conk*, 180 *N.J. Super.* 140 (App. Div. 1981).

Politician's conduct in striking his opponent's chin while waving a political flier during a heated political confrontation was an "offensive touching" not sufficiently serious to warrant criminal prosecution for simple assault. *State v. Cabana*, 315 *N.J. Super.* 84 (Law Div. 1997).

A twenty-year-old college student was entitled to dismissal of charges of underage consumption of alcohol for taking a sip of beer from a friend's glass while they attended a church fair. The court framed the dispositive issue as the degree of risk the defendant's conduct posed to society. *State v. Zarrilli*, 216 *N.J. Super.* 231 (Law Div.), *aff'd*, 220 *N.J. Super.* 517 (App. Div. 1987).

Disorderly persons offense of simple assault arising from defendant's direct, intentional physical attack on another, specifically striking a guest on his television show in the face with his open hand after advancing on the guest and beginning a face-to-face verbal confrontation, was not subject to dismissal as a *de minimis* infraction, especially in light of the fundamental purpose of the criminal law to insure public safety by deterring criminal and antisocial conduct. *State v. Downey*, 242 *N.J. Super.* 367 (Law Div. 1988).

Possession of drugs by a juvenile, specifically .08 grams of marijuana as residue in a pipe in his possession, coupled with his possession of the pipe, which was drug paraphernalia, and twelve cans of beer, posed a great risk of harm to society to militate against dismissal of the drug charge as a *de minimis* infraction. *State v. Ziegler*, 226 *N.J. Super.* 504 (Law Div. 1988).

Defendant casino patron who manipulated slot machine handles to cause improper functioning to increase his chances of winning was not entitle to dismissal of charges of swindling and cheating at casino gaming in violation of *N.J.S.A.* 5:12-113a as *de minimis*

infractions. The fact that the defendant was informed on several occasions that the method he was using was illegal precluded a finding that his conduct was "within a customary license or tolerance," and his conduct clearly subverted the legislative attempt in enacting the statute to maintain integrity and honesty of the operation of the casino gaming industry. *State v. Hawkins*, 197 *N.J. Super.* 531, 536-39 (Law Div. 1984).

A buffet patron who paid for the buffet meal but who was charged with theft for leaving the restaurant with two bananas, an orange, an apple, and a pear, was entitled to dismissal of the charges as *de minimis*. In reaching this conclusion, the court relied on the facts that there were no signs posted indicating that food could not be taken out of the restaurant, there was evidence that the patron may have been driven out of the restaurant by the harassment of the employees before he was ready to leave, and defendant took the fruit as his dessert to finish outside the restaurant. *State v. Nevens*, 197 *N.J. Super.* 531, 532-36 (Law. Div. 1984).

In determining that the defendant, who was charged with shoplifting three pieces of bubble gum, was entitled to dismissal of the charges as *de minimis* infractions, the court was authorized to engage in an objective consideration of all surrounding circumstances, such as the defendant's lack of any prior history of arrest or conviction, the detrimental effect of the notoriety of his arrest, defendant's industrious pursuit of full- and part-time employment to pay for his education, and the potential career problems that would result from a criminal conviction. *State v. Smith*, 195 *N.J. Super.* 468 (Law Div. 1984).

The defendant, a state prisoner, was not entitled to dismissal of charges resulting from his possession of .65 grams of cocaine as a *de minimis* offense since his conduct caused or threatened the harm or evil which the law proscribing possession of cocaine sought to avoid. The court rejected defendant's contention that the circumstances which resulted in his imprisonment presented "such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense." *State v Brown*, 188 *N.J. Super*. 229 (Law Div. 1983).

The defendant, who submitted false affidavits to the prosecutor's office regarding misconduct of a local government official and was indicted for filing false reports, fabricating physical evidence, and tampering with witnesses and informants, was not entitled to dismissal of the charges as *de minimis* infractions. *State v. Hegyi*, 185 *N.J. Super*. 229 (Law Div. 1982).

B. Procedural Issues and Burden of Proof

Although the *de minimis* statute authorizes dismissal of a prosecution, it does not authorize the assignment judge to dismiss a conviction. *State v. Zahl*, 259 *N.J. Super.* 372 (Law Div. 1992).

Statute permitting dismissal of a charge as a *de minimis* infraction is not applicable to a juvenile delinquency proceeding. *State v. I.B.*, 227 *N.J. Super.* 362 (App. Div. 1988). *But see State v. Ziegler*, 226 *N.J. Super.* 504 (Law Div. 1988).

There is a split in authority as to whether evidence concerning a defendant's innocence may be considered in motions made pursuant to N.J.S.A. 2C:2-11. In State v. Brown, 188 N.J. Super. 656, 675 (Law Div. 1983), the court noted that the statute authorizes a review of the conduct charged and the nature of the attendant circumstances but does not permit the defendant to assert a version contrary to the conduct charged in the complaint or indictment. See also State v. Cabana, 315 N.J. Super. 84, 86 (Law Div. 1997); State v. Downey, 242 N.J. Super. 367, 371 (Law Div. 1988); State v. Zarrilli, 216 N.J. Super. 231, 236 (Law Div.), aff'd, 220 N.J. Super. 517 (App. Div. 1987); State v. Nevens, 197 N.J. Super. 531, 538 (Law Div. 1984); State v. Smith, 195 N.J. Super. 468, 471 (Law Div. 1984). But see State v. Evans, 193 N.J. Super. 560, 566 (Law Div. 1984); State v. Hegyi, 185 N.J. Super. 229, 232 (Law Div. 1982).

In *State v. Evans*, 193 *N.J. Super.* 560, 563-66 (Law Div. 1984) and *State v. Hegyi*, 185 *N.J. Super.* 229, 230-33 (Law Div. 1982), the courts permitted the defendants to move for summary judgment under the *de minimis* statute, concluding that *N.J.S.A.* 2C:2-11 introduced summary judgment procedures to the criminal law.

There is also conflict as to whether application of the statute is discretionary or mandatory with the assignment judge. *See State v. Brown*, 188 *N.J. Super.* 656, 672-74 (Law Div. 1983) and *State v. Smith*, 195 *N.J. Super.* 468, 471-72 (Law Div. 1984) (discretionary) and *State v. Evans*, 193 *N.J. Super.* 560, 563-64 (Law Div. 1984) (mandatory).

A. Statutory Entrapment

There were two forms of entrapment under common law. Subjective entrapment existed when police planted a criminal plan in the mind of an innocent person who otherwise would not have committed the crime, in order to institute a criminal prosecution against the person. Subjective entrapment takes into consideration the predisposition of the defendant to commit the crime. Subjective entrapment protects the unwary innocent but not the unwary criminal. State v. Johnson, 127 N.J. 458, 464 (1992); State v. Rockholt, 96 N.J. 570, 576 (1984). Objective entrapment existed when police conduct caused an average law-abiding citizen to commit a crime or when police conduct was so egregious as to impugn the integrity of the court that permitted the conviction. Although the predisposition of the defendant to commit the crime was not totally irrelevant, the focus of objective entrapment was the wrongfulness of police conduct. State v. Johnson, 127 N.J. 458, 464 (1992); State v. Molnar, 81 N.J. 475, 484 (1986); State v. Talbot, 71 N.J. 160, 168 (1976).

The Code encompasses the subjective and objective elements of common-law entrapment. The Code requires an analysis of the interrelation between defendant's predisposition and the police conduct and a determination of which caused the commission of the crime. To constitute entrapment, police conduct must involve 1) "methods of persuasion or inducement" that 2) create "a substantial risk" of the commission of a crime 3) by a person not otherwise "ready to commit" the crime. N.J.S.A. 2C:2-12a(2). The formulation of the defense focuses on the "ability of the average person, rather than the particular defendant, to withstand the inducements to engage in criminal activity." The defendant's conduct must be a "direct result" of the police action. N.J.S.A. 2C:2-12a. Thus, a defendant predisposed to commit the crime would probably be unable to satisfy the requirement that the illegal conduct was the "direct result" of the police action. State v. Rockholt, 96 N.J. 570, 577-79 (1984).

A defendant's prior convictions may be admissible to prove predisposition to rebut a claim of entrapment when the prior convictions are for crimes "similar" to the crime for which the defendant is being prosecuted. To determine if the prior crimes are similar, the court should first identify those factors or elements that are necessary predicates of the respective crimes. It should then determine how many factors essential to each crime are shared and whether they are shared to such an extent that the conclusion that the crimes are similar is justified in light of all the surrounding circumstances. In conducting this analysis, the court should consider factors such as the object of the crimes, the methods used to perpetrate the crimes, and the particular mental state required. State v. Gibbons, 105 N.J. 67 (1987). Applying this analysis, the Court determined that the defendant's prior convictions for burglary and larceny were not sufficiently similar to narcotics distribution to permit their admission to show propensity to rebut the entrapment defense. The Court, however, acknowledged that if the State were able to establish a factual nexus between the crimes, that is, to show that the prior offenses were drug-related, then they might be admissible. Ibid.

Motor vehicle violations are not offenses under the Criminal Code so that Code defenses, such as entrapment, are not available. *State v. Fogarty*, 128 *N.J.* 59, 64 (1992).

It is reasonable to require law enforcement officers to have some reasonable suspicion that a person is predisposed to commit a crime before offering that person some inducement to participate in a criminal undertaking. That does not preclude a law enforcement officer from approaching a citizen to determine whether such criminal inclination exists without first having a reasonable suspicion of the citizen's criminal predisposition. In this case, there was no evidence that the law enforcement officer offered the defendant inducement to commit a crime before she expressed an interest in drug activity. *State v. Riccardi,* 284 *N.J. Super.* 459, 468 (App. Div. 1995).

The statutory provision making the defense of entrapment unavailable when causing or threatening bodily injury is an element of the offense charged does not preclude assertion of the defense in a prosecution for conspiracy to commit a second degree aggravated assault. Since actually "causing or threatening bodily injury" is not an element of the conspiracy charge, defendant could raise the defense. *State v. Soltys*, 270 *N.J. Super.* 182 (App. Div. 1994).

The defendant was not entitled to a charge on statutory entrapment as a defense to robbery and other charges where police conduct consisted only of an officer acting as a robbery decoy, sitting on a brick wall with a few dollar bills tucked in his shirt pocket. The decoy operation did not create the requisite "substantial risk" of the commission of a crime which is necessary to satisfy the objective element of the entrapment test. *State v. Long*, 216 *N.J. Super.* 269 (App. Div. 1987).

The affidavit which was part of a PTI application and required information regarding prior arrests and charges was misleading and "entrapping" since, if correct or inadequate information was provided, it formed a basis to reject the application or to charge the affiant with false swearing. *State v. Wood*, 211 *N.J. Super.* 110 (Law Div. 1986).

B. Due Process Entrapment

Due process entrapment exists when "the conduct of government is patently wrongful in that it constitutes an abuse of lawful power, perverts the proper role of government, and offends principles of fundamental fairness." Due process entrapment "centers around two major concerns: the justification for the police in targeting and investigating the defendant as a criminal suspect; and the nature and extent of the government's actual involvement in bringing about the crime." Traditional objective entrapment may apply to a defendant predisposed to commit the crime as due process entrapment, thus the principles of objective entrapment are relevant to an inquiry into due process State v. Johnson, 127 N.J. 458, 473-75 entrapment. (1992).

A so-called "full-circle" transaction is not *per se* due process entrapment. *State v. Johnson*, 127 *N.J.* 458, 481-82 (1992).

Government conduct of soliciting the police officer defendant and his girlfriend into a crime involving the theft and sale of illegal drugs was not due process entrapment. It was the defendant who first expressed a desire to "rip-off" a drug dealer; the crime was not primarily police-inspired; the police did not resort to excessive inducements; and the use of a full-circle transaction in which the police arranged both the supply and sale of the drugs was reasonable. In this case, the defendant had conceded predisposition to commit the crime. *State v. Johnson*, 127 *N.J.* 458 (1992).

There was no due process entrapment where a police informant and an individual in a foreign country agreed to import heroin, and defendant brought the heroin into the country and accepted a portion of the cost of the heroin from the informant as his fee.

The State was not primarily "responsible for creating and planning the crime," the individual outside of the country at all times controlled whether and how to transact business, and there is nothing to suggest that any party to the transaction was coerced, threatened, or intimidated into committing any crime. *State v. Abdelnoor*, 273 *N.J. Super.* 321 (App. Div. 1994).

C. Generally

Entrapment may be a defense only when the individual who solicits commission of the crime is a law enforcement official or someone acting as an agent of, or cooperating with, a law enforcement official. When the solicitor is a private party, entrapment is not available as a defense. *State v. Rockholt*, 69 *N.J.* 570, 582 (1984).

No form of entrapment defense was available to a defendant charged with DWI who alleged that he drove only when a police officer, who was attempting to control the crowd which had gathered around a fight in a parking lot, ordered him to leave and escorted him to his vehicle. The police did not engage in any sort of impermissible conduct; the officer did not know that the defendant was intoxicated; and the officer was legitimately exercising his law enforcement authority in attempting to control an escalating situation. The defendant should have informed the police that he was intoxicated and sought an alternative to violating the law. His subjective belief that he had no alternative was irrelevant. The Court also rejected a "quasi-entrapment" defense, which was derived from the objective-entrapment defense. State v. Fogarty, 128 N.J. 59 (1992).

D. Procedural Issues and Burden of Proof

Defendant must prove both the objective and subjective aspects of statutory entrapment by a preponderance

of the evidence. *N.J.S.A.* 2C:2-12b; *State v. Rockholt*, 96 *N.J.* 570, 577, 581 (1984). The existence of statutory entrapment is determined by the trier of fact. *Id.* at 577.

Regarding due process entrapment, the defendant has the burden of coming forth with evidence to support the defense, which the State must then disprove by clear and convincing evidence. The existence of due process entrapment is a question of law to be resolved by the court. *State v. Florez*, 134 *N.J.* 570, 584, 590-91 (1994).

A defendant's denial of the commission of a crime does not preclude assertion of an entrapment defense. *Mathews v. United States*, 485 *U.S.* 58, 108 *S.Ct.* 883, 90 *L. Ed. 2d* 54 (1988); *State v. Branam*, 161 *N.J. Super.* 53 (App. Div. 1978), *aff'd o.b.*, 79 *N.J.* 301 (1979).

VIII. NECESSITY AND JUSTIFICATION

A. Generally

N.J.S.A. 2C:3-2 provides that necessity and other justifications may in certain circumstances excuse an actor from culpability for conduct which would otherwise be an offense. The statute contains three limitations to the applicability of the defense: "(1) conduct is justifiable only to the extent permitted by law, (2) the defense is unavailable if either the Code or other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved, and (3) the defense is unavailable if a legislative purpose to exclude the justification otherwise plainly appears." *State v. Tate*, 102 *N.J.* 64, 70 (1986).

The common-law defense of necessity is referred to as the "choice-of-evils" defense. It relies on a theory that when the legislature defined the offense, if it had foreseen the circumstances faced by the defendant, it would have created an exception. To claim the common-law defense of necessity, a defendant must demonstrate an absence of an available alternative. *State v. Tate*, 102 *N.J.* 64, 73-74 (1986).

Justification defenses are not available in a prosecution for an offense for which recklessness or negligence is the requisite mental state. *State v. Moore*, 158 *N.J.* 292, 303 (1999).

Where the defendant armed herself with a carpet cutter in order to protect herself in the event of an attack by her former boyfriend, she could not rely on self-defense as justification to defend against a charge of possession of a weapon "under circumstances not manifestly appropriate for such lawful uses as it may have," in violation of *N.J.S.A.* 2C:39-5d. In reaching this conclusion, the Court acknowledged that self-defense might constitute justification where an individual "arms himself spontaneously to meet an immediate danger." *State v. Kelly*, 118 *N.J.* 370 (1990).

A defendant who used marijuana to relieve the spasticity associated with his quadriplegia was precluded from asserting the defense of medical necessity to charges of possession of marijuana. First, the designation of marijuana as a Schedule I controlled dangerous substance indicated that the legislature contemplated and specifically rejected the possibility of medical use of marijuana. Second, although the legislature delegated to the Commissioner of Health the authority to reschedule controlled dangerous substances based on, among other things, current scientific knowledge, the Commissioner had not exercised that authority regarding marijuana. And third, the statutory provision defining the offense creates an exception for medically-necessary possession of marijuana pursuant to a valid prescription. Since the legislature created an exception dealing with the specific situation presented by defendant's case, there was no authority for the Court to create an alternative exception. Thus, defendant's conduct was not "permitted by law;" other Code provisions dealt with the specific situation involved, and legislative intent to exclude the justification asserted by defendant did "otherwise plainly appear." In addition, since defendant's possession of marijuana required a supplier who obtained and supplied the substance in contravention of the law, the Court determined it was "inconceivable" that the legislature intended to sanction that activity by permitting the use of the drug under those circumstances. On these bases, defendant could not assert the defense of medical necessity. State v. Tate, 102 N.J. 64, 70-73 (1986).

Defendants were not entitled to reversal of their convictions for furnishing or giving a hypodermic needle to another, a disorderly persons offense, based on the defense of medical necessity to combat the spread of the human-immunodeficiency virus (HIV). The limiting criteria of the statute, excepting designated medical professions from the prohibition on distribution of hypodermic needles, rendered the defense inapplicable to the facts in this case. Moreover, the defendants were not confronted with a clear and imminent danger to themselves or others. *State v. McCague*, 314 *N.J. Super.* 254, 263-64 (App. Div.), *certif. denied*, 157 *N.J.* 542 (1998).

No legal excuse or justification existed for defendants' commission of defiant trespass in an attempt to prevent the performance of a abortion. The legislature could not have intended to authorize other persons to use force to prevent a woman from doing something which she has a legal right to do. *State v. Loce*, 267 *N.J. Super*. 102 (Law Div. 1991), *aff'd*, 267 *N.J. Super*. 10 (App. Div.), *certif. denied*, 134 *N.J.* 563 (1993), *cert. denied*, 510 *U.S.* 1165, 114 S.Ct. 1192, 127 *L. Ed. 2d* 542 (1994).

Defendants were precluded from asserting a defense of necessity in a prosecution for escape, where the claimed necessity was to avoid exposure to AIDs in the event they were sexually assaulted by other prisoners. First, escape from prison was clearly precluded by law. Second, *N.J.S.A.* 2C:29-5c addressed the situation presented in defendants' case, specifically it barred defenses based on irregularities in confinement, which includes general complaints of prison conditions. And third, if a necessity defense to escape were recognized, it would circumvent the legislative purpose of preventing prisoners from leaving confinement without authorization. The legislature had already balanced the competing values and concluded that "less than ideal" conditions do not justify escape from prison. *State v. Morris*, 242 *N.J. Super.* 532 (App. Div.), *certif. denied*, 122 *N.J.* 408 (1990).

In a prosecution for escape, where the defendant had contacted local police officers in Washington, D.C., but had failed to contact any New Jersey authorities or the Federal Bureau of Investigation to turn himself in, he was precluded from asserting the defense of necessity as a matter of law. *State v. Stewart*, 196 *N.J. Super.* 138 (App. Div.), *certif. denied*, 99 *N.J.* 212 (1984).

B. Procedural Issues and Burden of Proof

Justification and necessity are affirmative defenses. Defendant has the initial burden of producing some evidence to support the defense. That evidence, however, only becomes relevant when the essential elements of the crime have otherwise been established. The State must then negate the defense beyond a reasonable doubt. *N.J.S.A.* 2C:3-1a; *State v. Harmon*, 104 *N.J.* 189, 206-07 (1986); *State v. Tate*, 194 *N.J. Super.* 622, 633-34 (Law Div.), *aff'd*, 198 *N.J. Super.* 285 (App. Div. 1984), *rev'd on other grounds*, 102 *N.J.* 64 (1986).

It is proper to conduct a pretrial hearing to determine whether a defendant will be permitted to assert the defense of duress or necessity. *State v. Morris*, 242 *N.J. Super.* 532 (App. Div.), *certif. denied*, 122 *N.J.* 408 (1990).

DISCOVERY

(See also, SUBPOENAS, this Digest)

I. DISCOVERY BY DEFENDANT

A. Generally

See R. 3:13-3(c).

B. Defendant's Request for Specificity (*See also,* **INDICTMENT**, this Digest)

R. 3:7-5 provides that the trial court shall order a bill of particulars if the indictment or accusation is not sufficiently specific to enable defendant to prepare a defense. See State v. Mello, 297 N.J. Super. 452, 462-63 (App. Div. 1997); State v. Menter, 293 N.J. Super. 330, 336-37, 348, 367, 373 (Law Div. 1995). Defendant shall seek such a bill pursuant to R. 3:10-2 (motions) and clearly point out the particulars sought; the prosecutor shall furnish it within 10 days of the court's order. See State v. M.L., 253 N.J. Super. 13, 19 (App. Div. 1991), certif. denied, 127 N.J. 560 (1992). Further particulars may be ordered when defendant makes a prompt demand, and a bill may be amended at any time subject to such conditions as the interest of justice requires. Any particulars already furnished to defendant pursuant to R. 3:13-3 and 4 are not subject to an application under this rule.

C. Confidential and Secret Materials

1. Grand Jury Transcripts

R. 3:6-6(b) and *R.* 3:13-3 grant a defendant a right to discovery of the grand jury proceedings leading to his or her indictment, but the prosecutor may move for a protective order pursuant to *R.* 3:13-3(f). See State v. Wright, 312 N.J. Super. 442, 449 (App. Div.), certif. denied, 156 N.J. 425 (1998). The standard for discovery of state grand jury transcripts of another matter is whether a strong showing of particularized need outweighs the public interest in maintaining grand jury secrecy. See State v. Ciba-Geigy Corp., 240 N.J. Super. 511, 517 (App. Div. 1990); State v. CPS Chemical Co., Inc., 198 N.J. Super. 236, 241-45 (App. Div.), appeal denied, 105 N.J. 502 (1985).

2. Scientific and Medical Reports

R. 3:13-3(c)(3) (formerly *R.* 3:13-3(a)(4)) permits defendants to obtain reports and results of physical or

mental examinations and of scientific tests or experiments made in connection with the case. See State v. J.Q., 130 N.J. 554, 582 (1993); State v. Gordon, 261 N.J. Super. 462, 465 (App. Div. 1993) (rule applies only to items in prosecutor's possession, custody, or control); State v. Maida, 332 N.J. Super. 564, 575 (Law Div. 2000) (same); See also State v. Zola, 112 N.J. 384, 408-12 (1988), cert. denied, 489 U.S. 1022 (1989); State v. Cook, 43 N.J. 560 (1965); State v. White, 227 N.J. Super. 443 (App. Div. 1988); State v. Hofford, 152 N.J. Super. 283 (App. Div. 1977); State v. Perez, 150 N.J. Super. 166 (App. Div.), certif. denied, 75 N.J. 542 (1977); State v. Feldman, 254 N.J. Super. 754 (Law Div. 1992).

3. Police Reports

R. 3:13-3(c)(8) (formerly *R.* 3:13-3(a)(9)) permits defendants to obtain police reports within the prosecutor's possession, custody, or control. *See State v. Dreher*, 302 *N.J. Super.* 408, 485 (App. Div.), *certif. denied*, 152 *N.J.* 10 (1997), *cert. denied*, 524 *U.S.* 943 (1998); *see also Loigman v. Kimmelman*, 102 *N.J.* 98 (1986) (need clear showing of advancement of public interest to overcome confidentiality of police records); *State v. Ballard*, 331 *N.J. Super.* 529 (App. Div. 2000); *State v. Barath*, 169 *N.J. Super.* 181 (Law Div. 1979), *aff'd*, 172 *N.J. Super.* 230 (App. Div. 1980). But the State has no obligation to preserve handwritten reports prepared by officers in the field. *State v. Dreher*, 302 *N.J. Super.* at 485.

Cf. Pennsylvania v. Ritchie, 480 *U.S.* 39 (1987) (as to review of children and youth services files); *New Jersey Division of Youth and Family Services v. M.R.*, 314 *N.J. Super.* 390 (App. Div. 1998) (as to review of Division of Youth and Family Services records); *State v. L.J.P.*, 270 *N.J. Super.* 429 (App. Div. 1994) (same).

4. Juvenile Records and Probationary Status (*See also,* WITNESSES, this Digest)

The State is to disclose charges made against its juvenile witnesses, but those charges cannot be used to impeach credibility. *See State v. Hare*, 139 *N.J. Super*. 150, 153-54 (App. Div.), *certif. denied*, 70 *N.J.* 525 (1976); *State v. Tull*, 234 *N.J. Super*. 486, 498-99 (Law Div. 1989); *State v. Ramos*, 169 *N.J. Super*. 573, 574 (Law Div. 1979).

5. Identity of Informants (*See also,* EVIDENCE, this Digest)

N.J.R.E. 516 (formerly Evidence R. 36) and N.J.S.A. 2A:84A-28 grant a witness the privilege to refuse to disclose the identity of a person who furnished information to the State or federal government concerning a crime. This privilege may be overcome if the trial court determines either that the informant's identity has already been disclosed or that disclosure is essential to assure a fair determination of the issues. This rule and statute foster effective law enforcement by encouraging citizens to report crimes, and help provide a flow of information to the police. See, e.g., Grodjesk v. Faghani, 104 N.J. 89, 96-97 (1986); Maudsley v. State, 323 N.J. Super. 579, 589 (App. Div. 1999); State v. Wright, 312 N.J. Super. at 453-54; State v. Gallagher, 274 N.J. Super. 285, 301-03 (App. Div. 1994); State v. Foreshaw, 245 N.J. Super. 166, 179-84 (App. Div.), certif. denied, 126 N.J. 327 (1991); State v. Williams, 239 N.J. Super. 620, 627 (App. Div. 1990).

This protection also seems to extend to an informant giving information to a school vice-principal, and to administrative agencies that regulate professions and investigate complaints of unprofessional conduct. *Grodjesk v. Faghani,* 104 *N.J.* at 97-98; *State v. Biancamano,* 284 *N.J. Super.* 654, 660 (App. Div. 1995), *certif. denied,* 143 *N.J.* 516 (1996). Accident reports obtained pursuant to *N.J.S.A.* 39:4-131 are specifically exempt from *N.J.S.A.* 2A:84A-28's confidentiality requirements.

6. Surveillance Locations (*See also*, **EVIDENCE**, this Digest)

N.J.R.E. 515 (formerly *Evidence R.* 34) and *N.J.S.A.* 2A:84A-27 grant an "official information privilege" forbidding disclosure of such information of the State or federal government. This privilege permits the prosecution to withhold information of a surveillance location under appropriate circumstances. *See State v. Garcia*, 131 *N.J.* 67, 70, 72-82 (1993); *State v. Ribalta*, 277 *N.J. Super.* 277, 287-89 (App. Div. 1994), *certif. denied*, 139 *N.J.* 442 (1995); *State v. Laws*, 262 *N.J. Super.* 551, 558-60 (App. Div.), *certif. denied*, 134 *N.J.* 475 (1993); *State v. Williams*, 239 *N.J. Super.* at 623-34.

7. Prosecutor's Duty to Disclose (*See also,* **PROSECUTORS**, this Digest)

a. R. 3:13-3 Generally

The prosecutor shall permit defendant to inspect and copy nine particular forms of relevant material as set forth in *R.* 3:13-3(c), if not already provided after indictment

pursuant to *R.* 3:13-3(b). *See, e.g., State v. J.Q.*, 130 *N.J.* at 582 (State's expert's report); *State v. Zola*, 112 *N.J.* at 410-12, 416-19 (State's expert's reports and change of opinion); *State v. Ballard*, 331 *N.J. Super.* at 538-61 (discovery of documents relating to selective prosecution); *State v. Nelson*, 330 *N.J. Super.* 206, 218 (App. Div. 2000) (prior convictions of State's proposed witness); *State v. Alfano*, 305 *N.J. Super.* 178, 188 (App. Div. 1997) (State to disclose recorded statements of potential witnesses); *State v. Gordon*, 261 *N.J. Super.* at 462 (State need not create evidence); *State v. Carter*, 278 *N.J. Super.* 629, 634 (Law Div. 1994) (1973 revision of criminal discovery rule effectively made prosecutor's entire file available to defendant).

Not every discovery violation mandates reversal of convictions or dismissal of charges against defendant. *See State v. Zola*, 112 *N.J.* at 418-19; *State v. Laganella*, 144 *N.J. Super.* 268, 279-83 (App. Div.), *app. dism'd*, 74 *N.J.* 256 (1976); *cf. State v. Cole*, 204 *N.J. Super.* 618, 626 (App. Div. 1985) (Public Defender at fault for not forwarding to *pro se* defendant the timely discovery provided by the State).

b. *Brady* Violation (*See also,* **PROSECUTORS**, this Digest)

The State is required to disclose to defendant favorable evidence that is material either to guilt or to punishment, and to prove a violation of this duty defendant must demonstrate that (1) the prosecution suppressed evidence, (2) that evidence was favorable to the defense, and (3) that it was material. Bradv v. Maryland, 373 U.S. 83, 87 (1963); State v. Martini, 160 N.J. 248, 268-69 (1999); State v. Russo, 333 N.J. Super. 114, 134 (App. Div. 2000).. "Material" evidence is that which, if disclosed to defendant, had a reasonable probability to change the proceeding's outcome. United States v. Bagley, 473 U.S. 667, 682 (1995); State v. Martini, 160 N.J. at 269; State v. Russo, 333 N.J. Super. at 134; State v. Aguiar, 322 N.J. Super. 175, 185 (App. Div. 1999). Impeachment evidence, too, falls under Brady. United States v. Bagley, 473 U.S. at 676; State v. Russo, 333 N.J. Super. at 134; State v. Jones, 308 N.J. Super. 15, 41-42 (App. Div. 1998). Failure to disclose Brady material can be harmless. State v. Russo, 333 N.J. Super. at 134; State v. Scherzer, 301 N.J. Super. 363, 431-33 (App. Div.), certif. denied, 151 N.J. 466 (1997); State v. Carter, 221 N.J. Super. 219, 225-26 (App. Div. 1987), certif. denied, 110 N.J. 291 (1988).

c. Non-Compliance with Discovery Rules

The trial court has broad discretion in remedying discovery rule violations, ranging from ordering the party to turn over discovery, granting a continuance or delay during trial, prohibiting the use of evidence not disclosed, dismissal of the charges, or any other appropriate relief. *R.* 3:13-3(g); *State v. Cuni*, 159 *N.J.* 584, 598 (1999); *State v. Rowe*, 316 *N.J. Super.* 425, 433 (App. Div. 1998), *certif. denied*, 160 *N.J.* 89 (1999); *State v. Polasky*, 216 *N.J. Super.* 549, 556-57 (Law Div. 1986); *State v. Hofford*, 152 *N.J. Super.* at 291-92.

d. Destruction of Evidence

The State need only preserve "evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 *U.S.* 479, 489 (1984); see, e.g., State v. Dreher, 302 N.J. Super. at 482; State v. Bohuk, 269 N.J. Super. 581, 597 (App. Div.), certif. denied, 136 N.J. 29, cert. denied, 513 U.S. 865 (1994); State v. Serret, 198 N.J. Super. 21, 23-28 (App. Div. 1984), certif. denied, 101 N.J. 217 (1985); State v. Montijo, 321 N.J. Super. 483, 485-93 (Law Div. 1998).

e. Protective Orders

R. 3:13-3(f) allows the court in its discretion, on motion and for good cause shown, to order at any time that the discovery sought be denied, restricted, or deferred. *See State v. Garcia*, 131 *N.J.* at 83; *State v. Ballard*, 331 *N.J. Super.* at 557; *State v. Wright*, 312 *N.J. Super.* at 449, 454 (State could seek protective order to preclude disclosure of confidential informant's identity); *State v. DeMarco*, 275 *N.J. Super.* 311, 322 (App. Div. 1994); *State v. Carter*, 278 *N.J. Super.* at 634.

8. Post-Verdict Interrogation of Jury (*See also,* **JURIES**, this Digest)

9. Racial Profiling

See State v. Ballard, 331 N.J. Super. at 538-61 (showing necessary to obtain discovery of state police records regarding profiling; appointed statewide judge to determine scope of discovery); see also United States v. Armstrong, 517 U.S. 456 (1996); State v. Kennedy, 247 N.J. Super. 21 (App. Div. 1991); State v. Soto, 324 N.J. Super. 66 (Law Div. 1996).

D. Subpoena *Duces Tecum* (*See also,* **SUBPOENAS**, this Digest)

R. 1:9-2 governs the use of subpoenas *duces tecum* to obtain documents, papers, or tangible things, but the court on a motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. *Cupano v. Gluck*, 133 *N.J.* 225, 236 (1993); *State v. Bodtmann*, 239 *N.J. Super.* 33, 38 (App. Div. 1990). A valid subpoena must specify its subject with reasonable certainty, and a substantial showing must be made that the records contain evidence relevant and material to the issue. *State v. Cooper*, 2 *N.J.* 540, 556 (1949); *Greenblatt v. New Jersey Bd. of Pharmacy*, 214 *N.J. Super.* 269, 275-76 (App. Div. 1986).

E. Depositions

R. 3:13-2 permits the taking of depositions of a material witness, generally by videotaping. Defendants have no constitutional right, however, to depose witnesses, unwilling to speak to them, solely for discovery purposes to learn what they know. *State v. Tate*, 47 *N.J.* 352, 353-57 (1966); *State v. Harris*, 263 *N.J. Super.* 418, 421-22 (Law Div. 1993); *see State v. Mitchell*, 164 *N.J. Super.* 198, 201-03 (App. Div. 1978) (defendant made no proper showing necessary to subpoena for oral depositions the Attorney General, the Director of the Division of Criminal Justice, and the Superintendent of the State Police).

II. DISCOVERY BY THE STATE

A. Generally

See R. 3:12 and R. 3:13-3(d)

B. Defendant's Obligation to Provide Notice

R. 3:12-1 requires defendant to give timely, written notice to the prosecutor of the intent to rely on certain defenses and Code provisions. *State v. Lambert,* 275 *N.J. Super.* 125, 133 (App. Div. 1994); *State v. L.K.,* 244 *N.J. Super.* 261, 265, 271 (App. Div. 1990); *State v. Alston,* 212 *N.J. Super.* 644, 648 (App. Div. 1986).

C. Notice of Alibi

R. 3:12-2 (formerly *R.* 3:11-1 and 2) requires defendant to give a timely, signed alibi upon the prosecutor's written demand, and the failure to do so may result in the refusal to present alibi witnesses at trial. *State v. Silva*, 131 *N.J.* 438, 448-49 (1993); *State v. Rowe*, 316

N.J. Super. 425, 435-36 (App. Div. 1998), *certif. denied*, 160 *N.J.* 89 (1999). This requirement does not violate defendant's privilege against self-incrimination, but the State cannot admit the notice into evidence even though it can use it as a prior inconsistent statement in cross-examining a testifying defendant. *State v. Irving*, 114 *N.J.* 427, 435, 437-41 (1989); *State v. Rowe*, 316 *N.J. Super.* at 435-36; *State v. Lumumba*, 253 *N.J. Super.* 375, 396-97 (App. Div. 1992); *State in re J.H.*, 244 *N.J. Super.* 207, 217 (App. Div. 1990); *State v. Aceta*, 223 *N.J. Super.* 21, 28 (App. Div. 1988).

D. Scientific and Medical Reports

R. 3:13-3(d)(1) (formerly *R.* 3:13-3(b)(1)) requires defendant to provide the State with reports and results of physical or mental examinations and of scientific tests or experiments made in connection with the case. *Cf. State v. Alston,* 212 *N.J. Super.* at 647-49 (defendant must supply State with records relating to defense to be asserted at trial). Defendant need not disclose an expert's reports he or she will not use at trial. *State v. Mingo,* 77 *N.J.* 576, 585-87 (1978); *State v. Spencer,* 319 *N.J. Super.* 284, 301-02 (App. Div. 1999); *State v. Weston,* 216 *N.J. Super.* 543, 546-47 (Law Div. 1986).

E. Notice of Insanity or State of Mind Defenses (*See also,* COMPETENCY, COURTS [instructions to the jury], DEFENSES and INSANITY, this Digest)

1. Generally

R. 3:12-1 requires that a defendant intending to claim insanity as a defense pursuant to N.J.S.A. 2C:4-1, or that he or she lacked the requisite state of mind due to mental disease or defect pursuant to N.J.S.A. 2C:4-2, must serve written notice to the State no later than seven days before the arraignment/status conference. If defendant requests or receives discovery pursuant to R. 3:13-3, he or she must, when notice is served, turn over to the prosecutor discovery pertaining to these defenses. The court may for good cause extend the time for service, or enter such order as the interest of justice requires. In re Mandell, 250 N.J. Super. 125, 130 (App. Div. 1991) (defendant need not reveal any defense, strategy, or tactic except those set forth in R. 3:12-1 (various statutory defenses) or R. 3:12-2 (alibi)); State v. Alston, 212 N.J. Super. at 648 (same); but see State v. Chew, 159 N.J. 183, 226 (defendants in capital cases need not serve notice that they intend to rely on *N.J.S.A.* 2C:11-3c(5)(a) mitigating factor -- extreme mental or emotional

disturbance insufficient to constitute a defense), cert. denied, _____ U.S. ____, 120 S.Ct. 593 (1999).

2. Bifurcation

Reliance on the inconsistent defenses of alibi and insanity may, but does not require, a bifurcated trial proceeding. *See State v. Johnston*, 257 *N.J. Super.* 178, 195 (App. Div.), *certif. denied*, 130 *N.J.* 596 (1992); *State v. Haseen*, 191 *N.J. Super.* 564, 565-67 (App. Div. 1983); *cf. State v. Khan*, 175 *N.J. Super.* 72, 75-84 (App. Div. 1980) (bifurcation needed where conflicting defenses of insanity and self-defense are involved).

F. Subpoena *Duces Tecum* (*See also,* **GRAND JURY** and **SUBPOENAS**, this Digest)

1. Generally

As set forth previously, *R.* 1:9-2 governs the use of subpoenas *duces tecum* to obtain books, papers, documents, or other designated objects.

2. Resistance (*See also* **SEARCH** and **SEIZURE**, this Digest)

Defendants can oppose subpoenas via motions to quash, and can rely on grounds of unreasonableness or oppression. Cupano v. Gluck, 133 N.J. at 236; State v. Cooper, 2 N.J. at 556-57; In re Grand Jury Subpoenas Duces Tecum, 143 N.J. Super. 526, 532-40 (Law Div. 1976). To obtain results of a blood test protected by the patient-physician privilege, the police in a drunk-driving investigation should apply to a judge for a subpoena duces *tecum*, which will be treated as the functional equivalent of a search warrant. State v. Dyal, 97 N.J. 229, 232, 240-41 (1984); State v. Bodtmann, 239 N.J. Super. at 35-44; cf. State v. Weston, 216 N.J. Super. at 545-48 (prosecutor used subpoena duces tecum to obtain county jail records pertaining to defendant that did not disclose trial strategy and that were not prejudicial). While State can serve subpoena duces tecum on testifying defendant and have him produce certain documents without violating his or her constitutional rights, trial court can afford defendant reasonable time to comply. State v. Zwillman, 112 N.J. Super. 6, 14-15 (App. Div. 1970), certif. denied, 57 N.J. 603 (1971); see In re Application of Attorney General, 116 N.J. Super. 143, 145-47 (Ch. Div. 1971).

3. Grand Jury Subpoenas (*See also* **GRAND JURY**, this Digest)

Subpoenas duces tecum may be issued to aid a grand jury in its investigation if reasonable, and need not be founded on probable cause. In re Grand Jury Proceedings, 104 N.J. 218, 220-21 (1986); State v. Stelzner, 257 N.J. Super. 219, 235-36 (App. Div.), certif. denied, 130 N.J. 396 (1992); In re Doe and Roe Corp., 294 N.J. Super. 108, 120-29 (Law Div. 1996), aff'd, 302 N.J. Super. 255 (App. Div.), certif. denied, 151 N.J. 468 (1997), cert. denied, 523 U.S. 1096 (1998). The State can issue the subpoenas on the grand jury's behalf, without the latter's prior authorization, and have them returnable before that body. State v. Hilltop Private Nursing Home, Inc., 177 N.J. Super. 377, 379-97 (App. Div. 1981). The prosecutor cannot, however, issue a pre-trial subpoena independent of the grand jury. State v. Johnson, 287 N.J. Super. 247, 258 (App. Div.), certif. denied, 144 N.J. 587 (1996); State v. Misik, 238 N.J. Super. 367, 376 (Law Div. 1989).

III. ADDITIONAL DISCOVERY IN CAPITAL CASES

A. Generally (*See also* CAPITAL PUNISHMENT, this Digest)

R. 3:13-4 sets forth additional discovery that the prosecutor and defendant are to provide in capital cases, and explains that this is a continuing duty for both parties.

B. To Defendant

R. 3:13-4(a) requires the prosecutor, by the time of arraignment, to provide defendant with a list of the aggravating factors that may be proved at sentencing. The prosecutor must also turn over the discovery bearing on those factors, and any discovery relevant to the existence of mitigating factors. *N.J.S.A.* 2C:11-3c(2); *see, e.g., State v. Cooper*, 151 *N.J.* 326, 355 (1997); *State v. Fortin,* 318 *N.J. Super.* 577, 581 (App. Div. 1999), *aff'd o.g.* 162 *N.J.* 517 (2000); *State v. Spotswood,* 202 *N.J. Super.* 532, 533 (Law Div. 1984).

C. To the State

R. 3:13-4(b) requires defendant, immediately upon a verdict or plea of guilty in a capital case, to provide the prosecutor with itemized mitigating factors that may be proved at sentencing, and any discovery relevant to those factors. *See State v. Douglas*, 322 *N.J. Super.* 156, 171 (App. Div.), *certif. denied*, 162 *N.J.* 197 (1999). IV. DISCOVERY IN DRUNK DRIVING CASES (See also MOTOR VEHICLES [drunk driving], thisDigest)

R. 3:13-3 and *R.* 7:7-7 allow discovery of relevant materials in drunk driving prosecutions, subject to practical limitations. Thus, defendants are entitled to discovery of relevant items which there is a reasonable basis to believe will assist in the defense. *State v. Young*, 242 *N.J. Super.* 467, 470-73 (App. Div. 1990) (physical production of ampules from the same batch used in defendant's breathalyzer tests is not a part of routine discovery); *State v. Ford*, 240 *N.J. Super.* 44, 47-52 (App. Div. 1990).

DISORDERLY PERSONS

I. INTRODUCTION

The statutory provisions relating to most disorderly persons offenses may be found in Chapter 33 of the Code. *See also R.* 7:1 *et seq.* Prosecution for a disorderly persons offense or petty disorderly persons offense must be commenced within one year after it is committed. *N.J.S.A.* 2C:1-6b(2). The bright line separating crimes from lesser offenses is exposure to imprisonment for more than six months. *Compare N.J.S.A.* 2C:1-4a to *N.J.S.A.* 2C:1-4c; *State v. Dively*, 92 *N.J.* 573, 585 (1983); *State v. Owens*, 54 *N.J.* 153, 157 (1969), *cert. denied*, 90 *S.Ct.* 593 (1970).

N.J.S.A. 2C:1-4b bars imposition of certain disabilities on persons convicted of offenses less serious than "crimes." See, e.g., State v. B.C., 235 N.J. Super. 157, 160 (Law Div. 1989), where it was held that a disorderly persons offense is generally not admissible for the purpose of impeaching the credibility of a witness. Some collateral consequences that subsection b. does not bar include forfeiture of office as provided by N.J.S.A. 2C:51-1 and 2, see State v. Lazarchick, 314 N.J. Super. 500, 530-34 (App. Div.), certif. denied, 157 N.J. 546 (1998); State v. Lore, 197 N.J. Super. 277, 283 (App. Div.), certif. denied, 99 N.J. 230 (1984); State v. Baber, 256 N.J. Super. 240 (Law Div. 1992), and the presumption against incarceration for those convicted of third and fourth degree crimes. See State v. Battle, 256 N.J. Super. 268, 285-86 (App. Div.), certif. denied, 130 N.J. 393 (1992); State v. Kates, 185 N.J. Super. 226 (Law Div. 1982).

II. JURISDICTION

State v. Saulnier, 63 N.J. 199 (1973) and State v. Stern, 197 N.J. Super. 49 (App. Div. 1984), hold that the Superior Court has the power to adjudicate both indictable offenses and also any lesser-included nonindictable offenses which arise therefrom. See State v. Dively, 92 N.J. 573, 587 (1983), as well as N.J.S.A. 2C:1-8d. Note also that even though both indictable and lesser-included non-indictable offenses may now be tried together in Superior Court, prosecutors are nonetheless admonished to refrain from seeking indictments where the circumstances call only for disorderly persons proceedings in the municipal courts.

In those cases where a prosecutor, in accordance with his discretionary authority, chooses to downgrade

indictable complaints instead of sending them for grand jury action, the municipal court does not lose its jurisdiction to entertain the disorderly persons matter irrespective of the fact that the statute of limitations has run for the filing of a non-indictable charge, provided that the original indictable offense was filed within the time applicable for that offense. State v. Stern, 197 N.J. Super. at 53-54. See N.J.S.A. 2C:1-6b(2); N.J.S.A. 2C:1-6d. See also State v. Cummings, 122 N.J. Super. 540, 543-544 (App. Div. 1973); N.J.S.A. 2C:1-1e. Note, however, that such a rule will likely not apply in those situations where the charging of an indictable offense was merely a sham or ploy to avoid the expiration of the statute of limitations on the appropriate disorderly persons offense charge. See State v. Stern, 197 N.J. Super. at 54.

The Superior Court may impose no greater sentence than that imposed in the municipal court, *State v. DeBonis*, 58 *N.J.* 182, 188-89 (1971); *see State v. Czachor*, 82 *N.J.* 392, 408-409 (1980); *State v. Nash*, 64 *N.J.* 464, 469-470 (1974), as the court's jurisdiction is appellate, not original. The judgement of the Superior Court is thereupon substituted for that of the municipal court.

III. GENERAL CONSTITUTIONAL ISSUES

A. Right to Jury Trial

Trial by jury is not accorded to one charged with a disorderly persons offense or with a violation of a municipal ordinance. N.J.S.A. 2C:1-4b. Such offenses are deemed "petty offenses" rather than crimes within the provisions of our state constitution relating to indictment and trial by jury. Duncan v. Louisiana, 88 S.Ct. 1444 (1968); In re Yengo, 84 N.J. 111, 120-121, cert. denied, 449 U.S. 1124, 101 S.Ct. 941 (1981); State v. Owens, 54 N.J. at 157; State v. Linnehan, 197 N.J. Super. 41 (App. Div. 1984); State v. Stern, 197 N.J. Super. 49 (App. Div. 1984); State v. Wishnatsky, 258 N.J. Super. 67, 80-81 (Law Div. 1990); State v. Zoppi, 196 N.J. Super. 596 (Law Div. 1984). The maximum punishment authorized for a disorderly persons offense, six months, is below that authorized for a crime, and a conviction for such an offense carries none of the consequential civil disabilities which follow upon a conviction for a crime.

Note that where factually related petty offenses are tried together, thus exposing the defendant to a potential sentence in excess of six months, and the defendant is not offered a jury trial, the sentence ultimately imposed may not total more than six months. *State v. Owens*, 54 *N.J.*

at 163; *State v. Linnehan*, 197 *N.J. Super*. at 43. Note also that concurrent jail sentences, each of which does not exceed six months, are permissible.

In *State v. Linnehan*, 197 *N.J. Super.* at 43-44, the court held that the revocation of the defendant's driver's license for a period of ten years and the excess insurance premiums involved in his third conviction for drunk driving were insufficient to convert a petty offense into a crime so as to require a trial by jury. Also, fines may be added to a six-month term without involving the rights attendant on prosecution for crimes. *State v. Zoppi*, 196 *N.J. Super.* at 600.

B. Right to Counsel (See R. 3:4-2(b); R. 7:3-2(b))

In Argersinger v. Hamlin, 407 92 S.Ct. 2006 (1972), the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." These same views had been expressed by the New Jersey Supreme Court in *Rodriguez v. Rosenblatt*, 58 *N.J.* 281 (1971), wherein the court held that "as a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost." *Id.* at 295. *See also State v. Laurick*, 120 *N.J.* 1, 7, *cert. denied*, 498 *U.S.* 967, 111 *S.Ct.* 429 (1990); *State v. Lazarchick*, 314 *N.J. Super.* at 516.

An indigent defendant may waive counsel but must do so intelligently and voluntarily. A painstaking explanation of the advisability of and right to counsel, as well as an inquiry into the defendant's understanding, must precede acceptance of a waiver. *State v. Lach*, 213 *N.J. Super.* 466, 470-471 (App. Div. 1986); *State v. Guerin*, 208 *N.J. Super.* 527, 531-536 (App. Div. 1986).

In *State v. Hermanns*, 278 *N.J. Super.* 19 (App. Div. 1994), the Appellate Division reversed defendant's convictions for a variety of disorderly persons offenses because she was deprived of her right to counsel in municipal court. In municipal court defendant showed up without counsel and asked for a "dismissal" because her counsel from a previous trip to municipal court had not "been assigned to represent" her and she had no other attorney. The judge, on representation of the municipal prosecutor that the Law Division had previously denied her application for counsel in a prior unrelated appeal, denied defendant's request and did not inform her of her right to retain counsel if she could afford it, make

application for assigned counsel or make a showing of indigence. On appeal, the Law Division granted her application for assigned counsel and she was represented on the appeal. The Appellate Division found that the aggregate financial penalties to which defendant was subject (\$1,800) gave rise to a right to counsel under *Rodriguez v. Rosenblatt*, 58 *N.J.* 281 (1971) as it was a "consequence of magnitude."

State v. Dwyer, 229 *N.J. Super.* 531, 540 (App. Div. 1989), a prosecution under *N.J.S.A.* 2C:33-2a(2), it was held that a trial judge's obligation to advise a pro se defendant of his right not to testify applies to disorderly person and non-indictable offenses as well as to indictable offenses.

- C. Search and Seizure; Arrest
 - 1. Strip Searches

No strip search may be conducted upon a person who has been detained or arrested for a disorderly or petty disorderly offense, unless the search is authorized by a warrant or the consent of the persons to be searched; there is probable cause to believe that a weapon, controlled dangerous substance, or evidence of a crime will be found; or the person is lawfully detained in an adult correctional facility and the search is based on reasonable suspicion that a weapon or drugs will be found. *N.J.S.A.* 2A:161A-1.

2. Body Cavity Searches

No body cavity search may be conducted upon a person who has been detained or arrested for the commission of a disorderly or petty disorderly persons offense unless the search is authorized by a warrant or consent of the person, or the person is lawfully detained in a adult correctional facility and is based on reasonable suspicion that a weapon or drugs will be found. *N.J.S.A.* 2A:161A-2.

In *State v. Hayes*, 327 *N.J. Super.* 373 (App. Div. 2000), the Appellate Division reversed defendant's drug and related convictions, including using a remotely-activated paging device while engaged in the commission of a drug related offense under *N.J.S.A.* 2C:33-20. Police had arrested defendant on an outstanding warrant, and a pat-down search revealed a pager and more than \$1,000 in cash. Defendant, a prior drug offender, tried to reach into the back of his pants while handcuffed; the police knew that he often carried drugs there, and at headquarters a warrantless search revealed cocaine in his

anus. However, the State had not complied with the requirements of N.J.S.A. 2A:161A-1, which requires reasonable suspicion for strip searches and was adopted to provide greater protection than that the Fourth Amendment provides. The Appellate Division thus concluded that N.J.S.A. 2C:161A-1 prohibited a strip search of defendant because there were no recognized exceptions to the warrant requirement, section 1b, and defendant was not "confined in a municipal detention The court also concluded that facility." Section 1c. defendant was subjected to an unlawful "body cavity search" because he was not "confined in an adult county correctional facility." Section 2b. Finally, the court rejected the State's claim that the drugs should be admissible under the inevitable discovery rule.

In State v. Holland, 328 N.J. Super. 1 (App. Div. 2000), the Appellate Division consolidated defendants' cases to consider whether the police can knock on the door of a residence and enter without a warrant if they smell burning marijuana emanating from it. Here, probable cause existed to believe that people in the residence possessed an unknown quantity of marijuana once the officers smelled it, but such possession, a disorderly persons offense, was a "minor offense" for purposes of a warrantless home search. The court found that the need to search for the drugs or arrest defendants did not constitute exigent circumstances that, coupled with probable cause, justified warrantless entries of homes. While suppressing the evidence seized in the Califano case, the court remanded the Holland matter for a determination of whether the drugs seized were nonetheless admissible pursuant to an "independent source" analysis.

In *State v. Vonderfecht*, 284 *N.J. Super.* 555 (App. Div. 1995), the Appellate Division, reversing the trial court, ruled that police have the authority to arrest an individual for a petty disorderly persons offense committed in the view of the officer under *N.J.S.A.* 40A:14-152, which allows the arrest of any disorderly person. It found that an inventory search pursuant to a lawful arrest for a petty disorderly persons offense was proper and the controlled dangerous substance found during that search should not have been suppressed.

IV. SENTENCING

N.J.S.A. 2C:43-8, authorizing the disposition for disorderly persons and petty disorderly persons provides that the sentence shall not exceed 6 months in the case of a disorderly persons offense or 30 days in the case of a petty disorderly offenses.

The presumption of non-imprisonment under N.J.S.A. 2C:44-1e applies to these offenses. The statute requires that sentencing for disorderly persons and petty disorderly persons be determinate. As a general rule, bail for these offenses is not to exceed \$2,500. *N.J.S.A.* 2C:6-1.

State v. Pescatore, 213 N.J. Super. 22 (App. Div. 1986), aff²d 105 N.J. 441 (1987), held that the disorderly persons penalty prescribed by New Jersey Sales Tax Act is not the exclusive penalty for violations, and the State can seek harsher criminal sanctions under any applicable criminal statutes. In relation to said violations, disclosure of tax returns is proper.

V. SPECIFIC DISORDERLY AND PETTY DISORDERLY PERSONS STATUTES AND CASES

- A. Failure To Disperse (*N.J.S.A.* 2C:33-1b)
- B. Disorderly Conduct (N.J.S.A. 2C:33-2)
 - 1. Improper behavior (fighting) (*N.J.S.A.* 2C:33-2a)

In State v. Oliver, 320 N.J. Super. 405 (App. Div.), certif. denied, 161 N.J. 332 (1999), the Appellate Division affirmed defendants' disorderly persons convictions for creating a hazardous or physically dangerous condition by an act serving no legitimate purpose, N.J.S.A. 2C:33-2a(2), and their prohibited municipal ordinance violations on beach bathing. Defendants had been surfing in a beach area closed to the public due to a tropical storm, and had refused police officers' entreaties to exit the water. The municipal court had both territorial and subject-matter jurisdiction over this case, and the Public Trust Doctrine did not require adjudication in the Superior Court because that doctrine did not limit territorial jurisdiction. Also, the enabling statutes defining waters bounding the municipality, beaches bordering it, and "bathing facilities" were not vague and satisfied due process. Finally, the court determined that the evidence clearly supported defendants' convictions, and the municipal court judge did not err in refusing one defendant's request to substitute counsel.

In *State v. Egles*, 308 *N.J. Super.* 124 (App. Div. 1998), the Appellate Division reversed the Law Division's dismissal of a complaint charging disorderly conduct under *N.J.S.A.* 2C:33-2a, and resisting arrest. An arrest warrant may issue based upon a disorderly conduct complaint, but here the warrant itself was not

issued until after the police had arrested defendant. Still, the Appellate Division found that the Law Division judge should have granted the State's request to amend the complaint-warrant (R. 3:2-3) and treat it as a complaintsummons (R. 3:2-2) pursuant to *Rule* 3:3-4, since the complaint remains the same and simply the means of process changes. It determined in this case that dismissing the complaint was drastic action when merely a defect of process occurred, which an amendment of the complaint-warrant to a complaint-summons would have cured. Finally, the court noted that the appropriate remedy for an improper arrest is suppression of any evidence seized in connection with that arrest, not dismissal of the entire complaint.

State v. Figueroa, 237 *N.J. Super.* 215 (App. Div. 1989), *certif. denied*, 121 *N.J.* 643 (1990), held that it was proper for the trial judge to refuse to charge improper behavior under *N.J.S.A.* 2C:33-2a(2) as a lesser included offense of aggravated arson, because there was no rational basis in the evidence to charge any offense having a lesser culpability than purposeful or knowing.

In State v. Cummins, 168 N.J. Super. 429 (Law Div. 1979), a mental patient at a psychiatric hospital was charged with disorderly conduct under N.J.S.A. 2A:170-28 (since repealed and replaced by N.J.S.A. 2C:33-2 and 33-8) for disruptive conduct induced by his illness. Hospital records revealed that the patient was manic depressive and that in limited circumstances, his character and judgment were questionable. An institutional attendant brought charges, and defendant was convicted in municipal court. In reversing defendant's conviction, the Law Division judge found that applying the disorderly persons offense statute to this defendant was not only a misapplication of the statute but constituted an unconstitutional infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

In *State v. Lashinsky*, 81 *N.J.* 1 (1979), defendant, a press photographer for the Star Ledger, claimed privilege as a newspaperman for refusal to heed a police officer's order to remove himself from the immediate vicinity of an automobile accident. Whether a newsperson's conduct is disorderly must turn on whether, from an objective standpoint and under all of the circumstances, the policeman's order to the newsman was reasonable, taking into account the special role performed by the press. Defendant's disorderly persons conviction under *N.J.S.A.* 2A:170-29 (since repealed and replaced by *N.J.S.A.* 2C:33-2a(2) and 2C:33-4) was affirmed due to the exigent circumstances surrounding the accident,

namely, only one officer was present, personal property and valuables were strewn about, and an accident victim was in peril.

2. Offensive language (N.J.S.A. 2C:33-2b)

State in the Interest of H.D., 206 *N.J. Super.* 58 (App. Div. 1985), declared subsection b. unconstitutional on overbreath grounds, finding that the statute impermissibly punishes speech protected under the First Amendment.

C. Loitering for Purpose of Illegally Using, Possessing or Selling Controlled Substance (*N.J.S.A.* 2C:33-2.1). (*See also*, LOITERING, this Digest)

D. Juvenile's Right to Operate a Motor Vehicle; Suspension or Postponement (*N.J.S.A.* 2C:33-3.1)

E. Harassment (*N.J.S.A.* 2C:33-4) (*See also*, HARASS-MENT, this Digest)

F. Obstructing Highways and Other Public Passages (*N.J.S.A.* 2C:33-7)

In State v. Wishnatsky, 258 N.J. Super. 67 (Law Div. 1990), defendant was prosecuted in municipal court for violation of N.J.S.A. 2C:33-7, based on his actions of purposely barring the use of the passageway to a health clinic, rendering it impassable to employees and visitors by moving his body back and forth across the entryway. In conducting a trial de novo, the Law Division upheld the lower court finding of guilt. It rejected defendant's request to have the case transferred to the federal district court, finding that it had subject matter jurisdiction over the case and that it lacked any jurisdictional or legislative authority to make such transfer. It also reaffirmed the long-standing proposition that a defendant is not entitled to a trial by jury on a petty disorderly offense charge. The court rejected defendant's argument that his conduct was excused under the statute based on defendant's claim that he had a "legal privilege" to purposely block the public entrance to the clinic to protect unborn children. The court relied on the 1971 Commentary to the section in concluding that defendant's actions in blocking the doorway of the clinic was not protected by the First Amendment, and his actions, undertaken without the acquisition of a license or permit, did not make him immune from prosecution.

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

In *State v. Kane*, 303 *N.J. Super.* 167 (App. Div. 1997), defendant's brief shouts for recognition at an official budget hearing did not violate *N.J.S.A.* 2C:33-8, since his conduct did not reach the stage where it was so outrageous that police could appropriately act without direction from the chairman of the hearing.

H. Desecration of Venerated Objects (*N.J.S.A.* 2C:33-9)

I. Maintaining a Nuisance (N.J.S.A. 2C:33-12)

Maintaining a nuisance is a disorderly persons offense when the person either knowingly a) creates a condition that endangers the safety or health of a considerable number of persons; or b) conducts premises where persons gather to engage in unlawful conduct. *N.J.S.A.* 2C:33-12a and b. Under subsection c), it is a crime of the fourth degree when the premises are used as a house of prostitution or the for sale, manufacture or exhibition of obscene materials. *See State v. Channel Home Centers*, 199 *N.J.Super.* 483, 486-87 (App. Div. 1985).

Dumping large amounts of solid waste onto land reserved for a street could be prosecuted under *N.J.S.A.* 2C:33-12a and b. *State v. Garofola*, 252 *N.J. Super.* 356, 360 (Law Div. 1988).

To be prosecuted for maintaining a nuisance under *N.J.S.A.* 2C:33-12b, the operator of the place of business must know that the illegal activity is taking place. *See Town Tobacconist v. Kimmelman*, 94 *N.J.* 85, 127 n.22 (1983).

In *State v. Wright*, 235 *N.J. Super.* 97 (App. Div. 1989), *N.J.S.A.* 2C:33-12c was upheld as constitutional against vagueness and overbreadth challenges.

J. Abating Nuisance (*N.J.S.A.* 2C:33-12.1)

N.J.S.A. 2C:33-12.1a authorizes the additional penalty, upon conviction under *N.J.S.A.* 2C:33-12, of an order to abate the nuisance and forfeit or destroy personal property found on the premises and involved in maintaining the nuisance. *N.J.S.A.* 2C:33-12.1b permits the further penalty of an order to close the building where the nuisance was maintained and to bar its use for not more than a year. Conviction under this section only comes into play upon conviction under *N.J.S.A.* 2C:33-12; convictions under other nuisance

statutes will not suffice. *State v. Channel Home Centers*, 199 *N.J. Super.* at 487.

K. Smoking in Public (N.J.S.A. 2C:33-13)

L. Sale of Cigarettes to Minors (N.J.S.A. 2C:33-13.1)

M. Interference with Transportation (*N.J.S.A.* 2C:33-14)

N. Possession or Consumption of Alcoholic Beverage in Public Place or Motor Vehicle by Person under Legal Age (*N.J.S.A.* 2C:33-15). Note exception for persons employed by a bona fide restaurant or hotel, or who are engaged in the performance of employment pursuant to an employment permit issued by the Director of the Division of Alcoholic Beverage Control. *N.J.S.A.* 2C:33-15d.

State v. Buglione, 233 *N.J. Super.* 110, 113-15 (App. Div.), *certif. denied*, 117 *N.J.* 636 (1989), held that based on the plain language of *N.J.S.A.* 2C:33-15 as well as its legislative history, a custodial term of up to six months for drinking underage may be imposed.

O. Alcoholic Beverages; Bringing or Possession on School Property by Person of Legal Age; Penalty (*N.J.S.A.* 2C:33-16).

P. Offer or Service of Alcoholic Beverage to Underage Person; Disorderly Persons; Exceptions (*N.J.S.A.* 2C:33-17). Note exception for places with licenses issued by the Division of Alcoholic Beverage Control, to parents who are of legal age of the person who is underage, and to those observing religious ceremonies. *N.J.S.A.* 2C:33-17b(1),(2),(3).

An underage person who serves alcoholic beverages to those who are underage may be prosecuted for violation of *N.J.S.A.* 2C:33-17. *State v. Haarde,* 230 *N.J. Super.* 605, 607-08 (App. Div. 1989).

Q. Bringing or Possessing Remotely Activated Paging Device by Student on Property Used for School Purposes Without Express Written Permission of School Board; Disorderly Persons Offense (*N.J.S.A.* 2C:33-19)

R. Definitions (N.J.S.A. 2C:33-24)

S. Exhibition of Warning Sign Required for Sale of Spray Paint; Violations, Penalties (*N.J.S.A.* 2C:33-25)

T. Sale of Motor Vehicle on Sunday (*N.J.S.A.* 2C:33-26)

U. Consumption of Alcohol in Restaurants (*N.J.S.A.* 2C:33-27)

VI. ADDITIONAL DISORDERLY PERSONS OFFENSES

Simple Assault (*N.J.S.A.* 2C:12-1a) is a disorderly persons offense, unless committed in a flight or scuffle entered into by mutual consent, in which case it is petty disorderly persons offense.

*Assault by Auto (*N.J.S.A.* 2C:12-1c) is a crime of the fourth degree if serious bodily injury results, and is a disorderly persons offense if bodily injury results.

*Criminal Mischief (*N.J.S.A.* 2C:17-3b(2) is a disorderly persons offense if pecuniary loss is \$500 or less.

*Defiant Trespass (N.J.S.A. 2C:18-3b).

*Theft (*N.J.S.A.* 2C:20-2b(3) is a disorderly person offense if the amount is less than \$200.

State v. Smith, 136 N.J. 245 (1994). Theft of Services (N.J.S.A. 2C:20-8) - Where the property under the State's theory, \$120 stolen from the cab driver at knifepoint, was not the same as the property, a cab ride, for which defendant admitted he did not pay and for which he was not prosecuted, the consolidation of theft offenses did not require the trial court to charge the disorderly persons offense of theft of services as a lesser offense included of robbery.

*Unlawful Taking of Means of Conveyance (*N.J.S.A.* 2C:20-10a).

A defendant who enters a vehicle to commit the disorderly persons offense of joyriding, *N.J.S.A.* 2C:20-10, is also guilty of the crime of burglary. *See State v. Jijon*, 264 *N.J. Super.* 405 (App. Div. 1993), *aff'd o.b.*, 135 *N.J.* 471 (1994).

State v. Cantor, 221 *N.J. Super.* 219 (App. Div. 1987), *certif. denied*, 110 *N.J.* 291 (1988), held defendant's status as newsperson did not render her immune from prosecution on impersonation charge under *N.J.S.A.* 2C:28-8, a disorderly persons offense, when she falsely impersonated a public official in order to

gain information from the mother of a homicide victim. The court reasoned that the First Amendment has never been construed to provide immunity from either tortious or criminal conduct committed in the course of newsgathering.

*Resisting Arrest (*N.J.S.A.* 2C:29-2) is a disorderly persons offense if no physical force is used or intended.

*Possession of 50 Grams or Less of Marijuana - (*N.J.S.A.* 2C:35-10a(4)).

*Failure to Voluntarily Deliver Controlled Dangerous Substance to Law Enforcement (*N.J.S.A.* 2C:35-10(c)).

*Possession of Drug Paraphernalia (*N.J.S.A.* 2C:36-2).

*Possession of Hypodermic Needle (*N.J.S.A.* 2C:36-6).

*Employer Requiring Lie Detector Test (*N.J.S.A.* 2C:40A-1). See State v. Community Distribution, Inc., 64 N.J. 479 (1974); State v. Berkey, Photo, Inc., 150 N.J. Super. 56 (App. Div. 1977).

*Cruelty; Disorderly Persons Offense (*N.J.S.A.* 4:22-17).

In *State v. Spano*, 328 *N.J.Super.* 287 (App. Div. 2000), the Appellate Division affirmed defendant's convictions for needlessly killing animals and injuring property while hunting. The defendant had shot two dogs while deer hunting, allegedly in self-defense. It reasoned that a dog's mere barking does not justify its shooting, and defendant's conduct in supposed response to the "threat" the dogs posed was excessive. Too, no expert testimony was needed from a defense witness who offered to define what the word "worrying" meant in a relevant statute. Lastly, the Court upheld the suspension of defendant's two separate hunting license given the facts involved.

*Unlawful Discharge Of, or Discrimination Against, Employee Claiming Compensation Benefits; Penalty (*N.J.S.A.* 34:15-39.1). See Lally v. Copygraphics, 85 N.J. 688 (1981); Kenny v. Meadowview Nursing and Convalescent Ctr. 308 N.J. Super. 565, 571 (App. Div. 1998).

In State v. Ochoa, 314 N.J. Super. 168 (App. Div. 1998), the Appellate Division affirmed the denial of petitioner's petition for expungement of her three disorderly and petty disorderly persons convictions. Petitioner had four other convictions in other jurisdictions which precluded consideration of her expungement petition pursuant to N.J.S.A. 2C:52-3. While she had but three prior New Jersey disorderly and petty disorderly persons convictions, the Appellate Division found that it would be manifestly inconsistent under this statute to expunge the convictions occurring in this state of a habitual petty offender who also had committed numerous petty offenses in other jurisdic-N.J.S.A. 2C:52-3 does not specify that an tions. individual must commit his or her three prior convictions in New Jersey. The court concluded that petitioner was ineligible to seek expungement. In so ruling, the Appellate Division overruled the contrary decision in State v. H.J.B., 240 N.J. Super. 216 (Law Div. 1990), that foreign disorderly persons convictions could not be considered in determining such eligibility.

DOMESTIC VIOLENCE

I. LEGISLATIVE INTENT

N.J.S.A. 2C:25-18 provides: "It is the intent of the Legislature to stress that the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated . . . to protect the victim" and "to assure the victims of domestic violence the maximum protection from abuse the law can provide." To that end, the Legislature "encourages the broad application of the remedies available under this act in the civil and criminal courts of this State," and it intends "that the official response to domestic violence shall communicate the attitude that violent behavior will not be excused or tolerated, and that the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation."

A. Construction of the Act

The Prevention of Domestic Violence Act is remedial in nature; therefore, it is to be liberally construed to achieve its salutary purposes. Cesare v. Cesare, 154 N.J. 394, 400 (1998); J.N. v. D.S., 300 N.J. Super. 647, 650-51 (Ch. Div. 1996). The Act is designed to ensure that victims of domestic violence have full access to the protections of our legal system, including an immediate response when an offense is suspected. Cesare, 154 N.J. at 399-400. In relation to the Criminal Code, the Domestic Violence Act enumerates acts that constitute domestic violence when the alleged abuser and the victim have a relationship defined in N.J.S.A. 2C:25-19d. Therefore, the Act incorporates other criminal statutes, but it does not create a new class of offenses or proscribe acts not otherwise addressed by our criminal law. Kamen v. Egan, 322 N.J. Super. 222 (App. Div. 1999); N.B. v. T.B., 297 N.J. Super. 35, 40 (App. Div. 1997). It was designed to protect victims of domestic violence and to provide uniformity in prosecuting and adjudicating each claim. D.C. v. F.R., 286 N.J. Super. 589, 597 (App. Div. 1996); Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995).

B. Definition

"Domestic violence" means the occurrence of one or more of the following acts, inflicted upon a person protected under this act, by an adult or an emancipated minor: homicide (*N.J.S.A.* 2C:11-1); assault (*N.J.S.A.* 2C:12-1); terroristic threats (*N.J.S.A.* 2C:12-3); kidnapping (*N.J.S.A.* 2C:13-1); criminal restraint (*N.J.S.A.* 2C:13-2); false imprisonment (*N.J.S.A.* 2C:13-3); sexual assault (*N.J.S.A.* 2C:14-2); criminal sexual contact (*N.J.S.A.* 2C:14-3); lewdness (*N.J.S.A.* 2C:14-4); criminal mischief (*N.J.S.A.* 2C:17-3); burglary (*N.J.S.A.* 2C:18-2); criminal trespass (*N.J.S.A.* 2C:18-3); harassment (*N.J.S.A.* 2C:33-4); and stalking (*N.J.S.A.* 2C:12-10). *N.J.S.A.* 2C:25-19a.

C. Protected Persons

For domestic violence to be found, the perpetrator and victim must have a relationship recognized under the Act. *N.J.S.A.* 2C:25-19d.

1. Victim of Domestic Violence includes:

a. any person who is 18 years of age or older or an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present or former household member;

b. any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant.

c. any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship.

2. Emancipated Minor

An emancipated minor means a person under 18 years of age who has been married, has entered military service, has a child or is pregnant, or has been previously declared by a court or an administrative agency to be emancipated. *See Filippone v. Lee*, 304 *N.J. Super.* 301 (App. Div. 1997).

3. Household Member

The legislative intent behind the amendment of the Domestic Violence Act that alters the definition of a "victim" by removing the word "cohabitant" and replacing it with "household member" was to expand coverage of the Act. The amendment extended protection to individuals who have a close relationship with the batterer. *South v. North*, 304 *N.J. Super.* 104, 109 (Ch. Div. 1997). Being a "household member" within meaning the Domestic Violence Act requires

more than a casual dating relationship, but it is not necessary for the parties to reside together. Desiato v. Abbott, 261 N.J. Super. 30, 34 (Ch. Div. 1992). The determination depends upon a case-by-case analysis including a consideration of the amount of time the parties spend together in the context of the constancy of the relationship, over-night visits, storage of personal items at the other party's residence, shared property arrangements regarding use of automobiles, bank accounts, or mailing addresses, and familiarity with the other party's family functions. Id.; see also Smith v. Moore, 298 N.J. Super. 121, 126 (App. Div. 1997) (woman who shared weekend summer vacation housing with another women, including the alleged perpetrator of domestic violence was not a "victim" pursuant to the Act when the alleged domestic violence of telephone harassment occurred months later, in the autumn, and was unrelated to any domestic circumstance of the parties); Jutchenko v. Jutchenko, 283 N.J. Super. 17 (App. Div. 1995) (Domestic Violence Act did not apply to allegations of harassment of one brother against another brother as a "former household member" when the brothers had not resided in same household for 20 years and there was no showing that the defendant brother's past domestic relationship with the plaintiff brother provided a special opportunity for abusive and controlling behavior); Bryant v. Burnett, 264 N.J. Super. 222 (App. Div.) (plaintiff was a "household member" under the Domestic Violence Act when she lived with the defendant at the time that the domestic violence act occurred; the parties intent as to the permanency of relationship and the circumstances surrounding the agreement to live together were irrelevant), certif. denied, 134 N.J. 478 (1993); South v. North, 304 N.J. Super. 104, 109-114 (Ch. Div. 1997) (father of the victim's grandchild, who lived with grandchild and the victim's daughter in same apartment complex as the victim, and who had previously been in dating relationship with the victim, was a "household member" of the victim for purposes of the Domestic Violence Act because the parties shared domestic responsibilities, although the family situation was non-traditional); Sisco v. Sisco, 296 N.J. Super. 245, 248-49 (Ch. Div. 1996) (adult daughter's allegations against father, with whom she had not resided in same household for more than 15 years, did not satisfy jurisdictional requirements of the Domestic Violence Act because her allegations did not establish a special opportunity for "abusive and controlling behavior" on the part of her father); Croswell v. Shenouda, 275 N.J. Super. 614, 622-23 (Ch. Div. 1994) (intimate relationship between the parties did not automatically make the plaintiff and defendant household members);

Torres v. Lancellotti, 257 *N.J. Super*. 126 (Ch. Div. 1992) (Domestic Violence Act applied when the defendant was the plaintiff's live-in male friend for eight years although the parties were not married and had no children).

4. Dating Relationship

The recognition of a "dating relationship" between the perpetrator of domestic violence and the victim was added to the 1991 Act. This addition is in accordance with one court's interpretation of the prior law where a "girlfriend" was considered a "victim" under the Act as a "household member." See Desiato v. Abbott, 261 N.J. Super. 30, 34 (Ch. Div. 1992) (holding that although the parties had never been married or shared the same legal residence, the defendant's girlfriend met the requirements of a "household member" victim under the Domestic Violence Act when the parties were constant companions, had several overnight stays, dined together and with the boyfriend's parents, and the girlfriend kept personal effects at the boyfriend's residence). Under the 1991 Act, N.J.S.A. 2C:25-19d requires "that the victim 'has had' a dating relationship with the offender." Under this provision, to receive the protections of the 1991 Act, the victim is not required to have been engaged in a dating relationship with the defendant at the time of the domestic violence act. D.C. v. F.R., 286 N.J. Super. 589, 607 (App. Div. 1996). See also South v. North, 304 N.J. Super. 104, 108-09 (Ch. Div. 1997) (holding that woman whose social relationship with defendant ended seven years before she filed the domestic violence complaint, and prior to the amendment defining a victim of domestic violence as someone who has had a dating relationship with the defendant, was not in "dating relationship" which could qualify woman as "victim of domestic violence" for purposes of Act); Sperling v. Teplitsky, 294 N.J. Super. 312, 321 (Ch. Div. 1996) (the Domestic Violence Act of 1991 did not apply where there was a significant time gap between the alleged act of violence and the conclusion of the dating relationship and there was no evidence of the defendant's continuing violence or ongoing controlling behavior prior to the events at issue, even though the parties had previously lived together in a dating relationship for six months).

5. Child in Common

In *Croswell v. Shenouda*, 275 *N.J. Super.* 614, 617 (Ch. Div. 1994) the court found that the plaintiff's terminated pregnancy did not mean that she had a child in common with defendant, and even if it did, the plaintiff did not qualify as "victim of domestic violence" under the Act. *But see N.J.S.A.* 2C:25-18 (legislative

intent of the Domestic Violence Act to protect women who are assaulted while pregnant).

D. Sufficiency of the Act Allegedly Constituting Domestic Violence

N.J.S.A. 2C:25-29a prohibits the entry of a restraining order without a finding or an admission by the defendant that an act of domestic violence was committed. Kanaszka v. Kunen, 313 N.J. Super. 600, 607 (App. Div. 1998). The acts claimed by a plaintiff to be domestic violence must be evaluated in light of the previous history of violence between the parties including previous threats, harassment and physical abuse, and in light of whether immediate danger to person or property is present. Peranio v. Peranio, 280 N.J. Super. 47, 54 (App. Div. 1995). This requirement reflects the reality that ordinarily domestic violence is more than an isolated aberrant act and it incorporates the legislative intent to provide a vehicle to protect victims whose safety is threatened. Id.; accord, D.C. v. F.R. 286 N.J. Super. 589, 608-09 (App. Div. 1996); Corrente v. Corrente, 281 N.J. Super. 243, 249-50 (App. Div. 1995).

However, in *Cesare*, the Supreme Court recognized that one sufficiently egregious act may constitute domestic violence under the Act, even with no history of abuse between the parties or that an ambiguous act may qualify as domestic violence based upon a finding of violence in the parties' past. *Cesare v. Cesare*, 154 *N.J.* at 402. *Accord Kamen v. Egan*, 322 *N.J. Super.* 222, 228 (App. Div. 1999).

The analysis of the sufficiency of the alleged act of domestic violence is fact-sensitive. In assessing an allegation of domestic violence, the courts can consider evidence of a defendant's prior abusive acts, regardless of whether those acts have been the subject of a domestic violence adjudication. *Cesare v. Cesare*, 154 *N.J.* 394, 405 (1998). After weighing the entire relationship between the parties the court must specifically set forth its factual findings. *Id.*

1. Trespass

Kamen v. Egan, 322 *N.J. Super.* 222, 228-29 (App. Div. 1999) (daughter's single act of trespass of entering her father's house without his permission to visit her children, who lived there, on a day that was not designated as a visitation day, was insufficient to justify the issuance of a restraining order because the trespass did

not involve violence or a threat of violence and there was no history of violence between the parties).

2. Harassment

Integral to finding harassment pursuant to the Domestic Violence Act is a showing of a purpose to harass, along with a course of alarming conduct. State v. Hoffman, 149 N.J. 564, 576 (1997); Sweeney v. Honachefsky, 313 N.J. Super. 443, 447 (App. Div. 1998); Peranio v. Peranio, 280 N.J. Super. 47, 55 (App. Div. 1995); D.C. v. T.H., 269 N.J. Super. 458, 461-62 (App. Div. 1994); E.K. v. G.K., 241 N.J. Super. 567, 570 (App. Div. 1990); Grant v. Wright, 222 N.J. Super. 191, 196 (App. Div.), certif. denied, 111 N.J. 562 (1988). See also L.D. v. W.D., Jr., 327 N.J. Super. 1, 4-5 (App. Div. 1999) (husband's taking parties' children to counseling instead of choir practice and calling wife at work to say he had moved her desk from their shared office into their living room, were not harassment within meaning of the Domestic Violence Act); J.F. v. B.K., 308 N.J. Super. 387, 391 (App. Div. 1998) (absent evidence of surrounding circumstances to raise defendant's innocuous conduct of placing a note on the plaintiff's car to talk to her to harassment, there was no basis for a restraining order under the Domestic Violence Act); J.N.S. v. D.B.S., 302 N.J. Super. 525, 530-31 (App. Div. 1997) (husband's alleged conduct, during separation from his wife, of blocking wife's driveway for several minutes with his car when picking up children for visit, giving wife a vulgar hand gesture when picking up their son for a visit, calling wife obscene names, making offensive remarks of ethnic and sexual nature about wife's new boyfriend in child's presence and kicking wife's garbage can over when returning son home after visit did not constitute "harassment" or "domestic violence" warranting issuance of restraining order under the Domestic Violence Act); Corrente v. Corrente, 281 N.J. Super. 243, 249-50 (App. Div. 1995) (husband's calling his wife at work after they had separated and threatening drastic measures if she did not provide money to pay bills, and then terminating her phone service when she did not pay were not harassment pursuant to the Domestic Violence Act, where there was no history of domestic violence between them, and wife was neither harmed nor subjected to potential injury); D.C. v. T.H., 269 N.J. Super. 458, 461-62 (App. Div. 1994) (father's statement to mother expressing concern over her boyfriend's allegedly inappropriate discipline of child was not "harassment" within the Domestic Violence Act absent evidence that the statement was made for purpose of harassing the mother or to alarm or seriously annoy her); Mann v. Mann, 270 N.J. Super. 269, 271 (App. Div. 1993) (evidence that wife pulled

the cord out of the telephone, struck the door causing damage and repeatedly interfered with a telephone call to police to report her acts supported a finding that the wife was guilty of criminal mischief and harassment under the Domestic Violence Act); Peranio v. Peranio, 280 N.J. Super. 47 (App. Div. 1995) (husband's informing his wife, from whom he was separated and in the process of obtaining a divorce, that he would "bury" her when he discovered she had disposed of some of his property did not constitute "harassment" under the Domestic Violence Act where the judge found that, although the statement was objectively alarming, husband did not intend to harass his wife, and there was no history of threats, harassment, physical or mental abuse or violence between the parties); Murray v. Murray, 267 N.J. Super. 406, 409-11 (App. Div. 1993) (husband's remarks to wife while contemplating divorce that he did not have affection for her and did not find her sexually attractive was not harassment pursuant to the Domestic Violence Act where the purpose of the remarks was not to alarm or annoy wife); E.K. v. G.K., 241 N.J. Super. 567, 570-71 (App. Div. 1990) (wife's persistence in methods of disciplining adopted daughter, to which the husband objected, did not constitute harassment to husband under the Domestic Violence Act).

3. Terroristic Threats

For a discussion of terroristic threats under the Domestic Violence Act, *See Cesare v. Cesare*, 154 *N.J.* 394 (1998).

4. Burglary

For a discussion of burglary, along with other offenses, in relation to contempt for violating restraining order, *see State v. Marquez*, 277 *N.J. Super.* 162 (App. Div. 1994), *certif. denied*, 141 *N.J.* 99 (1995).

E. Standard of Review

Because of the family court's special jurisdiction and expertise in family matters, appellate courts should defer to fact-finding that is supported by adequate, substantial, credible evidence. *Cesare v. Cesare*, 154 *NJ.* 394, 411-13 (1998); *Kamen v. Egan*, 322 *N.J. Super.* 222, 228 (App. Div. 1999); *Grant v. Wright*, 222 *N.J. Super.* 191, 200 (App. Div.), *certif. denied*, 111 *N.J.* 562 (1988). Legal conclusions, however, are reviewed *de novo. In the Matter of Return of Weapons to J.W.D.*, 149 *N.J.* 108, 116-17 (1997); *J.N.S. v. D.B.S.*, 302 *N.J. Super.* 525, 530 (App. Div. 1997). The Domestic Violence Act does not place trial judges in the role of super monitors over modern day parenting. J.N.S. v. D.B.S., 302 N.J. Super. at 532. Likewise, it is improper for the trial court to base a finding of domestic violence upon a course of prior conduct that is not alleged in the complaint. L.D. v. W.D., 327 N.J. Super. 1, 4 (App. Div. 1999); J.F. v. B.K., 308 N.J. Super. 387, 391-92 (App. Div. 1998).

Nonetheless, a defendant who does not object to a finding of domestic violence at the trial level, waives that challenge on appeal. *Bryant v. Burnett*, 264 *N.J. Super.* 222, 227 (App. Div.), *certif. denied*, 134 *N.J.* 478 (1993).

II. REMEDIES UNDER THE PREVENTION OF DOMESTIC VIOLENCE ACT

A. Filing of a Complaint by Victim of Domestic Violence

Pursuant to *N.J.S.A.* 2C:25-28a, a domestic violence victim may file a complaint alleging the commission of an act of domestic violence with the Family Part of the Superior Court, Chancery Division. Once a complaint is filed, the court shall not dismiss it or delay the disposition of a case because the victim has left the residence to avoid further incidents of domestic violence. Moreover, the filing a complaint pursuant to this section shall not prevent the filing of a criminal complaint for the same act. Additionally, the court shall waive any requirement that the domestic violence victim's place of residence appear on the complaint. *N.J.S.A.* 2C:25-28b.

N.J.S.A. 2C:25-29 specifically provides that an order entered under the Domestic Violence Act "shall only restrain or provide damages payable from a person against whom a complaint has been filed." A restraining order was improperly issued against a teenage defendant's parents in civil proceeding under the Domestic Violence Act, when no complaint was filed against the defendant's parents, leaving them with no opportunity to file answering pleadings, present witnesses on their behalf, cross-examine plaintiff's witnesses, or enjoy separate legal representation. *D.C. v. F.R.*, 286 *N.J. Super.* 589, 609 (App. Div. 1996).

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

a. For a civil complaint, a plaintiff may apply for relief pursuant to the Domestic Violence Act in a court having jurisdiction over the place where the alleged act of domestic violence occurred, where the defendant resides, or where the plaintiff resides or is sheltered. See also R. 5:7A(f)

Thus, a New Jersey county court had jurisdiction to resolve a civil issue raised pursuant to the Domestic Violence Act where both parties resided in that county, even if the incident giving rise to the action occurred in New York. *Sperling v. Teplitsky*, 294 *N.J. Super.* 312, 317 (Ch. Div. 1996).

Also, New Jersey courts have jurisdiction to conduct a hearing and decide whether or not a final restraining order should be issued, where a temporary restraining order was issued in New Jersey and there is an allegation that an act of domestic violence has been committed in another state, but where the victim, a New Jersey resident, fled from the abuser and returned to New Jersey for shelter. J.N. v. D.S., 300 N.J. Super. 647, 652 (Ch. Div. 1996).

b. Criminal complaints filed pursuant to the Domestic Violence Act shall be investigated and prosecuted in the jurisdiction where the offense is alleged to have occurred.

c. Contempt complaints filed pursuant to *N.J.S.A.* 2C:29-9 shall be prosecuted in the county where the contempt is alleged to have been committed.

2. Other Pleadings

In *Mann v. Mann*, 270 *N.J. Super*. 269, 273 (App. Div. 1993), the wife was not prejudiced by serving of a cross-complaint by the husband at time of the hearing on her motion seeking a final domestic violence order because each side had a full opportunity to present its version of the critical events, no contemporaneous claim of prejudice was made at the time of the hearing, and each side was familiar with the other's position.

B. Temporary Restraining Orders

Pursuant to the Domestic Violence Act, a plaintiff may seek emergency, ex parte relief in the nature of a temporary restraining order (TRO). *N.J.S.A.* 2C:25-28f. A municipal court judge or a judge of the Family Part of the Superior Court, Chancery Division may enter an ex parte order upon good cause shown, when the victim is in danger of domestic violence and it is necessary to protect the life, health or well-being of a victim on whose behalf the relief is sought. *N.J.S.A.* 2C:25-28f, g; I; *J.N. v. D.S.*, 300 *N.J. Super.* 647, 652 (Ch. Div. 1996). *See Grant v. Wright,* 222 *N.J. Super.* 191, 199 (App. Div.), *certif. denied*, 111 *N.J.* 562 (1988) (holding that under the prior Act temporary ex parte restraining orders may be granted only if it appears that the plaintiff is in danger of domestic violence). A TRO may be issued upon sworn testimony or complaint of an applicant who is not physically present, pursuant to court rules, or by a person who represents a person who is physically or mentally incapable of filing personally if the judge is satisfied that exigent circumstances exist sufficient to excuse the failure of the applicant to appear personally and that sufficient grounds for granting the application have been shown. *N.J.S.A.* 2C:25-28h. *See also N.J.S.A.* 2C:12-10.2 (TRO for alleged stalking).

1. Effectiveness of a TRO

An order for emergency, ex parte relief shall remain in effect against whom the complaint is filed until a judge of the Family Part issues a further order. *N.J.S.A.* 2C:25-28i.; *N.J.S.A.* 2C:25-29a. A TRO also shall be in effect throughout the State and shall be enforced by all law enforcement officers. *N.J.S.A.* 2C:25-28p.

- 2. Appeal of a TRO
- a. Appeal of the issuance of a TRO

The issuance of a TRO is immediately appealable for a plenary hearing de novo not on the record before any judge of the Family Part of the county in which the plaintiff resides or is sheltered if that judge issued the temporary order or has access to the reasons for the issuance of the temporary order and sets forth in the record the reasons for the modification or dissolution. *N.J.S.A.* 2C:25-28i. However, a defendant who fails to challenge finding of domestic violence at trial cannot raise that challenge on appeal. *Bryant v. Burnett,* 264 *N.J. Super.* 222, 226-27 (App. Div.), *certif. denied,* 134 *N.J.* 478 (1993).

b. Effect of the Denial of a TRO

The denial of a temporary restraining order by a municipal court judge and subsequent administrative dismissal of the complaint shall not bar the victim from refiling a complaint in the Family Part based on the same incident and receiving an emergency, ex parte hearing de novo not on the record before a Family Part judge, and every denial of relief by a municipal court judge shall so state. *N.J.S.A.* 2C:25-28i.

3. Types of Emergency Relief

Emergency relief may include forbidding the defendant from returning to the scene of the domestic violence, forbidding a defendant from possessing any firearm or other weapon enumerated in N.J.S.A. 2C:39-1r., ordering the search for and seizure of weapons at any location that the judge has reasonable cause to believe the weapon is located, and any other appropriate relief. N.J.S.A. 2C:25-28j. If the court orders a search it shall state with specificity the reasons for and scope of the search and seizure authorized by the order. N.J.S.A. 2C:25-28j.

However, in-house restraining orders which permit the victim and the defendant to occupy the same premises but limits the defendant's use of the premises are prohibited as a form of relief. *N.J.S.A.* 2C:25-28.1.

4. Notice to and Service Upon the Defendant

A domestic violence complaint and order granting emergency relief shall immediately be forwarded to the appropriate law enforcement agency for service on the defendant, and to the police of the municipality in which the plaintiff resides or is sheltered, and shall immediately be served upon the defendant by the police, except that an order issued during regular court hours may be forwarded to the sheriff for immediate service upon the defendant in accordance with the Rules of Court. *N.J.S.A.* 2C:25-28I.

If personal service cannot be effected upon the defendant, the court may order other appropriate substituted service. However, the plaintiff shall not be asked or required to serve any order on the defendant. *N.J.S.A.* 2C:25-281.

The judge may permit the defendant to return to the scene of the domestic violence to pick up personal belongings and effects but shall, in the order granting relief, restrict the time and duration of such permission and provide for police supervision of such visit. *N.J.S.A.* 2C:25-28k.

C. Hearing on Domestic Violence Complaint. *N.J.S.A.* 2C:25-29

1. Timing of the Hearing

A hearing shall be held in the Family Part of the Superior Court, Chancery Division within ten (10) days of the filing of a domestic violence complaint pursuant to *N.J.S.A.* 2C:25-28 in the county where the ex parte restraints were ordered, unless good cause is shown for the hearing to be held elsewhere. *N.J.S.A.* 2C:25-29a.

2. Use of Testimony of Plaintiff and Defendant in Domestic Violence Matter in Simultaneous or Subsequent Criminal Proceeding

If a criminal complaint arising out of the same incident which is the subject matter of a complaint brought under the Domestic Violence Act of 1991 or the prior Domestic Violence Act of 1981 (repealed) has been filed, testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in the simultaneous or subsequent criminal proceeding against the defendant, other than domestic violence contempt matters and where it would otherwise be admissible under the rules of evidence that govern hearsay exceptions where a party is unavailable. N.J.S.A. 2C:25-29a. See State v. Chenique-Puey, 145 N.J. 334 (1996)(holding that the trial court should have severed terroristic threats charge from trial on contempt of domestic violence restraining order charge, because evidence of the restraining order was inadmissible to prove terroristic threats, the admission of the restraining order was not merely cumulative and the evidence of the restraining order could have unduly prejudiced defendant by bolstering victim's testimony regarding defendant's prior bad acts); State v. Whittaker, 326 N.J. Super. 252, 263-64 (App. Div. 1999) (discussing admission of statements made by a domestic violence victim in criminal trial under prior inconsistent statement and excited utterance hearsay exceptions).

3. Burden of Proof

The existence of domestic violence coupled with a threat to the victim's safety are necessary for the court to enter a restraining order. *Peranio v. Peranio*, 280 *N.J. Super.* 47 (App. Div. 1995); *Corrente v. Corrente*, 281 *N.J. Super.* 243 (App. Div. 1995); *C.O. v. J.O.*, 292 *N.J. Super.* 219 (Ch. Div. 1996). At the hearing, the standard for proving the allegations in the complaint shall be by a preponderance of the evidence. *N.J.S.A.* 2C:25-29a. *See Bryant v. Burnett*, 264 *N.J. Super.* 222, 226 (App. Div.), *certif. denied*, 134 *N.J.* 478 (1993). A judgment of conviction for stalking shall operate as an application for a permanent restraining order. *N.J.S.A.* 2C:12-10.1.

4. Factors the court shall consider at the Hearing

Pursuant to N.J.S.A. 2C:25-29a (1)-(6) the factors the court shall consider, include, but are not limited to

the: (1) previous history of domestic violence between the parties, including threats, harassment and physical abuse; (2) existence of immediate danger to person or property; (3) financial circumstances of the plaintiff and defendant; (4) best interests of the victim and any child; (5) in determining custody and parenting time the protection of the victim's safety; and (6) existence of a verifiable order of protection from another jurisdiction.

5. Types of Relief

The court shall grant any relief necessary to prevent further abuse. At the hearing the judge of the Family Part of the Superior Court, Chancery Division may issue an order granting any or all of the following relief:

An order restraining the defendant from a. subjecting the victim to domestic violence, as defined in this Act, N.J.S.A. 2C:25-29b(1), including, an order restraining the defendant from entering the residence, property, school, or place of employment of the victim or of other family or household members of the victim and requiring the defendant to stay away from any specified place that is named in the order and is frequented regularly by the victim or other family or household members, N.J.S.A. 2C:25-29b(6), restraining the defendant from making contact with the plaintiff or others, such as, an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm including, but not limited to, personal, written, or telephone contact with the victim or other family members, or their employers, employees, or fellow workers, or others with whom communication would be likely to cause annoyance or alarm to the victim, N.J.S.A. 2C:25-29b(7), and prohibiting the defendant from stalking or following, or threatening to harm, to stalk or to follow, the complainant or any other person named in the order in a manner that, taken in the context of past actions of the defendant, would put the complainant in reasonable fear that the defendant would cause the death or injury to the complainant or any other person. N.J.S.A. 2C:25-29b(17).

b. Exclusive Possession of Residence. An order granting exclusive possession of the residence or household to the plaintiff regardless of joint or sole ownership or leasehold. The order shall not, however, affect title or interest to any real property held by either party or both jointly. *N.J.S.A.* 2C:25-29b(2).

c. Payment of Victim's Rent. If it is not possible for the victim to remain in the residence, the court may order the defendant to pay the victim's rent at a residence other than the one previously shared by the parties if the defendant is found to have a duty to support the victim and the victim requires alternative housing. *N.J.S.A.* 2C:25-29b(2).

The court may also require the defendant to make or continue to make rent or mortgage payments on the residence occupied by the victim if the defendant is found to have a duty to support the victim or other dependent household members, provided that this issue has not been resolved or is not being litigated between the parties in another action. *N.J.S.A.* 2C:25-29b(8).

d. Visitation Rights.

An order providing for parenting time shall protect the safety and well-being of the plaintiff and minor children and shall specify the place and frequency of parenting time but shall not compromise any other remedy provided by the court by requiring or encouraging contact between the plaintiff and defendant. Orders for parenting time may include a designation of a place of parenting time away from the plaintiff, the participation of a third party, or supervised parenting time. *N.J.S.A.* 2C:25-29b(3).

(1) The court shall consider a request by a custodial parent who has been subjected to domestic violence by a person with parenting time rights for an investigation or evaluation by the appropriate agency to assess the risk of harm to the child prior to the entry of a parenting time order. Any denial of such a request must be on the record and shall only be made if the judge finds the request to be arbitrary or capricious. *N.J.S.A.* 2C:25-29b(3)(a). *See Cosme v. Figueroa,* 258 *N.J. Super.* 333, 338-40 (Ch. Div. 1994).

(2) Suspension of Parenting Time Order. The court shall consider suspending a parenting time order and hold an emergency hearing upon an application made by the plaintiff certifying under oath that the defendant's access to the child pursuant to the parenting time order has threatened the safety and well-being of the child. *N.J.S.A.* 2C:25-29b(3)(b).

When a risk assessment is ordered after a domestic violence complaint, suspension of a defendant's child visitation rights should only occur in the most extreme situations where the mere presence of the parent would create physical or emotional harm upon the child. *Cosme*

v. Figueroa, 258 *N.J. Super.* at 343. Supervised visitation may be an alternative to suspension of visitation. *Id.*

e. Spousal Support. An order requiring the defendant to pay to the victim monetary compensation for losses suffered as a direct result of a domestic violence act and to reimburse any parties that may have compensated the victim, as the court may determine. *N.J.S.A.* 2C:25-29b(4).

The Domestic Violence Act authorizes orders requiring payment of support during periods of restraint. *Mugan v. Mugan*, 231 *N.J. Super.* 31, 32 (App. Div. 1989). Support orders authorized pursuant to the Domestic Violence Act are intended to bridge the emergent situation and not to be a substitute for other more orderly procedures for support. *Id.* at 33. *See Federow v. Federow*, 256 *N.J. Super.* 75, 76 (App. Div. 1992); *Maksuta v. Higson*, 242 *N.J. Super.* 452 (App. Div. 1990); *Hayes v. Hayes*, 251 *N.J. Super.* 160 (Ch. Div. 1991).

(1) Compensatory losses shall include, but not be limited to, loss of earnings or other support, including child or spousal support, out-of-pocket losses for injuries sustained, cost of repair or replacement of real or personal property damaged or destroyed or taken by the defendant, cost of counseling for the victim, moving or other travel expenses, reasonable attorney's fees, court costs, and compensation for pain and suffering. *N.J.S.A.* 2C:25-29b(4). For a discussion of attorneys' fees, *see Kanaszka v. Kunen*, 313 *N.J. Super.* 600, 608 (App. Div. 1998); *M.W. v. R.L.*, 286 *N.J. Super.* 408 (App. Div. 1995); *Schmidt v. Schmidt*, 262 *N.J. Super.* 451 (Ch. Div. 1992).

(2) Punitive damages may be awarded in addition to compensatory damages, when appropriate. *N.J.S.A.* 2C:25-29b(4). See D.C. v. F.R., 286 N.J. Super. 589, 608-09 (App. Div. 1996); Reeves v. Reeves, 265 N.J. Super. 126 (App. Div. 1993); Sielski v. Sielski, 254 N.J. Super. 686 (Ch. Div. 1992).

(3) Emergency Monetary Relief. An order awarding emergency monetary relief, including emergency support for minor children, to the victim and other dependents, if any. An ongoing obligation of support shall be determined at a later date pursuant to applicable law. *N.J.S.A.* 2C:25-29b(10).

f. Professional Counseling. An order requiring the defendant to receive professional domestic violence

counseling or psychiatric counseling and requiring the defendant to provide the court, at specified intervals, with documentation of attendance at the professional counseling. *N.J.S.A.* 2C:25-29b(5); *N.J.S.A.* 2C:25-29b(18). As part of this order, the court may require the defendant to pay for the professional counseling. *N.J.S.A.* 2C:25-29b(5).

No application by the defendant to dissolve a final order which contains a requirement for attendance at professional counseling pursuant to this paragraph shall be granted by the court unless, in addition to any other provisions required by law or conditions ordered by the court, the defendant has completed all required attendance at such counseling. *N.J.S.A.* 2C:25-29b(5).

g. Temporary Possession of Specific Personal Property. An order granting either party temporary possession of specified personal property, such as an automobile, checkbook, documentation of health insurance, an identification document, a key, and other personal effects. *N.J.S.A.* 2C:25-29b(9).

h. Temporary Custody of a Minor Child. An order awarding temporary custody of a minor child under the presumption that the best interests of the child are served by an award of custody to the non-abusive parent. N.J.S.A. 2C:25-29b(11).

i. An order, of restricted duration, requiring a law enforcement officer to accompany either party to the residence or any shared business premises to supervise the removal of personal belongings in order to ensure the personal safety of the plaintiff when a restraining order has been issued. *N.J.S.A.* 2C:25-29a(12).

j. An order granting any other appropriate relief for the plaintiff and dependent children, provided that the plaintiff consents to such relief, including relief requested by the plaintiff at the final hearing, whether or not the plaintiff requested such relief at the time of the granting of the initial emergency order. *N.J.S.A.* 2C:25-29b(14). *See Basile v. Basile*, 255 *N.J. Super.* 181 (Ch. Div. 1992) (changing child's surname is not within the court's authority under the Domestic Violence Act).

k. Monitoring.

An order that requires that the defendant report to the intake unit of the Family Part of the Chancery Division of the Superior Court for monitoring of any other provision of the order. *N.J.S.A.* 2C:25-29b(15). l. Prohibition from Possessing Firearms.

An order prohibiting the defendant from possessing any firearm or other weapon enumerated in *N.J.S.A.* 2C:39-1r and ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located. The judge shall state with specificity the reasons for and scope of the search and seizure authorized by the order. *N.J.S.A.* 2C:25-29b(16)

The court may not, however, issue an in-house restraining order. *See N.J.S.A.* 2C:25-28.1.

D. Dissolution or Modification of Final Restraining Order

Pursuant to *N.J.S.A.* 2C:25-29d, upon good cause shown, any final order may be dissolved or modified upon application to the Family Part of the Superior Court, Chancery Division, but only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based.

1. Standard

Pursuant to N.J.S.A. 2C:25-29d, the court may dissolve or modify a restraining order upon "good cause This includes "a change in circumstances shown." [whereby] the continued enforcement of the injunctive process would be inequitable, oppressive, or unjust, or in contravention of the policy of the law." Carfagno v. Carfagno, 288 N.J. Super. 424, 434 (Ch. Div. 1995) (alterations in original). See Sweeney v. Honachefsky, 313 N.J. Super. 443, 445-46 (App. Div. 1998); Kanaszka v. Kunen, 313 N.J. Super. 600, 608 (App. Div. 1998). Dissolution of a restraining order at the request of the victim is not mandatory. Stevenson v. Stevenson, 314 N.J. Super. 350, 353 (Ch. Div. 1998). Rather, dissolution is within the sound discretion of the court and should depend upon a showing of good cause with an independent finding by the court based upon the history of the parties and other facts of the case. Id. at 362; Kanaszka v. Kunen, 313 N.J. Super. at 607. See also I.J. v. I.S., 328 N.J. Super. 166, 177-79 (Ch. Div. 1999) (good cause requirement to dismiss a restraining order pertains to abuser not the victim).

2. Dissolution Hearing

Not every motion for dissolution of a restraining order entered pursuant to the Domestic Violence Act

requires a plenary hearing. Kanaszka v. Kunen, 313 N.J. Super. 600, 608 (App. Div. 1998). However, if the court presiding over a party's motion to dissolve a final restraining order, did not enter the order, the "complete record" requirement of the Domestic Violence Act includes, at a minimum, all pleadings and orders and the court file. Id. at 606-07. In most cases, the transcript should accompany party's motion to vacate the order to allow the court to fully understand all of the circumstances and dynamics involved in the relationship and the dissolution application. Id. at 607. There is no requirement, however, that one year must expire from date of entry of the domestic violence restraining order before the defendant may move to dissolve the order. Id. at 609. (disapproving of the suggestion for a one year period to be engrafted into N.J.S.A. 2C:25-29d stated in M.J. v. J.R.G., 312 N.J. Super. 597, 602-03 (Ch. Div. 1997)).

3. Carfagno Factors:

Factors the court should consider when determining whether good cause has been shown to dissolve a restraining order upon a request by the defendant, include: (1) the victim's consent to vacating the restraining order; (2) the victim's fears of future violence; (3) present relationship between the parties; (4) defendant's contempt convictions for violating restraining orders; (5) defendant's continuing involvement with drug or alcohol abuse; (6) defendant's involvement in other violent acts with other persons; (7) defendant's involvement in counseling; (8) defendant's age and health; (9) whether the victim is acting in good faith when opposing the defendant's request for dissolution; (10) restraining orders between parties in other jurisdictions; and (11) other factors deemed relevant by the court. Carfagno v. Carfagno, 288 N.J. Super. 424, 435-442 (Ch. Div. 1995).

4. Fears of Future Violence

The Domestic Violence Act is designed to protect victims from physical harm as well as mental and emotional harm, because one party frequently asserts power and control over the other. *Carfagno*, 288 *N.J. Super.* at 436. The test is one of objective fear, not subjective fear. *Id.* at 437. Objective fear is that which a reasonable victim similarly situated would have under the circumstances. *Id.; Stevenson v. Stevenson*, 314 *N.J. Super.* at 363-64. The exploration of the victim's continued fear of the perpetrator may include incidents that were not testified to at the final restraining order hearing, particularly when the allegations are in the

complaint or the matter is uncontested. *Kanaszka v. Kunen*, 313 *N.J. Super*. at 607-08.

5. Reconciliation

Even in cases of reconciliation, under the "good cause" standard, the court must make an independent finding based upon objective evidence that continued protection is unnecessary before vacating a restraining order. A.B. v. L.M., 289 N.J. Super. 125, 128-31 (App. Div. 1996); Stevenson v. Stevenson, 314 N.J. Super. 350, 364 (Ch. Div. 1998); Torres v. Lancellotti, 257 N.J. Super. 126, 129-31 (Ch. Div. 1992). In prior cases, courts had found that reconciliation by parties that were separated by a court order entered under the Domestic Violence Act acted as a *de facto* vacation of the order. Mohamed v. Mohamed, 232 N.J. Super. 474, 477 (App. Div. 1989); Hayes v. Hayes, 251 N.J. Super. 160, 167 In *A.B.*, the Appellate Division (Ch. Div. 1991). distinguished Mohamed as being predicated upon the Domestic Violence Act of 1981 which was substantially revised in 1991. A.B. v. L.M., 289 N.J. Super. at 129-30. In light of *A.B.*, the prevailing law is that "[w]hen confronted with a party's request to vacate a domestic violence order on the ground of reconciliation, the court should closely scrutinize the record to determine whether there is a likelihood that violent conduct will be repeated." Id. at 131. Thus, before vacating a restraining order, the court should carefully consider the factors set forth in N.J.S.A. 2C:25-29a. Id. at 131; Carfagno, 288 *N.J. Super.* at 436. Nonetheless, there is no longer a need for a restraining order when there is true reconciliation. Torres v. Lancellotti, 257 N.J. Super. at 131; C.O. v. J.O., 292 N.J. Super. 219, 224 (Ch. Div. 1996).

Note, however, that even when the parties mutually reconcile, the restraining order is still in effect because only the court can modify its terms or vacate it. Absent any action by the court, the restraining order is still in effect. *State v. Washington*, 319 *N.J. Super.* 681 (Law Div. 1998).

6. Reinstatement of a Restraining Order

The court's authority to dissolve or modify a restraining order must include the authority to vacate a conditionally entered dismissal. *C.O. v. J.O.*, 292 *N.J. Super.* at 223. Thus, where the court dismissed the restraining order without prejudice on the condition that the defendant would attend counseling, *R.* 4:37-1(b) required the dismissed restraining order to be vacated when the defendant breached that condition and good

cause existed to reinstate the original restraining order. *Id.*

E. Contempt Proceedings upon a Violation of a domestic violence order

N.J.S.A. 2C:25-30 provides: except as provided below, a violation by the defendant of an order issued pursuant to the Domestic Violence Act shall constitute an offense under N.J.S.A. 2C:29-9b and each order shall so state. All contempt proceedings conducted pursuant to N.J.S.A. 2C:29-9 involving domestic violence orders, other than those constituting indictable offenses, shall be heard by the Family Part of the Superior Court, Chancery Division. All contempt proceedings brought pursuant to N.J.S.A. 2C:25-17 et seq. shall be subject to any rules or guidelines established by the Supreme Court to guarantee the prompt disposition of criminal matters. Additionally, and notwithstanding the term of imprisonment provided in N.J.S.A. 2C:43-8, any person convicted of a second or subsequent nonindictable domestic violence contempt offense shall serve a minimum term of not less than 30 days. Orders entered pursuant to paragraphs (3), (4), (5), (8) and (9) of N.J.S.A. 2C:25-29b shall be excluded from enforcement under N.J.S.A. 2C:29-9b; however, violations of these orders may be enforced in a civil or criminal action initiated by the plaintiff or by the court, on its own motion, pursuant to applicable court rules.

Pursuant to *N.J.S.A.* 2C:25-31, a law enforcement officer must arrest a defendant when the officer finds that there is probable cause that a defendant has committed contempt of a domestic violence order.

Where, however, a person alleges that a defendant has committed contempt of a domestic violence order but the law enforcement officer has found that there is not probable cause sufficient to arrest the defendant, the law enforcement officer shall advise the complainant of the procedure for completing and signing a criminal complaint alleging a violation of *N.J.S.A.* 2C:29-9. *N.J.S.A.* 2C:25-32.

In a criminal contempt proceeding it is irrelevant whether a TRO in effect at the time of the violation is later vacated or dismissed or if no permanent restraining order is issued as long as the TRO was in existence at the time of the alleged improper conduct. *State v. Sanders*, 327 *N.J. Super.* 385, 387 (App. Div. 2000). Moreover, reconciliation of the parties after the issuance of a domestic violence order did not vitiate the restraining order. *State v. Washington*, 319 *N.J. Super.* 681, 686-90

(Law Div. 1998). In the absence of any application to the court to dismiss the order or any action by the court, the parties conduct of reconciliation does not serve as a defense to a charge of contempt. Id. at 690. See also State v. Hoffman, 149 N.J. 564 (1997) (defendant's two mailings containing torn-up copies of support order and the notice of motion to modify were written contacts with wife in violation of restraining order supporting the contempt conviction); State v. Krupinski, 321 N.J. Super. 34 (App. Div. 1999) (finding defendant's de minimus conduct including a trivial, non-actionable event could not form a basis for a conviction for contempt as disorderly persons's offense); Von Pein v. Von Pein, 268 N.J. Super. 7 (App. Div. 1993) (court did not abuse its discretion by refusing to institute criminal contempt proceedings against former husband); State v. Wilmouth, 302 N.J. Super. 20 (App. Div. 1997) (father's oral statement to mother, as she picked up child, as to whether he would get to see child on the next day was not contempt of a domestic violence restraining order prohibiting contact with mother, since mother did not construe the order as affecting direct communication between her and the father regarding visitation); State v. J.T., 294 N.J. Super. 540 (App. Div. 1996) (evidence was sufficient to establish that defendant engaged in course of alarming conduct to support harassment and contempt convictions); State v. L.C., 283 N.J. Super. 441, 450-51 (App. Div. 1995) (while wife inappropriately referred to husband's female friend as a "whore" and "slut" in expressing dissatisfaction that friend had attended parties' son's birthday party, that speech did not constitute type of "harassment" contemplated by the Domestic Violence Act or "harassing communications" under final restraining order provision in contempt proceeding), certif. denied, 143 N.J. 325 (1996).

1. Enhanced Penalty

Pursuant to *N.J.S.A.* 2C:25-30 any person convicted of a "second or subsequent non-indictable domestic violence contempt offense" must serve a period of incarceration of at least thirty days. In *State v. Bowser*, 272 *N.J. Super.* 582 (Law Div. 1993), the Law Division concluded that the enhanced penalty should not be applied to an individual who has been simultaneously convicted of multiple non-indictable domestic violence contempts which occurred on separate occasions. The court interpreted *N.J.S.A.* 2C:25-30 as "requiring the entry of a prior conviction, at the time of the commission of the offense in question, as a prerequisite to the imposition of that enhanced penalty." *Id.*

2. Conditions of a Parole after Release from Custody

Under the clear and prevailing rules of law, a sentencing judge is without authority to establish conditions of parole after a defendant's release from custody, even if those conditions are case or party related and may be warranted by the nature of the circumstances or the quality of the relationship between the victim and the defendant. State v. Beauchamp, 262 N.J. Super. 532, 536 (App. Div. 1993). To do so would be an unwarranted intrusion on the executive branch of government and would unremittingly govern defendant's future freedom because of valid concerns at sentencing, without allowing for changes in circumstance or attitude. *Id.* at 538. The Beauchamp court noted that its reservations about a sentencing court's action did not bear upon its authority or discretion to provide the Parole Board with all of the factual concerns, judgments and insights it developed as a result of its exposure to the criminal case as long as the statements were limited to a report of background information or as recommended factors for the Parole Board's consideration. Id. at 537. Accord, State v. J.F., 262 N.J. Super. 539, 542-44 (App. Div. 1993) (plea agreement provision adopted as part of the judgment of conviction that "upon release [defendant] may not reside in New Jersey" was invalid where State conceded that it was condition of parole).

III. ARREST, SEARCH AND SEIZURE

A. Arrests and Filing Criminal Complaints

1. Mandatory Arrest

N.J.S.A. 2C:25-21a provides: "[w]hen a person claims to be a victim of domestic violence, and where a law enforcement officer responding to the incident finds probable cause to believe that domestic violence has occurred, the law enforcement officer shall arrest the person who is alleged to be the person who subjected the victim to domestic violence and shall sign a criminal complaint if: (1) the victim exhibits signs of injury caused by an act of domestic violence; (2) a warrant is in effect; (3) probable cause exists that the perpetrator has violated *N.J.S.A.* 2C:29-9, and probable cause exists that the person has been served with the order alleged to have been violated; or (4) probable cause exists that a weapon as defined in *N.J.S.A.* 2C:39-1r, has been involved in the commission of a domestic violence act."

2. Discretionary Arrest

Additionally, pursuant to *N.J.S.A.* 2C:25-21b, a law enforcement officer may arrest a person, sign a criminal complaint against that person, or may do both, where probable cause exists to believe that an act of domestic violence has been committed, but where none of the conditions in subsection a. of this section applies.

a. Construction of term "exhibits"

Under this provision, "exhibits" is to be liberally construed to mean any indication that a victim has suffered bodily injury, including physical pain or any impairment of physical condition. Furthermore, where the victim exhibits no visible sign of injury, but states that an injury has occurred, the officer should consider other relevant factors in determining whether there is probable cause to make an arrest. *N.J.S.A.* 2C:25-21c(1).

b. Determination of which Party in a Domestic Violence Incident is the Victim

In determining which party in a domestic violence incident is the victim where both parties exhibit signs of injury, the law enforcement officer should consider the comparative extent of the injuries, the history of domestic violence between the parties, if any, and any other relevant factors.

c. Actions in Self-defense by a Victim of Domestic Violence

No victim shall be denied relief or arrested or charged under the Domestic Violence Act with an offense because the victim used reasonable force in self-defense against domestic violence by an attacker. *N.J.S.A.* 2C:25-21c. *See also State v. Kelly*, 97 *N.J.* 178 (1984) (discussing domestic violence and self-defense under Battered-Woman's Syndrome).

3. Probable Cause

When responding to a domestic violence incident, a police officer need not check upon a dispatcher's assertion that a temporary restraining order is in effect on the perpetrator of domestic violence. *State v. Scott*, 231 *N.J. Super.* 258, 272 (App. Div. 1989) (Ashbey, J., concurring and dissenting), *rev'd on concurring and dissenting opinion below*, 118 *N.J.* 406 (1990). In responding for a radio call for help, a police officer is

entitled to rely upon the information he was given through the radio dispatch as sufficient to meet the necessary statutory elements for probable cause to arrest. *Id.*

Additionally, information provided by a private citizen, corroborated by police observations may provide probable cause for the police to arrest a perpetrator of domestic violence. *Wildoner v. Borough of Ramsey*, 162 *N.J.* 375, 390-92 (2000). *See State v. Krivoshik*, 289 *N.J. Super.* 132 (Ch. Div. 1995) (addressing issuance of warrant for arrest or summons under the Domestic Violence Act).

B. Seizure of Weapons

N.J.S.A. 2C:25-21d(1) states that in addition to a law enforcement officer's authority to seize any weapon that is contraband, evidence or an instrumentality of crime, a law enforcement officer who has probable cause to believe that an act of domestic violence has been committed may question persons present to determine if any weapons are on the premises and upon observing or learning that a weapon is present on the premises, seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury.

1. Searches pursuant to the Domestic Violence Act

The Domestic Violence Act is subject to the constraints of the Supremacy Clause, Art. IV, and the Fourth Amendment of the United States Constitution and Art. I, ¶ 7 of the New Jersey Constitution which guarantees the right of people to be free from unreasonable searches and seizures. *State v. Younger*, 305 *N.J. Super.* 250, 258 (App. Div. 1997). Thus, the authority conferred upon law enforcement officers by the Domestic Violence Act to determine if any weapons are on the premises of a domestic violence incident and to seize any weapons observed or learned about that pose a risk of harm to the domestic violence victim must be construed consistently with both the federal and state Constitutions. *Id.*

The permissible scope of search that officer may undertake pursuant to the Domestic Violence Act to find a weapon upon being informed that there might be one on premises will depend upon the circumstances, including extent and nature of officer's probable cause to believe that there is dangerous weapon on premises and degree of exigency of situation, if any. *Id.* The scope of the search, however, is limited by the object of the search. *Id.* Authority granted to law enforcement officers by Domestic Violence Act does not allow an officer to conduct a general and intensive search for weapon beyond what is reasonable to locate the weapon that the officer believes is there. *Id.* Thus, a police officer exceeded the scope of the search for a handgun when he opened a change purse, that was about three inches by two inches, that could not have possibly contained the handgun. *Id.*

A police officer responding to a domestic violence complaint and pursuant to an arrest is permitted to observe a perpetrator of domestic violence in a minimally intrusive fashion without running afoul of the Constitution. State v. Scott, 231 N.J. Super. 258, 273 (App. Div. 1989) (Ashbey, J., concurring and dissenting), rev'd on concurring and dissenting opinion below, 118 N.J. 406 (1990). In State v. Scott, after responding to a domestic violence complaint, the responding police officer informed the perpetrator of domestic violence that he was under arrest. Id. at 269. The perpetrator agreed to accompany the police to headquarters, but he had to dress. Id. The police officer kept the perpetrator "within his view" and saw marijuana that was the subject of a motion to suppress. Id. The court recognized a "self-protective exception" to the warrant requirement by keeping a domestic violence perpetrator in the sight of the officer. Id. at 274. It found that whether the police officer was investigating a domestic violence complaint or waiting to enforce an order, the police officer "was following reasonable procedures directed toward protecting police officers as well as domestic violence victims." Id. The court found that the police officer's conduct was also justified under the search incident to arrest and "emergency aid" doctrine exceptions to the warrant requirement. Id. at 274-77.

2. Seizure of a Weapon Pursuant to a Restraining Order or as a Condition of Bail

In the criminal context, a warrant may be issued only upon a showing of probable cause that would lead the reasonable person to believe that a crime has been committed and that evidence of that crime will be found in a particular place. *State v. Burdine*, 313 *N.J. Super*. 468, 472 (Law Div. 1998)(citing *In re Martin*, 90 *N.J.* 295, 315 (1982)). The Domestic Violence Act permits the court to order a search for and seizure of any weapon at any location where the court has reasonable cause to believe the weapon is located in the following situations: (1) as a condition of bail when a domestic violence assailant is released from custody before trial on bail or personal recognizance, *N.J.S.A.* 2C:25-26a; (2) upon issuing an emergent temporary restraining order, *N.J.S.A.* 2C:25-28j; or (3) upon issuing a final restraining order, *N.J.S.A.* 2C:25-29b(16).

A court may issue a search warrant for a defendant's apartment for a gun under the Domestic Violence Act when defendant's girlfriend filed a domestic violence complaint indicating where a gun was "possibly" located. *State v. Burdine*, 313 *N.J. Super.* 468, 472 (Law Div. 1998). Although in *Burdine* the complaint used the word "possibly" the court had reasonable cause to believe that gun was in the apartment and any doubt created by the use of the word "possibly" in the complaint was overcome by a specific description given by girlfriend of gun and its location. *Id.*

Even absent a showing of probable cause under some circumstances involving domestic violence a warrantless entry into a home can be lawful. In *Burdine*, the Law Division held: "the court is satisfied that even without the traditional probable cause requirement having been met, the search under the facts and circumstances of this case passes constitutional scrutiny. A limited police entry is allowed to remove an item of potential danger in the volatile setting of domestic violence, especially when the item is a handgun." *State v. Burdine*, 313 *N.J. Super*. 474-75.

Furthermore, it is not necessary for the perpetrator of domestic violence to be engaged in an act of violence at the time that the weapons are removed from the premises. In *Hoffman v. Union County Prosecutor*, 240 *N.J. Super*. 206 (Law Div. 1990), the police came into lawful possession of husband's rifles, shotguns and a Japanese saber, when the police were called to the marital residence because of a domestic violence complaint between the wife and son and the wife requested for the officers to remove her husband's weapons from the premises. In this case, the police officers' concern for the wife's safety was reasonable and prudent because the domestic violence was ongoing, although the husband was not engaged in violence the night that the weapons were removed. *Id.* at 212-13.

Additionally, a law enforcement officer is permitted to seize weapons identification cards, incidental to an appropriate search for weapons under the Domestic Violence Act even if the officer fails to confirm the presence of any of the weapons to which the card may pertain. *Matter of Seized Firearms Identification Card of Hand*, 304 *N.J. Super.* 360, 368-71 (Ch. Div. 1997).

C. Return of Seized Weapons

N.J.S.A. 2C:25-21d(3) states that weapons seized in accordance with the statute shall be returned to the owner except upon an order of the Superior Court. The prosecutor in possession of the seized weapons may, upon notice to the owner, petition a Family Part judge, within 45 days of seizure, to obtain title to the seized weapons, or to revoke any and all permits, licenses and other authorizations for the use, possession, or ownership of such weapons pursuant to the law governing such use, possession, or ownership. Alternatively, the prosecutor may object to the return of the weapons on the grounds provided for the initial rejection or later revocation of the authorizations or on the grounds that the owner is unfit or poses a threat to the public in general or a person(s) in particular.

That provision also requires that a hearing shall be held and a record made thereof within 15 days of the notice provided above. In the event that the prosecutor does not institute an action within 45 days of seizure, the statute states that the seized weapons shall be returned to the owner.

Under this statutory provision, after a hearing, the court must order the return of the firearms, weapons and any authorization papers relating to the seized weapons to the owner in three circumstances if: (1) the complaint has been dismissed at the request of the complainant and the prosecutor determines that there is insufficient probable cause to indict; or (2) the defendant is found not guilty of the charges; or (3) the court determines that the domestic violence situation no longer exists. Our courts have found, however, that a defendant is not entitled to the return of weapons in a domestic violence action even after the dismissal of the domestic violence complaint, if the court concludes that the defendant is a threat to public health, safety or welfare. In the Matter of Return of Weapons to J.W.D., 149 N.J. 108, 114-16 (1997); see also State v. Freysinger, 311 N.J. Super. 509, 513-17 (App. Div. 1998) (defendant not entitled to return of weapons in domestic violence action even after domestic violence complaint is dismissed by request of complainant where defendant was a habitual drunkard who posed a threat to public health, safety and welfare as demonstrated by his two driving under the influence convictions and his admission that he hit a pedestrian and failed to stop); State v. Volpini, 291 N.J. Super. 401, 405-15 (App. Div. 1996) (The Domestic Violence Act does not require dismissal of forfeiture application based upon complainant's withdrawal of a domestic violence complaint, overruling State v. Warrick, 283 N.J. Super.

169 (Ch. Div. 1995)); *State v. One Marlin Rifle, 30/30*, 319 *N.J. Super.* 359, 371 (App. Div. 1999) (dismissal of domestic violence complaint for lack of evidence does not preclude court from taking firearms from person posing a threat to public health, safety or welfare). Nor is a defendant entitled to the return of weapons upon dismissal of a related criminal complaint while the domestic violence complaint is still pending. *State v. Solomon,* 262 *N.J. Super.* 618, 621-25 (Ch. Div. 1993).

Thus, the State can seize weapons from defendants who violate domestic violence orders and can retain them pursuant to *N.J.S.A.* 2C:25-21d(3) if the trial court deems defendant a threat to the domestic violence victim. *State v. S.A.*, 290 *N.J. Super.* 240, 249 (App. Div. 1996). The State's failure to seek timely forfeiture of weapons seized pursuant to a restraining order does not give defendant the automatic right to return of seized weapons, as long as the order is in effect. *Ibid.* This statute is consistent with 18 *U.S.C.* §922(g)(8). *Id.* at 247-49.

As to the timeliness of the forfeiture proceedings, see State (E.L.) v. G.P.N., 321 N.J. Super. 172, 176-77 (App. Div. 1999) (discussing application of 45 day period to bring an action to revoke a firearms permit); Matter of Seized Firearms Identification Card of Hand, 304 N.J. Super. 360 (Ch. Div. 1997). See also State v. Volpini, 291 N.J. Super. 401, 415-16 (App. Div. 1996) (State's inability to obtain a hearing within 15 day statutory requirement did not warrant dismissal of motion for forfeiture of weapons in light of court's busy calendar); State v. Saavedra, 276 N.J. Super. 289, 292-93 (App. Div. 1994) (holding that the forty-five days within which prosecutor had to petition to court to forfeit weapons seized pursuant to Prevention of Domestic Violence Act does not begin to run until prosecutor came into possession of weapon or had knowledge of its seizure).

D. Release from Custody before Trial, *N.J.S.A.* 2C:25-26

1. Issuance of a Restraining Order

When a defendant charged with a crime or offense involving domestic violence is released from custody before trial on bail or personal recognizance, the court authorizing the release may as a condition of release issue an order prohibiting the defendant from having any contact with the victim including, but not limited to, restraining the defendant from entering the victim's residence, place of employment or business, or school, and from harassing or stalking the victim or victim's relatives in any way. The court may enter an order prohibiting the defendant from possessing any firearm or other weapon enumerated in *N.J.S.A.* 2C:39-1r and ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located. The judge shall state with specificity the reasons for and scope of the search and seizure authorized by the order. *N.J.S.A.* 2C:25-26a.

Also, a victim shall not be prohibited from applying for, and a court shall not be prohibited from issuing, temporary restraints pursuant to this act because the victim has charged any person with commission of a criminal act. *N.J.S.A.* 2C:25-26f.

2. Confidentiality of the Victim's Location

Pursuant to *N.J.S.A.* 2C:25-26c., the victim's location shall remain confidential and shall not appear on any documents or records to which the defendant has access.

Under this statutory provision a female registrant, who had to move because her ex-husband repeatedly violated a permanent restraining order issued pursuant to the Domestic Violence Act and who had sustained permanent injuries, was entitled to register to vote without making her address matter of public record. *D.C. v. Superintendent of Elections*, 261 *N.J. Super.* 366 (Law Div. 1992).

3. Bail

N.J.S.A. 2C:25-26d mandates that the court consider the defendant's prior record before setting bail and to conduct a search of the domestic violence central registry.

As to the timing of bail, the statutory provision provides that "bail shall be set as soon as is feasible, but in all cases within 24 hours of arrest." *N.J.S.A.* 2C:25-26d.

Once bail is set it shall not be reduced without prior notice to the county prosecutor and the victim. Bail shall not be reduced by a judge other than the judge who originally ordered bail, unless the reasons for the amount of the original bail are available to the judge who reduces the bail and are set forth in the record. *N.J.S.A.* 2C:25-26e.

IV. OTHER RELATED ISSUES

A. Retroactivity

The amendment of Prevention of Domestic Violence Act that expanded the class of potential plaintiffs eligible for protection to include persons who have engaged in a dating relationship with defendant substantially altered the scope of the Act and thus only should be applied prospectively. When, however, an act of domestic violence arising out of a dating relationship has occurred after the effective date of the amendment, the trial court may consider the prior history of domestic violence between the parties in determining the appropriate injunctive or monetary remedy. D.C. v. F.R., 286 N.J. Super. 589, 602-08 (App. Div. 1996); South v. North, 304 N.J. Super. 104, 108-09 (Ch. Div. 1997) (amendment to Prevention of Domestic Violence Act under which dating relationship between plaintiff and defendant may qualify plaintiff as "victim of domestic violence" is not applied retroactively).

B. Confidentiality of Records Maintained Pursuant to the Domestic Violence Act

Pursuant to *N.J.S.A.* 2C:25-33, all records maintained pursuant to the Domestic Violence Act shall be confidential and shall not be made available to any individual or institution except as otherwise provided by law.

1. Constitutionality. The confidentiality provision of *N.J.S.A.* 2C:25-33 is not absolute and therefore constitutional and it does not deny the media access to records implicitly guaranteed under First Amendment. *Pepe v. Pepe,* 258 *N.J. Super.* 157, 164-66 (Ch. Div. 1992).

2. Records within the Scope of the Confidentiality Provision. Confidentiality provision of the Domestic Violence Act applied to judicial records kept on file with the Clerk of Superior Court, and was not limited to statistical records that were required to be maintained by the Administrative Office of the Courts. *Pepe v. Pepe*, 258 *N.J. Super.* 157, 159-63 (Ch. Div. 1992).

C. Expungement of Domestic Violence Records

While a criminal charge and its related consequences that arise from a domestic incident may be subject to expungement, a domestic violence complaint arising from the same incident, in which the victim seeks restraints and other civil relief, is not. Thus, expunging dismissed criminal charges from defendant's record, but not records of domestic incident and matrimonial action stemming from same incident, was proper. *Matter of M.D.Z.*, 286 *N.J. Super.* 82 (App. Div. 1995).

D. Immunity

Pursuant to N.J.S.A. 2C:25-22: a law enforcement officer, a member of a domestic crisis team or any person who, in good faith, reports a possible incident of domestic violence to the police shall not be held liable in any civil action brought by any party for an arrest based on probable cause, enforcement in good faith of a court order, or any other act or omission in good faith under this Act. But see Campbell v. Campbell, 294 N.J. Super. 18 (Law Div. 1996) (holding that Tort Claims Act provision regarding discretionary acts did not provide police department and officers with immunity from shooting victim's negligence action arising when officers responded to unwanted guest call, officers failed to arrest guest who was subject to domestic violence restraining order, and guest later shot victim; officers were not performing discretionary act when they responded to call).

E. Joinder of Claims

For a discussion of domestic violence complaints and joinder of claims under the entire controversy doctrine, *see Oliver v. Ambrose*, 152 *N.J.* 383, 400 (1998); *Lickfield v. Lickfield*, 260 *N.J. Super.* 21 (Ch. Div. 1992).

F. Double Jeopardy

For a discussion of civil and criminal domestic violence complaints in relation to double jeopardy, *see State v. Morton*, 292 *N.J. Super.* 92 (App. Div. 1996).

G. Ineffective assistance of counsel

See State v. Keys, 331 N.J. Super. 480 (Law Div. 1998) (discussing ineffective assistance of counsel for failing to move to sever contempt for disobeying a domestic violence restraining order from other charges arising from violent attack on defendant's former girlfriend).

H. Federal Law

See Violence Against Women Act (VAWA), 18 U.S.C. and 42 U.S.C.A. C.136, sub. ch. 111; United *States v. Morrison*, 529*U.S.*598 120 *S.Ct.* 1740, *146 L.Ed.*2d 658 (2000).

For a discussion of the Domestic Violence Act in relation to a claim under 42 U.S.C. § 1983. See Brown v. Grabowski, 922 F.2d 1097 (3d Cir. 1990), cert. denied, 501 U.S. 1218, 111 S.Ct. 2827, 115 L.Ed.2d 997 (1991); Nannay v. Rowan College, 101 F. Supp.2d 272 (D.N.J. June 30, 2000).

DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND RES JUDICATA

I. INTRODUCTION

The Fifth Amendment of the U.S. Constitution affords the broad guarantee that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Double jeopardy protection is afforded in three distinct forms: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; (3) and protection against multiple punishment for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); see also Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978).

The New Jersey Constitution provides: "No person shall after acquittal, be tried for the same offense." *N.J. Const.* art.1, ¶ 11. The language with which double jeopardy protection is established by the New Jersey Constitution is significantly narrower than the corresponding language in the United States Constitution. *State v. Jones,* 188 *N.J. Super.* 201 (App. Div. 1983). Nevertheless, the development of the two clauses is the same and their application is coextensive. *State v. Farmer,* 48 *N.J.* 145, 167-168 (1966).

Double jeopardy analysis in New Jersey is also affected by the existence of so-called statutory double jeopardy protection, contained in the Penal Code. *See, e.g., N.J.S.A.* 2C:1-8 (prosecution when conduct constitutes more than one offense); *N.J.S.A.* 2C:1-9 (prosecution barred by former prosecution for same offense); *State v. Yoskowitz*, 116 *N.J.* 679 (1989). Additionally, tests developed to determine whether an offense is the "same offense" for double jeopardy purposes, for example, the "same conduct" test, are implicated by *joinder* provisions of both the Penal Code and the Court Rules. *See N.J.S.A.* 2C:1-8b; *R.* 3:15; **JOINDER**, this Digest.

In the last twenty years, federal double jeopardy jurisprudence and New Jersey double jeopardy jurisprudence have changed and changed again. For decades, the key term "same offense" was defined by the same-elements test of *Blockburger v. United States*, 284 *U.S.* 299, 52 *S.Ct.* 180, 76 *L.Ed.* 306 (1934). Two offenses are the same unless each contains an element not contained by the other. In *Grady v. Corbin*, 495 *U.S.* 508, 110 *S.Ct.* 2084, 109 *L.Ed.*2d 548 (1990), the United States Supreme Court expanded the definition to include also as the same offense those offenses which arise out of the same conduct. Then, in a reversal, the Supreme Court rejected *Grady* just three years after it was decided, and returned to the *Blockburger* same-elements test. *United States v. Dixon*, 509 U.S. 688, 113 *S.Ct.* 2849, 125 *L.Ed.*2d 556 (1993).

Meanwhile, in 1983 the New Jersey Supreme Court decided *State v. Dively*, 92 *N.J.* 573 (1983), and held that in order to demonstrate a double jeopardy violation, a defendant must show not only that the offenses met the *Blockburger* same-elements test but also that they met the same-conduct test. Four years later, in *State v. DeLuca*, 108 *N.J.* 98 (1987), the Court rejected *Dively* as "erroneous," and held that a defendant need only show that two offenses met either the same-elements test or the same-conduct test.

II. ATTACHMENT OF JEOPARDY

The significance of whether jeopardy has attached rests in the legal principle that "an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States,* 420 *U.S.* 377, 95 *S.Ct.* 1055, 43 *L.Ed.*2d 265 (1975). The Supreme Court has held that in a jury trial, jeopardy attaches when the jury is impaneled and sworn. *Crist v. Bretz,* 437 *U.S.* 28 (1978). In a non-jury trial, jeopardy attaches when the first witness is sworn. *Serfass v. United States, supra, Crist v. Bretz, supra, see also State v. Lynch,* 74 *N.J.* 327 (1979); *State v. Antieri,* 180 *N.J. Super.* 267 (Law Div. 1981).

Jeopardy does not attach and retrial is not barred when a trial court dismisses a case as a pre-trial matter of calendar control or administration. *Serfass v. United States, supra, State v. Johnson,* 125 *N.J. Super.* 438 (App. Div. 1973). Analytically, "the conclusion that jeopardy has attached begins, rather than ends, the inquiry whether the Double Jeopardy Clause bars retrial." *Illinois v. Somerville,* 410 *U.S.* 458, 93 *S.Ct.* 1066, 35 *L.Ed.*2d 425 (1973). Retrial may be permitted, even though jeopardy has attached, if the original jeopardy may be regarded as continuing. Double jeopardy is not implicated until original jeopardy is terminated. *Green v. United States,* 355 *U.S.* 184, 188, 78 *S.Ct.* 221, 2 *L.Ed.*2d 199 (1957).

Original jeopardy continues until criminal proceedings have "run their full course." Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300, (1970); see also Swisher v. Brady, 438 U.S. 204, 98 S.Ct. 2699, 57 *L.Ed.*2d 705 (1978). The Supreme Court has emphasized this concept of continuing jeopardy, while rejecting double jeopardy claims. In Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984), the Court rejected a habeas petitioner's claim that jury trial *de novo* following a bench trial conviction under the Massachusetts two-tier trial system used for the prosecution of certain minor crimes violated double jeopardy principles when the evidence presented at the bench trial was insufficient to support a finding of guilt. The Court found that following his bench trial the petitioner was in continuing jeopardy and thus would not be placed in double jeopardy by trial de novo even if there was insufficient evidence to convict at the bench trial.

Similarly, in *Richardson v. United States*, 468 *U.S.* 317, 104 *S.Ct.* 3081, 82 *L.Ed.*2d 242 (1984), the Court held that the failure of a jury to reach a verdict does not terminate the original jeopardy. The Court held that, regardless of the sufficiency of evidence at a first trial, retrial is permitted when the jury is discharged because it is unable to agree.

In State v. Ortiz, 202 N.J. Super. 233 (App. Div. 1985), however, "continuing jeopardy" concepts did not come into play. At the conclusion of the State's case, the trial judge erroneously granted the defendant's motion, on sufficiency grounds, for judgments of acquittal with respect to two of four counts in the indictment. Ultimately, a jury verdict on the "dismissed counts" was permitted by an interlocutory order; the jury never was dismissed pending the interlocutory process; and the trial court truly erred in its original decision. Nevertheless, the Appellate Division held that the trial court's dismissal based on "insufficiency," was a judgment of acquittal which on double jeopardy grounds foreclosed the jury's subsequent conviction of defendants for these offenses. Accord, State v. Portock, 205 N.J. Super. 499 (App. Div. 1985), certif. denied, 105 N.J. 579 (1986).

Under New Jersey statutes governing dismissals of prosecutions on grounds similar to those implicated by double jeopardy, each case depends on its facts rather than on the simpler but more rigid determination of when jeopardy attaches. *State v. Carson*, 192 *N.J. Super.* 612 (Law Div. 1983).

In State v. Loyle, 208 N.J. Super. 334 (App. Div. 1986), certif. denied, 109 N.J. 40 (1987), the defendant was indicted for causing death by automobile, in violation of N.J.S.A. 2C:11-5. Defendant pleaded not guilty to the indictment. Then, defendant pleaded guilty to motor vehicle complaints filed in municipal court, and was fined. Since the complaints arose out of the same incident which resulted in the indictment, defendant moved for a dismissal of the indictment on double jeopardy grounds. The trial court denied the motion. On appeal, the Court distinguished Dively, because when defendant entered his guilty plea here, all of the prosecutions were pending simultaneously and only one was terminated by the guilty plea. Defendant had not been exposed to guilt on the indictable charge to which he had pleaded not guilty nor had he received an implied acquittal on a more serious offense by being convicted on a lesser charge.

In State v. Boyer, 221 N.J. Super. 387 (App. Div. 1987), certif. denied, 110 N.J. 299 (1988), the defendant was convicted of various offenses including felony murder and possession of a weapon for an unlawful purpose. During jury selection, defendant's address had not been revealed to potential jurors. After the jury was selected, however, one of the jurors discovered that he lived on the same street as defendant. After the juror indicated that this fact might affect his ability to be fair, the court removed the juror for cause and jury selection was reopened by the court, whereupon a new juror was The Appellate Division concluded that selected. replacing a juror with a new juror after opening statements had been given did not violate double jeopardy since no evidence had been introduced and the court reporter read the opening statements to the new juror.

In N.J. State Parole Board v. Mannson, 220 N.J. Super. 566 (App. Div. 1987), the defendant, while on parole, was charged with violating the conditions of his parole. A final revocation hearing was scheduled, but defendant's supervising parole officer did not appear for the proceedings, and the hearing officer adjourned the hearing after it had begun. The Parole Board subsequently ordered a second revocation hearing, and at the reconvened hearing, defendant's parole was revoked. On appeal, defendant argued that the second hearing violated his constitutional protection against double jeopardy. The Appellate Division affirmed the parole board's finding that double jeopardy protection does not apply to parole revocation proceedings, since such a hearing is an administrative proceeding designed to determine whether a parolee has violated the conditions of parole, not a proceeding designed to punish a criminal defendant for violation of a criminal law.

Finally, with respect to a defendant's double jeopardy interest in the finality of his sentence, the general rule is that jeopardy attaches once the defendant has begun to serve his sentence. State v. Ryan, 86 N.J. 1, 10 (1981); State v. Dively, 92 N.J. 573, 588 & n.9 (1983).Nevertheless, it warrants emphasis that a defendant's double jeopardy interest in the finality of his sentence, once he has been convicted, differs from his double jeopardy interest in avoiding retrial after he has been acquitted or convicted. State v. Dively, supra. For example, although double jeopardy would foreclose the State from appealing a verdict of acquittal, double jeopardy does not foreclose the State from appealing a sentence which it alleges to be too lenient, even though the sentence has been partially served, so long as the legislature has enacted a statute authorizing such an appeal. State v. Roth, 95 N.J. 334, 344-345 (1984); United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); Pennsylvania v. Goldhammer, 474 U.S. 28, 106 S.Ct. 353, 88 L.Ed.2d 183 (1985).

In State v. Cuneo, 275 N.J. Super. 12 (App. Div. 1994), the Appellate Division held that where a defendant charged with DWI and other motor vehicle offenses submits to a trial in municipal court on the sole issue of operation of the motor vehicle, an adjudication of non-operation is tantamount to a judgment of acquittal, and the State is prevented by the doctrine of double jeopardy from appealing the determination and retrying the defendant. While the State attempted to characterize the municipal proceeding as a probable cause hearing, the Appellate Division stated that it is the substance of the hearing and not the label which controls. Since the purpose of the hearing was to determine if the defendant drove the vehicle, the proceeding concerned an element of the offense which the State failed to establish. Therefore, jeopardy attached and the defendant cannot be retried for any of the offenses charged in which operation of the vehicle is an element.

III. RETRIAL PROHIBITED

A. Acquittals During Trial

Fong Foo v. United States, 369 *U.S.* 141, 82 *S.Ct.* 671, 7 *L.Ed.*2d 629 (1962), held that once the defendant has been acquitted, no matter how "egregiously erroneous" the legal rulings leading to the judgment of

acquittal might be, there is no exception to the constitutional rule forbidding successive trials for the same offense. In this case, the court of appeals held that the district court had erred in various rulings and lacked power to direct a verdict of acquittal before the Government rested its case. The Supreme Court accepted the holding of the court of appeals that the district court had erred, but found nevertheless that the Double Jeopardy Clause was violated when the court of appeals set aside the judgment of acquittal and directed that defendants be tried again for the same offense.

In *State v. Lynch*, 79 *N.J.* 327 (1979), the trial judge prematurely and erroneously dismissed the charge of accessory-after-the-fact when the State's opening statement failed to assert an essential element of the crime. The Court held that once an acquittal resolves the factual elements of a crime charged, correctly or not, double jeopardy prevents a new trial for the same offense. *Accord, State v. Portock*, 205 *N.J. Super.* 499 (App. Div. 1985), *certif. denied*, 105 *N.J.* 579 (1985); *see also State v. Stamberger*, 209 *N.J. Super.* 579 (Law Div. 1985) (purpose of opening statement merely to advise jury of facts in the case and prepare jury for questions it will face).

Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The trial court sustained a demurrer filed by defendants at the close of the State's case, saying that it was not satisfied that there was sufficient evidence from which it could conclude that either of the two defendants was guilty beyond a reasonable doubt. The State appealed. The United States Supreme Court concluded that a grant of demurrer at the close of the State's case in chief at a bench trial constitutes an acquittal for double jeopardy purposes. Also, whether the case is tried to a jury or to the bench, the Double Jeopardy Clause bars a post-acquittal appeal by the State whenever reversal might result in a second trial or would subject defendant to further fact-finding proceedings as to his guilt or innocence.

In a *per curiam* opinion the Supreme Court affirmed the majority Appellate Division opinion, *State v. Blacknall*, 288 *N.J. Super.* 466 (App. Div. 1995), *aff'd* 143 *N.J.* 419 (1996), reversing defendant's first degree kidnaping conviction on double jeopardy grounds. Once defendant testified, the trial court could not reinstate the first degree charge after ruling at the close of the State's case that it would not charge that offense because of proof failure. In essence, the trial judge's decision not to charge, even if mistaken, acted as an acquittal that triggered jeopardy.

B. Acquittals after Deliberation of Verdict

In United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), the United States Supreme Court held that the entry of a judgment of acquittal when the jury could not reach agreement barred an appeal and thus retrial. Martin, however, does not foreclose the State's appeal of a judgment of acquittal entered by the court after a guilty verdict. See United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) (dismissal after verdict appealable); State v. Kleinwaks, 68 N.J. 328 (1975) (State may appeal judgment of acquittal entered after jury has returned guilty verdict). See also section E, infra.

C. Dismissals Pre-Trial

In Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975), the trial court dismissed the indictment charging defendant with willful failure to report for induction into the armed forces on double jeopardy grounds. The trial court found that defendant had established a prima facie claim for conscientious objector status. The Supreme Court concluded that since defendant had not waived his right to a jury trial and no jury had been impaneled and sworn when the trial court ruled, jeopardy had not attached and the dismissal was an appealable order. The Supreme Court stressed that the double jeopardy clause does not come into play until the proceeding begins before a trier having jurisdiction to try the question of guilt or innocence. Since there was never a risk of a determination of guilt before the draft board, jeopardy did not attach.

In Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987), defendant pleaded guilty pursuant to an agreement to second-degree murder and promised to testify against other participants in the murder, in return for which he was to receive a favorable prison term and specified actual incarceration time. Defendant testified against the others, but their convictions were reversed on appeal. At retrial, defendant again was asked for cooperation, but he refused, claiming that his obligation to testify ended when he was sentenced. The government then charged defendant with first-degree murder which he countered on double jeopardy grounds. The Supreme Court held that prosecution for first-degree murder did not violate double jeopardy principles, since defendant's breach of the plea agreement removed the double jeopardy bar, assuming that under state law, second-degree murder is a lesser-included offense of firstdegree murder. The Court analogized defendant's understanding of the consequences of his breach to a waiver of his double jeopardy defense.

In *State v. Barksdale*, 224 *N.J. Super.* 404 (App. Div. 1988), a juvenile defendant was charged with possession and possession with intent to distribute crack. Relying on *State v. Gonzalez*, 75 *N.J.* 181 (1977), the Family Part judge granted defendant's pre-trial motion to suppress evidence seized during a warrantless search of an automobile. On appeal by the State, the Appellate Division affirmed the suppression order but found that the Family Part judge should not have dismissed the complaint against defendant after granting the suppression motion. The Court further held that double jeopardy was not implicated by the reinstatement of the complaint against the juvenile defendant, since the dismissal was only procedural and trial on the complaint had never commenced.

D. Dismissals at Trial

In United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), the Court held that the Government may appeal from the dismissal (on defendant's application) during trial of an indictment where the dismissal is not based on a factual determination of guilt or innocence. Thus, there could be retrial in the event of reversal. The Court likened a dismissal based on grounds unrelated to guilt or innocence to a mistrial, cf. Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977), where defendant's motion generally permits retrial. The Court concluded that an acquittal occurs only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." The Court also ruled that "... where the defendant himself seeks to have the trial terminated without any submission to judge or jury as to guilt or innocence, an appeal by the Government from his successful effort to do so is not barred by 18 U.S.C. § 731," which permits appeals not barred by double jeopardy. The Court expressly overruled United States v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), which prohibited retrial after midtrial dismissal.

In *Sanabria v. United States*, 437 *U.S.* 54, 98 *S.Ct.* 2170, 57 *L.Ed.*2d 43 (1978), decided on the same day as *Scott*, the Supreme Court made it clear that not all midtrial dispositions are appealable. A midtrial ruling resulted in the exclusion of evidence, and a judgment of acquittal was entered. The Court emphasized the long-

standing principle that a defendant may not be retried after acquittal even if the legal ruling underlying the acquittal was clearly erroneous, because an acquittal is "a resolution, correct or not, of some or all of the factual elements of the offense charged." The Court expressly held that defendant did not waive his double jeopardy rights by moving for acquittal during trial.

In *State v. Barnes*, 84 *N.J.* 362 (1980), the New Jersey Supreme Court followed *Scott*, holding that where proceedings against an accused are terminated during trial on a basis unrelated to factual guilt or innocence, the State may appeal from a ruling of the trial court in favor of the defendant. The trial court had reversed municipal court convictions of defendants in a trial *de novo* where the sole issue was the constitutionality of the ordinance under which defendants had been found guilty. The Supreme Court found that the constitutional determination did not involve factual guilt or innocence and held that an appeal by the State of the constitutional determination did not offend established principles of double jeopardy.

In *State v. Costello*, 224 *N.J. Super.* 157 (App. Div. 1988), defendant was convicted of two separate counts of driving while intoxicated for offenses which had occurred within a two hours of each other. After defendant was arrested for the first of the offenses, he was released, and while driving home, defendant was again stopped by the police and again charged with driving while intoxicated. On appeal *de novo*, the court found that the second offense was part of the "same offense" and acquitted defendant of the second offense. Although the acquittal of the second offense was later found to be erroneous, the Appellate Division held that the principles of double jeopardy barred the appeal which sought to reinstate the second offense after acquittal.

E. Dismissals After Verdict

A dismissal after a jury verdict or a finding of guilt by the court in a bench trial is appealable, and, therefore, the case can be retried. United States v. Kopp, 429 U.S. 121, 97 S.Ct. 400, 50 L.Ed.2d 336 (1976); United States v. Morrison, 429 U.S. 1, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976); United States v. Rose, 429 U.S. 5, 97 S.Ct. 26, 50 L.Ed.2d 5 (1976) (bench trial); United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975) (jury verdict); State v. Kleinwaks, 68 N.J. 328 (1975).

F. Reversal on Appeal

A retrial may follow reversal on appeal except when the reversal is based on insufficient evidence to support the conviction. *Burks v. United States*, 437 *U.S.* 1, 98 *S.Ct.* 2141, 57 *L.Ed.*2d 1 (1978); *Greene v. Massey*, 437 *U.S.* 19, 98 *S.Ct.* 2151, 57 *L.Ed.*2d 15 (1978); *see also State v. Lynch*, 79 *N.J.* 327 (1979).

In State v. Tropea, 78 N.J. 309 (1978), defendant's conviction for speeding was reversed because the State failed to prove the speed limit and the evidence was insufficient to sustain the conviction. Defendant argued that double jeopardy prohibited retrial, and the State countered by asserting this proceeding was neither criminal nor quasi-criminal in nature, and thus, double jeopardy did not apply. The Court avoided the issue, holding instead that "considerations of fundamental fairness militated against retrial." The Court suggested that there may be some circumstances which would warrant application of double jeopardy protections to motor vehicle offense proceedings. Five years later in State v. Dively, 92 N.J. 573, 586 (1983), the Court expressly held that double jeopardy protections apply to motor vehicle offenses.

Montana v. Hall, 481 *U.S.* 400, 107 *S.Ct.* 1825, 95 *L.Ed.*2d 354 (1987), held the Double Jeopardy Clause does not bar retrial after a conviction is reversed because of a defect in the charging instrument. The state court's reversal of defendant's conviction was not on grounds related to guilt or innocence but on grounds of a defective instrument. Defendant's retrial was not for an offense of which he had already been convicted and punished.

In *State v. Williams*, 226 *N.J. Super.* 94 (App. Div. 1988), the trial court's improper receipt of evidence was a mere trial error for double jeopardy purpose, and defendant could be retried after reversal of original conviction. The appellate court need not determine whether, without the improperly admitted evidence, the balance of evidence was sufficient to sustain defendant's conviction.

In *State v. Dohme*, 223 *N.J. Super.* 485 (App. Div. 1988), defendant was convicted of driving while under the influence. Defendant appealed on the ground that prerequisites to the admission of the breathalyzer results had not been established before the results were admitted into evidence. The Appellate Division ruled that the prerequisites must be satisfied before the breathalyzer results can be admitted against defendant, and ordered a new hearing. The Court noted, however, that double

jeopardy did not preclude the ordering of a new hearing limited solely to the question of the admissibility of the breathalyzer results, since correction of this error at a new trial flowed from the trial judge's erroneous ruling that these prerequisites were not necessary, and not flow from the State's inability to produce a *prima facie* case against defendant.

IV. SAME OFFENSE

Before 1983, as many as three different tests may have been applied by New Jersey courts to determine the "same offense" issue: (1) the "same evidence" test, *State* v. Hoag, 21 N.J. 496 (1956), aff'd 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913 (1957); State v. Thomas, 114 N.J. Super. 360 (Law Div. 1971), mod. 61 N.J. 314 (1972); (2) the "same transaction" test, State v. Hoag, supra, State v. Mowser, 92 N.J.L. 474 (E. & A. 1919); and (3) the "lesser included offense" test, State v. Wolf, 46 N.J. 301 (1966); State v. Dixon, 40 N.J. 180 (1963).

Between 1983 and 1987, New Jersey courts applied the test enunciated in State v. Dively, 92 N.J. 573 (1983), namely a same- elements and same-conduct test. The Dively court, interpreting Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), concluded that an offense was the same offense for double jeopardy purposes only if it met both the same-elements test and the same-conduct test. State v. Dively, supra, 92 N.J. at 581 ("It is only when both prongs are met that double jeopardy attaches.") In 1987, however, the New Jersev Supreme Court retreated from *Dively* and, interpreting Vitale anew, concluded that an offense was the same offense for double jeopardy purposes if it met either the same-elements test or the same-conduct test. State v. DeLuca, 108 N.J. 98 (1987), cert. denied, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987). In State v. Yoskowitz, 116 N.J. 679 (1989), the Supreme Court reviewed Dively and confirmed DeLuca. Thus, Yoskowitz remains the last significant pronouncement on sameoffense jurisprudence in New Jersey.

Federal law also underwent abrupt change during the same period. Before *Vitale*, the basic *Blockburger* same-elements test prevailed: offenses are not the same if each one requires proof of an additional fact which the other does not. In *Illinois v. Vitale*, 447 *U.S.* 410, 100 *S.Ct.* 2260, 65 *L.Ed.*2d 228 (1980), the United States Supreme Court addressed a double jeopardy claim by analyzing not only the elements of the two offenses but also the conduct that would be introduced to prove them. Then, not unlike the New Jersey Court in *DeLuca*, and citing *Vitale*, the United States Supreme Court in *Grady* *v. Corbin*, 495 *U.S.* 508, 110 *S.Ct.* 2084, 109 *L.Ed.*2d 548 (1990), held that even if a second prosecution survives the *Blockburger* test, "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of the offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 510.

Three years later however, in *United States v. Dixon*, 509 *U.S.* 688, 113 *S.Ct.* 2849, 125 *L.Ed.*2d 556 (1993), the Supreme Court overruled *Grady v. Corbin* and returned to the *Blockburger* test: "We have concluded however that *Grady* must be overruled. Unlike *Blockburger* analysis, whose definition of what prevents two crimes from being the 'same offence,' *U.S. Const.*, Amend. 5, has deep historical roots and has been accepted in numerous precedents of this Court, *Grady* lacks constitutional roots. The 'same conduct' rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." 509 *U.S.* at 704.

The same-offense cases should be read against this backdrop. A case decided one way in 1986, for example, may have been decided differently had it been decided two years later. Further, although New Jersey Courts assert that double jeopardy protection in New Jersey is coextensive with federal protection, *see, e.g., State v. Barnes,* 84 *N.J.* 362 (1980), New Jersey may, or may not, offer more protection under *DeLuca* than the United States offers under *Dixon. See State v. Capak,* 272 *N.J. Super.* 397, 403 (App. Div. 1994), *certif. denied,* 137 *N.J.* 164 (1994) ("We ... do not read *DeLuca* or *Yoskowitz* as requiring adherence to the *DeLuca* test in light of *Dixon.*")

In State v. DeLuca, 108 N.J. 98 (1987), cert. denied, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987), the question was whether a motor vehicle offense of driving while intoxicated, in violation of N.J.S.A. 39:4-50, is "same offense" for double jeopardy purposes as the criminal offense of death by auto, in violation of N.J.S.A. 2C:11-5. After defendant was acquitted of the greater offense of death by auto, she was charged with the lesser offense of driving while intoxicated. Since death by auto and driving while intoxicated each contains an element that the other does not (death in the former, and intoxication in the latter) the offenses are not the "same offense" under the same-elements test. The Court ruled, however, that an offense is the "same offense" for double jeopardy purposes if it meets either the same-elements or the same-conduct test. Thus, the Court remanded the case for determination whether the only proof of recklessness were intoxication, for if so, then the offenses would be the same under the same-conduct test. Resolving practical concerns that can give rise to double jeopardy issues, the Court also ruled that the judge who presides as a Superior Court judge over the trial of a defendant's indictment for death by auto should simultaneously preside as a municipal court judge to adjudicate defendant's guilt for driving while intoxicated. *See also State v. Sloane*, 111 *N.J.* 293 (1988).

In *State v. Yoskowitz*, 116 *N.J.* 679 (1989), defendant pled guilty in municipal court to filing a false police report about the staged "theft" of his car. Later, the state prosecuted defendant for arson and attempted theft by deception, alleging that defendant attempted to defraud his insurance carrier and conspired in burning the car. The Supreme Court reaffirmed its *DeLuca* ruling and held that since defendant had not shown that the offenses met either the same-elements test or the same-evidence test, the arson and attempted theft prosecution did not violate defendant's double jeopardy rights.

In *State v. Capak*, 272 *N.J. Super.* 397, 403 (App. Div. 1994), *certif. denied*, 137 *N.J.* 164 (1994), defendant pled guilty in municipal court to theft of prescription forms by failure to turn them over to a doctor. When the state later prosecuted defendant for attempting to obtain prescription drugs, she claimed that the prosecution violated her double jeopardy rights. Using a *DeLuca* analysis, the Appellate Division ruled defendant had not shown that the offenses were the same under either the same-elements test or the same-evidence test.

State v. Catanoso, 269 N.J. Super. 246 (App. Div. 1993), certif. denied, 134 N.J. 563 (1993), upheld defendant's convictions for conspiracy and official misconduct, but ruled that his conviction for bribery should merge into the conviction for official misconduct. The Court rejected defendant's claims that his convictions violated constitutional and statutory prohibitions against double jeopardy because he had previously been acquitted of another conspiracy which overlapped the current offense. The Court found that under the "totality of the circumstances" test, the crimes were not the same, even though defendant's role was the same in each conspiracy, because the two conspiracies took place at different locations, the time periods for the two offenses overlapped only slightly, the co-conspirators were not identical in each conspiracy, and the overt acts were entirely different. The Court concluded that neither the Federal or State Constitutions nor N.J.S.A.

2C:1-9 or 10, required the dismissal of the indictment. The Court also rejected defendant's claim that the two cases should have been mandatorily joined, noting that defendant had never requested joinder, the objects of the two conspiracies were different, different evidence was necessary to convict the defendant on the two indictments, the conspiracies alleged in the two indictments were not integral parts of a larger scheme but constituted separate acts, and the consequences of the two conspiracies were different.

V. MULTIPLE PUNISHMENT

Another form of double jeopardy protection protects against multiple punishment for the same offense. In the final years of the 20th century, the United States Supreme Court took up the question of what is punishment for purposes of double jeopardy protection. Generally, a series of cases asked whether some noncriminal sanction, for example, a civil *in rem* forfeiture or a civil penalty, was punishment such that when imposed along with a criminal sanction for a parallel criminal offense, double jeopardy protections were violated.

In United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), defendant was a health services manager and a "prolific but small-gauge offender." Initially, the federal government prosecuted and convicted defendant for a \$585 Medicare fraud comprising 65 separate counts of fraud at \$9 each. Defendant was sentenced to two years imprisonment and The government then obtained a a \$5,000 fine. \$130,000 civil penalty under the federal False Claims Act. The United States Supreme Court, breaking with precedent, held that the civil penalty, despite its civil label and despite Congressional intent to create a noncriminal sanction, might provide more than a measure of rough remedial justice and could constitute punishment for double jeopardy purposes. The Supreme Court remanded the case to the district court to allow the government to prove its "injuries;" and to show that the \$130,000 civil sanction was proportionate to government costs.

In *State v. Williams*, 286 *N.J. Super.* 507 (Law Div. 1995), the court denied defendant's motion to dismiss the indictment, holding that civil forfeiture did not constitute punishment for double jeopardy purposes; and that the *in rem* forfeiture of funds found in close proximity to illegal drugs did not violate the excessive fines clause of the Eighth Amendment.

Halper led to numerous double-jeopardy-based attacks on forfeiture, but in 1996, the United States Supreme Court held in *United States v. Ursery*, 518 *U.S.* 267, 116 *S.Ct.* 2135, 135 *L.Ed.*2d 549 (1996), that the remedy of civil *in rem* forfeiture, at least, does *not* constitute punishment for double jeopardy purposes. Civil *in rem* forfeiture was thus revitalized after a period of constitutional doubt.

In *State v. \$3,000,* 292 *N.J. Super.* 205 (App. Div. 1996), defendant pled guilty to drug charges arising from an investigation that had also led to a forfeiture action against \$3,000 seized from defendant. Defendant challenged the forfeiture on double jeopardy grounds. The Appellate Division noted the "congruence" between federal double jeopardy jurisprudence and New Jersey double jeopardy jurisprudence. The court noted further that New Jersey has accepted "federal jurisprudence in respect of civil forfeiture classifications and consequences." Following *Ursery*, then, the Appellate Division held that civil *in rem* forfeiture under New Jersey's statute does not constitute punishment for double jeopardy purposes.

In State v. Womack, 145 N.J. 576 (1996), defendant was investigated for practicing medicine without a Through settlement of a civil action, the license. Attorney General obtained an injunction restricting defendant's practice of "medicine," although he was allowed to continue operation of his "Wellness Center." Defendant also agreed to pay \$5,000 in "civil penalties" and \$3,554.07 in "investigative costs." After the State indicted defendant for third degree practicing medicine without a license, defendant moved to dismiss the indictment on double jeopardy grounds. The Supreme Court ruled that multiple punishment protection may be implicated by a civil penalty imposed for conduct that also results in a criminal penalty. The Court ruled that if the civil penalty were "punitive," it would implicate double jeopardy protection, but if the penalty were "remedial," it would not. Even so, the Court concluded, a punitive civil penalty might be remitted or reduced to bring it within constitutional, remedial tolerances.

In *Hudson v. United States*, 522 *U.S.* 93, 118 *S.Ct.* 488, 139 *L.Ed.*2d 450 (1997), the United States Supreme Court held that administratively imposed monetary penalties and occupational debarment did not preclude on double jeopardy grounds subsequent criminal indictment for essentially the same federal banking statute violations. The administrative proceedings were civil, not criminal, and the Court's holding in large part disavowed the analysis used in

Halper,, and reaffirmed the rule previously established in United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). The Double Jeopardy Clause, the Court held, protects only against imposing multiple criminal punishment for the same offense, and whether a particular punishment is criminal or civil initially focuses on statutory construction; Halper marked the first time the Court applied the double jeopardy clause to a sanction without first determining if it was criminal in nature. That decision deviated from traditional double jeopardy doctrine by avoiding the threshold question of whether the successive punishment was "criminal," and by assessing the character of the actual sanctions imposed. This deviation was "ill considered" and "unworkable." Applying traditional double jeopardy principles illustrated no multiple punishment in this case because the monetary penalties and debarment sanctions were civil in nature. Administrative agencies do not generally impose criminal penalties, nor were the sanctions here so punitive in form and effect that they constituted criminal punishment.

In *State v. Black*, 153 *N.J.* 438 (1998), the Court held that criminal prosecutions for absconding from parole, brought under *N.J.S.A.* 2C:29-5b, are neither prohibited by the Double Jeopardy Clause nor by principles of fundamental fairness in cases where the Parole Board has also revoked parole for the same act of absconding. The Court concluded that parole revocation proceedings are not criminal in nature and do not constitute "punishment" for double jeopardy purposes because the aim of the entire parole system, including parole revocation, is remedial and not punitive in nature, as it seeks to protect the welfare of parolees and the safety of society.

State v. Parker, 335 N.J. Super. 415 (App. Div. 2000). In the context of a merger analysis, the Appellate Division concluded that the interests protected by N.J.S.A. 2C:35-7.1, with sentencing provisions for public-facility drug offenses and N.J.S.A. 2C:35-7, with sentencing provisions for school-zone drug offenses are the same interests. Therefore, the Court reasoned, to impose separate punishment, that is, separate sentences, for violation of those statutes would offend double jeopardy principles.

VI. COMPULSORY JOINDER

Although not required by principles of double jeopardy, New Jersey has adopted a compulsory joinder rule which generally requires a prosecutor to join for a single trial all offenses arising from the same episode or conduct. *R.* 3:15-1(b); *N.J.S.A.* 2C:1-8b. Unjoined offenses that should have been joined may later be barred. Because the rule has an effect similar to the effect of conventional double jeopardy protection, case law discussing the rule is noted here.

In State v. Gregory, 66 N.J. 510 (1975), defendant sold a small quantity of heroin in a glassine envelope to an undercover narcotics agent. The sale took place in defendant's apartment. The officer saw defendant remove the glassine bag from a stack of other envelopes. After the sale, the officer notified other officers who immediately returned to seize the rest of the cache. Defendant was indicted, tried, and convicted for the single sale. Thereafter, he was charged in two separate indictments with possession and possession with intent to distribute the other heroin. He was convicted on both later charges. The Supreme Court reversed, noting that neither the "same evidence," test nor the principles of collateral estoppel and double jeopardy would bar the conviction. The Court relied on the broad principles of State v. Curie, 41 N.J. 531 (1959), which emphasized basic considerations of fairness and reasonable expectations. Since the prosecution knew of the sale and the possession of the large quantity, the Court held that there should have been a joinder of all charges. The Court followed Section 1.07(2) of the M.P.C. which provides that a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode where the prosecuting attorney knows the offenses when he begins the first trial an the offenses are within the jurisdiction of the court. This decision had been codified in R. 3:15-1(b) and in N.J.S.A. 2C:1-8b. See also State v. Godfrey, 139 N.J. Super. 135 (App. Div. 1976), certif. denied, 73 N.J. 40 (1976).

In *State v. Vasquez*, 135 *N.J. Super.* 303 (Law Div. 1975), defendant was convicted of distributing cocaine from his apartment in March 1974. Thereafter, he was indicted for possession of cocaine in the same apartment in April 1974. Relying on *Gregory*, defendant argued that since the possession offense was fully known to the prosecution prior to the return of the indictment and trial for distribution, they should have presented all the charges in one indictment. The trial court disagreed, noting that the possession of cocaine in April 1974 did not charge an offense "based on the same conduct or arising from the same criminal episode" as the illegal sale in March 1974. The court noted that in *Gregory*, the actual sale and the possession with intent to distribute

both involved the same bulk of narcotics within a relatively short time span.

In *State v. Phillip*, 150 *N.J. Super.* 75 (App. Div. 1977), defendant had been indicted for possession of heroin with intent to distribute. The indictment was dismissed on motion of the prosecutor, however, after defendant succeeded on a motion to suppress evidence. Defendant was later charged with distributing heroin to an undercover police officer on the same day. The trial court, relying on *Gregory*, dismissed the latter indictment on the ground that the State was required to join all the offenses it intended to prosecute. The Appellate Division reversed and reinstated the indictment, since no disposition on the merits had taken place with respect to the first indictment. Fundamental fairness, the Court ruled, did not require dismissal of the second indictment.

In State v. Muscia, 206 N.J. Super. 551 (App. Div. 1985), the Appellate Division reinstated an indictment dismissed by the trial court after trial on an earlier indictment charging similar crimes of receiving stolen motor vehicles, determining that the offenses in each indictment did not arise from the same conduct, episode, The Court found no substantive or transaction. difference between the mandatory joinder provision in *R*. 3:15-1(b) and provisions in N.J.S.A. 2C:1-8b. The Court recommended amendment of R. 3:15-1 to conform to A.B.A. Standards for Criminal Justice (2d. ed. 1980), Ch. 13 Joinder and Severance, Standard 13.2.3(b), requiring defendant to move for joinder of same-conduct offenses he knew had been charged.

State v. Louf, 64 *N.J.* 172 (1973), held that separate prosecutions for similar offenses, all arising out of the same general series of events, did not necessarily constitute a form of harassment. The *Louf* rationale may be applicable in a *Gregory* situation. *Louf* involved a conspiracy of numerous Hudson County officials, and a single trial of all the indictments would have involved too many defendants and too many issues.

In *State v. Tsoi,* 217 *N.J. Super.* 290 (App. Div. 1987), defendant was charged with many counts of embezzlement from her employer over a five-month period. However, it did not become apparent that defendant was responsible for numerous other unexplained shortages at the company until one month after defendant confessed in a handwritten informal statement to the single theft to which she pleaded guilty in municipal court. After completion of a formal investigation into the numerous shortages, the manager signed another complaint against defendant, charging

her with third-degree theft. She was subsequently Nevertheless, defendant indicted in Superior Court. successfully moved for dismissal of the indictment, asserting that double jeopardy barred prosecution on the indictment, since the municipal court offense was identical to the indictment and part of a single episode for which she had already been convicted. The State appealed, and the Court reversed. The Appellate Division found that knowledge of all of defendant's thefts was not imputable to the county prosecutor since the first plea was handled by another prosecuting attorney in another jurisdiction. Furthermore, defendant's guilty plea to a single theft charge in municipal court did not bar a subsequent prosecution by county prosecutor of 67 other instances of embezzlement. The initial theft charge was not prosecuted by county prosecutor and investigation of the other offenses was not complete or known to county at the time the plea was entered. Therefore, neither double jeopardy nor compulsory joinder requirements barred prosecution of the later indictment.

In *State v. Alevras*, 213 *N.J. Super.* 331 (App. Div. 1986), defendant pled guilty, pursuant to a negotiated plea agreement, to numerous counts of four different indictments. Defendant claimed, however, that the indictments should have been joined for purposes of trial with an earlier conspiracy indictment, before he entered into the plea agreement. The Court disagreed and held that the indictments associated with the plea agreement were not required to be joined, pursuant to *Gregory* and *N.J.S.A.* 2C:1-8 and 2C:1-10, with the earlier conspiracy indictment, since each indictment involved different victims at different locations and different times. That both sets of indictments involved the same co-conspirators, the Court found, was insignificant.

In *State v. Yoskowitz*, 116 *N.J.* 679 (1989), the Supreme Court detailed the criteria a defendant must meet to invoke the compulsory joinder rule: (1) the offenses must be criminal; (2) the offenses must arise from the same episode or conduct; (3) the prosecutor or prosecuting officer must have known of the offenses when the first offense was tried; and (4) the offenses must be within the jurisdiction and venue of the same court. The Supreme Court also compared compulsory joinder analysis to double jeopardy analysis, noting that a double jeopardy analysis includes "a consideration of the elements of the charged offenses as well as the evidence supporting them," irrespective of any classification as a disorderly persons offense. The Court observed that a

compulsory joinder analysis, by contrast, may depend on classification of one offense as a disorderly persons offense.

VII. MISTRIALS

Retrial after a mistrial is generally permitted if the mistrial is based on defendant's consent or motion or if the mistrial is based on "manifest necessity." However, there is an exception if the defendant's motion is caused by prosecutorial "bad faith." *See, e.g., United States v. Dinitz,* 424 *U.S.* 600, 96 *S.Ct.* 1075, 47 *L.Ed.*2d 267 (1976). While courts have refused to categorize those circumstances which would permit or prohibit retrial, "manifest necessity" may justify granting a mistrial if the jury is unable to reach a verdict. *Logan v. United States,* 144 *U.S.* 263, 12 *S.Ct.* 617, 36 *L.Ed.* 429 (1892).

A. Consent

United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). For repeated misconduct by defense counsel in his opening statement, the trial court excluded him from the trial and ordered him to leave the courthouse. The trial court asked defendant's co-counsel if he were prepared to proceed with trial. Informed that co-counsel was not prepared (he said that his role was to make "legal arguments" only), the trial judge asked defendant whether he consented to declaration of a mistrial or desired to go forward. Defendant consented to a mistrial, but later claimed that he should not have been tried a second time for the crime. The Supreme Court noted that ordinarily a defendant, by requesting a mistrial, chooses to terminate the trial, and the Double Jeopardy Clause will not bar reprosecution even where prosecutorial misconduct, for example, is the basis for defendant's request. However, the Court continued, if the judge or the prosecutor acted in bad faith, or engaged in conduct to provoke defendant's request for a mistrial, then double jeopardy protection bars retrial.

Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977). Defendant moved to dismiss an information after the prosecutor and defense counsel had made opening statements, claiming that the allegations in the information were incomplete. The trial court initially reserved decision on defendant's motion, but when all the evidence had been admitted, the court dismissed the information. Thereafter, defendant was indicted for the same offense. The Supreme Court held that the Government could retry defendant because the proceedings against defendant had not ended in his favor and the dismissal was not based on any judgment that he was innocent; defendant had asked for the dismissal; and there was no prosecutorial bad faith.

State v. Andrial, 203 N.J. Super. 1 (App. Div. 1985). Defendant was charged with a series of crimes. At trial, an allegedly inadvertent, but potentially prejudicial response was given by a witness during his testimony. Defendant moved for a mistrial, and it was granted. Before a new jury was impaneled, defendant moved for dismissal of the indictment on double jeopardy grounds, arguing that he was forced to move for a mistrial due to "prosecutorial overreaching." The trial court determined that the witness's remarks were "unintentional" and denied the motion. Defendant appealed, and the Appellate Division held that "[w]hen a defendant successfully moves for a mistrial, he may invoke the bar of double jeopardy in a second effort to try him only when the prosecutorial conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into making the motion." 203 N.J. Super. at 8 (citing Oregon v. Kennedy, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416, 427 (1982)). See also Scott v. United States, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (permitting a Government appeal from a midtrial dismissal not related to finding of guilt or innocence, and considering defendant's motion for dismissal to be akin to a motion for mistrial that does not bar retrial).

State v. DeMarco, 211 N.J. Super. 421 (App. Div. 1986). At retrial, a jury found defendant guilty of possessing gambling records. At the first trial, defendant had successfully moved for a mistrial based on prosecutorial misconduct in the opening statement. Before retrial, the trial court denied defendant's doublejeopardy-based motion for dismissal. Defendant had contended that the prosecutor in his opening statement intentionally referred to hearsay. The trial court found no intentional misconduct by the prosecutor. On appeal, the Appellate Division, citing *Dinitz*, agreed with the trial court that the prosecutor had not intentionally goaded defendant into moving for a mistrial; that there was no evidence the prosecutor had an incentive to abort the trial; and that retrial was permitted.

In *State v. Chenique-Puey*, 145 *N.J.* 334 (1996), the Court held that double jeopardy concerns do not arise and retrial is not barred when defendant requests to sever trial of a domestic violence contempt charge and trial of the underlying terroristic threats charge. Neither double jeopardy nor collateral estoppel, the Court stated, would bar the second trial.

In *State v. Cooper*, 307 *N.J. Super.* 196 (App. Div. 1997), the Appellate Division held that assuming the prosecutor acted improperly or inexcusably in violating a sequestration order, the Double Jeopardy Clause did not bar a retrial because the prosecutor did not intend to provoke defendant into requesting a mistrial. The Court noted that mistrials declared with the defendant's consent generally do not bar later prosecution. In *Cooper*, defendant "could have sought to cross-examine the State's witnesses and sum up by reference to the impact of their communications during trial in violation of the sequestration order." As a result of defendant's decision to move for a mistrial, the Court reasoned, double jeopardy did not prevent retrial.

In State v. Wright, 312 N.J. Super. 442 (App. Div. 1998), the Appellate Division affirmed defendant's drug and conspiracy convictions. An undercover police officer had worked with a confidential informant to set up a drug buy with defendant and defendant's brother, and did so. The officer's police report concerning the buy never mentioned the informant, nor did any other investigative reports, and defendant's brother during a pretrial hearing first discussed the informant's existence. After conviction, the trial judge granted a new trial because the confidential informant had played a substantial role in the investigation; the prosecutor, though, had never known of his existence, which the police had withheld. The judge denied defendant's motion to bar a retrial because double jeopardy did not apply. On appeal after conviction, the Appellate Division agreed that double jeopardy principles did not prevent a retrial since those principles do not prevent a second trial for defendants who successfully have their guilty verdicts set aside and since no prosecutorial misconduct existed. Fundamental fairness dictated no different result, either, particularly since defendant had presented the confidential informant's testimony at the retrial. While a similar Cumberland County case demanded reversal last year, State v. Cooper, 301 N.J. Super. 298 (App. Div. 1997), the withholding of the informant's existence in this case took place before the court decided Cooper. The Appellate Division, however, strongly disapproved of this police practice, which "must cease immediately," and directed the county prosecutor to notify all county police departments that police reports must disclose a confidential informant's existence. Failure to do so could bar reprosecutions in the future.

In a brief concurring opinion, Judge Kestin emphasized that little difference exists between police misfeasance that deprives defendant of a fair trial and prosecutorial misconduct that has the same result.

State v. Torres, 328 N.J. Super. 77 (App. Div. 2000), reversed the trial court's grant of defendant's mistrial request. In his opening statement to the jurors the prosecutor stated that a coindictee, who had pleaded guilty to the three murders for which defendant was being tried, would testify for the State and implicate defendant. When that coindictee subsequently refused to testify, the trial court granted defendant's mistrial request, dismissed the indictment, and barred any retrial on double jeopardy grounds. In this case of overwhelming guilt, federal double jeopardy consideration did not preclude defendant's retrial. The prosecutor never deliberately provoked defendant's mistrial request -- the record disclosed no pattern of prosecutorial error, the State argued vociferously against defendant's mistrial motion, neither trial judge found that the prosecutor intended to provoke a mistrial, and the error was made in the opening statement before any evidence was offered or admitted and prior to the point where the prosecution's success or failure could reasonably have been assessed. Apart from these determinations, moreover, nothing in the record suggests any prosecutorial motive for provoking a mistrial. The appellate court also concluded that the New Jersey double jeopardy prohibition provided no greater protection than its federal counterpart, but rather is coextensive with it. And no fundamental fairness considerations required any different result here, particularly because the bar against reprosecution is not a sanction applied to punish prosecutorial or judicial error. Finally, the Appellate Division determined that the public should not suffer because of a prosecutor's error. A blundering or evil prosecutor can be addressed in ways that do not harm the public, which would happen if an offender is released and commits future crimes. The court did commend the matter to the Attorney General to afford him "an opportunity to take appropriate curative action" against the prosecutor.

B. Manifest Necessity

In *United States v. Jorn*, 400 *U.S.* 470, 91 *S.Ct.* 547, 27 *L.Ed.* 543 (1971), the trial court, acting on its own motion and without defendant's consent, declared a mistrial to allow prosecutors to confer with their witnesses about potentially self-incriminating testimony. The Supreme Court affirmed a decision barring retrial. The Double Jeopardy Clause does not bar retrial, even where defendant did not consent to the declaration of mistrial, if there is "manifest necessity" for the declaration of mistrial or if the ends of public justice would not be served by continuation of the trial. The Court found no "manifest necessity" for a declaration of

mistrial, only the trial court's abuse of discretion in acting on its belief that the witnesses had not been advised of their Fifth Amendment rights. It noted that it had "explicitly declined ... to formulate rules based on categories of circumstances which will permit or preclude retrial." Further, the Court said, "The conscious refusal of this Court to channel the exercise of [judicial] discretion [in declarations of mistrial] according to rules based on categories of circumstances ... reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury. But that discretion must still be exercised ... [B]right-line rules based on either the source of the problem or the intended beneficiary of the ruling would only disserve the vital competing interests of the government and the defendant."

In Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973), the trial court granted a mistrial over defendant's objection after realizing that under Illinois law the indictment was defective, it could not be cured by amendment, and the defect could be raised by defendant at any time on appeal or in a subsequent habeas proceeding. The Supreme Court held that "manifest necessity" existed for the declaration of mistrial and that the ends of public justice would not have been served by continuing with the original trial. The Supreme Court explained that the "manifest necessity" test depends on the trial court's discretion and on the circumstances of the particular case; that the determination involves a balancing process between defendant's interest in having his fate determined by the jury first impaneled and the State's interest in fair trials designed to end in just judgments. A mistrial was necessary and a retrial appropriate because defendant would have been able to assert the procedural defect on appeal after the verdict, thus wasting, time, energy, and money; and Illinois law did not provide any alternative to remedy the procedural defect.

In *Arizona v. Washington*, 434 *U.S.* 497, 98 *S.Ct.* 824, 54 *L.Ed.*2d 717 (1978), the trial judge granted the prosecutor's motion for a mistrial based on defense counsel's improper comment during his opening statement that evidence had been hidden from defendant at the first trial. The judge did not explicitly find that there was "manifest necessity" for a mistrial. The Supreme Court held that it is not necessary for a trial judge to make an explicit finding of "manifest necessity" so long as the record supports the conclusion that the trial judge exercised "sound discretion" in declaring a mistrial. The Court defined the "manifest necessity" requirement as meaning "a high degree" of necessity and noted that

necessity was not to be interpreted literally. The basis for the mistrial will often determine the degree of scrutiny to be given to the motion. The Court held that the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a factual advantage over the accused. One the other hand, the Court held, a mistrial ruling premised upon the trial judge's belief that the jury is unable to reach a verdict generally permits retrial. The Court also noted that defense counsel's comments about the previous misconduct had affected the impartiality of the jury, and as a consequence, the mistrial was appropriate because in these circumstances "the public's interest in fair trials designed to end in just judgments" must prevail over the defendant's "valued right" to have his trial concluded before the first jury impaneled.

State v. Stani, 197 N.J. Super. 146 (App. Div. 1984). At a robbery trial, the State was unable to produce the victim, who was the only witness to the alleged robbery. Without the victim's testimony, the State was unable to prove a *prima facie* case. As a result, the court *sua sponte* granted a mistrial and dismissed the charges. The State appealed, and the Appellate Division held that further prosecution was barred by constitutional principles of double jeopardy. The court noted that once a jury has been impaneled and sworn and the prosecution goes forward before the jury and testimony is taken, jeopardy has attached. The court observed that "the State may not retreat from the field when its case turns sour and then be permitted to sally forth on a further day before a new jury when its case is refreshed and reinforced." 197 N.J. Super. at 151.

In *State v. Farmer,* 48 *N.J.* 145 (1966), the Supreme Court held that the double jeopardy protection did not bar retrial where a mistrial had been declared by the trial court *sua sponte* on the morning of the first day of trial devoted to presentation of evidence. The trial judge had determined that the interests of both the defendant and the public required the delay to permit defendant to investigate reports which the prosecution was required to deliver under a discovery order.

Then in *State v. Rechtschaffer*, 70 *N.J.* 395 (1976), defendant was charged with possession of marijuana and possession of marijuana with intent to distribute. At trial, one of the arresting officers testified that defendant threatened to "take his hunting knife and kill" the informant. Defendant moved for a mistrial on both counts because of this testimony. The trial court granted

a mistrial on the charge of possession with intent to distribute but not on simple possession, over the objections of both defendant and the prosecutor. Defendant was convicted of simple possession. A second trial took place on the charge of possession with intent to distribute, and defendant was convicted of that charge too. On appeal, the Appellate Division upheld defendant's conviction for possession with intent to distribute but voided the first conviction for simple possession, on the ground of merger. The Supreme Court reversed and reinstated the conviction for simple possession, while vacating the conviction for possession with intent to distribute. The Supreme Court noted that where the trial judge acts sua sponte over the objection of both parties, the propriety of the mistrial depends upon the sound exercise of the court's discretion, and a mistrial should be declared only in those situations which would otherwise result in injustice. The Court concluded that the trial judge had erroneously declared a mistrial on the charge of possession with intent to distribute because the testimony about defendant's threat was not objectionable. Defendant's conviction on that charge, therefore, was vacated. As noted, the conviction for possession of marijuana was reinstated.

In State v. Hudson, 139 N.J. Super. 360 (App. Div. 1976), the prosecutor failed to comply with R. 3:15-2(a), requiring him to move before trial for a judicial determination whether a portion of a statement by a codefendant, referring to defendant could be effectively deleted. The prosecutor's omission prevented the court from determining before the trial whether separate trials of the defendants were necessary. The prosecutors's noncompliance was negligent. During the course of trial, it became apparent that the offending portions of the codefendant's statement could not be effectively deleted. The trial judge, over the objections of the prosecutor and the defendants, declared a mistrial and ordered a severance. The Appellate Division was satisfied that the termination of the joint trial by a declaration of a mistrial was manifestly necessary to protect the rights of defendants and was required to serve the public's interest in fair trials that end in just judgments. Therefore, double jeopardy did not bar a second trial. See also Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

State v. Gallegan, 117 *N.J.* 345 (1989), held that adjournment of a trial by a municipal court judge because of the prosecutor's unavailability is not an adjudication on the merits, and double jeopardy principles did not bar "renewal" of the trial.

In State v. Dunns, 266 N.J. Super. 349 (App. Div. 1993), certif. denied, 134 N.J. 567 (1993), the Appellate Division dismissed an indictment for attempted murder on Double Jeopardy grounds. Defendant had been convicted in the first trial which had subsequently been reversed on appeal. The second trial ended in a mistrial when the key State's witness refused to testify despite a grant of immunity and was jailed on contempt charges. After the mistrial, defendant moved to have the indictment dismissed on double jeopardy grounds which motion was denied. The appellate court found that the State had not acted in bad faith and indeed had done all it could to ensure the witness would be present and testify. Nevertheless, the Appellate Division dismissed the indictment, finding that based upon the history of the case and the witness' repeated refusal to testify despite being jailed for contempt, there was no reason to believe that she would ever testify and that without her testimony there was no case. The court likened this case to State v. Abatti, 99 N.J. 418 (1985), and found that while technical double jeopardy doctrine would not prevent a retrial, further pursuit of this matter would offend principles of fundamental fairness and not serve the ends of justice.

Love v. Morton, 112 *F*.3d 131 (3d Cir. 1997), held that manifest necessity to declare a mistrial did not exist when a trial judge learned of the death of his mother-inlaw and did not consider substitution of another judge who was available to begin trial either that afternoon or the following morning.

In *State v. Loyal*, 164 *N.J.* 418 (2000), the Court held that the trial court correctly concluded that defense counsel's prior representation of a material recanting witness posed a significant risk to the reliability of the outcome of defendant's trial and acted appropriately in declaring a mistrial over the objection of both the prosecution and defense counsel. The Court further found that defendant's retrial did not violate the federal or state constitution's prohibition against double jeopardy because there was no evidence of misconduct, bad faith or inexcusable neglect on the part of the State and because the delay in the proceedings did not prejudice defendant.

State v. Allah, 334 *N.J. Super.* 516 (App. Div. 2000). A codefendant on drug charges pleaded guilty under an agreement that required him to testify against defendant. At defendant's trial, codefendant initially testified but then asserted a Fifth Amendment privilege. Finding manifest necessity, the trial court granted a mistrial.

Defendant was convicted at his second trial and raised a double jeopardy issue for the first time on appeal. The Appellate Division affirmed defendant's conviction. The Court held that manifest necessity did not exist for the declaration of mistrial, because codefendant twice had waived his privilege: once when he pleaded guilty, and again when he testified. However, the Court ruled, although double jeopardy principles would have barred retrial had defendant raised the issue before trial as required by R. 3:10-2(c), defendant procedurally waived the issue by not raising it until appeal. Additionally, the Court ruled, trial counsel's failure to raise the double jeopardy issue was not ineffective assistance of counsel, because the trial itself was fair and the result reliable.

C. Deadlocked Juries

The discharge of a jury that cannot agree on a verdict does not, as a matter of double jeopardy, preclude retrial. *United States v. Jorn*, 400 *U.S.* 470, 91 *S.Ct.* 547, 27 *L.Ed.*2d 543 (1971); *Downum v. United States*, 372 *U.S.* 734, 83 *S.Ct.* 1033, 10 *L.Ed.*2d 100 (1964); *State v. Williams*, 30 *N.J.* 105 (1959). In *State v. Roller*, 29 *N.J.* 339 (1959), involving two single-count indictments consolidated for trial, one indictment was dismissed, and the jury was unable to reach a verdict on the other. The jury was discharged, and retrial on the count on which the jury had deadlocked was permitted. *See also State v. D'Amato*, 218 *N.J. Super.* 595 (App. Div. 1986), *certif. denied*, 110 *N.J.* 170 (1988); *State v. Roach*, 222 *N.J. Super.* 122 (App. Div. 1987), *certif. denied*, 110 *N.J.* 317 (1988).

VIII. GOVERNMENT APPEALS

The State may appeal from a dismissal granted on defendant's application if the dismissal is not related to a factual determination of guilt or innocence. In United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), the Court likened a dismissal based on grounds unrelated to guilt or innocence to declaration of a mistrial, cf. Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977), which if made on defendant's motion, generally permits retrial. The Court explained that an acquittal occurs only when "the ruling of the judge, whatever its label, actually represents a resolution in defendant's favor, correct or not, of some or all of the factual elements of the offense charged." The Court further explained that "... where the defendant himself seeks to have the trial terminated without any submission to judge or jury as to guilt or innocence, an

appeal by the Government from his successful effort to do so is not barred by 18 *U.S.C.* § 3731," which permits appeals not barred by double jeopardy. *Id.* at 101. The Court expressly overruled *United States v. Jenkins*, 420 *U.S.* 358, 95 *S.Ct.* 1006, 43 *L.Ed.*2d 250 (1975), which barred retrial after midtrial dismissal.

Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), decided on the same day as *Scott*, establishes however, that not all midtrial dispositions are appealable. In *Sanabria*, a midtrial ruling resulted in the exclusion of evidence, and a judgment of acquittal was entered. The Supreme Court emphasized the long-standing rule that a defendant may not be retried after acquittal even if the legal ruling underlying the acquittal was wrong. The Court expressly held that the fact that defendant makes the motion for acquittal constitutes no waiver.

Pre-trial dismissals not based on determination of guilt or innocence, *Serfass v. United States*, 420 *U.S.* 377, 95 *S.Ct.* 1055, 43 *L.Ed.*2d 265 (1975), and post-guilty-verdict dismissals and acquittals, *United States v. Martin Linen Supply*, 430 *U.S.* 564, 97 *S.Ct.* 1349, 51 *L.Ed.*2d 642 (1977); *United States v. Wilson*, 420 *U.S.* 332, 95 *S.Ct.* 1013, 43 *L.Ed.*2d 232 (1975), are appealable.

In State in Interest of C.K., 198 N.J. Super. 290 (App. Div. 1984), the trial judge perceived technical deficiencies in the State's proof against two juveniles and found them not guilty on all charges. The prosecution nevertheless obtained a "continuance" of the trial. After the prosecution corrected the "deficiencies," the trial judge found the juveniles guilty of all charges. One of the juveniles appealed. The Appellate Division held that the trial judge's adjudication of delinquency constituted a clear violation of the Double Jeopardy Clause, stating that a "judgment of acquittal [or finding of not guilty], however erroneous, bars further prosecution...." 198 N.J. Super. at 294-95. See also State v. Woodlands Condominium Assoc., 204 N.J. Super. 85 (Law Div. 1985) (in absence of order of dismissal or written opinion which could have been sought, State may not seek reversal of, nor may any reviewing court reverse those legal determinations resolved in defendant's favor and resulting in acquittal).

Swisher v. Brady, 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978). Maryland procedure provided for a master to hear evidence on juvenile charges, to make findings of fact, and to submit a report to the juvenile court. The same procedure authorized the court to accept, modify or reject the master's report. Petitioner sued for an injunction, pursuant to 28 U.S.C. § 1983, to enjoin the State from filing exceptions to the master's conclusion that the State failed to show that petitioners committed the acts that they were charged with committing. The Supreme Court viewed the process as a single proceeding which began with the master and ended with an adjudication by the judge. Thus, the Court held that double jeopardy did not bar the juvenile court from reviewing the record and reaching its own conclusions, or bar the State from taking exception to the master's conclusion. The Court stated that double jeopardy bars only those proceedings requiring supplementary findings which follow a previous trial ending in acquittal, or in conviction when it is not reversed on appeal or reversed on the basis of insufficient evidence. Accord, State v. Barnes, 84 N.J. 362 (1980).

In United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), a federal district court judge granted defendant's motion for judgment of acquittal after a deadlocked jury was discharged. The Supreme Court held that the Double Jeopardy Clause barred retrial after the first trial ended in a valid judgment of acquittal premised upon the Government's failure to prove its case. The Court noted, however, that entry of a judgment *n.o.v.* after a guilty verdict would be appealable.

In *Finch v. United States,* 433 *U.S.* 676, 97 *S.Ct.* 2909, 53 *L.Ed.*2d 1048 (1977), the government appealed from a federal district court's order dismissing a criminal indictment, on a stipulated statement of facts. The dismissal was ordered prior to any declaration of guilt or innocence and was based upon the failure of the indictment to charge an offense. The Supreme Court held that the Double Jeopardy Clause barred the government's appeal.

United States v. Kopp, 429 U.S. 121, 97 S.Ct. 400, 50 L.Ed.2d 336 (1976). Initially, the trial court had denied defendant's motion to suppress and found defendant guilty after a bench trial. The Supreme Court held that the Double Jeopardy Clause did not bar the government's appeal when, post-verdict, the trial court reversed its suppression ruling and dismissed the indictment. See also United States v. Rose, 429 U.S. 5, 97 S.Ct. 26, 50 L.Ed.2d 5 (1976); United States v. Morrison, 429 U.S. 1, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976).

United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975). "When a judge rules in favor of a defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that

ruling without running afoul of the Double Jeopardy Clause." In *Wilson*, a post-guilty-verdict dismissal based on denial of a speedy trial was appealable. *State v. Lynch*, 79 *N.J.* 327 (1979). The intent of *R.* 2:3-1 is that limitation of the State's right to appeal be coextensive with retrial bars of double jeopardy. If the State and Federal Constitutions would allow the State to appeal a judgment entered at trial, so would *R.* 2:3-1. *Accord*, *State v. Barnes, supra.*

State v. Laganella, 144 N.J. Super. 168 (App. Div. 1976), app. dism. 74 N.J. 256 (1976), ruled that R. 2:3-1 on its terms permits an appeal by the State from a dismissal of an indictment only when the dismissal is entered before or after trial. However, the rule should not be construed to limit review of other dismissals, in extraordinary circumstances. Where a trial judge, on motion of a defendant, in good faith but in error dismisses an indictment to sanction the State for a purported failure to adhere to principles of fairness, double jeopardy should not bar an appeal by the State.

In *State v. Kleinwaks*, 68 *N.J.* 328 (1975), the defendant contended that then *R.* 2:3-1(b)(3), which permits the State to appeal a judgment of acquittal *n.o.v.* entered in accordance with *R.* 3:18-2, violates the Double Jeopardy Clause. The Supreme Court rejected defendant's contention, holding that *R.* 2:3-1(b)(3) did not violate the constitution and that the State could appeal from a judgment of acquittal *n.o.v.* entered under *R.* 3:18-2. The Court explained that since a guilty verdict initially had been rendered, no retrial would be required upon reversal. Later, *R.* 2:3-1(b)(3) was amended to specify that only a *R.* 3:18-2 judgment entered after a guilty verdict is appealable.

In *State v. Sims*, 65 *N.J.* 359 (1974), the trial court granted defendant's motion for a new trial after a jury verdict of guilty. The State appealed, claiming that the trial court had applied the wrong legal standard in granting defendant's new-trial motion. The Supreme Court ruled that the State may seek leave to appeal any grant of a new trial. While the Court noted numerous policy reasons for allowing the State to do so, the Court stated, "[W]e do not at all suggest that leave should always be granted."

State v. \$36,560 in U.S. Currency, 289 N.J. Super. 237 (App. Div. 1996), certif. denied, 147 N.J. 579 (1997), held that the State may appeal a trial court's setting aside its finding of guilt when there was sufficient evidence to support the conviction.

In State v. Lefkowitz, 335 N.J. Super. 352 (App. Div. 2000), a jury originally returned a verdict that defendant had possessed one-half ounce or more of cocaine with intent to distribute, a second degree crime. Then, after the trial court specifically instructed the jury to consider the amount of cocaine possessed by defendant, the jury answered that the amount was less than one-half ounce. The trial court therefore entered a conviction for third degree possession with intent to distribute and sentenced accordingly. The State appealed seeking reinstatement of the "original" verdict, and the Appellate Division dismissed the appeal. The Court held that a jury is a deliberating jury until it is discharged and that the third degree verdict was the only verdict in this case. The Court noted that the New Jersey Supreme Court had not adopted a rule that the State could appeal whenever double jeopardy principles were not violated, rather that the State could appeal only when the right to appeal was delineated, which it was not in these circumstances.

Generally, "an illegal sentence can be corrected [and thus appealed] even if it means increasing the term of a custodial sentence that defendant has begun to serve." *State v. Eigenmann,* 280 *N.J. Super.* 331, 337 (App. Div. 1995). Specific statutes also may authorize the State to appeal a sentence. The right of the State to appeal from the imposition of sentence under *N.J.S.A.* 2C:44-1f to a term appropriate to a crime one degree lower, for example, does not violate state constitutional prohibitions against double jeopardy. *State v. Roth,* 95 *N.J.* 334 (1984). (*See also,*

APPEALS, SENTENCING, this Digest).

IX. COLLATERAL ESTOPPEL AND RES JUDICATA

Res judicata and collateral estoppel are related concepts. *See, e.g., Allen v. McCurry*, 449 *U.S.* 90, 101 *S.Ct.* 411, 66 *L.Ed.*2d 308 (1980). Res judicata precludes relitigation of an entire claim, while collateral estoppel precludes relitigation of an issue previously adjudicated on the merits. *Id.; State v. Cormier,* 46 *N.J.* 494, 505 (1966). For res judicata to apply, it must be shown that all of the issues in dispute were determined in a former prosecution. *See, e.g., United States v. Fancher,* 323 *F. Supp.* 1069, 1071 (D.S.D. 1971). New Jersey case law addresses collateral estoppel as "part of the broader field of res judicata." *State v. Cormier,* 46 *N.J.* at 505; *State v. Gonzalez,* 75 *N.J.* 181, 186 (1977).

The doctrine of collateral estoppel was regarded as part of New Jersey's criminal jurisprudence even before 1970, when the doctrine was ruled, in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), to be an element of double jeopardy protection. In a criminal setting, however, the State's attempt to use collateral estoppel against a defendant is problematic and disfavored by the courts. See Simpson v. Florida, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971); State v. Ingenito, 87 N.J. 204 (1981).

In State v. Cormier, 46 N.J. 494 (1966), defendant was tried and acquitted on a conspiracy charge that he obtained money from a bank through false statements about his company's condition. Defendant was later tried and convicted on the substantive charge of unlawfully obtaining monies from the bank through the same false statements. The question presented was whether defendant's conviction violated principles of either double jeopardy or res judicata or collateral The Supreme Court ruled that although estoppel. defendant's conviction was not barred by double jeopardy protection, collateral estoppel barred relitigation of a key issue in the case. The State's failure to persuade the jury that the loans were made on the basis of fictitious invoices rather than genuine purchase orders was no reason for allowing the State to try the issue again.

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), held collateral estoppel as "embodied" in the Fifth Amendment guarantee against double jeopardy precludes relitigation of an issue already "necessarily determined." Accordingly, after acquittal on a charge of robbing one victim, by a jury verdict that necessarily found defendant was not one of the robbers, defendant could not be tried for robbery of a second victim. To do so would relitigate the issue of defendant's identify as the robber. See also State v. Yormark, 117 N.J. Super. 315 (App. Div. 1971), certif. denied, 60 N.J. 138 (1972), cert. denied sub nom. Mulvaney v. New Jersey, 407 U.S. 925, 92 S.Ct. 2459, 32 L.Ed.2d 812 (1972); State in the Interest of A.B.M. 125 N.J. Super. 162 (App. Div. 1973), aff'd 63 N.J. 531 (1973). For post-Ashe United States Supreme Court collateral estoppel cases, see One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (doctrine does not bar subsequent civil proceeding; double jeopardy does not bar imposition of criminal and civil penalty for same act); Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972) (acquittal of felony murder bars subsequent trial of underlying felony); Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971) (bomb killed two persons; acquittal on trial of one bars trial on other); Simpson v. Florida, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971) (robbery of store

manager and customer; acquittal regarding manager bars trial regarding customer).

According to *State v. Ebron,* 61 *N.J.* 207 (1972), the burden of proving collateral estoppel is on the defendant. A defendant must show by examination of the record that an issue he seeks to exclude was "necessarily determined" in the prior proceeding.

United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed. 2d 361 (1984) held that acquittal of criminal charges involving firearms does not preclude a subsequent *in rem* forfeiture proceeding under 18 U.S.C. § 924(d) against the same firearms. The Court ruled that neither collateral estoppel nor double jeopardy will bar civil, remedial forfeiture proceeding commencing after an acquittal on related criminal charges.

State v. Redinger, 64 *N.J.* 41 (1973), ruled that collateral estoppel applies only where the person involved was a party in both the earlier and the later proceedings; it does not apply to a person who was only a witness at an earlier trial. Therefore, collateral estoppel does not bar prosecution of a witness for perjury although the witness testified at a former trial and his testimony resulted in acquittal of the defendant. In accordance with *State v. Currie,* 41 *N.J.* 531 (1964), the *Redinger* Court held that where the witness testified at a prior municipal court hearing relating to a charge of careless driving, he could be prosecuted for perjury based upon his testimony.

State v. Davis, 67 *N.J.* 22 (1975), held that collateral estoppel must be asserted by a timely objection at trial, and a defendant may not wait until the appellate stage to raise the issue. The trial judge must be afforded a proper opportunity to rule on the question, on the basis of a suitable record. Failure to advance the issue at trial, therefore, constituted a waiver of the issue.

In *State v. Gonzalez,* 75 *N.J.* 181 (1977), two codefendants were arrested and charged with possession of a weapon. In addition, one of the defendants was charged with possession of cocaine. Both the weapon and the cocaine were discovered by police in the car in which defendants were riding. One defendant filed a motion to suppress, resulting in suppression of seized evidence. The other defendant, unable to file a contemporaneous motion, later filed a motion to suppress, which was denied. In each instance, the motion turned on the credibility of the trooper's testimony that he was able to identify a partially smoked cigarette on the rear floor of the car as a marijuana cigarette. The Supreme Court

reversed the denial of the second defendant's motion and held that he should have the benefit of his codefendant's earlier ruling. The Court abandoned the traditional doctrine requiring mutuality as an absolute perquisite for invoking collateral estoppel and adopted, instead, a more flexible approach suggested in contemporary case law and the Restatement, Judgement 2d. (No. 2, 1975). The Court noted that in some cases the absence of mutuality might militate against collateral estoppel, and the Court rejected defendant's argument that the State's failure to have sought interlocutory appeal in the first case should favor collateral estoppel in the second. Nevertheless, the Court noted that "the inconsistent adjudications were based on precisely the same facts" and concluded that "the facts of this case present such a classic example of unfairness that we feel constrained to afford the defendant the benefit of the earlier ruling invalidating the search." Id. at 195. The Court took steps to avoid recurrence of the problem. R. 3:5-7(a) was amended to require joinder of all such motions by coindictees for consolidated consideration in a single hearing. Where a defendant makes a convincing showing that he was unable to participate at a prior suppression hearing in which the challenged search was invalidated, and the evidence adduced at both hearings is substantially the same, he should be afforded the right to claim the benefits of such a hearing. However, where a defendant resists such joinder or fails without adequate justification to participate in the consolidated suppression proceeding, a claim of collateral estoppel will be unavailable.

Romano v. Kimmelman, 190 N.J. Super. 554 (App. Div. 1983), aff'd 96 N.J. 66 (1984). In earlier matters unrelated to plaintiffs' indictment for drunk driving, the municipal court was persuaded that results of the breathalyzer tests were unreliable because of radio frequency interference affecting the breathalyzer's performance. Plaintiffs, none of whom was a party to the earlier municipal court proceedings, but all of whom were charged with drunk driving, brought suit seeking to collaterally estop the State from using breathalyzer test results at their trials. The Court noted that in Gonzalez, the Supreme Court had abandoned mutuality as absolute prerequisite for invoking the doctrine of collateral estoppel. Nevertheless, "in criminal proceedings the identity-of-parties requirement remains paramount, tempered by considerations of fairness to the defendant." 190 N.J. Super. at 563. The court concluded that those considerations did not require collateral estoppel in this case. Although the Attorney General participated in the earlier municipal court proceedings, nevertheless, that court was a court of limited jurisdiction whose ruling had not been reviewed by an appellate court. Moreover, the question was one of general public importance and great concern. The court's responsibility for the protection of the public through the fair administration of drunk driving laws overrode its concern for the time and expense suffered by plaintiffs and others who must protect their own rights individually. Collateral estoppel, the Court stated, although a principle designed to prevent relitigation of issues, should not to be the device by which the greater public good is overridden.

In State v. Ingenito, 87 N.J. 204 (1981), defendant was charged with various violations of the weapons laws. Specifically, defendant was accused of receiving stolen property, the unlicensed transfer of weapons, and possession of a firearm by a previously convicted felon. The last count was severed and defendant was tried on the receiving stolen property and unlicensed transfer of weapons counts. He was convicted of the unlicensed transfer charge but acquitted of the receiving stolen property allegation. One week later, defendant was tried before a second jury on the possession of a weapon by a convicted felon charge. He stipulated that he was a convicted felon. With regard to the second element of the crime, possession of the firearm, the State proffered the testimony of the county clerk about the record of defendant's recent conviction for the unlicensed transfer of weapons. Defendant's objection to this tactic was overruled by the trial court and defendant was convicted of the charge. In reversing the conviction, the Supreme Court determined that the use of defendant's prior conviction of unlicensed transfer of weapons constituted improper application of collateral estoppel by the State in a criminal trial, thereby impinging a defendant's constitutional right to trial by jury. Stressing the jury's function as fact-finder, evaluator of credibility of witnesses and ultimate resolver of a defendant's guilt or innocence, the Court ruled that those considerations required that "that same [jury] decide all of the elements of the charged offense "

In *State v. Lane*, 279 *N.J. Super.* 209 (App. Div.1995), defendant contended for the first time on appeal that his retrial for second-degree aggravated assault impinged his rights under both the Double Jeopardy Clause and the collateral estoppel doctrine. The Appellate Division noted that a defendant must raise the double jeopardy offense by pretrial objection. Likewise, the Court noted, a defendant may not raise an issue of collateral estoppel for the first time on appeal.

X. FEDERAL-STATE RELATIONS AND DUAL SOVEREIGNTY

Former prosecution in one jurisdiction does not bar prosecution in another jurisdiction because double jeopardy guarantees are implicated only by the efforts of a single sovereign. *State v. Cooper*, 211 *N.J. Super*. 1 (App. Div. 1976), *certif. denied*, 105 *N.J.* 525 (1986). The Criminal Justice Code specifies the circumstances when former prosecution in the federal district court will bar later prosecution in New Jersey courts. *See N.J.S.A.* 2C:1-11. Any bar resulting from former prosecution in another state is purely discretionary. *See N.J.S.A.* 2C:1-3f; *State v. Ellis*, 280 *N.J. Super.* 533 (App. Div. 1995).

In Petite v. United States, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960), the Supreme Court had prohibited federal prosecution for crimes arising from the same transaction for which the State has already prosecuted and punished a person, unless compelling reasons exist for federal prosecution. In *Rinaldi v. United States*, 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977), the Court held that the Petite policy should be followed and the charges dismissed if urged by the government, whether the proceedings were instituted by inadvertence or prosecutorial misconduct.

Health v. Alabama, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). Describing the dual sovereignty doctrine, the Court explained that double jeopardy protection is inapplicable when separate governments prosecute the same defendant, because the defendant has offended both sovereigns. The Court noted that although the doctrine ordinarily comes into play when one sovereign is the federal government and the other sovereign is a state, the doctrine also applies when two states seek to prosecute a defendant for a single offense. However, the Court continued, for purposes of the doctrine, a state and any of its political subdivisions (e.g., a municipality) are not separate sovereigns, and only one prosecution may occur with respect to a single offense against two such units. Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970); see also State v. Dively, 92 N.J. 573 (1983).

In *State v. Cooper*, 211 *N.J. Super.* 1 (App. Div. 1976), *certif. denied*, 105 *N.J.* 525 (1986), defendants claimed that their conspiracy convictions in federal court for participation in an enterprise engaged in racketeering activity barred any subsequent state prosecution for conspiracy to commit robbery. The Court ruled that defendants' federal RICO conspiracy convictions involved proof of facts different from those required for

the state convictions for conspiracy to commit robbery. Further, the Court noted, the law defining the two offenses was intended to prevent substantially different harms. *See N.J.S.A.* 2C:1-11a(1); *State v. DiVentura*, 187 *N.J. Super*. 165 (App. Div. 1982); *State v. King*, 215 *N.J. Super*. 504 (App. Div. 1978); *State v. Goodman*, 92 *N.J.* 43 (1983); *State v. Sessoms*, 187 *N.J. Super*. 625 (Law Div. 1982).

State v. Buhl, 269 *N.J. Super.* 344 (App. Div. 1994), *certif. denied,* 135 *N.J.* 468 (1994). Quoting *State v. Goodman,* 92 *N.J.* 43, 51 (1983), the Appellate Division explained that the dual sovereignty doctrine "recognizes that separate governmental jurisdictions have concurrent power to proscribe criminal conduct and to prosecute crime; and further each sovereign may exercise this power without regard to whether particular conduct is or was the subject of separate criminal proceedings undertaken by another jurisdiction." The Appellate Division also noted the statutory limits placed by *N.J.S.A.* 2C:1-11 on application of the doctrine.

State v. Walters, 279 N.J. Super. 626 (App. Div. 1995). The Appellate Division rejected defendant's claim that the use of criminal conduct in federal court to enhance a federal sentence required a New Jersey court to dismiss an indictment based upon that conduct pursuant to *N.J.S.A.* 2C:1-11. The Court found that the use by a federal court of facts pertinent to a pending state indictment cannot transmute that enhancement of sentence into a "prosecution" or "conviction" within the meaning of *N.J.S.A.* 2C:1-11. Thus, defendant had never been prosecuted or convicted of any of the New Jersey indicted acts and *N.J.S.A.* 2C:1-11 did not present a bar to prosecution.

In *State v. Jones*, 287 *N.J. Super.* 478 (App. Div. 1996), the Appellate Division held that defendant's prosecution for possession of cocaine and possession of cocaine with intent to distribute was not barred under *N.J.S.A.* 2C:1-11 because of his previous federal conviction in North Carolina for conspiracy to distribute cocaine and for violating the Travel Act. The court found that the possession of cocaine in New Jersey was merely evidence for the violation of the Travel Act, and both the federal drug offense and the Travel Act had significantly different elements than the New Jersey offense. Further,

the court concluded that the same conduct was not involved in the federal and State crimes.

XI. RESENTENCE AFTER APPEAL OR ON DEFENDANT'S MOTION

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), held that a sentence imposed after a retrial could be harsher than the original sentence, but that due process prohibited the threat of sentence increase to discourage appeals and noted that valid reasons for the increased sentence must appear, premised upon circumstances occurring since the first sentence. See also Moon v. Maryland, 398 U.S. 319 (1970).

In Arizona v. Rumsey 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the Court held that the double jeopardy clause prohibits the state from sentencing a defendant to death after a life sentence has been set aside on appeal. The Court reasoned that given the trial-like characteristics of the sentencing proceedings, an initial life sentence constitutes an acquittal of the death penalty, and thus the double jeopardy clause prohibits the subsequent imposition of a death sentence. The Court held that even if the acquittal were the result of an erroneous evidentiary ruling or an erroneous interpretation of governing legal principles, nevertheless, it is an acquittal precluding retrial.

Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973), held that a sentence imposed by jury after retrial violates neither the Double Jeopardy Clause nor the Fourteenth Amendment Due Process Clause so long as the jury is not informed of the prior sentence and is not shown to be motivated by vindictiveness. The possibility that the retrial jury might impose a harsher sentence than did the first jury does not place an impermissible burden on the right appeal. The Supreme Court distinguished North Carolina v. Pearce, which established limitations on the imposition of higher sentences by judges in retrials following successful appeals. The underlying rationale of *Pearce* was that vindictiveness against the accused for having successfully overturned his conviction had no place in the resentencing process. As the Court pointed out, this rationale in no sense precludes a jury, unaware of the sentence previously imposed, from returning a considered verdict and sentence. Pearce does not apply to a "two tier" system such as a municipal court appeal system. Ludwig v. Massachusetts, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976); Colton v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). However, New Jersey has recognized as a matter of state policy in the "two tier" municipal court system that no harsher sentence will be imposed on trial *de novo. State v. DeBonis*, 58 *N.J.* 182 (1971). *See also In re Disciplinary Hearing of Bruno*, 166 *N.J. Super.* 285, 288 (App. Div. 1979).

But see State v. Pomo, 95 N.J. 13 (1983). Defendant appealed a municipal court conviction to the Superior Court for a trial *de novo* on the record. In municipal court defendant misrepresented his prior record of convictions when being sentenced and was thus given a suspended sentence and probationary term. Upon discovery of the misrepresentation, the Law Division imposed a custodial sentence. Defendant appealed this enhanced sentence and prevailed in the Appellate Division. However, the Supreme Court reversed and held that the Law Division properly imposed an enhanced sentence. The Court concluded that a defendant who appeals from a municipal court conviction would not risk greater sentence by filing an appeal de novo. However, an exception to this rule occurs when a defendant misrepresents his criminal conviction status as was clearly the case here. The need for honesty overrides the general policy and provides the rationale for this exception to the *DeBonis* rule.

In a series of cases, New Jersey courts have held that the rule of *Pearce* allowing the imposition of a harsher sentence upon resentencing applies not only to defendants who are resentenced by virtue of their having successfully appealed and having thereafter been convicted again upon the remanded trial ordered by the appellate court, but also to other defendants who are compelled to face resentencing because they successfully involved the court's process to have an earlier sentence vacated. In State v. Rodriguez, 97 N.J. 263 (1984), the court held that a defendant who persuades an appellate court to merge two convictions into one may be resentenced upon the surviving conviction. However, the new sentence imposed upon the surviving conviction may not exceed the aggregate sentence originally imposed upon the two unmerged convictions.

Poland v. Arizona, 476 *U.S.* 147, 106 *S.Ct.* 1749, 90 *L. Ed.*2d 123 (1986), addressed the question of when jeopardy attaches in a capital sentencing hearing. The sentencing judge found that one of two aggravating factors alleged by the prosecution was not present but that the other one did exist, and upon that factor, he sentenced defendant to death. On appeal, the state supreme court reversed and remanded the case, noting that there was insufficient evidence of the one aggravating factor that the judge found to be present. With respect to the aggravating factor that the judge discarded, the appeals court found that the judge had mistaken the law, and that upon retrial, the court might find the existence of this aggravating factor. On remand, defendant was again convicted of capital murder and sentenced to death on the basis that both aggravating factors existed. The Supreme Court held that when the sentencing judge rejected the one aggravating factor, it did not constitute an "acquittal" for purpose of double jeopardy. Furthermore, the Court concluded that the double jeopardy clause does not forbid a second capital sentencing hearing where the evidence was never deemed insufficient to justify imposition of the death penalty and, hence, it did not "acquit" defendant.

Texas v. McCullough, 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986), found that the due process clause was not violated by the trial judge's imposition of a longer sentence on retrial than the jury had imposed at the prior trial, where the same judge had ordered the retrial and where the judge entered findings of fact justifying the longer sentence. Defendant had moved for a new trial on the basis of prosecutorial misconduct. The trial judge granted the motion, and defendant was then convicted by the jury on retrial before the same judge. However, on retrial, defendant requested the judge to fix sentence rather than the jury. The judge did so and sentenced defendant to 30 years longer that the original sentence defendant received from the jury. Nevertheless, the judge entered specific and objective findings of fact, justifying the longer sentence. Hence, the Court ruled, there was no basis for a presumption of vindictiveness which was proscribed in Pearce.

In State v. Biegenwald, 110 N.J. 521 (1988), following Pearce, held that there was no double jeopardy violation if, on retrial, a court imposed a harsher sentence than that imposed after the first conviction. The Court continued, however, that in order to ensure that a harsher sentence is not due to the vindictiveness of the sentencing court, the court must set forth its reasons for doing so, which should be based on "objective information concerning identifiable conduct" on the defendant's part. The Court ruled that on resentencing, admission of a second murder conviction which did not exist at the time of the original sentence would not violate the principles of double jeopardy, since defendant already had been sentenced to death at the conclusion of the first sentencing phase and the only change was that an additional aggravating circumstance was submitted to the jury for its consideration at the resentencing trial.

In State v. Crouch, 225 N.J. Super. 100 (App. Div. 1988), defendant was convicted of first degree robbery and aggravated assault. Upon sentencing, the conviction for aggravated assault was merged into the conviction for first-degree robbery. Following a grant of postconviction relief, the case was remanded to the trial court for resentencing. At resentencing, the court realized that it had improperly merged the assault into the robbery convictions, unmerged them, and sentenced defendant to two consecutive terms. On appeal, defendant argued that double jeopardy prevented the unmerging as well as defendant's new sentence. The Appellate Division disagreed and held that the principles of double jeopardy do not prevent the correction of inadvertent errors at sentencing, especially when it is defendant's appeal. Thus, defendant could have had no legitimate expectations of finality with respect to his original sentence.

In *State v. Bowen*, 224 *N.J. Super.* 263 (App. Div. 1988), defendant, a pedophile with an extensive criminal history, appealed his resentencing, which had been ordered when defendant was found not to be amenable to treatment as a sex offender. Based upon defendant's lack of amenability to treatment, the Commissioner of the Department of Corrections ordered his transfer to the general prison population. At defendant's resentencing, the sentences for certain offenses increased but the maximum amount of time which defendant was to spend in prison did not increase. On appeal, the Appellate Division held that defendant's resentence did not have the net effect of enhancing the aggregate maximum term which was initially imposed.

State v. Koedatich, 118 *N.J.* 513 (1990), held that as long as there is sufficient evidence in the record to sustain a death sentence, double jeopardy principles do not bar at resentencing evidence of aggravating factors that the jury did not find unanimously to exist at the first trial. In reaching this conclusion , the Court rejected defendant's contention that the jury's failure to find an aggravating factor at the first trial amounted to an "acquittal" of that factor.

ELECTIONS

I. INTERFERENCE WITH THE EXERCISE OF THE RIGHT TO VOTE

Under *N.J.S.A.* 2C:27-3a(1) and b (Threats and Other Improper Influence in Official and Political Matters), it is a third degree crime to directly or indirectly "threaten[] unlawful harm to any person with purpose to influence a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election. . . ." *See also, N.J.S.A.* 2C: 27-2 (Bribery in Official and Political Matters).

II. ELECTION LAW VIOLATIONS

Violations of the elections laws have both criminal and civil consequences, and prosecutors are responsible to investigate the criminal aspects. The Legislature ahas given the power to investigate the civil consequences of such violations to two independent administrative bodies: the office of the Superintendent of Elections and the Election Law Enforcement Commission (ELEC). In Cupano v. Gluck, 133 N.J. 225 (1993), a complaint was filed seeking temporary restraints of a prosecutor's investigation into such violations and to quash subpoenas that the prosecutor's office had issued. The Supreme Court held that in a second class county te prosecutor was not required to await the result of an ELEC inquiry before commencing a criminal investigation, and that the prosecutor's investigation was neither an abuse of discretion nor arbitrary.

In the Matter of an Application for Disclosure of Grand Jury Testimony, 124 N.J. 443 (1991), involved a motion by the Attorney General to compel disclosure of grand jury transcripts for use by ELEC. The Court held that ELEC was not entitled to such disclosure concerning an investigation into allegations that a corporation and certain senior officials had violated provisions of the Campaign Contributions and Expenditures Reporting Act, even after the grand jury handed up a presentment recommending that such evidence be turned over to ELEC, where ELEC failed to make a strong showing of particularized need sufficient to outweigh the public interest in preserving grand jury secrecy.

III. NOMINATIONS AND PETITIONS

In relevant part, *N.J.S.A.* 19:34-2 makes it a misdemeanor punishable by up to a five year prison term

to "falsely make, falsely make oath to, or fraudulently deface or fraudulently destroy any certificate of nomination or petition, or any part thereof, or file, or receive for filing, any certificate of nomination or petition, knowing the same or any part thereof to be falsely made, or suppress any certificate of nomination or petition which has been duly filed, or any part thereof." In *State v. Toland*, 123 *N.J. Super*. 286 (App. Div. 1973) (*per curiam*), *app. dismissed*, 416 *U.S.* 953, 94 *S.Ct.* 1964 (1974), the Court held that this statutory provision applies not only to the principal but also to a notary public who knowingly participates in obtaining false signatures to the verification and having then certified as genuine. *Id.* at 289-90.

However, the mere fact that certain individuals who signed a nominating petition for one candidate voted for other candidates, in the absence of evidence of fraud, forgery or other wrongdoing, "is not, without more, evidentiary of [the] candidate's bad faith." *In the Ross Petition*, 116 *N.J. Super*. 178, 183 (App. Div. 1971).

The *Ross* Court also relied upon the "wellestablished" principal that election laws are to be given a liberal construction in order to establish a public policy in favor of the enfranchisement of voters. *Id.* at 184. *Cf. Petition of Kriso, N.J. Super.* 337, 341 (App. Div. 1994)(requirement of domicile is construed broadly and flexibly).

IV. ILLEGAL VOTER REGISTRATION EVI-DENCE

When an unqualified voter is nevertheless registered to vote, the State must prove beyond a reasonable doubt that the individual had actual knowledge that he or she was not qualified in order to prove criminal culpability. Furthermore, a voter must be domiciled in New Jersey; mere residency is insufficient. *State v. Benny*, 20 *N.J.* 238 (1955). *See State v. Smith*, 22 *N.J.* 59 (1956).

V. LOSS OF THE RIGHT TO VOTE

See generally, N.J.S.A. 2C:51-1 (Loss and Restoration of Rights Incident to Conviction of an Offense). N.J.S.A. 19:4-1 denies the right to vote to persons convicted of certain enumerated offenses. N.J.S.A. 19:4-1(8) denies the right to vote to any person serving a sentence, including probation, or who is on parole. This statutory provision also applies "to all persons serving the supervised release component of a sentence for conviction of a federal indictable offense." McCann v. Superintendent of Elections, 303 N.J. Super. 371 (Ch. Div.), aff'd 303 N.J. Super. 352 (App. Div.), certif. 149 N.J. 139 (1997). However, this statutory provision does not apply to a vote cast by a municipal corporation officer while exercising the rights and duties of his office. Galloway v. Council of Clark Twp., N.J. Super. 409 (Law Div. 1966), aff'd 94 N.J. Super. 27 (App. Div. 1967).

In *Hitchner v. Cumberland County Board of Elections*, 163 *N.J. Super.* 560 (Co. 1978), the Court held that a convicted criminal was entitled to vote in an election when free on his own recognizance pending his future surrender date to prison, and the Superintendent of Elections failed to notify him that he was disqualified, so that he was only informed of his disqualification when he was refused the right to vote at the polling place.

In *State v. Musto*, 188 *N.J. Super*. 106 (App. Div. 1983), the Court held that *N.J.S.A.* 2C:51-2, which mandates forfeiture of public office upon conviction, was constitutional notwithstanding that the state constitution limits eligibility for membership in the State Senate to persons entitled to the right of suffrage.

VI. COMPETENCY TO VOTE

The state constitution, *N.J. Const.1947,* Art. 2, \P 1 and *N.J.S.A.* 19:4-1 deny the right of suffrage to "idiots or insane persons" both.

Voters who are involuntarily committed residents of a psychiatric hospital, pursuant to *N.J.S.A.* 30:24 to 80, are presumed competent to vote. *In The Matter of Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 331 *N.J. Super.* 31 (App. Div. 2000).

VII. CONTRIBUTIONS

N.J.S.A. 19:44-21 makes the concealment or misrepresentation of contributions or expenditures a fourth degree crimes. *N.J.S.A.* 19:34-45 prohibits corporations in certain industries from making political contributions.

Thus, a bank's purchase of ten \$100 tickets to a political reception and dinner, payment of which was by check payable to a candidate's campaign committee, violated *N.J.S.A.* 19:34-45. *State v. Bank of New Jersey,* 139 *N.J. Super.* 593 (Law Div. 1976).

In *Markwardt v. New Beginnings*, 204 *N.J. Super*. 522 (App. Div. 1997), the Court held that individuals, corporations, businesses and continuing political

committees may not evade the restrictions on the amounts of contributions that may be made, set forth in N.J.S.A. 19:44A-1 to 19:44A-47, the Campaign Contributions and Expenditure Reporting Act, by entering into an agreement to funnel monies to a candidate or candidate's campaign committee.

ELUDING

I. HISTORY

When the Code became effective on September 1, 1979, eluding was part of the resisting arrest offense, *N.J.S.A.* 2C:29-2. The offense was elevated from a disorderly persons offense if the perpetrator: (1) "[u]ses or threatens to use physical force or violence against the law enforcement officer or another," *N.J.S.A.* 2C:29-2a; or (2) "[u]ses any other means to create a substantial risk of causing physical injury to the public servant or another." *N.J.S.A.* 2C:29-2b. In 1981, the Code was amended to renumber the sections and to create a separate offense for eluding in *N.J.S.A.* 2C:29-2b. That offense was restricted to the use of motor vehicles and was only a disorderly persons offense.

The Code was amended again in 1991 to make eluding a fourth-degree offense if there was a risk of death or injury. L. 1991, c. 343, § 3. A permissive inference regarding a person's conduct during flight or attempt to elude was added at the same time. Id. Finally, in 1993, eluding was elevated from a fourth-degree offense to a crime of the third-degree. L. 1993, c. 219, § 5. It became a second-degree offense if the attempt to elude created a risk of death or injury to any person. *Id.* At the same time, the Legislature amended N.J.S.A. 2C:12-1b(6), the section of the Code relating to aggravated assault by a motor vehicle while eluding the police or law enforcement person, to eliminate the requirement of "serious bodily injury." L. 1993, c. 219, § 2. It substituted "any bodily injury." *Id.* Read together, the sections suggest that the Legislature intended both second-degree eluding and second-degree aggravated assault caused while eluding a law enforcement officer under N.J.S.A. 2C:12-1b(6) to require "bodily injury" or "risk of bodily injury" as defined in N.J.S.A. 2C:11-1a rather than "serious bodily injury."

II. ELEMENTS AND CONSTRUCTION

The eluding statute creates a duty immediately to bring a vehicle to a full stop after receiving a law enforcement officer's signal, whether the officer's stop is legal or illegal. *State v. Seymour*, 289 *N.J. Super.* 80, 87 (App. Div. 1996).

In *State v. Wallace*, 158 *N.J.* 552 (1999), the Supreme Court of New Jersey ruled that, in a second degree eluding case, the jury must be instructed that the term "injury" means bodily injury. The failure to define

"injury" in this case, however, was harmless error because of the permissive inference contained in the eluding statute that the flight or attempt to elude creates a risk of death or injury if defendant is found to have violated one or more of the motor vehicle statutes contained in Title 39, Chapter 4. The jury must be instructed as to the elements of the applicable Title 39 offenses. *State v. Dorko*, 298 *N.J. Super.* 54, 58 (App. Div.), *certif. denied*, 150 *N.J.* 28 (1997). Here, the case was based on that theory; the jury was charged with the permissive inference, and defendant was convicted of several motor vehicle offenses.

Even if the statutory inference is unavailable, moreover, the State need not prove that some member of the public was in the vicinity of the chase. The eluding statute is intended to protect all persons, including police officers chasing the vehicle and occupants in the eluding vehicle, as well as persons exposed along the chase route.

In State v. Curt Thomsen, 316 N.J. Super. 207 (App. Div. 1998), the Appellate Division reversed defendant's conviction for second degree eluding. The trial court, prosecutor, and defense counsel were all unaware until sentencing that, when defendant committed his crime, eluding was a second as opposed to a fourth degree crime. The court in sentencing defendant imposed a minimum five year term and entered a judgment of conviction reflecting a second degree conviction because he viewed the matter primarily as a sentencing problem. The appellate court held that defendant was entitled to a mistrial at the trial level. First, defendants are entitled to know the penal consequences of any criminal charge they must defend against. Once it was apparent that the trial was conducted under a misapprehension as to the gravity of the crime involved, defendant could be convicted of no crime of a greater degree than he and everyone else understood to be charged. Second, the trial court could have declared a mistrial for fundamental fairness reasons when it became aware of the "manifest and pervasive" error committed. Finally, defense counsel was ineffective for not knowing the eluding statute's effective amendment date, particularly as it related to considering the State's pretrial plea offer. The Appellate Division would not speculate whether or not a different defense strategy would have been used at trial since the misinformation in several ways denied defendant an adversarial process.

In *State v. Wallace*, 313 *N.J. Super.* 435 (App. Div. 1998), the Appellate Division affirmed defendant's eluding conviction, but remanded for re-sentencing to reflect appropriate mergers of his resisting arrest and

careless driving convictions. Defendant had attempted to evade police officers in his car for approximately a mile as he drove no faster than thirty miles per hour, had run stop signs, had driven on the left side of the road, had driven the wrong way down a one-way street, and had attempted to run from the officers after their vehicle was stopped. Under these circumstances, defendant's resisting arrest and careless driving convictions should have merged with his eluding conviction on both an elemental and factual basis.

In *State v. Fuqua*, 303 *N.J. Super.* 40 (App. Div. 1997), the Appellate Division reversed defendant's conviction for eluding because the trial court failed to charge the jury that a knowing scienter was an element of the offense.

In State v. Green, 318 N.J. Super. 361 (App. Div. 1999), aff'd, 163 N.J. 140 (2000), the Appellate Division held that a defendant could be convicted of second degree eluding based on evidence that defendant struck a police officer with a vehicle in a private parking lot and that other police officers subsequently chased defendant through city streets. The Green court also held that a trial court's failure to instruct the jury regarding the offense of second-degree aggravated assault while eluding law enforcement officers, which offense was set forth in one count of a multi-count indictment alleging aggravated assault and eluding law enforcement officers, required reversal of the conviction on that count; the court asked the question on the verdict sheet as to whether defendant caused bodily injury to the officer while fleeing or attempting to elude officer, but essential to fair trial was guidance from court by way of specific instructions on the count that, at the very least, referred to court's prior instructions on eluding police officer and bodily injury, and required jury to deliberate anew on the count. Id.

Police involvement was essential element of offense of eluding police officers, and thus, police involvement could not, by itself, constitute an aggravating factor for sentencing purposes. *State v. Nataluk*, 316 *N.J. Super.* 336 (App. Div. 1998).

Second degree eluding may be a "violent crime" to which the No Early Release Act is applicable. In *State v. Griffin, ____ N.J. Super.* ____ (App. Div. 2000), the Appellate Division affirmed a NERA sentence where a defendant used or threatened the use of a deadly weapon by intentionally ramming his vehicle into occupied police cars. However, NERA does not apply to the

second degree eluding where a defendant recklessly struck another vehicle during a police chase and no death or serious bodily injury resulted. *State v. Burford*, 163 *N.J.* 16 (2000).

ENDANGERING THE WELFARE OF CHILDREN

N.J.S.A. 2C:24-4 criminalizes conduct which would impair or debauch the morals of a child or cause the child harm that would make the child abused or neglected. This statute also prohibits child pornography.

I. IMPAIRING THE MORALS OF A CHILD

A. Definition

N.J.S.A. 2C:24-4a criminalizes any sexual conduct which would impair or debauch the morals of a child and distinguishes between offenders in terms of their relationship to the child as well as the age of the child. While "sexual conduct" is not defined, it includes sexual assaults and sexual contact proscribed in Chapter 14 of the Code. See State v. D.R., 109 N.J. 348 (1988); State v. Miller, 108 N.J. 112 (1987); State v. Smith, 279 N.J. Super. 131 (App. Div. 1995); State v. Davis, 229 N.J. Super. 66 (App. Div. 1988); State v. Hess, 198 N.J. Super. 322 (App. Div. 1984). It is not, however, limited to such conduct. See, e.g., State v. Bottigliero, 174 N.J. Super. 101 (Resen. Panel 1980) (showing a nine-year-old child pictures of sexual intercourse between a man and a woman and requesting a eleven-year-old to touch defendant's penis constituted crimes under N.J.S.A. 2C:24-4).

In *Bottigliero*, the Appellate Division held that *N.J.S.A.* 2C:24-4 is the congruent offense to *N.J.S.A.* 2A:96-3 (debauching or impairing the morals of a child). Also, under Title 2A, the actual delinquency of a child need not occur in order for the actor to be guilty of contributing to the delinquency of a minor. *State v. Norflett*, 67 *N.J.* 268 (1975); *State v. Blount*, 60 *N.J.* 23 (1972).

In *State v. Bowen*, 154 *N.J. Super*. 368 (App. Div. 1977), *certif. denied*, 77 *N.J.* 479 (1978), defendant's implicit solicitation of a 14-year-old boy to engage in homosexuality, consume alcohol and gamble, fell within the statutory endangerment proscription, whether or not the solicitation resulted in the actual commission of the proposed acts.

State v. Brown, 59 *N.J.* 539 (1971), held that although the actual delinquency of the child involved need not occur, the State must prove that the child knew of the accused's actions or was somehow influenced by them. On this basis, merely permitting an 11-year-old

girl to be on premises where defendant unlawfully possessed marijuana, absent evidence that she knew of its presence, was exposed to its use, or was encouraged to use it, was found not to constitute contributing to the delinquency of a child.

B. Sufficiency

In State v. D.G. 157 N.J. 112 (1999), the Supreme Court reversed a decision by the Appellate Division that had affirmed defendant's convictions for sexual assault and endangering the welfare of a child. The Court held that an insufficient showing of particularized guarantees of trustworthiness had attended the child victim's report to her relative of her stepfather's molestations pursuant to the tender years hearsay exception, N.J.R.E. 803(c)(27). In fact, the trial court had held no hearing to determine if the child's extrajudicial statements carried with them appropriate indicia of reliability. The Supreme Court also disagreed with the lower courts concerning the admissibility of the second portion of the child's videotaped statement under the tender years exception. It reviewed the reliability factors present as articulated in State v. Michaels, 136 N.J. 299 (1994), finding that the interviewing detective had assumed that the child's report to her relative about defendant's molestations was accurate and continued the interview until that report was repeated to her satisfaction. The most damaging allegations were provided after a seven-minute gap in the videotape, and were not spontaneous. Thus, that portion of the videotape occurring after the break was not sufficiently reliable to be admitted under the tender years hearsay exception.

C. Evidence

In *State v. Hackett*, 166 *N.J.* 66 (2001), the Court determined that a defendant's nudity could suffice to support an endangering conviction if the nudity "would impair or debauch the morals" of a child under the age of 16. Proof of actual impairing or debauching is not required, however, and it is sufficient if the sexual conduct would result in the impairing or debauching of an average child in the community. There is no need for expert testimony to establish that a defendant's conduct had the tendency to impair or debauch the morals of a child; rather, such determination was "well within the abilities of an average jury" to make.

In *State v. D.R.*, 109 *N.J.* 348 (1988), *rev'g*, 14 *N.J. Super.* 278 (App. Div. 1986), the Court held that a child's out-of-court statements concerning acts of sexual abuse were admissible only when the child testifies at trial. Thus, the jury is given an opportunity to assess child's credibility, and defendant's right to confrontation and cross-examination is not violated.

Sexual abuse victims, 16 years of age or younger, may testify at trial via closed circuit television. *See N.J.S.A.* 2A:84A-32. *See also, State v. Bass,* 221 *N.J. Super.* 466 (App. Div. 1987)(videotaped trial testimony of defendant's five-year-old son, who was eyewitness to his younger brother's murder, "constitutionally adequate" and not violative of defendant's right to face-to-face confrontation). *But see, Coy v. Iowa,* 478 *U.S.* 1012 (1988) (placement of screen between defendant and two 13-year-old victims of sexual assault which blocked him from their sight but allowed defendant to see and hear victims, violated defendant's right to confrontation). *(See also,* **SEXUAL OFFENSE AND OFFENDERS**, this Digest).

In prosecution for sexual assault of an 11-year-old victim, cumulative effect of trial errors, *i.e.*, permitting victim to testify as to defendant's admission of a prior similar crime and prosecutor's comments on defendant's silence after being advised of *Miranda* rights and his decision not to testify, constituted reversible error. *State v. Schumann, 218 N.J. Super.* 521 (App. Div. 1987), *mod. o.g.,* 111 *N.J.* 470 (1988).

D. Jury Instruction

In *State v. Hackett, supra*, the Supreme Court found the instruction on third degree endangering, which mirrored the model charge, contained a problematic reference to "nudity" when explaining "sexual conduct," and lacked sufficient clarity. While the Court required reversal of defendant's conviction on this basis, it noted that the subsequently revised Model Jury Charge appeared to address the problems in the charge used here, but "entrust[ed]" to the Model Jury Charge Committee the question of whether any further amendment of the model charge was necessary.

In *State v. Collier*, 90 *N.J.* 117 (1982), defendant was charged with the rape of a 16-year-old girl and contributing to the girl's delinquency. The fact of sexual intercourse was uncontested, but defendant testified that the intercourse was consensual, while the victim testified she was forced to engage in sexual intercourse. At the close of the evidence, the trial court directed the jury to return a guilty verdict on the charge of contributing to the girl's delinquency because the mere act of sexual intercourse with a minor is illegal. Defendant was subsequently found guilty of both charges. On appeal,

the Appellate Division found the trial court's instructions on the guilty verdict to be erroneous; however, the convictions were affirmed as harmless error. On further appeal, the New Jersey Supreme Court agreed with the Appellate Division's determination of error, but disagreed that it was harmless. The Court reversed after finding that the error in the trial court's instructions contributed to the guilty verdict below because its effect was to communicate to the jurors that defendant was guilty, regardless of whose testimony they believed.

E. Merger

A conviction under N.J.S.A. 2C:24-4a will not merge with convictions under N.J.S.A. 2C:14-2a and b (sexual assault) because of the legislative intent to punish separately sexual assaults committed by strangers and those committed by family members. State v. Miller, 108 N.J. 112, 118-119 (1987). Therefore, the emphasis of N.J.S.A. 2C:24-4a is defendant's violation of the duty of care owed to a child for whom he had responsibility. See State v. Bass, 221 N.J. Super. 466 (App. Div. 1987), where the court held that *Miller* applied to the circumstances of each case, thus precluding merger. Accord State v. South, 136 N.J. Super. 402 (App. Div. 1975) (lewdness and impairing the morals of a minor do not merge but defendant's sentence modified from two consecutive indeterminate terms to one indeterminate term because conduct which led to defendant's convictions of both charges was the same). Compare State v. Still, 257 N.J. Super. 255 (App. Div. 1992) (convictions held to merge where defendant convicted of sexual assault and child endangerment, but he was not child's parent and endangerment based solely on the assault). Compare also, State v. McCauley, 157 N.J. Super. 349 (App. Div. 1978) (conviction for impairing the morals of a minor and assault with intent to rape merged because they arose out of the same incident with a 14year-old girl; thus, such a single criminal transaction required only one conviction and one sentence be imposed), certif. denied, 77 N.J. 500 (1978).

II. CHILD ABUSE

N.J.S.A. 2C:24-4a criminalizes the conduct described in *N.J.S.A.* 9:6-1 (abuse, abandonment, cruelty and neglect of a child) and distinguishes between offenders in terms of their relationship to the child as well as the age of the child.

In *State v. Galloway*, 133 *N.J.* 631 (1993), the Supreme Court reversed defendant's convictions for murder and third degree endangering the welfare of a

child, after finding that defendant did not have ongoing and continuous care-taking responsibilities of the child. The Court interpreted the "assumed responsibility" requisite of *N.J.S.A.* 2C:24-4a to include only those who assumed a general and ongoing responsibility for the child and established a continuing or regular supervisory or caretaker relationship with the child, but not those who irregularly or infrequently babysit. *Id.* at 657-662.

A. Nature of Harm

The requisite element "harm that would make the child an abused or neglected child," *N.J.S.A.* 2C:24-4a, held not vague as applied where a 15-month-old baby was left unattended for indefinite time. *State v. M.L.*, 253 *N.J. Super.* 13 (App. Div. 1991), *certif. denied*, 127 *N.J.* 560 (1992).

The requisite "harm" also found in other cases involving child abandonment, *see State v. Sanders*, 230 *N.J. Super.* 233 (App. Div. 1989), as well as sexual offenses, *see State v. Hess*, 198 *N.J. Super.* 322 (App. Div. 1984)

The term also includes failure of persons with parental responsibilities to provide the child with "proper and sufficient" medical care. *State v. Bass*, 221 *N.J. Super*. 466 (App. Div. 1987). *See Schroeder v. Perkel*, 87 *N.J.* 53 (1981).

The harm need not be physical and may be inferred from the type of abuse or neglect inflicted upon the child. *State v. M.L.*, 253 *N.J. Super.* at 31-32. *See also, New Jersey Youth & Family Serv. v. R.Q.*, 273 *N.J. Super.* 365 (Ch. Div. 1994) (abuse and neglect included condoning of sexual relationship between defendant's 13-year-old daughter and 19-year-old boyfriend).

B. Mental Element

In *State v. Demarest*, 252 *N.J. Super*. 323 (App. Div. 1991), defendant claimed he accidentally scalded his daughter with water from a pot on the stove. The Appellate Division held that any non-accidental harm could be reached in a civil child abuse actions, but criminal conviction limited to those who act knowingly.

C. Admissibility Of Evidence

State v. Sanders [*Oscar*], 163 *N.J.* 2 (2000), affirmed the Appellate Division majority's reversal of defendant's convictions for aggravated manslaughter and endangering the welfare of a child, substantially for the reasons expressed in 320 *N.J. Super*. 574 (App. Div. 1999). There, the Appellate Division majority held that the trial court committed reversible error when it admitted evidence of defendant's previous assaults upon his girlfriend, pursuant to *N.J.R.E.* 404(b), to establish intent and absence of mistake or accident with respect to defendant's fatal beating of their 20-month-old daughter. *State v. Sanders*, 320 *N.J. Super.* at 580-584. The majority also held that the trial court's limiting instructions were plainly erroneous because they did not adequately explain the permissible uses of the evidence.

State v. Fulston, 325 N.J. Super. 184 (App. Div. 1999), reversed defendant's aggravated manslaughter and endangering convictions. Defendant beat to death his girlfriend's one-year-old son, but his defense at trial was that the child's mother had done the killing. Here, N.J.R.E. 404(b) did not bar admission of other-crimes evidence defendant offered to illustrate that the victim's mother had previously abused the child and had stated that she wished she had never given birth to him. When defendants offer such exculpatory proofs, prejudice to them is not an issue, and a less-rigorous standard applies to admit such defense evidence. The "third-party guilt" evidence defendant offered at trial was both relevant and probative, particularly since it was obvious that either defendant or the child's mother had killed the child, and the trial court's exclusion undermined the Appellate Division's confidence in the verdict. Id. at 189-193.

State v. Compton, 304 N.J. Super. 477 (App. Div. 1997), certif. denied, 153 N.J. 51 (1998), affirmed defendant's aggravated manslaughter and endangering the welfare of a child convictions. The court agreed with the trial judge that defendant's prior abuse of the child was admissible and relevant to the issue of whether his son's death was accidental and found requisite limiting instruction adequate as given. Also, Shaken Baby Syndrome held to be a fitting subject for expert testimony, resting as it did upon reliable scientific premises. Id. at 485-488.

A. Definition

N.J.S.A. 2C:24-4b imposes criminal penalties upon any person who permits or causes a child to engage in a prohibited sexual act that he knows will be photographed or reproduced in any manner. A child is defined as anyone under 16 years of age. N.J.S.A. 2C:24-4b(1). Prohibited sexual acts are defined in N.J.S.A. 2C:24-4b(2)(a) to (i). *N.J.S.A.* 2C:24-4b(3) and (4)(a) proscribe, as a second degree offense, any form of manufacturing or trafficking in child pornographic materials. N.J.S.A. 2C:24-4b(4)(b) also prohibits, as a fourth degree crime, knowing possession or viewing of child pornography. Violations of the child pornography laws under N.J.S.A. 2C:24-4b are strict liability crimes with respect to the age of the child. N.J.S.A. 2C:24-4b(5).

B. Legislative History

N.J.S.A. 2C:24-4b has been amended several times since 1984 to reflect technological advances. In 1984, the Legislature amended the subsection to include videotape and other forms of pictorial representation and to include any form of manufacturing or trafficking. In 1992, in response to the United States Supreme Court ruling in Osborne v. Ohio, 495 U.S. 103 (1990), which permitted states to criminalize the possession of pornographic photographs of children, the Legislature amended N.J.S.A. 2C:24-4b to make it a fourth degree crime to knowingly possess or view such material. In 1995, the Legislature again amended the statute to clarify that computer programs and video games containing child pornography are also prohibited by N.J.S.A. 2C:24-4b. In 1999, the statute was amended once again to include the Internet as a prohibited means of trafficking in child pornographic materials. See State v. Brady, 332 N.J. Super. 445 (App. Div. 2000), certif. denied, 165 N.J. 606 (2000).

C. Constitutionality

According to New York v. Ferber, 458 U.S. 747 (1982), child pornography is not entitled to First Amendment protection provided the conduct to be prohibited is adequately defined by applicable state law, as written or authoritatively construed.

United States v. X-Citement Video, Inc., et al., 513 U.S. 64 (1994), construed the scienter element in federal pornography statute ("knowingly") to extend both to the

sexually explicit nature of the material and to the age of the performers.

In Reno v. American Civil Liberties Union, et al., 521 U.S. 844 (1997), the constitutionality of provision in Communications Decency Act, 47 U.S.C. 223, prohibiting transmission of obscene or indecent communications by means of a telecommunications device to persons under age 18 would survive facial overbreath challenge by severing term "or indecent" from statute pursuant to its severability clause.

ENVIRONMENTAL PROSECUTIONS

The law applicable to environmental prosecutions consists primarily of statutes which have not been the subject of much judicial interpretation. Among the particular statutes involved are the Code of Criminal Justice, the Solid Waste Management Act (*N.J.S.A.* 13:1E-1, *et seq.*), the Water Pollution Control Act (*N.J.S.A.* 58:10A-1, *et seq.*), the Air Pollution Control Act (*N.J.S.A.* 26:2C-1, *et seq.*) and the Comprehensive Regulated Medical Waste Act (*N.J.S.A.* 13:1E-48.1, *et seq.*).

I. THE CODE OF CRIMINAL JUSTICE

Under *N.J.S.A.* 2C:17-2a(1), it is a crime of the second degree to purposely or knowingly unlawfully cause an explosion, flood, avalanche, collapse of a building, release or abandonment of poison gas, radioactive material or any other harmful or destructive substance. *See State v. Iron Oxide Corp.*, 178 *N.J. Super.* 303 (Law Div. 1980) (determining that knowing or purposeful release or abandonment of substances included in *N.J.S.A.* 2C:17-2a(1) sufficient to establish second degree offense and not necessary to show widespread damage actually occurred).

Under *N.J.S.A.* 2C:17-2a(2), it is a crime of the second degree to purposely or knowingly cause the release or abandonment of hazardous waste, as defined in *N.J.S.A.* 58:10A-3r, and a third degree crime to do so recklessly. *N.J.A.C.* 7:14A-4, *Appendix A*, contains a list of toxic pollutants.

Also, under *N.J.S.A.* 2C:17-2a(2), it is a crime of the second degree to purposely or knowingly cause a hazardous discharge required to be reported under the Spill Compensation and Control Act, *N.J.S.A.* 58:10.23-11, *et seq.*, and a crime of the third degree to do so recklessly.

Under *N.J.S.A.* 58:10.23-11B, a discharge is the spilling or leaking of hazardous substance onto lands or into waters of the State when damage may result to lands, waters or natural resources of the State. *See In re Frank*, 276 *N.J. Super*. 269 (App. Div. 1994) (conviction by plea of *N.J.S.A.* 2C:17-2a(2)).

Under *N.J.S.A.* 2C:17-2c, it is a crime of the fourth degree to recklessly create the risk of "widespread injury or damage." It is a crime of the third degree to recklessly

cause widespread injury or damage. *N.J.S.A.* 2C:17-2b. It is a crime of the second degree to do so purposely or knowingly. *N.J.S.A.* 2C:17-2a(1).

Under *N.J.S.A.* 2C:17-2d, it is a crime of the fourth degree to knowingly or recklessly fail to take reasonable measures to prevent or mitigate widespread injury or damage.

The State must prove beyond a reasonable doubt territorial jurisdiction as an essential element of each count of a criminal environmental prosecution for the unlawful abandonment or disposal of hazardous waste on property owned by the United States Army Corps of Engineers. *State v. Ingram*, 226 *N.J. Super*. 680 (Law Div. 1988). In *Ingram*, the Law Division held that the State had failed to proffer evidence establishing that the alleged abandonment or disposal took place on land acquired by the Federal government. The United States had not filed an acceptance of exclusive jurisdiction.

II. THE SOLID WASTE MANAGEMENT ACT

The Solid Waste Management Act, *N.J.S.A.* 13:1E01, *et seq.*, establishes a statutory framework for a coordinate system of solid waste collection and disposal by creating solid waste management districts which formulate plans for solid waste disposal and collection within that district. *See N.J.S.A.* 13:1E-20. *N.J.A.C.* 7:26-6.1, *et seq.*, provide for designated interdistrict waste flow.

N.J.S.A. 13:1E-5 requires that anyone engaging in the collection, transportation or disposal of solid waste, must first obtain Department of Environmental Protection ("DEP") approval to do so.

The Solid Waste Management Act contains no criminal provisions relating to the unlawful collection, transportation or disposal of solid waste. Criminal provisions for such conduct are contained in the Solid Waste Utility Control Act, *N.J.S.A.* 48:13A-1, *et seq.*

In *State v. Sunzar*, 331 *N.J. Super.* 248 (Law Div. 1999), an environmental prosecution under *N.J.S.A.* 13:1e-9, the court decided that solicitation of criminal conduct, unaccompanied by any overt act in furtherance, rose to the level of an attempt under *N.J.S.A.* 2C:5-1.

III. THE WATER POLLUTION CONTROL ACT

Under the Water Pollution Control Act, *N.J.S.A.* 58:10A-1, *et seq.*, enacted in 1977, New Jersey regulates

discharges into surface and ground waters, discharges into sewer systems and land application of municipal and industrial wastewaters. *See N.J.A.C.* 7:14A-1.2. It is unlawful for any person to discharge any pollutant, as defined in *N.J.S.A.* 58:10A-3(n), without a valid New Jersey Pollutant Discharge Elimination System ("NJPDES") permit.

Sewer discharges without a permit or in violation of a permit are subject to the same penalties as discharges of pollutants to surface waters in violation of, or without, a permit. *N.J.S.A.* 58:10A-3e. The DEP Commissioner is authorized to promulgate regulations establishing pretreatment standards to which sewage must conform before it may be discharged into a public sewer. *N.J.S.A.* 58:11-49; *N.J.S.A.* 58:11-51. Authority is also delegated to Municipal Utility Authorities to regulate sewer discharges into the MUA sewage treatment systems. *N.J.S.A.* 58:10A-6i.

The 1990 Clean Water Enforcement Act ("the 1990 Act") penalizes serious water pollution violations and significant non-compliance, *N.J.S.A.* 58:10A-3; *N.J.S.A.* 58:10A-3w, and requires the assessment of a mandatory minimum penalty of \$1,000 for a serious violation and \$5,000 for significant non-compliance. *N.J.S.A.* 58:10A-10.1b and c.

The 1990 Act limits DEP's discretion to compromise penalty assessments. DEP cannot compromise the amount by more than 50% of the assessed penalty and cannot compromise the amount below the statutory minimum amount. *N.J.S.A.* 58:10A-10d(4).

The 1990 Act significantly increases criminal penalties for water pollution violations. Prior to 1990, any person who willfully or negligently discharged pollutants not in conformity with a valid permit; built or operated a facility for collection, treatment or discharge or a pollutant without DEP approval; or knowingly falsified permit applications or knowingly tampered with monitoring equipment, was guilty of a fourth degree crime for which that person could receive a maximum one year custodial sentence and a fine between \$5,000 and \$50,000 per day of violation. *N.J.S.A.* 58:10A-6a and b; *N.J.S.A.* 58:10A-10f.

Under the 1990 Act, negligent violations are fourth degree crimes for which the defendant receives an 18-

month custodial sentence and a fine of between \$5,000 and \$50,000 per day of violation. *N.J.S.A.* 58:10A-10f(3). For purposeful, knowing or reckless violations of the Act, a person is guilty of a third degree crime for which he can receive a three- to five-year custodial sentence and a fine between \$5,000 and \$75,000 per day of violation. *N.J.S.A.* 58:10A-10f(2).

The 1990 Act creates a second degree crime for a person who purposely, knowingly or recklessly violates the Act and in so doing, causes a significant adverse environmental effect. For such a violation, a person can receive a custodial sentence between five and ten years and a fine between \$25,000 and \$250,000 per day of violation. N.J.S.A. 58:10A-10f(1)(a). The 1990 Act defines a significant adverse environmental effect as causing "serious harm or damage to wildlife, freshwater or saltwater fish, any other aquatic or marine life, water fowl, or to their habitats, or to livestock or agricultural crops; serious harm or degradation of, any ground or surface water used for drinking, agricultural, navigational, recreational, or industrial purposes; or any other serious articulable harm or damage to, or degradation of, the lands and waters of the State, including ocean waters subject to its jurisdiction." N.J.S.A. 58:10A-10F(1)(b).

The Act creates a first degree crime for any person who purposely or knowingly violates a permit condition or discharges without a permit and who knows at the time that he places another person in imminent danger of death or serious bodily injury. For such a violation, a person can receive a custodial sentence of between 10 and 20 years and a fine between \$50,000 and \$250,000 for an individual and \$200,000 and \$1,000,000 for a corporation. *N.J.S.A.* 58:10A-10(f)(4).

The Freshwater Wetlands Protection Act, *N.J.S.A.* 13:9B-1, *et seq.*, prohibits removal, excavation or disturbance of soil, dumping or filing with materials or erecting of structures in designated freshwater wetlands without DEP authorization.

Under *N.J.S.A.* 13:9B-21f, any person who willfully or negligently violates the Wetlands Act is guilty of a crime of the fourth degree and can be fined between \$2,500 to \$25,000.

In *State v. Robinson*, 287 *N.J. Super*. 240 (App. Div. 1996), the Appellate Division reversed defendant's conviction for a violation of the Wetlands Act because the judge failed to charge the jury that the State had to prove that defendant failed to ascertain the need for a permit or

waiver before placing wood chips on his farm, located in a wetlands area.

Under the Ocean Dumping Enforcement Act, N.J.S.A. 58:10A-49, it is a third degree crime to intentionally dump "material" into the ocean waters within the jurisdiction of this State (within 3 miles from the shore) or into waters outside the jurisdiction of this State which enter ocean waters within the jurisdiction of New Jersey.

The statute defines "material" to include dredge material, garbage, sewage, chemicals, biological and laboratory waste, and industrial and municipal waste.

No Discharge Zones, as provided in *N.J.S.A.* 58:10A-56 & 59, apply to discharge of sewage from a watercraft into coastal waters.

USEPA, in response to DEP's petitions, has designated the Shark River, Manasquan River, and Navesink River as "no discharge" areas. Violators are subject to penalty provisions of the Water Pollution Control Act, *N.J.S.A.* 58:10A-10, *supra*.

Under *N.J.S.A.* 58:10A-32, a person who violates provisions of Underground Storage Tank Act (*e.g.,* construction without a permit) is subject to the penalty provisions of the Water Pollution Control Act, *N.J.S.A.* 58:10A-10, *supra*.

IV. THE AIR POLLUTION CONTROL ACT

The Air Pollution Control Act, *N.J.S.A.* 26:2c-1, *et seq.*, makes it a crime of the third degree to purposely or knowingly violate any provision of the Act or any code, rule, regulation or administrative order promulgated or issued pursuant to the Act and a crime of the fourth degree to do so recklessly. *N.J.S.A.* 26:2C-19f.

N.J.S.A. 26:2C-8 authorizes DEP to promulgate rules and regulations preventing, controlling and prohibiting air pollution throughout the State. *See, e.g., N.J.A.C.* 7:27-2.1, *et seq.* (controlling and prohibiting open burning of rubbish, garbage, trade waste and plant life); *N.J.A.C.* 7:27-3.1, *et seq.* (controlling and prohibiting smoke emissions from the combustion of fuel); *N.J.A.C.* 7:27-4.1, *et seq.* (controlling the emission of particles from the combustion of fuel); *N.J.A.C.* 7:27-6.2 (controlling the emission of particles from manufacturing processes); *N.J.A.C.* 7:27-7.2 (controlling the emission of particles from sulfur compounds.

N.J.S.A. 26:2C-19e criminalizes knowing or reckless failure to report a release which poses a potential threat to public health, welfare or the environment or which results in citizen complaints.

V. COMPREHENSIVE REGULATED MEDICAL WASTE ACT

Under the Comprehensive Regulated Medical Waste Act, *N.J.S.A.* 13:1E-48.1, *et seq.*, enacted in 1989, a person must have New Jersey DEP or Department of Health authorization to store, transport or dispose of regulated medical waste. *N.J.S.A.* 13:1E-48.20g, h.

The Act establishes a manifest system for regulated medical waste similar to that used for hazardous waste. N.J.S.A. 13:1E-48.20i.

The purposeful or knowing unlawful storage or disposal or improper treatment of regulated medical waste is a crime of the third degree for which a defendant can receive a fine of up to \$50,000 for first offense, and up to \$100,000 for subsequent offenses, and/or a prison sentence of between three to five years. If reckless or negligent, it is a fourth degree crime.

For the unlawful transportation of regulated medical waste, either without DEP authorization or a regulated medical waste manifest, a person is guilty of a fourth degree crime, regardless of the intent of that person. For this violation, a court can impose a custodial sentence of up to 18 months and/or a \$75,000 fine.

Any person who purposely, knowingly or recklessly generates and causes or permits regulated medical waste to be transported to an unauthorized site in the State or in an unauthorized manner is guilty of a crime of the fourth degree.

ESCAPE

I. INTRODUCTION

Under *N.J.S.A.* 2C:29-5a, an individual commits a crime if without lawful authority he removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. *See also N.J.S.A.* 2C:29-6 (implements for escape) and *N.J.S.A.* 2C:29-7 (bail jumping).

N.J.S.A. 2C:29-5c bars public servants from knowingly or recklessly permitting an escape, and any person who knowingly causes or facilitates an escape is guilty of an offense. *N.J.S.A.* 2C:29-5b provides that any person on parole who hides or leaves the State with the purpose to avoid supervision is guilty of an offense. Abandoning a place of residence without any notice to the parole authorities is *prima facie* evidence that the person intended to avoid supervision.

II. OFFICIAL DETENTION (N.J.S.A. 2C:29-5a)

N.J.S.A. 2C:29-5a provides that "official detention" means arrest, detention in any facility for custody for persons under a charge or conviction of a crime or offense, alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes.

1. A crime or offense includes a defendant under arrest for a disorderly persons offense. *State v. Frost*, 95 *N.J. Super.* 1 (App. Div. 1967); *N.J.S.A.* 2C:1-4.

2. Detention includes participation in a work release program where a defendant has failed to return to the institution where he was confined. *State v. Walker*, 131 *N.J. Super.* 547 (App. Div. 1974). *See also N.J.S.A.* 30:8-1 *et seq.* (escape from outdoor labor or vocational training program).

3. Persons committed both as unfit to stand trial (2C:4-6) and as not guilty by reason of insanity (2C:4-8), are subject to the penalties for escape if they abscond from the institution in which they are being held. *See State v. Moore*, 192 *N.J. Super.* 437 (App. Div. 1983), *certif. denied*, 96 *N.J.* 271 (1984)(one convicted of escaping from a mental institution must receive a criminal sanction, not a new indeterminate civil commitment).

III. ABSCONDING FROM PAROLE (N.J.S.A. 2C:29-5b)

This offense requires proof that the defendant, with purpose to avoid parole supervision, has either left the state or gone into hiding. *See State v. Black*, 153 *N.J.* 438, 453 (1998). The critical elements of absconding from parole are the act of going into hiding or leaving the state for the purpose of avoiding parole supervision. *State v. Eisenman*, 153 *N.J.* 462, (1998); *State v. Graham*, 284 *N.J. Super.* 413 (App. Div. 1995), *certif. denied*, 144 *N.J.* 378 (1996)(to prove hiding State must present more than evidence that a defendant simply changed his residence); Compare *State v. Eisenman*, 153 *N.J.* 462, 470-471 (1998)(plea taken from the defendant by the trial court was barely sufficient to establish a violation of this subsection).

Absconding while on work release status constitutes escape under pre-Code law. *State v. Walker*, 131 *N.J. Super*. 547 (App. Div. 1974). Escape from pre-parole home confinement also constitutes escape, *State v. Kyc*, 261 *N.J. Super*. 104 (App. Div. 1992), *certif. denied*, 133 *N.J.* 436 (1993), as does absconding from the Intensive Supervision Program ("ISP"). *See State v. Clay*, 230 *N.J. Super*. 509 (App. Div. 1989), *aff'd o.b.* 118 *N.J.* Super. 251 (1990); *but see State v. Kline*, 277 *N.J. Super*. 623 (Law Div. 1994) (holding that an escape charge under subsection b may not be brought against a person who absconded from ISP before the date that provision was amended to include ISP).

IV. EXCLUSIONS

Running away from a juvenile shelter or facility, where defendant was placed for his own protection, does not constitute escape under *N.J.S.A.* 2C:29-5. *State v. Interest of M.S.*, 73 *N.J.* 283 (1977). However, the section does apply to the unauthorized departure from custody of a juvenile delinquent. *N.J.S.A.* 2C:29-5a.

Departure from a drug treatment facility, where the defendant was required to live as a condition of probation, does not qualify as an escape. *See State v. Smeen*, 147 *N.J. Super.* 229 (App. Div. 1977), *certif. denied*, 74 *N.J.* 263 (1977); *but see State v. Graham*, 284 *N.J. Super.* 413 (App. Div. 1995) (defendant not only left the drug rehabilitation program to which he had been paroled but also deliberately evaded parole officials for the next six months which served as an adequate foundation for the grand jury to infer that defendant concealed himself for

a substantial period of time in order to evade parole supervision).

V. DEFENSES

N.J.S.A. 2C:29-5d provides a limited defense to an escape prosecution. An irregularity in bringing about or maintaining detention, or the lack of jurisdiction of the committing or detaining authority, however, is not a defense to prosecution of the offense of escape if the escape is from a prison or other custodial facility or from detention pursuant to commitment by official proceedings. *N.J.S.A.* 2C:29-5d. In the case of other detentions, either an irregularity or lack of jurisdiction is a defense only where:

1. the escape involved no substantial risk of harm to any other person or property; or

2. the detaining authority did not act in good faith under color of law.

Generally, irregularities in detention are not a defense to escape. *See State v. Casimono*, 250 *N.J. Super*. 173, 182-185 (App. Div. 1991), *certif. denied*, 127 *N.J.* 558 (1992) and *State v. Battle*, 256 *N.J. Super*. 268 (App. Div.), *certif. denied*, 130 *N.J.* 393 (1992) (escape charge will lie notwithstanding the illegality of the arrest); *see also State v. Brown*, 239 *N.J. Super*. 635 (App. Div. 1990) (discussing imposition of such a defense when a defendant fled from the scene of a traffic stop).

Where defendant claims a defense of duress or necessity based on alleged unhealthy or unsafe jail conditions, defendant must make a bona fide effort to return to custody once he has removed himself from those conditions to assert the defense. United States v. Bailey, 444 U.S. 394 (1980); see generally State v. Stewart, 196 N.J. Super. 138 (App. Div. 1984). In State v. Saxon, 226 N.J. Super. 653 (Law Div. 1988), aff'd sub nom. State v. Morris, 242 N.J. Super 532 (App. Div. 1990), certif. denied, 127 N.J. 321 (1992), the court followed the holding of United States v. Bailey, 444 U.S. 393 (1980) in determining that defense of duress was unavailable to a defendant who failed to make a bona fide effort to surrender or return to custody. State v. Saxon also limits the defense to situations involving imminent serious bodily harm or sexual assault and the like, not bad prison conditions and hypothetical or statistical danger.

VI. DOUBLE JEOPARDY

Double jeopardy does not preclude prison authorities from imposing administrative penalties in addition to defendant's sentence for escape. *State v. Hatterer,* 75 *N.J. Super.* 400 (App. Div. 1962); *see also, State v. Soriano,* 107 *N.J. Super.* 286 (App. Div. 1968), *aff'd o.b.* 54 *N.J.* 567 (1964).

Defendant's prosecution for absconding from parole, subsequent to parole revocation for substantially the same conduct, did not violate double jeopardy; parole revocation was remedial and rehabilitative and could not be viewed as "punishment" triggering double jeopardy protections, *State v. Eisenman*, 153 *N.J.* 462 (1998).

Double jeopardy did not bar prosecution of defendant for absconding from parole after his parole was revoked and he was ordered to serve his adjusted maximum sentence; defendant was not punished twice for the same offense, since revocation of parole was not punishment. *State v. Black,* 295 *N.J. Super.* 453, 685 A.2d. 485 (A.D. 1996), *aff'd* 153 *N.J.* 438 (1998).

VII. ESCAPE PENDING APPEAL OF CONVIC-TION

Escape by a defendant from his place of confinement during the pendency of his appeal required dismissal of his appeal. *State v. Rogers,* 90 *N.J.* 418 (1982).

EVIDENCE

I. ALIBI (See also, ALIBI, DISCOVERY, INFERENCES and PRESUMPTIONS, this Digest)

A defendant may not be cross-examined with regard to his failure to inform the police, while in custody, of the existence of an alibi. *State v. Deatore*, 70 *N.J.* 100, 109-19 (1976). The rule is based on the need to protect the privilege against self-incrimination. *Id.*

The prosecutor is entitled to cross-examine a defense alibi witness, other than the defendant, as to why the witness failed to come forward to the police with his or her information regarding the defendant's alibi. State v. Plowden, 126 N.J. Super. 228, 230-31 (App. Div. 1974), certif. denied, 64 N.J. 504 (1974). This may only be done, however, if a witness appears to know of the charges and would naturally have been expected to come forward with the alibi testimony. State v. Silva, 131 N.J. 438 (1993). Once a notice of alibi is filed, however, making the witness available for questioning by law enforcement, there is no longer an inconsistency from which to infer fabrication unless the witness refuses to discuss the matter. Id. The State may not impugn an alibi defense, by cross-examination or comment, on the ground that it was not timely offered to police after the defendant's arrest. See State v. Pierce, 330 N.J. Super. 479 (App. Div. 2000); State v. Aceta, 223 N.J. Super. 21 (App. Div. 1988).

The prosecutor is not entitled to argue to the jury that the defendant's failure to produce an alibi witness named in a notice of alibi might be due to the witness' reluctance to commit perjury where the failure to produce the witness could have a number of innocent explanations not readily or appropriately exposed at trial. State v. Gross, 216 N.J. Super. 92 (App. Div. 1987), certif. denied, 108 N.J. 194 (1987). The admission into evidence of the written alibi notice to support such a comment is also improper. Id.; see also State v. Rowe, 316 N.J. Super. 425 (App. Div. 1998), certif. denied, 160 N.J. 89 (1999); State v. Lumumba, 253 N.J. Super. 375, 396 (App. Div. 1992). The proscription against such reference to a notice of alibi does not preclude a Clawans charge if such is independently supported. State v. Lumumba, supra. However, if a defendant does testify, his alibi notice may be used on cross-examination as a prior inconsistent statement. State v. Irving, 114 N.J. 427, 437-41 (1989).

Pursuant to R. 3:12-2(a), upon written demand of the prosecutor, the defendant must, within ten days, give a notice of alibi accompanied with details of the alibi and the names of alibi witnesses on whom the defendant intends to rely. Appropriate sanctions, including the preclusion of alibi witnesses, may be imposed for violations. R. 3:12-2(a). See also R. 3:12-2(b).

In State v. Mitchell, 149 N.J. Super. 259 (App. Div. 1977), a defendant gave his notice of alibi four months late but over five months before trial. The trial judge, on the prosecutor's motion, refused to permit the defendant to present an alibi defense. The exclusion was reversible error because stripping a defendant of such a defense is an "extremely severe sanction." Although the *Mitchell* court recognized that an eleventh hour claim of alibi might justify total exclusion of the alibi defense, the prosecution had ample notice of the defense. Moreover, the trial court did not consider whether a lesser sanction, such as an adjournment, would have cured any prejudice from the delayed notice. Finally, the court noted that the State failed for five months to raise any objection based on the late notice of alibi. This could have legitimately "lulled" the defense into believing that its tardy notice was being accepted without objection.

What constitutes evidence of alibi has been disputed. In State v. Volpone, 150 N.J. Super. 524 (App. Div. 1977), aff'd, 75 N.J. 543 (1977), the defendant who did not give a notice of alibi, attempted to call a witness who would testify that the defendant was not at the scene of the crime. The prosecutor objected, and the trial court held that this evidence was in the nature of alibi testimony and would be excluded because of the defendant's failure to comply with the rule. The Appellate Division reversed the conviction and held that this testimony was not evidence of an alibi because the only evidence of alibi is that which indicates that a defendant was at some other place than the scene of the crime. Hence, evidence that the defendant was not at the scene of the crime could not be considered alibi evidence. The only notice received by the State was on the first day of trial and that witness was excluded one week later. The Volpone court held, in the alternative, that even if the rule was applicable, the trial court failed to establish that the State was unfairly surprised by the late notice and failed to explore the possibility of less drastic sanctions. On review, the Supreme Court of New Jersey summarily affirmed the grant of a new trial, but held that the evidence proffered by the defendant did come within the ambit of the notice of alibi and that the defendant in Volpone would be required to comply with that rule.

Thus, evidence that a defendant is not at the scene of the crime requires compliance with the notice of alibi rule.

II. AUTHENTICATION AND BEST EVIDENCE (See also, CHAIN OF POSSESSION; SCIENTIFIC AND TECHNICAL EVIDENCE, infra)

N.J.R.E. 901 states that the requirement of authentication or identification as a condition of admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims. *N.J.R.E.* 902 provides a list of categories of evidence which authenticate themselves. There need not be absolute certainty or conclusive proof; only a *prima facie* showing is required to get the evidence before the jury. *State v. Mays*, 321 *N.J. Super.* 619, 628 (App. Div.), *certif. denied*, 162 *N.J.* 132 (1999). Authentication may be by direct or circumstantial evidence. *Id.; State v. Bassano*, 67 *N.J. Super.* 526, 532 (1961).

In ruling on the admissibility of photographs, the trial court must determine whether they accurately depict the subject at a time relevant to the issues involved in the litigation. *State v. Wilson*, 135 *N.J.* 4, 15 (1994). The same is true of a videotape or film; it must accurately reproduce the phenomena actually perceived by the witness. *Id.* at 15-16. Photographs may be authenticated without producing the photographer as a witness. It is sufficient if a witness testifies from personal knowledge that the photographs accurately depict the subject at the relevant time. *State v. Kennedy*, 135 *N.J. Super.* 513, 525 (App. Div. 1975).

In State v. Moore, 158 N.J. Super. 68 (App. Div. 1978), the defendant was charged with fraudulently obtained unemployment compensation. The State proffered evidence in the form of an investigative report which contained excerpts of the defendant's payroll records as copied by the investigator from the originals. The Appellate Division held that this evidence should have been excluded. The authentication requirement of former Evid. R. 67 (now N.J.R.E. 901) could be satisfied by hearsay proofs, but the State failed to establish under Evid. R. 70 (now N.J.R.E. 1002) that the original records were unavailable and, if they were, that they constituted the best available secondary evidence of the employment records. See also State v. Sheppard, 197 N.J. Super. 411, 438 (Law Div. 1984) (hearsay evidence admissible for court to determine admissibility of videotaped testimony of child abuse victim); Gunter v. Fischer Scientific American, 193 N.J. Super. 688 (App. Div. 1984) (affidavit or certification allowed to establish foundation for admissibility of business records); *D'Arc v. D'Arc*, 175 *N.J. Super.* 598, 601-02 (App. Div. 1980) (defendant's hearsay testimony regarding the existence of tape could be considered in preliminary proceeding determining the tape's admissibility).

Authentication may be stipulated at trial. *State v. Thomas*, 132 *N.J.* 247, 257 (1993). *Thomas* involves a common issue, the authentication of a school zone map for a prosecution of a drug offense committed within 1,000 feet of a school. The preferred practice is to produce the adopting resolution or ordinance even if there is a stipulation. *Id.*; *State v. Collins*, 262 *N.J. Super.* 230, 240 (1993).

N.J.R.E. 1002 through 1008 replace prior *Evid. R.* 70, the "best evidence rule." Generally, the original writing or photograph is required, *N.J.R.E.* 1002, except as provided in the rules or by statute. However, a duplicate as defined by *N.J.R.E.* 1001(d) is admissible to the same extent as an original unless a genuine question of the authenticity of the original is raised or it would be unfair under the circumstances.

III. CHAIN OF CUSTODY

In order to authenticate demonstrative evidence, and tests based on such evidence, it is necessary to establish the chain of possession of the evidence. There are two bases for the rule. The first is the general principle under *N.J.R.E.* 403 that all evidence must have sufficient probative force when balanced against counterfactors to justify its admission. The second basis for the chain of possession rule is related to the first and involves the tremendous influence which demonstrative evidence exerts on the human mind. This influence arises from the natural mental tendency of a person to connect physical objects in his view with a version of past events. *State v. Brown*, 99 *N.J. Super.* 22, 27 (App. Div.), *certif. denied*, 51 *N.J.* 468 (1968).

In *State v. Brown, supra*, the Appellate Division held that determinations of the sufficiency of a chain of possession are highly discretionary decisions by the trial judge and will not be overturned absent a clearly mistaken exercise of discretion. *Accord, State v. DiCarlo,* 67 *N.J.* 321, 329 (1975); *see also State v. Lozada,* 257 *N.J. Super.* 260, 276 (App. Div.), *certif. denied,* 130 *N.J.* 595 (1992); *State v. Zarinsky,* 143 *N.J. Super.* 35, 58 (App. Div. 1976), *aff'd* 75 *N.J.* 101 (1977); *State v. Long,* 137 *N.J. Super.* 124, 134 (App. Div. 1975); *State v. Rajnai,* 132 *N.J. Super.* 530, 536-537 (App. Div. 1975); *State v.* Johnson, 90 N.J. Super. 105, 113-115 (App. Div. 1965), aff'd, 46 N.J. 289, 291 (1966). The Brown Court noted:

While the proper foundation for the admission of such real evidence requires a showing of an uninterrupted chain of possession, it is not necessary for the party introducing such evidence to negate every possibility of substitution or change in condition between the event and the time of trial, especially where as here, the custodian has been an arm of the State. The question is one of reasonable probability that no tampering has occurred.

Generally it is sufficient if the court finds in reasonable probability that the evidence has not been changed in important respects, ... or is in substantially the same condition as when the crime was committed. [99 *N.J. Super.* at 27-28].

The principles announced in *Brown* were more recently endorsed by the Supreme Court in *State v. Brunson*, 132 *N.J.* 377, 393 (1993).

Even where the chain of possession is not established with absolute certainty, there must be some verified suggestion of irregularity or tampering to warrant exclusion of the evidence. See also, State v. Roszkowski, 129 N.J. Super. 315, 317 (App. Div.), certif. denied, 66 N.J. 325 (1974); State v. Brown, 99 N.J. Super. at 28. Generally, however, such concerns go to the weight of the evidence, and not its admissibility. State v. Morton, 155 N.J. 386, 447 (1998). Morton involved the admission of a pair of surgical gloves recovered near the crime scene, one of which contained a tear in one finger. The Supreme Court had no problem approving the admission of the evidence, given the testimony of the law enforcement custodians that they did not tamper with the evidence and the cross-examination which raised the possibility that the tear had nonetheless occurred in their possession. Id.

If an item is not fungible, but rather easily identifiable, no viable chain of custody issue is presented. *State v. Hoffman*, 290 *N.J. Super.* 588, 595 (App. Div. 1996), *aff'd in part, rev'd in part,* 149 *N.J.* 564 (1997).

In *State v. Binns*, 222 *N.J. Super.* 583 (App. Div.), *certif. denied*, 111 *N.J.* 624 (1988), the court found that the *Brown* standard had been satisfied in a case where the arresting officer had failed to initial drug distribution paraphernalia and the container holding cocaine, both found in a car trunk. The officer at trial testified that he recognized all the items as those taken from the trunk and

based on the chain of evidence usually employed he would be able to identify the items. Another detective testified that he had taken the items from the arresting officer and placed them in an evidence locker until trial.

IV. CHARACTER EVIDENCE (See also, CREDIBILITY and BIAS, *infra*)

As a general rule, character evidence or a trait of character intended to prove that a person acted on a specific occasion in conformity with that character or trait is inadmissible unless it falls within one of the exceptions of the rules. N.J.R.E. 404(a). One exception is that character evidence offered by an accused cannot be excluded under N.J.R.E. 403, formerly Evid. R. 4. Thus, in State v. Taylor, 226 N.J. Super. 441 (App. Div. 1988), the defendant was permitted to introduce evidence of his character, but the trial court precluded evidence offered by the defendant of the character of the sexual assault victim, her mother, and her aunt under former Evid. R. 4. The Appellate Division agreed with the trial court that the absolute right of a defendant to introduce character evidence unlimited by Evid. R. 4 considerations is confined to character evidence relating to the defendant himself. The Taylor court did not specifically determine whether the trial court's exclusion of the character testimony under Evid. R. 4 grounds was proper, as it held that any error was harmless under the facts of the case.

Once a defendant has introduced evidence of his good character, the State may introduce rebuttal evidence to the contrary, but a trial court may limit such evidence by the State. See also State v. Hunt, 115 N.J. 330, 339 (1989). However, in State v. Cavallo, 88 N.J. 508 (1982), the Supreme Court affirmed an Appellate Division decision holding inadmissible the proffered expert testimony of a psychiatrist to the effect that the defendant accused of rape did not have the psychological traits of a rapist. The Court found that the proffered testimony was relevant in that it could be inferred that one who has the character of a non-rapist did not commit rape on the charged occasion. Id. However, the evidence was inadmissible under former Evid. R. 56(2) since the testimony did not satisfy the standard of acceptability for scientific evidence.

Evidence of good character may itself raise a reasonable doubt as to a defendant's guilt. *State v. Siciliano*, 21 *N.J.* 249, 260-61 (1956). An instruction on the effect of character evidence should be given. In *State v. Bogus*, 223 *N.J. Super.* 409 (App. Div.), *certif. denied*, 111 *N.J.* 567 (1988), the defendant claimed that the trial court failed to specifically instruct the jury that

character evidence may create a reasonable doubt as to the defendant's guilt and that such alleged failure constituted plain error, since there had been no objection to the charge the court did give. Viewing the charge given on character evidence in conjunction with its reasonable doubt charge, the jury was instructed to consider all of the testimony, which would include that of the character witness, and to acquit the defendant if any of the evidence created in their minds a reasonable doubt as to the defendant's guilt.

In the context of a prosecution for racially-motivated crimes, it was proper for the trial court to permit the prosecutor to cross-examine the defendant and another defense witness about racially derogatory statements previously uttered by the defendant. *State v. Davidson*, 225 *N.J. Super.* 1 (App. Div.), *certif. denied*, 111 *N.J.* 594 (1988). The appellate court held that this did not constitute inadmissible bad character evidence, but instead the trial court properly exercised its discretion in finding the evidence relevant to the defendant's mental state, an element of the crime which the State had to prove.

An accused can present evidence of a character trait of a victim but the State can offer such evidence only in rebuttal. *N.J.R.E.* 404(a)(2). Self-defense claims generally permit admission of a victim's aggressive reputation if relevant, and N.J.R.E. 404(a)(2) permits the use of such character evidence even if the defendant is unaware of it, to prove that the victim acted violently in conformity with the aggressive character trait. State v. Aguiar, 322 N.J. Super. 175 (App. Div. 1999); see also State v. Gartland, 149 N.J. 456, 473 (1997); State v. Carter, 278 N.J. Super. 629, 632 (Law Div. 1994) (knowledge of defendant of reputation of victim necessary if evidence is used to support claim of selfdefense, since defendant must honestly and reasonably believe use of force is justified).

A third exception is that the character of a witness can be attacked or supported by opinion or reputation evidence relating to the witness' truthfulness or untruthfulness. *N.J.R.E.* 404(a)(3); *N.J.R.E.* 608. Except for a criminal conviction, *see also N.J.R.E.* 609, specific instances of conduct may not be used to affect the credibility of a witness. *State v. Dreher*, 302 *N.J. Super.* 408, 455-56 (App. Div.), *certif. denied*, 152 *N.J.* 10 (1997); *State v. Hutchins*, 241 *N.J. Super.* 353, 361 (App. Div. 1990); *State v. Mondrosch*, 108 *N.J. Super.* 1 (App. Div. 1969), *certif. denied*, 55 *N.J.* 600 (1970). V. CONFRONTATION (See also, SIXTH AMENDMENT, this Digest)

A defendant in a criminal trial is entitled under the Confrontation Clause of the Sixth Amendment, to access to juvenile court transcripts which may discredit the testimony of a crucial prosecution witness. The defendant in Davis v. Alaska, 415 U.S. 308 (1974), charged with grand larceny and burglary, was precluded by a protective order, granted in accordance with Alaska's statutory policy of protecting the anonymity of juvenile offenders, from cross-examining a key prosecution witness about his probationary status and testimony connected to a prior adjudication of juvenile delinquency. The Supreme Court of the United States held that the crucial juvenile prosecution witness' probationary status and prior testimony in, and disposition of, a juvenile proceeding against him would have been relevant to the jury's evaluation of the juvenile's bias, prejudice and credibility.

The New Jersey Supreme Court has also held that the confidentiality accorded a juvenile's record may be breached to the extent necessary to insure the right of cross-examination. State v. Allen, 70 N.J. 474, 484-85 (1976). See also, State in the Interest of D.H., 139 N.J. Super. 330 (J. & D. R. Ct. 1976); State v. Parnes, 134 N.J. Super. 61 (App. Div. 1975); State v. Brown, 132 N.J. Super. 584 (Law Div. 1975); State in the Interest of A.S., 130 N.J. Super. 388 (J. & D. R. Ct. 1974). But see, State in the Interest of S.F., 139 N.J. Super. 337 (J. & D. R. Ct. 1976) (record of juvenile delinquency proceeding arising out of automobile accident which resulted in one motorist's death could not be disclosed to plaintiff in wrongful death action where juvenile defendant was available as a witness and no reason existed for bias or motive for inconsistent testimony) and State v. Burgos, 200 N.J. Super. 6, 12 (App. Div. 1985) (defendant is not denied right to confrontation by admission of prior inconsistent statement made by witness who testifies at trial that he can not remember statements he made to the police, when both witness and person who recorded the statement are available for cross-examination).

The *Allen* court extended this rationale to encompass the State's motion to review a juvenile defense witness' prior medical and psychiatric juvenile records. The defendant, charged with murder, proffered alibi testimony by a juvenile witness who was on parole. The State, after learning from confidential sources that the witness suffered from psychological delusions, attempted to resolve the issue of the juvenile's medical and psychiatric records and require the witness to submit to psychiatric examination. After examining the records *in camera*, the trial court granted the State's motion to review the record, noting that the State's review was for the sole purpose of determining whether it wanted to move for a psychiatric examination. The Supreme Court affirmed this decision.

While the constitutional right to confrontation is firmly entrenched in American jurisprudence, it is not absolute, and is subject to certain exceptions. Craig v. Maryland, 497 U.S. 836 (1990); State v. Smith, 158 N.J. 376 (1999). The basic elements of cross-examination are physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. The central concern of the confrontation clause, however, "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Craig, 497 U.S. at 845-46. Hence, the protection of children warrants closed-circuit testimony pursuant to N.J.S.A. 2A:84A-32.4 in cases where the child is fearful of the defendant, State v. Crandall, 120 N.J. 649 (1990), or defendant and the jury, State v. Smith, supra; see also State v. Delgado, 327 N.J. Super. 137 (App. Div. 2000).

The videotaping of a victim's cross-examination, after he suffered a heart attack after his direct testimony, did not violate the defendant's right to confrontation in *State v. Rodriguez*, 264 *N.J. Super.* 261 (App. Div. 1993), *aff'd*, 135 *N.J.* 3 (1994).

A videotape deposition of an ill, elderly victim may be used at trial even where the defendant has waived his opportunity to appear at the deposition. State v. Driker, 214 N.J. Super. 467 (App. Div. 1987). The defendant's Sixth Amendment/confrontation rights were protected by the opportunity for cross-examination of the victim. The court applied the rules regarding videotape depositions in civil cases, R. 4:14-9, to R. 3:13-2, which addresses the general admissibility of depositions in criminal cases. The criminal rules now specifically provide for the use of videotape depositions. See also R. In Driker, the defendant was afforded the 3:13-2. opportunity to be present at the deposition, to confront the witness face to face, but the defendant waived that right.

The admission of a laboratory certificate under *N.J.S.A.* 2C:35-19 over a defendant's objection without a hearing on reliability violates the confrontation clause. *State v. Kittrell,* 279 *N.J. Super.* 255 (App. Div. 1995); *See*

also State in Interest of J.H., 244 N.J. Super. 207 (App. Div. 1990).

With respect to evidence excluded by *N.J.S.A.* 2C:14-7, the Rape Shield Law, only where the relevance and probative worth of evidence of a victim's prior sexual conduct are "clear and substantial" should that law "bend to the confrontation rights of the defendant." *State v. Cuni*, 159 *N.J.* 608 (1999). One such situation was presented in *State v. Budis*, 125 *N.J.* 519 (1991), where evidence of a nine-year-old's prior abuse by her stepfather was relevant and admissible to show an alternative source for the child's sexual knowledge.

VI. CREDIBILITY and BIAS (See also PRIOR INCONSISTENT STATEMENTS, infra)

N.J.R.E. 607, the former *Evid. R.* 20, provides that except as otherwise provided by *N.J.R.E.* 405 and *N.J.R.E.* 608, both pertaining to character evidence, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility, except that the party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless the statement is in a form admissible under *R.* 803(a)(1) or the judge finds that the party calling the witness was surprised.

A party may affect credibility not only through direct and cross-examination upon matters in the case, but also through extrinsic evidence relevant to credibility, whether or not such evidence bears upon the subject matter. *State v. Martini*, 131 *N.J.* 176, 255 (1993). Hence, in *State v. Gorrell*, 297 *N.J. Super.* 142 (App. Div. 1996), the Appellate Division ruled that bias against the defendant by a witness could be shown by extrinsic evidence, including other witnesses to threats uttered by the witness in question.

Courts retain, however, the discretion to exclude or limit extrinsic evidence under *N.J.R.E.* 403. *See also State v. Mance*, 300 *N.J. Super.* 37, 60 (App. Div. 1997); *State v. Saez*, 268 *N.J. Super.* 250, 266-67 (App. Div. 1993), *rev'd o.g.*, 139 *N.J.* 279 (1995). In *State v. Tirone*, 64 *N.J.* 222, 228-29 (1974), the Supreme Court held that the trial judge did not err in refusing to permit defense counsel to cross-examine a police officer as to the contents of the criminal complaint which was filed in the municipal court, and which charged the defendant with assault with intent to rape. The trial court properly sustained an objection on the ground that the complaint had no bearing on the case because the grand jury had subsequently returned a two-count indictment charging assault with intent to rape and rape.

Cross-examination on credibility can be very farranging. In *State v. Wormley*, 305 *N.J. Super.* 57 (App. Div. 1997), *certif. denied*, 154 *N.J.* 607 (1998), the Appellate Division reversed robbery and weapons convictions because the trial court precluded crossexamination regarding the victim's long-standing drug usage, despite his denial that he had used drugs at the time he was robbed.

Conversely, in response to cross-examination of a witness regarding his use of drugs or alcohol on a particular occasion, thus attacking the witness' credibility, the proponent of the witness may support his credibility by eliciting opinion or reputation testimony that the witness did not drink or use drugs to rebut the inference that the witness' perception was impaired. *State v. Johnson*, 216 *N.J. Super.* 588 (App. Div. 1987).

In *State v. Farr*, 183 *N.J. Super.* 463, 468-69 (App. Div. 1982), the prosecutor cross-examined the defendant charged with armed robbery as to his employment status and financial obligations and commented upon them in his summation. The Appellate Division held that the cross-examination and comment were proper in that they were in direct response to defendant's testimony that he was employed and therefore had no motive to rob.

Similarly, in State v. Plowden, 126 N.J. Super. 228, 230-231 (App. Div.), certif. denied, 64 N.J. 504 (1974), the court ruled that it is not improper cross-examination to interrogate a witness as to conduct on his part at variance and inconsistent with what would be natural or probable if his statement on his direct examination were true. The credibility of a witness may be attacked by showing that he failed to speak or act when it would have been natural to do so if the facts were in accordance with his testimony. Thus, it was not improper for the prosecutor to cross-examine an alibi witness as to why she had not come forward with exculpatory evidence prior to trial. In addition, the prosecutor was well within his rights in commenting on the witness' failure to go to the police during his summation. But see, State v. Felton, 131 *N.J. Super.* 344, 353-354 (App. Div. 1974), in which the Appellate Division reversed and remanded for a new trial when, subsequent to the defendant connecting, during his trial testimony, his own innocence to the innocence of a codefendant separately tried, the State impermissibly suggested to the jury during cross-examination that the codefendant has been found guilty.

In State v. Weeks, 107 N.J. 396 (1987), the prosecution attacked the defendant's credibility by questioning his knowledge of his codefendant's prior criminal acts. Defendant, being tried separately on the charge of armed robbery, claimed that he had "minimal contact" with his codefendant prior to the date of the offense. Yet, during lengthy cross-examination on the topic, defendant admitted knowledge of a prior robbery in which his codefendant was involved. The Court, in remanding the case on another matter, directed that the trial judge permit a "reasonable exploration" of defendant's knowledge of his codefendant's prior criminal conduct at retrial, so long as the questioning was directed at defendant's credibility regarding his prior familiarity with the codefendant, and was not a backdoor attempt at establishing the bad character of the codefendant.

Other than limitations on prior consistent statements (*see also* HEARSAY, PRIOR CONSISTENT STATEMENTS, *infra*), and those governing character evidence in *N.J.R.E.* 607, there are few limitations on the circumstances in which the credibility of a witness can be supported, either through direct or redirect examination or extrinsic evidence. *State v. Frost*, 242 *N.J. Super.* 613-14 (App. Div. 1990), *certif. denied*, 127 *N.J.* 321 (1992). However, an expert witness may not express an opinion as to the credibility of a statement by another witness. *State v. J.Q.*, 252 *N.J. Super.* 11, 39 (App. Div. 1991), *aff'd*, 130 *N.J.* 554 (1993).

Bias is a special subcategory of credibility. However, the trial court does not enjoy the same broad discretion to exclude evidence relating to bias as it does with regard to evidence merely affecting credibility in general. Bias describes the relationship between a party and a witness which might lead the party to slant, unconsciously or otherwise, his testimony in favor or against a party. *State v. Holmes,* 290 *N.J. Super.* 302, 312-13 (App. Div. 1996). Proof of bias is almost always relevant. *Id.*

In *State v. Furey*, 128 *N.J. Super.* 12, 23-24 (App. Div. 1974), the court ruled that defense counsel should be afforded wide latitude in his cross-examination of a State's witness in order to establish bias. Specifically, the defense may question a prosecution witness concerning a completely unrelated indictment which is pending

against him. Such testimony may support an inference that the witness' testimony is the product of his desire to curry favor with the State. *See also, State v. Wiggins,* 158 *N.J. Super.* 27, 35 (App. Div. 1978); *State v. Miller,* 144 *N.J. Super.* 91, 94 (App. Div. 1976).

In *State v. Spano*, 69 *N.J.* 231 (1976), the prosecution failed to disclose to the defense that its chief witness received favorable treatment in another matter through a conditional discharge. The New Jersey Supreme Court held that this arrangement should have been disclosed to the defense because it might have demonstrated the witness' motive for testifying for the State.

Similarly, in *State v. Gray*, 67 *N.J.* 144 (1975), the defendant's accomplice, in return for favorable treatment by the State, testified as a prosecution witness. The trial court only permitted defense counsel on the issue of bias to examine this witness with regard to how much shorter the witness' sentence would be as a result of the favorable treatment accorded the witness. The Supreme Court of New Jersey found that this was an improper, but harmless, limitation on cross-examination with respect to the witness' possible bias. *See also State v. Bicanich*, 132 *N.J. Super.* 393, 395-396 (App. Div. 1973), *aff'd o.b.*, 66 *N.J.* 557 (1975). *Cf. State v. Balthrop*, 92 *N.J.* 542 (1983) (Trial court erred by excluding prior narcotics convictions to attack credibility of prosecution's witness, where prosecution would not suffer undue prejudice).

For purposes of showing bias, it is irrelevant whether or not there exists an actual agreement for favorable treatment between the witness and the prosecution. In State v. Mazur, 158 N.J. Super. 89 (App. Div.), certif. denied, 78 N.J. 399 (1978), the trial court refused to permit cross-examination of a prosecution witness with regard to whether the prosecution terminated a general investigation into the witness' business dealings in return for the witness' testimony. The trial court felt that the objective non-existence of such an agreement vitiated any need for cross-examination on bias. The Appellate Division held that this was error. There is no necessity for an actual quid pro quo between the prosecution and a witness; it is sufficient if a witness may believe that he will be rewarded for his testimony. This is true even if the investigation into the witness' background is not necessarily criminal in nature. The defense is entitled to develop the essential facts which may create bias in the witness.

Even the mere pendency of charges or an investigation relating to a prosecution witness is a topic

for cross-examination, and the denial of an expectation of leniency is not a basis for barring or curtailing crossexamination. *State v. Landano*, 271 *N.J. Super.* 1, 40-41 (App. Div.), *certif. denied*, 137 *N.J.* 164 (1994).

A cross-examiner does not have license to roam at will under the guise of impeaching the witness, and there may be limitation on bias, for example, under *N.J.R.E.* 403. *State v. Pontery*, 19 *N.J.* 457, 473 (1955); *State v. Mance, supra* at 59-62; *State v. Engel,* 249 *N.J. Super.* 336, 375 (App. Div. 1991), *certif. denied,* 130 *N.J.* 393 (1992).

VII. DEMONSTRATIVE EVIDENCE

The admission of articles in the form of demonstrative evidence is a matter within the discretion of a trial court and is governed by the general principles of materiality that probative force must be weighed against such counterfactors as confusion of the issue or inflaming the jury. See also e.g., State v. Feaster, 156 N.J. 1, 82 (1998) (use of mannequin with knitting needle inserted in head to show trajectory of bullets permissible, but trial court would not allow prosecution to dress mannequin in victim's clothing and wig); State v. Scherzer, 301 N.J. Super. 363, 434-35 (App. Div.), certif. denied, 151 N.J. 466 (1997) (replica bat and broom handle used in sexual assault permissible); Wimberly v. Paterson, 75 N.J. Super. 584, 608-09 (App. Div.), certif. denied, 38 N.J. 340 (1962). The State may use demonstrative aids even if somewhat cumulative to other evidence. State v. Grunow, 199 N.J. Super. 241, 253 (App. Div. 1985), aff'd 102 N.J. 133 (1986).

The use of drawings made by a brain-damaged person to compare to drawings made by the defendant, to show that the defendant had no such damage, was not illustrative or demonstrative evidence, but rather impermissible substantive evidence to show that the defendant was not impaired. *State v. Raso*, 321 *N.J. Super.* 5 (App. Div.), *certif. denied*, 161 *N.J.* 332 (1999).

Demonstrative evidence in the form of tests and experiments is governed by a similar discretionary standard. Such experiments may be conducted if they tend to enlighten the trier of fact on a significant issue. However, they must be within the scope of the evidence presented at trial. *State v. Gear*, 115 *N.J. Super.* 151, 154-55 (App. Div.), *certif. denied*, 59 *N.J.* 270 (1971), and may not be conducted during summation. *State v. LiButti*, 146 *N.J. Super.* 565, 572 (App. Div. 1977).

In *State v. LiButti, supra*, the prosecutor in summation engaged in an experiment to show how long

it would have taken for the commission of an integral part of the crime charged. The Appellate Division held this was error because such experiments must be conducted while evidence is being received and there exists an opportunity for the defendant to cross-examine and otherwise assure the integrity of the experiment. The observation of the test by the trial court, even in the form of judicial notice, could not justify the failure to conduct the test at a time while evidence was still being received.

The defendant in *State v. Gear, supra*, was charged with possession of lottery slips which, upon the approach of the arresting officer, the defendant dissolved in a container of water. The Appellate Division held that it was within the discretion of the trial court to permit a detective to testify as to his tests of water soluble paper and to conduct before the jury, an experiment with water soluble paper when the purpose of the demonstration was only to show the existence of water soluble paper.

VIII. EXPERT WITNESS (*See also*, SCIENTIFIC and TECHNICAL EVIDENCE, *infra*)

A. Generally

Expert testimony in New Jersey is generally governed by *N.J.R.E.* 702 through *N.J.R.E.* 706, formerly *Evid. R.* 56(2) and (3), 57, and 58. *N.J.R.E.* 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

N.J.R.E. 703 addresses the bases of an expert's opinion:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

An expert opinion is not objectionable even if it embraces an ultimate issue to be decided by the trier of fact. *N.J.R.E.* 704.

It is not necessary that questioning of an expert witness take the form of hypothetical questions, unless the trial court, in its discretion, orders otherwise. *N.J.R.E.* 705. While prior disclosure of the underlying facts or data for an expert opinion need not be disclosed prior to the expert's testimony, absent a court order otherwise, the expert may be required to disclose those facts or data on cross-examination. *Id.*

There are three basic requirements for the admission of expert testimony:

1. the intended testimony must concern a subject matter that is beyond the ken of the average juror;

2. the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable;

3. and the witness must have sufficient expertise to offer the intended testimony. *State v. Kelly*, 97 *N.J.* 178, 208 (1984).

The true issue on admissibility is not whether the subject matter is a common or uncommon when, or how many persons have knowledge of the matter, but rather whether the person offered as an expert has peculiar knowledge or experience not common to the world which renders his opinion, based on such knowledge or experience, an aid to the fact finder in determining the questions at issue. State v. Berry, 140 N.J. 280, 291 (1995), citing Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 141-42 (1950); see also State v. Papasavvas, 163 N.J. 565 (2000); State v. Jamerson, 153 N.J. 318, 337 (1998); State v. Odom, 116 N.J. 65, 70 (1989); State v. Zola, 112 N.J. 384, 414 (1988), cert. denied, 484 U.S. 1022 (1989); State v. Kelly, supra; State v. Chatman, 156 N.J. Super. 35, 40-41 (App. Div.), certif. denied, 79 N.J. 467 (1978).

Thus, a qualified expert may testify regarding the modus operandi of narcotics traffickers. *State v. Berry*, 140 *N.J.* at 290-93; *State v. Odom, supra, State v. Montesano,* 298 *N.J. Super.* 597, 619-20 (App. Div.), *certif. denied,* 150 *N.J.* 27 (1997); *but see, State v. Baskerville,* 324 *N.J. Super.* 245, 258-63 (App. Div. 1999); *State v. Singleton,* 326 *N.J. Super.* 351 (App. Div. 1999).

The key is whether the opinion will aid in the jury's deliberations. In *State v. Spann*, 130 *N.J.* 484 (1993), the Supreme Court held that expert opinion testimony on the probability, based on an application of Bayes' Theorem, that a defendant charged with a sexual assault was the father of the victim's child would not aid the jury in its deliberations and created a substantial danger of misleading the jury. In *State v. Noel*, 157 *N.J.* 141

(1999), however, the Supreme Court reversed the Appellate Division's application of *Spann* in a case involving expert testimony on the similarity in composition of lead bullets taken from the body of a murder victim and from the defendant, comparing it to expert testimony on matching fibers. *See also State v. Koedatich*, 112 *N.J.* 225 (1988).

If expert evidence, because of its lack of scientific reliability, poses such a danger of prejudice, confusion, and diversion of attention that it exceeds its ability to aid the fact finder, it must be excluded. Examples include "linkage analysis," based on the "signature" aspects of two crimes, *State v. Fortin*, 162 *N.J.* 517 (2000), and expert testimony that the defendant did not fit the psychological profile of a rapist. *State v. Cavallo*, 88 *N.J.* 508, 520 (1982).

Expert testimony regarding Child Sexual Assault Accommodation Syndrome is inadmissible to establish guilt or innocence, and is admissible only to establish that the victim's symptoms were consistent with sexual abuse and to explain delay in reporting abuse or recantation of allegations of abuse. *State v. J.Q.*, 130 *N.J.* 554 (1993); *see also State v. W.L.*, 278 *N.J. Super.* 295 (App. Div. 1995) (testimony on CSAAS beyond limited evidence permitted by *J.Q.*).

Expert testimony regarding such matters as posttraumatic stress disorder is sufficiently reliable. *State v. Hines*, 303 *N.J. Super.* 311 (App. Div. 1997).

Expert testimony is not required in a criminal case involving cross-racial identification, since the matter is within the ken of the average juror rather than on scientific, technical or other specialized knowledge. *State v. Cromedy*, 158 *N.J.* 112, 130 (1999). An instruction on the issue may be given upon request, but only if identification is a critical issue in the case and a witness' cross-racial identification is not corroborated by other evidence giving it independent reliability. *Id.* at 132.

A proponent of expert testimony can prove its general acceptance in three ways: (1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance. *State v. Harvey*, 151 *N.J.* 117, 170 (1997), *cert. denied*, 528 *U.S.* 1085, 120 *S.Ct.* 811 (2000); *State v. Kelly*, 97 *N.J.* at 210; *State v. Cavallo*,

88 *N.J.* at 521. The burden is on the proponent of expert testimony to "clearly establish" its general acceptances. *State v. Harvey, supra, State v. Williams,* 252 *N.J. Super.* 369, 376 (App. Div. 1991). *Harvey* upheld the admission of Polymerase Chain Reaction (PCR) DNA testing as generally accepted in the scientific community. *See also State v. Dishon,* 297 *N.J. Super.* 254, 277 (App. Div.), *certif. denied,* 149 *N.J.* 144 (1997). In *State v. Marcus,* 294 *N.J. Super.* 267, 285 (App. Div. 1996), *certif. denied,* 157 *N.J.* 543 (1998), the Appellate Division concluded that DNA tests using the restriction fragment length polymorphism (RFLP) method was generally accepted and properly admitted.

In State v. Freeman, 223 N.J. Super. 92 (App. Div. 1988), a forensic toxicologist testified for the State that the likely way a victim murdered by cyanide poisoning had taken the chemical was orally in some water or other liquid, probably soda, milk, or tea with sugar or lemon. The expert further testified that it was not likely that food would be used because the cyanide would burn. The defendant on appeal argued that the doctor's testimony failed to account for the quantity of tea, milk, soda, or water needed to dilute or cover the taste and burning effect of cyanide, and thus constituted a "net opinion." The court held that "such testimony is not inadmissible merely because it fails to account for some particular condition or fact which the adversary considers relevant." If the quantity of liquid was relevant, it would have been an appropriate matter for cross-examination.

In State v. Zola, supra, a capital case, the defendant raised a number of objections to the testimony of the State's expert in serology, the identification of bodily fluids. The expert testified that an elevated level of the digestive enzyme amylase found in a vaginal sample from the victim indicated the presence of saliva. The expert had based this opinion in part upon a review of 1,644 samples of bodily fluids he had previously examined for amylase activity. The Supreme Court held that while this data preferably should have been disclosed in discovery, the reference to them at trial did not have the capacity to prejudice the defendant, since the defendant was given the opportunity (albeit belated) to examine the data and question the expert, and because the defendant's expert agreed that the significant amylase level in the sample was consistent with the presence of saliva, but challenged the State's expert's testimony on a different basis, that the vaginal sample had not been tested for other characteristic components of saliva. The amylase testing was reliable to scientifically indicate the presence of saliva in the sample, the expert's suggestion that the defendant had introduced his or the victim's saliva into the vagina assisted the jury's understanding, in that it showed that there was not necessarily an answer to the question of the source of the saliva other than that which their own common sense suggested.

Generally, expert testimony on credibility is improper, as credibility is within the ken of the trier of fact. *See also State v. Jamerson*, 153 *N.J.* at 341; *State v. Michaels*, 136 *N.J.* 299, 321-22 (1994); *State v. J.Q.*, *supra*, *State v. Pasterick*, 285 *N.J. Super.* 607, 620 (1995). In cases involving child victims, both the State and the defense can offer expert testimony on the suggestive capacity of pretrial interview techniques. *State v. Michaels, supra*.

Expert testimony on matters of New Jersey law is also precluded, although it may be permitted on the law of other jurisdictions. *State v. Grimes*, 235 *N.J. Super.* 75, 80 (App. Div.), *certif. denied*, 118 *N.J.* 222 (1989); *see also State v. Kelly*, 118 *N.J. Super.* 38, 54 (App. Div.), *certif. denied*, 60 *N.J.* 350 (1972). Testimony of opinion on matters beyond the scope of an expert's expertise is not permitted. *State v. Jamerson*, 153 *N.J.* at 340; *In re Hyett*, 61 *N.J.* 518, 531 (1972).

In State v. Jones, 308 N.J. Super. 174 (App. Div.), certif. denied, 156 N.J. 380 (1998), the Appellate Division upheld the trial court's preclusion of defense counsel from arguing that the victim's hyoid bone was broken given the lack of evidence on the subject and the failure of the defense to present expert testimony.

Shaken Baby Syndrome is also a fitting subject for expert testimony, as it is generally accepted in the scientific community. *State v. Compton*, 304 *N.J. Super.* 477 (App. Div. 1997), *certif. denied*, 153 *N.J.* 51 (1998).

Bite-mark analysis has also gained general acceptance and is reliable and admissible. *State v. Timmendequas*, 161 *N.J.* 515, 624 (1999).

The question of an expert witness' qualifications is within the sound discretion of the trial judge. *State v. Pemberthy*, 224 *N.J. Super.* 280 (App. Div.), *certif. denied*, 111 *N.J.* 637 (1988).

With respect to drunkenness, lay testimony is admissible as in the testimony of police officers and others who have special experience with intoxicated persons. *State v. Johnson*, 42 *N.J.* 146, 166 (1964); *State v. Hudes*, 128 *N.J. Super.* 589, 608 (Cty. Ct. 1974); *State v. Tiernan*, 123 *N.J. Super.* 322, 326 (Cty. Ct. 1973), *rev'd* on other grounds, State v. Tamburro, 68 N.J. 414, 421 (1975).

A qualified expert need only determine from a person's physical and mental condition, as well as his conduct as a whole, that he is under the influence of a narcotic; the expert does not have to specifically identify the narcotic in question. *State v. Tamburro*, 68 *N.J.* 414, 421 (1975).

A police officer who is not qualified to testify as an expert may nonetheless testify as to his opinion with regard to the comparison of a voice exemplar of a defendant with a voice in an electronically intercepted conversation. *State v. Perez*, 150 *N.J. Super.* 166, 169-70 (App. Div.), *certif. denied*, 75 *N.J.* 542 (1977). *See also State v. Johnson*, 138 *N.J. Super.* 579, 582 (App. Div.), *certif. denied*, 71 *N.J.* 340 (1976).

This identification by a non-expert police officer of a voice on an intercepted taped conversation can be based upon the officer's hearing the subject's voice at any time, including the day of the trial. *State v. Carminati*, 170 *N.J. Super.* 1, 18-19 (App. Div. 1979).

A police officer is not qualified to interpret, as an expert, hospital records presenting results of various tests conducted upon a sexual assault victim when his only qualifications are an associate's degree from a community college and training in sex crimes analysis and investigations. *State v. Frey*, 194 *N.J. Super.* 326, 332-333 (App. Div. 1984).

In an obscenity prosecution expert testimony may be received to prove the local community standards. *State v. Napriavnik*, 147 *N.J. Super.* 36 (App. Div. 1977), *certif. denied*, 74 *N.J.* 264 (1977). However, such expert testimony is not essential to establish the State's case. *Id.*

When the materials themselves were actually placed in evidence, the failure to require expert affirmative evidence that materials were obscene is not error. *Paris Adult Theatre I v. Slaton*, 413 *U.S.* 49, 56 (1973). *See also State v. Wein*, 162 *N.J. Super*. 159, 168 (App. Div. 1978) (same).

In *State v. Kelly*, 97 *N.J.* 178 (1984), the Supreme Court held that expert testimony on battered woman's syndrome was relevant to the reasonableness of the defendant's belief that she was in imminent danger of death or serious injury.

Despite the language of *N.J.R.E.* 705, hypothetical questions are required where the State uses expert testimony on the issue of whether narcotic are possessed for distribution. *State v. Odom*, 116 *N.J.* at 81-82; *State v. Montesano*, 298 *N.J. Super.* at 619. Where a hypothetical question is employed, it need not include all the facts, and the adversary may on cross-examination supply omitted facts and ask the expert if his opinion would be modified by them. It is advisable that such a question be impersonal. However, the use of actual names when necessary or helpful does not, of itself, destroy the hypothetical nature of the question. *State v. Doyle*, 77 *N.J. Super.* 328, 338-39 (App. Div.), *aff'd*, 42 *N.J.* 334 (1964).

B. Expert Testimony Based on Hearsay

In State v. Burris, 298 N.J. Super. 505 (App. Div.), certif. denied, 152 N.J. 187 (1997), the Appellate Division reversed defendant's conviction for murder, despite the overwhelming evidence of her guilt, finding that the trial judge had conditioned her right to present psychiatric evidence upon her taking the stand and testifying. The court acknowledged that experts cannot be a conduit for hearsay. In this case, however, the hearsay problem could have been solved by limiting the expert testimony to include only hearsay used as a basis for the expert's opinion, and by instructing the jury that the hearsay was not substantive evidence on the question of guilt or innocence, but only as evidence in support of the expert's conclusion. Also, a trial court should instruct the jury that the expert's opinion is only as sound as the proofs of the facts upon which it rests. See also State v. Martini, 131 N.J. 176, 278 (1993); State v. Farthing, 331 N.J. Super. 58, 77 (App. Div. 2000); State v. D.R., 214 N.J. Super. 278, 285 (App. Div. 1986), rev'd o.g., 109 N.J. 348 (1988). It is improper to attack the credibility of a defendant's expert by cross-examining him on details of inadmissible hearsay on which he did not rely in forming his opinion. State v. Farthing, 331 N.J. Super. at 79.

The testimony of an expert witness may be based upon hearsay, if that hearsay consists of tests performed by an individual under the supervision of the witness. *State v. Stevens*, 136 *N.J. Super.* 262, 264 (App. Div. 1975). In *Stevens*, the Appellate Division held that a prosecution expert witness could testify about the presence of spermatozoa on tissue papers at the scene of the rape. The positive results of the test corroborated the victim's version of the crime. The test was performed by a laboratory assistant of the expert witness and under the supervision of the expert witness. The *Stevens* court held that expert opinion testimony based on hearsay was admissible and that the modern rule, to which New Jersey adheres, does not require the personal performance of tests as a prerequisite to the admission of expert testimony based on the results of such tests. *Id.* at 264-265.

C. Qualification of Expert Witness

The following is a suggested method of qualifying a witness:

1. Name and address.

2. What is your profession or occupation?

3. Where is your office or laboratory located?

4. Of what has your general education consisted?

5. How long have you been engaged in your present occupation?

6. During this period where have you been so engaged?

7. During this period of time have you made a special study of the matter in question? (State specific area)

8. Of what has this special study consisted?

9. Have you testified previously with regard to the subject in question?

10. How many times have you testified?

11. Have you published any articles with regard to the subject in question?

12. Name these publications?

13. Are you a member of any professional associations?

14. What are these organizations?

IX. FRESH COMPLAINT

The fresh complaint doctrine provides that evidence may be adduced that the victim of a sexual assault complained of the assault within a reasonable period of time to a person to whom the victim would normally turn for sympathy, protection and advice. See also, e.g., State v. Hill, 121 N.J. 150, 163 (1990); State v. Tirone, 64 N.J. 222, 226-27 (1974); State v. Balles, 47 N.J. 331, 338 (1966), app. dism'd and cert. denied, 388 U.S. 471 (1967); State v. Ramos, 203 N.J. Super. 197 (Law Div. 1985), aff'd, 226 N.J. Super. 339 (App. Div. 1988). It permits the State to negate the inference from a victim's silence that the victim was not sexually assaulted. State v. Hill, supra. Because the evidence is admitted to show that a complaint was made, no details of the complaint are admissible. Id. at 165; State v. Scherzer, 301 N.J. Super. 368, 418 (App. Div.), certif. denied, 151 N.J. 466 (1997). The evidence is admitted for the limited purpose that a complaint was made; it is not permitted to corroborate the alleged offense. State v. J.S., 222 N.J. Super. 247, 256-57 (App. Div.), certif. denied, 111 N.J. 588, 589 (1988). The details should be those minimally necessary to identify the subject matter of the complaint. Id.

Thus, the third party evidence should be limited to a recitation of when the complaint was made, by whom it was made, the sexual accusation against the defendant as the assailant and sufficient details of the complaint to intelligibly indicate its nature. *State v. Balles, supra,* 47 *N.J.* at 338-39.

The underlying theory of fresh complaint evidence is that in the absence of such evidence the jury will draw a natural inference, adverse to the credibility of the formal criminal complaint and the complainant. The jury should be instructed with regard to the limited use for which the evidence has been admitted. *State v. Bethune*, 121 *N.J.* 137, 147-48 (1990).

Fresh complaints made in response to general noncoercive questioning are permitted. State v. Hill, 121 N.J. at 167. There is more latitude with the type and extent of questioning permitted when young children are involved. State v. Bethune, supra, State v. Ramos, supra (court finds admissible discussion between child victim and her mother, subsequent to child's bringing home school material designed to assist parents in discussing sexual matters with their children which resulted in the victim's mother cautioning child not to allow anyone to touch her private parts. This discussion prompted the victim to ask whether this included defendant and to indicate that defendant had touched her private parts. The child's delay in making the complaint was justifiable given child's age and the circumstances surrounding the child's giving of the statement to her mother). Cf. State v. Simmons, 52 N.J. 538, 541-42 (1968) (out of court identification held admissible as a spontaneous declaration, although made in response to inquiry, where declarant was in a state of excitement when she made the identification); *State v. Balles*, 47 *N.J.* at 334-39; *State v. Kozarski*, 143 *N.J. Super.* 12, 17 (App. Div.), *certif. denied*, 71 *N.J.* 532 (1976).

However, statements procured by pointed, inquisitive, coercive interrogation lack the voluntariness necessary to be a valid fresh complaint. *State v. Hill*, 121 *N.J.* at 167; *State v. Bethune*, 121 *N.J.* at 145. Factors to be considered include the age of the victim; the victim's relationship with the interrogator, whether friend, relative, professional counselor, or authoritarian figure; who initiated the discussions, and the type of questions asked, *i.e.*, whether they are leading and their specificity regarding the alleged abuser and the acts alleged. *Id.*

The doctrine is somewhat misnamed. To constitute a "fresh" complaint there need not be a high degree of contemporaneity between the sexual offense and the time of the complaint. The only temporal requirement is that the complaint occur within a reasonable time after the sexual offense. See also, State v. Tirone, supra, 64 N.J. at 226. A determination of what is a reasonable period of time depends upon an evaluation of the nature of the offense and the victim, the natural reluctance of a victim to speak of a sexual assault, and any other relevant circumstances such as the victim's fear of the defendant or some relationship between the victim and the defendant which would deter an earlier complaint. See also State v. Kozarski, 143 N.J. Super. at 16; State v. Hummel, 132 N.J. Super. at 423. Indeed, numerous complaints made substantial periods of time after sexual assaults have been held to come within the fresh complaint rule. See also, State v. Queen, 221 N.J. Super. 601, 605, 608 (App. Div.), certif. denied, 110 N.J. 506 (1988) (two day interval); State v. Kozarski (two week interval); State v. Hummel (four to six weeks interval). The court in Hummel, 132 N.J. Super. at 423, held that the temporal proximity of the victim's complaint to the sexual offense does not affect the admissibility of the complaint, but only its probative worth.

In determining whether duplicative fresh complaint testimony is admissible, the court must balance the probative value of such testimony, bearing in mind the purpose of the rule, against the potential for prejudice. *State v. Hill*, 121 *N.J.* at 169-70.

Convictions can still be sustained even though the trial court fails to give a limiting instruction as to the fresh complaint evidence unless the error can be shown to be clearly capable of producing an unjust result. *State v.*

Tirone, 64 *N.J.* at 227. *See also, State v. Rajnai*, 132 *N.J. Super.* 530, 538 (App. Div. 1975). However, it is not necessary that this limiting instruction be given at the time the evidence is admitted. *State v. Hummel*, 132 *N.J. Super.* at 424. Moreover, the applicability of the fresh complaint doctrine is unaffected by the order of proofs in the State's case in chief. Thus, testimony of the fresh complaint may precede the testimony of the victim. *Id.* at 422; *cf. State v. Balles*, 47 *N.J.* at 340 (no prejudice to defendant where victim's mother testified before the victim).

Evidence which goes beyond the strict parameters of "fresh complaint" may still be admissible under some other evidence rule. For example, details of a complaint are inadmissible, as fresh complaint evidence, but could be admitted under *N.J.R.E.* 803(a)(2) as evidence as a prior consistent statement after an explicit or implicit charge of recent fabrication. *See also State v. King*, 115 *N.J. Super.* 140, 146 (App. Div.), *certif. denied*, 59 *N.J.* 268 (1971). Moreover, if the complaint is more closely related to the time of the sexual assault, then the victim's statements may constitute excited utterances admissible pursuant to *N.J.R.E.* 803(a)(2). *State v. Bass*, 221 *N.J. Super.* 466 (App. Div. 1987), *certif. denied*, 110 *N.J.* 186 (1988).

X. HABIT OR CUSTOM

N.J.R.E. 406 follows former *Evid. R.* 49 and 50 and states:

a. Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice.

b. Evidence of specific instances of conduct is admissible to prove habit or routine practice if evidence of a sufficient number of such instances is offered to support a finding of such habit or routine practice.

A habit is a "person's regular practice of responding to a particular kind of situation with a specific kind of conduct." *State v. Kately*, 270 *N.J. Super.* 356, 362 (App. Div. 1994); *State v. Radziwil*, 235 *N.J. Super.* 557, 564 (App. Div. 1989), *aff'd o.b.*, 121 *N.J.* 527 (1990). The distinction between habit evidence and a character trait turns upon the regularity and situation-specific nature of the conduct. *Id.* at 565.

Thus, in *Kately*, 271 *N.J. Super.* at 363-64, evidence of the defendant's nightly drinking parties was properly

admitted as habit evidence because it specifically described his routine practice of drinking in a particular situation and was relevant to prove reckless driving in a death by auto case. Similarly, in *Radziwill*, 235 *N.J. Super.* at 565-66, a bartender's testimony that the defendant became intoxicated nearly every week at a social club was proper habit evidence to prove defendant was intoxicated on the weekend of a fatal auto accident.

In *State v. Bogus*, 223 *N.J. Super.* 409 (App. Div.), *certif. denied*, 111 *N.J.* 567 (1988), however, the court held that evidence of the defendant's driving record for speeding, disobeying traffic signals, and driving carelessly was not admissible as habit or custom evidence in an aggravated manslaughter prosecution to show that the defendant drove recklessly, but was harmless given the defendant's own unobjected-to testimony regarding that record.

XI. HEARSAY

A. Generally

A statement other than one made by the declarant while testifying at a trial or hearing which is offered to prove the truth of the matter stated, is hearsay pursuant to *N.J.R.E.* 801(c), formerly *Evid. R.* 63. *See, e.g., State v. White*, 158 *N.J.* 230, 238 (1999); *State v. Robinson*, 139 *N.J. Super.* 58, 62 (App. Div. 1976), *certif. denied*, 75 *N.J.* 534 (1977); *State v. Hummel*, 132 *N.J. Super.* 412, 424-425 (App. Div.), *certif. denied*, 67 *N.J.* 102 (1975). A specific statement is unnecessary; hearsay can be in the form of an inference, *State v. Spencer*, 319 *N.J. Super.* 284, 304-05 (App. Div. 1999), or be nonverbal conduct which is a substitute for words. *See also N.J.R.E.* 801(a); *State v. Simmons*, 52 *N.J.* 538, 541 (1968); *State v. Jones*, 308 *N.J. Super.* 15 (App. Div. 1998).

Exceptions to the general rule excluding hearsay, *see also N.J.R.E.* 802, are set forth in *N.J.R.E.* 803 and *N.J.R.E.* 804. The hearsay exceptions in *N.J.R.E.* 803 do not require the declarant to be unavailable, while those in *N.J.R.E.* 804 apply *only* if the declarant is unavailable.

Relevant evidence presented by the defense may nonetheless be excluded under the hearsay rule if it does not meet a recognized exception. Only if the hearsay offered has such indicia of reliability, akin to those implicated by the unique facts of *Chambers v. Mississippi*, 410 *U.S.* 284 (1973), that a defendant is denied fundamental fairness, does the Sixth Amendment require the admission of hearsay despite the lack of an applicable exception. *State v. Bunyan*, 154 *N.J.* 261 (1998). This is because of the State's right to ensure that reliable evidence is presented to the trier of fact. *United States v. Sheffer*, 523 *U.S.* 303 (1998).

The hearsay rule is not violated if a law enforcement officer testifies that he did some act, such as going to the scene of a crime "upon information received," as it is intended to demonstrate that the officer did not act arbitrarily. State v. Bankston, 63 N.J. 261 (1973). If the officer becomes specific about what he has been told of the defendant's involvement, the rule has been transgressed. State v. Roach, 146 N.J. 208, 224-25, cert. denied, 519 U.S. 1021 (1996); State v. Irving, 114 N.J. 427, 444 (1989); State v. Farthing, 331 N.J. Super. 58 (2000); State v. Alston, 312 N.J. Super. 102, 113 (App. Depending on the circumstances, a Div. 1998). Bankston error can be harmless. State v. Irving, 114 N.J. at 447-48; State v. Brown, 325 N.J. Super. 447, 451-52 (App. Div. 1999), certif. denied, 163 N.J. 76 (2000); State v. Douglas, 204 N.J. Super. 265, 272-73 (App. Div.), certif. denied, 102 N.J. 378 (1985).

A statement by a third person which did not implicate the defendant but was offered to establish that an argument had occurred prior to the shooting of the victim was not "offered to prove the truth of the matter stated" and was therefore not hearsay. *State v. Johnson*, 216 *N.J. Super.* 588, 599-600 (App. Div. 1987).

The precise text of each exception should be consulted in advance since some exceptions are only applicable in civil matters. *See, e.g., N.J.R.E.* 804(b)(6), formerly *Evid. R.* 63(32) (reliable statements by deceased declarants); *State v. Bunyan, supra.*

Below are set forth some of the rules of law established to govern application of the hearsay rule and its exceptions in criminal traits.

B. Adoptive Admissions (*See also*, **SELF-INCRIMINA-TION**, this Digest)

N.J.R.E. 803(b)(2), formerly *Evid. R.* 63(8)(b), permits the introduction of a hearsay statement against a party which is "a statement whose content the party has adopted by word or conduct or in whose truth the party has manifested belief[.]" This exception must be used with caution and only when the court is satisfied that all conditions for its application have been established by the proponent. *State v. Dreher*, 302 *N.J. Super.* 408, 506 (App. Div.), *certif. denied*, 152 *N.J.* 10 (1997). There must be a preliminary judicial finding that the party has adopted or manifested a belief in the assertion of another.

State v. Gorrell, 297 *N.J. Super.* 142, 151 (App. Div. 1996). Thus, a statement by another that the defendant smiled silently when called a "butcher" shortly after an alleged knife attack would have permitted, but not required, findings by the court and the jury that the defendant's silence was an implied or adoptive admission. The contents of the statement should be clear such that there is no ambiguity regarding what the party is adopting. *State v. Briggs*, 279 *N.J. Super.* 555 (App. Div.), *certif. denied*, 141 *N.J.* 99 (1995).

However, equivocal or evasive responses to specific comments or questions may be adoptive admissions. See also State v. Thompson, 59 N.J. 396 (1971). In Thompson, a defendant who was suspected of murder had a telephone conversation with his sister in which she referred to the details of the offense and the murderer's escape. The defendant responded: (1) that the crime "just was one of those things"; (2) that he had "some pretty close calls" in the swamp where the murderer escaped, and (3) "no comment" to his sister's inquiry as to whether he committed the murder. The Supreme Court held that these statements by the defendant constituted admissions in which he adopted the truth of his sister's declarations. This adoption occurred because under the circumstances, the defendant's equivocal replies became indicative of guilt, since an innocent person would have denied involvement in the murder. They were "tacit admissions." Id. at 408-10.

Once a defendant is in police custody, however, no negative inference may be drawn from silence, and thus *N.J.R.E.* 803(b)(2) cannot apply. *State v. Deatore*, 70 *N.J.* 100 (1976); *State v. Ripa*, 45 *N.J.* 199, 204 (1965); *see also Doyle v. Ohio*, 426 *U.S.* 610 (1976). However, under certain circumstances, a defendant's silence or conduct may be utilized to impeach credibility if the defendant testifies. *See also State v. Marks*, 201 *N.J. Super.* 514, 529-34 (App. Div.), *aff'd o.b.*, 59 *N.J.* 156 (1971), *cert. denied*, 404 *U.S.* 1047 (1972).

C. Business and Official Records

N.J.R.E. 803(c)(6), formerly *Evid.* R. 63(13) allows the admission of:

A statement contained in a writing or other record of acts, events, conditions, and, observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

In *Mahoney v. Minsky*, 39 *N.J.* 208, 218 (1963), Justice Francis set forth the underlying rationale for the admissibility of business records:

... [R]ecords which are properly shown to have been kept as required normally possess a circumstantial probability of trustworthiness, and therefore ought to be received into evidence unless the trial court, after examining them and hearing the manner of their preparation explained, entertains serious doubt as to whether they are dependable or worthy of confidence.

The rule is premised on indicia of reliability, *see also Matter of C.A.*, 146 *N.J.* 71, 98 (1996), so much so that it satisfies the Confrontation Clause of the Sixth Amendment. *State in Interest of J.H.*, 244 *N.J. Super.* 207, 215 (App. Div. 1990).

Three conditions must be met for admissibility:

First, the writing must be made in the regular course of business. Second, it must be prepared within a short time of the act, condition or event being described. Finally, the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence. [*State v. Matulewicz*, 101 *N.J.* 27, 29 (1985)].

The trial court should examine the proffered records and hear the manner of their preparation explained before determining whether they are trustworthy or there are serious doubts about their dependability. *Id.* at 29-30. Thus, an *N.J.R.E.* 104 hearing must be conducted to determine whether all criteria for admission are met. *See State v. Moore*, 158 *N.J. Super* 68 (App. Div. 1978).

In *Matulewicz*, the Appellate Division had reversed the defendant's conviction because a report of a forensic chemist concerning a controlled dangerous substance had been admitted over defendant's objection. The Supreme Court modified the Appellate Division's opinion by holding that evidence that the chemist was an employee of the State was insufficient to support a finding that the evidence was inadmissible due to underlying bias in preparation of the report and remanded the matter for an evidentiary hearing. *State v. Matulewicz, supra.* In *State v. Hollander,* 201 *N.J. Super.* 453 (App. Div. 1985), *certif. denied,* 101 *N.J.* 335 (1985), the court held that a police memorandum was not admissible under the business records exception to indicate whether the victim's vehicle had been locked prior to impoundment.

"Included statements" within a business record may be inadmissible. See also Matter of C.A., 146 N.J. at 98 (portion of police report containing account of rape victim's complaint not admissible under N.J.R.E. 803(c)(6); State v. Taylor, 46 N.J. 316, cert. denied, 385 U.S. 855 (1966) (medical records containing victim's identification of attackers were inadmissible); Gilligan v. International Paper Co., 24 N.J. 230 (1957) (hospital records were inadmissible to establish manner and place of personal injury); State v. McGee, 131 N.J. Super. 292 (App. Div. 1974) (NCIC printout inadmissible to show that weapon was stolen); Sas v. Strelecki, 110 N.J. Super. 14 (App. Div. 1970) (statements of witnesses contained in police accident report were inadmissible); Rogalski v. Plymouth Homes, Inc., 100 N.J. Super. 501 (App. Div.), certif. denied, 52 N.J. 167 (1968) (portion of police report containing declaration by witness as to cause of automobile accident was inadmissible).

Computerized records generally have sufficient reliability for admission under *N.J.R.E.* 803(c)(6), and there are no special evidentiary requirements for their admission. *See also Hahneman Univ. Hosp. v. Dudnick*, 292 *N.J. Super.* 11, 15 (App. Div. 1996); *State v. Swed*, 255 *N.J. Super.* 228, 236-39 (App. Div. 1992).

The courts have endorsed the admission of hospital records as business entries. In *State v. Biddle*, 150 *N.J. Super.* 180 (App. Div.), *certif. denied*, 75 *N.J.* 542 (1977). The Appellate Division upheld the admission, as business entries, of hospital records of the victim that showed the treatment rendered, his progress in recuperation, his medical records, X-ray reports and the resume, by the attending physician, of the victim's progress during his entire stay at the hospital. The court ruled that these records were made and maintained in the ordinary course of business and were properly introduced through the testimony of the custodian of the records. 150 *N.J. Super.* at 183-84.

Similarly, in *State v. Martorelli*, 136 *N.J. Super.* 449 (App. Div. 1975), *certif. denied*, 69 *N.J.* 445 (1976), a hospital report of a blood test, performed on the defendant, was held to have been properly admitted into evidence as a business record. The *Martorelli* court stated that personal knowledge of the entrant-declarant was not required for included hearsay if the document was admissible under former *Evid. R.* 63(13). The only requirement was that the source of the included hearsay be reasonably reliable. Opinion may be included in the

hospital record because a requirement that the medical personnel actually appear in court as witnesses would be unduly burdensome. The court in *Martorelli* noted that the admissibility of hospital test reports as business records in part depended on the complexity of the text. Not all diagnostic findings could be admissible, only those based on objective data where the results do not present more than an average difficulty in interpretation. The weight to be accorded the test is a matter for the trier of fact and is subject to appropriate attack by the opposing party. *See also State v. Soney*, 177 *N.J. Super.* 47, 60 (App. Div. 1980), *certif. denied*, 87 *N.J.* 313 (1981).

Law enforcement records have been liberally treated as coming with the business entries exception. However, this policy has been clarified by the decision in State v. Lungsford, 167 N.J. Super. 296 (App. Div. 1979), where the Appellate Court held that the trial court erred in holding that certain hearsay evidence was admissible under the business records exception. The court noted that while police records may qualify as business records for certain purposes, they are nevertheless not vehicles by which substantive evidential status may be conferred upon the otherwise hearsay declarations. If the declarant is not available to testify, and if the statement is not admissible under some other exception to the hearsay rule, then admissibility cannot be predicated exclusively upon the circumstance that the statement was made to a police officer who paraphrased its content in his report.

N.J.R.E. 808 addresses the issue of an expert opinion included in an admissible hearsay statement, and is intended to generally codify principles from *Matulewicz. State v. Benas,* 281 *N.J. Super.* 251 (App. Div. 1995); *State v. Moore,* 240 *N.J. Super.* 269, 282 (App. Div. 1990), *aff'd o.b.,* 123 *N.J.* 457 (1991).

Applying *Matulewicz*, a trial court concluded that a State police laboratory report which contains a positive reading of ethyl alcohol in the blood of a defendant may be admitted into evidence under former *Evid. R.* 63(13), since the report was made in the regular course of business, was prepared within a short time of the test performed, and the methods and circumstances of its preparation show that it is reliable and thus justifies its admission. State v. Weller, 225 N.J. Super. 274 (Law Div. 1986). Furthermore, such a report, which gives the results of a highly objective test, is admissible as a factual observation of a public officer within the scope of that officer's duty to observe the condition reported. See also N.J.R.E. 803(c)(8). According to Weller, no testimony from the forensic chemist who performed the test was necessary.

In *State v. Oliveri*, 336 *N.J. Super.* 244 (App. Div. 2001), the Appellate Division, held that a laboratory report showing the result of a defendant's blood alcohol level, utilizing the same test as in *Wells*, was properly admitted as a business or public record. Given the traditional simplicity and accuracy of blood-alcohol analysis, it was admissible under *N.J.R.E.* 808 without additional testimony from the person performing the test.

The official records exception somewhat overlaps that of business records, especially since "business" includes governmental agencies. *N.J.R.E.* 801(d). *N.J.R.E.* 803(c)(8), formerly *Evid. R.* 63(15), provides for the admission of:

Public records, reports, and findings. Subject to *R.* 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

The rule is premised on the special trustworthiness of a statement made in the scope of an official's duty and the high probability that the duty to make an accurate report has been performed. *New Jersey D.E.P. v. Duran*, 251 *N.J. Super.* 55, 65 (App. Div. 1991); *State v. Hudes*, 128 *N.J. Super.* 589 (Cty Ct. 1974).

Despite the considerable overlap between the business entries exception and the official reports exception, the two exceptions operate in different ways. In *State v. Kalafat*, 134 *N.J. Super.* 297, 301 (App. Div. 1975), addressing the earlier rules, the court observed:

The absence of an explicit requirement for a foundation in *Evid. R.* 63(15), as contrasted with such an explicit requirement in *Evid. R.* 63(13), indicates that neither the reporter nor custodian need appear to provide a foundation for a public record admitted under *Evid. R.* 63(15) (citation omitted). The inherent trustworthiness of a report of an unchanging fact by a disinterested public official overcomes the usual barrier to its admissibility because of hearsay. There is a rebuttable presumption that public officials will properly, prudently and carefully perform their duties. *State v. Hudes*, 128 *N.J. Super.* at 602.

Absent evidence demonstrating that the test protocol established by the State Police is not scientifically reliable to establish that a Breathalyzer machine is in proper operating order, the State may, subject to *N.J.R.E.* 803(c)(6), 803(c)(8), 807, and 901, offer into evidence at a DWI trial a copy of the Breath Test Inspector's Inspection Certificate. *State v. Garthe*, 145 *N.J.* 1 (1996); *see also State v. McGeary*, 129 *N.J. Super.* 219 (App. Div. 1974).

D. Declarations Against Interest

Statements against interest are now governed by *N.J.R.E.* 803(c)(25), formerly *Evid. R.* 63(10) which allows the admission of:

A statement which was at the time of its making so far contrary to the declarant's pecuniary, proprietary, or social interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid declarant's claim against another, that a reasonable person in declarant's position would not have made the statement unless the person believed it to be true. Such a statement is admissible against an accused in a criminal action only if the accused was the declarant.

This rule does not require the declarant to be unavailable. See State v. Barry, 86 N.J. 80, cert. denied, 454 U.S. 1017 (1981). The exception is based on the theory that, by human nature, individuals will neither assert, concede, nor admit to facts that would affect them unfavorably. State v. White, 158 N.J. 230, 238 (1998); see also State v. Timmendequas, 161 N.J. 515, 620-21 (1999). No statement may be admitted under this rule against a defendant in a criminal trial unless the declarant is that defendant. N.J.R.E. 803(c)(25); State v. Felton, 131 N.J. Super. 344, 351-352 (App. Div. 1974), certif. denied, 68 N.J. 140 (1976). See Bruton v. United States, 391 U.S. 123 (1968), where the court held that the admission of a codefendant's confession that implicated the other defendant at a joint trial constituted prejudicial error even though the trial court gave a limiting instruction. It should be noted that this prohibition has also been applied to interlocking confessions which were held to be inadmissible in a joint trial. See also Cruz v. New York, 481 U.S. 186 (1987); State v. Roach, 146 N.J. 208, 224, cert. denied, 519 U.S. 1021 (1996); State v. Haskell, 195 N.J. Super. 235 (App. Div. 1984), aff'd, 100 N.J. 469 (1985).

Statements by a declarant that exculpate another and inferentially indicate one's own involvement might be admissible. *State v. Norman*, 151 *N.J.* 5, 31 (1997); *State v. Davis*, 50 *N.J.* 16, 28-29 (1967), *cert. denied*, 389 *U.S.* 1054 (1968). The issue regarding statements which only indirectly inculpate the declarant but which also exculpate the accused was comprehensively addressed in *State v. White, supra.* The Supreme Court in *White* held that:

a declarant's statements exculpating a defendant should be admitted as evidence under the statement-againstinterest exception to the hearsay rule if, when considered in the light of surrounding circumstances, they subject the declarant to criminal liability or if, as a related part of a self-inculpatory statement, they strengthen or bolster the incriminatory effect of the declarant's exposure to criminal liability. The circumstances that indicate that a defendant-exculpatory statement may enhance a declarant's self-inculpatory statement will necessarily vary. In this case, we recognize that although a statement by a declarant that another suspected of an offense is innocent may not on its face inculpate the declarant, the statement takes on inculpatory character and subjects the declarant to criminal liability when the declarant is a suspect in connection with the same crime. [158 N.J. at 244].

The Law Division recently held that a confession of a third party sought to be introduced by a defendant under *N.J.R.E.* 803(c)(25) need not be corroborated. *State v. Reed*, 332 *N.J. Super.* 575 (Law Div. 2000).

In *State v. Gaines*, 147 *N.J. Super.* 84 (App. Div. 1975), *aff'd o.b. sub. nom., State v. Powers*, 72 *N.J.* 346 (1977), a number of unlicensed firearms were found in a vehicle occupied by three persons. One of the occupants, while speaking to a police officer, stated that the defendant did not know anything about the weapon. This statement was improperly excluded from evidence when offered by the defendant. The statement, clearly exculpatory of the defendant, was impliedly inculpatory of the declarant because its import was that the declarant did have knowledge of the firearms. *See State v. Davis, supra.*

A statement of a declarant exculpating himself does not "tag along" with a declaration against interest unless the two are "essentially a single, integral statement" where the trustworthiness ascribable to the portion against interest can be transferred to the portion exonerating himself from criminal liability. *State v. DeRoxtro*, 327 *N.J. Super.* 212, 222 (App. Div. 2000); *State v. Gomez*, 246 *N.J. Super.* 209, 218-19 (App. Div. 1991).

In *State v. Abrams*, 72 *N.J.* 342 (1977), *aff'g o.b.*, 140 *N.J. Super.* 232 (App. Div. 1976), the Supreme Court held that the trial court erred in refusing to admit into evidence a confession made to police by the codefendant. That written confession contained two discrete sentences which exculpated the defendant. These passages could not, in effect, be "excised" from their inculpatory context.

In State v. West, 145 N.J. Super. 226 (App. Div. 1976), certif. denied, 73 N.J. 67 (1977), a defendant was charged with having distributed narcotics to an undercover police officer in a transaction arranged by a confidential informant. At trial the defendant claimed that he was framed by the confidential informant and alleged that a defense witness overheard the informant boast of having framed the defendant. The Appellate Division held that the statement was admissible as a declaration against interest if it could be established that the declarant was in fact, the confidential informant. 145 N.J. Super. at 232-33. See also State v. Rechtschaffer, 70 N.J. 395 (1976), where the court held that defendant's statement that he would kill the informer if he discovered his identity was admissible as a declaration against interest.

1. Corroboration

An uncorroborated extra-judicial confession cannot provide the evidential basis to sustain a conviction for crime. *State v. Lucas*, 30 *N.J.* 37, 62 (1959). As the Court in *State v. Johnson*, 31 *N.J.* 489 (1960), *cert. denied*, 368 *U.S.* 933 (1961), explained:

The reason for requiring evidence independent of the confession and corroborating it is to avoid the danger of convicting a defendant solely out of his own mouth of a crime that never occurred or a crime committed by someone else.

See also State v. Boyer, 221 N.J. Super. 387 (App. Div. 1987), certif. denied, 110 N.J. 299 (1988).

A trial court must determine whether there is any legal evidence, apart from the confession of facts and circumstances, from which the jury might determine that the confession is trustworthy. *State v. Lucas*, 30 *N.J.* at 62; *see also State v. Mancine*, 124 *N.J.* 232, 250 (1991).

The State need only produce independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness. *State v. DiFrisco*, 118 *N.J.* 253, 273 (1990), *cert. denied*, 516 *U.S.* 1129 (1995); *State v. Lucas*, 30 *N.J.* at 56.

In *State v. Kreiger*, 193 *N.J. Super*. 568 (App. Div. 1983), the court held that defendant's confession, obtained after a polygraph test, was inadequately corroborated to meet the trustworthiness standard, and its details were both so sparse and so contradicted by the State's undisputed evidence as to generate an affirmative belief in its untrustworthiness, thereby requiring reversal of defendant's conviction. The decision of the Appellate Division was reversed by the New Jersey Supreme Court, *State v. Krieger*, 96 *N.J.* 256, *cert. denied*, 469 *U.S.* 1017 (1984), for the reasons set forth in the dissent. The dissenting judge was convinced that the State's proofs were sufficiently corroborated on the record to present the question to the jury as to the trustworthiness of the defendant's confession.

The corroboration rule applies in juvenile proceedings. *State in Interest of J.F.*, 286 *N.J. Super.* 89, 101 (App. Div. 1995); *State in the Interest of W.J.*, 116 *N.J. Super.* 462, 465 (App. Div. 1971).

Circumstantial evidence of a crime is sufficient to satisfy the corroboration rule. In State v. Zarinsky, 143 N.J. Super. 35 (App. Div. 1976), aff'd, 75 N.J. 101 (1977), the defendant was indicted in 1975 for committing a murder in 1969. The victim's body could not be found. The Appellate Division held that circumstantial evidence, such as testimony that the defendant was seen with the victim on the day she disappeared, sufficed to corroborate his confessions to the murder. The Zarinsky court also noted that "a voir dire to determine the existence of corroboration is not a condition precedent to the admission of a confession." It is sufficient if the State's proofs, adduced during its case in chief, disclose evidence of corroboration. Hence, the appropriate remedy for a failure to corroborate a confession is a motion for a judgment of acquittal at the close of the State's case.

2. Co-Conspirator Statements

N.J.R.E. 803(b)(5), replacing *Evid. R.* 63(9)(b), permits the admission of a hearsay statement against a party if "at the time the party and the declarant were participating in a plan to commit a crime or civil wrong and the statement was made in furtherance of that plan."

The exception may be stated as where two or more persons are alleged to have conspired to commit a crime or a civil wrong, any statement made by one during the course of and in furtherance of the conspiracy is admissible in evidence against any other member of the conspiracy. [*State v. Phelps*, 96 *N.J.* 500, 508 (1984); *State v. Varona*, 242 *N.J. Super.* 474, 483 (App. Div. 1990), *certif. denied*, 112 *N.J.* 386 (1990)].

The exception is coextensive with the federal coconspirator hearsay exception. *State v. Taccetta*, 301 *N.J. Super.* 227, 251 (App. Div.), *certif. denied*, 152 *N.J.* 187 (1997). The provision does not violate a defendant's right to confrontation. *See also Bourjaily v. United States*, 483 *U.S.* 171 (1987); *State v. Harris*, 298 *N.J. Super.* 478, 486 (App. Div), *certif. denied*, 151 *N.J.* 474 (1997).

To admit such a statement, there must be evidence, independent of the hearsay, of the existence of the conspiracy and defendant's relationship to it. *State v. Phelps*, 96 *N.J.* at 510; *State v. McKiver*, 199 *N.J. Super.* 542, 545 (App. Div. 1985); *State v. D'Arco*, 153 *N.J. Super.* 258, 262 (App. Div. 1977). This independent evidence may take many forms but "must be substantial enough to engender a strong belief in the existence of a conspiracy and of defendant's participation." *State v. Phelps*, 96 *N.J.* at 511.

The determination of whether there is sufficient independent proof is to be made by the trial judge. *State* v. Phelps, 96 N.J. at 513-16. The prosecution must demonstrate by a preponderance of the evidence independent of the hearsay that the conspiracy existed and that the defendant participated in it. State v. Clausell, 121 N.J. 298, 337 (1990); State v. Phelps, 96 N.J. at 518-The court is not precluded, however, from 19. considering the hearsay evidence in conjunction with independent evidence. State v. Phelps, 96 N.J. at 512; State v. McKiver, supra. Indeed, the trial court "may consider the coconspirator's hearsay declaration if it is satisfied that such declaration is reliable and that there is other evidence substantial enough to engender a belief in the conspiracy's existence and the defendant's participation in it." State v. Phelps, 96 N.J. at 518-19; see also Bourjaily v. United States, supra. When the declarant makes statements supportive of the existence of a conspiracy of which he is a part, the trustworthiness of the hearsay is enhanced because of the likelihood that he would not have made declarations contrary to his best interests unless they were truthful. State v. Phelps, 96 N.J. at 511.

The coconspirator exception does not require that the defendant be formally charged with conspiracy or any other form of criminal plan. *State v. Clausell*, 121 *N.J.* at 336; *State v. Louf*, 64 *N.J.* 172, 177 (1973); *State v. Farthing*, 331 *N.J. Super.* 58, 82 (App. Div. 2000). Indeed, such evidence may be admissible on a substantive offense, even if the defendant is acquitted on a companion charge of conspiracy. *State v. D'Arco*, 153 *N.J. Super.* at 265-266; *State v. Farinella*, 150 *N.J. Super.* 61, 69 (App. Div.), *certif. denied*, 75 *N.J.* 17 (1977).

As set forth above, the defendant and the declarant must have been engaged in the conspiracy when the statement was made and the statement must have been to further one or more objects of the conspiracy. See State v. Farthing, 331 N.J. Super. at 83; State v. Taccetta, 301 N.J. Super. at 252. However, a conspiracy is presumed to continue with regard to each member of the conspiracy until the conspiracy's object has been attained or there is evidence of an affirmative act of withdrawal by one or more members of the conspiracy. Id. Statements regarding past events may be in furtherance of a conspiracy if they serve a current purpose of the conspiracy, such as to promote cohesiveness, provide reassurance to a coconspirator, or prompt a nonmember of the conspiracy to respond in a way that furthers conspiratorial goals. Id. at 253.

3. Excision

Pursuant to *R.* 3:15-2, if, in a joint trial of two or more defendants, a prosecutor intends to use against one defendant a statement or confession of a codefendant, the prosecutor shall move prior to trial to determine if the references to the non-declarant defendant can be effectively deleted from the statement. *See also State v. Young*, 46 *N.J.* 152 (1965). In *State v. Biddle*, 150 *N.J. Super.* 180, 183 (App. Div.), *certif. denied*, 75 *N.J.* 542 (1977), the Appellate Division held that the failure of the State to move for excision prior to trial was not per se reversible error and did not require complete exclusion of the codefendant's statement. *See also State v. Guzman*, 313 *N.J. Super.* 363, 381 (App. Div.), *certif. denied*, 156 *N.J.* 424 (1998).

4. Confession of Another

A confession by another is of such probative importance in a criminal trial that its exclusion constitutes a denial of defendant's due process right to a fair trial. Thus, where a witness voluntarily appears to testify that he and not the defendant is the guilty party, it is improper for the trial judge to have him arraigned and to advise him of his privilege against self-incrimination prior to his trial testimony. The first concern of the court should be the free flow of evidence. The wise judicial course under these circumstances is to leave the matter of suspicion of criminality attendant upon the actions of the prospective witness to the prosecutor. State v. Jamison, 64 N.J. 363, 378-79 (1974). See Chambers v. Mississippi, 410 U.S. 284 (1973); Cf. Webb v. Texas, 409 U.S. 95 (1972). (It is improper for judge to discourage witness from testifying by implying he would be on the witness stand and be prosecuted for perjury). State v. Smith, 322 N.J. Super. 385 (App. Div.), certif. denied, 162 N.J. 489 (1999), recently reviewed the procedures approved in Jamison to be utilized by a trial court when the privilege against self-incrimination may be implicated for a witness.

E. Excited Utterances

N.J.R.E. 803(c)(2), formerly *Evid. R.* 63(4)(b), provides for the admission of:

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate.

The rationale for the rule is that there is special reliability of a spontaneous statement made at or near the time of the observation of a startling event, due to the excitement caused by the event. *Matter of C.A.*, 146 *N.J.* 71, 98 (1996). *Accord, State v. Williams*, 106 *N.J. Super.* 170, 172 (App. Div.), *certif. denied*, 55 *N.J.* 78 (1969), *cert. denied*, 397 *U.S.* 1057 (1970); *State v. Newsome*, 177 *N.J. Super.* 221, 230 (App. Div. 1980). *Cf. State in the Interest of C.A.*, 201 *N.J. Super.* 28, 32 (App. Div. 1985) (disqualification of children as witnesses does not foreclose admission of their statements because of reliability of excited utterance of nervous excitement rather than the declarant's conscious recognition of a general duty to tell the truth).

It is not necessary under *N.J.R.E.* 803(c)(2) that there be a strict contemporaneity between an exciting event and an excited utterance, as long as the excitement generated by the event has not been dissipated by the time of the utterance. *Cestero v. Ferrara*, 57, *N.J.* 497, 501-05 (1971). Thus, excited utterances have been admitted into evidence by New Jersey courts even though there existed a time interval between the exciting event and the utterance. *Id.; State v. Simmons*, 52 *N.J.* 538, 542 (1968), *cert. denied*, 395 *U.S.* 924 (1969); *Atamanik v. Real Estate Management, Inc.*, 21 *N.J. Super.* 357, 362-64 (App. Div. 1952). But see Sas v. Strelecki, 110 N.J. Super. 14 (App. Div. 1970); Rogalsky v. Plymouth Homes, Inc., 100 N.J. Super. 501 (App. Div.), certif. denied, 52 N.J. 167 (1968).

State v. Bass, 221 N.J. Super. 466 (App. Div. 1987), certif. denied, 110 N.J. 86 (1988), explored former Evid. *R.* 63(4)(b) in the context of a hearsay declaration by a three year old murder victim, killed by his father. The victim had lived with the witness for nearly a year and had developed a close relationship with her. A few months after the child had returned to his own household, the witness had taken the child, with the mother's permission, to go with the witness' husband and her to repair a refrigerator. While helping the child go to the toilet, the witness saw apparent burn marks on his buttocks, and asked him what happened. The child responded that the defendant had "burned me with the light." Shortly thereafter, when the witness flicked a cigarette lighter, the victim asked her "to please not burn him with the lighter." The Appellate Division held that this hearsay was admissible under former Evid. R. 63(4)(b). The statement of the victim coupled with the reaction to the lighter demonstrated that the victim was in continued state of nervous excitement despite the fact that the burning may have occurred a substantial time before the statement. Significantly, the court noted the age of the victim and held that the state of excitement could be enhanced by the young age of the child. While youth and naivete may extend the time during which the nervous excitement continues to enhance the reliability of the statement, they are not substitutes for the stress of a nervous excitement.

With respect to a statement by the victim's older brother, made about six hours after the child was beaten to death by defendant, that the defendant had "walked on [the victim's] back," the court in *Bass* held that it was truly spontaneous as being made under the stress of the nervous excitement of seeing his brother brutally beaten.

In determining whether or not there was opportunity to fabricate or deliberate, the court must consider the element of time, the circumstances of the incident, the mental and physical condition of the declarant, and the nature of the utterance, *i.e.*, whether against the interest of the declarant or not, or made in response to questions or involuntary. *State v. Lazarchick*, 314 *N.J. Super.* 522 (App. Div.), *certif. denied*, 157 *N.J.* 546 (1998).

Thus, a rape victim's statements, made in a voluntary phone call to police from the hospital immediately after the incident, while emotional and upset, were sufficiently reliable to be admitted under the rule. *Matter* of *C.A.*, *supra*.

In State v. Simmons, supra, a 16-year-old deaf mute was raped. She was taken to a hospital emergency room. While there she was confronted by the defendant, and in response to questioning, she identified him as her assailant. It is now well established in New Jersey that a statement made in response to an inquiry may still qualify as an excited utterance if the effect of the exciting event has not abated. State v. Graham, 59 N.J. 366, 370-71 (1971); Cestero v. Ferrara, supra, State v. Simmons, supra, State v. Sands, 138 N.J. Super. 103, 107 (App. Div. 1975); State v. Tapia, 113 N.J. Super. 322, 331-32 (App. Div. 1971). The continuation of physical or emotional distress in the victim of an exciting event is a strong factor supporting the reliability and the unreflective quality of a statement offered as an excited utterance. Cestero v. Ferrara, supra, 57 N.J. at 504; State v. Ramos, 203 N.J. Super. 197 (Law Div. 1985) (court finds two statements made by child victim of sexual assault, one made just after victim returned home from staying at defendant's house the previous night which consisted of victim telling her mother that defendant had touched her private parts and the other, made two weeks later, after victim and her mother drove to defendant's on an errand whereupon victim began to cry and expressed a desire to remain in the car and upon returning home with her mother, became extremely emotionally upset while describing other sexual acts of misconduct which defendant committed upon her, admissible as excited utterances). Cf. State in the Interest of C.A., supra, 201 N.J. Super. at 31-32 (in which statements by child victims to their mother occurring two and three days subsequent to alleged sexual assault and criminal sexual contact were excluded because the court found that the children did not make the statements under the stress of a nervous excitement in contrast to finding that their nervous excitement had dissipated by the time they made them); State v. Ryan, 157 N.J. Super. 121, 126-127 (App. Div. 1978) (exculpatory statement given by defendant charged with rape to police at the time of his arrest indicating that the victim had consented to intercourse was not admissible as an excited utterance).

Admission of a statement as an excited utterance requires a trial court to balance various factors such as the time lapse, the nature of the exciting event, the extent of inquiry, the likelihood of an ability to reflect by the declarant and the declarant's mental and physical condition. Each case must be judged on its own facts. Hence, it is imperative that an appellate court afford considerable deference to the findings and rulings of a trial judge under *N.J.R.E.* 803(c)(2). *State v. Lazarchick*, 314 *N.J. Super*. at 524; *Cestero v. Ferrara, supra,* 57 *N.J.* at 502; *Lieberman v. Saley,* 94 *N.J. Super.* 156, 161 (App. Div. 1967).

An excited utterance need not be reported *in haec verba* to be admissible; thus, the substance or effect of the actual words spoken will suffice, such as a police officer's testimony summarizing the statements of eyewitnesses to a crime. *State v. Reese*, 288 *N.J. Super.* 133 (App. Div. 1996).

In State v. Williams, 214 N.J. Super. 12 (App. Div. 1986), the victim was attacked while walking on a Camden street late at night and stabbed at least nine times. A police officer responding to the scene wrote in his report that the victim told him that the assailant was "pulling on her clothes." At trial, the defendant attempted to introduce evidence of allegedly similar crimes committed in the area by another individual. The trial court excluded the evidence, holding that those attacks were dissimilar to the one in Williams since the latter assault lacked a sexual element. The trial court would not allow the police officer to testify regarding the victim's statement to him, which would provide such an element and make the offenses similar. The Appellate Division held that the victim's statement to the officer was admissible as an excited utterance, since it was made under circumstances indicating the presence of a continuing state of excitement that contraindicates fabrication, provides trustworthiness, and justifies admission.

Fresh complaints made by a child sexual assault victim to her aunt shortly after the assault and to her mother the next morning could also have probably been admitted substantively under former *Evid. R.* 63(4)(b) as excited utterances. *State v. Taylor*, 226 *N.J. Super.* 441 (App. Div. 1988). The court thus held that the admission of the statements as fresh complaints was not plain error. (*See also* Fresh Complaint, *supra*).

F. Included Hearsay

Often hearsay evidence will include another hearsay statement. Such included hearsay evidence is generally admissible under *N.J.R.E.* 805, if each level of hearsay falls within an exception to *N.J.R.E.* 802. For example, in *State v. Lyle*, 73 *N.J.* 403, 411-13 (1977), the Supreme Court held that a witness could testify that shortly before his murder, the victim stated that defendant said "I know you're there Egbert -- you better get out of my house."

The victim's statement fell within the excited utterance exception of *Evid. R.* 63(4)(b), while the defendant's "included" statement was an admission under *Evid. R.* 63(7). *See also Dalton v. Barone*, 310 *N.J. Super.* 375, 378 (App. Div. 1998).

A double hearsay statement attributed to an alleged eyewitness to a murder, that the witness herself committed the crime, was not required to be admitted, since it was for the truth of the matter stated. *State v. Dreher*, 251 *N.J. Super.* 300, 324-25 (App. Div. 1991), *certif. denied*, 127 *N.J.* 564 (1992); *see also State v. Torres*, 313 *N.J. Super.* 129, 157-58 (App. Div.), *certif. denied.*, 156 *N.J.* 425 (1998).

G. Informant Hearsay

In State v. Bankston, 63 N.J. 261, 268-69 (1973), the Supreme Court of New Jersey held that the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so "upon information received." Such testimony has been held to be admissible to show that the officer was not acting in an arbitrary manner or to explain his subsequent conduct. However, when the officer becomes more specific by repeating what some other person told him concerning a crime by the accused, the testimony violates the hearsay rule. See also State v. Irving, 114 N.J. 427 (1989); State v. Douglas, 204 N.J. Super. 265 (App. Div.), certif. denied, 102 N.J. 378 (1985). The admission of such testimony violates the accused's Sixth Amendment right to be confronted by witnesses against him. See State v. Farthing, 331 N.J. Super. 58, 75 (App. Div. 2000); State v. Alston, 312 N.J. Super. 102, 113 (App. Div. 1998); State v. Long, 137 N.J. Super. 124, 133-34 (App. Div.), certif. denied, 70 N.J. 143 (1976).

When the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the defendant's guilt, the testimony should be disallowed as hearsay. *State v. Roach*, 146 *N.J.* 208, 224, *cert. denied*, 519 *U.S.* 1021 (1996); *State v. Irving*, 114 *N.J.* at 444-48; *State v. Bankston*, 63 *N.J.* at 277; *State v. Baker*, 228 *N.J. Super*. 135, 140 (App. Div. 1989). In certain circumstances, the admission of such evidence has been held to have been harmless. *See, e.g., State v. Hightower*, 120 *N.J.* 378, 410 (1990); *State v. Irving*, 114 *N.J.* at 447-48; *State v. Brown*, 325 *N.J. Super.* 447, 451-52 (App. Div. 1999), *certif. denied*, 163 *N.J.* 76 (2000); *State v. Johnson*, 325 *N.J. Super.* 78, 88 (App. Div. 1999); *State v. Torres*, 313 *N.J. Super.* 129, 155-58 (App. Div.), *certif. denied*, 156

N.J. 425 (1998); *State v. Douglas*, 204 *N.J. Super.* at 272-73.

H. Lists and Compilations

For a statement to be admissible under *N.J.R.E.* 803(c)(17), it must (1) be a statement contained in a compilation under the rule, and (2) the compilation must contain matters used and relied upon by persons engaged in an "occupation" or by members of the general public. Biunno, *Current N.J. Rules of Evidence* (2000), Comment 1 to *N.J.R.E.* 803(c)(17) at 857. By including documents relied on by members of the public, the rule expands the scope of former *Evid. R.* 63(30).

In State v. McGee, 131 N.J. Super. 292 (App. Div. 1974), the defendant was charged with bringing a stolen firearm into New Jersey. The prosecution sought to establish that the gun was stolen through testimony regarding a NCIC computer printout of stolen firearms. The Appellate Division held that former *Evid. R.* 63(30) might justify the admission of this evidence because generally "the manner of the list's compilation affects only the weight to be accorded the evidence and not its admissibility." However, the Court ruled that there was an insufficient showing of reliability to warrant the admission of this hearsay evidence. This conclusion was based on the absence of any showing: (1) how and when the owner of the firearm reported its theft to his local police; (2) how and who fed this data into the computer; (3) who programmed the computer and how it was programmed; (4) how the data was retrieved from the computer and (5) the accuracy of those who operated the computer. The court also noted that the computer printout was not presented at trial and there was no showing that the owner of the firearm was unavailable as a witness.

I. Past Recollection Recorded

N.J.R.E. 803(c)(5), formerly *Evid. R.* 63(1)(b), provides for the admission of:

A statement concerning a matter about which the witness is unable to testify fully and accurately because of insufficient present recollection if the statement is contained in a writing or other record which (A) was made at a time when the fact recorded actually occurred or was fresh in the memory of the witness, and (B) was made by the witness himself or under the witness' direction or by some other person for the purpose of recording the statement at the time it was made, and (C) the statement concerns a matter of which the witness had knowledge when it was made, unless the circumstances indicate that the statement is not trustworthy; provided that when the witness does not remember part or all of the contents of a writing, the portion the witness does not remember may be read into evidence but shall not be introduced as an exhibit over objection.

In *State v. Wood*, 66 *N.J.* 8 (1974), the New Jersey Supreme Court, affirming on the opinion below, held that a four month time lapse between an event and it recordation did not preclude the admission of that recordation as past recollection recorded. *Id.* at 9; *State v. Wood*, 130 *N.J. Super.* 401, 408-10 (App. Div. 1974). The *Wood* Court determined that the detailed nature of the statement showed that it was made at a time when the relevant event was fresh in the memory of the witness. *Id.* at 408. The reliability and admissibility of a statement as past recollection recorded is enhanced if the statement is in the handwriting of the declarant and signed by him or her.

The history of *N.J.R.E.* 803(c)(5) indicates that its "freshness" language was intended to permit the admission of a recordation made even months after the events recorded had transpired. Although the exception to the hearsay rule for past recollection is grounded in the common law, former *Evid. R.* 63(1)(b) was deliberately worded to nullify existing New Jersey precedent that required a high degree of temporal proximity between the events recorded and the recordation. *See State v. Cestone*, 38 *N.J. Super.* 139 (App. Div. 1955). The New Jersey Courts have recognized the expanded scope of past recollection recorded and have since the adoption of former *Evid. R.* 63(1)(b) in 1967 admitted such evidence freely. *State v. Wood, supra; Johnson v. Malnati*, 110 *N.J. Super.* 277, 280 (App. Div. 1970).

In *State v. Hacker*, 177 *N.J. Super.* 533 (App. Div.), *certif. denied*, 87 *N.J.* 364 (1981), the court held that the prior statements of a witness given under oath to the grand jury could be read to the jury in a criminal prosecution. Such evidence was admissible as past recollection recorded where the witness stated that she could not recall many of the events to which she testified before the grand jury but that her prior statements were truthful and that she had made them.

In a sexual assault case involving the admission of an out-of-court statement of a juvenile witness, the standards set forth in *N.J.R.E.* 803(c)(27), the "tender years" hearsay exception, should be followed, rather than admitting the statement as past recollection recorded, because such statements "present a special kind of

evidence problem in sexual assault prosecutions." *State v. Delgado*, 327 *N.J. Super.* 137, 145-46 (App. Div. 2000).

J. Prior Consistent Statements (*See also*, **CREDIBILITY** and **BIAS**, *supra*)

Under *N.J.R.E.* 607, formerly *Evid. R.* 20, a prior consistent statement may only be utilized to support the credibility of a witness where there is an express or implied charge against the witness of recent fabrication or improper influence or motive. *N.J.R.E.* 803(a)(2) allows the use of such statements as substantive evidence. While federal law permits the introduction of a consistent statement to rebut a charge of recent fabrication or improper influence or motive only when the statement was made before the charged recent fabrication or improper influence or motive, *Tome v. United States*, 513 *U.S.* 150 (1995), the New Jersey Supreme Court has not yet resolved the issue of whether *N.J.R.E.* 803(a)(2) contains this temporal requirement. *State v. Chew*, 150 *N.J.* 30, 80-81 (1997).

If such evidence is admitted substantively, no cautionary charge is needed. *State v. Torres*, 313 *N.J. Super.* 129, 158-59 (App. Div.), *certif. denied*, 156 *N.J.* 425 (1988).

In *State v. Spano*, 69 *N.J.* 231 (1976), the sister of the defendant provided him with alibi testimony. On her direct testimony she was not permitted to refer to her diary, for the ostensible purpose of refreshing her recollection. The Supreme Court of New Jersey held that this was a proper limitation on the testimony of the witness because there was no need for her to refresh her recollection since she manifested no inability to recall the pertinent event. The use of the diary was actually an improper attempt, barred by former *Evid. R.* 20, to bolster her credibility, prior to any impeachment.

A tape recording of a police officer, made during a chase of a criminal suspect, although not admissible to bolster the officer's credibility under former *Evid. R.* 20, is admissible as highly probative independent evidence of the criminal incident. *State v. King*, 215 *N.J. Super.* 504 (App. Div. 1987).

In *State v. Bass*, 221 *N.J. Super.* 466 (App. Div. 1987), *certif. denied*, 110 *N.J.* 86 (1988), the court held that testimony by two detectives regarding prior statements to them by the brother of a murder victim, consistent with the brother's trial testimony, was properly admitted under former *Evid. R.* 20. The court determined that the cross-examination of the witness was

an attack on his credibility and was calculated to imply that the witness had fabricated his account of the murder of his brother pertaining to the defendant at the urging of the investigators.

K. Prior Identification (*See also*, **IDENTIFICATION**, this Digest)

A statement is admissible if previously made by a person who is a witness at the trial if it is a prior identification of a party and is "made under circumstances precluding unfairness or unreliability." *N.J.R.E.* 803(a)(3), formerly *Evid. R.* 63(1)(a); *State v. Johnson*, 216 *N.J. Super.* 588 (App. Div. 1987). Testimony by police officers regarding descriptions of the defendant given by the victim to the police is admissible under this rule if the victim also testifies. *Id.* The identification need not be unequivocal to be admitted. *State v. Swed*, 255 *N.J. Super.* 228, 246 (App. Div. 1992).

L. Prior Testimony (*See also,* **SIXTH AMENDMENT**, this Digest)

N.J.R.E. 804(b)(1) addresses the admissibility of testimony in other proceedings. The rule, which requires that the declarant be unavailable to testify, states in part

1. Testimony in prior proceedings

(A) Testimony given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive in the prior trial, hearing or proceeding to develop the testimony by examination or cross-examination.

While this rule would allow the introduction of the defendant's testimony from a first trial in a retrial after reversal, where the defendant exercises his Fifth Amendment right not to testify, it does not permit those portions of the prior testimony which would be inadmissible under some other rule of evidence. *State v. Farquharson*, 321 *N.J. Super.* 117, 122 (App. Div.), *certif. denied*, 162 *N.J.* 129 (1999). Thus, the defendant's prior testimony regarding his previous convictions, only admissible under *N.J.R.E.* 609 if he was actually a witness, should have been redacted.

A Law Division case recently held that a defendant may introduce the grand jury testimony of a now unavailable witness, concluding that the State had both the opportunity and a similar motive to examine the exculpatory portions of that witness' testimony before the grand jury. *State v. Gentile*, 331 *N.J. Super.* 386 (Law Div. 2000).

M. State of Mind (See also RES GESTAE, supra)

N.J.R.E. 803(c)(3), formerly Evid. *R.* 63(12)(a), allows the admission of a hearsay statement of:

Then existing mental, emotional, or physical condition. A statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

A statement proffered pursuant to this rule can only establish a state of mind which existed when the declaration was made. See State v. Baldwin, 47 N.J. 379, 394, cert. denied, 385 U.S. 980 (1966); State v. Sejuelas, 94 N.J. Super. 576, 582-83 (App. Div. 1967). However, application of the rule is somewhat broader. In practice, courts have been willing to recognize that an individual's state of mind may continue. Thus, it allows statements of a declarant's intent to act in the future, if the occurrence of that act is in dispute. State v. Benedetto, 120 N.J. 250, 255 (1990); State v. Downey, 237 N.J. Super. 4, 12 (App. Div. 1989), certif. denied, 121 N.J. 627 (1990). See also State v. Scherzer, 301 N.J. Super. 363, 422-423 (App. Div.), certif. denied, 151 N.J. 466 (declaration of mental state by sexual assault victim three days later probative of mental state at the time of the crime); State v. Williams, 106 N.J. Super. 170 (App. Div.), certif. denied, 55 N.J. 78 (1969), cert. denied, 397 U.S. 1057 (1970); In re Spiegelglass, 48 N.J. Super. 265 (App. Div.), certif. denied, 26 N.J. 302 (1968). Hence, the rule admits statements to explain the meaning of both previous and subsequent conduct. State v. Baldwin, supra.

This assumption of a continuing state of mind, however, is not without limitation. It is obvious that a state of mind may change, especially where the context in which the opinion was formulated has been altered. *State v. Williams*, 106 *N.J. Super.* at 172-73. Accordingly, the determination of the probative force, and therefore the admissibility, of a declaration of an individual's mental state is left to the discretion of the trial court. *Id.*; *In re Spiegelglass*, 48 *N.J. Super.* at 272-73. The standard under which the discretion is to be exercised is whether or not there is a reasonable basis to conclude that the relevant state of mind still exists. *Id.* at 273.

The origin of the state of mind exception to the hearsay rule elucidates the nature of that exception and the scope of its availability. The exception has received its earliest and perhaps most extensive discussion in Hunter v. State, 40 N.J.L. 495 (E. & A. 1878). In Hunter, a murder victim made statements which indicated that he was planning to go to Camden that evening with the The admission of those statements was defendant. upheld on appeal on the grounds that the victim's declarations were part of the res gestae and were sufficiently reliable because they either explained the victim's subsequent conduct or they reflected his state of mind at the time they were made, that state of mind being directly in issue. Id. at 536-42; accord, Mutual Life Ins. Co. v. Hillman, 145 U.S. 285 (1802); State v. Thornton, 38 N.J. 380, 389-394 (1962), cert. denied, 374 U.S. 816 (1963). Hunter demonstrates that the state of mind exception, arising as it does from the common law doctrine of *res gestae*, is highly limited in scope. See State v. Baldwin, 47 N.J. 379, 394-96, cert. denied, 385 U.S. 980 (1966); Robertson v. Hackensack Trust Co., 1 N.J. 304, 322 (1949).

In State v. Gibson, 156 N.J. Super. 516 (App. Div.), certif. denied, 78 N.J. 411 (1978), the defendant was charged with possession of drugs with intent to distribute. The crucial transaction occurred in a codefendant's apartment. The defendant sought to prove that he made statements indicating he was going to that apartment to discuss insurance policies. This evidence was excluded. The Appellate Division held that this was error, although harmless in nature, because the statement did arguably fall within the ambit of former Evid. R. 63(12). However, the court noted that the statement might have been properly excluded if the trial court found that it was not "made in good faith." State v. Gibson, 156 N.J. Super. 525-26; Cf. In re Quinlan, 70 N.J. 10, 21-22 (1976), cert. denied, 429 U.S. 992 (1977) (Statements regarding possible termination of extraordinary life sustaining treatment were too remote and impersonal to have probative value).

However, *See also Matter of Conroy*, 98 *N.J.* 321, 361 (1985), where the court held that evidence of the decision which an incompetent person would have made with respect to life sustaining treatment is not impermissible hearsay since oral and written expressions of a person's reactions or desires fit within the existing state of mind exception to the hearsay rule.

The rule often is applied in criminal cases with respect to statements of homicide victims. Generally, a decedent's hearsay statements are not admissible to prove a defendant's motivation or conduct. State v. Benedetto, 120 N.J. at 255-61; State v. Marshall, 123 N.J. 1, 112-13 (1991); State v. Machado, 111 N.J. 480, 489 (1988); State v. Prudden, 212 N.J. Super. 608 (App. Div. 1986); State v. Downey, 206 N.J. Super. 382 (App. Div. 1986). Thus, generalized statements of a victim's fear of the defendant are inadmissible. State v. Benedetto, supra; State v. Machado, supra.

In Machado, the Supreme Court ruled that oral statements made by a homicide victim to others that the defendant was jealous, possessive, and violent towards her, as well as a letter written by the victim to the defendant in which she stated that she left him because she felt her life was in danger, were improperly admitted at the defendant's murder trial. The court held that the victim's state of mind with regard to the danger she felt from the defendant was inadmissible for the purpose of inferring the state of mind of the defendant from those declarations. The court distinguished its holding from that of State v. Baldwin, 47 N.J. 379 (1966), on the basis that the statements in Baldwin were by the defendant and admissible to establish the defendant's state of mind. The Machado Court pointed out, however, that some of the victim's statements could be admissible as background to establish the nature of the relationship between the victim and the defendant. The Court further noted that where the hearsay declarations by the victim did not express fear of the defendant, they might be admissible as a declaration of the victim's state of mind or under some other hearsay exception, such as that pertaining to contemporaneous declarations.

The key to admissibility, therefore, is that the declarant/victim's state of mind must have some relevance to the issues at trial. This may include the admission of state of mind hearsay to establish the nature of the relationship between the victim and the defendant, i.e., the "mosaic" of the event. See also State v. Benedetto, supra; State v. Machado, supra; State v. Vasquez, 265 N.J. Super. 346, 360 (App. Div.), certif. denied, 134 N.J. 480 (1993), but see, State v. Freeman, 223 N.J. Super. 92 (App. Div. 1988) (hearsay statements of a murder victim to her mother, sister, and a friend regarding her relationship with the defendant, her husband, were inadmissible under former Evid. R. 63(12), the statements were considered to be probative of nothing but the marital breakdown between the victim and the defendant). More specifically, the court in *Downey*, 206 N.J. Super. at 392-93, posited three exceptions to the rule prohibiting statements of fear of the victim: (1) where the defendant asserts a claim of self-defense as justification for the killing, (2) where the defendant seeks to defend upon a

claim that the deceased committed suicide, and (3) where the defendant asserts that the decedent died as the result of an accident. *See also State v. Dreher*, 251 *N.J. Super.* at 317.

The trial court abused its discretion in *State v. Bowens*, 219 *N.J. Super.* 290 (App. Div. 1987), when it excluded testimony from the defendant's sister that the grandmother of a five year old sexual assault victim had told her that the grandmother's boyfriend used to beat the grandmother. The defense in the case was that the grandmother's boyfriend had actually committed the assault, and the Appellate Division considered the testimony crucial to establish the grandmother's state of mind, *i.e.*, that she so feared her boyfriend that she would attempt to pin the crime on the defendant rather than accuse her boyfriend for fear of incurring his wrath.

N. Tender Years

N.J.R.E. 803(c)(27) was initially adopted in as *Evid. R.* 63(33). It was proposed in *State v. D.R.*, 109 *N.J.* 348 (1988), to alleviate the difficult problems of proof in sexual assault cases involving children.

A child victim's spontaneous out-of-court account of an act of sexual abuse may be highly credible because of its content and the surrounding circumstances. The Supreme Court in *D.R.* believed that the adoption and application of a modification of the hearsay rule in criminal prosecutions would enable the judicial system to deal more sensitively and effectively with the difficult problems of proof inherent in child sex abuse prosecutions.

The rule states:

Statements by a child relating to a sexual offense. A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to R. 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of R. 601.

The trial court must make a preliminary finding that the out-of-court statement is sufficiently reliable based on the "time, content and circumstances of the statement and then decide what is the probability that the statement is untrustworthy." State v. Smith, 158 N.J. 376, 389 (1999); State v. D.G., 157 N.J. 112, 128 (1999); see also State v. Delgado, 327 N.J. Super. 137 (App. Div. 2000) (admission of statements of children under 12 in sexual assault cases should be reviewed under *N.J.R.E.* 803(c)(27) and not *N.J.R.E.* 803(c)(5), recorded recollection). The court should compare key factors such as the spontaneity and consistency of the child's responses to questions and the language and terminology used by the child. State v. Smith, 158 N.J. at 389-90, citing State v. Michaels, 136 N.J. 299, 318 (1994).

The determinative age is that of the child when the statement is made, not that at the time of trial. *State v. Roman*, 248 *N.J. Super.* 144, 152 (App. Div. 1991). *State v. Maben*, 132 *N.J.* 487 (1993), addresses the situation where the State seeks to offer the statement of a child who is unavailable to testify, requiring a probing inquiry of the State's efforts to locate a missing witness to ensure that the search was duly diligent.

The notice requirement has been viewed as a "critical element" of the rule and "courts should be very reluctant to admit evidence under the tender years exception unless proper and timely notice has been given." *State v. D.G.*, 157 *N.J.* at 128-29; *see also State v. W.L.*, 292 *N.J. Super.* 100, 113 (App. Div. 1996); *State in Interest of S.M.*, 284 *N.J. Super.* 611 (App. Div. 1995).

XII. IMPEACHMENT (See also, PRIOR CONVICTIONS, supra)

A. Impeachment and Immunity

In *New Jersey v. Portash*, 440 *U.S.* 450, 460 (1979), the U.S. Supreme Court held that the defendant's prior testimony before the grand jury under a grant of immunity could not be used to impeach him at his own criminal trial later on.

B. Impeachment and Miranda

A statement elicited from a defendant in violation of the rules set forth in *Miranda v. Arizona*, 384 *U.S.* 436 (1966), may still be used to impeach his credibility as a witness. Oregon v. Hass, 420 U.S. 714, 722-724 (1975); Harris v. New York, 401 U.S. 222, 223, 225 (1971); State v. Burris, 145 N.J. 509 (1996); State v. Miller, 67 N.J. 229, 233, 234 (1975). Burris observed that the impeachment exception is "strictly limited to situations in which the suppressed statement is trustworthy and reliable in that it was given freely and voluntarily without compelling influences." Id. at 525. Even if the statement is voluntary, it may be excluded if prejudicial, cumulative, or misleading. Id. at 534; See N.J.R.E. 403. A defendant should be informed prior to testifying if the State intends to utilize his statement taken in violation of Miranda for impeachment. State v. Burris, 145 N.J. at 535. The jury should be instructed that the evidence is admitted solely to affect the defendant's credibility and not as substantive evidence of guilt. Id. The jury also must be instructed that it may, but need not, consider the statement as affecting the defendant's credibility. Id.

The use of *Miranda* violative statements is highly circumscribed and is limited to impeaching the defendant's own testimony. In *State v. Davis*, 67 *N.J.* 222, 228 (1975), *cert. denied*, 425 *U.S.* 943 (1975), the Supreme Court held that such statements could not be used to impeach the credibility of defense alibi witnesses where the defendant did not testify. *Id.* at 228.

The Appellate Division recently held that a custodial statement without *Miranda* warnings due to prosecutorial, and not police, misconduct could not be used even for impeachment of the defendant, regardless of voluntariness. *State v. Sosinski*, 331 *N.J. Super.* 11 (App. Div. 2000). A petition for certification by the State is pending.

XIII. INFERENCES AND PRESUMPTIONS (See also, PRESUMPTIONS, this Digest)

A presumption is an evidentiary device that enables the trier of fact to determine the existence of an elemental fact from the existence of an evidentiary or basic fact. *State v. Thomas*, 132 *N.J.* 247, 254-55 (1993); *State v. Ingram*, 98 *N.J.* 489, 495 (1985). To be constitutional, in a criminal case, the elemental fact must bear a rational connection, in terms of logical probability, to the evidentiary fact, and must be permissive. *State v. Thomas*, 132 *N.J.* at 255; *State v. Ingram*, 98 *N.J.* at 497-98; *State v. DiRienzo*, 53 *N.J.* 360, 370-77 (1969); *see also*, *Sandstrom v. Montana*, 442 *U.S.* 510, 516-18 (1979).

In *Sandstrom*, the Court held that since the jury was instructed that the law presumes a person intends the ordinary consequences of his voluntary acts, they may have interpreted the presumption as conclusive or as shifting the burden of persuasion, and either interpretation would have violated the 14th Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt, thereby rendering the jury instruction unconstitutional.

In demonstrating whether a presumption is permissive or mandatory, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it. *County of Ulster County v. Allen*, 442 *U.S.* 140 (1979). Thus, a key concern is the specific instructions given to the jury. *State v. Thomas*, 132 *N.J.* at 255; *State v. Ingram*, 98 *N.J.* at 499.

In State v. Stasio, 78 N.J. 467 (1979), the Supreme Court held that a jury should be instructed in terms of inferences which may or may not be drawn from a fact. In Stasio, where defendant was charged with intent to rob and with assault while armed with a dangerous knife, the trial court erred in charging the jury that possession of the knife was prima facie evidence of intent to commit the crime. With respect to negating an inference, the jury should not be instructed with regard to an "explanation," because this might be place an impermissible burden on a defendant's right to remain silent. However, it is proper to charge a jury in impersonal terms that indicate the viability of the inference unless the proven fact "is satisfactorily accounted for." This makes it clear to the jury that the inference may be negated by the evidence as a whole, and not only by the defendant's testimony. State. v. DiRienzo, 53 N.J. at 381-82.

N.J.R.E. 303 governs presumptions against the accused in criminal cases, and embodies the foregoing principles of constitutional law. The Criminal Code contains a number of presumptions which must be construed under this rule. *See also Biunno, Current N.J. Rules of Evidence* (2000), Comment 3 to *N.J.R.E.* 301. Among these are: *N.J.S.A.* 2C:20-7b (receiving stolen property); *N.J.S.A.* 2C:20-71e (fencing); *N.J.S.A.* 2C:20-8a, c, d, and e (theft of various services); *N.J.S.A.* 2C:20-11d (shoplifting); *N.J.S.A.* 2C:21-5 (bad checks); *N.J.S.A.* 2C:21-6c (credit card theft); *N.J.S.A.* 2C:35-11a (imitation CDS); and *N.J.S.A.* 2C:39-2a and b (firearms and absence of permit).

In *State v. DiRienzo*, 53 *N.J.* at 379-80, the Supreme Court upheld the constitutionality of the inference in *N.J.S.A.* 2A:139-1 (presently 2C:20-7) regarding the possession of stolen property within one year after its theft.

Even though unexplained possession of recently stolen property does not fit one of the express presumptions available under *N.J.S.A.* 2C:20-7b for a receiving stolen property charge, the common law rule -- which permitted an inference of guilt under these specific facts -- can still be "invoked" in theft prosecutions under Title 2C. *State v. Alexander*, 215 *N.J. Super.* 523 (App. Div. 1987). The inference also applies where the defendant is in joint possession of the stolen property. *State v. Merritt*, 247 *N.J. Super.* 425, 431-32 (App. Div.), 126 *N.J.* 336 (1991).

In *State v. Humphreys*, 54 *N.J.* 406, 411-14 (1969), the inference set forth in *N.J.S.A.* 2A:151-7 (presently 2C:39-2) of possession of a firearm by all occupants of a vehicle was found to be constitutional.

Similarly, in *State v. Curtis*, 148 *N.J. Super.* 235, 239-40 (App. Div.), *certif. denied*, 75 *N.J.* 22 (1977), the inference in *N.J.S.A.* 2A:170-64 (presently 2C:20-8) that an electric meter has been tampered with by a person being furnished electricity was held to be constitutional; *see also State v. Swed*, 255 *N.J. Super.* 228 (App. Div. 1992); *State v. Fitzmaurice*, 126 *N.J. Super.* 361, 364-365 (App. Div.), *certif. denied*, 65 *N.J.* 562 (1974) (inference of intent to shoplift justified by willful concealment of goods).

In *State v. Ingram, supra,* the Court held that under the statutory presumption that an accused weapons offender does not possess the requisite license or permit unless he establishes to the contrary, the jury may be permitted to infer, until the defendant comes forward with some evidence to the contrary, that the defendant does not possess the required license or permit to carry a dangerous weapon, thereby permitting the jury to make such an inference without offending any notions of due process. *See also, State v. Harmon,* 104 *N.J.* 189, 218 (1986); *State v. Johnson,* 287 *N.J. Super.* 247, 269 (App. Div.), *certif. denied,* 144 *N.J.* 587 (1996); *State v. McCandless,* 190 *N.J. Super.* 75 (App. Div. 1983).

In *State v. Brown*, 80 *N.J.* 587 (1979), the Supreme Court of New Jersey viewed the state's evidence in its entirety, of defendant's presence in an apartment, the heroin found in the closet, other heroin related materials found in the apartment and the fact that known and suspected narcotics users were seen frequenting the apartment, and held this evidence sufficient to allow the jury to draw the relevant inferences and determine beyond a reasonable doubt that the defendant had knowledge and control over the narcotics and that narcotics trafficking took place in defendant's apartment. The court overruled the holding of *State v. Sapp*, 71 *N.J.* 476 (1976), since the Court in *Sapp* did not give appropriate weight to the availability of the inferences to be drawn from all of the surrounding circumstances. The Court acknowledged the jury's right to draw those inferences and to consider them in their totality in concluding that defendant was guilty beyond a reasonable doubt. *State v. Brown*, 80 *N.J.* at 599.

As held in *Brown*, 80 *N.J.* at 592, and reaffirmed in *State v. Kittrell*, 145 *N.J.* 112, 131 (1996), "a jury may draw an inference from a fact whenever it is more probable than not that the inference is true; the veracity of each inference need not be established beyond a reasonable doubt for the jury to draw the inference." *See also State v. Swint*, 328 *N.J. Super.* 236, 251 (App. Div. 2000); *State v. Taccetta*, 301 *N.J. Super.* 227, 240 (App. Div.), *certif. denied*, 152 *N.J.* 187 (1997).

N.J.S.A. 2C:29-2b, the eluding statute, creates a permissive inference "that the flight or attempt to elude creates a risk of death or injury to any person [an element of second degree eluding] if the person's conduct involves a violation of chapter 4 to Title 12 of the Revised Statutes." In a case where the motor vehicle violations are charged to the jury, the failure to define the word injury has been held to be harmless error because of this permissive inference. *State v. Wallace*, 158 *N.J.* 552, 558 (1999).

XIV. JUDICIAL NOTICE (See also, SCIENTIFIC and TECHNICAL EVIDENCE, infra)

N.J.R.E. 201 addresses judicial notice of law and facts and embodies principles contained in former *Evid. R.* 9 through 11. With respect to notice of facts, *N.J.R.E.* 201(b) states:

Facts which may be judicially noticed include (1) such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute, (2) such facts as are so generally known or are of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute, (3) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned, and (4) records of the court in which the action is pending and of any other court of this state or federal court sitting for this state.

Judicial notice serves to provide a speedy and efficient means of proving matters which are not in genuine

dispute. State v. Downie, 117 N.J. 450, 468, cert. denied, 498 U.S. 819 (1990).

"Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence, generally known within the limits of their jurisdiction." *State v. Flowers*, 328 *N.J. Super.* 205, 214 (2000), quoting *Palestroni v. Jacobs*, 8 *N.J. Super.* 438, 444 (Cty Ct.), *rev'd o.g.*, 10 *N.J. Super.* 266 (App. Div. 1950). Thus, in *Flowers*, the stolen vehicle problem in Newark was so universally known in that jurisdiction that it was beyond reasonable dispute, making it unnecessary for the State to present empirical data to justify the site selection for a roadblock checkpoint. *Id.* at 214-15.

A court may take judicial notice whether requested or not, *N.J.R.E.* 201(c), but judicial notice is mandatory "if requested by a party or notice to all other parties and if supplied with the necessary information." *N.J.R.E.* 201(d).

Judicial notice is often utilized in the context of establishing the reliability of a scientific test or technique. When a scientific device has been held to be reliable, it is no longer necessary to have expert testimony on the issue at every trial. State v. Downie, 117 N.J. at 468. Thus, as long as proper procedures are followed, the breathalyzer is a proper subject of judicial notice. Id.; Romano v. Kimmelman, 96 N.J. 66, 82 (1984). The same is true of various devices designed to measure the speed of motor vehicles, State v. Boyington, 159 N.J. Super. 426, 432 (Law Div. 1978); State v. Dantonio, 18 N.J. 570 (1955); State v. Finkle, 128 N.J. Super. 199 (App. Div. 1974), aff'd o.b., 66 N.J. 139 (1974), cert. denied, 423 U.S. 836 (1975); State v. Wojtkowiak, 174 N.J. Super. 460 (App. Div. 1980), and the use of a gas chromatograph mass spectometer to determine the nature of a controlled dangerous substance. State v. Cathcart, 247 N.J. Super. 340, 351-52 (App. Div. 1991).

Judicial notice is a principle of evidence. Thus, a judge's personal knowledge should not be utilized to take judicial notice. *State v. LiButti*, 146 *N.J. Super.* 565, 571 (App. Div. 1977). In *LiButti*, the prosecutor was attempting to show how long it would take an arson suspect to empty a five gallon container of paint thinner. The Appellate Division held that this demonstration should have been conducted prior to the time of argument and was not a proper subject for judicial notice. The court stated:

the theory of judicial notice is that where the court is justified by general considerations in declaring the truth of the proposition without requiring evidence from the party, it may take judicial notice of same. It is, however plainly accepted that the judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer.

Pursuant to *N.J.S.A.* 2C:43-6d, the court, when imposing a sentence under the *Graves Act*, can take judicial notice of any evidence, testimony, or information adduced at the trial, plea hearing or other court proceedings. The same is true with respect to mandatory extended terms for repeat drug offenders under *N.J.S.A.* 2C:43-6f.

A trial court in a drug case is required to take judicial notice of a notarized signature on a laboratory certificate of the person who performed the analysis of the substance and of the fact that the signer is that person. *N.J.S.A.* 2C:35-19b.

XV. PRIVILEGES

A. Attorney-Client Privilege (*See also*, **ATTORNEYS**, this Digest)

The attorney-client privilege has long been recognized in New Jersey, and is currently embodied in *N.J.R.E.* 504 (*N.J.S.A.* 2A:84A-20), formerly *Evid. R.* 26. The need for confidentiality is particularly important in criminal matters. In *State v. Sugar*, 84 *N.J.* 1, 12 (1980), the New Jersey Supreme Court stated:

When confronted with the awesome power of the criminal process, a client is never more in need of professional guidance and advocacy. In this setting, an instinct for survival compels a defendant to confide in an attorney. The necessity of full and open disclosure by a defendant ... imbues that disclosure with an intimacy equal to that of the confessional, and approaching even that of the marital bedroom.

It has also been said, however, that the privilege is not absolute and should be limited to the purposes for which it exists, namely the need for consultation between attorney and client without fear of public disclosure. *State v. Humphreys*, 89 *N.J. Super.* 322, 325 (App. Div. 1965). Thus, the attorney-client privilege will not extend to non-privileged documents which come into the hands of an attorney for the purpose of rendering legal advice to a defendant. In *Fisher v. United States*, 425 *U.S.* 391 (1976), the government subpoenaed the work papers of an accountant employed by the defendant, which were in the hands of the defendant's attorney. The United States Supreme Court held that there was absolutely no constitutional privilege under the Fourth or Fifth Amendment which would preclude compliance with the subpoena. The submission of the papers, prepared by a third party, did not constitute a testimonial act. *Id.* at 397-410. However, where a defense counsel obtains statements from a prosecution witness in preparation for trial and decides not to use such statements at trial, the statements are entitled to protection as attorney's work product and are not subject to discovery. *State v. Williams*, 80 *N.J.* 472 (1979).

The privilege does not permit an attorney's concealment of his client's identity or the fact of his retention as his attorney. *State v. Toscano*, 13 *N.J.* 418 (1953). However, the attorney-client privilege bars a grand jury from compelling an attorney to answer questions concerning the whereabouts of a client under investigation, where the grand jury had already returned an indictment charging the client as a fugitive, where other less intrusive means existed to obtain information that the client was a fugitive and to develop a record in support of the indictment or presentment, and where the prosecutor employed the grand jury as an investigative arm to obtain information unrelated to the indictment. *Matter of Nackson*, 221 *N.J. Super.* 187 (App. Div. 1987), *aff'd*, 114 *N.J.* 527 (1989).

When the privilege is applicable, only the client can waive the protection afforded by the attorney-client privilege. *State v. Sugar, supra.* Furthermore, the formal termination of counsel's role as attorney for his client does not release him from his ethical duty to preserve his client's secrets and confidences and, indeed, he has a continuing obligation to refrain from revealing them. *State v. Belluci,* 81 *N.J.* 531 (1980). However, an attorney consulted on a limited basis for one purpose may not be regarded as having a protected confidential relationship with him on matters entrusted to other lawyers. *State v. Marshall,* 123 *N.J.* 1, 69-70 (1991).

In order for a statement to come within the attorneyclient privilege, it must have been made in confidence between a lawyer and his client in the course of the professional relationship. The lawyer must claim the privilege for the client unless otherwise instructed by the client or the client's representative. *State v. Schubert*, 235 *N.J. Super.* 212, 220 (App. Div. 1989), *certif. denied*, 121 *N.J.* 597 (1990). An attorney need not give the prosecution names of potential trial witnesses until it is determined whether their testimony would be inculpatory or exculpatory, *Matter of Lependorf,* 212 *N.J. Super.* 284, 291-92 (App. Div. 1986), nor give advance notice of whether or not his client intends to testify at trial. *Matter of Mandell,* 250 *N.J. Super.* 125, 129-31 (App. Div. 1991).

In *State v. Mingo*, 77 *N.J.* 576 (1978), the defendant, who was charged with rape and attempted robbery, employed a handwriting expert to compare the defendant's handwriting with that on an incriminating document. The defense sought access to the document for purposes of comparison. The trial court, over objection, required that the defense supply the prosecution with a report prepared by a handwriting expert irrespective of whether or not the defense intended to call the expert as a witness at trial. The report subsequently prepared by the defense expert concluded that the defendant executed the incriminating document. The State called this witness at trial to testify regarding this conclusion.

The Supreme Court in *Mingo* held that this procedure was a denial of the Sixth Amendment right to effective assistance of counsel and an infringement of the attorney-client privilege. Although the report was not "work product," it enjoyed a limited privilege. It was legitimate to require prior disclosure of the report if the defense intended to introduce it or the testimony of the expert witness at trial. However, since the defense did not intend to do so, requiring disclosure of the report and the identity of the handwriting expert was improper. If the defense did not call the expert as a witness, then the State was foreclosed from doing so or from using the expert's report in any way.

In *State v. Pavin*, 202 *N.J. Super.* 255 (App. Div. 1985), however, the court held that the attorney-client privilege does not apply to a communication by an insured to his insurance adjuster unless the communication was made for the dominant purpose of defense of the insured by an attorney and confidentiality was a reasonable expectation of the insured.

In *State v. James Blacknall*, 335 *N.J. Super.* 52 (Law Div. 2000), the Law Division held that the attorneyclient privilege protected statements defendant made to a member of the county's criminal division bail unit. When interviewed by the bail unit's investigator the day after his arrest, the receipt of *Miranda* warnings, and the giving of a statement denying any type of sexual contact with his young niece, the defendant claimed to have touched her vagina accidentally. This admission was reported to the prosecutor's office, and defendant thereafter orally repeated his admission to an investigator of that office but refused to give a taped statement.

The trial court determined that the defendant's statements to the bail unit investigator were protected because the latter was an employee of a state judiciary's criminal case management unit. Part of the investigator's duties was to assist the defendant in determining eligibility for public defender representation, and thus he was an agent of the Public Defender's Office. Also, an arrestee's interview with such an investigator -- a "necessary intermediary" -- requires open communication without the need for the presence of counsel. Here the defendant's statements to the investigator thus fell within the attorney-client privilege, and that privilege was not waived when the investigator reported the defendant's statement to his supervisor and then to the prosecutor's office.

N.J.R.E. 504(3) provides for a presumption that a lawyer-client communication has been made in confidence, unless knowingly made within the hearing of one whose presence nullifies the privilege. A communication made with the intent that it be communicated to others is not privileged, however. *State v. Schubert,* 235 *N.J. Super.* at 220.

B. Cleric-Penitent Privilege

In *State v. Szemple*, 135 *N.J.* 406, 422-23 (1994), the Supreme Court held that *N.J.S.A.* 2A:84A-23 (*N.J.R.E.* 511), as then existing, conferred "a testimonial privilege only on clergypersons," and the penitent had no power to preclude disclosure. Responding to this ruling, the Legislature quickly amended the privilege to allow both the cleric and the penitent to hold it.

A "cleric" must be a "person or practitioner [of any religion] authorized to perform "functions similar to a priest, rabbi, or minister. Communications to a nun who was not so authorized were held not to be privileged. *In re Murtha*, 115 *N.J. Super.* 380, 387 (App. Div. 1971).

The communication must be made in confidence in the cleric's "professional character, or as a spiritual adviser." Thus, a confession to a Baptist deacon who was also a New Jersey State Trooper and performing both functions was held to be not privileged in *State v. Cary*, 331 *N.J. Super.* 236 (App. Div. 2000).

C. Marital Privilege

N.J.R.E. 509 (*N.J.S.A.* 2A:84A-22), formerly *Evid. R.* 28, permits disclosure in a criminal proceeding of confidential communications between spouses if either spouse consents. This is a significant change from prior law; before amendment in November 1992, disclosure was permitted only with the consent of both spouses. Thus, while the policy underlying the privilege is to encourage free and uninhibited communication between spouses and to protect the sanctity and tranquility of marriage, "the amendment clearly demonstrates the Legislature's intent to limit significantly the preclusive effect of the marital-communications privilege." *State v. Szemple*, 135 *N.J.* 406, 414 (1994).

If a confidential spousal communication is overheard by a third party, then the third party may testify to the communication. In *State v. Sidoti*, 134 *N.J. Super.* 426, 430-31 (App. Div. 1975), the State was in possession of tape recordings of non-incriminatory conversations between the defendant and his wife. The tape recordings were introduced to corroborate the identification of defendant in other telephone conversations. The Appellate Division held that the tapes were properly admitted and that generally "a third person overhearing a confidential communication between a husband and wife may testify as to it." The same is true with respect to a written communication obtained by a third party. *State v. Szemple*, 135 *N.J.* at 414-19.

While the confidential communications privilege of *N.J.R.E.* 509 survives a subsequent divorce, it must be proved that the communication was confidential in nature and made during the course of the marriage. In *State v. Brown*, 113 *N.J. Super.* 348 (App. Div. 1971), the State adduced the testimony of the defendant's divorced wife to the effect that, during their marriage she overheard the defendant make incriminatory statements to a third party. The Appellate Division held that this testimony was not barred by former *Evid. R.* 28.

The marital testimonial privilege is not extended to encompass conversations between a parent and child. *In the Matter of Gail D.*, 217 *N.J. Super.* 226 (App. Div. 1987).

The privilege in *N.J.R.E.* 509 does not apply in a criminal action or proceeding coming within *N.J.R.E.* 501(2) (*N.J.S.A.* 2C:84A-17), formerly *Evid. R.* 23(2). This provision states:

The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse consents, or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent, or (c) such spouse is the complainant.

By its terms, it is inapplicable if the parties are divorced when the testimony is offered at trial. *State v. Lado*, 275 *N.J. Super.* 140, 151 n.6 (App. Div.), *certif. denied*, 138 *N.J.* 271 (1994).

The rule does not preclude a defendant from compelling the testimony of his spouse on his behalf. *State v. Santoro*, 229 *N.J. Super.* 501, 506-07 (App. Div. 1988).

The testimonial privilege of *N.J.R.E.* 501(2) is inapplicable if the defendant is charged with an offense against his or her spouse or child. In *State v. Eason*, 138 *N.J. Super.* 249 (App. Div. 1975), a defendant, who was charged with murder, had slapped his wife during the criminal transaction. No complaint or indictment for the assault on his wife was ever filed against the defendant. The Appellate Division held that since there were no pending charges relating to that assault, the defendant's wife could not, under former *Evid. R.* 23(2), testify against him.

However, a spouse may give testimony regarding an entire criminal event of which the offenses against him or her were just a part, even if the offenses against the spouse are tried separately or are of a lesser nature. *State v. Briley*, 53 *N.J.* 498, 507 (1968); *see also State v. Lado*, 275 *N.J. Super.* at 153-55.

Where spouses are co-defendants, and there is a realistic prospect that one spouse might incriminate another, then a severance must be granted if sought before trial. *State v. Ospina*, 239 *N.J. Super.* 645, 652 (App. Div. 1990), *certif. denied*, 127 *N.J.* 321 (1992); *State v. White*, 195 *N.J. Super.* 457 (Law Div. 1984). If not raised, however, it can be deemed waived. *State v. Ospina*, 239 *N.J. Super.* at 654.

The assertion of the marital privilege should not take place before the jury. *State v. Piscopo*, 131 *N.J. Super.* 257 (App. Div. 1974). If a prosecutor wishes to call a defendant's spouse as a witness and the prosecutor is uncertain as to whether or not a marital privilege will be invoked, the proper course is for him to request a *voir dire* to determine if there will be a valid assertion of the privilege.

In *State v. Walker*, 80 *N.J.* 187 (1979), the Supreme Court held that the prosecutor's summation comments to the jury concerning defendant's failure to call his wife as a witness in support of his alibi was not a violation of defendant's marital privilege under former *Evid. R.* 23(2), since the defendant in effect waived his privilege by indicating during the course of the trial that his wife as a witness would support his defense. *See also State v. Lowry*, 49 *N.J.* 476 (1967), where the Court held that a prosecutorial comment concerning the nonappearance of a defendant's wife as a witness was proper where the defendant indicated during the trial that he intended to call his wife as a witness.

The marital privilege has been held to be inapplicable to proceedings before the State Commission of Investigation since the privilege only prohibits testimony in the courtroom by a spouse and does not prevent the State from obtaining information from one spouse in order to aid in the other's apprehension. *In re Vitabile*, 188 *N.J. Super.* 61 (App. Div. 1981), *certif. denied*, 94 *N.J.* 506 (1983).

The attempted marriage of a defendant to a witness, for the purpose of invoking *N.J.R.E.* 501(2), may be admissible as evidence of consciousness of guilt. *State v. Rivera*, 232 *N.J. Super.* 165, 174 (App. Div.), *certif. denied*, 117 *N.J.* 169 (1989).

D. Marriage or Family Therapist Privilege

Under N.J.S.A. 45:8B-29 (N.J.R.E. 510), a privilege is created with regard to communications between a marriage or family therapist and the person or persons being counseled. This privilege applies to all communications, confidential or not, and applies to all marriage counselors whether licensed or not under the Act. Kinsella v. Kinsella, 150 N.J. 276, 304-05 (1997); Wichansky v. Wichansky, 126 N.J. Super. 156 (Ch. Div. 1973). However, where both the husband and the wife voluntarily consent to a waiver of the privilege, the marriage counselor cannot claim an independent privilege for himself. Touma v. Touma, 140 N.J. Super. 544 (Ch. Div. 1976). One party may not force disclosure of communications made by another party when both were engaged in common therapy. Kinsella v. Kinsella, 150 N.J. at 305.

In *State v. Roma*, 140 *N.J. Super.* 582 (Law Div. 1976), supplemented 143 *N.J. Super.* 504 (Law Div.

1976), a defendant was charged with the brutal and senseless slaying of his wife and his infant son. For use at a competency hearing, both the prosecution and the defense subpoenaed a marriage counselor and his files. The *Roma* court held that the privilege improperly infringed on the defendant's rights to compulsory process in his defense and due process of law. Hence, the privilege was unconstitutional as applied to the facts of this case.

The privilege has also been held to be unconstitutional in the context of child custody disputes since it interferes with a child's due process right to have introduced relevant evidence concerning the child's best interests and welfare. *M. v. K.*, 186 *N.J. Super.* 363 (Ch. Div. 1982).

E. Physician-Patient Privilege

The physician-patient privilege is contained N.J.R.E. 506 (N.J.S.A. 2A:84A-22.1 et seq.). The purpose of the privilege is to permit patients to disclose facts necessary for diagnosis and treatment, by protecting the patient from the adverse consequences that would follow from disclosure. State v. Dyal, 97 N.J. 229, 237 The privilege is to be strictly construed, (1984).however, and while it applies to a prosecution for a crime or disorderly persons offense, it does not apply to a prosecution for a violation of the motor vehicle laws, including one for driving while intoxicated. State v. Schreiber, 122 N.J. 579, 588 (1991). Moreover, even if a physician violates the privilege and informs police of a privileged communication, the police are not required to ignore evidence voluntarily placed before them. Id. at 587; State v. Smith, 307 N.J. Super. 1, 14 (App. Div. 1997), certif. denied, 153 N.J. 216 (1998).

In State in Interest of M.P.C., 165 N.J. Super. 131 (App. Div. 1979), a juvenile prosecution, the juvenile was arrested and taken to a hospital for blood tests and treatment. The hospital provided treatment, but the hospital personnel wrongfully refused to perform the blood tests requested by the police. The State subpoenaed the records of the hospital to obtain the results of diagnostic blood tests performed on the defendant. The defendant asserted the physician-patient privilege, but the Appellate Division affirmed the trial court's decision that the request for blood tests and the results thereof should have been honored by the hospital staff, for different reasons. The court agreed with the trial court that a blood test is a "confidential communication" under N.J.S.A. 2A:84A-22.1d since the term is defined as including information obtained by an examination of a patient. However, the court held that the statutory patient-physician privilege was inapplicable, since the defendant did not fall under the definition of patient as defined by *N.J.S.A.* 2A:84A-22.1a, as the defendant had not submitted to an examination by a physician for the *sole* purpose of securing treatment or a diagnosis preliminary to treatment of his physical or mental condition.

In *State v. Dyal, supra*, the Supreme Court of New Jersey expanded the ruling in *M.P.C.* by holding that to obtain the results of a blood test that was protected by the patient-physician privilege, the police should apply to a municipal court judge for a subpoena *duces tecum.* "Upon a showing by the police that they have a reasonable basis to believe the defendant was operating a motor vehicle while under the influence, the judge may issue a subpoena. In establishing a reasonable basis, the police may rely on objective facts known by them at the time of the event or within a reasonable time thereafter." *Id.* at 232. Although *M.P.C.* and *Dyal* no longer apply to motor vehicle offenses after *Schreiber*, their analysis still has validity with respect to crimes or disorderly persons prosecutions, *e.g.*, a death by auto case.

The holder of the physician-patient privilege is the patient. *State v. Barath*, 169 N.J. Super. 181, 188 (Law Div. 1979), *aff'd o.b.*, 172 *N.J. Super.* 230 (App. Div. 1980). However, the privilege can be waived where defendant interjects an issue concerning a statement he made to his physician which contradicts his own testimony. *See State v. Soney*, 177 *N.J. Super.* 47 (App. Div. 1980), *certif. denied*, 87 *N.J.* 13 (1981).

Communications made to medical personnel within the hearing of others are not privileged, nor are observations by medical personnel observable by others. *State v. Phillips*, 213 *N.J. Super.* 534, 541-42, 545 (App. Div. 1986).

N.J.S.A. 2A:84-22.4 (*N.J.R.E.* 506(d)) limits the privilege where the condition of the patient is an element or factor of a defense. Thus, the State should be given pretrial access to any medical records or other information dealing with a murder defendant's prior treatment for physical abuse caused by her victim-husband, where it appears inevitable or "highly probable" that the defendant will allege the prior abuse at trial in order to lower the degree of homicide. *State v. Alston,* 212 *N.J. Super.* 644 (App. Div. 1986). The defendant told police shortly after the homicide that she had killed her husband because of prior physical abuse, specifically naming two centers where she had been treated for this

abuse. The court noted, in ordering that pre-trial discovery be granted, the exception to the physicianpatient privilege where the condition of the patient is a defense to a legal action. While there could be no absolute assurance that the defendant would put forth evidence at trial charging prior abuse by the victim, the Court held, under the circumstances of this case, that it would be "fundamentally unfair" to withhold defendant's records from the State until such time as the defense was raised at trial.

F. Psychologist - Patient Privilege

N.J.R.E. 505, also *N.J.S.A.* 45:14B-28, provides that "confidential relations and communications between a licensed practicing psychologist and [patient] ... are placed on the same basis as those provided between attorney and client." As with the attorney-client privilege, the privilege belongs to the patient and any waiver must be made by the patient. *State v. L.J.P.*, 270 *N.J. Super.* 429, 438 (App. Div. 1994). It is of greater scope and protection than the physician-patient privilege. *Id.* at 439; *see also Kinsella v. Kinsella*, 150 *N.J.* 276, 298 n. 1 (1997).

In State v. McBride, 213 N.J. Super. 255 (App. Div. 1986), the defendant was convicted of aggravated assault in viciously attacking his wife with a metal pipe, striking her in the head, and also banging her head on an asphalt driveway. The victim was subsequently hospitalized, suffering from organic brain syndrome, the symptoms of which were disturbed mental behavior, the making-up of stories, and retrograde amnesia. A clinical psychologist examined the victim, and his conclusions were partially relied upon by another doctor who testified regarding his continuing diagnosis and treatment of the victim following her hospital discharge. The report apparently referred to the victim's mental disorder as not organically caused by head trauma and described certain problems the victim had with reality. The trial court precluded defense counsel from cross-examining the second doctor concerning the clinical psychologist's report, basing its decision upon the privilege.

The Appellate Division in *McBride* ruled that, despite the psychologist-patient privilege, the trial court should have made an *in camera* inspection of the report to determine its relevance, since "common notions of fairness" may compel limited disclosure of otherwise confidential communications. *See also Arena v. Saphier*, 201 *N.J. Super.* 79 (App. Div. 1985). The court can limit the scope of inquiry in order both to preserve confidential communications the victim may have made to the clinical

psychologist and to accommodate the defendant's need to show the mental condition of the victim where there might have been other causes of her mental disorder and where it might affect the credibility of both the doctor and the victim.

Although, unlike the physician-patient privilege, there is no explicit exception for information required by another statute to be reported, *State v. Snell*, 314 *N.J. Super.* 331, 337 (App. Div. 1998), held that a psychotherapist consulted for treatment by a child sexual abuser was obligated by *N.J.S.A.* 9:6-8.10 to report the abuse to the Division of Youth and Family Services. However, the privilege is not completely lost, and the therapist cannot be forced to testify regarding the privileged communications at the defendant's trial. *State v. Snell*, 314 *N.J. Super.* at 339.

XVI. NEUTRALIZATION (See also, HEARSAY, PRIOR CONSISTENT STATEMENTS, supra)

Pursuant to *N.J.R.E.* 607, formerly *Evid. R.* 20, the party calling a witness may not neutralize the testimony of that witness with a prior contradictory statement unless the party is surprised by the testimony of the witness or the statement is in a form admissible under *N.J.R.E.* 803(a)(1), formerly *Evid. R.* 63(1)(a). *State v. Nelson,* 318 *N.J. Super.* 242 251 (App. Div.), *certif. denied,* 158 *N.J.* 687 (1999); *State v. Johnson,* 216 *N.J. Super.* 588, 608-09 (App. Div. 1987). Neutralization serves to erase or cancel the unexpected harmful testimony by showing that the witness has made a prior contradictory statement. *State v. Gallicchio,* 44 *N.J.* 540 (1965).

When evidence of a prior contradictory statement is admitted for neutralization, the trial court must instruct the jury on the limited purpose for which that evidence may be considered. *Id.; State v. Johnson*, 216 *N.J. Super.* at 609. The contradictory statements are not admissible as substantive evidence unless the reliability requirements of *N.J.R.E.* 803(a)(1) are met. A hearing pursuant to *N.J.R.E.* 104(a) must be held with respect to the testimony sought to be neutralized, either before the witness testifies, if it is known he will not adhere to prior statements, or if the State had no indication that the witness would give contradictory testimony, after the testimony sought to be neutralized is given. *State v. Johnson*, 216 *N.J. Super.* at 609. The admission of explicit pictures, even of a deceased victim, has traditionally been a matter within the discretion of the trial court. *State v. Marshall*, 123 *N.J.* 1, 99 (1991); *State v. Johnson*, 120 *N.J.* 263, 297 (1990); *State v. Lamb*, 71 *N.J.* 545, 551 (1976); *State v. Thompson*, 59 *N.J.* 396, 420 (1971); *State v. Gosser*, 50 *N.J.* 438 (1967), *cert. denied*, 390 *U.S.* 1035 (1968).

Pictures of a murdered body are likely to cause some emotional stirring in any case, but that of itself does not render them incompetent. They become inadmissible only when their probative value is so significantly outweighed by their inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence. [*State v. Thompson*, 59 *N.J.* at 421; *see also State v. Sanchez*, 224 *N.J. Super.* 231, 249 (App. Div.), *certif. denied*, 111 *N.J.* 653 (1988)].

In order to be admissible, photographs must be "logically relevant" to an issue in the case. State v. Bey II, 112 *N.J.* 123, 182 (1988). The "admissibility of photographs of the victim of a crime rests in the discretion of the trial court, and the exercise of its discretion will not be reversed in the absence of a palpable abuse thereof." State v. Thompson, 59 N.J. at 420; State v. Branch, 301 N.J. Super. 307 (App. Div. 1997), rev'd in part o.g., 155 N.J. 317 (1988). The test for the admissibility of photographs of dead bodies was established in State v. Smith, 32 N.J. 501 (1960), cert. denied, 364 U.S. 936 (1961), where the Supreme Court held that a picture with "some probative value" though inflammatory could be admitted at the trial court's discretion unless its "logical relevance" was "overwhelmed by the inherently prejudicial nature of the photo." Id. at 525. There can be no reversal of a conviction unless the trial court's admission of such photographs is clearly shown to be a "palpable abuse" of its discretion. State v. Lamb, 71 N.J. at 551; State v. Thompson, 59 N.J. at 420; see also State v. Grunow, 199 N.J. Super. 241, 253 (App. Div. 1985), where the admission of a video tape and a mannequin were upheld by the court. Nor does the fact that photographic evidence is cumulative render photographs inadmissible. State v. Thompson, 59 N.J. at 421; State v. Micheliche, 220 N.J. Super. 532, 545 (App. Div.), certif. denied, 109 N.J. 40 (1987).

Authentication of photographs as evidence does not require the testimony of the photographer or developer of the photographs. It is sufficient if a witness, who has observed the scene, testifies that the photographs accurately depict the subject as it appeared at a relevant time. *State v. Kennedy*, 135 *N.J. Super.* 513, 525 (App. Div. 1975).

XVIII. PHYSICAL OR MENTAL EXAMINA-TION (See also, SELF-INCRIMINATION, this Digest)

N.J.R.E. 503(a) (*N.J.S.A.* 2A:84A-19) provides that no person has the right to refuse to submit to an examination for the purpose of discovering his physical or mental condition. Identifying characteristics and the physical or psychic condition of a person are nontestimonial and beyond the privilege against selfincrimination. *Schmerber v. California*, 384 *U.S.* 757 (1966). Since the refusal to take a test, such as a breathalyzer test, is non-testimonial, it may be admitted into evidence against the defendant. *State v. Stever*, 107 *N.J.* 543, 558 (1987); *see also State v. Cary*, 49 *N.J.* 343, 352 (1967).

XIX. PLEA OF GUILTY

In *State v. Boone*, 66 *N.J.* 38, 45-50 (1974), the Supreme Court held that a defendant's withdrawn plea of guilty could not be subsequently used for any purpose. This rule is now contained in *N.J.R.E.* 410, which provides:

Except as otherwise provided in this rule, evidence of a plea of guilty which was later withdrawn, of any statement made in the course of that plea proceeding, and of any statement made during plea negotiations when either no guilty plea resulted or a guilty plea was later withdrawn, is not admissible in any civil or criminal proceeding against the person who made the plea or statement or who was the subject of the plea negotiations. However, such a statement is admissible (1) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should in fairness be considered contemporaneously with it, or (2) in a criminal proceeding for perjury, false statement, or other similar offense, if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

The rule essentially supersedes *State v. Boyle*, 198 *N.J. Super.* 64 (App. Div. 1984), which permitted the use of a statement made during plea negotiations. *See also State v. Malik-Ismail*, 292 *N.J. Super.* 590, 595 (App. Div. 1996). A statement given the same day as a

withdrawn guilty plea was held to be within the scope of the rule. *Id.*

An uncounselled statement made as part of negotiations with a prosecutor relating to the proper sentence upon disposition of the criminal charges should not be admitted against the defendant if the case is not disposed of by plea. *State v. Watford*, 261 *N.J. Super.* 151, 159 (App. Div. 1992). However, it would be a "reasonable exercise of discretion" under *N.J.R.E.* 101(a)(2)(c) to relax *N.J.R.E.* 410 to allow the use of a statement made during plea negotiations to rebut a factual contention expressly or inferentially raised during a *Graves Act* sentencing proceeding with respect to whether a gun was real. *State v. Hawkins*, 316 *N.J. Super.* 74, 82 (App. Div. 1998), *certif. denied*, 162 *N.J.* 489 (1999).

It is not permissible for the prosecution to show, even by innuendo, that a defendant's alleged accomplice has been indicted or convicted of the same offense charged against the defendant. *State v. Felton*, 131 *N.J. Super.* 344, 353-54 (App. Div. 1974), *certif. denied*, 68 *N.J.* 140 (1975). Furthermore, the guilty plea of a codefendant is inadmissible in the separate trial of another defendant as substantive evidence of his guilt. *State v. Stefanelli*, 78 *N.J.* 418 (1979).

The exception in *N.J.R.E.* 410(2) for use of guilty plea statements in prosecutions for perjury or false swearing does not impermissibly chill a defendant's constitutional right to testify. *State v. Rodriguez*, 280 *N.J. Super.* 590 (App. Div. 1995).

A plea of guilty, but before sentence, is sufficient to constitute a conviction of a crime for purposes of impeaching the credibility of a witness. *State v. Baker*, 133 *N.J. Super.* 398, 401-02 (App. Div. 1975). In *Baker* the guilty plea was previously entered by a prosecution witness who was testifying against the defendant. The *Baker* court held that the plea constituted a conviction and that the witness might have been attempting to curry favor with the prosecution through his testimony. Hence, evidence of the guilty plea would have demonstrated the witness's bias.

XX. POLYGRAPHS (See also, POLYGRAPHS, thisDigest)

The only way to admit as evidence the results of a polygraph examination is for the State and the defendant to enter into a clear, unequivocal, and complete stipulation. *State v. Carter*, 91 *N.J.* 86, 116 (1982); *State*

v. McDavitt, 62 N.J. 36, 46 (1972); State v. Reyes, 237 N.J. Super. 250, 263 (App. Div. 1989); State v. Hollander, 201 N.J. Super. 453, 477 (App. Div.), certif. denied, 101 N.J. 335 (1985). A pretrial hearing on the reliability of a stipulated polygraph is unwarranted since the requirement of the stipulation for admissibility presumes the unreliability of the test. State v. McMahon, 217 N.J. Super. 182, 186 (Law Div. 1986).

An "uncounseled" defendant will be bound by a stipulation which provisions bar the polygraph admissibility of any subsequent, independent test conducted on that defendant. State v. Capone, 215 N.J. *Super.* 497 (App. Div. 1987). The court expressly disapproved of State v. Finn, 175 N.J. Super. 13 (Law Div. 1980), which held that a defendant could not alone waive his right to have his own polygraph exam admitted, or to call an expert witness to refute the results of the State's test. It should be noted that the defendant in Capone did consult with an attorney, apparently by telephone, the day before entering into the stipulation. The court further implied that, while the State did not raise the issue on appeal, the defendant should also not be permitted to call his own expert at trial to challenge the results of the stipulated polygraph.

In *State v. Jones*, 224 *N.J. Super.* 527 (App. Div. 1988), the defense to a robbery charge was based primarily on the results of a polygraph test taken by a State investigator wherein the investigator testified that defendant was being truthful when he stated during the test that he was not involved in the robbery. The Appellate Division held that the trial court's instruction that "the opinion [of the polygraph expert] is not by itself sufficient evidence to support a finding of guilt or innocence" was erroneous because it implied that the defendant had a burden to present evidence of his innocence and that this burden could not be satisfied by the polygrapher's opinion alone but had to be supported by other evidence.

XXI. PRIOR CONVICTIONS

Pursuant to *N.J.R.E.* 609, the credibility of any witness may be affected through the production of evidence of the witness's prior conviction of crime. *N.J.S.A.* 2A:81-12, which was the sole provision addressing this area prior to the revision of the Evidence Rules in 1993, was repealed effective January 6, 2000. For purposes of such impeachment, only convictions for indictable offenses may be used to affect a witness's credibility. *State v. Rowe*, 57 *N.J.* 293, 302 (1970); *State*

v Kociolek, 23 N.J. 400, 420 (1957); State v. Jenkins, 299 N.J. Super. 61, 72 (App. Div. 1997).

In State v. Sands, 76 N.J. 127 (1978), the New Jersey Supreme Court held that the admission in evidence of prior conviction rests in the sound discretion of the trial court. Such evidence should be generally admitted, and the defendant must shoulder the burden of proof to justify exclusion. Id. at 144. Exclusion is only warranted upon a strong showing of remoteness. This remoteness arises from the length of time between the conviction and the trial as well as from the nature of the offense with regard to the defendant's honesty and veracity. These factors must be balanced against the prejudice to a defendant. However, since there is a presumption in favor of the admission of prior conviction evidence, even a temporally remote offense may be admitted if it is one of a series of criminal convictions. Id. at 142-47. The holding in Sands is incorporated into N.J.R.E. 609 by allowing the judge to exclude evidence of a prior conviction "as remote or for other causes."

In *State v. Whitehead*, 104 *N.J.* 353 (1986), the New Jersey Supreme Court reversed the ruling of the Appellate Division, 203 *N.J. Super.* 209 (App. Div. 1985), that a defendant must testify in order to preserve his right to challenge on appeal the trial court's discretionary decision permitting his prior convictions to be introduced. The Supreme Court, differing with *Luce v. United States*, 469 *U.S.* 38 (1984), upon which the Appellate Division had relied, concluded that a defendant need not testify at trial to obtain appellate review of a trial court's ruling that the defendant's convictions may be used for impeachment purposes.

In State v. Brunson, 132 N.J. 377 (1993), the Supreme Court, overruling prior precedent, see State v. Pennington, 119 N.J. 547 (1990), modified the ruling in Sands and held that because of difficulty a juror would have in following a limiting instruction in a case in which the defendant has been convicted previously of a crime "that is the same or similar to the offense charged," the State may only introduce evidence of the prior similar conviction limited to the degree of the time and the date of the offense, excluding any evidence of the specific crime. State v. Brunson, 132 N.J. at 391. The State may also introduce evidence of the sentence imposed on the "sanitized" conviction. State v. Hicks, 283 N.J. Super. 301 (App. Div. 1995), certif. denied, 143 N.J. 327 (1996). If there are multiple convictions, some of which require sanitization and some of which do not, the State may introduce sanitized evidence of all of the convictions or unsanitized evidence of the dissimilar convictions. State v. Brunson, 132 N.J. at 394; State v. Jenkins, 299 N.J. Super. at 71. Similarity need not be precise, e.g., in a robbery prosecution, sanitization of a prior conviction for receiving stolen property was required. State v. White, 297 N.J. Super. 376, 381-82 (App. Div.), certif. denied, 149 N.J. 407 (1997); see also State v. Singleton, 308 N.J. Super. 411 (App. Div. 1998).

The balancing standard of *Sands* also applies to nondefendant witnesses who are subject to impeachment by prior convictions. *State v. Balthrop*, 92 *N.J.* 542, 544-46 (1983); *State v. L.J.P.*, 270 *N.J. Super.* 429, 433-34 (App. Div. 1994).

In *State v. Knight*, 63 *N.J.* 187, 194-95 (1973), the Supreme Court held that correct practice calls for the trial court to advise the jury that in considering the prior convictions which have been introduced at trial they may or may not conclude that the credibility of the witness is affected thereby and to what extent. *See also State v. Burgos*, 262 *N.J. Super.* 1, 4 (App. Div. 1992).

In *State v. Michael Wray*, 336 *N.J. Super.* 205 (App. Div. 2001), held that while the defendant had testified at trial and was questioned about his prior criminal record relating to its possible effect on his credibility, submission of a previously bifurcated charge of possession of a weapon by a convicted felon to the jury improperly expanded this evidence's proper purpose from that of credibility to consideration as substantive proof of possession by a convicted felon. This was so even though the trial court had decided without objection to submit both charges to the jury and instructed the jury that defendant's prior convictions could only be used for credibility purposes.

Generally, a prior conviction cannot be used for impeachment purposes if then on appeal. *State v. Williams*, 299 *N.J. Super.* 264, 274 (App. Div. 1997); *State v. Blue*, 129 *N.J. Super.* 8, 12 (App. Div.), *certif. denied*, 66 *N.J.* 328 (1974); *but see State v. Nelson*, 318 *N.J. Super.* 242, 254-55 (App. Div.), *certif. denied*, 158 *N.J.* 687 (1999) (admission of foreign conviction on appeal at time of trial harmless when conviction affirmed pending appeal in New Jersey).

Juvenile offenses are not crimes, and proof of a delinquency adjudication, even one attended by legal representation and which would have constituted an indictable offense if committed by an adult, is not admissible for purposes of impeachment of the juvenile himself. *State in Interest of K.P.*, 167 *N.J. Super.* 290 (App. Div. 1979), *certif. denied*, 87 *N.J.* 394 (1981).

Although a juvenile offense may not be utilized to impeach a defendant's credibility, he may not misrepresent his juvenile record. In *State v. Buffa*, 51 *N.J. Super.* 218, 233 (App. Div. 1958), *aff'd*, 31 *N.J.* 378 (1960), *cert. denied*, 364 *U.S.* 916 (1960), the defendant on direct examination testified to two prior juvenile convictions. On cross-examination the prosecutor sought to examine the defendant as to other juvenile offenses. The *Buffa* court stated:

This would amount to a waiver of objection to crossexamination as to juvenile offenses if designed to show there was more than one offense or more than two convictions of crime. Certainly, the State is not compelled to stand by helpless when a defendant misrepresents the number or character of prior convictions.

Although evidence relating to a juvenile adjudication of guilt is not admissible merely to affect the credibility of a witness, such evidence is admissible as a matter of constitutional law to demonstrate the bias or interest of the witness in testifying against the defendant. *Davis v. Alaska*, 415 *U.S.* 308 (1974).

Conviction of a juvenile at a trial as an adult is admissible to impeach credibility. *See State v. Paige*, 256 *N.J. Super.* 362, 371 (App. Div.), *certif. denied*, 130 *N.J.* 17 (1992); *State v. Stefanelli*, 133 *N.J. Super.* 512, 514 (App. Div. 1975), *certif. denied*, 67 *N.J.* 102 (1975). In such a case, the trial judge may instruct the jury that, in determining the weight to accord the conviction, they may consider the defendant's status as a juvenile when he committed the crime. *Id.* at 514.

For the purpose of attacking the credibility of a witness, his prior sentencing for crime on a plea of non vult or nolo contendere should be treated just like a conviction after a trial or a plea of guilty. *State v. Parker*, 33 *N.J.* 79, 94-95 (1960).

An uncounseled guilty plea or conviction may not be used to affect a defendant's credibility. *Loper v. Beto*, 405 *U.S.* 473, 483-84 (1972). *See Burgett v. Texas*, 389 *U.S.* 109 (1967); *State v. Koch*, 118 *N.J. Super.* 421 (App. Div. 1972). If the record is silent regarding representation at the time of the prior conviction, the defendant has the burden of producing some evidence to substantiate a claim of no representation. *State v. H.G.G.*, 202 *N.J. Super.* 267, 279-80 (App. Div. 1985).

A defendant should ordinarily be barred on postconviction review and on appeal from complaining of the use by the State at trial of prior uncounseled convictions to affect credibility if he failed to object on that ground at trial. *State v. Miscavage*, 62 *N.J.* 294, 300-03 (1973).

In *State v. Lueder*, 74 *N.J.* 62 (1977), a defendant was impeached by the use of a prior conviction that followed an uncounseled juvenile waiver proceeding. The waiver proceeding was prior to the United States Supreme Court's decision in *Kent v. United States*, 383 *U.S.* 541 (1966), which required counsel at juvenile waiver proceedings. The New Jersey Supreme Court in *Lueder* held that the prior conviction could be used to impeach the defendant's credibility, declining to apply *Kent* retroactively.

XXII. PRIOR CRIMES -- N.J.R.E. 404(b)

A. Prior Crimes - Generally

The admission of evidence of other crimes, wrongs, or acts is governed by *N.J.R.E.* 404(b), formerly *Evid. R.* 55:

Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in despite.

The essential policy of N.J.R.E. 404(b) is that evidence of a defendant's prior criminal acts cannot be utilized to demonstrate his propensity to commit crimes, including the offense for which he is being tried. See State v. Covell, 157 N.J. 554, 563 (1999); State v. Nance, 148 N.J. 376, 386 (1997); State v. Stevens, 115 N.J. 289, 299 (1989); State v. Kociolek, 23 N.J. 400, 418-20 (1957); State v. Hackett, 323 N.J. Super. 460, 482 (App. Div. 1999). However, N.J.R.E. 404(b) will permit the admission of evidence of other crimes to prove a material element of the offense charged. The explicit terms of N.J.R.E. 404(b) refer to material issues such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, the fact that evidence of prior crimes may have some bearing on motive, intent, plan, absence of mistake, knowledge or identity does not automatically warrant its admission. State v. Atkins, 78 N.J. 454, 462 (1979). This listing of exceptions is not exclusive, since N.J.R.E. 404(b) evidence may be admitted to prove any material issue. State v. Hummel, 132 N.J. Super. 412 (App. Div.), certif. denied, 67 N.J. 102 (1975). For example, prior crimes evidence may be admissible to demonstrate

defendant's predisposition to commit crime to rebut an entrapment defense. *State v. Rockholt*, 96 *N.J.* 570 (1984).

Although *N.J.R.E.* 404(b) is commonly considered to address the admission of "other crime" evidence, it is in fact broader in scope. Under former *Evid. R.* 55, if the other conduct was not a "crime or civil wrong," it was not subject to the rule. *State v. Brown*, 138 *N.J.* 481, 534 (1994); *see also State v. Porambo*, 226 *N.J. Super.* 416, 424-25 (App. Div. 1988). Now, however, the rule refers to "acts," criminal or not. *See State v. Nance*, 148 *N.J.* at 385.

However, conduct which is part of the criminal events of the case being charged are part of the *res gestae* of the case and cannot be excluded under *N.J.R.E.* 404(b). *See State v. Cherry*, 289 *N.J. Super.* 503, 522 (App. Div. 1995); *State v. Ortiz*, 253 *N.J. Super.* 239, 244 (App. Div.), *certif. denied*, 130 *N.J.* 6 (1992). This includes evidence which "establishes the context of the criminal event, explains the nature of, or presents the full picture of the crime to the jury." *State v. Cherry, supra; see also State v. Torres*, 313 *N.J. Super.* 129, 161 (App. Div.), *certif. denied*, 146 *N.J.* 425 (1998). (*See Res Gestae, infra).*

In State v. Cofield, 127 N.J. 328, 338 (1992), the Supreme Court established a four-part test for the admission of evidence of other crimes, wrongs, or acts: (1) the evidence must be admissible as relevant to a material issue; (2) it must be similar in kind and reasonably close in time to the offense charged; (3) the evidence of the other crime, wrong, or act must be clear and convincing; and (4) pursuant to N.J.R.E. 403, the probative value of the evidence must not be outweighed by its apparent prejudice. See also State v. Marrero, 148 N.J. 469, 483 (1997); State v. Collier, 316 N.J. Super. 181, 192-93 (App. Div. 1998), aff'd o.b., 162 N.J. 27 (1999); State v. Wilson, 158 N.J. Super. 1 (App. Div. 1978). The admissibility of other-crime evidence is left to the discretion of the trial court which, because of its intimate knowledge of the case, is in the best position to engage in the balancing process. State v. Covell, 157 N.J. at 564. A decision of a trial court is entitled to deference and reviewed under an abuse of discretion standard. Id; State v. Ramseur, 106 N.J. 123, 266 (1987). Only when there is a "clear error of judgment" will an abuse of discretion be found. State v. Covell, 157 N.J. at 564; State v. Marrero, 148 N.J. at 483.

When evidence is admitted pursuant to *N.J.R.E.* 404(b), the jury must be given an instruction on its limited use. *State v. Marrero*, 148 *N.J.* at 495; *State v.*

Cofield, 127 *N.J.* at 340-41. Because of the inherently prejudicial nature of other crimes evidence, the limiting instruction "should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." *Id.* at 341, quoting *State v. Stevens*, 115 *N.J.* at 304; *see also State v. G.V.*, 162 *N.J.* 252, 260, 262 (2000). In some cases, the failure to give a proper instruction can be harmless error, *see State v. G.S.*, 145 *N.J.* 460, 474-476 (1996), but care should be taken in crafting a precise instruction sufficiently tailored to the narrow basis for admissibility.

Quite recently, the notion of "sanitization" of *N.J.R.E.* 404(b) evidence has crept into this State's jurisprudence. *See State v. Collier, supra.* In *Collier,* too much of the "gruesome details" surrounding the burning death of a dog were admitted in that case, which were not relevant to the fact at issue, the defendant's motive to rob and shoot a friend whom the defendant believed had implicated him in the dog incident. Thus, the horrible facts of the dog burning had a clear capacity to unduly prejudice the jury. *State v. Collier,* 316 *N.J. Super.* at 185, 190, 194-95.

If sanitization is raised in an *N.J.R.E.* 404(b) context, it should be pointed out that *Collier* is best viewed in terms of the observation by the trial court in that case that "other than a crime committed against a child, there are very few factual patterns that would produce as extreme an emotional response in the minds of the jurors as the animal abuse here involved." *Id.*, 316 *N.J. Super.* at 194. The details of most other crimes are not likely to provoke nearly such revulsion, and should be admissible to the extent they are relevant to the fact in issue.

In *State v. David Hernandez*, 334 *N.J. Super.* 264 (App. Div. 2000), *certif. granted*, _____ *N.J.* ____ (2001), the Appellate Division reversed defendant's drug convictions due to perceived prejudicial error stemming from certain other-crimes evidence. The codefendant entered a plea agreement with the State and testified against the defendant, detailing not only the drug sale involved in this case but also to events immediately prior to this transaction and to his alleged drug business relationship with the defendant for the two months preceding their arrest.

While testimony as to the codefendant's dealings with defendant just before their arrest was admissible to prove preparation and plan pursuant to *N.J.R.E.* 404(b), the court held that evidence relating their drug activities during the prior two months was not admissible. Sidestepping the question of whether evidence of the older crimes was probative of a material fact in issue under Cofield, the Appellate Division concluded that no clear and convincing proof of them existed. Although conceding that direct testimony of other-crimes evidence proffered by "credible" witnesses -- the police, victims and their families, and disinterested witnesses -- may qualify as clear and convincing, that offered by a codefendant with a favorable plea bargain, "and particularly the testimony of this codefendant," cannot. The court felt that this is so despite the admissibility of a codefendant's similar statements that could qualify as prior consistent statements, since "reliability in that context" was not involved here. The appellate court itself weighed the credibility of codefendant's testimony as contained in the record, and found that a fact-finder could not find it clear and convincing. This case is now pending in the New Jersey Supreme Court.

In *State v. Slocum*, 130 *N.J. Super.* 358 (App. Div. 1974), the court held that evidence of a prior crime committed five years earlier could be admitted although the defendant was acquitted of that offense. *Slocum* involved the robbery of a store during which the robber knocked a female clerk to the ground and savagely stomped on her head. Five years before this assault, the victim testified against the defendant in a larceny prosecution in which he was ultimately acquitted. The evidence of the prior crime was held properly admitted to demonstrate the defendant's malice and desire for revenge against the victim. Thus, it tended to prove the intent element of the offense of atrocious assault and battery. *State v. Slocum* 130 *N.J. Super.* at 362-64.

Testimony of a witness that he had been shot three days before the original date at the instigation of the defendant was not inadmissible as other crimes evidence since it evidenced a consciousness of guilt and indicated conduct inconsistent with defendant's claim of innocence. *State v. Lassiter*, 197 *N.J. Super.* 2 (App. Div. 1984).

It is to be remembered that proof of other crimes, where relevant, must be demonstrated through competent evidence. Even where it is proper for the State to offer proof of a defendant's other offense, that proof may not be embodied in otherwise inadmissible hearsay testimony. *State v. Bass,* 221 *N.J. Super.* 466, 480 (App. Div. (1987), *certif. denied,* 110 *N.J.* 186 (1988); *see also State v. Ingenito,* 87 *N.J.* 204, 224 (1981).

To justify admission of other crimes evidence, the State must demonstrate that the jury will not consider the evidence as showing the defendant's criminal capacity. However, a lesser standard of admissibility is to be employed when a defendant attempts to adduce evidence of other crimes to exculpate himself. In State v. Garfole, 76 N.J. 445 (1978), the defendant was charged with a sexual assault. He attempted to show that he had an alibi during four other sexual assaults that were of an allegedly similar nature. The Supreme Court held that a defendant who seeks to admit evidence of other crimes is not bound by the same high standard of proof as the State. However, the defendant must demonstrate the relevance of the evidence and must also satisfy the strictures of N.J.R.E. 403. See also State v. Gookins, 135 N.J. 42, 47-48 (1994); State v. Fulston, 325 N.J. Super. 184 (App. Div. 1999), certif. denied, 163 N.J. 397 (2000); State v. Dreher, 302 N.J. Super. 408, 457 (App. Div.), certif. denied, 152 N.J. 10 (1997); State v. Landano, 271 N.J. Super. 1, 381 (App. Div.), certif. denied, 137 N.J. 164 (1994).

In State v. Williams, 214 N.J. Super. 12 (App. Div. 1986), the Appellate Division examined the lesser standard of similarity of other crimes required to justify the use of such evidence by a defendant instead of the State. In Williams, the victim was attacked and stabbed at least nine times by an assailant who was also "pulling at her clothes." The defendant attempted to introduce evidence that another person living in the area had twice raped women at the same location, threatening one with a knife and stabbing another eight times. The Appellate Division held that this evidence was improperly excluded under the diminished standard of Garfole for the defensive use of other crimes evidence. The Court cited as similarities the proximity of the location of all three attacks; in all three the victims were grabbed suddenly and threatened: all involved the use of knife: one victim was stabbed eight times and another nine times; and in two cases the victim was raped and that in Williams a sexual element could be inferred. The court balanced the probative value of this other crimes evidence against the issues of undue consumption of time and jury confusion, former Evid. R. 4, and, finding the latter two elements "not particulary weighty" under the facts of the case, concluded that the other crimes evidence should have been admitted.

Where entrapment is claimed by a defendant, the State is restricted to offering prior convictions of the defendant similar to that with which he is charged, in order to show predisposition to commit the offense. *State v. Gibbons*, 105 *N.J.* 67 (1987). The court found

reversible error in the trial judge's admission of property crimes to refute the defendant's claim of entrapment on the charge of distribution of C.D.S. The court directed that, prior to their admission, past convictions must be carefully compared to the present charge for similarities in objective, method, and mental state of the defendant. This holding significantly narrowed the general admissibility of prior crimes in entrapment cases suggested by *State v. Rockholt*, 96 *N.J.* 570 (1984).

As previously noted, other crimes evidence may be admitted to prove a material issue in a criminal trial. Below is an illustrative listing of circumstances in which such evidence has been admitted.

B. Prior Crimes - Character Witness

N.J.R.E. 405(a) is intended to continue the explicit prohibition of former *Evid. R.* 47 in the impeachment of a defendant's character witness by inquiry into knowledge of the defendant's alleged criminal acts not the subject of a criminal conviction. Thus, evidence of the defendant's criminal conduct may be admitted only on the basis of proven convictions and only in an attempt to impeach the direct testimony of a character witness who has testified on his behalf. *See State v. La Porte*, 62 *N.J.* 312 (1974).

Use of a defendant's remote prior convictions to impeach the testimony of a reputation character witness who had known the defendant as a "good family man" for five or six years was *denied* in *State v. Campbell*, 212 *N.J. Super*. 322 (Law Div. 1986). In a pretrial *Sands* hearing the defendant was able to exclude, for use in impeaching his own testimony, introduction of two criminal convictions 17 and 22 years old. The court distinguished on both facts and law *State v. Whittle*, 52 *N.J.* 408 (1968), a pre-*Sands* case wherein the character witnesses had known the defendant at the time of his remote convictions and, further, where evidence of the defendant's convictions had already been revealed to the jury during defendant's testimony.

C. Prior Crimes - Knowledge

In *State v. Stevens*, 115 *N.J.* 289 (1989), the court held that evidence of instances where a police officer previously used his office to intimidate women into disrobing or providing sexual favors was relevant to show that the defendant conducted searches of two women to gratify his sexual desires (his purpose) and his knowledge that such conduct was an unauthorized exercise of his official position. However, since the latter issue was not a contested one, the evidence was not admissible to establish that element of the offense.

In *State v. Campisi*, 47 *N.J. Super.* 455 (App. Div. 1957), the defendant had been convicted for unlawful possession of a hypodermic needle and for unlawful use of a narcotic drug. On appeal, the conviction for possession of a hypodermic needle was affirmed and the conviction for unlawful use of a narcotic drug was reversed. During the later trial under reindictment for unlawful *possession* of a narcotic drug, evidence was admitted concerning the defendant's *use* of a narcotic drug. The court held that in a prosecution for unlawful possession of narcotics, evidence of use of the narcotics by the defendant was relevant to the question of his guilt or innocence and was properly admitted.

The Appellate Division held in *State v. Wilkinson*, 126 *N.J. Super.* 553 (App. Div. 1973), *certif. denied*, 63 *N.J.* 562 (1973), that possession of a controlled dangerous substance is not punishable unless the defendant knows that the material he has in his control is an unlawful substance. Therefore, where a defendant is charged with possession of marijuana, the State may offer evidence of his simultaneous possession of other drugs. When the defendant is charged with possession with intent to distribute a controlled dangerous substance, the State may offer similar evidence. Such evidence is admissible to prove that the defendant intended to distribute or dispose of the drugs which he possessed.

In *State v. Rajnai*, 132 *N.J. Super.* 530, 537 (App. Div. 1975), narcotics paraphernalia discarded from an automobile during a search was held properly admitted to show that the occupants of the vehicle had knowledge of the character of the narcotics found in the vehicle. In *State v. McMenamin*, 133 *N.J. Super.* 521, 525 (App. Div. 1975), a defendant was charged with possessing LSD. The defendant, who shared a room with his brother, admitted that he and his brother jointly possessed marijuana found in the room but claimed he had no knowledge of the existence of the LSD. Six live marijuana plants found in the room were held to have been properly admitted to demonstrate his knowledge of the presence of the LSD.

Evidence of defendant's two prior accidents was admissible in prosecution for willful or wanton death by automobile to prove knowledge of defendant's capacity to operate the vehicle. *State v. Soney*, 177 *N.J. Super.* 47 (App. Div. 1980), *certif. denied*, 87 *N.J.* 313 (1981). *Compare State v. Niemeyer*, 195 *N.J. Super.* 559 (Law Div. 1984), where the court held that the defendant's prior incidents of driving while under the influence offered to prove his knowledge of his capacity to operate a motor vehicle were inadmissible in aggravated assault prosecution on the issue of whether the defendant consciously disregarded a substantial and unjustifiable risk that he would injure someone by driving his automobile while intoxicated.

D. Prior Crimes - Motive

A wider range of evidence is generally admissible when the motive or intent of the defendant is in issue. *State v. Covell*, 157 *N.J.* 554, 565 (1999). In *Covell*, the evidence in a prosecution for child luring was a statement made by the defendant to police in connection with another investigation that he had a "thing" for young girls. The Supreme Court held that the statement was admissible in that it made it more likely that the defendant's purpose in beckoning to a girl was to commit a crime against her, an element of the luring offense. *Id.* at 566-67.

In *State v. Erazo*, 126 *N.J.* 112, 130-31 (1991), the court allowed evidence that the defendant had been previously convicted of a crime and sentenced to up to 30 years in prison as evidence of motive, since the State's theory was that the defendant killed his victim to prevent her from following through on a threat to revoke his parole.

In *State v. Marrero*, 148 *N.J.* 469, 485-86 (1997), in the context of finding the Appellate Division's reversal of a trial court ruling excluding the evidence to be harmless error, the Supreme Court found evidence of the defendant's recent guilty plea to sexual assault, for which he was pending sentence, to be probative in his prosecution for a murder committed in the course of another sexual assault, in part because it gave the defendant a motive to kill his victim to avoid a revocation of his bail and a greater sentence.

Evidence of a defendant's bad conduct toward his exgirlfriend was admissible to show that he shot the godfather of her children while motivated by jealousy. *State v. Nance*, 148 *N.J.*376, 388 (1997). Other crimes evidence has been used in other cases to demonstrate jealousy as a motive. *State v. Pitts*, 116 *N.J.* 580, 599-603 (1989); *State v. Lado*, 275 *N.J. Super.* 140, 149-51 (App. Div.), *certif. denied*, 138 *N.J.* 271 (1994); *State v. Breakiron*, 210 *N.J. Super.* 442 (App. Div. 1986), *aff'd in part, rev'd in part o.g.*, 108 *N.J.* 591 (1987). While the victim's implication of the defendant in the burning death of a dog was admissible on the issue of the defendant's motive to attempt to murder the victim, the evidence of the dog-burning itself needed to be "sanitized" due to its gruesome nature. *State v. Collier*, 316 *N.J. Super.* 181 (App. Div. 1998), *aff'd o.b.*, 162 *N.J.* 27 (1999).

In *State v. Crumb*, 307 *N.J. Super.* 204, (App. Div. 1997), *certif. denied*, 153 *N.J.* 215 (1998), evidence of racist and anti-Semitic writings by the defendant were admissible to demonstrate his motive for beating a black man to death.

Evidence of prior sexual acts can be admissible in a later prosecution involving sexual misconduct to demonstrate motive or intent. *State v. Zeidell,* 299 *N.J. Super.* 613 (App. Div. 1997), *rev'd o.g.,* 153 *N.J.* 417 (1998); *State v. G.S.,* 278 *N.J. Super.* 151, 161-62 (App. Div. 1994), *rev'd o.g.,* 145 *N.J.* 460 (1996).

The defendant in *State v. Zarinsky*, 143 *N.J. Super* 35, 55-56 (App. Div. 1976), *aff'd*, 75 *N.J.* 101 (1977), was charged with abducting and murdering a young woman. The Appellate Division held that the State properly presented evidence of the defendant's previous attempts to lure young women into his vehicle. This evidence was admissible to show the defendant's motive when he offered a ride to the victim on the last day she was seen alive.

Evidence of a victim's testimony against the defendant in a prior prosecution was admitted in *State v. Slocum*, 130 *N.J. Super.* 358, 363-64 (App. Div. 1974), to show the defendant's motive for the savage beating he inflicted on the victim during the course of a robbery. The *Slocum* court held that this evidence was properly admitted although there was a five year interval between the crime and the witness' prior testimony against the defendant.

Evidence relating to defendant's prior traffic offenses and revocation of driver's license was admissible to show motive in prosecution for assault and battery on police officers. *State v. Smith*, 55 *N.J.* 476 (1970).

E. Prior Crimes - State of Mind

N.J.R.E. 404(b) permits the admission of evidence of other acts which are "'so intertwined in time, place and circumstances' with the present charges as to evidence a continuous state of mind." *State v. M.L.*, 253 *N.J. Super.* 13, 22-23 (App. Div. 1991), *certif. denied*, 127 *N.J.* 560

(1991), quoting *State v. Hummel*, 132 *N.J. Super.* 412, 425-26 (App. Div.), *certif. denied*, 67 *N.J.* 102 (1975). In *Hummel*, the Appellate Division held that in a prosecution for sexually abusing minors who were in his custody, evidence was properly admitted that the defendant previously abused other young victims also in his custody. These proofs were admissible to show the defendant's state of mind toward young women in his custody. Similarly, in *State v. Kozarski*, 143 *N.J. Super.* 12, 17-18 (App. Div.), *certif. denied*, 71 *N.J.* 532 (1976), the defendant's commission in another jurisdiction of sexual offenses against the child victim was held to have been properly admitted to show the defendant's continuous state of mind with respect to the victim.

In *State v. Morton*, 155 *N.J.* 383 (1998), a capital case, the Supreme Court held that evidence that the defendant and his codefendant in the murder and robbery of a gas station attendant had planned to commit other crimes, including robbing a bank or another gas station, was admissible to show the defendant's state of mind.

In State v. Davidson, 225 N.J. Super. 1 (App. Div. 1988), the defendant was convicted of criminal mischief and causing damage to others, fourth degree crimes, and putting others in fear of bodily violence, a third degree crime. The charges arose from the spray-painting of a black family's house with racially threatening graffiti. The judge admitted evidence showing that about one month before the spray painting, the defendant had poured rice or sugar into the gas tanks of the victim's two cars. The Appellate Division ruled that this evidence was properly admitted as it had a bearing on the defendant's motive, intent, plan, and state of mind. "[E]vidence that defendant, just a month before had damaged the [family's] property in another way . . . tended to show that defendant had targeted the [family] as victims of a campaign of terror."

The defendant was tried in *State v. Sinnott,* 24 *N.J.* 408, 413-14 (1957), on an indictment charging him with sodomy and there was testimony of the commission of the same offense against another boy just prior to the sodomy being tried. The Supreme Court held the testimony admissible as showing the continuous state of mind of the defendant at the time he committed the act for which he was being tried.

A victim's state of mind can also be shown by evidence admitted under the rule. Thus, in *State v. Chenique-Puey*, 145 *N.J.* 334, 342 (1996), prior acts of domestic violence were admissible at a defendant's trial

for terroristic threats to kill to demonstrate that the victim had reason to believe that the defendant would make good on the threats. In *State v. G.S.*, 278 *N.J. Super*. 151, 162-63 (App. Div. 1994), *rev'd o.g.*, 145 *N.J.* 460 (1996), allegations of sexual abuse made by a girl against her stepfather a year before charges of similar conduct were brought were admissible at the trial of the latter to explain why the girl never told her mother of the renewed crime, because the mother never believed the original allegations and continued to support the stepfather.

F. Prior Crime - Common Plan or Scheme

Other crime evidence is admissible under N.J.R.E. 404(b) to demonstrate a common plan or scheme only if it "proves the existence of an integrated plan, of which the other crimes and the indicted offenses are components." State v. Stevens, 115 N.J. 289, 305-06 (1989); see also State v. Louf, 64 N.J. 172, 178 (1973); State v. Coruzzi, 189 N.J. Super. 273, 300 (App. Div.), certif. denied, 94 N.J. 531 (1983); State v. Zicarelli, 122 N.J. Super. 225, 240-41 (App. Div.), certif. denied, 63 N.J. 252 (1973), cert. denied, 414 U.S. 875 (1973); State v. Sease, 138 N.J. Super. 80, 85-86 (App. Div. 1975). The exception requires a single purpose binding together several crimes, rather than having the same purpose several times. State v. Oliver, 133 N.J. 141, 152 (1993). In Oliver, evidence of similar sexual assaults against three other women were not admissible to prove the defendant's intent with respect to the charges of sexual assault upon two other women for which the defendant was being tried. Similarly, in State v. Lumumba, 253 N.J. Super. 375, 387 (App. Div. 1992), there was no common higher goal to which the use of the same weapon, car, and gunman pertained with respect to shootings committed two days apart. Therefore, evidence of the second, attempted murder, was inadmissible in a prosecution for the murder resulting from the first shooting.

G. Prior Crimes - Malice or Ill Will

In *State v. Donahue*, 2 *N.J.* 381, 388 (1949), the defendant was charged with murder of his wife. The State produced evidence of prior beatings inflicted upon the deceased by the defendant. *See State v. Lederman*, 112 *N.J.L.* 336 (E. & A. 1933). The defendant in *State v. Slocum*, 130 *N.J. Super.* 358, 362-64 (App. Div. 1974), was charged with committing a savage attack on a store clerk during the course of a robbery. The Appellate Division held that the State was entitled to adduce evidence that the victim once testified against the defendant in a criminal prosecution. This evidence was admissible to show the defendant's malice against the

victim. See also State v. Ramseur, 106 N.J. 123, 266 (1987).

H. Prior Crimes - Intent; Absence of Mistake

Evidence of a defendant's prior crimes, if sufficiently probative, may be admitted to show his intent with respect to the offense for which he is being tried. *State v. Garfole*, 76 *N.J.* 445 (1978); *State v. Zarinsky*, 143 *N.J. Super.* 35, 55-56 (App. Div. 1976), *aff'd*, 75 *N.J.* 101 (1977); *see also State v. Mulero*, 51 *N.J.* 224 (1968); *State v. Zwillman*, 112 *N.J. Super.* 6 (App. Div. 1970), *certif. denied*, 57 *N.J.* 603 (1971). In prosecutions for possessory offenses which entail proof of an intent to possess contraband, evidence may be admitted to show that the defendant possessed other, similar contraband. *See, e.g., State v. Cofield*, 127 *N.J.* 328 (1992); *State v. McMenamin*, 133 *N.J. Super.* 521, 525 (App. Div. 1975); *State v. Rajnai*, 132 *N.J. Super.* 530, 537-538 (App. Div. 1975).

One aspect of intent in which other crimes evidence is often quite probative is the absence of mistake. The Supreme Court held that if a defense of mistake is interposed by the defendant, then it is especially appropriate for the State to rebut this claim with proof of his commission of other similar crimes. *State v. Atkins*, 78 *N.J.* 454 (1979). *See also State v. Boone*, 154 *N.J. Super.* 36 (App. Div. 1977), *certif. denied*, 77 *N.J.* 493 (1978). Prosecutions involving child abuse often generate defense claims of a parental "mistake" that resulted in serious injury or death of a child. In such cases, it is proper for the State to present evidence of prior mistreatment of the victim. *State v. Wilson*, 158 *N.J. Super.* 1 (App. Div. 1978), *certif. denied*, 79 *N.J.* 473 (1978).

In State v. Cusick, 219 N.J. Super. 452 (App. Div.), certif. denied, 109 N.J. 54 (1987), the trial court admitted into evidence testimony that defendant, accused of the sexual assaults of two children, had previously sexually assaulted one of the victims and one of the victim's friends. The Appellate Division found this evidence properly admitted under former Evid. R. 55, to rebut a potential defense of mistake in that the defendant claimed that any touching of one of the victims was accidental when he swung and cradled her. The court further held that the testimony was admissible to prove intent when the defendant molested the children, since to prove the crime the State had to prove that the touching of the victims by the defendant was for the purpose of sexually arousing or sexually gratifying the victim.

In such cases, however, there must be a material factual dispute that the defendant had not acted accidentally and was seeking sexual gratification. In State v. G.V., 162 N.J. 252, 259 (2000), the New Jersey Supreme Court found it "absurd" that the defense of mistake or accident could be raised in a case involving "an horrendous course of patent sexual depravity which continued for years." Thus, evidence of the defendant's prior, similar course of sexual molestation of the victim's older sister was not admissible under this theory. The Court did conclude that the evidence could be admissible at a retrial to rebut the defendant's claim that the victim's story was fabricated as revenge for the defendant having abandoned the mother and having come home with a new girlfriend, if the fabrication defense was renewed, subject to weighing its probative value against its potential for prejudice. Id. at 264-65.

I. Prior Crimes - Identity

The most restricted form of other crimes evidence that may be offered by the State is proof of other crimes of a defendant for the purpose of proving the identity of the perpetrator who committed the instant offense as the defendant. The probative value of the other crimes evidence in such cases arises from the similarity of the offenses so that an inference arises that they were committed by a single person or persons.

In *State v. Fortin*, 162 *N.J.* 517 (2000), the Supreme Court reviewed the standard for admission of *N.J.R.E.* 404(b) evidence on the issue of identity, and approved the holdings of prior cases that the prior criminal activity with which defendant is identified must be so nearly identical in method as to earmark the crime as defendant's handiwork. The conduct in question must be unusual and distinctive so as to be like a signature, and there must be proof of sufficient facts in both crimes to establish an unusual pattern. [*State v. Fortin*, 162 *N.J.* at 532, quoting *State v. Reldan*, 185 *N.J. Super.* 494, 502 (App. Div.), *certif. denied*, 91 *N.J.* 493 (1982), citing *State v. Sempsey*, 141 *N.J. Super.* 317, 323 (App. Div. 1976), *certif. denied*, 74 *N.J.* 273 (1977)].

In describing what constitutes a "signature" crime, the Court in *Fortin* repeated what it had stated about former *Evid. R.* 55 in *State v. Cofield*, 127 *N.J.* 328, 336 (1992):

Evid. R. 55 is most easily understood in situations of signature crimes, in which some distinct feature about the two crimes clearly allows the jury to make an inference other than propensity to commit crime. For example, the

distinctive features of a silver pistol used in a prior crime would be admissible under *Evid. R.* 55 in an unrelated murder trial to establish either the identity of the perpetrator or the weapon used. *State v. Fortin,* 162 *N.J.* at 529.

Cofield, in turn, had cited *State v. Long*, 119 *N.J.* 439, 475-76 (1990), for its example of the distinctive features of a silver pistol used in a prior crime constituting the "signature" establishing the identity of the perpetrator of the crime for which a defendant is being tried.

Introduction, in a murder prosecution, of evidence of defendant's accomplishing alleged prior rape and alleged prior assault by the use of force to the throat was improper admission of other crimes evidence to establish identity and constituted reversible error. *State v. Reldan, supra.*

XXIII. PRIOR INCONSISTENT STATEMENTS

Pursuant to *N.J.R.E.* 803(a)(1), formerly *Evid. R.* 63(1)(a):

The following statements are not excluded by the hearsay rule:

a. Prior statements of witnesses. A statement previously made by a person who is a witness at trial or hearing, provided it would have been admissible if made by the declarant while testifying and the statement:

1. is inconsistent with the witness' testimony at the trial or hearing and is offered in compliance with Rule 613. However, when the statement is offered by the party calling the witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition; or . . .

N.J.R.E. 803(a)(1) renders prior inconsistent statements of a witness admissible as substantive proof provided the statement would have been admissible if made by the witness while testifying at the hearing and the other requirements of the rule have been met. *State v. Gross*, 216 *N.J. Super.* 98 (App. Div. 1987), *aff'd* 121 *N.J.* 1 (1990); *State v. Cole*, 154 *N.J. Super.* 138 (App. Div. 1977), *certif. denied*, 78 *N.J.* 415 (1978); *State v.*

Maddox, 153 N.J. Super. 201 (App. Div. 1977); State v. Provet, 133 N.J. Super. 432 (App. Div. 1975), certif. denied, 68 N.J. 174 (1975).

In *Gross*, the Appellate Division, in a ruling upheld by the Supreme Court, outlined the circumstances to be considered by a trial court during a hearing pursuant to *N.J.R.E.* 104 to determine whether the reliability of a prior inconsistent statement has been sufficiently established:

(1) the declarant's connection to and interest in the matter reported in the out-of-court statement, (2) the person or persons to whom the statement was given, (3) the place and occasion for giving the statement, (4) whether the declarant was then in custody or otherwise the target of investigation, (5) the physical and mental condition of the declarant at the time, (6) the presence or absence of other persons, (7) whether the declarant incriminated or sought to exculpate himself b his statement, (8) the extent to which the writing is in the declarant's hand, (9) the presence or absence, and the nature of, any interrogation, (10) whether the offered sound recording or writing contains the entirety, or only a portion or a summary, of the communication, (11) the presence or absence of any motive to fabricate, (12) the presence or absence of any express or implicit pressures, inducements or coercion for the making of the statement, (13) whether the anticipated use of the statement was apparent or made known to the declarant, (14) the inherent believability or lack of believability of the statement and (15) the presence or absence of corroborating evidence. [State v. Gross, 216 N.J. Super. at 109-10].

The trial court is to determine whether the statement is reliable by a preponderance of the evidence. *State v. Gross*, 121 *N.J.* at 16. If the statement is admitted, the court must not tell the jury of its findings of reliability, but rather should instruct the jury to consider the same kinds of factors, including the status of the witness, in assessing its credibility and probative worth. *Id.* at 16-17.

Corroboration of a prior inconsistent statement is not required for admissibility; it is only a factor to be considered by the trial court. *State v. Mancine*, 124 *N.J.* 232 (1991).

A feigned lack of recollection regarding the facts contained in a prior statement renders the testimony to be inconsistent as an implied denial. *State v. Brown*, 138 *N.J.* 481, 540 (1994); *State v. Bryant*, 217 *N.J. Super*. 72,

77-79 (App. Div.), certif. denied, 108 N.J. 202, cert. denied, 484 U.S. 978, 108 S.Ct. 490, 98 L.Ed.2d 488 (1987); State v. Burgos, 200 N.J. Super. 6, 10-12 (App. Div.), certif. denied, 101 N.J. 304 (1985). However, if a witness refuses answer questions, or to take the oath, he has not given "testimony" and therefore a prior statement would not be admissible. State v. Caraballo, 330 N.J. Super. 545, 556 (App. Div. 2000); State v. Williams, 182 N.J. Super. 427, 434 (App. Div. 1982).

When evidence is substantively admitted pursuant to *N.J.R.E.* 803(a)(1), it is error for a trial court to instruct the jury that the evidence is limited to the issue of credibility. *State v. Ramos*, 217 *N.J. Super.* 530, 538 (App. Div. 1987); *State v. Maddox*, 153 *N.J. Super.* at 209-11. However, a limiting instruction must be given when evidence is admitted solely under the neutralization doctrine pursuant to *N.J.R.E.* 607. *State v. Provet*, 133 *N.J. Super.* at 437-38.

XXIV. REBUTTAL

The scope of proper rebuttal evidence, and whether or not it should be admitted, are matters within the discretion of the trial court. *State v. Cook*, 330 *N.J. Super*. 395, 418 (App. Div.), *certif. denied*, _____ *N.J.* ____ (2000); *State v. Sanducci*, 150 *N.J. Super*. 400, 401-02 (App. Div.), *certif. denied*, 75 *N.J.* 524 (1977). *Accord*, *State v. Balles*, 47 *N.J.* 331, 343 (1966), *cert. denied*, 388 *U.S.* 461 (1967). In *Sanducci*, the defendant testified that he did not attempt to extort money from the victim. In rebuttal, the State proffered taped telephone conversations in which the victim was threatened by the defendant. The Appellate Division held that this was properly admitted as rebuttal evidence. *State v. Sanducci*, 150 *N.J. Super.* at 401-02. *See also State v. Conyers*, 58 *N.J.* 123, 135 (1971).

While ordinarily rebuttal is confined to the contradiction of specific subjects introduced on direct or cross-examination of defense witnesses, the trial court's discretion to admit rebuttal evidence extends to testimony which would properly have been admissible in the case in chief. *State v. Carroll,* 256 *N.J. Super.* 575, 604 (App. Div.), *certif. denied,* 130 *N.J.* 18 (1992); *State v. Provoid,* 110 *N.J. Super.* 547, 557 (App. Div. 1970); *State v. DeRocco,* 53 *N.J. Super.* 316, 324 (App. Div. 1959).

XXV. REFRESHING RECOLLECTION

Any object or writing may be used to refresh the recollection of a witness. The object or writing employed

is not itself admitted into evidence. Where the witness' memory has been refreshed, the admissible evidence is the recollection of the witness and not the extrinsic paper, with the test being whether the witness puts before the court his independent recollection and judgment. State v. Carter, 91 N.J. 86, 123 (1982); see N.J.R.E. 612. The basis for application of this rule is a claim that a witness' memory is impaired. State v. Williams, 226 N.J. Super. 94, 103 (App. Div. 1988). The witness must have prior knowledge of the subject of the statement that could be refreshed by the information therein. Lautek Corp. v. Image Business Systems Corp., 276 N.J. Super. 531, 545 (App. Div. 1994). In propounding questions, the prosecutor may not merely parrot a statement ostensibly used to refresh recollection. State v. Caraballo, 330 N.J. Super. 545, 558 (App. Div. 2000), citing Lautek Corp., 276 N.J. Super. at 546.

If, after an attempt at refreshing the witness by the prior statement, the witness is still unable to testify fully and accurately as to its subject, the statement may be admissible under N.J.R.E. 803(c)(5), which permits the recorded statement to be admitted into evidence as proof of the matter contained therein if certain conditions are met. See State v. Hacker, 177 N.J. Super. 533, 539 (App. Div. 1981), certif. denied, 87 N.J. 364 (1981). The statement must be "contained in a writing or other record which (A) was made at a time when the fact recorded actually occurred or was fresh in the memory of the witness, and (B) was made by the witness himself or under the witness' direction or by some other person for the purpose of recording the statement at the time it was made, and (C) the statement concerns a matter of which the witness had knowledge when it was made, unless the circumstances indicate that the statement is not trustworthy[.]" *N.J.R.E.* 803(c)(5).

XXVI. RELEVANCE

N.J.R.E. 401, formerly *Evid. R.* 1(2), provides that evidence is relevant if it tends "to prove or disprove any fact of consequence to the determination of the action." The inquiry focuses on the logical connection between the offered evidence and a fact in issue, and if the evidence offered makes the inference to be drawn more logical, it should be admitted unless otherwise excludable under a rule of law. *State v. Covell*, 157 *N.J.* 554, 565 (1999); *State v. Swint*, 328 *N.J. Super.* 236, 252 (App. Div.), *certif. denied*, _____ *N.J.* ____ (2000); *State v. Hutchins*, 241 *N.J. Super.* 353, 358 (App. Div. 1990); *State v. Coruzzi*, 189 *N.J. Super.* 273, 302 (App. Div.), *certif. denied*, 94 *N.J.* 531 (1983). Determinations of the admissibility of evidence is to be made by the standard of simple relevance to guilt or innocence. *State v. Fulston*, 325 *N.J. Super.* 184, 190 (App. Div. 1999), *certif. denied*, 163 *N.J.* 397 (2000), citing *State v. Garfole*, 76 *N.J.* 445, 452-53 (1978). Therefore, a defendant is entitled to introduce any evidence that will "rationally tend to refute his guilt or buttress his innocence of the charge made." *State v. Gookins*, 135 *N.J.* 42, 47 (1994).

For a lengthy discussion of relevance, as it pertains to excluding evidence of a defendant offered to show the possibility that others committed the offenses with which he is charged, see State v. Allison, 208 N.J. Super. 9 (App. Div. 1985). The defendant, indicted on multiple arson counts, wished to argue at trial that drug addicts could have caused the fires. In support of this proposition the defendant offered testimony that, two months prior to the fires, a witness observed flammable drug paraphernalia on the roof of the building which later caught fire. The trial court's exclusion of this evidence was sustained by the Appellate Division. While the reviewing court agreed that the defendant's proposition was material (i.e., that drug addicts and not defendant started the fires), there was considerable doubt about whether the isolated facts offered by the defendant were probative (i.e., evidence of flammable drug paraphernalia would not sufficiently support, on its own, the inference that drug addicts set the fires).

Evidence should be excluded if it has a inflammatory potential that will likely divert a jury from making a fair and reasonable evaluation of defendant's guilt or innocence. *N.J.R.E.* 403; *State v. Loftin*, 146 *N.J.* 295, 358 (1996); *State v. Thompson*, 59 *N.J.* 396, 421 (1971). Ultimately, the determination of the admissibility of relevant evidence falls within the broad discretion of the trial court. *State v. Catlow*, 206 *N.J. Super.* 186, 193 (App. Div. 1995), *certif. denied*, 103 *N.J.* 465 (1996).

XXVII. REPUTATION (See also CREDIBILITY and BIAS, supra)

N.J.R.E. 803(c)(19), formerly covered by *Evid. R.* 63(26) and 63(27)(c), allows evidence of personal history and family matters to be proved by reputation. In *State v. Perez*, 150 *N.J. Super.* 166 (App. Div. 1977), *certif. denied*, 75 *N.J.* 542 (1977), a defendant was charged with gambling offenses. The State presented evidence that a person who was identified as "Cenizo" was involved in the offenses. Subsequently, the State offered evidence that the defendant's nickname in the community was "Cenizo". The Appellate Division held

that this evidence was admissible as an exception to the hearsay rule because it was proof of defendant's reputation in the community for being know as "Cenizo".

N.J.R.E. 803(c)(21), formerly *Evid. R.* 63(28), permits evidence of reputation of a person's character at a relevant time among the person's associates or in the community. The reputation of a victim of an assault for aggressiveness has long been permitted where a defendant claiming self-defense is aware of the victim's "pugnacious reputation." *State v. Burgess*, 141 *N.J. Super.* 13, 16 (App. Div. 1976). More recently, however, the Appellate Division has held that even if the defendant is unaware of the victim's reputation, such evidence, as well as evidence of a conviction for an assaultive crime, is admissible under *N.J.R.E.* 404(a)(2), 405, and 803(c)(21) to demonstrate the character of the victim to show that the victim was the aggressor. *State v. Aguiar*, 322 *N.J. Super.* 175, 183-84 (App. Div. 1999).

XXVIII. RES GESTAE

N.J.R.E. 404(b) does not apply when evidence of other crimes or acts is part of the total criminal conduct occurring during the incident in question and thus may be considered within the *res gestae* of the charged crime. State v. Cherry, 289 N.J. Super. 503, 522 (App. Div. 1995); State v. Ortiz, 253 N.J. Super. 239, 243 (App. Div. 1992), certif. denied, 130 N.J. 6 (1992). Such evidence is admissible without limitation if it serves to establish the context of the criminal event, explains the nature of it, or presents the full picture of the crime to the jury. State v. Martini I, 131 N.J. 176, 242 (1993), cert. denied, 516 U.S. 875 (1995); State v. Torres, 313 N.J. Super. 129, 160-61 (App. Div. 1998), certif. denied, 156 N.J. 425 (1998); State v. Cherry, supra. Since it is not other crimes evidence, no limiting instruction is required. State v. Martini I, supra; State v. Torres, 313 N.J. Super. at 161; State v. Cherry, supra.

XXIX. SCIENTIFIC AND TECHNICAL EVI-DENCE (See also, EXPERT WITNESS, JUDICIAL NOTICE, supra)

Expert testimony is admissible if the scientific technique or mode of analysis has "a sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of the truth." *State v. Kelly*, 97 *N.J.* 178, 210 (1984); *Romano v. Kimmelman*, 96 *N.J.* 66, 80 (1984). The standard of reliability, applicable to all fields of science, is designed

to ensure that each method or technique "relies primarily upon objective factors for reaching a conclusion, with subjective factors playing only a minimal role in the analysis." *Windmere, Inc. v. International Ins. Co.*, 105 *N.J.* 373, 385 (1987).

In *Windmere*, the New Jersey Supreme Court considered the admissibility of voiceprint test results in a civil case. The plaintiff, which owned a restaurant, was denied a fire loss recovery from its insurer. The jury's verdict for the insurer came after a trial in which voiceprints were used to assist the jury in comparing the voice of the plaintiff's maintenance man with the voice recorded by the police when the fire was reported anonymously by telephone.

The Court in *Windmere* discussed three methods by which a proponent of expert testimony or scientific results can prove the reliability of the technique in terms of its general acceptance within the professional community: (1) the testimony of knowledgeable experts; (2) authoritative scientific literature; and (3) persuasive judicial decisions which acknowledge such general acceptance of expert testimony. The Court concluded that each criteria was seriously challenged or impugned in the case with respect to voiceprints. First, the Court found that the testimony of two experts, who had limited experience and were both affiliated with the development of the voiceprint device at its principal source, did not establish the general acceptance of voiceprints within the professional community, particularly since one expert conceded that the scientific community was divided. The Court also found that the scientific journals "are in disarray" and that there was "a split among the jurisdictions as to the scientific reliability of the instrument." The Court concluded, however, that the future use of voiceprint analysis "may not be precluded forever, if more thorough proofs as to reliability are introduced in other litigation."

The Supreme Court has followed a *Windmere*-type approach in a number of areas of criminal law. *See State v. Spann*, 130 *N.J.* 484 (1993); *State v. Cavallo*, 88 *N.J.* 508 (1982); *State v. Hurd*, 86 *N.J.* 525 (1981). In *Hurd*, the Court adopted the following standards as a condition precedent for the admissibility of hypnotically induced recollection:

1. The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.

2. The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator or the defense.

3. Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.

4. Before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness' description of the events.

5. All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Video tape should be employed if possible but should not be mandatory.

6. Only the hypnotist and the subject should be present during any phase of the hypnotic session including the pre-hypnotic testing and post-hypnotic interview. *State v. Hurd*, 86 *N.J.* at 545-46.

In Rock v. Arkansas, 483 U.S. 44 (1987), the United States Supreme Court struck down an Arkansas per se rule which excluded all hypnotically refreshed testimony when applied to a criminal defendant. The Court held that the wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on that defendant's constitutional right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections. The Court also concluded, however, that states may establish guidelines to aid trial courts in the evaluation of post-hypnosis testimony, and the prosecution may be able to show that testimony in a particular case is so unreliable that exclusion is justified. To this extent, the procedural safeguards adopted in Hurd may be constitutionally applied to a defendant's post-hypnosis testimony as well as that of other witnesses. See State v. Choinacki, 324 N.J. Super. 19, 42 (App. Div.), certif. denied, 162 N.J. 197 (1999); State v. L.K., 244 N.J. Super. 261 (App. Div. 1990).

The Supreme Court held in *Romano v. Kimmelman*, 96 *N.J.* 66 (1984), that the results of breathalyzer tests shall be generally admissible in evidence when it is shown that the breathalyzer instrument is in proper working order and is administered by a qualified operator in accordance with accepted procedures. *See also State v. Johnson*, 42 *N.J.* 146, 171 (1964); *State v. Hardy*, 281 *N.J. Super.* 251, 252 (App. Div. 1995).

Once reliability is established, further inquiry into the reliability of the device is normally foreclosed. Thus, for example, radar devices, *see State v. Dantonio*, 18 *N.J.* 570 (1955); *State v. Cardone*, 146 *N.J. Super.* 23 (App. Div. 1976), and the breathalyzer, *see Romano v. Kimmelman, supra*, have both been held to be scientifically reliable.

With respect to breathalyzer evidence, the Supreme Court, in State v. Tischio, 107 N.J. 504 (1987), interpreted N.J.S.A. 39:4-50a, which makes it unlawful for a person to operate "a motor vehicle . . . with a blood alcohol concentration of 0.10% or more by weight of alcohol in the [person's] blood." The Court concluded that a defendant may be convicted under the statute when a breathalyzer test that is administered within a reasonable time after the defendant was actually driving the vehicle reveals a blood-alcohol level of at least 0.10%. The Court stated, "[I]t is the blood-alcohol level at the time of the breathalyzer test that constitutes the essential evidence of the offense." Extrapolation evidence, where the defendant attempts to show by expert testimony that his blood-alcohol level, although registering 0.10% or more when tested, was actually below that reading while he was driving, was inadmissible. The Court reasoned that a narrow or literal interpretation of N.J.S.A. 39:4-50a, which would require a showing that the bloodalcohol level was 0.10% while driving, would "frustrate the fundamental regulatory goals underlying New Jersey's drunk driving laws."

In *State v. Downie*, 117 *N.J.* 450 (1990), the Supreme Court reinforced its judicial acknowledgement of the reliability of breathalyzer evidence, holding that the breathalyzer is "unsurpassed in its combined practicality and usefulness." *Id.* at 469.

In *State v. Dohme*, 229 *N.J. Super.* 49 (App. Div. 1988), the Appellate Division held that with respect to the reliance on a certificate demonstrating that breathalyzer ampoules were properly constituted, the officer who inspected the machine or administered the test could testify that the certificate relates to the same batch of ampoules from which the ampoules were taken that were used in the testing of the defendant and that they can fairly say that such certificates are generally relied on by experts in the field. While the court in *State v. Maure*, 240 *N.J. Super.* 269, 285 (App. Div. 1990),

aff'd o.b., 123 *N.J.* 457 (1991), did not consider the certificate to be an "indispensible prerequisite" to the admission of breathalyzer readings, it did note that it was the "preferred practice."

The use of an Automatic Clinical Analyzer (ACA) to test the alcohol content of blood taken from the defendant was approved in *State v. Figueroa*, 212 *N.J. Super.* 343 (App. Div. 1986), *certif. denied*, 107 *N.J.* 142 (1987).

Recently, a Law Division judge approved the Horizontal Gaze Nystagmus (HGN) field sobriety test, which records involuntary eye spasm indicative of alcohol intoxication, as scientifically reliable. State v. Maida, 332 N.J. Super. 564 (Law Div. 2000). Maida also held that a coordinator's certificate was sufficient to prove the accuracy of a breathalyzer. Id.; see also State v. Slinger, 281 N.J. Super. 538, 542 (App. Div. 1995). In State v. Doriguzzi, ____ N.J. Super. ____ (App. Div. 2000), however, decided after Maida, the Appellate Division declined to take judicial notice of the general acceptance of HGN testing in the scientific community, after a review of authoritative, scientific and legal writings, and judicial opinions from other jurisdictions. The Court stated that its survey of relevant caselaw "does not provide us with the level of certainty necessary to approve HGN testing for future cases."

Statistical probability evidence is not necessary for the admission of expert testimony concerning the similarity of the composition of lead bullets taken from a murder victim's body. *State v. Noel*, 157 *N.J.* 141 (1997). The lack of such evidence only goes to the weight, and not the admissibility, of the expert testimony.

The reliability of laser speed detectors was addressed in *Matter of LTI Speed Detec. System*, 314 *N.J. Super.* 233 (Law Div. 1998), *aff'd sub nom., State v. Abeskaron*, 326 *N.J. Super.* 110 (App. Div. 1999), *certif. den*, 163 *N.J.* 394 (2000). Speed readings produced by such detectors may be generally admitted as evidence, subject to certain restrictions as to distance and weather, without the necessity of expert testimony in individual prosecutions, so long as the officer operating the device received appropriate training and that relevant pre-operational checking procedures were satisfied. *Id.*

While Human Leukocyte Antigen (HLA) serological testing resulting in a finding of the probability of paternity is recognized in the scientific community, its

admission in a criminal trial is subject to the rules established in *State v. Spann*, 130 *N.J.* 484 (1993).

Isoenzyme tests analyze blood for six enzyme systems. The procedure then compares the results to the general population, which arrives at a figure which represents the percentage of the population which has a particular enzyme. Such testing was held in *State v. King*, 215 *N.J. Super.* 504 (App. Div. 1987), to be sufficiently reliable to be admitted into evidence.

DNA testing has also been found sufficiently reliable. *State v. Harvey*, 157 *N.J.* 117 (1997) (PCR); *State v. Marcus*, 294 *N.J. Super.* 267, 279-80 (App. Div. 1996), *certif. denied*, 157 *N.J.* 543 (1998).

Judicial disfavor with the results of so-called "truth serums" was reaffirmed in *State v. Blome*, 209 *N.J. Super*. 227 (App. Div. 1986), *certif. denied*, 104 *N.J.* 458 (1986). The prosecution, in summation, argued that the defendant could have confirmed her claim of insanity by submitting to sodium amytal while hospitalized shortly after the homicide with which she was charged. The reviewing court held that these comments constituted reversible error. The decision was based not so much on Fifth Amendment grounds as on the lack of reliable evidence showing that "truth serums" produce truthful responses in its users. Statements procured during the use of sodium amytal would be inadmissible at trial because of the as-yet unproven reliability of the drug.

Comparison between a shoe print and a shoe does not require expert testimony. *State v. Johnson*, 120 *N.J.* 263, 293-94 (1990). With respect to expert testimony in other areas involving the size and shape of feet, the reliability of the scientific techniques utilized is open to question. *See State v. Harvey*, 121 *N.J.* 407, 428-29 (1990); *State v. Prudden*, 212 *N.J. Super.* 608 (App. Div. 1986).

The results of a search conducted with the use of a metal detector were held to have been erroneously admitted at trial, at least where the trial court failed to take expert testimony regarding the reliability and accuracy of the device, and no evidence was offered to show that the device was operating properly on the day of the search. *State v. Burks*, 208 *N.J. Super.* 595 (App. Div. 1986). A police officer was improperly permitted to state that, had the homicide victim fired his gun at the defendant as the defendant said he had, the metal detector would have uncovered spent shells from the victim's gun.

The courts have held that the battered woman's syndrome has a sufficient scientific basis to produce uniform and reasonably reliable results so as to permit its introduction in a prosecution for murder which resulted in a conviction of reckless manslaughter. *State v. Kelly*, 97 *N.J.* 178 (1984).

The courts have permitted expert testimony with regard to human tracking by a bloodhound, provided a proper foundation is laid regarding the handler of the dog as an expert and the dog in question as being trained and reliable in the tracking of human beings. *State v. Parton*, 251 *N.J. Super.* 230, 233-35 (App. Div. 1991), *certif. denied*, 127 *N.J.* 560 (1992); *State v. Wanczyk*, 196 *N.J. Super.* 397 (Law Div. 1984), *rev'd o.g.*, 201 *N.J. Super.* 258 (App. Div. 1985).

Although the courts are liberal regarding the admission of expert testimony where it will assist the jury, they will not permit its introduction where it will cause confusion. In *State v. Conway*, 193 *N.J. Super.* 133, 169 (App. Div.), *certif. denied*, 97 *N.J.* 650 (1984), the court held that expert testimony regarding discourse analysis, which is a discipline used to determine the intent of the speaker in covertly recorded conversations, was inadmissible. The court held that discourse analysis had not gained general acceptance in the field of linguistics and was a potential source of confusion for the jury, thereby justifying its exclusion.

XXX. SUFFICIENCY OF PROOFS AND RECORD

R. 3:18-1 provides for the entry of a judgment of acquittal by the trial court at the end of the State's case or at the close of the evidence if the evidence is insufficient to warrant a conviction on one or more counts of an indictment. *R.* 3:18-2 provides for a motion for an acquittal to be made within ten days of a guilty verdict.

The oft-stated standard, derived from *State v. Reyes*, 50 *N.J.* 454, 458-59 (1967), is that the e question the trial judge must determine is whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

See also State v. Kittrell, 145 N.J. 112, 130 (1996); State v. Taccetta, 301 N.J. Super. 227, 240 (App. Div.), certif. denied, 152 N.J. 187 (1997). The court in reviewing a motion for acquittal is not to consider evidence from the defense case. *State v. Reyes, supra.* An exception is in the case of a motion for an acquittal notwithstanding the verdict when the defendant has been convicted of a lesser-included offense; there, the court can look to evidence in the entire record to support the verdict. *State v. Sugar,* 240 *N.J. Super.* 148 (App. Div.), *certif. denied,* 122 *N.J.* 187 (1990); *see also State v. Kluber,* 130 *N.J. Super.* 336, 341-42 (App. Div. 1974), *certif. denied,* 67 *N.J.* 72 (1975) (standard for motion for judgment *n.o.v.* same as applicable to motion for acquittal made at end of State's case or the end of the entire case).

The only issue on a motion for acquittal is whether the State's proofs, be they direct or circumstantial, are sufficient to permit a jury to find the defendant's guilt beyond a reasonable doubt. *State v. DeLuca*, 325 *N.J. Super.* 376, 393 (App. Div. 1999), *certif. granted*, 163 *N.J.* 79 (2000); *State v. Taccetta*, 301 *N.J. Super.* at 240. In considering such a motion, the trial court must view the evidence most favorably to the State. *State v. Milton*, 255 *N.J. Super.* 514, 521 (App. Div. 1992).

In a habeas corpus proceeding arising out of a claim that a person had been convicted in a state court on insufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt, the court should not restrict its inquiry to whether there is any evidence to support the conviction. In Jackson v. Commonwealth of Virginia, 443 U.S. 307 (1979), the court held that defendant would be entitled to habeas corpus relief, assuming procedural prerequisites for such a claim had otherwise been satisfied, if it was found that upon the record evidence adduced at trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt in terms of the substantive elements of the criminal offense as defined by state law. In reviewing a challenge as to the sufficiency of evidence to support a conviction, the State's right to the benefit of a reasonable inference cannot be used to reduce the State's burden of establishing the essential elements of the offense charged beyond a reasonable doubt. State v. Martinez, 97 N.J. 567 (1984).

Issues of sufficiency of the evidence often arise in cases in which the State is alleging that the defendant was in constructive possession of illicit drugs. The determination of constructive possession is fact sensitive. *State v. Hurdle*, 311 *N.J. Super.* 89, 96 (App. Div. 1998).

In *State v. Brown*, 80 *N.J.* 587, 593 (1979), the Supreme Court held that "where . . . defendant is one of

several persons found on the premises where illicit drugs are discovered, it may not be inferred that he knew of their presence or had control of the drugs unless there are other circumstances or statements of the defendant tending to permit such an inference to be drawn." The Court in Brown held that the total circumstances depicted by the proofs, *i.e.* defendant's presence in the apartment, and the concealed heroin and heroin-related materials found in the apartment, were sufficient to allow the jury to draw relevant inferences and determine beyond a reasonable doubt that defendant had knowledge and control over the narcotics and that narcotics trafficking took place in defendant's apartment. See also State v. Jackson, 326 N.J. Super. 276, 281 (App. Div. 1999) (presence of defendant in room insufficient to establish possession of cocaine in dresser drawer, but evidence was sufficient to establish possession of cocaine found in pants since jury could infer pants belonged to the defendant); State v. Whyte, 265 N.J. Super. 518 (App. Div.), aff'd o.b., 133 N.J. 481 (1993).

In State v. Palacio, 111 N.J. 543 (1988), the Supreme Court examined a number of factual circumstances which provided sufficient evidence to convict the defendant, a passenger in a vehicle found to contain drugs, of possession of cocaine and possession of cocaine with intent to distribute. First, the jury could infer that the driver was a drug smuggler, due to the large quantity of drugs seized, their extraordinary monetary value, their degree of purity, the existence of a secret storage compartment in his car, and a slip of paper found in his wallet indicating a drug transaction. The Court then considered as a likely inference that the smuggler would travel with a knowledgeable companion, the defendant, and not an innocent passenger or stranger. The Court further noted that the defendant and the codefendant spoke to each other in Spanish during the stop, which was evidential as an indication that the parties knew one another, conversed when critical and incriminating events were occurring, and sought to keep the conversation concealed. See also State v. Miller, 273 N.J. Super. 192 (App. Div. 1994) (drugs under hood of car; defendant was front seat passenger; evidence insufficient); State v. Shipp, 216 N.J. Super. 662 (App. Div. 1987) (insufficient evidence).

In *State v. Binns*, 222 *N.J. Super.* 583 (App. Div.), *certif. denied*, 111 *N.J.* 624 (1988), the evidence was sufficient to convict the defendant of possession of cocaine and possession of cocaine with intent to distribute where the defendant was the sole operator of a rental car and possessed the keys to the truck where the cocaine was found, distribution paraphernalia was in

plan view in the trunk, and the codefendant passenger attempted to mislead the police about the origination point of the trip, which was outside the permissible area of operation of the rental vehicle.

A conviction of a crime may be based solely upon fingerprint evidence as long as the attendant circumstances establish that the object upon which the prints are found was generally inaccessible to the defendant and, thus, a jury could rationally find beyond a reasonable doubt such object had been touched during the commission of the crime. *State v. Watson*, 224 *N.J. Super.* 354 (App. Div.), *certif. denied*, 111 *N.J.* 620, *cert. denied*, 488 *U.S.* 983 (1988). The mere existence of other possible hypotheses is not enough to remove the case from the jury.

That a defendant-passenger was in unexplained "possession" of a recently-stolen auto, lived close to the location of the auto's theft, and gave police false information upon being arrested, was sufficient evidence to support a guilty verdict on a receiving stolen property charge. *State v. Alexander*, 215 *N.J. Super.* 522 (App. Div. 1987).

In *State v. McCoy*, 116 *N.J.* 293 (1999), however, the Court held that where a defendant is merely a passenger in a car he knows to be stolen, but does not "possess" it because he lacks dominion and control over the vehicle, he may not be convicted of receiving a stolen auto under *N.J.S.A.* 2C:20-7. An inference of possession can be drawn from the surrounding circumstances when it is more likely than not that the proven facts point to the inferred fact of possession.

An issue similar to sufficiency of the evidence is where the State has a duty to preserve evidence and fails to do so because the evidence is either lost or destroyed. The failure of the police to preserve potentially useful evidence does not constitute a denial of due process of law unless a defendant can show bad faith on the part of the police. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); State v. Dreher, 302 N.J. Super. 408, 483 (App. Div.), certif. denied, 152 N.J. 10 (1997), cert. denied, 524 U.S. 943 (1998); State v. Colasurdo, 214 N.J. Super. 185, 189 (App. Div. 1986); State v. Hollander, 201 N.J. Super. 453, 479 (App. Div. 1985), certif. denied, 101 N.J. 335 (1985); see also State v. Marshall I, 123 N.J. 1, 109-10 (1991). Moreover, a defendant must demonstrate that the evidence was material. The evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *California* v. Trombetta, 467 U.S. 479, 489 (1984); State v. Dreher, supra; see State v. Marshall, 123 N.J. at 108; State v. Hollander, supra.

XXXI. WEALTH OR POVERTY

Evidence that a defendant owed money to a deceased victim is admissible to prove motive in a criminal prosecution. *State v. Rogers*, 19 *N.J.* 218, 228-29 (1955). However, there must be something more than mere poverty to tie defendant to a crime involving the acquisition of property. Hence, it is improper to present evidence that a person "had no apparent means of income and hence was likely to commit a crime for dollar gain." *State v. Mathis*, 47 *N.J.* 455, 472 (1966); *see State v. Martini I*, 131 *N.J.* 176, 266 (1993), *cert. denied*, 516 *U.S. 875 (1995); State v. Zola*, 112 *N.J.* 384, 427-28 (1988); *State v. Robinson*, 139 *N.J. Super.* 58, 63 (App. Div. 1976), *certif. denied*, 75 *N.J.* 534 (1977).

There is no similar interdiction with respect to evidence of sudden acquisition of wealth. In State v. Smollok, 148 N.J. Super. 382, 286-87 (App. Div.), certif. denied, 74 N.J. 274 (1977), the defendant was charged with accepting bribes. The State was permitted to prove that during the period of the bribery scheme, the defendant made substantial deposits, some of them in cash, in round numbers in his bank account. The Appellate Division held that this was proper, especially in view of defendant's limited salary as a public servant, since there was other evidence of defendant's guilt. Moreover, the court ruled that such evidence could be admitted even in the absence of evidence tracing the money in the deposits to the bribes. This foundation was unnecessary to the admissibility of the evidence, although it could be considered by the trier of fact in determining the weight to accord the evidence. Id. If the defendant comes forward with an innocent explanation for the sudden acquisition of wealth, then the trier of fact will resolve the question of the origin of the wealth.

Evidence of a defendant's affluence is not admissible to negate a motive for the commission of a crime of gain. *State v. Wilbely*, 122 *N.J. Super.* 463, 466-67 (App. Div. 1973), *rev'd o.g.*, 63 *N.J.* 420 (1973). In *Wilbely*, the Appellate Division noted the peripherical relevance of such evidence and, relying on former *Evid. R.* 4, concluded that its admission could not be justified. The court noted the existence of both "the honest poor as well as the thieving wealthy."

EX POST FACTO

I. CONSTITUTIONAL PROVISIONS

"No state shall. . .pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. . ." U.S. Const. art. I, § 10.

"The Legislature shall not pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." *N.J. Const.1947*, art. IV, § VII, ¶ 3.

II. STATE CONSTITUTIONAL PROHIBITION COMPARED WITH FEDERAL CONSTITU-TIONAL PROHIBITION

The New Jersey ex post facto clause is not construed more expansively than its federal counterpart. *State v. Kaplan*, 178 *N.J. Super.* 487, 495 (App. Div. 1978).

III. GENERAL DEFINITIONS

Generally, an ex post facto law is one which makes a prior act that was innocent when committed a crime, which makes punishment for a crime more burdensome after its commission, or which deprives a defendant of a defense available when the act was committed. *State v. T.P.M.*, 189 *N.J. Super.* 360, 366 (App. Div. 1983), citing *Dobbert v. Florida*, 432 *U.S.* 228, 292 (1977) (defining "*ex post facto*" precisely in those terms).

The ex post facto clause prohibits any law which, in relation to the past offense or its punitive consequences, alters the situation of the offender to his disadvantage. *State v. Humanik*, 199 *N.J. Super.* 283 (App. Div. 1985), *certif. denied*, 101 *N.J.* 266 (1985), quoting *State v. T.P.M.*, 189 *N.J. Super.* at 366-367. *See also State v. Chapman*, 187 *N.J. Super.* 474, 477 (App. Div. 1982), and cases cited therein.

IV. PURPOSES OF THE PROHIBITION

The purpose of the prohibition is to secure substantial personal rights against arbitrary and oppressive legislation. *State v. T.P.M.*, 189 *N.J. Super.* at 366, citing *Dobbert v. Florida*, 432 *U.S.* at 293, and *State v. Davis*, 175 *N.J. Super.* 130, 147 (App. Div. 1980), *certif. denied*, 85 *N.J.* 136 (1980).

The prohibition's drafters intended thereby "to assure that individuals had fair warning of the impact of legislation and could rely on its meaning." *State v. T.P.M.,* 189 *N.J. Super.* at 366, citing *Weaver v. Graham,* 450 *U.S.* 24, 28-29 (1981).

V. APPLYING THE PROHIBITION (GENERAL PRINCIPLES)

A. Application Limited to Statutes Operating Retrospectively

"The statute in question must be retrospective, altering the legal consequences of acts completed before its effective date." *State v. T.P.M.*, 189 *N.J. Super.* at 367, citing *Weaver v. Graham*, 450 *U.S.* at 29.

B. Application Limited to Penal (Criminal) Statutes

The prohibition "applies only to statutes that are by their nature penal." *Matter of Coruzzi*, 95 *N.J.* 557, 578 (1984). *See also In re Garay*, 89 *N.J.* 104, 111 (1982) (the prohibition "applies only to criminal laws"), and cases cited therein, including *Galvan v. Press*, 347 *U.S.* 522, 531 n.4 (1954). Accordingly, the prohibition applies only to criminal penalties and not civil penalties. *In re Garay*, 89 *N.J.* at 111-113. *United States v. Ward*, 448 *U.S.* 242, 249 (1980), "sets forth the inquiry to be followed in deciding whether a penalty is criminal or civil." *In re Garay*, 89 *N.J.* at 112.

Primarily, the determination of whether a penalty is civil or criminal is a matter of statutory construction. *United States v. Ward*, 448 *U.S.* at 248; *In re Garay*, 89 *N.J.* at 112.

Where the legislature has labeled the penalty civil, that expression of legislative purpose is accorded substantial weight. Such a penalty will be deemed criminal only upon "the clearest proof" that the sanction is punitive either in purpose or effect. *United States v. Ward*, 448 *U.S.* at 248-249; *In re Garay*, 89 *U.S.* at 112.

Some of the factors to be examined in determining whether a sanction is civil or criminal are set forth in *Kennedy v. Mendoza-Martin*, 356 *U.S.* 86, 168-169 (1963). *In re Garay*, 89 *N.J.* at 113.

The United States Supreme Court has never rejected Congress' designation of a penalty as civil when the sanction was merely monetary. *In re Garay*, 89 *N.J.* at 112.

Applications of the penal/non-penal dichotomy are:

Matter of Coruzzi, 95 N.J. 557 (1984). Although a statute which provided for the indefinite suspension of a judge without pay pending the completion of removal proceedings applied retrospectively and thus brought to bear unpleasant consequences upon the respondent for his prior conduct, the crucial issue is whether the legislative intent behind the provision was to punish judges for past activity or to regulate a present situation. The expost facto prohibition only provides that when a statute engenders unpleasant consequences for an individual because of a past act, punishment cannot be the purpose of the statute. Thus, the appropriate focus is not simply the effect on the individual challenging the statute but also other potential or intended objects of the law's operation to determine if the challenged restriction serves a valid regulatory purpose. The statute in question serves the important regulatory purposes of maintaining the standards of the profession, protecting the public and preserving public confidence in the judiciary by not allocating public funds to pay salary to judges who have conducted themselves in a manner that warrants suspicion. The unpleasant consequences brought to bear upon the respondent by the statute were thus incidental to valid regulatory purposes, and the statute was not an ex post facto law. Id.

In re Garay, 89 N.J. 104 (1982). The retroactive application of a statutory amendment which provided for the recovery of penalties, treble damages and interest from physicians convicted of Medicaid fraud did not violate the expost facto prohibition. The Legislature specifically denoted the penalties assessed by the amendment as "civil." Moreover, the obvious purpose of the amendment was to cover the costs of fraud investigations and of the legal proceedings required to ensure repayment, and not to impose punishment. The penalties prescribed thereby are thus in effect liquidated damages for the State's costs. In view of the many costs to the State entailed by the respondent's conduct and substantial precedent supporting the retroactive application of similar penalty provisions, the penalty fixed by the statute was not on its face so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty.

See also In re Kaplan, 178 N.J. Super. 487, 493-495 (App. Div. 1981), and cases cited therein.

C. Application Limited to Statutes Which Affect Substance

No ex post facto violation occurs if the change effected is merely procedural and does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt. State v. Humanik, 199 N.J. Super. at 283 (App. Div. 1985), quoting Weaver v. Graham, 450 U.S. at 29, in turn quoting Hopt v. Utah, 110 U.S. 574, 590 (1884). The ex post facto prohibition "does not, however, apply to procedural changes, even when they disadvantage the offender." State v. T.P.M., 189 N.J. Super. at 367, citing Weaver v. Graham, 450 U.S. at 29, n.12. "The Clause also does not prohibit legislative control of remedies which do not affect substance." State v. T.P.M., 189 N.J. Super. at 367, citing Dobbert v. Florida, 432 U.S. at 293 (1977) and State v. Davis, 175 N.J. Super. at 147. However, "a procedural form will not protect a substantive change." State v. T.P.M., 189 N.J. Super. at 367, citing Weaver v. Graham, 450 U.S. at 29, n.12.

For example:

1. "[B]urdens of proof - those rules governing the degree of certainty the evidence must engender to warrant a given disposition by the trier of fact - are procedural matters" for purposes of determining whether the New Jersey penal code should be retroactively applied. *State v. Molnar*, 81 *N.J.* 475 (1980).

2. Generally, however, "[a] substantial question exists as to whether evidentiary rules are to be considered substantive or procedural," and thus, whether such rules may be applied retrospectively. *State v. Humanik, supra.*

Compare, e.g., Beazell v. Ohio, 269 U.S. 167, 170 (1925) (statutory alterations do not fall within the *ex post* facto ban if they pertain to the mode of trial or the rules of evidence, do not deprive the accused of a defense, and operate only in a limited manner and insubstantial to his disadvantage); Thompson v. Missouri, 171 U.S. 380 (1898) (a statute changing the rules of evidence to allow testimony against an accused which was inadmissible at the time of the homicide at bar could be retroactively applied); Hopt v. Utah, 110 U.S. 574, 590 (1884) (a statute removing the disqualification of convicted felons as potential witnesses could be retroactively applied); Parker v. United States, 235 F.2d 21, 22 (D.C. Cir. 1956) (statute revoking physician's privilege could be applied retroactively); with Kring v. Missouri, 107 U.S. 221, 228 (1883) (retroactive application of provision in Missouri constitution violated ex post facto prohibition, since it

"change[d] the rule[s] of evidence so that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide is not received as evidence" in a subsequent murder prosecution); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) ("every law that alters the legal rules of evidence, and requires less, or different, testimony, that the law required at the time of the commission of the offense, in order to convict the offender is ex post facto"); Government of Virgin Islands v. Civil, 591 F.2d 255, 259 (3d Cir. 1979) (repeal of corroboration statute reduced amount of proof necessary for conviction and violated the ex post facto prohibition); United States v. Henson, 486 F.2d 1292, 1304-1308 (D.C. Cir. 1973) (statute eliminating trial court's discretion in admitting prior criminal convictions violated *ex post facto* prohibition).

3. A law is *ex post facto* if it changes the rules of evidence after the commission of the crime so that less or different testimony is sufficient to convict a defendant of the crime. *State v. Donato*, 106 *N.J.L.* 397 (E. & A. 1930). *See also State v. Humanik, supra* (court "tend[ed] to believe" that *N.J.S.A.* 2C:4-2 [defendant must prove diminished capacity by a preponderance of the evidence] could be applied retroactively "because it does not decrease the nature, amount or quality of the evidence the State must present in order to obtain a conviction").

D. Nature of the Impairment

"[T]o disadvantage the offender the statute need not impair a vested right. The alteration of penal provisions established by the Legislature is sufficient if the burden on the defendant is made more onerous." *State v. T.P.M.*, 189 *N.J. Super.* at 367, citing *Weaver v. Graham*, 450 *U.S.* at 29-30.

Compare, e.g., State v. T.P.M., 189 N.J. Super. at 366-368 (retrospective application of statutory modification of expungement procedure did not violate ex post facto clause, as expungement is a remedial measure, and the denial of expungement does not prolong a defendant's punishment; expungement is not a sentencing consideration and applies neither to the form of sentence nor the extent of punishment; a defendant's interest in expungement is in obtaining a potential remedy, not in retaining something which had already inured to his benefit); State v. Davis, 175 N.J. Super. at 145-146. Davis held that the amendment of the Parole Act to make commutation and work credits inapplicable to reduce any judicial or statutory mandatory minimum term of imprisonment could be applied retroactively without conflicting with the ex post facto prohibition. This was because parole is not a constitutional right, but an act of leniency or grace and a device for the protection of society through the rehabilitation of the offender. Similarly, the granting of work credits is purely a legislative function and cannot properly be included in the sentencing procedure. When sentence is imposed upon a defendant, there is no constitutional guarantee that the provisions regarding parole will remain constant. Thus, the retroactive application of the amended Parole Act provision did not violate the ex post facto prohibition; Trantino v. Department of Corrections, 168 N.J. Super. 220 (App. Div. 1979), certif. denied, 81 N.J. 338 (1979) (new policy which refused to grant work credits towards parole for time spent on death row and thereby altered defendant's estimated parole expectation date did not offend the ex post facto prohibition, because a defendant has no vested right in his estimated parole expectation date); Zink v. Lear, 28 N.J. Super. at 515 (a change in the parole laws is not an ex post facto violation provided that the change does not result in a new penalty for the crime committed or an increase in the sentence); Weaver v. Graham, 450 U.S. at 29 (it violated the expost facto prohibition to retroactively eliminate "gain time" credits, as those credits had already been earned by the petitioner and the elimination thereof prolonged his punishment; significantly, such credits appeared to have been considered in the imposition of the petitioner's sentence); Ex parte Garland, 71 U.S. (4 Wall.) 333, 377 (1867) (exclusion from a profession is sufficient deprivation to establish a violation of the ex post facto clause). See also Loftwich v. Fauver, 284 N.J. Super. 530 (App. Div. 1995).

See State v. Johns, 111 N.J. Super. 574 (App. Div. 1970). An amendment to the Sex Offender Act adding incest to offenses specified therein could not be applied to one who committed incest prior to the effective date of the amendment in view of the ex post facto prohibition. It was "not of controlling significance that a provision for a commitment under the ... Act does not authorize a more severe punishment than provided in the Crimes Act section relating to incest, N.J.S.A. 2A:114-2." What was important was that it "authorize[d] different treatment of and consequences to a defendant" and was thereby potentially disadvantageous to him. Id. at 577, citing Lindsey v. Washington, 301 U.S. 397, 401-402 (1937) ("[w]e need not inquire whether the [statutory change] is technically an increase in the punishment annexed to the crime.... It is plainly to the substantial disadvantage of petitioners"), and State v. Blanford, 105 N.J. Super. 56, 59-60 (App. Div. 1969), remanded sub nom. State v. Horne, 56 N.J. 372 (1970) (itemizing some potentially

substantial disadvantages to a prisoner sentenced under the Sex Offender Act).

E. Effect Of Statute of Limitations

A law is not ex post facto if it extends the statute of limitations before the original statutory period has expired. *State v. Nagle*, 226 *N.J. Super.* 513 (App. Div. 1988); *United States v. Richardson*, 512 *F.*2d 105, 106 (3d Cir. 1975); *United States v. Kurzenknabe*, 136 *F.Supp.* 17, 23 (D.N.J. 1955). However, a statute which purports to authorize the prosecution of a crime previously banned by the statute of limitations is illegal. *United States v. Richardson*, 512 *F.*2d at 106; *Falter v. United States*, 23 *F.*2d 420, 425-426 (2d Cir. 1928), citing *Moore v. State*, 43 *N.J.L.* 203 (E. & A. 1881).

F. Effect of Judicial Construction

The first application of a criminal statute which has to be judicially construed in order to be applied is not an *ex post facto* violation. *State v. Western Union Telegraph Co.,* 13 *N.J. Super.* 172, 220 (Cty. Ct. 1951); 3 *Southerland Statutory Construction* (3rd ed.), § 2301, *et seq.*

G. Effect of Superceding Statutes

A defendant convicted for a continuing offense which began prior to a statutory supersession and continuing to a point in time after such supersession was not convicted in violation of the *ex post facto* prohibition. *State v. Bobbins*, 21 *N.J.* 338 (1956), *app. dis.*, 352 *U.S.* 920 (1956).

VI. MISCELLANEOUS APPLICATIONS

A. Conspiracy

It is not a violation of the ex post facto prohibition to apply a new conspiracy statute where the new statute came into effect while a conspiracy was ongoing. *United States v. Goldberger*, 197 *F.*2d 330 (3d Cir. 1952), *cert. denied*, 344 *U.S.* 833 (1952).

A statute increasing a penalty with respect to a criminal conspiracy which commenced prior to but was continued beyond the effective date of such statute is not ex post facto as to that crime. In applying the ex post facto prohibition, those continuing criminal conspiracies which must be evidenced by overt acts, such as may be charged under a general conspiracy statute, are regarded as having been committed on the date of the last overt act

alleged in the indictment. Conspiracies which do not require proof of an overt act are considered concluded as alleged in the indictment. *Leyras v. United States*, 371 *F.*2d 714, 717 (9th Cir. 1967); *see also United States v. Borelli*, 336 *F.*2d 376 (2d Cir. 1964).

B. Sentencing

In re Caruso, 10 *N.J.* 184 (1952). There is no ex post facto violation occurring in sentencing a defendant under a statute which imposes more punishment for a subsequent offense, since the defendant is being punished for the present offense rather that the prior offense. The prior offense serves only as background in determining the present sentence.

State v. Oliver, 162 *N.J.* 580, 587 (2000). Petitioner, who qualified for and received a life sentence under the three-strikes law, claimed that the law violates the ex-post facto clause because it "changes the legal consequences of his prior bad acts." *See N.J.S.A.* 2C:43-7.1a. Held: This is a recidivist statute, and recidivist statutes do not violate the ex post facto clause if they were on the books at the time the triggering offense was committed. *See also Gryger v. Burke*, 334 *U.S.* 728, 732 (1948) (holding that sentence as a habitual criminal is not viewed as a new jeopardy or additional penalty for earlier crimes; rather, it is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one).

State v. Dela Rosa, 327 *N.J. Super.* 295 (App. Div. 1999), *certif. denied*, 164 *N.J.* 191 (2000). Petitioner was convicted prior to an increase in the penalty in favor of the Victims of Crime Compensation Board. Held: The retroactive application of this increased penalty violates the Ex Post Facto clause.

State v. Williams, 309 *N.J. Super.* 117 (App. Div. 1998). The use of convictions that predate the adoption of the Code of Criminal Justice to impose an extended term does not violate the ex post facto clause.

State v. Bowen, 224 N.J. Super. 263 (App. Div.), certif. denied, 113 N.J. 323 (1988). Petitioner was convicted under the Sex Offender Act and was therefore sentenced to consecutive indeterminate terms, subject to the aggregate maximum of six years. A resentencing panel resentenced defendant after he was determined not to be amenable to treatment as a sex offender. The resentencing was not an ex post facto violation, even though it increased the terms for the offenses, because it did not increase the aggregate period of incarceration. *Hendricks v. Kansas*, 521 *U.S.* 346 (1997). Petitioner, convicted of indecent liberties with child and having served his prison sentence for same, appealed from an order committing him to custody of the Secretary of Social and Rehabilitation Services based on a jury finding that he was a sexually violent predator under Kansas's Sexually Violent Predator Act. Petitioner contended that the Act was a criminal proceeding and therefore violated the ex post facto clause. Held: There is no violation of the ex post facto clause since (1) the Act does not establish criminal proceedings, and (2) involuntary confinement is not punishment.

Collins v. Youngblood, 497 U.S. 37 (1990). Defendant was convicted in Texas of aggravated sexual abuse and received both a life sentence and a fine. On appeal, he complained that the Texas law under which he was convicted did not authorize both a fine and a prison term for his offense. Before his claim was considered, a new law was passed allowing an appellate court to reform an improper verdict assessing a punishment not authorized by law. Defendant subsequently received a new verdict, whereupon he argued that the application of the new law was a violation of the ex post facto clause. Held: The application of the statute to defendant was not prohibited by the ex post facto clause because (1) it does not punish a crime which was not a crime when it was done, (2) it does not make the punishment more burdensome, and (3) it does not deprive defendant of any defense that was available to him under the law at the time he committed the offense.

But see, Miller v. Florida, 482 U.S. 423 (1987). Petitioner argued that application of sentencing guidelines, which had been revised after commission of the offense, violated the ex post facto clause. Held: The application of revised sentencing guidelines to defendant, whose crimes occurred before their effective date, violated the ex post facto clause because they (1) increased the presumptive sentence and therefore changed the legal consequences of the acts committed before the act's effective date, and (2) made the punishment for the crime more burdensome than it would have been prior to the revision.

C. Retroactive Application of New Criminal Rules

State v. Young, 77 *N.J.* 245 (1978), *rev'g*, 148 *N.J. Super*. 405 (App. Div. 1977). The common law rule that in order for a killing to be murder, the victim must die within a year and a day after the attack, is abolished. Held: Abolition of the rule is not to operate retroactively to inculpate defendant for murder, where the victim died one year and 63 days after defendant shot him.

State v. Humanik, 199 N.J. Super. 283 (App. Div.), certif. denied, 101 N.J. 266 (1985). Defendant contended that an amendment to a statute enacted after the crime was committed but before trial began, violated the ex post facto law. The amendment required defendant to prove mental disease or defect by a preponderance of the evidence, whereas the prior statute did not enumerate any standard of proof. Held: The amendment does not violate the ex post facto clause, since it does not decrease the nature, amount, or quality of the evidence that the State must present in order to obtain a conviction.

D. Bail

United States v. Miller, 753 F.2d 19 (3d Cir. 1985).

Petitioners contended that the application of an amended bail statute, which was enacted after all the offenses in their indictments took place, violated the ex post facto clause. Held: The availability of bail pending appeal is a procedural issue, rather than a type of punishment, so the ex post facto clause does not apply.

E. Parole

*Trantino v. N.J. State Parole Boar*d, 2000 *WL* 739311 (N.J. App. Div. 2000), *appeal pending.* Petitioner claimed that the 1997 statutory amendment eliminating requirement of consideration of "new information" with respect to a subsequent parole application, after initial denial of parole, violated the ex post facto clause. The Court found that the amendment was a procedural modification that did not constitute a substantive change in parole release criteria. *See N.J.S.A.* 30:4-123.56c. Therefore, the application of amendment to petitioner did not violate the ex post facto clause.

Garner v. Jones, 529 *U.S.* 244, 120 *S.Ct.* 1362, 146 *L.Ed.*2d 236 (2000). Petitioner, an inmate, claimed that the application of an amendment to the Parole Board's rule, changing the frequency of required reconsideration hearings for inmates serving life sentences from every three years to every eight years, violated the ex post facto clause. Held: The application of the amended rule did not necessarily violate the ex post facto clause. This is because (1) the law is qualified in that it vests with the Board discretion as to how often to set an inmate's date for reconsideration with an 8-year maximum, and (2) the Board's policies permit expedited reviews in the event of a change in circumstance or new information.

California Dep't of Corrections v. Morales, 514 U.S. 499 (1995). Petitioner complained that California's parole procedures, which decreased the frequency of parole hearings for certain offenders, violated the ex post facto law. Those procedures allowed the Parole Board, after holding an initial hearing, to defer for up to three years a subsequent parole suitability hearing for prisoners convicted of multiple murders if the Board found it was unreasonable to expect that it would grant parole at a hearing during the subsequent years, violated the expost facto clause. Held: Because the parole procedures had not changed the quantum of punishment attached to the petitioner's offense, they were not ex post facto. The Court rejected petitioner's argument that the ex post facto clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment, and noted that the question of what legislative adjustments will be held to be of sufficient moment to transgress the ex post facto prohibition must be a matter of degree. The Court declined to articulate a single formula for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the prohibition.

Royster v. Fauver, 775 *F.*2d 527 (3d Cir. 1985). Petitioner, who was convicted of a murder he committed in 1968, argued that the Parole Act of 1979, which was passed post-conviction, violated the ex post facto clause. Held: The 1979 Act and the prior Act were precisely the same, so the application of the 1979 Act to petitioner was not a violation of the ex post fact clause.

But see, Lynce v. Mathis, 519 U.S. 433 (1997). Petitioner, who was incarcerated, received early release credits due to prison overcrowding. A statute was then passed which retroactively canceled these provisional early release credits, resulting in the rearrest and reincarceration of petitioner. Held: This statute violated the ex post facto clause because the retroactive cancellation had the effect of increasing petitioner's punishment, regardless of the legislative purpose in enacting the overcrowding statute.

F. Evidence

State v. Gadsen, 245 *N.J. Super.* 93 (App. Div. 1990). Defendant was convicted of unlawful possession of cocaine with intent to distribute within 1,000 feet of a school. At trial, the State utilized an amended statute authorizing the use of a map to establish that cocaine was

distributed within 1,000 feet of a school. Because the statute was amended after commission of the offense, defendant argued that its application violated the ex post facto clause. Held: Since changes in evidentiary rules enacted after the commission of a crime are not ex post facto laws unless they are a guise for depriving defendants of a substantial right, and the law does not make any change in defining the offense or its punitive consequences, defendant's ex post facto claim is without merit.

But see, Carmell v. Texas, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000). Petitioner was convicted in 1996 of committing sexual offenses from 1991 to 1995 when the victim was 12 to 15 years old. Pursuant to a 1993 amendment to a Texas statute, the victim's testimony alone could support a conviction if the victim was under 18. Prior to the amendment, the statute specified that a victim's testimony could not, by itself, support a defendant's conviction, and that there had to be corroborating evidence. Held: The application of the 1993 amendment violated the ex post facto clause because the law "alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offen[se]."

G. Capital Punishment

Dobbert v. Florida, 432 *U.S.* at 296-298 (1977). It does not violate the ex post facto prohibition to sentence a defendant to death under a death penalty statute implemented subsequent to the occurrence of the defendant's capital offense if the death penalty statute in existence on the date of the offense was thereafter held to be unconstitutional.

In *Dobbert*, the defendant was convicted of first degree murder. The death penalty statute which was in existence at the time of the crime was later held to be unconstitutional. However, at the time the defendant was tried, a new death penalty statute had been enacted which met constitutional mandates. The death penalty was imposed based upon findings made in accordance with the new statute. The defendant claimed that the death penalty statute could not be imposed upon him because it had been enacted following his offense.

The Supreme Court was not persuaded. This was because the changes in the death penalty statute between the time of the offense and the time of the trial were procedural and on the whole ameliorative. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed, and there was no change in the quantum of the punishment attached to the crime. The new statute provided capital defendants with more rather than less judicial protection than was afforded under the old statute. Hence, there was no ex post facto violation.

General Rule: If a superceding statute changes the procedures by which a death penalty may be imposed, the defendant is precluded from challenging the statute as being *ex post facto* unless the procedure prescribed by the new statute is more onerous than that prescribed by the superceded statute. *Dobbert v. Florida*, 432 *U.S.* at 294.

State v. Erazo, 126 *N.J.* 112 (1991). Defendant, convicted of capital murder, claimed that a capital murder statute permitting the jury's consideration of prior murder in sentencing violated the ex post facto clause. Held: This was not an ex post facto law, because the prior murder was admissible to enable the jury to determine the appropriate sentence for charged murder, not to punish defendant for the prior murder.

State v. Muhammad, 145 N.J. 23 (1996). Defendant was charged with the kidnapping, rape, and murder of a child. He claimed that the victim impact statute, N.J.S.A. 2C:11-3c(6), violated the expost fact clause, because it may lessen the weight that a jury attaches to his catch-all mitigating factor. Held: There was no such violation because the statute does not criminalize behavior that was previously lawful, and does not make punishment for a crime more burdensome after its commission. The fact that the statute works to defendant's disadvantage does not constitute an ex post facto violation. The statute only modifies the scope of evidence that may be admitted during the penalty phase of a capital case and does not alter any substantive rights of defendant.

H. Megan's Law

Doe v. Poritz, 142 *N.J.* 1 (1995). Petitioner, a convicted repeat sex offender, argued that the Registration and Community Notification Laws violated the ex post facto clause. Held: The statute can fairly be characterized as remedial, both in its purpose and implementing provisions. Such a law does not become punitive simply because its impact, in part, may be punitive, unless the only explanation for that impact is a punitive purpose. *Accord, State in the Interest of B.G.*, 289 *N.J. Super.* 361 (App. Div. 1996).

E.B. v. Verniero, 199 F.3d 1077 (3d Cir. 1996); *Artway v. New Jersey*, 81 F.3d 1235, *reh'g denied*, 83 F.3d 594 (3d Cir. 1996).

The application of the community notification provisions of Megan's Law do not constitute punishment for the purposes of the ex post facto clause, because the Legislature's purpose was not punitive and because notification was not intended as punishment. Furthermore, the effects of notification on sex offenders' reputational interests and safety are not unduly burdensome when evaluated in light of the State's interest in protecting the public.

I. Plea Bargaining

State v. Reyes, 325 N.J. Super. 166 (App. Div. 1999). Petitioner argued that the application of the Attorney General Interim Guidelines, governing plea offers in Comprehensive Drug Reform Act (CDRA) cases, to his sentence for offenses committed prior to the promulgation of the guidelines, violated the ex post facto Held: The Attorney General promulgated clause. guidelines as part of his delegated power; these guidelines represented the executive branch's interpretation of legislative purpose of CDRA, and this interpretive function was not a promulgation of a "law" within the meaning of ex post facto.... A mere change in enforcement methods, priorities, or policies, does not activate the prohibition against ex post facto laws. See also State v. Jimenez, 266 N.J. Super. 560 (App. Div. 1993).

EXPUNGEMENT

I. GENERAL PROVISIONS AND OVERVIEW

In New Jersey, expungement of an arrest and/or conviction record is a statutory creation of the Legislature. N.J.S.A. 2C:52-1 et seq. It is a remedy created by law, and is not an equitable remedy subject to judicial interpretation or the application of equitable principles. In re F.A.U., 190 N.J. Super. 245, 247-248 (App. Div. 1983), cited with approval in State v. A.N.J., III, 98 N.J. 421, 427 (1985); State v. T.P.M., 189 N.J. Super. 360, 367-368 (App. Div. 1983); E.A. v. N.J. Real Estate Comm., 208 N.J. Super. 65, 68 (App. Div. 1986), certif. denied, 104 N.J. 415 (1986); State v. Blazanin, 298 N.J. Super. 221, 226, 229 (App. Div. 1997); IMO Application of Hart, 265 N.J. Super. 285, 292-293 (Law Div. 1993). Cf., State v. Raymond M., 188 N.J. Super. 533, 538 (Law Div. 1982)(interpreting the Code provisions on expungement, as applied to pre-Code offenses and the extent of relief available, the Court stated that the Code provisions "confers a considerably lesser benefit than previously resulted," but, the "Legislature is entitle to restrict the benefits of expungement.") As a statutory remedy, the expungement statutes should be viewed as "a remedial, not a punitive statute." State v. T.P.M., 189 N.J. Super. 360, 367-368 (App. Div. 1983).

The Code statutory scheme became operative on September 1, 1979. However, for the purposes of continuity, the provisions of *N.J.S.A.* 2C:52-1 *et seq.* were made retroactive to arrests and convictions pre-dating the adoption of the Code. *N.J.S.A.* 2C:52-25. This retroactivity provision was challenged in *State v. T.P.M., supra,* as an *ex post facto* constitutional violation. In rejecting the constitutional claim, the Appellate Division stated:

... the Legislature had a right to overhaul the statutory expungement scheme in 1979 and make the new law retroactive in the interest of uniformity and efficiency without treading on the Due Process or Ex Post Facto Clauses of the Federal Constitution. A 'statutory expectation' does not 'mean that in addition to the full panoply of due process required to convict and confine' the expectation becomes a protected liberty interest. ... Legislation which readjusts rights and burdens is not unconstitutional solely because it upsets settled expectations." *Id.* at 364-365. The statute permits a petitioner to apply to expunge his/her arrest and subsequent disposition of that arrest. But, the statute only applies to arrests charging violations of the laws of this State. The statute can not be utilized to expunge arrests and their dispositions for charges under federal law or the laws of other jurisdictions. *IMO*, *N.A.*, 218 *N.J. Super.* 547 (App. Div. 1987); *IMO Application of Hart*, 265 *N.J. Super.* 285 (Law Div. 1993); *State v. Josselyn, III*, 148 *N.J. Super.* 538 (Law Div. 1977).

There are two categories of disposition of an arrest: (1) a non-conviction disposition, or (2) a conviction disposition. Non-conviction dispositions include various sub-categories: acquittal; dismissal; discharge without a finding of guilt; pre-trial intervention, supervisory treatment, or other diversion program; not guilty by reason of insanity or lack of mental capacity. A conviction disposition includes a determination as a result of a trial, with or without a jury, or the entry of a plea of guilty to an offense by way of accusation or indictment.

Every petitioner, regardless of the type of expungement being sought - non-conviction disposition, (*i.e.*, an arrest not resulting in a conviction), or conviction disposition, (i.e., an arrest resulting in a conviction) must disclose to the court: any other non-conviction or conviction dispositions, any pending charges, for criminal or other offenses, except motor vehicle violations; if the petitioner is on probation, parole, under supervisory treatment or otherwise subject to judicial supervision (N.J.S.A. 2C:52-8a, and 2C:52-13); any related civil or administrative actions (N.J.S.A. 2C:52-14d); and if the petitioner is seeking to expunge a criminal conviction, any previous expungements for criminal offenses (N.J.S.A. 2C:52-8b). State v. DeMarco, 174 N.J. Super. 411, 417 (Law Div. 1980). The burden initially falls to the petitioner to "demonstrate that he/ she is entitle to the [expungement] relief sought." State v. Merendino, 293 N.J. Super. at 451. Failure to make such disclosures is a basis for the court to deny relief. In the absence of court or other official public records, the prosecutor is entitled to present, and the Court is "entitled to consider all facts that were available to both the State and the petitioner at the time the petitioner entered his original plea to determine if he is entitled to expungement." Id. at 455.

When a record is expunged, the Court enters an Order to Expunge which requires criminal justice entities, corrections, and the judiciary to isolate, *but not* *to destroy*, the records involved. *State v. X.Y.Z. Corp.*, 119 *N.J.* 416, 421-422 (1990).

Certain limited statutory exceptions permit expunged records to be made available to law enforcement, corrections, the Violent Crimes Compensation Board, and the judiciary. In general, those statutory exceptions only become operative when the individual, whose record has been expunged, either: (1) re-enters the criminal justice system (N.J.S.A. 2C:52-17 and 2C:52-20 through -24); (2) is the subject of related civil or administrative proceedings (N.J.S.A. 2C:52-19); (3) is applying for a subsequent expungement (N.J.S.A.2C:52-27a), (4) is seeking admission to PTI, a supervisory treatment or other diversion program (N.J.S.A. 2C:52-20), or (5) is seeking employment within the criminal justice system, corrections, or the judiciary (N.J.S.A. 2C:52-27c).

II. RECORDS WHICH CAN NOT BE EXPUNGED

A. Records Maintained by Non Criminal Justice Agencies

The language of the Expungement statutes, with regard to what agencies and entities of government are subject to its terms, has been interpreted by the Courts as being limited to the judiciary, detention or correctional facility, law enforcement or criminal justice agencies. E.A. v. N.J. Real Estate Comm., 208 N.J. Super. at 68. Accordingly, a non-criminal justice agency can use and retain records which are otherwise subject to an Order to Expunge under the provisions of N.J.S.A. 2C:52. In Re D'Aconti, 316 N.J. Super. 1, 10 (App. Div. 1998); IMO Expungement, M.D.Z., 286 N.J. Super. at 85. Examples of such governmental non-criminal justice agencies include school boards, professional licensing agencies, and professional disciplinary boards or committees. In addition, under the holding in State v. Zemak, 304 N.J. Super. 381 (Law Div. 1997), police department personnel records, including internal affairs of internal investigations files are not subject to the provisions of the expungement statutes. Also, judicial records of PTI, supervisory treatment or conditional discharge are not subject to Orders to Expunge. IMO Petition, Anthony Podias, 284 N.J. Super. 674, 678 (App. Div. 1995), certif. denied, 143 N.J. 517 (1996); N.J.S.A. 2C:52-31.

B. Domestic Violence & Family Court Records

In situations where police have arrested an individual under the Prevention of Domestic Violence Act of 1991, the records of the arrest and disposition of that arrest may be subject to expungement, but the ancillary reports prepared by the police or others and filed with the Court, such as the Domestic Violence Report, TRO, etc., as well as any documents related to a civil matrimonial action in the Family Division, are not subject to the provisions of the Expungement statute. *IMO Expungement, M.D.Z.*, 286 *N.J. Super.* 82 85 (App. Div. 1995).

C. Motor Vehicle Offenses

N.J.S.A. 2C:52-28 absolutely prohibits a court from expunging any records of arrests or convictions for offenses charged under Title 39, Motor Vehicle offenses. This includes all records maintained by the Division of Motor Vehicles pertaining to the driver history or driving record of an individual. *State v. K.M.*, 220 *N.J. Super.* 338 (App. Div. 1987).

D. Records Subject to Pending Civil or Criminal Litigation

Given that the purpose of the expungement statute is to relieve the petitioner of any burden associated with a criminal record, if the petitioner is engaged in civil litigation involving the facts or circumstances of their arrest and subsequent disposition, then the record is not to be expunged. *N.J.S.A.* 2C:52-14d. This prohibition applies regardless of the identities of the other litigants, government or non-government. Likewise, if a petitioner has any pending criminal charges in any jurisdiction, no expungement should be granted until those charges are concluded to a finality. *See, IMO Petition, Anthony Podias, supra.*

Under the holding in *State v. San Vito*, 133 *N.J. Super.* 508 (App. Div. 1975), the State can object to the entry of an Order to Expunge a non-conviction disposition if, as a condition of that disposition, the State has requested the petitioner stipulate that he will not seek civil actions against the State as a result of that disposition. *Id.* at 511, citing *State v. Italiano*, 132 *N.J. Super.* 1, 4 (App. Div. 1975).

In a situation where the petitioner has already obtained an Order to Expunge and then seeks to pursue a civil action based upon the facts underlying the expungement, our Courts have instructed that the remedy is a shield to the petitioner, and the successful petitioner can not utilize the benefits of that remedy as a sword. *Ulinsky v. Avignone*, 148 *N.J. Super.* 250 (App. Div. 1977).

A. Who Can File to Expunge a Record?

Expungement is a remedy available to both living human beings and corporate entities. *State v. X.Y.Z. Corp., supra.* Deceased persons, however, are not eligible to petition to expunge a record for the simple reason that they are unable to comply with the statutory requirement of verifying their petition and submitted the accompanying affidavit or certification, under the provisions of *N.J.S.A.* 2C:52-7.

B. Where is a Petition to Expunge Filed?

To obtain an Order to Expunge, a petitioner must make a formal application by way of motion on a Verified Petition to the Superior Court, Law Division, in the county where the disposition of the matter to be expunged occurred. However, in *IMO, J.N.G.*, 244 *N.J. Super.* 605, 610-611 (App. Div. 1990) it appears that a petitioner may apply to expunge a record in *any* county in which the petition could be file under the statute. *But see, State v. DeMarco*, 174 *N.J. Super.* 411, discussing the application of statutory construction to the Expungement statutes.

C. How is the application filed?

In order for any person to expunge a record, that person must file a Verified Petition and an accompanying affidavit or certification with the Superior Court, Law Division. *N.J.S.A.* 2C:52-7. In addition, the petitioner is responsible for providing service of the petition on *all* agencies and entities required to be served. *N.J.S.A.* 2C:52-10. The purpose of this requirement is to assure that all parties entitled to and required to be given notice will have an opportunity to review the petition and inform the Court of any objections. *N.J.S.A.* 2C:52-11.

Expungement is not, however, an automatic remedy. *State v. Petti*, 142 *N.J. Super.* 283, 286-7 (App. Div. 1976). *But see*, P.L. 2000, c. 108, concerning ordinance violations declared to be unconstitutional.

Implicit in the filing of a Verified Petition is the fact that the petitioner is obligated to "demonstrate that he/ she is entitled to the relief sought." *State v. Merendino*, 293 *N.J. Super.* at 451.

A. In General

If the prosecutor or other party entitled to notice determines that a petitioner is not eligible to expunge the record, then an objection should be communicated to the Court and the petitioner. An objection based upon a prior or subsequent criminal conviction is satisfied by the submission of a certified copy of the Judgment of Conviction.

The burden is then on the petitioner to prove the conviction's invalidity. A petitioner seeking expungement of a conviction, when his record shows another conviction, must do more than merely allege the [other] conviction's invalidity to put the State to its proofs. [The petitioner] must present at least a *prima facie* case of invalidity. Otherwise the courts would become bogged down with excessive collateral matters and criminal verdicts would never have any finality.

State v. H.G.G., 202 *N.J. Super.* 267, 273 (App. Div. 1985).

N.J.S.A. 2C:52-14 sets out the statutory reasons why an expungement must be denied by a Court. An objection under any one or more of the subsections at *N.J.S.A.* 2C:52-14a, or -14c through -14f, inclusive, requires the Court to deny relief. An objection under the provision of *N.J.S.A.* 2C:52-14b, is the only provision which allows the Court a measure of discretion in granting or denying relief.

B. Types Of Objections

1. Failure of a Petitioner to fulfill any of the statutory prerequisites

N.J.S.A. 2C:52-14a is the basis upon which most objections to an expungement are interposed. Generally, it involves failures to by a petitioner to comply with the procedural mandates of the statute [notice to all necessary parties, or deficiencies in the verified petition or in the accompanying affidavit or verified statement], or the petitioner may not have fully disclosed relevant information [the petitioner's entire record of arrests and/ or convictions in this or any other jurisdiction (State or federal), other pending charges (indictable or non-indictable, but not motor vehicle violations], a previously granted expungement, or a petition to expunge a record pending in another county). *State v. DeMarco*, 174 *N.J.*

Super. at 417; *State v. H.G.G.*, 202 *N.J. Super.* at 270; *State v. Merendino*, 293 *N.J. Super.* at 451.

An objection under this subsection, even though it may only be procedural in nature, can not be ignored by the Court. In instances where Courts have attempted to grant relief, notwithstanding a statutory objection or prohibition under this subsection, the Appellate Courts have not hesitated to reverse. It is not within the discretion of the court to ignore a statutory objection to an expungement. *State v. A.N.J., III,* 98 *N.J.* at 427 (1985); *In re F.A.U.,* 190 *N.J. Super.* at 247-248; *State v. H.G.G.,* 202 *N.J. Super.* at 271-272; *see also, State v. San Vito,* 133 *N.J. Super.* 508 (App. Div. 1975); *State v. DeMarco,* 174 *N.J. Super.* at 417.

In addition to these general objections, other and more specific objections can be interposed under § 14a, depending on the specific relief being sought.

2. Criminal convictions

Under the explicit terms of N.J.S.A. 2C:52-2a, a petitioner can expunge only one criminal conviction. The purpose of the expungement statutory scheme is to "be construed with the primary objective of providing relief to the one-time offender." N.J.S.A. 2C:52-32. IMO Application of R., 171 N.J. Super. 53, 57 (App. Div. 1979); State v. D'Angerio, 124 N.J. Super. 240, 243 (Law Div. 1973); see also, State v. A.N.J., III, 98 N.J. at 427; State v. Blazanin, 298 N.J. Super. 221, 225-6 (App. Div. 1997). The existence of another criminal conviction in this State, or in any other jurisdiction (federal or other State), is an absolute bar to expungement relief. IMO, N.A., 218 N.J. Super. 547 (App. Div. 1987); IMO Application of Hart, 265 N.J. Super. 285 (Law Div. 1993); State v. Josselyn, III, 148 N.J. Super. 538, 540-541 (Law Div. 1977).

If the petitioner is seeking to expunge a criminal conviction pursuant to *N.J.S.A.* 2C:52-2, and that conviction is for one of the enumerated offenses at *N.J.S.A.* 2C:52-2b ¶ 1 or ¶ 2, then the expungement must be denied. The crimes listed at ¶ 1 were crimes under Title 2 or Title 2A, the predecessor statutes to the Code of Criminal Justice. Those offenses are not listed by their statutory reference; rather, they are listed by the name of the offense. Crimes under the Code of Criminal Justice are listed by their statutory reference and name. For the crimes listed under ¶ 1 and ¶ 2 there is a prohibition on convictions for conspiracies or attempts to commit those crimes.

Criminal convictions, by indictment or accusation, can be expunded pursuant to the provisions of N.J.S.A. 2C:52-2. However, only one criminal conviction can be Persons with more that one criminal expunged. conviction are absolutely barred from any relief under this statute. See, N.J.S.A. 2C:52-32; IMO, N.A., 218 N.J. Super. at 547. But see, State v. Blinsinger, 114 N.J. Super. 318 (App. Div. 1971), distinguished by State v. Dylag, 267 N.J. Super. 348 (Law Div. 1993) (the Blinsinger Court determined that a Disorderly Persons conviction was not a criminal conviction for the purposes of barring an expungement of a subsequent criminal conviction). The limitation on expungement for the onetime offender, has been strictly applied. A petitioner with multiple convictions can not serially expunge all of his convictions, by applying for expungement relief for one offense at a time. IMO Application of R., 171 N.J. Super. 53 (App. Div. 1979).

There is, however, an exception for certain multiple offenders under the holding in *In Re Fontana*, 146 *N.J. Super.* 264 (App. Div. 1976), cited with approval in *State v. A.N.J., III*, 98 *N.J.* at 427, n. 3. A person convicted of a crime spree can seek to expunge all charges evolving from that spree. *See, IMO, Application of V.S.,* 258 *N.J. Super.* 348, 352 (Law Div. 1992). The Court defined a crime spree as one with related factual and time elements. *In Re Fontana,* 146 *N.J. Super.* at 267. The burden is on the petitioner to establish the necessary proofs that the convictions constituted a spree.

That statutory bar, limiting relief to the one-time offender, applies for criminal convictions in New Jersey, as well as other jurisdictions, including federal convictions. *IMO, N.A., supra*; *IMO Application of Hart, supra; State v. Josselyn, III, supra.*

There is a statutory 10 year waiting period, which does not begin to run until the petitioner has been fully and completely discharged from the criminal justice system, including discharge from parole or probation, and the payment of all fines and penalties. If a person made a payment plan for their fines and penalties, the 10 year waiting period will not begin until the payment plan is completed. *State v. Rapacchia*, 124 *N.J. Super.* 331 (Law Div. 1973).

This statute also contains specific exclusions, or statutory bars to expungement relief, for persons convicted of certain enumerated crimes and offenses. *See, N.J.S.A.* 2C:52-2b; *State v. Raymond M.*, 188 *N.J. Super.* 533 (Law Div. 1982); *In Re Application, R.C.*, 292 *N.J. Super.* 151 (Law Div. 1996); *IMO Application of R.*, 171

N.J. Super. 53 (App. Div. 1979), superseded by statute, *see, State v. N.W.*, 329 *N.J. Super.* 326, 334, n.9 (App. Div. 2000). These exclusions are strictly applied, and if the Judgment of Conviction is not for one of the enumerated offenses, then the statutory objection can not be supported. *State v. N.W.*, 329 *N.J. Super.* 326 (App. Div. 2000); *IMO Application of R.*, 171 *N.J. Super.* at 56-57.

In *State v. Blazanin*, 298 *N.J. Super.* 221 (App. Div. 1997), the Appellate Division concluded that the Law Division lacked authority to treat petitioner's prior conviction for petit larcecy as a disorderly persons offense, overruling *State v. R.G.W.*, 208 *N.J. Super.* 60 (App. Div. 1986), and even assuming that it did, petitioner was not entitled to expungement since he had a subsequent indictable conviction.

Expungement of a conviction for the sale or distribution of CDS or for possession with intent to sell is prohibited, subject to two specific limited exceptions. If the CDS involved was: (1) marijuana and the quantity sold, distributed or possessed with intent to sell was 25 grams or less; or (2) hashish, and the quantity sold, distributed or possessed with intent to sell was 5 grams or less. *N.J.S.A.* 2C:52-2c.

Proof of the quantity of drugs, particularly for pre-Code drug offenses, where the quantity of the drugs was not a required element of proof of the offense, can be accomplished through the use of "extraneous, but relevant information" [not evidence], such as lab reports. *State v. Merendino*, 293 *N.J. Super.* at 449.

In In Re Application, R.C., 292 N.J. Super. 151 (Law Div. 1996), the Court found that aiding or abetting the crime of sale or distribution of CDS did not fall within the category of convictions which were absolutely barred from expungement. This case notes that aiding or abetting is a separate offense and within the statutory construct of N.J.S.A. 2C:52-2c, it is not an enumerated offense, as it is under the provisions of N.J.S.A. 2C:52-2b. In Re Application, R.C., 292 N.J. Super. at 154. In Re Application, R.C., 292 N.J. Super. at 154. The holding in R.C. was expressly overruled in IMO Petition for Expungement of Records of D.C. v. State, ____ N.J. Super. ____ (App. Div. 2001), which affirmed the denial of expungement of a person who pled guilty to distribution of LSD and related offenses on the ground that the statutory bar against eligibility for expungement in controlled dangerous substance distribution cases applies equally to principals and accomplices.

3. Disorderly or petty disorderly persons convictions

The existence of more than two disorderly persons or petty disorderly persons convictions also constitutes a statutory bar to a criminal conviction expungement. See, In re F.A.U., 190 N.J. Super. at 247-248. Although the language of N.J.S.A. 2C:52-2a is phrased such that convictions for no more than two disorderly or petty disorderly persons convictions shall not be a bar to relief, that statutory phrase can also be read to mean that a person with three disorderly or petty disorderly persons convictions is eligible for relief, an interpretation which conforms this subsection to the provisions of N.J.S.A. 2C:52-3. State v. A.N.J., III, 98 N.J. at 427. If the petitioner has more than three disorderly or petty disorderly persons convictions, then expungement is prohibited. State v. Ochoa, 314 N.J. Super. 168, 172 (App. Div. 1998). A petitioner with more than three disorderly persons or petty disorderly persons convictions can not expunge up to three of those convictions and leave the remaining disorderly persons or petty disorderly persons convictions on their record. IMO Application of R., 171 N.J. Super. 53, 57 (App. Div. 1979).

If the petitioner has a prior or subsequent criminal (indictable) conviction, regardless if that record is expunged or not, relief under this provision is barred by the statute. *State v. H.G.G.*, 202 *N.J. Super.* at 271-272; *IMO, N.A., supra.*

In *State v. Ochoa*, 314 *N.J. Super.* 168 (App. Div. 1998), the Appellate Division affirmed the denial of petitioner's petition for expungement of her three disorderly and petty disorderly persons convictions. Petitioner had four other convictions in other jurisdictions, which precluded consideration of her expungement petition pursuant to *N.J.S.A.* 2C:52-3. In making this finding, the Appellate Division overruled the contrary decision in *State v. H.J.B.*, 240 *N.J. Super.* 216 (Law Div. 1990), that foreign disorderly persons convictions could not be considered in determining such eligibility.

The existence of a prior or subsequent criminal conviction constitutes an absolute bar to the expungement of any convictions for disorderly or petty disorderly persons offenses, even if the prior arrest record for a criminal charge was expunged. *IMO Petition, Anthony Podias,* 284 *N.J. Super.* 674 (App. Div. 1995). The fact that this application of the statute creates an anomaly does not give a Court the right or authority to

grant an expungement where the statute forbids it. *State v. A.N.J., III, supra.*

4. Juvenile Adjudications

With the adoption of an amendment *N.J.S.A.* 2C:52-4.1 at P.L.1980, c.136, §1, the holding in *IMO*, *State v. W.J.A.*, 173 *N.J. Super.* 19 (Law Div. 1980) is no longer authoritative. It held that an adjudication of a juvenile as delinquent was not within the scope of the Code expungement statutes since the provisions of *N.J.S.A.* 2A;4-67 had not been repealed.

5. Youthful Drug Offender Convictions & Dispositions

The provisions of *N.J.S.A.* 2C:52-5, govern youthful drug offenders (persons 21 years of age or younger at the time of the offense).

Diversion, supervisory treatment or PTI for a drug offense classified as a disorderly persons or petty disorderly persons offense does not constitute a statutory bar to expungement relief under this section. *State v. B.C.*, 235 *N.J. Super.* 157 (Law Div. 1989).

6. Non-conviction dispositions of arrests

Where a non-conviction disposition was the result of a determination that the person was insane or lacked the mental capacity to commit the crime charged, then, pursuant to *N.J.S.A.* 2C:52-6c, no expungement can be granted. To prove this objection, a prosecutor only need obtain from the clerk of the court where the judgment was entered, a certified copy of the judgment making the finding of insanity or lack of mental capacity. *State v. H.G.G.*, 202 *N.J. Super.* at 278-279.

7. The need for the continued availability of the records outweighs the desirability of freeing the petitioner from any disabilities, *N.J.S.A.* 2C:52-14b.

This is the only objection provision in the expungement statutes which allows the Court any measure of discretion in the determination to grant or deny expungement. Moreover, it places a specific proof burden on the prosecutor who wishes to make this objection. The party offering this objection is required to satisfy a burden of proof of preponderance of the evidence in order to sustain the objection. *State v. X.Y.Z. Corp.*, 119 *N.J.* at 422-424; *IMO, J.N.G.*, 244 *N.J. Super.* 605

(App. Div. 1990); *State v. H.G.G.*, 202 *N.J. Super.* at 280-282; State v. R.E.C., 181 *N.J. Super.* 79, 82 (Law Div. 1981).

In order to meet this evidentiary burden, the prosecutor must be prepared for an evidentiary hearing. In some instances, that may require that witnesses be prepared and subpoenaed to appear and that evidence related to the charges which are the subject of the petition to expunge be ready for introduction to the Court. However, not all materials presented need to qualify as evidence in the criminal prosecution context. "The use of extraneous, but relevant, information is not uncommon in ancillary proceedings in the criminal justice system." *State v. Merendino*, 293 *N.J. Super.* at 449.

8. Non-conviction disposition from a Plea bargain

This objection can only be interposed if the petitioner is seeking to expunge a non-conviction disposition, pursuant to N.J.S.A. 2C:52-6, where the non-conviction disposition resulted from a plea bargain agreement involving a conviction on other charges. This objection can only be applied until such time as the petitioner seeks to apply for the expungement of any related criminal conviction. If the petitioner is otherwise eligible for the criminal conviction expungement, pursuant to N.J.S.A. 2C:52-2, then the non-conviction dispositions in the plea bargain agreement can also be expunged. But see, IMO Expungement T.P.D., 314 N.J. Super. 535 (App. Div. 1998), aff'd. o.b., 314 N.J. Super. 643 (Law Div. 1997), where a special condition of a PTI dismissal and plea bargain was found to be sufficient to bar an expungement. See also, State v. San Vito, 133 N.J. Super. 508 (App. Div. 1975), where the State sought an agreement by the petitioner not to pursue any civil action against the State as a condition for not entering an objection to the expungement petition.

9. Prior criminal conviction expunged, *N.J.S.A.* 2C:52-14e

This section is, in effect, a restatement of the limitations found at *N.J.S.A.* 2C:52-3, -4, -4.1 and -5. It merely clarifies that the existence of a prior expungement of a criminal conviction is a statutory bar to other relief, subject to the following two exceptions: (1) the petitioner is seeking to expunge a municipal ordinance conviction, pursuant to *N.J.S.A.* 2C:52-4; (2) the petitioner is seeking to expunge a non-conviction disposition pursuant to *N.J.S.A.* 2C:52-6.

This section also underscores the holding in *IMO* Application of R., 171 N.J. Super. 53 (App. Div. 1979) which prohibited a serialization of the expungement process. "[T]he statute provides that a single conviction can be expunged.... But, such expungement cannot be used to erase his record of the previous convictions. The intent of the Legislature was not to permit a multiple offender to expunge the records of all his convictions by starting with the last and working backwards, arguing each time that his latter convictions never occurred because they are expunged." 171 N.J. Super. at 57; State v. N.W., 329 N.J. Super. 326, 334, n. 9 (App. Div. 2000).

In order to interpose this objection, a prosecutor is permitted to access the expunged records, including the Order to Expunge, and present those materials to the Court as the evidence in support of the objection. This access and use of expunged records is specifically authorized under the provisions of *N.J.S.A.* 2C:52-17 and -24. Also, as with an objection under *N.J.S.A.* 2C:52-2, based upon a prior or subsequent criminal conviction, proof of the prior or subsequent criminal conviction is deemed sufficient upon presentation of a certified Judgment of Conviction. *State v. H.G.G.*, 202 *N.J. Super.* at 273.

10. Participation in a PTI or other supervisory treatment program, *N.J.S.A.* 2C:52-14f

Whenever a petitioner is applying to expunge a criminal conviction or convictions of disorderly or petty disorderly persons offenses, and that petitioner has had a criminal charge dismissed following participation in a PTI or other supervisory treatment or other diversion program (*e.g.*, conditional discharge, *N.J.S.A.* 24:21-27), expungement can not be granted. *IMO Petition, Anthony Podias,* 284 *N.J. Super.* 674 (App. Div. 1995); *State v. Dylag,* 267 *N.J. Super.* 348 (Law Div. 1993); *State v. B.C.,* 235 *N.J. Super.* 157 (Law Div. 1989).

EXTRADITION

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

As explained in *In re Cohen*, 23 *N.J. Super.* 209, 214-218 (App. Div. 1951), *aff'd* 12 *N.J.* 362 (1953), the return of fugitives from one state to another is a federal, not a state matter governed by the United States Constitution, Article IV, § 2, clause 2 and 18 *U.S.C.* § 31852-3195; *see also State v. Morel*, 253 *N.J. Super.* 470 (App. Div. 1992). The federal provisions have been implemented by *N.J.S.A.* 2A:160-1 *et seq.* (The Uniform Criminal Extradition Act); *Cf. Watts v. McGowan*, 516 *F.*2d 203 (3d Cir. 1975) (international extradition is governed only by considerations of comity and treaty provisions).

In both *Cohen* and *State v. Phillips*, 62 *N.J. Super.* 70, 74-75 (App. Div. 1960), aff'd 34 N.J. 63 (1961), the Appellate Division set forth the rule in New Jersey respecting the scope of inquiry at an extradition proceeding. Such a hearing is limited to a consideration of the identity of the accused as the person named in the requisition and rendition warrant, and whether the accused is a fugitive from justice. This last inquiry requires a determination that a crime is alleged and that the accused was within the demanding state at the time of its commission. Id; Cf. In re Mahler, 177 N.J. Super. 337 (App. Div. 1981) (surrender of a nonfugitive, unlike surrender of a fugitive, is within discretion of the Governor, but discretionary nature of the gubernatorial function does not mandate a hearing as a prerequisite to a valid exercise of discretion), certif. denied, 87 N.J. 349, 350 (1981).

It is well established that the rendition papers constitute *prima facie* evidence that the named accused stands charged with the alleged crime and is a fugitive from justice. It is open to the accused to show that he is not the person charged or that he was not present within the demanding state when any of the essential acts of setting the crime in motion transpired. Absent such a showing, the demanding authority's warrant is presumptive evidence of his presence and the accused must bear the burden or proving the contrary by clear and convincing proof. *State v. Phillips, supra; Passalaqua v. Biehler,* 46 *N.J. Super.* 154, 159-60 (App. Div. 1957); *Foley v. State,* 32 *N.J. Super.* 154, 159-60 (App. Div. 1954). Moreover, waivers of extradition rights, executed as a condition of either parole or probation, are enforceable by

the state in which the absconding defendant is arrested, even if the waiver does not conform to procedures pursuant to *N.J.S.A.* 2A:160-1 *et seq.*. See State v. Maglio, 189 *N.J. Super.* 257 (Law Div. 1983). Such waivers should, however, be explicit, not implicit. *Id.*

It is clear that the guilt or innocence of the accused may not be challenged except as it may be involved in identifying the person held as the person charged with the crime. N.J.S.A. 2A:160-28; In re Cohen, supra. Moreover, the asylum state has no authority to adjudge the technical sufficiency of the indictment, this being exclusively within the domain of the demanding state. State v. Phillips, supra. Nor are the merits underlying the proceedings a proper subject of inquiry. Foley v. State, supra; Frank v. Naughright, 1 N.J. Super. 242 (App. Div. 1949); Cf. Klaiber v. Frank, 9 N.J. 1 (1952) (if executive authority of asylum state knows of intent to use extradition proceedings to attain civil jurisdiction of individual and as means to private ends, rendition warrant cannot lawfully issue.) The merits of the accused's trial and whether his constitutional rights have been violated in the proceedings leading to his conviction in the demanding state may not be considered either. In re Cohen, supra; State v. Wilson, 135 N.J.L. 398, 400 Ct. 1947). However, in State v. Diefenbach, 137 N.J. Super. 531 (Law Div. 1975), the Court held that the Sixth Amendment speedy trial prosecutions are applicable to extradition proceedings, and such a constitutional issue is cognizable at the extradition hearing.

Moreover, a governor's grant of extradition in the asylum state is *prima facie* evidence that the constitutional and statutory requirements for extradition have been met. A court considering defendant's petition for habeas corpus can do no more than decide whether the extradition documents are in order; whether he is charged with a crime in the demanding state; whether he is the named person, and whether the defendant is a fugitive. Once the governor of the asylum state acts on a requisition for extradition based on the demanding state's finding of probable cause, no further judicial inquiry may be had on that issue in the asylum state. *Michigan v. Doran*, 439 *U.S.* 282, 99 *S.Ct.* 530, 58 *L.Ed.2d* 521 (1978).

In *Puerto Rico v. Branstad*, 483 *U.S.* 219, 107 *S.Ct.* 2802, 97 *L.Ed.*2d 187 (1987), the Court, overruling *Kentucky v. Dennison*, 24 *How.* 66 (1861), held that federal courts have the power to order the governor of the state to fulfill the state's obligation under the Extradition

Clause of the Constitution, Art. IV, § 2, to deliver up fugitives from justice.

II. BAIL

Until such time as a Governor's extradition warrant is issued, *N.J.S.A.* 2A:160-24 authorizes an arrested fugitive's release on bail unless he is charged with an offense punishable by death or life imprisonment in the demanding state. *In re Lucas,* 136 *N.J. Super.* 24 (Law Div. 1975), *aff'd* 136 *N.J. Super.* 460 (App. Div. 1975), *certif. denied,* 69 *N.J.* 378 (1975).

In Matter of Basto, 108 N.J. 480 (1987), the Supreme Court held that the silence of the Uniform Criminal Extradition Law on availability of bail after the governor's warrant is issued was not intended to preclude availability of postwarrant bail, at least for nonfugitives, for whom return to the demanding state is not constitutionally required; thus, pending habeas corpus hearing and any appeal therefrom, a nonfugitive accused who has been granted bail after delivering himself into custody in the asylum state pursuant to a requisition warrant issued by the governor of demanding state is eligible for bail after the governor of the demanding state had issued an arrest warrant. Notwithstanding this holding, the Supreme Court nonetheless cautioned, "the power [to admit to bail] must be circumspectly exercised" even though the extraditee is a nonfugitive since, once the New Jersey governor has exercised discretion in favor of extradition, there is a solemn obligation to deliver up the extraditee if the habeas corpus application is unsuccessful. This obligation is not diminished by the fact that, as to a nonfugitive, the rendition state governor's obligation finds its source in principles of comity rather than in a constitutional requirement.

New Jersey's constitutional right to bail applies only to New Jersey crimes and does not bar application of nonbailable provisions of the Uniform Criminal Extradition Law. *State v. Morel*, 253 *N.J. Super.* 420 (App. Div. 1992). Thus, in *Morel*, the accused was charged in another state with an offense punishable there by life imprisonment was not bailable in New Jersey during pendency of rendition proceedings.

III. SENTENCING AND INCARCERATION

R. 3:21-8, which provides credit for time spent in custody, should be liberally construed. *State v. Johnson*, 167 *N.J. Super.* 64 (App. Div. 1979). Where defendant has spent time in custody resisting extradition, a failure

to give him credit for this time would chill his constitutional right to contest extradition. Id. In State v. Corbitt, 147 N.J. Super. 195 (Law Div. 1977), the issue was whether a sentence imposed by a New Jersey court should be served concurrently or consecutively to a sentence previously imposed in another state when the defendant had been brought to New Jersey, upon the interruption of his confinement in the other jurisdiction, under the terms of an extradition agreement which required his immediate return upon the completion of the New Jersey prosecution. The sentencing judge was unaware of the proceedings in that other state and therefore made no comment and gave no direction. The court, in concluding that the sentence must run concurrently with the sentence pending in the foreign jurisdiction, stated that the burden of calling the terms of such an agreement to the attention of the sentencing judge rested upon the State. See N.J.S.A. 2C:44-4 and 5; see also Braedon v. New Jersey Dept. of Corrections, 132 N.J. 457 (1993) (credit for time spent while serving under conviction in one jurisdiction will not be allowed against sentence upon another conviction in second jurisdiction).

In State v. Parsells, 124 N.J. Super. 144 (App. Div. 1973), certif. denied, 63 N.J. 562 (1973), the Appellate Division adopted the majority rule that the release of a convict to one sovereign for prosecution for another crime or to serve a sentence for which crime the prisoner has already been convicted by another sovereign does not constitute a waiver of that sovereign's right to exact the full penalty. Where a prisoner serving a sentence is extradited as a fugitive from justice and delivered to another state, jurisdiction over his person is not forever waived by the asylum state. The prisoner may be extradited to the asylum state to serve the remainder of his sentence. Although federal courts have the power to compel rendition, rendition remains discretionary if the fugitive demanded is incarcerated in an asylum state for violation of that state's laws; the governor's duty to extradite in such situation does not mature until punishment in the asylum state has been completed. State v. Robbins, 124 N.J. 282, 286-290 (1990). As matter of comity, the governor of the asylum state may choose to extradite prisoner incarcerated in the asylum state for violation of that state's law prior to completion of punishment. Id. at 293. Executive authority of the asylum state may withhold a rendition request until the fugitive has completed his prison sentence imposed by the court of the asylum state, but this is a matter of executive discretion and not a personal right of the fugitive. The executive of the asylum state may waive the right of that state to retain the prisoner and may surrender him to the demanding state while he is still undergoing, or subject, to punishment in the asylum state. *Id. at* 293-294.

IV. JUVENILES

In State in Interest of D.N.H., 147 N.J. Super. 1 (App. Div. 1977), a juvenile charged as an adult with murder in a foreign state was extradited as an adult following a hearing at which he was represented by counsel and given the opportunity to oppose the extradition. The Appellate Division held that the extradition hearing was appropriate and a preliminary hearing to determine his status as a juvenile was not required. R. 5:9-5(b) and N.J.S.A. 2A:4-48 were not applicable to extradition procedures, and nothing in the Interstate Compact on Juveniles (N.J.S.A. 8:23-1 et seq.) indicated that the hearing required by it was to determine the status of the person charged. It should be noted that R. 5:9-5(b) was superseded by R. 5:22-2 and N.J.S.A. 2A:4-48 was repealed and replaced by N.J.S.A. 2C:4A-26, effective December 31, 1983.

V. RELEASE OF THE ACCUSED

In Application of Dunster, 131 N.J. Super. 22 (App. Div. 1974), certif. denied, 67 N.J. 72 (1975), the orderly disposition of extradition proceedings was interrupted by local detainers and proceedings resulting in sentences of up to 390 days and continuances resulting from the accused's challenge to extradition. He was released on bail a short time after completion of his local jail sentences and remained on bail pending receipt of the foreign requisition and disposition of the extradition proceedings. These circumstances presented no basis for discharging the accused. The purpose of N.J.S.A. 2A:160-21 to 2A:160-23 is to allow an accused to be held in jail after his original arrest while awaiting the Governor's warrant pursuant to a foreign requisition, but to prevent detention for an undue length of time. The demanding state is not to be penalized for awaiting the outcome of valid court proceedings brought by an accused, before undertaking the expense of sending its agent to claim him. Moreover, the 30 day period specified in 18 U.S.C. § 3182, pertaining to the release of an arrested fugitive, begins to run after the arrest effected pursuant to the Governor's rendition warrant.

FIRST AMENDMENT

I. FREEDOM OF THE PRESS

A. General Basis

State v. Shapiro, 122 *N.J. Super.* 409, 430-431 (Law Div. 1973), stated: "The underlying reason for protecting a right freely to speak or freely to print is that the people may be informed..... The First Amendment seeks to keep sources of information available to the people."

The constitutional guarantees of free press are found in both the Federal and State constitutions:

"Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const., Amend. I.

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." *N.J. Const.*, Art. 1, ¶ 6. B. Cases on Media Access

1. U.S. Supreme Court Cases

Sheppard v. Maxwell, 384 U.S. 333 (1966), held that the failure of the trial judge to sufficiently protect the defendant from "massive, pervasive, and prejudicial publicity" and disruptive influences deprived defendant of a fair trial in violation of the due process clause of the Fourteenth Amendment. The presence of the media should have been limited, representatives of the news media should not have been placed inside the bar and the judge should have more closely regulated the presence of the press in the courtroom. Furthermore, the judge should have made some effort to control the release of prejudicial matters to the press.

In *Nebraska Press Ass'n v. Stuart*, 427 *U.S.* 539 (1976), the Court held that an Order restraining the news media from publishing information revealed at a pretrial hearing, violated the First Amendment's guarantee of free speech. The protection against prior restraint has particular force in criminal proceedings. The protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty requiring the person to direct some effort to protect the rights of an accused to a fair trial by unbiased jurors. Nevertheless, the Court would not undertake to assign priorities between the First Amendment right of free press and the Sixth Amendment right to an impartial

jury, inasmuch as the authors of the Bill of Rights declined to do so. In evaluating the validity of the prior restraint the Court examined the evidence before the trial judge when the order was entered to determine a) the nature and extent of pretrial news coverage; b) whether other measures would be likely to mitigate the effect or unrestrained pretrial publicity; and c) how effectively a restraining order would operate to prevent the threatened danger. The Court held that the high barriers to prior restraint had not been overcome in this case and the order was therefore invalid. Finally, the Court reaffirmed its position that, although First Amendment rights are not absolute, the barriers to prior restraint remain high and the presumption against it continues intact.

In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the Court affirmed the state court decision upholding an order to close a pretrial suppression hearing. The Sixth Amendment right to public trial is personal to the accused and, therefore, does not give the press and public a right to access to pretrial criminal proceedings. The order was proper where counsel for the newspaper publisher had been given the opportunity, after the filing of the briefs, to voice objections and where the trial judge had balanced the rights to the press and the public against the defendant's rights to a fair trial and had determined that an open proceeding would pose a reasonable probability of prejudice to the defendants. The Court also noted that the denial of access had not been absolute, but only temporary. The majority, in deciding the case on Sixth Amendment grounds, left open the question of whether such a right of access may be guaranteed by other provisions of the Constitution. In a footnote the Court distinguished its earlier decision in Nebraska Press Ass'n on the grounds that it involved a direct prior restraint imposed by a trial judge on members of the press, prohibiting them from disseminating information about a criminal trial, while in contrast, the exclusion order in the present case did not prevent the petitioner from publishing any information in its possession.

Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 *U.S.* 555 (1980), a plurality opinion, concluded that the First Amendment implicitly guaranteed to the public and the press the right to attend criminal trials. The Court relied on the lengthy tradition of open trials in this country as in England, as well as in their functional "therapeutic" community value. Absent an overriding interest articulated in findings by the trial court, and the unavailability of any alternative method of dealing with the problem, the trial of a criminal case must be open to the public. The right of the public and press

is not absolute but rather subject to those reasonable limitations (*i.e.* time, place, manner) which the trial judge may impose in the interest of the fair administration of justice. The Court distinguished *Gannett* on the ground that it involved a pretrial motion rather than a trial.

In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Court held that a State statute which required, under all circumstances, exclusion of the press and general public from the courtroom during the testimony of minor victims in sex offense trials violated the First Amendment, as applied to the states through the Fourteenth Amendment. Richmond Newspapers established for the first time that the press and the general public have a constitutional right to access to criminal trials. The First Amendment protection is afforded both because criminal trials have historically been open to the press and the public and because such right of access plays a significant role in the functioning of the judicial process and the government as a whole. While this right is not absolute, the circumstances under which the press and the public can be barred are limited. The State must show that denial of such right is necessitated by a compelling governmental interest and is narrowly The statute herein tailored to serve that interest. requiring mandatory closure could not be justified on the basis of either the State's interest in protecting minor victims of sex crimes from further trauma and embarrassment or its interest in encouraging such victims to come forward and testify in a truthful and credible manner. The Court noted that there may very well be individual cases where closure may be proper during the testimony of minor sex offense victims, but found that the mandatory rule herein requiring no particularized determinations in individual cases, was unconstitutional.

The Court extended the right of access to the pretrial proceeding of jury selection. In Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984), a review of the historical evidence revealed that, since the development of trial by jury, the process of selection of jurors has presumptively been a public process. This openness enhances both the fairness of the criminal trial and the appearance of fairness essential to public confidence. Therefore, closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Furthermore, the interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire. Finally, when limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied by making a transcript of closed proceeding available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the jurors valid privacy interests. Even then the judge may determine that certain parts of the transcript should be sealed, or the name of the juror withheld, to protect the person from embarrassment. Inasmuch as the trial judge herein did not consider alternatives to closure and refused to release any portion of the transcripts, the underlying decision was vacated and remanded.

Finally, in *Waller v. Georgia*, 467 *U.S.* 39 (1984), the Court held that the defendant's right to a public trial applied to a suppression hearing. Accordingly, the Court held that under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors.

2. New Jersey Supreme Court cases

In State v. Williams, 93 N.J. 39 (1983), the New Jersey Supreme Court enunciated guidelines for New Jersey courts to follow when evaluating closure applications. Considering whether and under what circumstances pretrial proceedings in a criminal matter can be closed to the public and the press, the Court held that the only exception to open pretrial proceedings will arise if there is a realistic likelihood of prejudice to a fair trial by an impartial jury as a result of adverse publicity and further, that such prejudice cannot be overcome by resort to various methods relating to the selection of jurors that will be available to the court at the time of trial. Id. at 63. Due to the lack of a dispositive United States Supreme Court decision, the right to access rested on the State Constitution. A defendant seeking closure is required to make an application in order to show that fair trial rights will be jeopardized by recognizing the public and press rights to open court proceedings. The application should be supported by evidence of extensive prior adverse publicity in the case that, together with the adverse publicity anticipated from open pretrial proceedings, is sufficient to support an inference that the publicity anticipated from open pretrial proceedings will create bias in the minds of potential jurors as to the guilt of the defendant or as to any material issue in the case. The defendant bears the burden of proof by a

preponderance of the evidence. Once defendant meets that burden, the trial court must then determine whether closure is the only alternative which will adequately protect the defendant's rights. The other alternatives for the trial court to consider are: larger pools of potential jurors; changes of venue, more extensive voir dires, and effective cautionary jury instructions. In order to assure overall consistency, uniformity and soundness in the application of the balancing test the trial courts must follow certain minimum procedures and general guidelines. Members of the press must be given notice of the motion for closure and must be allowed to participate. Further, the trial court should consider whether any application on the closure should be closed in order to protect defendant's rights. Finally, the trial court must indicate to the parties and disclosure on the record its findings of fact and the basis for its conclusion as to closure.

See also State v. Marshall, 199 *N.J. Super.* 502 (App. Div. 1985) and *State v. Sugar,* 100 *N.J.* 214 (1985).

Regarding alternatives to closure, see *State v. Allen*, 73 *N.J.* 132 (1977) and *State v. Joyce*, 160 *N.J. Super.* 419 (Law Div. 1978).

3. Courtroom Sketches

In re Application of National Broadcasting Co., Inc., 64 N.J. 476 (1974) reviewed whether newspaper artists may make sketches of the courtroom or of any person during sessions of court. Canon 35 of Canons of Judicial Ethics forbids such a procedure. Nevertheless, the Supreme Court held that sketching may be permitted where it is unobtrusive, does not disturb the attention of witnesses or jurors and is in no way a coercive influence upon them. Should the conduct of an artist at any time fail to meet these standards or appear to detract from the decorum of the court, the trial judge has discretion to take corrective steps.

4. Cameras

See generally, the New Jersey Supreme Court guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Court of New Jersey, issued March 19, 1985.

B. Privilege To Gather News

State v. States, 84 *N.J. Super.* 404, 408 (Cty. Ct. 1964), *rev'd on other grounds,* 44 *N.J.* 285 (1965),

observed that "...the right of a free press to gather news is a jealously guarded constitutional guarantee."

State v. Lashinsky, 81 N.J. 1 (1979), held that a pressphotographer was properly convicted as a disorderly person for his refusal to heed a police officer's order to move back from the immediate vicinity of a fatal automobile accident. Although the right of the press to gather news is entitled to special constitutional protection, that right must yield, under appropriate circumstances, to other important and legitimate government interests. Accordingly, reasonable time, place and manner regulation may be imposed by the State. However, regulations imposed must take into account the "unique role" of the press in public life. A balancing of the competing values is required to determine the reasonableness of a criminal statute or governmental sanction as applied to a member of the press engaged in his profession. In this case, from an objective standpoint and under all the circumstances, the policeman's order was reasonable even taking into account the special role performed by the press.

See also, Gannett Co. Inc. v. DePasquale, supra; Houchins v. KQED, Inc. 438 U.S. 1, 17 (1978) (Stewart, J. concurring); Pell v. Procunier, 417 U.S. 817, 826 (1974); Branzburg v. Hayes, 408 U.S. 665, 707 (1972); In re Farber, 78 N.J. 259 (1978), cert. denied sub nom. New York Times Co. v. New Jersey, 439 U.S. 997 (1978); Freedman v. New Jersey State Police, 135 N.J. Super. 297, 302 (Law Div. 1975).

C. Privilege Of Non-Disclosure

1. Introduction

New Jersey courts consistently refused to recognize a newsperson's privilege of non-disclosure under the common law. *In re Grunow*, 84 *N.J.L.* 235 (Sup. Ct. 1913). Additionally, the United States Supreme Court has held that the First Amendment does not relieve a newspaper reporter from appearing before a grand jury and answering questions as to either the identity of the news sources or information which the reporter received in confidence. *Branzburg v. Hayes*, 408 *U.S.* 665 (1972).

Nevertheless, the Legislature enacted the "Shield Law," *N.J.S.A.* 2A:84A-21 *et seq.*, and the 1977 Shield Law amendment was introduced shortly after the Appellate Division upheld the incarceration of a newspaper reporter for his refusal to testify. *In re Bridge*, 120 *N.J. Super.* 460 (App. Div.), *certif. denied*, 62 *N.J.* 80 (1972), *cert. denied*, 410 *U.S.* 991 (1973). The bill was

amended again after the New Jersey Supreme Court's decision in *In re Farber, supra*, to strengthen the protection afforded to the press. *N.J.S.A.* 2A:84A-21.1 *et seq.*

2. Cases

In re Bridge, 120 N.J. Super. 460 (App. Div.), certif. denied, 62 N.J. 80 (1972), cert. denied, 410 U.S. 991 (1973). A newspaper writer disclosed in a published article concerning an alleged bribe, that the Housing Authority Commissioner was the source of his information. When he refused to answer questions on the alleged bribe before the grand jury he was held in contempt. Affirmed the order, the court held that although a newspaper writer has a privilege of nondisclosure of the source of his information, Evid. R. 27, it is limited. Evid.R. 37 clearly states that a person waives his privilege if he "made disclosure of any part of the privileged matter..." Where the reporter disclosed in the article the name of his source in addition to part of the information given him by her, he waived his privilege and could be compelled to testify before the grand jury.

In re Farber, 78 N.J. 259 (1978), cert. denied sub nom. New York Times Co. v. New Jersey, 439 U.S. 997 (1978). Appellants, a newspaper and a newspaper reporter, challenged judgments entered against them in two related matters. One was a proceeding in aid of litigant rights (civil contempt); the other was for criminal contempt of court. The proceedings were instituted in an ongoing murder trial as a result of appellate's failure to comply with two subpoenas *duces tecum*, directing them to produce certain documents's and materials complied in the course of reporter Farber's investigative reporting. This information was said to have contributed largely to the indictment and prosecution of defendant for murder. The Court held that the Sixth Amendment of the United States Constitution and Art. I, § 10 of the New Jersey Constitution, which embody the right to compulsory process, take precedence over the privilege conferred by the state shield law. However, recognizing the "strongly expressed legislative viewpoint favoring confidentiality," the Court held that appellants, and those who in the future may be similarity situated, are entitled to a preliminary determination before being compelled to submit the subpoenaed materials to a trial judge for in *camera* inspection. Assuming qualification of the movant to assert the privilege, it is the obligation of the defense to satisfy the trial judge, by a fair preponderance of this evidence, including all reasonable inferences, that there was a reasonable probability or likelihood that the information sought by the subpoena was material and relevant to his defense, that it could not be secured from any less intrusive source, and that the defendant had a legitimate need to see and otherwise use it. The Court held that the preliminary requirement for *in camera* inspection had been met.

State v. Boiardo, 82 N.J. 446 (1980), reviewed the order of a trial court directing a newspaper reporter to produce a letter sent to her by a prospective prosecution witness in a criminal trial, for *in camera* inspection. The Supreme Court, in vacating the order, held that defendants had failed to meet their burden under the Shield Law of proving by a preponderance of the evidence the non-availability of a less intrusive source which could provide information substantially similar to that contained in the letter. The Court interpreted the new law to require defendants to prove that it is "reasonably probable" that this information cannot be secured from any less intrusive source. The Court noted that precisely the same findings are required by the statue when the procedure is to compel disclosure in camera as when it is to compel a turnover by the court to counsel to use at trial. Finally, the Court concluded that the Shield Law, as amended after Farber, embodies those protections of reporters contained in prior law as it was interpreted in Farber, adding only the requirements that a defendant seeking information in a newsperson's possession must prove that, on balance, the value of the particular information to a fair trial outweighs the importance to a free press of shielding that information from disclosure.

The issue returned in *State v. Boiardo,* 83 *N.J.* 350 (1980) when after remand, the trial court again ordered the reporter to turn over letters for *in camera* inspection. The Supreme Court reversed the order, concluding that defendants had failed to meet their burden of proof under the new Shield Law that the information sought could not be gained elsewhere. Rather, the Court held that the record below established to a reasonable certainty that numerous less intrusive sources of information were available.

Maressa v. New Jersey Monthly, 89 N.J. 176 (1982), cert. denied, 459 U.S. 907 (1982). During pre-trial discovery in a civil action for libel, defendants refused to provide any information about their sources or editorial process. The New Jersey Supreme Court reasoned that, in light of the clear legislative intent that N.J.S.A. 2A:84A-21 is to be as broad as possible, absent any countervailing constitutional right, the newspaper's statutory privilege not to disclose confidential information is absolute. Inasmuch as a plaintiff in a defamation action has *no* overriding constitutional interest, the newsperson's privilege is absolute in libel cases. The Shield Law affords newsperson's complete protection against disclosure of their confidential sources and the editorial process leading to publication of an alleged libel. As to plaintiff's argument that defendant had waived the privilege by assertion of such affirmative defenses as truth, fair comment, good faith, honest belief and lack of malice, the Court noted that waiver under the shield law operates only as to those specific materials that are knowingly and voluntarily disclosed. Furthermore, each piece of confidential information from a source, or about the source, must be separately considered for purposes of finding a waiver of the newspaper's privilege.

Compare with *Herbert v. Lando*, 441 *U.S.* 153 (1979), where the United States Supreme Court held that when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to plaintiff's reputation, there is no privilege under the First Amendment's guarantees of freedom of speech and press barring the plaintiff from inquiring into the editorial processes of those responsible for the publication.

D. Search And Seizure

Zurcher v. Stanford Daily, 436 U.S. 547, reh'g denied, 439 U.S. 885 (1978), upheld a search of a college newspaper pursuant to a warrant, holding that the Fourth Amendment standards governing the issuance of a search warrant are determined not by the apparent culpability of the item to be seized, but by probable cause to believe that the "fruit, instrumentalities, or evidence of the crime" may be located in the property to be searched. The First Amendment does not prohibit the use of a search warrant to obtain evidence from a newspaper. "The preconditions for a warrant, *i.e.* probable cause, specificity with respect to the place to be searched and the thing to be seized, and overall reasonableness, should afford sufficient protection against the harms that are assuredly threatened by warrants for searching newspaper offices." 436 U.S. at 565.

In light of *Zurcher*, the New Jersey Legislature enacted *L.* 1979, c. 488, s.1, eff. February 28, 1980, *N.J.S.A.* 2A:84A-21.9.

E. University Press

Freedman v. New Jersey State Police, 135 *N.J. Super.* 297 (Law Div. 1975), held that the constitutional

protection of free press encompasses representatives of a university newspaper.

F. Equal Treatment Requirement

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) held that the State's sales tax scheme violated the First Amendment's freedom of press guarantee by taxing general interest magazines but exempting newspapers and religious, professional, trade and sports journals.

II. FREEDOM OF SPEECH

A. Source

"Congress shall make no law ... abridging the freedom of speech..." U.S. Const., Amend. I. ("It is no longer open to doubt that the liberty of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by State action." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976)).

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." *N.J. Const.*, Art. I, ¶ 16.

B. Standards For Adjudicating Substantive First Amendment Rights

The United States Supreme Court has applied a variety of tests in order to assess whether potentially inflammatory political expression may be restricted.

1. Clear and Present Danger Test

Schenck v. United States, 249 U.S. 47 (1919). Members of the Socialist Party were indicted under the Espionage Act of 1917 for sending leaflets urging men called to military service to refuse to be drafted. The question in every case is whether the words are used in such circumstances as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things might be said that in time and peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. 249 U.S. at 52. This test was later applied to uphold convictions under the Espionage Act for the publication of twelve newspaper articles concerning World War I and for a speech which criticized American involvement in the war. *Frohwerk v. United States,* 249 *U.S.* 204 (1919); *Debs v. United States,* 249 *U.S.* 211 (1919).

In *Terminiello v. Chicago*, 337 *U.S.* 1 (1949), an ordinance classified "any misbehavior which violates the public peace and decorum" as a breach of the peace. The Court stressed the importance of free debate and dispute to a democracy. The Court reversed defendant's conviction, as no clear and present danger of a "serious" substantive evil that rises far above public inconvenience, annoyance or unrest had been demonstrated. "The ordinance as construed by the trial court permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of public unrest." 337 *U.S.* at 5.

In Dennis v. United States, 341 U.S. 494 (1951), members of the Communist Party were charged with violating the Smith Act of 1940. The Court upheld their convictions. Freedom of speech is not unqualified or unlimited, and must on occasion be subordinated to other values and considerations. Overthrow of the government by force or violence furnishes sufficient interest for the government to limit speech. The State can act to prevent its overthrow. In each case, courts must ask "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U.S. at 510. Applying the clear and present danger test, the Court found that the requisite danger existed. Cf. Keyishian v. Board of Regents, 385 U.S. 589 (1967). See also In re Hinds, 90 N.J. 604, 622 (1982) (".... [C]lear and present danger formulation is not constitutionally compelled when the subject of the restriction is the extrajudicial speech of attorneys participating in criminal trial."

2. The Bad Tendency Test

Gitlow v. New York, 268 *U.S.* 652 (1925). Under this test, speech that *tends* to injure the government may be suppressed, and it does not have to be demonstrated that the speech or publications will produce a substantive evil. A member of the Socialist Party was convicted of violating New York's Anarchy Act of 1902, by circulating publications urging the violent overthrow of the government. The defendant contended that there was no concrete result from his activities. The Court noted that the Act does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. The language of the document in question was the language of direct incitement. Freedom of speech and of the press does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom. The Court further observed that the government cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction, but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.

Brandenburg v. Ohio, 395 *U.S.* 444 (1969), overruled *Whitney v. California*, 274 *U.S.* 357 (1927), and held that a state cannot proscribe advocacy of the use of force or violation of the law except where it is directed to producing or inciting imminent lawless action and is likely to incite or produce such action. The statute in question was unconstitutional because it punished mere advocacy.

3. Regulation of Speech Advocating the Forceful Destruction of Government

In State v. Jahr, 114 N.J. Super. 181 (Law Div. 1971), defendant was prosecuted for violating a statute which made it a high misdemeanor to utter, sell, etc., any book, speech, picture, photograph, etc., which in any way incites or counsels, the subversion or destruction by force of the government of the United States or of the State of New Jersey. The Court held that the statute, unless interpreted as requiring intent or knowledge of content by implication, does not so require and is so overly broad as to be in violation of the First and Fourteenth Amendment. The Court further held that the statute is so vague as to be violative of due process. Although the Court ruled that the statue was invalid, the Court observed that if properly framed, a law may make unlawful the advocacy of the violent overthrow of the government. In particular, the Court observed that the Constitution protects against invasions of individual rights, but it is not a suicide pact, and, thus, the people of a democracy cannot abuse the freedoms of speech and press.

4. Regulatory Ordinances

News Printing Co. v. Borough of Totowa, 211 N.J. Super. 121 (Law Div. 1986), concluded that defendant borough's requirement that plaintiff newspaper obtain permits before placing its news racks on public streets constituted a prior restraint. In determining whether an injunction should issue with respect to this prior restraint on the newspaper's ability to circulate its papers under the First Amendment, the regulating governmental body must show that it has a substantial interest to protect. Further, the ordinance must be related to that interest and must allow for sufficient alternative means of communication.

C. Picketing, Demonstrations, And The Distribution Of Information

Many cases in this area arise in an action for violation of a state statute or municipal ordinance concerning trespass. *See N.J.S.A.* 2C:18-3.

1. Parades and Assemblies

In *Forsyth County v. Nationalist Movement*, 505 *U.S.* 123 (1992), an organization filed suit challenging constitutionality of county's assembly and parade ordinance. The Supreme Court held that: (1) county ordinance permitting government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order was facially unconstitutional, due to absence of narrowly drawn, reasonable, and definite standards to guide fee determination; (2) ordinance unconstitutionally required administrator to examine content of message and to estimate public response and cost of police services ; and (3) \$1,000 cap on parade permit fee did not render otherwise invalid ordinance constitutional.

In an action concerning the constitutionality of an ordinance governing parades, *Hurwitz v. Boyle*, 117 *N.J. Super.* 196 (App. Div. 1971), the Appellate Division observed that the right of free speech does not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The Court additionally observed that while the First Amendment does not afford the same kind of freedom to those communicating ideas by conduct such as patrolling, marching and picketing on streets and highways as afforded to those communicating by "pure speech," such conduct may nonetheless constitute methods of expression entitled to First Amendment protection.

Faculty Ad Hoc October 15th Vietnam Moratorium Committee v. Borough of Glassboro, 111 N.J. Super. 258 (Ch. Div. 1970), held that the provision of a municipal parade permit ordinance that one of nine criteria to be observed by the chief of police in deciding whether a permit should issue is whether the conduct of the parade is not reasonablely likely to cause injuries to persons or property, provoke disorderly conduct, or create a disturbance, is unconstitutional on its face. It affords public officials the discretion to reject a parade permit if they feel others might disagree with the views expressed and create a disturbance. The constitutional right of free speech and assembly cannot be abridged simply because others might take offense at what is being said or advocated and create a disturbance.

2. Leafletting and Other Forms of Information Distribution

In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), a minister of religious group who was prevented from distributing free religious literature at Los Angeles International Airport brought suit challenging a resolution of the Board of Airport Commissioners banning all "First Amendment activities" within the "Central Terminal Area" at the airport. Held: the resolution was facially unconstitutional under the First Amendment overbreadth doctrine, regardless of whether airport was considered a nonpublic forum, because no conceivable governmental interest could justify such an absolute prohibition of speech.

In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 *U.S.* 568 (1988), a union's peaceful distribution of handbills at shopping mall's entrances, urging customers not to shop at any of mall's stores until mall's owner promised that all mall construction would be done by contractors paying fair wages, did not violate provision of National Labor Relations Act making it an unfair labor practice to "threaten, coerce, or restrain any person" to cease doing business with another.

In *Marsh v. State of Alabama*, 326 *U.S.* 501 (1946), appellant was arrested for distributing Jehovah's Witness literature on the sidewalk in Chickasaw, Alabama, a town owned by the Gulf Shipping Corporation. The Court held that the mere fact that a single company possessed legal title to the town was not dispositive of the issue: "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general the more do his

rights become circumscribed by the statutory and constitutional rights of those who use it." 326 *U.S.* at 506. The Court held that the company-owned town, which possessed all of the characteristics of a municipality, providing full access to the public to all of its facilities including its shopping district, was subject to the strictures of the First Amendment.

Floyd Corp., LTD. v. Tanner, 407 *U.S.* 551 (1972), considered whether the protection of free expression in a shopping center, that was unrelated to the center's operations, violates rights of private property protected by the Fifth and Fourteenth Amendments. After balancing the rights in question, the Court held that under circumstances where there were adequate alternative avenues of communication, it would be an unwarranted infringement of property rights to require the shopping center to yield to the exercise of First Amendment rights. Finally, the Court held that there had been no dedication of Floyd's privately owned and operated shopping center to public use as to entitle the exercise therein of the asserted First Amendment rights.

See also Hudgens v. N.L.R.B., 424 U.S. 507 (1976), overruling Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

In *Green Party of New Jersey v. Hartz Mountain Industries, Inc.*, 164 *N.J.* 127 (2000), a small political party and politically active citizen sued shopping center, challenging the constitutionality of its regulations regarding distribution of leaflets by persons or groups. Held: (1) The standard for determining the constitutionality of regulations on the time, place, or manner of speech in a shopping mall requires a balancing of the rights of citizens to speak and assemble freely with the private property rights of mall owners; and (2) the regulations that a political party could not hand out leaflets without providing a \$1 million liability insurance policy or signing a hold harmless agreement were unconstitutional.

In New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994), cert. denied, 516 U.S. 812 (1995), a citizens group sued owners of private shopping malls and sought permanent, mandatory injunctive order to compel owners to grant access to private property to allow leafletting. Held: Regional shopping centers are required to permit distribution of leaflets on societal issues, subject to reasonable conditions.

In State v. Schmid, 84 N.J. 535 (1980), appeal dismissed sub nom. Princeton University v. Schmid, 455 U.S. 100 (1982), defendant sought to distribute political materials dealing with the United States Labor Party on the main campus of Princeton University, a private non-profit institution. Defendant was not a student at Princeton, nor was the Labor Party a university-affiliated or campus-backed organization. Under the University regulations then in effect, permission was a prerequisite for the on-campus distribution of materials by off-campus organizations. No permission was required for the same activity by a university-affiliated organization or by Princeton students. Defendant, who was aware of the University policy, was arrested for trespass and charged as a disorderly person under N.J.S.A. 2A:170-31 (Superceded by N.J.S.A. 2C:18-3). The Court stated that, in light of the fact that First Amendment principles as applied to the owners of private property were still evolving, it would not attempt to decide whether the First Amendment applied to Princeton University. Rather, the Court considered defendant's assertion that he was entitled to protection under the State Constitution. The Court formulated a three prong test to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can be restricted to accommodate those rights. The elements to be considered are: "(1) the nature, purpose, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." Additionally, in weighing the reasonableness of an owner's restrictions to access to private property, weight may be given to whether there exists "convenient and feasible alternate means to individuals to engage in substantially the same expressional activity." The Court found that the dissemination of political material by defendant was not incompatible with Princeton University's professed educational goals or use of its property for educational purposes, and there was no indication that defendant's activities disrupted University operations, or significantly infringed on the rights of others, or caused any interference or inconvenience with respect to the normal use of the University property. Accordingly, the judgment below was reversed.

State v. Today Newspapers, 183 *N.J. Super.* 264 (Law Div. 1982), held that a Franklin Lakes Municipal Ordinance which precluded distribution of handbills

upon vacant premises was not a reasonable time, place and manner regulation and was, therefore, violative of the newspaper's First Amendment rights. Specifically, the ordinance prohibited distribution "... in or upon any private premises which are temporarily or continuously uninhabited or vacant." The Court held that the language of the ordinance was vague. Finally, the Court noted that there were not "ample" alternatives available to the newspaper, within Franklin Lakes, to disseminate its newspaper.

3. News Racks

In *City of Cincinnati v. Discovery Network, Inc.*, 507 *U.S.* 410 (1993), commercial publishers requested declaratory and injunctive relief against enforcement of city ordinance prohibiting distribution of "commercial handbills" on public property, used as basis for ordering removal of news racks. The Supreme Court held that: (1) ban on news racks containing "commercial handbills," which did not apply to news racks containing "newspapers" was not a "reasonable fit" with city's legitimate interest in safety and esthetics and means chosen to serve interest; and (2) enforcement did not constitute a valid time, place, and manner restriction of protected speech, as it was not content-neutral.

News Printing Co. v. Borough of Totowa, 211 N.J. Super. 121 (Law Div. 1986). The Borough of Totowa enacted an ordinance which, inter alia, required that a newspaper company obtain a permit prior to placing a news rack in a public area. An annual permit fee was also required as well as mandatory liability insurance for damages arising out of personal and property damage related to use of the news rack. The trial court concluded that such regulation placed a prior restraint on the distribution and circulation of newspapers in violation of the First and Fourteenth Amendments. The Court did, however, agree that the borough could enact reasonable regulations for the placement of each news rack and could also charge reasonable fees which served to defray administration and inspection costs.

4. Demonstrations and Protests

In *Hill v. Colorado*, 530 *U.S.* 703, 120 *S.Ct.* 2480 147 *L.Ed.* 2d 597 (2000), abortion opponents sought declaration that criminal statute prohibiting any person from knowingly approaching within eight feet of another person near health care facility without that person's consent violated First Amendment. The Supreme Court held that: (1) statute was narrowly-tailored time, place, and manner regulation; (2) statute was not overbroad or

unconstitutionally vague; and (3) statute did not impose unconstitutional prior restraint on speech.

In Schenck v. Pro-Choice Network, 519 U.S. 357 (1997), health care providers sought a preliminary injunction prohibiting abortion protestors from engaging in allegedly illegal efforts to prevent women from obtaining abortions and other family planning services. The Supreme Court held that: (1) preliminary injunction was not unlawful prior restraint on free speech; (2) governmental interests in ensuring public safety and order, promoting free flow of traffic, protecting property rights, and protecting woman's freedom to seek pregnancy-related services, were significant enough to justify appropriately tailored preliminary injunction to secure unimpeded access to clinics; (3) floating buffer zones requiring protestors to stay 15 feet from people and vehicles entering and leaving clinics violated First Amendment by burdening more speech than was necessary to serve relevant governmental interests; (4) fixed buffer zones requiring abortion protestors to remain 15 feet from clinic doorways, driveways, and driveway entrances were necessary to ensure access; and (5) preliminary injunction's "cease and desist" provision, allowing patients to require sidewalk counselors to retreat and remain outside fixed buffer zones, was not contrary to First Amendment.

In Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994), operators of health clinic that performed abortions sought to broaden a previously entered injunction against anti-abortion protestors, complaining that access to a clinic was still impeded by protestors' activities and that such activities had also discouraged some potential patients from entering the clinic, and had deleterious physical effects on others. The Supreme Court held that: (1) fact that injunction restricted speech of only anti-abortion protestors did not make it content based; (2) content-neutral injunction would be upheld if its challenged provisions burdened no more speech than necessary to serve significant government interests; (3) provisions of injunction establishing 36-foot buffer zone around clinic entrances and driveway and imposing limited noise restrictions did not violate First Amendment; and (4) provisions of injunction establishing 36-foot buffer zone on private property, banning observable images, establishing 300-foot noapproach zone around clinic, and establishing 300-foot buffer zone around staff residences burdened more speech than necessary to serve government interests.

Boos v. Barry, 485 *U.S.* 312 (1988), held unconstitutional a provision of the Washington, D.C.

code making it unlawful to display within 500 feet of a foreign embassy any sign tending to bring a foreign government into public odium or public disrepute. The Court found the clause was facially violative of the First Amendment because it was a content-based restriction on political speech taking place in a public forum and was not narrowly drawn to serve a compelling State interest. The Court upheld another provision of the Code, modified by the Court of Appeals, making it unlawful for crowds demonstrating within 500 feet of a foreign embassy to fail to disperse at the request of a police officer when the police reasonably believe that a threat to the security or peace of the embassy is threatened. The Court found that this clause, as modified by the Court of Appeals, was not vague or overboard.

In *Frisby v. Schultz*, 487 *U.S.* 474 (1988), abortion protesters brought suit seeking to enjoin enforcement of a municipal ordinance prohibiting picketing before or about residence or dwelling of any individual. The Supreme Court held that: (1) the ordinance does not ban all picketing in residential areas, but, rather, prohibits only focused picketing taking place in front of residences; and (2) the ordinance serves the significant government interest of protecting residential privacy, is narrowly tailored, and, thus, does not violate the First Amendment.

National Socialist Party v. Village of Skokie, 432 *U.S.* 43 (1977), reversed the denial of a stay of an order that would have prevented a Nazi organization from staging a demonstration in a largely Jewish suburb.

Bachellar v. Maryland, 397 *U.S.* 564 (1970), reversed the conviction of anti-war protesters, because it was demonstrated that their convictions may have been caused by a charge to the jury which allowed a finding of guilt upon the ground that the protester's views concerning the Vietnam War may have been deemed offensive by some of the spectators.

In Adderley v. Florida, 385 U.S. 3 (1967), university students who attended a demonstration at a jail concerning the arrest of fellow students who had previously protested were themselves arrested. The Court distinguished this situation from *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox v. Louisiana*, 379 U.S. 536 (1965), on a variety of grounds. In *Edwards*, the demonstration occurred near the State Capitol which was open to the public. Jails, built for security purposes, are not. The trespass statute in question was clearly defined and nothing prevented Florida "from even-handed enforcement of its general

trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to the curtilege of the jail house." The State was empowered to preserve its property for the use to which it is lawfully dedicated. No constitutional right exists to protest whenever and however a citizen pleases.

In Murray v. Lawson, 136 N.J. 32 (1994), vacated 513 U.S. 802, 115 S.Ct. 44 (1994), on remand 138 N.J. 206 (1994), cert. denied 515 U.S. 1110, 115 S.Ct. 2264 (1995), physicians sought to enjoin anti-abortion protestors from picketing in front of their residences. Trial court entered permanent injunction in favor of one physician and granted restraining order with respect to the other. Protestors appealed. The Supreme Court held that: (1) trial judges had power to enjoin nonviolent, noncriminal activity of protestors to protect physicians' residential property; (2) restrictions were contentneutral; (3) the State has common-law public policy in favor of protecting residential privacy, and enforcement of that policy constitutes a significant government interest justifying imposition of injunctive restrictions; (4) injunction prohibiting protestors from picketing within 300 feet of physician's residence was narrowly tailored place restriction; but (5) injunction prohibiting protestors from picketing within immediate vicinity of physician's residence was not sufficiently narrowly tailored, warranting remand for more precise definition of ban's spacial scope.

In Horizon Health Center v. Felicissimo, 135 N.J. 126 (1994), a family planning clinic sought to enjoin activities of anti-abortion protestors. The trial court issued a permanent injunction, and protestors appealed. The Supreme court held that: (1) trial court had authority to impose reasonable injunctive restrictions on peaceful expressive activities of protestors; (2) injunction was content-neutral; (3) injunction served significant government interests; (4) injunction's "manner" restriction was not sufficiently narrowly tailored to address actual problem of noise; (5) "place" restriction prohibiting trespass and obstruction of access was sufficiently narrowly tailored, while restriction requiring protestors to stay across street from clinic was too broad; and (6) after modification, injunction would provide adequate alternative channels of communication for protestors.

In *State v. Brown,* 212 *N.J. Super.* 61 (App. Div.), *certif. denied,* 107 *N.J.* 53 (1986), defendant challenged her conviction for criminal trespass resulting from her participation in an anti-abortion demonstration at a multi-business office complex, on First Amendment

grounds. Defendant's conviction was upheld, the Court concluding that the owner of the complex had not sufficiently dedicated the property to public use to entitle access for First Amendment activity under the New Jersey Constitution. In so doing, the Court refused to take a more expansive view of New Jersey's Constitution than that applied to the United States First Amendment provision.

In *State v. Kirk*, 84 *N.J. Super*. 151 (Cty. Ct. 1964), *aff'd*, 88 *N.J. Super*. 130 (App. Div. 1965), defendants entered the waiting room of the City of Newark air terminal operated by the Port of New York Authority to picket the ticket counter of the airline, after having been denied permission to do so. The Court held that they were neither invitees nor licensees, but were trespassers who were guilty of willful trespass. The operation and conduct of the facility was akin to that of a private business operation and the Port Authority could prosecute a trespasser on its premises. Defendants could have picketed at other less disruptive partes of the building and would still have been able to communicate their message.

D. Campaigning, Canvassing And Soliciting

1. Campaigning

In *California Democratic Party v. Jones*, 530 *U.S.* 567, 120 *S.Ct.* 2402 (2000), an action was brought challenging constitutionality of California proposition which converted the State's primary election from closed to blanket primary in which voters could vote for any candidate regardless of voter's or candidate's party affiliation. Held: The blanket primary violated political parties' First Amendment right of association.

In Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000), a political action committee and unsuccessful candidate in primary for Missouri state auditor brought suit challenging provisions of Missouri's campaign finance law limiting amount of contributions to candidates. The Supreme Court held that: (1) decision in Buckley v. Valeo is authority for state limits on campaign contributions; (2) Missouri statute limiting campaign contributions for various state offices was not void for lack of evidence, and was sufficiently tailored to serve its purposes, as required to survive First Amendment scrutiny; and (3) statute was not invalid based on fact that, accounting for inflation, Missouri's contribution limits may have been effectively lower in real dollar value than those campaign contribution limits upheld in Buckley.

In Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999), a nonprofit public interest organizations and individuals who regularly participated in Colorado's initiative and referendum petition process brought § 1983 action against state officials, challenging statutes regulating petition process. The court held that: (1) statute requiring that initiative-petition circulators be registered voters violated First Amendment; (2) statute requiring that initiative-petition circulators wear identification badge bearing the circulator's name violated First Amendment; and (3) statute requiring that proponents of an initiative report names and addresses of all paid circulators and amount paid to each circulator violated First Amendment.

In Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998), an independent political candidate brought against a state-owed public television broadcaster, alleging that his exclusion from a candidate debate violated the First Amendment. The Supreme Court held that the debate was a nonpublic forum from which the broadcaster could exclude the candidate in the reasonable, viewpoint-neutral exercise of its journalistic discretion.

In *Timmons v. Twin Cities Area New Party*, 520 *U.S.* 351 (1997), a minor political party challenged constitutionality of Minnesota's antifusion laws prohibiting candidates from appearing on ballot as candidate of more than one political party. The Supreme Court held that antifusion laws did not violate party's First and Fourteenth Amendment associational rights.

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 *U.S.* 604 (1996), the Federal Election Commission brought an action against state political party for violating spending limits under Federal Election Campaign Act (FECA). The Court held that First Amendment prohibits application of FECA's party expenditure provision to expenditure that political party has made independently, without coordination with any candidate.

In *Burson v. Freeman*, 504 *U.S.* 191 (1992), a political party worker sought to enjoin enforcement of state statute prohibiting solicitation of votes and display of campaign materials within 100 feet of entrance to polling place on election day. The Supreme Court held that statute was narrowly tailored to serve compelling state interest in preventing voter intimidation and election fraud.

In Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), a business organization challenged a state statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in elections for state offices. The Supreme Court held that: (1) unique state-conferred corporate structure which facilitates the amassing of large treasuries warrants the limit on independent expenditures; (2) statute is sufficiently narrowly tailored to achieve its goal; (3) statute may be constitutionally applied to not-for-profit corporations; and (4) there is no equal protection violation in fact that act does not apply to labor unions, unincorporated associations, and news media corporations.

In *Eu v. San Francisco County Democratic Central Committee*, 489 *U.S.* 214 (1989), party central committees challenged sections of California Election Code banning primary endorsements and imposing restrictions on internal policy governance of political parties. The Supreme Court held that: (1) the ban on primary endorsements violated the First and Fourteenth Amendments; and (2) restrictions on organization and composition of official governing bodies of political parties, limits on term of office for state central committee chairs, and requirement that such chairs rotate between residents of Northern and Southern California could not be upheld.

In *Munro v. Socialist Workers Party*, 479 *U.S.* 189 (1986), a candidate on primary election ballot, his political party, and two registered voters brought suit alleging that their First and Fourteenth Amendment rights were abridged by state statute requiring that minor-party candidate receive at least 1% of votes cast in primary election before name would be placed on general election ballot. Held: the statute was not unconstitutional, because burdens imposed on minority party candidates' First Amendment rights were not too severe to overcome state's interest in restricting access to general ballot.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 *U.S.* 238 (1986), the Federal Election Commission brought an enforcement proceeding seeking to hold nonprofit corporation liable under Federal Election Campaign Act for publishing newsletter urging readers to vote "pro-life" in upcoming primary election. The Supreme Court held that: (1) corporation's publication and distribution of newsletter urging readers to vote "pro-life" in upcoming primary election violated section of Act prohibiting direct expenditure of corporate funds in connection with election to public office, but (2) section violated First Amendment as applied.

In *Tashjian v. Republican Party of Connecticut*, 479 *U.S.* 208 (1986), Connecticut's closed primary law impermissibly interfered with political party's First Amendment right to define its associational boundaries.

Greer v. Spock, 424 U.S. 828 (1976), upheld the regulation of an army base commander which had prevented Dr. Benjamin Spock from campaigning for the Presidency from the grounds of the Fort Dix, New Jersey military reservation. Another regulation which permitted the commander to ban certain publications from the base was also allowed to stand. The Court observed that the "business of a military institution like Fort Dix is to train soldiers, not to provide a public forum." In addition, the commander possessed the "historically unquestioned power" to exclude civilians from the base in order to further the unique function of the military. There exists no "generalized constitutional right" to make speeches or to distribute literature within the confines of a military base. The Court referred to the traditional political neutrality of military bases in finding the exclusion to be constitutional.

Markwardt v. New Beginnings, 304 *N.J. Super.* 522 (App. Div. 1997), held that individuals, corporations, businesses and continuing political committees may not evade restrictions of the Campaign Contribution and Expenditure Reporting Act by entering into agreements to funnel money to a candidate or his or her campaign committee.

2. Canvassing and Soliciting

In *McIntyre v. Ohio Elections Commission*, 514 *U.S.* 334 (1995), a pamphleteer challenged a fine imposed by Ohio Elections Commission for distributing anonymous leaflets opposing proposed school tax levy. The Supreme Court held that Ohio's statutory prohibition against distribution of any anonymous campaign literature violated First Amendment.

In International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992), a nonprofit religious corporation challenged the port authority's restrictions on distribution of literature and solicitation of contributions in airport terminals. The Supreme Court held that: (1) airport terminal was nonpublic forum for First Amendment purposes; and (2) prohibition on solicitation of contributions satisfied reasonableness requirement. In United States v. Kokinda, 497 U.S. 720 (1990), defendants were convicted of soliciting contributions on sidewalk in front of Post Office in violation of Postal Service regulation. The Supreme Court held that: (1) postal sidewalk was not traditional public forum, nor had Postal Service expressly dedicated sidewalk to any expressive activity; and (2) Postal Service regulation prohibiting solicitation on postal premises, as applied to members of political advocacy group who were soliciting contributions, selling books and newspaper subscriptions and distributing political literature on sidewalk near Post Office entrance, did not violate free speech protections of First Amendment, under reasonableness test.

Meyer v. Grant, 486 U.S. 414 (1988). Under Colorado law, citizens are permitted to place propositions on the ballot through an initiative process. The law made it a felony to pay any person, corporation or association to circulate an initiative petition. Respondent, a proponent of a measure that would exempt motor carriers from the jurisdiction of the public utilities commission, brought an action against state officials alleging that the prohibition against paid circulators violated the First Amendment. The Supreme Court unanimously agreed, holding that an initiative petition is core political speech; thus, any prohibition is subject to exacting scrutiny under the First Amendment. The Court found that the statute hindered respondent's speech by limiting the amount of people who could spread the message, and made it less likely that respondent could obtain the necessary amount of signatures to satisfy the initiative requirement. The Court ruled that the State failed to meet its burden that the prohibition advanced a substantial state interest sufficient to outweigh respondent's First Amendment rights because other alternatives, such as laws requiring a certain amount of signatures on the ballot, satisfied the State interest in preserving the integrity of the initiative process. Additionally, the state failed to show that paid circulators were any more likely to interfere with the integrity of the initiative process than volunteers.

In *Riley v. National Federation of the Blind of North Carolina*, 487 *U.S.* 781 (1988), charitable organizations, professional charitable solicitors and others challenged constitutionality of law regarding solicitation of funds for charitable purposes. The Supreme Court held that: (1) statute was subject to review under strict scrutiny standard; (2) state's definition of reasonable fee, using percentages, was not narrowly tailored to state's interest in preventing fraud; (3) requirement that professional fund raisers disclose a potential donor's percentage of charitable contributions collected during previous year which were actually turned over to charity was unduly burdensome and unconstitutional; and (4) licensing requirement for professional fund raisers was unconstitutional.

In Hynes v. Mayor and Council of Borough of Oradell, 66 N.J. 376 (1975), rev'd, 425 U.S. 610 (1976), plaintiffs challenged an ordinance that required that any person desiring to canvass, solicit, or call from house to house for a recognized charitable cause, or for a political campaign or cause, furnish local police departments with advance written notification for the purpose of identification. The New Jersey Supreme Court held that the requirements of the statute were easily satisfied. The only requirement was one of identification. It need be fulfilled only once each campaign, and there was no fee involved. The applicant did not have to obtain a card or carry a license. Significantly, no discretion reposes in any municipal official to deny the privilege of calling from door to door. The ordinance was plainly an identification device in its most basic form. In this instance, the sole requirement is that the requirements be reasonable. Identification in this case would aid the community in securing itself against break-ins and illegal entries into private homes, and was not an interference with First Amendment rights. It was not a prior restraint on the rights of free speech and assembly. The United States Supreme Court reversed and remanded this decision, holding that the ordinance in question was unconstitutionally vague, despite the State court's limiting construction that the identification requirement might be satisfied by resort to the mails. While a municipality can regulate soliciting and canvassing to protect its citizens from crime and annoyance, the ordinance must be narrowly drawn.

In *Borough of Collingswood v. Ringgold*, 66 *N.J.* 350 (1975), *appeal dismissed*, 426 *U.S.* 901 (1976), an identification requirement of an ordinance prohibiting canvassing or soliciting without first registering with the chief of police, and procuring a permit was sufficiently reasonable and neutral to withstand a First Amendment constitutional attack. It was a legitimate tool in the hands of the municipality, particularly as applied to the conduct of defendants engaged in canvassing house-to-house in connection with a survey of listener preferences for radio stations. The Court additionally held that speech is not unprotected by the Constitution merely because it is uttered by a corporation as opposed to an individual or because it serves economic purposes of the corporate entity.

International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority, 691 F.2d 155 (3d Cir. 1982). Invoking the First Amendment, ISKON challenged a policy that prohibits any outside organizations from soliciting money at the race track and stadium in the Meadowlands Sports Complex. The Court noted the distinction between valid restrictions on First Amendment activity in a public versus a non-public forum. In a public forum, First Amendment activity may be restricted only by "reasonable time, place or manner regulations that serve a governmental interest and leave open ample alternative channels for communication." On the other hand, the government may prohibit all forms of communication in a non-public forum "so long as the ban is reasonable and content-neutral." The primary factor in determining whether property owned by the government is a public forum is how the locale is The Court reasoned that the Meadowlands used. Complex is a commercial venture by the State and does not fit any of the accepted descriptions of a public forum. The next step is to determine if the policy is reasonable, i.e., whether the proposed activity is basically incompatible with the normal character and function of the Meadowlands, and whether the policy si uniform and The Court, in upholding the non-discriminatory. policy, found that it was both reasonable and contentneutral.

3. Voters' Rights

In Morse v. Republican Party of Virginia, 517 U.S. 186 (1996), registered voters wishing to become delegates to a political party's state convention to nominate a candidate for United States Senator challenged the party's requirement that persons wishing to become delegates pay a registration fee. the Supreme Court held that: (1) the party was "acting under authority explicitly or implicitly granted by a covered jurisdiction," for purposes of the regulation making a political party's change that affects voting subject to the preclearance requirement, when it adopted a filing fee for delegates to the state nominating convention; (2) a filing fee for party delegates operates in precisely the same fashion as other practices covered by the preclearance requirement and, thus, requires preclearance; and (3) a private right of action exists to enforce the Voting Rights Act section that prohibits a poll tax.

E. Actions And Conduct Which Constitute Symbolic Speech

In *Texas v. Johnson*, 491 *U.S.* 397 (1989), defendant was convicted of desecration of venerated object after he

burned an American flag during a protest rally. The Supreme Court held that: (1) defendant's conduct was expressive conduct within protection of the First Amendment; and (2) State could not justify prosecution of defendant based upon its interest in preventing breaches of peace and preserving the flag as a symbol of nationhood and national unity.

United States v. Eichman, 496 *U.S.* 310 (1990) struck down the federal Flag Burning Act as violative of the First Amendment.

Clark v. Community for Creative Non-Violence (CCNV), 468 U.S. 288 (1984), held that a National Park regulation prohibiting camping in certain parks did not violate the First Amendment, though applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in connection with a demonstration which was intended to call attention to the plight of the homeless. The Court first acknowledged that sleeping in connection with the demonstration was "expressive conduct protected to some extent by the First Amendment." However, the Court held that the regulations forbidding sleeping were defensible as a time, place or manner restriction of expression, whether oral, written or symbolized by conduct. The Court reasoned that the park service neither attempted to ban sleeping generally nor to ban it everywhere in the parks. The park service had established areas where camping was allowed and areas where it was not. Further, the Court found that the regulations were content-neutral. Additionally, the message could be communicated in other ways, chief of which was the demonstration in progress with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil. Finally, the Court found that the regulations narrowly focused on the Government's substantial interest in maintaining the parks in the heart of the capital.

Spence v. State of Washington, 418 U.S. 405 (1974), held that a Washington state statute forbidding improper use of the flag is unconstitutional as applied to a college student who, to protest the then-recent Cambodian intervention, displayed an inverted flag on which a peace symbol was superimposed. The plurality declared that such a use of the flag is closely analogous to the manner in which flags have always been used to convey ideas and is protected under the First Amendment. Cf. Smith v. Gougen, 415 U.S. 566 (1974); Street v. New York, 394 U.S. 576 (1976).

Cohen v. California, 403 *U.S.* 15 (1971). Defendant, who was in a county courthouse, was arrested

for wearing a jacket with "Fuck the Draft" written on it. He wore the jacket as a means of informing the public of his feelings about the Vietnam War. The Court held that no conduct was involved, simply speech. There was no showing of an intent to incite disobedience or disruption of the draft. States are free to ban the simple use of "fighting words" which are inherently likely to provoke violent action. However, the words here were not directed to the person of the hearer as personal insult. The fact that some unwilling "listeners" in a public building may have been briefly exposed to it cannot justify the conviction in this case.

In *Tinker v. Des Moines Independent Community School District,* 393 *U.S.* 503 (1969), students wore arm bands to school to protest the Vietnam War and were suspended. Teachers and students retain their constitutional rights in the school environment. However, the State is authorized to prescribe and control conduct in its schools. Wearing arm bands was akin to "pure" speech and there was no disorder or disturbance occasioned. There was no showing that the school discipline would be disrupted. *See New Jersey v. T.L.O.,* 469 *U.S.* 325 (1985) ("we have recently held school officials subject to the commands of the First Amendment..."

United States v. O'Brien, 391 U.S. 367 (1968), upheld a statute which classified the burning of draft cards as a criminal offense. The concept that an apparently limitless variety of conduct can be labeled "speech" whenever the persons engaging in it intends thereby to express an idea, was rejected. Due to the fact that draft-card burning entails both communicative and non-communicative aspects, a sufficiently important government interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. The statute advanced an important interest of the government which was not related to the curtailment of expressions. Any incidental restriction upon the freedom of expression was only as great as was necessary to advance that interest.

In *Tri-State Metro Naturists v. Township of Lower*, 219 *N.J. Super.* 103 (Law Div. 1987), plaintiffs argued that defendant township's total ban on the practice of nude sunbathing on a public beach was a violation of their First and Fourteenth Amendment right to freedom of expression. The trial court ruled that, while there was an element of nonverbal expression inherent in the practice, "its communicative character [was] not sufficiently distinct to warrant constitutional protection."

F. Chilling Effect

Laird v. Tatum, 408 U.S. 1 (1972). Mere investigation and data processing by government officials which causes a "chilling" effect on the exercise of First Amendment rights does not present a justifiable controversy. See also Socialist Workers Party et al. v. Attorney General of the United States, 419 U.S. 1314 (1974).

In Anderson v. Sills, 56 N.J. 210 (1970), plaintiffs sued for a declaratory judgment and injunctive relief alleging that the use of a reporting system by law enforcement officials to gather information relating to potential and actual civil disorders violated the constitution. The Superior Court, Chancery Division, granted plaintiff's motion for summary judgment. The New Jersey Supreme Court held that the injunction had been improperly granted on the basis of the speculation that police activities would deter the exercise of First Amendment rights. There was no evidence of such activities or of the deterrent effect, nor was there any evidence of an intent to inhibit the exercise of First Amendment rights. It is not required that injury is experienced as a condition for a declaratory judgment suit to vindicate First Amendment rights, but the prospect of wrongful conduct must be tangible. The fact that First Amendment freedoms may be chilled by police activity is not pivotal, and these rights must be weighed against the competing interest of the citizens. Pursuant to the remand, the Appellate Division held that where the forms used in intelligence gathering activity by State Police and local agencies were no longer in use, the case was moot. Also, assuming arguendo that the case is not moot, the United States Supreme Court holding in Laird v. Tatum, 408 U.S. 1 (1972), is dispositive in establishing that the assailed police activity is permissible and, therefore, plaintiffs have failed to state a claim.

In *Wooley v. Maynard*, 430 *U.S.* 705 (1977), Jehovah's Witnesses had religious objections to the motto "live free or die" on their license plates. The Court held that the State was barred from prosecuting them for obscuring the motto on their license plates. The statute required that the appellees use their private property as a billboard for the State's ideological message or suffer a penalty. The First Amendment allows individuals to refuse to foster ideas which they find morally objectionable.

G. Offensive Speech

In *Cohen v. California*, 403 *U.S.* 15 (1971), defendant was convicted of disturbing the peace, after he walked through a courthouse corridor wearing a jacket bearing the words 'Fuck the Draft' in a place where women and children were present. Held: the conviction could not be justified either upon theory that words were inherently likely to cause violent reaction or upon the more general assertion that the states may remove an offensive word from the public vocabulary. Consistent with the First and Fourteenth Amendments, the states cannot make the simple public display of a four-letter expletive a criminal offense.

In *Bethel School District No. 403 v. Fraser*, 478 *U.S.* 675 (1986), a student filed civil rights action after he was disciplined for language used during nominating speech at student assembly. The Supreme Court held that school district acted entirely within its permissible authority in imposing sanctions upon student in response to his offensively lewd and indecent speech, which had no claim to First Amendment protection.

In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S.Ct. 1878 (2000), a cable television programmer brought action against United States, seeking declaratory judgment that Telecommunications Act's "signal bleed" provision, requiring cable operators either to scramble sexually explicit channels in full or limit programming on such channels to certain hours, was unconstitutional, and seeking an injunction prohibiting enforcement of the law. The Supreme Court held that: (1) the provision was content-based restriction that was subject to strict scrutiny; and (2) the provision violated the First Amendment's free speech clause, absent showing by government that provision was least restrictive means of achieving goal of preventing children from hearing or seeing images resulting from "signal bleed."

In *Reno v. A.C.L.U.*, 521 *U.S.* 844 (1997), plaintiffs filed suit challenging the constitutionality of the Communications Decency Act (CDA), which was enacted to protect minors from harmful material on the Internet. The Supreme court held that: (1) provisions of the CDA prohibiting transmission of obscene or indecent communications by means of telecommunications device to persons under age 18, and prohibiting transmission of patently offensive communications through use of interactive computer service to persons under age 18, were content-based blanket restrictions on speech, and, as such, could not be viewed as a form of time, place, and manner regulation; (2) challenged provisions were facially overbroad in violation of the First Amendment; and (3) constitutionality of provision prohibiting transmission of obscene or indecent communications by means of telecommunications device to persons under age 18 would be saved from facial overbreadth challenge by severing term "or indecent" from statute.

In Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission, 518 U.S. 727 (1996), television access programmers and cable television viewers petitioned for judicial review of Federal Communications Commission orders implementing Cable Television Consumer Protection and Competition Act section governing indecent and obscene The Supreme Court held that: (1) programming. provision permitting operator to prohibit patently offensive or indecent programming on leased access channels is consistent with First Amendment; (2) "segregate and block" provision with respect to leased access channels violates First Amendment; and (3) provision permitting operator to prohibit patently offensive or indecent programming on public access channels violates First Amendment.

R.A.V. v. City of St. Paul, 505 *U.S.* 377 (1992). The State may ban all "fighting words." But it may not choose to ban only those fighting words directed at the listener's race, religion, or other enumerated traits. Thus, city ordinance prohibiting bias-motivated disorderly conduct was facially invalid under the First Amendment.

In United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), defendant was convicted of violating the Protection of Children Against Sexual Exploitation Act. The Ninth Circuit reversed on ground that Act violated First Amendment. The United States Supreme Court reversed, holding that term "knowingly" as used in Act applied to elements of crime concerning minority of performers and sexually explicit nature of material, despite natural grammatical reading of Act under which scienter element would apply only to transport element.

In Sable Communications of California v. Federal Communications Comm'n, 492 U.S. 115 (1989), a "diala-porn" service sought declaratory and injunctive relief against enforcement of Communications Act amendments imposing blanket prohibition on indecent as well as obscene interstate commercial telephone messages. The Supreme court held that: (1) prohibition of obscene telephone messages was constitutional; and (2) denial of adult access to telephone messages which were indecent but not obscene far exceeded that which was necessary to limit access of minors to such messages and did not survive constitutional scrutiny.

In *Fort Wayne Books, Inc. v. Indiana,* 489 *U.S.* 46 (1989), an adult bookstore operator was charged with violating Indiana's RICO statute. Held: (1) Indiana's RICO statute was not unconstitutionally vague as applied to obscenity predicate offenses with which bookstore owner was charged, but (2) pretrial seizure of bookstore owner's books and files, based on finding of probable cause, before there had been any judicial determination that seized items were obscene or that RICO violation had occurred, violated First Amendment.

Alexander v. United States, 509 *U.S.* 544 (1993). Forfeiture of defendant's assets, used in adult entertainment business, following conviction for participating in racketeering activities in violation of RICO, did not violate defendant's First Amendment rights.

Arcara v. Cloud Books, Inc., 478 *U.S.* 697 (1986). First Amendment did not preclude the closing down of an adult bookstore, pursuant to generally applicable statute, on the basis that solicitation of prostitution was occurring on the premises.

In *Barnes v. Glen Theatre, Inc.*, 501 *U.S.* 560 (1991), a public decency statute requiring that dancers at adult entertainment establishments wear pasties and G-strings did not violate the First Amendment.

Miller v. California, 413 *U.S.* 15 (1973). Expression that is obscene is unprotected by the First Amendment and may be banned by the states. For a work to be "obscene," all three parts of the following test must be met: first, the average person, applying community standards, must find that the work appeals to the "prurient" interest. Second, the work must depict or describe, in a "patently offensive way," particular types of sexual conduct as defined by state law. Third, the work, taken as a whole, must lack "serious literary, artistic, political or scientific value."

Stanley v. Georgia, 394 *U.S.* 557 (1969). The mere private possession of obscene material by an adult may not be made criminal.

Osborne v. Ohio, 495 *U.S.* 103 (1990). The States may criminalize even private possession of child pornography.

Chaplinsky v. New Hampshire, 315 *U.S.* 568 (1942), upheld a conviction of a Jehovah's Witness for addressing the City Marshall as a "damned Fascist" and a "God damned racketeer" under a statute prohibiting persons from addressing "any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place.

In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), defendant was charged with violating an ordinance that prohibits a drive-in movie theater from showing films containing nudity when its screen is visible from a public street or place. The Court held that while a State or municipality may protect individual privacy by enacting reasonable time, place and manner regulations applicable to all speech irrespective of content, the government cannot, absent a showing that substantial privacy interests are being invaded in an essentially intolerable manner, act as a censor, selectively shielding the public from some kinds of speech on the ground that they are more offensive than others. The Court noted that any viewer on the street that would be offended could simply "avert his eyes." The Court invalidated the ordinance inasmuch as it did not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression.

F.C.C. v. Pacifica Foundation, 438 *U.S.* 726 (1978). A broadcaster may be deprived of his license and his forum if the Federal Communications Commission decides that such an action would serve the public interest. Patently offensive, indecent material presented over the airways confronts the citizen, not only in public, but also in the privacy of the home, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." See *Rowan v. United States Post Office Dept.*, 397 *U.S.* 728 (1970); *F.C.C. v. League of Woman Voters of California*, 468 *U.S.* 364 (1984).

Karins v. City of Atlantic City, 152 *N.J.* 532 (1998). Off-duty firefighter appealed after he was suspended for directing a racial epithet at a police officer during a traffic stop. Held: the racial epithet was not protected under the First Amendment.

In *State in Interest of W.E.C.*, 165 *N.J. Super*. 161 (App. Div. 1979), *rev'd in part on other grounds*, 81 *N.J.* 442 (1979), a juvenile defendant was charged with using loud and offensive language in two acts of assault and battery on a police officer. Defendant was found guilty of delinquency on all charges, and he was given indeterminate sentences at Yardville. Appellant

contended that the language he uttered would not support guilt under *N.J.S.A.* 2A:170-29(1) (superseded by *N.J.S.A.* 2C:33-4b), the constitutional criteria recognized by the Supreme Court in *State v. Rosenfeld*, 62 *N.J.* 594, 603-604 (1973). The Court disagreed and held that "when offensive language is directed specifically to another individual and is of such a nature and uttered in such circumstances as likely to result in an immediate breach of the peace, the conduct may be constitutionally proscribed ..., i.e., not protected by the First Amendment." It is irrelevant that the person to whom the language was directed was not offended.

In *State in Interest of H.D.*, 206 *N.J. Super.* 58 (App. Div. 1985), defendant was adjudicated delinquent under *N.J.S.A.* 2C:33-2b for directing the words "you God-dammed jerk off," "fucking jerk off," and "I'm going to kick the shit out of you" to a police officer while in custody at the North Plainfield Police Department. In striking down the statute as unconstitutionally overbroad, the Appellate Division held that "there is no valid statutory authority for prosecution based upon the public use of coarse or abusive language which does not got beyond offending the sensibilities of the listener." *Id.* at 61.

Hamilton Amusement Center, Inc. v. Poritz, 298 N.J. Super. 230 (App. Div. 1997), aff'd, 156 N.J. 254 (1998), cert. denied, 527 U.S. 1021 (1999). The Appellate Division dissolved an injunction imposed by the trial court, finding that N.J.S.A. 2C:34-7c, which limits the size, number and context of sexually oriented businesses, is not an unconstitutional content-based restriction on free speech or void for vagueness.

Chez Sez VIII, Inc. v. Poritz, 297 *N.J. Super.* 331 (App. Div.), *certif. denied,* 149 *N.J.* 409 (1997), *cert. denied,* 522 *U.S.* 932 (1999), reversed the trial court's ruling restraining enforcement of *N.J.S.A.* 2C:33-12.2. The appellate court found that the statute, which prohibits private booths or enclosures which facilitate sexual activity in sexually oriented businesses, was a content-neutral time, place, and manner restriction that was not unconstitutionally vague. Accordingly, it dissolved the restraints, thereby allowing law enforcement to arrest for this fourth-degree crime.

Wisconsin v. Mitchell, 508 *U.S.* 476 (1993). The government may attack "hate speech" by a 'penalty enhancement" approach, under which existing crimes like assault, vandalism and arson are punished more severely if the prosecution shows that the crime was motivated by one of a listed set of biases. However, the

existence of bias is an element of the offense that must be found by a jury, beyond a reasonable doubt. *See also Apprendi v. New Jersey*, 530 *U.S.* 466, 120 *S.Ct.* 2348 (2000).

H. Commercial Speech

The government may restrict truthful commercial speech only if the regulation (1) directly advances (2) a substantial governmental interest (3) in a way that is "no more extensive than necessary" to achieve the government's objective. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 *U.S.* 748 (1976) (Virginia could not forbid a pharmacist from advertising his prices for prescription drugs because the state's desire to prevent price-cutting was not strong enough to qualify as "substantial").

In *Greater New Orleans Broadcasting Ass'n v. United States*, 527 *U.S.* 173 (1999), a broadcasters association and others sued United States and Federal Communications Commission, seeking declaratory and injunctive relief permitting them to broadcast advertisements for legal gambling at area casinos. Held: the prohibition on broadcasting lottery information could not be applied to petitioners' radio and television stations, which were located in Louisiana, where gambling was legal.

In United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), the owner and operator of radio station sought declaratory judgment that federal statutes prohibiting radio broadcast of lottery advertising by licensees in nonlottery states violated First Amendment and equal protection clause. The Supreme Court held that federal statutes prohibiting the broadcast of lottery advertising by broadcasters licensed in states that do not allow lotteries, while allowing such broadcasting by broadcasters licensed in states that allow lotteries, regulate commercial speech in a manner that does not violate First Amendment.

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 *U.S.* 328 (1986), operators of Puerto Rican gambling casino filed declaratory judgment action, seeking a declaration that Puerto Rico statute and regulations restricting advertising of casino gambling to residents of Puerto Rico violated their commercial speech rights under the Constitution. Held: The statute and regulations did not facially violate the First Amendment.

Bates v. State Bar of Arizona, 433 *U.S.* 350 (1977). The qualified First Amendment right means that lawyers have a limited right to advertise. Thus, a state may not

ban all advertising by lawyers, nor may it ban advertising directed to a particular problem (*e.g.*, a lawyer can advertise, "If you've been injured by a Dalkon shield, I may be able to help you.")

In *Shapero v. Kentucky Bar Ass'n*, 486 *U.S.* 466 (1988), an attorney petitioned for review of advisory opinion of State Bar Association's Ethics Committee regarding propriety of proposed direct mailing to potential clients. Held: the state could not, consistent with First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

Ohralik v. Ohio State Bar Ass'n, 436 *U.S.* 447 (1978). The states may ban certain types of in-person solicitation by lawyers seeking clients (*e.g.*, solicitation of accident victims in person by tort lawyers who want to obtain a contingent-fee agreement).

In *Florida Bar v. Went For It, Inc.*, 515 *U.S.* 618 (1995), a lawyer and lawyer referral service challenged constitutional validity of Florida Bar rules that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of accident. Held: the restriction withstood First Amendment scrutiny.

In *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy,* 512 *U.S.* 136 (1994), an attorney was reprimanded by Board of Accountancy for engaging in "false, deceptive, and misleading" advertising by referring to her credentials as Certified Public Accountant and Certified Financial Planner in advertising for her law practice. The Supreme Court reversed, holding that Board's decision was incompatible with First Amendment.

In *Edenfield v. Fane*, 507 *U.S.* 761 (1993), a certified public accountant (CPA) challenged Florida ban on inperson solicitation by CPAs. Held: the ban violated the First Amendment as applied to CPA's proposed communication to potential clients of truthful, nondeceptive information proposing lawful commercial transaction.

In re Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 155 *N.J.* 357 (1998). Improper solicitation of clients after gas line explosion at apartment complex warranted reprimand.

In re Anis, 126 N.J. 448 (1992), cert. denied, 504 U.S. 956 (1992). Held: (1) Proscription against direct solicitation of clients who are vulnerable and probably not able to make reasoned judgment on their behalf can be violated even without proof that attorney actually knew of prospective client's inability to make reasoned judgment about retaining counsel following tragedy; (2) commercial speech guarantees of First Amendment did not protect solicitation of father of deceased airplane passenger; and (3) public reprimand was warranted for misleading solicitation of passenger's father at time of vulnerability.

Hamilton Amusement Center, Inc. v. Verniero, 156 N.J. 254 (1998), cert. denied, 527 U.S. 1021 (1999), affirmed the Appellate Division's finding that N.J.S.A. 2C:34-7c, which controls sexually oriented businesses by restricting signs and establishing a perimeter buffer, was not vague and did not violate freedom of speech. The statute regulates only commercial speech and is contentneutral, thereby invoking an intermediate scrutiny of its restrictions. Although the speech being regulated was protected commercial speech, the statute directly advanced substantial governmental interests in traffic safety and the welfare of minors and was not more extensive than necessary to serve these asserted interests. Thus, N.J.S.A. 2C:34-7c does not violate freedom of speech. The statute, too, was not facially vague, nor did it violate equal protection as an impermissibly underinclusive law. The Legislature may correctly distinguish between the speech and content of sexually-oriented businesses and non-sexually-oriented businesses, and the statute was not a prior restraint both because it did not prohibit plaintiffs from expressing their message entirely and because suit was brought before the government enforced the statute. Simply put, plaintiffs are only prohibited from expressing their message on signs larger than those permitted.

Town Tobacconist v. Kimmelman, 94 *N.J.* 85 (1983), upheld the constitutionality of the Drug Paraphernalia Act, *N.J.S.A.* 2A:21-46 to 53 (L. 1980, c. 133). One of the particular objections to the law was that *N.J.S.A.* 24:21-49, which makes it a crime to place a printed advertisement "knowing that the purpose of the advertisement in whole or in part, is to promote the sale of objects intended for use as drug paraphernalia," infringed upon their First Amendment right to engage in commercial speech. The Court rejected plaintiff's contentions that the statute was vague and overbroad, and violated plaintiff's First Amendment rights. After observing that the statute did not deal with "pure" noncommercial speech, the Court noted that the constitutional protection accorded to commercial speech is less than is provided to other constitutionally guaranteed expression. The Court held that although the First Amendment protects commercial speech from unwarranted governmental regulation plaintiff's commercial speech may be regulated or banned, as it is here, if it proposes an illegal transaction. See also Barry v. Arrow Pontiac, Inc., 193 N.J. Super. 613 (App. Div. 1984) (the constitutional right of commercial speech does not include the right to mislead the public ... commercial speech is accorded less constitutional protection that "pure" non-commercial speech); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) (upholding the constitutionality of an ordinance requiring businesses to obtain licenses before selling any item "designed or marketed for use with illegal cannabis or drugs"); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

I. Defamation

New York Times v. Sullivan, 376 *U.S.* 254 (1964). Where plaintiff is a public official, he may only win a defamation suit for a statement relating to his official conduct if he can prove that the statement was made "with knowledge that it was false" or with "reckless disregard" of whether it was true or false. These two mental states are usually collectively referred to as the "actual malice" requirement.

Associated Press v. Walker, 388 U.S. 130 (1967). The rule in *Sullivan*, that plaintiff can only recover for defamation if he shows intentional falsity or recklessness about the truth, applies not only to public "officials" but also to public "figures." Thus, a well known college football coach, and a prominent retired Army general, were public figures who had to show that the defendant acted with actual malice.

Gertz v. Robert Welch, Inc., 418 *U.S.* 323 (1974). If the plaintiff is a "private" (rather than a "public") figure, he does not have to meet the *Sullivan* "actual malice" rule. On the other hand, the First Amendment requires that he show at least negligence. In other words, the states may not impose strict liability for defamation, even for a private-figure plaintiff. Also, a private-figure plaintiff who shows only negligence cannot recover punitive damages - he must show actual malice to get punitive damages.

In *Hustler Magazine v. Falwell*, 485 *U.S.* 46 (1981), a public figure sued publishers of advertisement parody for libel, invasion of privacy, and intentional infliction of

emotional distress. Held: the *Sullivan* rule applies to actions for intentional infliction of emotional distress as well as ones for defamation. Thus, a public-figure plaintiff like Jerry Falwell cannot recover for any intentional infliction of emotional distress unless he shows that the defendant acted with actual malice.

In *Philadelphia Newspapers, Inc. v. Hepps,* 475 *U.S.* 767 (1986), a private figure brought libel action against newspapers and its reporters based on series of articles claiming that he had links to organized crime. The Supreme Court held that a private figure plaintiff alleging defamation had burden of proving falsity of media defendant's speech on matter of public concern.

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 *U.S.* 657 (1989), a candidate for judicial office brought libel action against newspaper. The Supreme Court held that: (1) public figure libel cases are governed by the *Sullivan* standard; (2) newspaper's motives and deviation from standards will not alone support a finding of actual malice; (3) newspaper's failure to investigate will not support a finding of actual malice, but purposeful avoidance of truth may; and (4) evidence sustained finding of actual malice.

In *Fortenbaugh v. New Jersey Press, Inc.*, 317 *N.J. Super.* 439 (App. Div. 1999), a university professor sued newspaper, and author of opinion column published by newspaper, for defamation, based on statement in column that he had been accused of masturbating during faculty meeting. The Appellate Division held that: (1) to establish truth as a defense, newspaper and author would be required to show not simply that it was true that allegation was made, but that underlying conduct was true; and (2) whether professor was public official or public figure, for First Amendment purposes, was issue for trial court on remand.

In *Milkovich v. Lorain Journal Co.*, 497 *U.S.* 1 (1990), a former high school wrestling coach brought defamation action against newspaper and reporter. The United States Supreme Court held that: (1) separate constitutional privilege for "opinion" was not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by First Amendment; and (2) reasonable fact finder could conclude that statements in reporter's column implied assertion that coach perjured himself in judicial proceeding; and (3) the issue was sufficiently factual to be susceptible of being proved true or false and, thus, there was potential for a defamation recovery.

J. Restriction of First Amendment Rights of Attorneys in Criminal Trials

1. Contempt

In re Daniels, 219 N.J. Super. 550 (App. Div. 1987), aff'd, 118 N.J. 51 (1990), cert. denied, 498 U.S. 951 (1991).

2. Pre-trial Publicity

Note: Although the constitutionality of the standard in RPC 3.6 ("substantial likelihood of materially prejudicing an adjudicative proceeding") has not been challenged, the New Jersey Supreme Court upheld the constitutionality of the prior standard under DR7-107 ("reasonably likely to interfere with a fair trial") in *In re Hinds*, 90 *N.J.* 604 (1982).

The Court in Hinds held that the determination of whether a particular statement is likely to interfere with a fair trial involves a "careful balancing of factors, including consideration of the status of the attorney, the nature and timing of the statement, as well as the content in which it was uttered." DR7-107(D) applied not only to the attorney of record in a criminal case, but also "to an attorney who cooperates in what the defense on a regular and continuing basis, provides legal assistance in connection with the defense of a criminal charge, and holds himself out to be a member of the defense team." A restriction on speech can survive judicial scrutiny under the First Amendment only if the following two conditions are satisfied: first, the limitation must further an important or substantial government interest unrelated to the suppression of expression, and second, the restriction must not be greater than is necessary or essential to the protection of the particular governmental interest involved. The State has a substantial interest in ensuring the fairness of judicial proceedings. This interest is particularly acute in the context of a criminal trial, where preserving fairness and integrity takes on a constitutional dimension, because the defendant's right to a fair trial is guaranteed in the Sixth Amendment. Attorneys in their special capacity as officers of the court have a special responsibility to protect the administration of justice. Finally, the Court held that since defendant stands to lose his personal liberty, there are compelling reasons for making every effort to preserve fairness in the criminal trial, which interests DR7-107(D) clearly seeks to effectuate. As to the second requirement, the Court held that the reasonable likelihood standard is no broader than necessary to protect the substantial governmental interest involved. See In re Rachmiel, 90 N.J. 646 (1982); see also Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

Gentile v. State Bar of Nevada, 501 *U.S.* 1030 (1991). In disciplinary proceeding, the Nevada Supreme Court found that attorney who held press conference after client was indicted on criminal charges violated Nevada Supreme Court rule prohibiting lawyer from making extrajudicial statements to press that he knows or reasonably should know have a "substantial likelihood of materially prejudicing" adjudicative proceeding. The Supreme Court held that: (1) as interpreted by the Nevada Supreme Court, the rule was void for vagueness; and (2) the "substantial likelihood of material prejudice" test satisfied the First Amendment.

In re Broadbelt, 146 *N.J.* 501 (1996). Municipal court judge's appearances as commentator on television violated Canons of Code of Judicial Conduct prohibiting judges from making public comment on pending or impending court proceedings and lending prestige of office to advance private interests of others. Held: Canons did not violate judge's First Amendment rights.

K. Challenges to Constitutionality of Ordinances

In 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), liquor retailers brought declaratory judgment action challenging state statutes prohibiting the advertisement of liquor prices. The Supreme Court held that: (1) state's complete statutory ban on price advertising for alcoholic beverages abridged speech in violation of First Amendment; and (2) Twenty-First Amendment did not qualify constitutional prohibition against laws abridging freedom of speech embodied in First Amendment and, thus, could not save state's ban on liquor price advertising.

In *Church of Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 *U.S.* 520 (1993), the church challenged city ordinances dealing with ritual slaughter of animals. The Supreme Court held that: (1) ordinances were not neutral; (2) ordinances were not of general applicability; and (3) governmental interest assuredly advanced by the ordinances did not justify the targeting of religious activity.

In *Ward v. Rock Against Racism*, 491 *U.S.* 781 (1989), the sponsor of musical event at park band shell sued city and city officials, challenging constitutionality of use guidelines for band shell. Held: Municipal noise regulation designed to ensure that music performances in band shell did not disturb surrounding residents, by

requiring performers to use sound system and sound technician provided by city, did not violate free speech rights of performers.

In *City of Erie v. Pap's A.M.*, 529 *U.S.* 277 (2000), the operator of an establishment featuring nude erotic dancing challenged constitutionality of city's public indecency ordinance proscribing nudity in public places. The Supreme Court held that: (1) ordinance was content-neutral regulation; and (2) ordinance satisfied *O'Brien* standard for restrictions on symbolic speech.

In *City of Renton v. Playtime Theatres, Inc.* 475 *U.S.* 41 (1986), a suit was brought challenging the constitutionality of a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school. Held: The ordinance, which was predominantly concerned with the secondary effects of adult theaters and not on the content of adult films, was "content-neutral" speech regulation that served a substantial government interest while leaving reasonable alternatives. It was a valid governmental response to the serious problems created by adult theaters and did not violate the First Amendment.

In FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), petitioners involved with adult entertainment industry adversely affected by zoning and licensing ordinance, sued for declaratory and injunctive relief. The Supreme Court held that: (1) petitioners could challenge facial validity of ordinance on First Amendment prior restraint grounds; (2) ordinance's failure to provide reasonable period during which decision whether to issue license must be made, and to provide avenue for prompt judicial review of adverse decision, rendered licensing requirements unconstitutional as enforced against petitioners engaged in First Amendment activity; and (3) petitioners lacked standing to challenge ordinance provisions barring persons residing with individuals whose licenses to conduct sexually oriented businesses had been denied or revoked, or prohibiting applicants for such licenses.

State of New Jersey, Township of Pennsauken v. Schad, 160 N.J. 156 (1997). Defendant who operated two adult entertainment businesses was convicted of violating the town sign ordinance. The Appellate Division reversed. On appeal, the Supreme Court held that (1) sign ordinance applied to illuminated displays installed behind front windows of defendant's adult entertainment business; (2) sign ordinance did not violate the free speech guarantee; (3) the permit requirement in the sign ordinance was not an unconstitutional prior restraint on speech; (4) the sign ordinance was not void for vagueness; (5) the sign ordinance was not selectively enforced in violation of equal protection; and (6) fines totalling \$95,920 were not cruel and unusual punishment. In reaching its decision, the Court emphasized that a restriction on commercial speech which concerns lawful activity and is not misleading does not violate the First Amendment if the asserted governmental interest is substantial, the regulation directly advances the governmental interest, and the regulation is no more extensive than is necessary to serve that interest. *Id.* at 176, quoting *Central Hudson Gas and Electric Corp. v. New York Public Service Commission,* 447 *U.S.* 557 (1980).

Allen v. City of Bordentown, 216 N.J. Super. 557 (Law Div. 1987). Bordentown enacted an ordinance which prohibited minors under 18 years-of-age from being in public places between 9:00 p.m. and 6:00 a.m. Certain exceptions to such prohibition were provided for. The ordinance further provided for any law enforcement officer "in the exercise of reasonable judgment" to determine if the ordinance had been violated. The trial court ruled such ordinance unconstitutional as violative of an individual's First Amendment right to travel. Such constitutionality was premised upon the statute's lack of ascertainable standards and overbreadth.

Bell v. Stafford Township, 110 *N.J.* 384 (1988). Stafford Township enacted an ordinance prohibiting billboards, signboards, and off-premises advertising signs within any zoning district of the township. Plaintiff, owner of an outdoor advertising company, was denied pursuant to the ordinance, a permit to erect a billboard. The Court held that the ordinance was facially unconstitutional. Finding that the ordinance infringed on the fundamental right of free speech, the Court determined that the township failed to present evidence to demonstrate that the ordinance furthers a substantial government interest, and is sufficiently narrow to further only that interest without unnecessarily restricting freedom of expression.

State of New Jersey, Borough of Paramus v. Malcolm Konner Chevrolet, 226 N.J. Super. 692 (Law Div. 1988). Defendants were found guilty of violating a borough ordinance prohibiting the flying of garrison flags, except on holidays or as permitted by Presidential proclamation. The Court used the three-prong test established by the United States Supreme Court in Regan v. Time, Inc., 468 U.S. 641 (1984), and in State v. Miller, 83 N.J. 402 (1980). The Court found that the ordinance met the third prong of the test by leaving open other forms of communication in the form of allowing other sized flags. However, since the borough failed to establish that the ordinance was content neutral by presenting testimony concerning its purpose, or that it served a significant, substantial governmental goal, the Court found that it was an unconstitutional restriction on defendant's freedom of speech.

In *City of Houston, Texas v. Hill,* 482 *U.S.* 451 (1987), a municipal ordinance, which made it unlawful to interrupt a police officer in the performance of his duty, was held unconstitutionally overboard under the First Amendment. In determining the question of overbreadth, the Court's examination considered whether the law reached a substantial amount of constitutionally protected conduct. The Court concluded that the instant statute did, and further concluded that the enactment accorded police "unconstitutional discretion in enforcement."

State v. Miller, 162 N.J. Super. 333 (App. Div. 1978), aff'd, 83 N.J. 402 (1980). Defendant appealed from his conviction of a violation of a portion of the Borough of Milltown zoning ordinance prescribing the permitted size and content of signs erected in the various use districts of the borough. He claimed that the ordinance provision was unconstitutional, based on the fact that the ordinance tended to prohibit rather than merely regulate expressions of political views. The basis of defendant's conviction was that the size limitation of Zoning Ordinance § 20-9.1(d) could be applied to the sign in question since the content of the sign was not within First Amendment political speech protection. The Appellate Division reversed the conviction and held that with respect to the constitutional question involved, the State concedes the evident proposition that a municipality is, by reason of the First Amendment, precluded from total prohibition of an individual's freedom of political expression through the technique of posting a sign on his own property. Political expression obviously includes any fair comment on any matter of public interest, whether or not the subject of an election campaign, whether or not embarrassing to the local governing body, and whether or not irritating to one's neighbors. The constitutionally protected right of free speech, if it extends to the dissemination of accurate commercial information must a fortiori extend to the dissemination of non-commercial information which may be of impact not only to the disseminator but also to those to whom the information is communicated.

In Capitol Movies, Inc. v. City of Passaic, 194 N.J. Super. 298 (App. Div. 1984), an action challenging the constitutionality of a municipal ordinance which limited the showing of x-rated films to certain hours, the Appellate Division held that the restriction imposed by the ordinance constituted more than a minimal intrusion of freedom of speech and was, therefore, unconstitutional. A regulation which restricts the time, place or manner of protected speech will survive judicial scrutiny only if it meets a three-prong test: first, the regulation must be justified without reference to the content of the regulated speech; second, the regulation must serve a significant governmental interest by the least restrictive possible means and third, the regulation must leave open ample alternative channels for the communication of the information. Additionally, where the subject of the regulation is a constitutionally protected interest, the governmental agency must prove that all of the criteria prerequisite to permissible regulation have been met.

The regulated activity was within the ambit of the free speech protection of the First and Fourteenth Amendments. That factor coupled with the fact that Passaic had failed to demonstrate either the nature of the governmental interest to be served by the regulation or the manner in which the regulation might serve any legitimate public interest led the Court to find the ordinance unconstitutional. *See Regan v. Time, Inc.,* 468 *U.S.* 641 (1984).

Compare, Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 *U.S.* 789 (1984), wherein the United States Supreme Court held that an ordinance prohibiting posting of signs on public property was not unconstitutional as applied to expressive activities of a group of supporters of political candidates. The Court held that based on the record before it, the city's interests were sufficiently substantial to justify the "content neutral, impartially administered prohibition" against the posting of signs on public property.

Regarding the power of municipalities to enact ordinances, and the permissible scope thereof, see *Bonito v. Council of Bloomfield Township*, 197 *N.J. Super.* 390 (Law Div. 1984); *N.J. Shore Builders Ass'n v. Township Committee of Dover Township*, 191 *N.J. Super.* 627 (Law Div. 1983); *Redeb Amusement, Inc. v. Committee of Township of Hillside*, 191 *N.J. Super.* 84 (Law Div. 1983); *Trombetta v. Mayor and Commissioners of City of Atlantic City*, 181 *N.J. Super.* 203 (Law Div. 1981), *aff'd*, 187 *N.J. Super.* 351 (App. Div. 1982).

L. Censorship of Prison Mail

State v. Gillespie, 225 N.J. Super. 435 (Law Div. 1987). Defendant sent a letter addressed to a prison inmate containing photographs showing a female child and an adult female in sexually explicit poses. The envelope was opened by a prison official, who turned the photographs over to the police. Defendant was subsequently charged with endangering the welfare of a child. The Court held that the prison officials' seizure of the photographs did not violate defendant's First Amendment rights. The Court followed the standards set forth by the United States Supreme Court in Procunier v. Martinez, 416 U.S. 396 (1974), which stated that regulation authorizing mail censorship must (a) further one or more of the substantial government interests of security, order and rehabilitation and, (b) limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the governmental interest involved. Defendant's First Amendment rights were not violated because the letter fell within the definition of contraband, as defined by the In addition, the letter was seized prison manual. according to the safeguards contained in the manual, which protected the seizure of letters from the arbitrary whim of prison officials.

M. Public Employees - Free Speech in the Workplace

In Waters v. Churchill, 511 U.S. 661 (1994), a discharged nurse alleged that her discharge violated First Amendment. The Supreme Court held that: (1) government, as employer, has far broader powers in First Amendment context than does the government of sovereign; (2) government employee's speech is treated differently than private person's speech with regard to substance and procedural requirements; (3) before government employer can discharge employee for unprotected speech, it must undertake reasonable investigation to determine what the speech actually was and must in good faith believe the facts on which it purports to act; (4) hospital had undertaken adequate investigation; (5) nurse's speech as believed by hospital officials was not protected; and (6) genuine issue of fact existed as to the motivation of the hospital officials.

In *Rutan v. Republican Party of Illinois*, 497 *U.S.* 62 (1990), former and present low-level public employees and employment applicant brought action challenging Governor's use of political considerations in hiring, rehiring, transferring, and promoting. The Supreme Court held that: (1) promotions, transfers, and recalls based on political affiliation or support are impermissible

infringements on public employees' First Amendment rights; and (2) conditioning hiring decisions on political belief and association violates applicants' First Amendment rights in the absence of a vital government interest.

Rankin v. McPherson, 483 U.S. 378 (1987). Respondent, a clerk in a county constable's office, was discharged after a supervisor overheard respondent's remark, in reaction to a news report that an attempt had been made to assassinate the President of the United States, "If they go for him again, I hope they get him." The United States Supreme Court held that respondent's discharge violated her First Amendment right to freedom of expression. The issue of public employee free speech requires a balance between the interest of the employee, as a citizen, in commenting on matters of public concern, and the interest of the public employer in promoting the efficiency of the public services it performs through its employees. Respondent's interest in exercising her First Amendment rights outweighed the constable's interest in discharging her because (a) the remark was related to a matter of public concern, expressing matters of the President's policies; (b) there was no indication that the remarks interfered with the functioning of the constable's office; (c) the remark was made in a private conversation; and (d) the employee served no public or policy making role; therefore, her private remarks had a minimal effect on the constable's function.

Civil Service Comm'n v. Letter Carriers, 413 *U.S.* 548 (1973). Civil servants can constitutionally be forced to choose between their jobs and engaging in partisan political activities, since there is a very strong government interest in making sure that civil servants can do their jobs without being coerced into campaigning for or contributing to their elected bosses.

Board of County Commissioners v. Umbehr, 518 *U.S.* 668 (1996). Following nonrenewal of his trash hauling contract with county, independent contractor brought § 1983 action against two members of Board of County Commissioners, alleging that they had terminated his government contract in retaliation for his criticism of county and board. The Supreme Court held that First Amendment protects independent contractors from termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of freedom of speech.

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996). Private towing service brought § 1983 action against city, challenging its removal from city's rotation list of available towing service contractors. The Supreme Court held that: (1) protections generally afforded to public employees against being discharged for refusing to support political party or its candidates also extend to independent contractors, and (2) towing service stated First Amendment claim against city.

Squeo v. Borough of Carlstadt, 296 *N.J. Super.* 505 (App. Div. 1997). Former municipal court employee sued municipality and municipal council, alleging First Amendment political affiliation discrimination arising out of the decision not to reappoint her. The Appellate Division held that: (1) political party affiliation was not an appropriate requirement for the position; and (2) a genuine issue of material fact precluded summary judgment on whether plaintiff was not reappointed because of her political affiliation.

III. RIGHT OF EXPRESSIVE ASSOCIATION

Boy Scouts of America v. Dale, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. But the freedom of expressive association, like many freedoms is not absolute: it can be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational The Boy Scouts of America engaged in freedoms. "expressive association," protected by the First Amendment, when scoutmasters and assistant scoutmasters inculcated youth members with Boy Scouts' values. Moreover, the Boy Scouts' assertion that homosexual conduct was inconsistent with values embodied in Scout Oath and Law was entitled to deference. Thus, applying New Jersey's public accommodations law to require Boy Scouts to admit an avowed homosexual and gay rights activist as assistant scoutmaster violated Boy Scouts' First Amendment right of expressive association.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995). Gay, lesbian, and bisexual descendants of Irish immigrants who were joined together as group to march in St. Patrick's Day parade sued parade's private organizers, alleging that organizers' exclusion of group from parade violated Massachusetts' public accommodation law, which prohibits discrimination on account of sexual orientation in places of public accommodation. After state trial court rendered judgment for plaintiffs, defendants appealed. The Massachusetts Supreme Judicial Court affirmed, but the United States Supreme Court reversed, holding that the state courts' application of public accommodation law to essentially require defendants to alter expressive content of their parade violated First Amendment.

City of Dallas v. Stanglin, 490 *U.S.* 19 (1989). City ordinance limiting use of dance halls to persons between ages of 14 and 18 did not infringe on First Amendment right of association and was rationally related to legitimate purpose.

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 *U.S.* 537 (1987). Local rotary club and two of its women members filed a complaint, alleging that actions of Rotary International revoking the charter of the club and terminating its members in the International for admitting women violated California's Unruh Civil Rights Act. The Supreme Court held that: (1) Unruh Act does not violate the First Amendment by requiring California Rotary Clubs to admit women; and (2) application of act to local Rotary Clubs does not interfere unduly with club members' freedom of private association, nor does it violate the First Amendment right of expressive association.

California Democratic Party v. Jones, 530 *U.S.* 567, 120 *S.Ct.* 2402, 147 *L.Ed.* 2d 502 (2000). Action was brought challenging constitutionality of California proposition which converted State's primary election from closed to blanket primary in which voters could vote for any candidate regardless of voter's or candidate's party affiliation. Held: The blanket primary violated political parties' First Amendment right of association.

IV. THE ESTABLISHMENT CLAUSE

Pursuant to the First Amendment, Congress shall make no law respecting an establishment of religion.

Mitchell v. Helms, 530 U.S. 793, 120 *S.Ct.* 2530, 147 *L.Ed.* 2d 660 (2000). Action was brought challenging constitutionality of state and federal school aid programs as applied to parochial schools in Jefferson Parish, Louisiana. Held: Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, under which federal government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, does not violate the Establishment Clause.

Sante Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed. 2d 295 (2000). Students and their parents filed a § 1983 action against school district, alleging that district's policy of permitting student-led, student-initiated prayer before football games violated the Establishment Clause. The Supreme Court held that: (1) student-led, studentinitiated invocations prior to football games did not amount to private speech; (2) policy of permitting such invocations was impermissibly coercive; and (3) policy was invalid on its face.

Agostini v. Felton, 521 U.S. 203 (1997). Twelve years after the Supreme Court held, in Aguilar v. Felton, 473 U.S. 402, that the Establishment Clause barred New York City Board of Education from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to program mandated by Title I of the Elementary and Secondary Education Act, the Court overruled Aguilar and held that the program did not violate the Establishment Clause.

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993). Parents of deaf student attending Catholic high school brought action to require school district to provide interpreter for the student. The Supreme Court held that: (1) the Establishment Clause does not lay down an absolute barrier to the placing of a public employee in a sectarian school; and (2) providing services of an interpreter, under the Individuals with Disabilities Act, to a student attending a Catholic high school does not violate the Establishment Clause.

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986). The First Amendment does not preclude state from extending assistance under state vocational rehabilitation program to blind person who chose to study at Christian college to become a pastor, missionary, or youth director.

Capitol Square Review and Advisory Board v. Pinette, 515 *U.S.* 753 (1995). Held: State did not violate the Establishment Clause by permitting private party to display unattended cross on grounds of State Capitol.

Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994). Taxpayers and association of state school boards challenged constitutionality of statute creating special school district for practitioners of strict form of Judaism. Held: The statute violated the Establishment Clause. Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). Church brought suit alleging that school district violated its constitutional rights by refusing church's request to use school facilities for religious-oriented film series on family values and child-rearing. The Supreme Court held that: (1) school district violated Free Speech Clause of First Amendment by denying church access to school premises solely because film dealt with the subject from a religious standpoint; and (2) allowing church access to school premises would not have been an establishment of religion.

Lee v. Weisman, 505 *U.S.* 577 (1992). Public school student and her father sought permanent injunction to prevent invocations and benedictions in form of prayer at graduation ceremonies of city public schools. Held: School could not provide for "nonsectarian" prayer to be given by clergyman selected by school.

Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990). Religious organization brought action seeking refund of sales and use taxes paid under protest. The Supreme Court held that imposition of sales and use tax on religious organization did not result in excessive entanglement between government and religion, and thus did not violate Establishment Clause.

County of Allegheny v. A.C.L.U., 492 *U.S.* 573 (1989). Civil liberties organization and certain individuals brought suit against county and city, challenging the constitutionality of a creche in the county courthouse and a Chanukah menorah outside a city and county building. The Supreme Court held that the display of the creche violated the Establishment Clause, but that the display of the menorah next to a Christmas tree did not have the unconstitutional effect of endorsing Christian and Jewish faiths.

Texas Monthly, Inc. v. Bullock, 489 *U.S.* 1 (1989). Publisher of nonreligious periodical challenged state statute providing for a sales tax exemption for religious periodicals. Held: The statute violated the Establishment Clause, and the exemption was not required by the Free Exercise Clause.

Bowen v. Kendrick, 487 *U.S.* 589 (1988). Held: (1) The Adolescent Family Life Act did not have "primary effect of advancing religion," though it provided for grants to religious and other institutions providing counseling on teenage sexuality without expressly requiring that funds not be used for religious purposes. Also, the Act did not necessarily entail any "excessive government entanglement" with religion. Nonetheless, the case would be remanded to District Court for a determination of whether the Act violated the Establishment Clause "as applied."

United States v. Amos, 483 U.S. 327 (1987). Individuals fired from their job with church-owned corporations for failure to qualify as church members brought action for religious discrimination. The Supreme court held that application of the religious exemption of Title VII's prohibition against religious discrimination in employment to secular nonprofit activities of religious organization did not violate the Establishment Clause.

Edwards v. Aguillard, 482 *U.S.* 578 (1987). Action was brought challenging constitutionality of Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act. The Supreme Court held that: (1) Act serves no identified secular purpose; and (2) Act has as its primary purpose the promotion of a particular religious belief and is thus unconstitutional.

Ran-Dav's County Kosher, Inc. v. State, 129 *N.J.* 141 (1992), *cert. denied*, 507 *U.S.* 952 (1993). Purveyors of kosher foods challenged New Jersey's kosher regulations. The Supreme Court held that regulations violated Establishment Clauses of Federal and State Constitutions by imposing substantive religious standards for kosher products industry and authorizing civil enforcement of those standards with assistance of clergy.

Marsa v. Wernik, 86 *N.J.* 232 (1981). Action was brought challenging constitutionality of practice of a nondenominational invocation or silent meditation at start of regular meetings of borough counsel. Held: The procedure followed, i.e., having a particular council member call for a silent meditation or deliver an invocation, the content of which was selected by that council person, did not violate the Establishment Clause.

V. FREE EXERCISE CLAUSE

Pursuant to the First Amendment, Congress shall make no law prohibiting the free exercise of religion.

Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990). Religious organization brought action seeking refund of sales and use taxes paid under protest. The Supreme Court held that collection and payment of generally applicable sales and use tax did not impose constitutionally significant burden on organization's religious practices or beliefs, and thus, the Free Exercise Clause did not require state to grant organization a tax exemption.

Frazee v. Illinois Department of Employment Security, 489 *U.S.* 829 (1989). State's denial of unemployment benefits to worker who refused position because job would have required him to work on Sunday violated the Free Exercise Clause.

Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987). A claimant, who was discharged when she refused to work on her Sabbath, sought recovery of unemployment compensation benefits. Held: Florida's refusal to award unemployment compensation benefits violated the Free Exercise Clause.

Employment Division, Dept. of Human Resources v. Smith, 494 *U.S.* 872 (1990). The Free Exercise Clause did not prohibit application of state drug laws to claimants' ceremonial ingestion of peyote, and, thus, state could deny claimants' unemployment compensation for work-related misconduct based on their use of the drug.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). Suit to preclude Forest Service from permitting timber harvesting and road construction in area of national forest that was traditionally used for religious purposes by members of three American Indian tribes. Held: The Free Exercise Clause did not prohibit government from permitting timber harvesting and road construction in area in question.

O'Lone v. Estate of Shabazz, 482 *U.S.* 342 (1987). State prison inmates brought civil rights suit challenging certain prison regulations as violative of their First Amendment rights. The Supreme Court held that: (1) separate burden should not have been placed on prison officials to prove that no reasonable method existed by which inmates' religious rights could be accommodated without creating bona fide security problems; and (2) prison officials had acted in reasonable manner by precluding Islamic inmates from attending weekly Friday religious service and prison regulations to that effect thus did not violate Free Exercise Clause.

Goldman v. Weinberger, 475 *U.S.* 503 (1986). Serviceman, an Orthodox Jew and ordained rabbi, brought suit against Secretary of Defense and others, claiming that application of air force regulation to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious belief. Held: The First Amendment did not prohibit application of air force regulation to prevent wearing of yarmulke by plaintiff while on duty and in uniform.

VI. MISCELLANEOUS APPLICATIONS OF FIRST AMENDMENT LAW

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991).

Publisher sued members of New York State Crime Victims Board, seeking order declaring that New York's "Son of Sam" statute, which required that accused or convicted criminal's income from works describing his crime be deposited in escrow account, which funds were then made available to victims of crime and criminal's other creditors, violated First and Fourteenth Amendment. The Supreme Court held that: (1) statute was presumptively inconsistent with First Amendment; and (2) statute was not narrowly tailored to achieve State's objective of compensating victims from profits of crime.

Rubin v. Coors Brewing Co., 514 *U.S.* 476 (1995). Held: The Federal Alcohol Administration Act subsection that prohibits beer labels from displaying alcohol content, violates the First Amendment.

City of Chicago v. Morales, 527 *U.S.* 41 (1999). Held: City's gang loitering ordinance, which required a police officer, upon observing a person whom he reasonably believed to be a criminal street gang member loitering in a public place with one or more other persons, to order all such persons to disperse, and which provided penalties for the failure to obey such an order, was unconstitutionally vague in failing to provide fair notice of prohibited conduct, and in failing to establish minimal guidelines for enforcement.

Keller v. State Bar of California, 496 *U.S.* 1 (1990). Attorneys challenged use of dues of State Bar of California to finance certain ideological or political activities. Held: The State Bar's use of compulsory dues to finance political and ideological activities with which members disagreed violated their First Amendment right of free speech when such expenditures were not necessarily or reasonably incurred for purposes of regulating the legal profession or improving the quality of legal services.

See also Communications Workers of America v. Beck, 487 U.S. 735 (1988) (section of National Labor Relations Act permitting employer and exclusive bargaining representative to enter into agreement requiring all employees in bargaining unit to pay periodic union dues and initiation fees as condition of continued employment, whether or not they wish to become union members, does not also permit union, over objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining activities).

Butterworth v. Smith, 494 U.S. 624 (1990). Reporter, who had testified before grand jury, sought declaration that Florida statute proscribing disclosure of his testimony was unconstitutional. Held: The Florida statute, which prohibited witnesses from ever disclosing testimony given before a grand jury, violated the First Amendment insofar as it prohibited witnesses from disclosing their own testimony after grand jury's term had ended.

The Florida Star v. B.J.F., 491 *U.S.* 524 (1989). Rape victim brought suit against newspaper for publishing her name, which it had obtained from a publicly released police report. The trial court awarded compensatory and punitive damages, but United States Supreme Court reversed, holding that the imposition of damages violated the First Amendment.

Turner Broadcasting System, Inc. v. Federal Communications Commission, 520 U.S. 180 (1997). Cable television system operators and programmers brought actions against federal government and Federal Communications Commission, challenging constitutionality of must-carry provisions of Cable Television Consumer Protection and Competition Act that required carriage of local broadcast television stations on cable television systems. The Supreme Court held that: (1) Congress's interests in preserving benefits of free, overthe-air local broadcast television, promoting widespread dissemination of information from multiplicity of sources, and promoting fair competition in market for television programming were important governmental interests for First Amendment purposes; and (2) for purposes of determining whether must-carry provisions of Act were designed to address real harm under First Amendment analysis, substantial evidence supported Congress's determination that significant numbers of broadcast stations would be refused carriage on cable systems absent must-carry requirement. See also Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994); Turner Broadcasting System, Inc. v. Federal Communications Commission, 507 U.S. 1301 (1993).

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995). University student organization which published newspaper with Christian editorial viewpoint brought action against university, challenging denial of funds from fund created by university to make payments to outside contractors for printing costs of publications of student groups. The Supreme Court held that: (1) denial of funding amounted to viewpoint discrimination; (2) exclusion of several views on an issue is just as offensive to the First Amendment as the exclusion of only one; and (3) scarcity of funds does not permit university to discriminate on the basis of viewpoint.

FLIGHT

(See also, ESCAPE, RESISTING ARREST, thisDigest)

I. INSTRUCTION TO JURY See MODEL JURY CHANGES (CRIMINAL), FLIGHT (11/18/91)

In early cases the subject of unexplained flight raised a presumption of guilt akin to the presumptions deemed to arise upon the fabrication of false evidence, or the suppression of truth. State v. Harrington, 87 N.J.L. 713 (E & A 1915); State v. Jaggers, 71 N.J.L. 281 (E & A 1904). Later cases referred to an inference of guilt, State v. Manzel, 136 N.J.L. 233 (Sup. Ct. 1947), aff'd p.c., 137 N.J.L. 616 (E & A 1948), or expressed the doctrine as a circumstance tending to prove consciousness of guilt. State v. Cenalonza, 18 N.J. Super. 154, 161 (App. Div. 1952); State v. D'Amato, 26 N.J. Super. 185 (App. Div. 1953). In State v. Petrolia, 45 N.J. Super. 230 (App. Div. 1957), the Court held that it is preferable to instruct the jury in terms of "unexplained flight as a circumstance tending to prove a consciousness of guilt." If a defendant does not submit an explanation for flight, consistent with a clear conscience as to guilt, which is given credence by the jury, the jury may infer from the flight consciousness of guilt on the part of the defendant. State v. Leak, 128 N.J. Super. 212 (App. Div. 1974). The jury should not draw any inference relative to guilt against the defendant. Id.

In *State v. Sullivan,* 43 *N.J.* 209 (1964), the Court distinguished between flight and mere departure. Departure from the crime scene does not warrant an inference of guilt. *State v. Long,* 119 *N.J.* 439 (1990). For departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt. *Id.* Thus, the jury is required to find not only departure, but also the motive which would turn the departure into flight. *State v. Knight,* 145 *N.J.* 233 (1996); *State v. Wilson,* 57 *N.J.* 39 (1970).

In *State v. Wilson, supra,* the Court rejected defendant's contention that a charge regarding flight can only be given where the accused flees from custody or where he is found hiding after the crime. A jury question is presented if defendant departed the scene because of a consciousness of guilt. *Accord, State v. Canery,* 144 *N.J. Super.* 527 (App. Div. 1976), *certif. denied,* 74 *N.J.* 259

(1977). See also, State v. Curtis, 195 N.J. Super. 354 (App. Div. 1984); State v. Centalonza, supra.

Ordinarily, the flight occurs in the context of departure immediately following or shortly after the occurrence of the criminal event. In *State v. Andrial*, 150 *N.J. Super.* 198 (Law Div. 1977), defendant failed to appear on the fourth day of trial and testimony revealed that he fled to escape the potential consequences of the jury verdict. Ruling in favor of the State's request for a flight instruction, the court expressed the view that flight during trial is relevant and probative to prove consciousness of guilt. *See also State v. Melendez*, 129 *N.J.* 48 (1992).

Similarly, in *State v. Tomaras*, 168 *N.J. Super.* 418 (Law. Div. 1979), defendant escaped from the Bergen County Jail where he had been incarcerated pending trial on a murder change. The court expressed the view that the inference of a consciousness of guilt rests on even firmer ground when a defendant escapes from incarceration, since the possible reasons for flight of an innocent person from a crime scene, *i.e.*, a desire to avoid possible blame or involvement, do not apply where one has already been apprehended indicted and incarcerated for an offense. It is also probable that only one who expects his guilt to be proved at trial will attempt to escape, while an innocent man will stay for trial in order to clear his name and win lawful liberty. *See also State v. Petrolia, supra* (flight while on bail).

In State v. Apostolis, 133 N.J. Super. 175 (App. Div. 1975), the defendant acknowledged that consciousness of guilt may properly be demonstrated by evasive flight but contended that the reference in the jury charge to "unexplained" flight unconstitutionally infringed defendant's privilege against self-incrimination. Rejecting this contention, the court cautioned that care should be exercised by trial judge to avoid language which might be misunderstood to impose a burden upon defendant which is not his. While it is necessary for the judge to instruct the jury that motive for departure is an essential element with respect to consideration of flight as evidence of guilt, this should be done by charging the jury that flight, if factual, may be considered as evidence of consciousness of guilt only after a determination from all the evidence in the case that the purpose of the departure was to evade accusation or arrest. See also State v. Andrial, supra.

In *State v. McNeil*, 303 *N.J. Super.* 266 (App. Div. 1997), the defendant's convictions were reversed, in part, because the trial court gave an inappropriate flight

charge. The *McNeil* court found that the trial court's flight charge suggested to the jury that that the judge believed defendant to be the perpetrator. *Id.* at 275.

Evidence of attempted suicide by a defendant ordinarily can be grounds for a flight charge. *State v. Mann,* 132 *N.J.* 410, 417 (1993); *cf. State v. Martini,* 131 *N.J.* 176, 285-286 (1993)(flight is not relevant to establish the death penalty aggravating factor that a defendant killed his victim in order to escape detention).

II. FLIGHT TOLLS STATUTE OF LIMITA-TIONS

N.J.S.A. 2C:1-6f provides that the statute of limitations does not apply to any person fleeing from justice.

III. AGGRAVATING FACTOR TO CAPITAL MURDER

N.J.S.A. 2C:11-3g provides that it is an aggravating factor if the murder was committed while the defendant was engaged in flight after committing or attempting to commit robbery, sexual assault, arson, burglary or kidnapping.

IV. USE OF FORCE TO ARREST

N.J.S.A. 2C:3-7 permits the use of deadly force by a peace officer or someone summoned and assisting a peace officer to prevent the escape of certain felons. In *Tennessee v. Garner,* 471 *U.S.* 1, 105 S.Ct. 1694, 85 *L.Ed.*2d 1 (1985), the Court held that use of deadly force violated the Forth Amendment unless the suspect committed a crime of violence or endangered the officer or a third person in the course of the escape.

V. ENHANCED SENTENCES

N.J.S.A. 2C:43-6c (the Graves Act) requires mandatory incarceration with parole ineligibility for using a firearm while in the course of committing certain, including the immediate flight therefrom.

FORFEITURE (See also, REMOVAL, this Digest)

I. IN GENERAL

N.J.S.A. 2C:64-1 et seq. recodified statutory provisions on civil forfeiture ancillary to a criminal prosecution, although certain existing forfeiture statutes were retained, including some dealing with adulterated food and fish and games matters. When the statute was enacted, New Jersey's principal offense-specific forfeiture statutes were repealed. See, e.g., former N.J.S.A. 2A:151-16 (pertaining to firearms); and former N.J.S.A. 24:18-38.1 et seq. (pertaining to drugs). Property that was the subject of these offense-specific statutes became prima facie contraband under the new forfeiture statute. The Code provision establishes two categories of contraband, prima facie contraband and derivative contraband, and separate forfeiture procedures for each. See N.J.S.A. 2C:64-2; N.J.S.A. 2C:64-3; see also State v. Seven Thousand Dollars, 136 N.J. 223, 233 (1994); In Re Two Seized Firearms, 127 N.J. 84, 89-90 (1992).

By definition, it is not possible to acquire property or possessory rights in *prima facie* contraband. *N.J.S.A.* 2C:64-1a. The category of *prima facie* contraband has been expanded since enactment of the statute and now includes: "controlled dangerous substances, firearms which are unlawfully possessed, carried acquired or used, illegally possessed gambling devices, untaxed cigarettes and untaxed special fuel." *N.J.S.A.* 2C:64-1a(1).

In contrast to *prima facie* contraband, derivative contraband includes items in which property or possessory rights can be acquired. It is property whose contraband quality inheres not in its "nature" but derives from the manner in which the property was used, intended to be used, or generated. Thus, the forfeiture statute defines as contraband any property which is the proceeds of illegal activity; any property which "has been or is intended to be utilized in furtherance of illegal activity;" and any property which became or was intended to become an integral part of illegal activity. *N.J.S.A.* 2C:64-1a(2) to -1a(4). Since the forfeiture statute does not limit the illegal activity from which contraband can derive, for example, to illegal *narcotics* activity, the statute is said to be non-offense-specific.

Forfeiture procedures for *prima facie* contraband do not require institution of a legal action by the State. *Prima facie* contraband is merely held, pending determination of criminal proceedings, if any, and then forfeited to the entity funding the prosecuting agency. *N.J.S.A.* 2C:64-2. Forfeiture procedures for derivative contraband, however, require the institution of a civil *in rem* forfeiture action, in which the property sought to be forfeited, not its owner or possessor, is the defendant. *N.J.S.A.* 2C:64-3a. Prosecution of the action must meet ordinary notice requirements for *in rem* actions, along with particulars of procedure established for forfeiture action is a civil *in rem* forfeiture action (as opposed to an *in personam* penalty proceeding, for example) has significant implications in the analysis of constitutional rights attending the action, as noted *infra.*

In addition to *in rem* forfeiture authorized by the general civil forfeiture statute, the Legislature has provided for criminal, *in personam* forfeiture as well as civil forfeiture of property that was used in or acquired as a result of racketeering activity, *N.J.S.A.* 2C:41-3; *N.J.S.A.* 2C:41-4, *see State v. Sparano*, 249 *N.J. Super.* 411 (App. Div. 1991); *e.g.*, civil forfeiture of conveyances used in the illegal discharge of harmful substances, *N.J.S.A.* 13:1K-1 *et seq.*; and forfeiture of weapons pursuant to the Prevention of Domestic Violence Act, *N.J.S.A.* 2C:25-1 *et seq.*, *see In Re Seized Firearms Identification Card of Peter Hand*, 304 *N.J. Super.* 360 (Ch. Div. 1997).

Other statutes may or may not refer to Chapter 64 of the Penal Code and incorporate its definitions and procedure. Racketeering forfeiture provisions, for example, incorporate Chapter 64 procedure and definitions. *N.J.S.A.* 2C:41-4a(9). Harmful-substances forfeiture provisions make no reference at all to Chapter 64 forfeiture. These statutes should be consulted when appropriate.

II. FORFEITURE PROCEDURE FOR PRIMA FACIE CONTRABAND

A. Seizure

Prima facie contraband may be seized as evidence pending a criminal proceeding. *N.J.S.A.* 2C:64-1b; *N.J.S.A.* 2C:64-4. Even if no criminal proceeding is instituted, *prima facie* contraband may be seized without process so long as the seizure comports with the Fourth Amendment and other applicable constitutional provisions. *N.J.S.A.* 2C:64-1b. Pre-seizure notice and hearing are not required. *See Calero-Toledo v. Pearson* Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974).

B. Forfeiture Procedure

"With *prima facie* contraband, the State may retain the property until the conclusion of the criminal proceeding [if any], after which the property shall be forfeited, 'subject to the rights of owners and others holding interests pursuant to Section 2C:64-5." *State v. One 1990 Honda Accord*, 154 *N.J.* 373, 377 (1998). The qualification regarding *N.J.S.A.* 2C:64-5 "innocent owner" rights, however, "does not apply to the illegal possession of weapons." *In Re Two Seized Firearms*, 127 *N.J.* 84, 90 (1992).

The forfeiture statute does not establish an express procedure to test the State's position that seized property is prima facie contraband. If the State has instituted a criminal proceeding, the defendant may move under R. 3:5-7 for suppression of evidence and return of seized property. But the determination of a *R*. 3:5-7 motion to suppress is not tantamount to a determination of the motion for return. "If a motion made pursuant to [R. 3:5-7] is granted, the property shall be delivered to the person entitled thereto unless otherwise subject to lawful detention and shall not be admissible in any court." R. 3:5-7e. Prima facie contraband should not be returned, and property that is the subject of an existing forfeiture action should be detained pending conclusion of the forfeiture action. State v. Rose, 173 N.J. Super. 478 (App. Div. 1980).

R. 3:5-7 does not authorize an independent motion for return of property. "A motion for the return of property seized can only be made under that rule if in conjunction with a motion to suppress." *State v. Howery*, 171 *N.J. Super.* 182, 183 (App. Div. 1979). Therefore, if the State has instituted no criminal proceeding, a claimant seeking the return of property that the State maintains is *prima facie* contraband should appropriately bring a replevin action. *See State v. One 1986 Subaru*, 120 N.J. 310, 318 (1990); *State v. Cavassa*, 228 *N.J. Super.* 204 (App. Div. 1988). The courts, nevertheless, have entertained motions for return of property, *see State v. Sherry*, 46 *N.J.* 172 (1965); *State v. One Wrist Slingshot*, 230 *N.J. Super.* 498 (App. Div. 1989), and even a letter request. *See State v. Cavassa*, 228 *N.J. Super.* at 205-206.

In *One Wrist Slingshot*, the State had seized nearly 200 items including assault firearms, handguns, long guns, and a cannon. A jury acquitted the defendant of all criminal charges. After the defendant requested return of

seized property, the trial court, with no opposition by the State, ordered its return. Only then did the State contend that some items were prima facie contraband, and decline to return them. The trial court threatened sanctions against the State and dismissed a forfeiture action that the State belatedly had commenced against the alleged *prima facie* contraband. The Appellate Division reversed the trial court, concluding: "To permit the return of weapons that may constitute prima facie contraband, solely by reason of the State's failure to contest the ... order, is contrary to the interests of justice and may adversely affect the public safety. The State, therefore, should have an opportunity to present evidence to establish that the property seized constitutes prima facie contraband within the provisions of the Code." State v. One Wrist Slingshot, 230 N.J. Super. at 504.

New Jersey's firearms laws also came into play in In Re Two Seized Firearms, 127 N.J. at 84. The defendant, a Florida motorist, who under Florida law legally possessed two loaded handguns in the glove compartment of his car, was stopped on the New Jersey Ultimately, criminal charges against the Turnpike. defendant were resolved through successful completion of the pre-trial intervention program. The Law Division ordered return of defendant's guns, despite finding that they were *prima facie* contraband under New Jersey law. The State appealed; the Appellate Division affirmed; and the Supreme Court reversed, concluding that the State was required neither to defer to Florida law under comity principles nor to forgo enforcement of New Jersey law under the federal pre-emption doctrine. The Supreme Court held that "the proceedings ... furnished sufficient procedural due process to the property owner to assert any claim that possession of the weapons was not illegal in New Jersey or any other cognizable claim to the property." Id. at 90.

III. FORFEITURE PROCEDURE FOR DE-RIVATIVE CONTRABAND

A. Seizure

Like *prima facie* contraband, derivative contraband may be seized as evidence pending a criminal prosecution. *N.J.S.A.* 2C:64-1b; *N.J.S.A.* 2C:64-4. When no criminal proceeding is instituted, property may be seized under court order, or if the property subject to seizure poses an immediate threat to public health, safety or welfare, the property may be seized without a court order. *N.J.S.A.* 2C:64-1b. Generally, pre-seizure notice and a hearing are not required for derivative contraband. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 *U.S.* 663, 94 *S.Ct.* 2080, 40 *L.Ed.*2d 452 (1974). When the derivative contraband is real property, however, and the government seeks ouster, federal due process requires notice and an opportunity to be heard. *United States v. James Daniel Good Real Property*, 510 *U.S.* 43, 114 *S.Ct.* 492, 126 *L.Ed.*2d 490 (1993).

More limited means of asserting *in rem* jurisdiction over real property would not require pre-seizure notice and opportunity to be heard. If the State commences a forfeiture action against real property, New Jersey law requires that a notice of *lis pendens* be filed. *N.J.S.A.* 2A:15-6 *et seq.* Potential claimants to the property would then receive copies of both the notice of *lis pendens* and the forfeiture complaint. *See N.J.S.A.* 2A:15-7b; *R. 4:4; Attorney General's Forfeiture Guidelines,* Guideline 1 (calling for use of least intrusive means to preserve State's interest in real property pending forfeiture).

There is no right to a *post*-seizure pre-complaint probable cause hearing. Due process rights are satisfied post-seizure by the prompt filing of a forfeiture complaint. *United States v. \$8,850,* 461 *U.S.* 555, 103 *S.Ct.* 2005, 76 *L.Ed.*2d 143 (1983). In a federal setting, the time between property seizure and filing the complaint is measured by the four-factor balancing test of *Barker v. Wingo,* 407 *U.S.* 514, 92 *S.Ct.* 2182, 33 *L.Ed.*2d 101 (1972). *United States v. \$8,850, supra* (factors include length of delay, reason for delay, demand for hearing, and prejudice to claimant). In New Jersey, the forfeiture statute prescribes a bright-line ninety-day period for filing the complaint. *N.J.S.A.* 2C:64-3a.

Under a Fourth Amendment analysis, the United States Supreme Court has held that the exclusionary rule applies to civil in rem forfeiture proceedings. In One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), the Court ruled that if untaxed liquor were illegally seized, it could not be introduced in a civil forfeiture action against the car used The ruling, however, leaves the to transport it. government free to proceed against the car -- just as it could proceed in a criminal action -- and to prove forfeiture with independent evidence untainted by any illegal seizure. Id. New Jersey courts have articulated identical principles. See, e.g., State v. \$199,167, 227 N.J. Super. 524 (Law. Div. 1988); State v. Jones, 181 N.J. Super. 549, 554 (Law. Div. 1981).

B. Forfeiture Procedures

1. Civil Proceedings

As noted above, a civil forfeiture action must be filed against derivative contraband within ninety days of seizure. N.J.S.A. 2C:64-3a. Otherwise, if no seizure has occurred, the complaint must be filed within five years of the event subjecting the property to forfeiture. See *N.J.S.A.* 2C:1-6. Some cases indicate that the ninety-day period demands strict adherence. See State v. Jones, 181 N.J. Super. 549 (Law Div. 1981); State v. One Pontiac Firebird, 168 N.J. Super. 168 (App. Div. 1979). Where the State failed to file a forfeiture action within ninety days of seizure, and sought no extension of time, and where the record presented no extenuating circumstances that would justify an extension, a defendant's motion for return of seized property (not alleged to be prima facie contraband) was granted. State v. Cavassa, 228 N.J. Super. at 207 (time requirements are of constitutional dimension).

a. Delay in Commencement

How that dimension should be gauged is partially answered by State v. One 1986 Subaru, 120 N.J. 310 (1990). In One 1986 Subaru, the State seized the car on October 1, 1987, and filed a forfeiture complaint on January 13, 1988, after an earlier complaint with a mistaken caption had been returned. A notice and summons, which pursuant to R. 4:4-1 should issue within ten days of filing the complaint, were issued on February 23, 1988, that is, forty-one days after filing the complaint. The complaint, notice, and summons were served on March 8, 1988. Approving this sequence of events, the Supreme Court held that for due process purposes, delay is measured from property seizure to service of the notice and summons, id. at 316-317, and must meet the four-factor Barker v. Wingo test enunciated United States v. \$8,850, supra. Additionally, the Supreme Court noted that "[l]egally seized property may be retained as long as the retention is reasonably related to the government's legitimate need for it," State v. One 1986 Subaru, , 120 N.J. at 317, including retention to obtain evidence for use in a pending criminal prosecution. Id. at 316.

b. Verification

The complaint must be verified on oath or affirmation. A "verification" stating merely that the facts contained therein "are true to the best of my knowledge and belief" is insufficient. *State v. One* 1971 *Datsun,* 189

N.J. Super. 209 (App. Div. 1983). Similarly, unsworn statements of persons allegedly involved in the illegal activity are insufficient to establish that the property is forfeitable. *State v. One* 1979 *Pontiac Sunbird*, 191 *N.J. Super.* 578, 581-582 (App. Div. 1983).

c. Notice

Notice of the action must be given to any person known to have a property interest. *N.J.S.A.* 2C:64-3c. Traditional notice requirements for *in rem* actions must be met. To take advantage of provisions applicable to service upon absent potential claimants in *in rem* actions, *see R.* 4:4-5, the State must conduct a "diligent inquiry" to confirm that a claimant can not be served in New Jersey. *Id.* Further, to take advantage of provisions for service by publication alone, the State must confirm by "diligent inquiry" that the place where a claimant ordinarily receives mail is unknown and unascertainable. *R.* 4:4-5(c).

d. Answer

Once served with a copy of the complaint, a notice, and a summons, a claimant must respond with a verified answer stating his or her interest in the property, and if the answer is made by an agent, establish that the agent is authorized to make the claim. *N.J.S.A.* 2C:64-3d; *R.* 4:5-3. Technically, if no answer contesting the complaint is timely filed, the property is forfeited. *N.J.S.A.* 2C:64-3e. A final judgment by default, however, confirming that the property has been forfeited should be sought pursuant to *R.* 4:43. If judgment is sought by motion, *see R.* 4:43-2(b), the court in its discretion may conduct an evidentiary hearing to test the State's allegations.

e. Use Orders

Any person with a property interest in the seized property, other than a defendant who is being prosecuted in connection with the seized property, may secure its release while the forfeiture action is pending unless the article is dangerous or unless the State can demonstrate that the property will be lost, destroyed or employed in subsequent criminal activity. *N.J.S.A.* 2C:64-3g. In addition, the State can decline to release evidence pending criminal prosecution. *N.J.S.A.* 2C:64-4. A person seeking such release of property pending forfeiture proceedings must post a bond with the court equal to the market value of the property. *N.J.S.A.* 2C:64-3g.

If the property is not released to a claimant pending disposition of the forfeiture action the prosecuting agency, with the approval of the entity funding it, may apply to the Superior Court for an order permitting use of the property. *N.J.S.A.* 2C:64-3h. The prosecuting agency must file a bond equal to the market value of the seized property or a written guarantee of payment in the event forfeiture is ultimately denied. *N.J.S.A.* 2C:64-3h.

f. Trustee

If the seized property is difficult to maintain or preserve pending forfeiture, the court may appoint a trustee. *N.J.S.A.* 2C:64-3i. Questions arise about the extent of control to be given to the fiduciary and about the cost. Control may progress from mere oversight to full receivership, and cost may be borne initially by the government to be recouped if and when final judgment is obtained. *See, e.g., United States v. Ianniello,* 824 *F.*2d 203 (2d Cir. 1987) (federal RICO fiduciary).

g. Trial

The forfeiture statute always has specified that if an answer were timely filed, the Superior Court would schedule a summary hearing as soon as practicable. *N.J.S.A.* 2C:64-3f. That is to say, the statute did not require a jury trial in civil *in rem* forfeiture cases involving derivative contraband. In *State v. One 1990 Honda Accord*, 154 *N.J.* 373 (1998), the Supreme Court held that jury trials were provided in forfeiture cases when the constitution of 1776 was adopted and that jury trials therefore were required now.

2. Guilty Pleas and Parallel Proceedings

Forfeiture may be incorporated into a plea agreement as part of the plea or as a separate consent order. A plea agreement may, of course, include the sentence that will be imposed. R. 3:9-3(a). In addition, *N.J.S.A.* 2C:43-2d specifically provides that an order confirming forfeiture may be made part of a criminal sentence. As with any right subject to waiver by reason of guilty plea, the defendant should be questioned by the trial court to ascertain that he is voluntarily and intelligently waiving his right to contest a civil forfeiture action brought by the State.

In *Libretti v. U.S.*, 516 *U.S.* 29, 116 *S.Ct.* 356, 133 *L.Ed.*2d 271 (1995), however, the Court held that rule requiring inquiry into whether there is a factual basis for guilty plea does not require such inquiry into a plea

agreement containing a provision to forfeit drug-tainted property.

Parallel civil and criminal actions are endorsed, even encouraged by the courts. *See, e.g., United States v. Kordel,* 397 *U.S.* 1, 90 *S.Ct.* 763, 25 *L.Ed.*2d 1 (1980). A claimant may wish to suspend the tension caused by parallel civil and criminal actions, for example, to avoid a Fifth Amendment waiver for purposes of the criminal case effected by answering the complaint or giving a deposition in the forfeiture case. *See State v. Kobrin Securities, Inc.,* 111 *N.J.* 307 (1988). If so, the claimant can seek a stay authorized by the forfeiture statute. *See N.J.S.A.* 2C:64-3f. If a claimant is "a defendant in a criminal proceeding arising out of the seizure, the ... court may stay proceedings in the forfeiture action until the criminal proceedings have been concluded by an entry of final judgment. *Id.*

Generally, when parallel civil forfeiture proceedings and criminal proceedings co-exist, the criminal case is tried first "either out of solicitude for the indictee's right of self-incrimination or the preference customarily accorded the criminal docket over a civil docket." State v. One 1976 Pontiac Firebird, 168 N.J. Super. 169 (App. Div. 1979). Typically, a criminal defendant seeking a stay of parallel civil proceedings asserts the Fifth Amendment privilege; when the government seeks a stay it does so to "prevent the criminal defendant from broadening [the defendant's] rights of criminal discovery against the government." S.E.C. v. Dresser Indus., 628 F.2d 1368, 1375 (D.C. Cir.), cert. denied 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980) (citing Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied 371 U.S. 955,83 S.Ct. 502, 9 L.Ed.2d 502 (1963)). A criminal conviction involving seized property creates a rebuttable presumption that the property was used in furtherance of unlawful activity. N.J.S.A. 2C:64-3j.

3. Discovery

Since statutory forfeiture under N.J.S.A. 2C:64-1 et seq. is a civil action, "discovery rules permit, indeed encourage, a broad factual inquiry." State v. \$199,167, 227 N.J. Super. 524, 527 (Law Div. 1988). The State enjoys a right to discovery in a civil forfeiture action just as it would in any other civil action, State v. Rodriguez, 130 N.J. Super. 57, 61 (App. Div. 1974), appeal after remand, 138 N.J. Super. 575 (App. Div. 1976), aff'd, 73 N.J. 463 (1977). The State has a right to "bolster" its cause of action through discovery. Printing-Mart Morristown v. Sharp Electronics Corp., 116 N.J. 739, 768 (1989). In State v. 1987 Chevrolet Camaro, IROC-Z28,

307 N.J. Super. 34 (App. Div. 1998), the Appellate Division concluded that the trial court had abused its discretion in ordering as a discovery sanction dismissal with prejudice of the State's in rem forfeiture complaint. The State sought forfeiture of claimant's vehicle because he had used it to facilitate a homicide. When the State did not answer defendant's interrogatories, defendant first obtained dismissal without prejudice. Defendant then sought dismissal with prejudice, and the State crossmoved to reinstate the complaint, finally attaching answers to defendant's interrogatories. The trial court, nevertheless, dismissed the complaint with prejudice and denied the State's cross-motion, because the State could show no "exceptional circumstances" for not complying with R. 4:23-5(a)(2) (procedure upon failure to serve answers to interrogatories). The Appellate Division determined that the trial judge erred in levying the ultimate sanction of dismissal against the State, because the defendant was unable to articulate any prejudice attributable to the State's tardy answers. The Appellate Division noted that while discovery in civil actions seeking the return of seized items is a right and while the State's excuses for not timely answering the interrogatories did not constitute "exceptional circumstances," the State ultimately did answer them and defendant never proved that this untimely submission in fact prejudiced him. On remand the defendant was required to articulate prejudice, and the trial court was required to evaluate it, as a predicate to dismissal with prejudice. Also, the trial judge was required to relax the rules and reinstate the complaint if defendant could not establish actual prejudice. State v. 1987 Chevrolet Camaro, IROC-Z28, supra.

IV. FUNDAMENTAL FORFEITURE ISSUES

A. Rights of Third Parties

New Jersey's forfeiture statute affords protection from forfeiture to an "innocent" lessor or lienholder who was unaware of the unlawful activity and did not consent to it, and to an "innocent" owner who had no reason to know that the property would be involved in unlawful activity and who did everything that reasonably could have been expected to prevent involvement of the property in unlawful activity. *N.J.S.A.* 2C:64-5.

In *Bennis v. Michigan*, 516 *U.S.* 442, 116 *S.Ct.* 994, 134 *L.Ed.*2d 68 (1996), the United States Supreme Court held that a claimant has no federal constitutional due process right to advance an innocent owner defense. However, in *United States v. A Parcel of Land ... Known as 92 Buena Vista Avenue, Rumson*, 507 *U.S.* 111, 113 *S.Ct.*

1126, 122 *L.Ed.*2d 469 (1993), the Court held that federal *statutory* innocent owner protection extends to bona fide donees of property that would be forfeitable as derivative contraband in the hands of the donor.

New Jersey courts have extended innocent-owner protection to a bona fide purchaser for value. In *State v. Somerset Central Corp.*, 216 *N.J. Super.* 716 (App. Div. 1987), a boat owner had fraudulently claimed the loss of his boat at sea and collected the boat's value from his insurance company. Three years later, the defendant corporation with no knowledge of the fraud purchased the boat from the owner. The court refused to enforce forfeiture against the purchaser, following *State v. 1979 Pontiac Trans Am*, 98 *N.J.* 474 (1985), and reading innocent owner protection into the statute before it was amended to provide that protection explicitly. *But see Kutner Buick, Inc. v. Strelecki*, 118 *N.J. Super.* 89 (Ch. Div. 1970) (enforcing pre-Chapter 64 forfeiture against innocent owner).

The relation-back doctrine, like statutory innocent owner protection, bears on title to derivative contraband. Under New Jersey's forfeiture statute, "title to property forfeited under [Chapter 64] shall vest in the entity funding the prosecuting involved at the time the property was utilized illegally or in the case of proceeds, when received." N.J.S.A. 2C:64-7. Obviously, if strictly applied, or applied despite innocent owner protection, the doctrine would nullify the rights of innocent owners whether they acquired title before or after the illegal activity. In Farley v. \$168,400.97, 55 N.J. 31 (1969), the Court applied the doctrine to give priority over a federal tax lien to New Jersey's title to gambling proceeds. The Court held that "when a statute provides for a forfeiture, the forfeiture takes place upon the occurrence of the forbidden act or omission ..., and the sovereign's title is in no sense inchoate" Id. at 40. "The judgment which settles the dispute does not initiate the title; it serves only to confirm the title by dissipating claims against it." Id.

The Appellate Division has viewed *Farley* as an expression of "pre-Code" relation-back analysis only. *See State v. Am. Banking Ins. Co. of Fla.*, 263 *N.J. Super.* 124 (App. Div. 1993). In *American Banking* the Appellate Division determined that the relation-back provisions of *N.J.S.A.* 2C:64-7 modify pre-Code case law, and noted that for derivative contraband, only the judgment of forfeiture relates back. *State v. Am. Banking Ins. Co. of Fla.*, 263 *N.J. Super.* at 132 (citing *State v. Cavassa*, 228 *N.J. Super.* at 208).

B. Nexus

Interpreting the civil forfeiture statute, the New Jersey Supreme Court held that when the property sought to be forfeited is derivative contraband, the State must demonstrate by a preponderance of evidence that the property has been used or is intended to be used in furtherance of an unlawful activity or is proceeds of illegal activity. *State v. Seven Thousand Dollars*, 136 *N.J.* 223 (1994). The Court noted that the illegal activity must constitute an indictable crime, but rejected any requirement that the owner must actually be indicted for the crime before forfeiture may occur. *Id.; see also State v.* 1988 *One Honda Prelude*, 252 *N.J. Super.* 312 (App. Div. 1991).

Additionally, when the State seeks to forfeit derivative contraband, it must demonstrate by a preponderance of the evidence, a direct causal relationship between the use of the property and the crime allegedly committed or intended to be committed. The burden on the State includes a requirement that the connection be shown to be "proximate and substantial." *State v. Seven Thousand Dollars*, 136 *N.J.* at 234-235. *See also State v. One* 1985 *Ford Bronco*, 261 *N.J. Super.* 643 (App. Div. 1993) (relying on Attorney General's Forfeiture Guidelines, Guideline 3, "Forfeiture and the Underlying Criminal Offense").

Not every unlawful activity supports civil *in rem* forfeiture. The term "unlawful activity" in *N.J.S.A.* 2C:64-1a has been interpreted to refer only to crimes. *State v. One* 1979 *Chevrolet Camaro* Z-28, 202 *N.J. Super* 22 (App. Div. 1985). Forfeiture provisions do not apply to traffic offenses or disorderly persons offenses. *Id.* Possessory crimes can result in forfeiture if the State demonstrates that the property to be forfeited was "utilized the furtherance of" or "to facilitate" the criminal possession or has "become an integral part" of illegal or unlawful activity, or was intended to. *N.J.S.A.* 2C:64-1a(2) and (3). *See, e.g., State v. One* 1979 *Chevrolet* Z - 28, 202 *N.J. Super.* at 231; *see also, State v. A* 1971 *Datsun,* 139 *N.J. Super.* 186 (App. Div. 1976); *Ben Ali v. Towe, 30 N.J. Super* 19 (App. Div. 1954).

C. Jury Trial

State v. One 1990 *Honda Accord*, 154 *N.J.* 373, *clarification denied*, 156 *N.J.* 378 (1998), held that the owner of derivative contraband is entitled to a jury trial in an action to forfeit the property pursuant to Chapter 64 of New Jersey's civil forfeiture statute. In essence, the Court invalidated the statutory summary procedure

prescribed by *N.J.S.A.* 2C:64-3f as unconstitutional under *N.J. Const.* art. 1, ¶9. Thus, a person claiming to be an innocent owner who demands a jury trial is entitled to one. On August 14, 1998, the Court denied the State's motion for clarification of the retroactivity issue, but the order stated: "provided, however, that the judgment of the Court filed on July 15, 1998, shall be applied to all pending cases and those on direct appeal ('pipeline retroactivity')." Thus, the Court essentially agreed with the State that the rule should not be applied to cases that have resulted in final judgment if the direct appeal was not pending. 156 *N.J.* 378.

D. Double Jeopardy

Settling an issue that had divided the courts for many years, a majority of the United States Supreme Court ruled in *United States v. Ursery*, 518 *U.S.* 267, 116 *S.Ct.* 549, 135 *L.Ed.*2d 549 (1996), that civil *in rem* forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause. This determination allows the government to pursue both a criminal case and a civil forfeiture case in separate proceedings, and obtain separate judgments.

In State v. \$3,000.00 In United States Currency, 292 N.J. Super. 205 (App. Div. 1996), New Jersey continued its acceptance of federal jurisprudence on double jeopardy protection. The Appellate Division rejected the defendant's double jeopardy claim that civil forfeiture proceedings were barred because he already had been convicted of drug offenses arising out of the same facts. Reversing the trial court's order that dismissed on double jeopardy grounds a portion of the State's forfeiture case, the Appellate Division specifically relied on Ursery and held that the double jeopardy bar was inapplicable to the State's right to prosecute a civil *in rem* forfeiture action under Chapter 64 after obtaining the criminal convictions. Id. at 212.

E. Excessive Fines

In an opinion that depends on the accuracy of an analysis later implicated by *Ursery*, the United States Supreme Court held that the federal constitution affords excessive fines protection to civil *in rem* forfeitures, at least where the forfeiture is "punitive in part." *Austin v. United States*, 509 *U.S.* 602, 113 *S.Ct.* 2801, 125 *L.Ed.*2d 488 (1993). In *Austin*, the Court noted that the provision of innocent owner protection indicates that an *in rem* forfeiture action is partly personal and not directed solely at the property. The Court also noted that the

development of an excessiveness test -- to determine which forfeitures are excessive and which are not -- was better left to the lower courts, and specifically declined to formulate a test.

In State v. \$3,000 In United States Currency, 292 N.J. Super. 205, 213 (App. Div. 1996) the Appellate Division (citing the lone dissent in Ursery) noted that proceeds forfeitures do not implicate the Excessive Fines Clause because they are in no way punitive. Relying on Austin, the Appellate Division concluded that the forfeiture of non-proceeds derivative contraband is subject to excessive fines protection, and outlined a test. "Excessiveness, obviously, is a matter of proportionality," the Appellate Division stated, "[The proportionality standard approved by the New Jersey Supreme] Court requires that in making the excessiveness determination, 'the Court should focus on the depth of the connection between the crime and the property rather than on the value of the penalty in relation to the offense." Id. (citing State v. Seven Thousand Dollars, 136 N.J. at 235).

Six years after deciding *Austin* (and two years after the Appellate Division decided *State v. \$3,000*), the United States Supreme Court established an excessiveness test, at least for criminal, *in personam* forfeitures. In *United States v. Bajakajian*, 514 *U.S.* 321, 118 *S.Ct.* 2028, 141 *L.Ed.*2d 314 (1998), the Court concluded that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality. The amount of the forfeiture must bear some relation to the gravity of the offense that it is designed to punish.... We now hold that a punitive forfeiture violates the excessive fines clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* 118 *S.Ct.* at 2036.

V. RELATED ISSUES

A. Fugitive Disentitlement

The fugitive disentitlement doctrine, under which a fugitive from justice loses the right to assert certain legal claims, did not warrant judgment in favor of government in a civil forfeiture action. *Degen v. United States*, 517 *U.S.* 820, 116 *S.Ct.* 1777, 135 *L.Ed.*2d 102 (1996). The Supreme Court ruled that the district court could not strike a claimant's filings in a forfeiture action and grant summary judgment against him merely because he failed to appear in a related criminal prosecution. The Supreme Court determined that the district court's jurisdiction over the property was secure, that there was no risk of delay or frustration in determining the merits of the government's forfeiture case, and that the district

court had less harsh sanctions available to ensure that the claimant did not use liberal civil discovery rules to gain an advantage in the criminal case where discovery is more limited.

B. Sufficiency of Evidence

In State v. \$36,560.00 in U.S. Currency, 289 N.J. Super. 237 (App. Div. 1996), certif. denied, 147 N.J. 97 (1997), following a bench trial, the court found that the evidence did not support a conclusion that the currency was derived from or was an integral part of illegal marijuana distribution. The Appellate Division reversed, noting "a wealth" of circumstances establishing that the cash was derivative contraband, circumstances including: the cash was found in a locked strongbox directly underneath a one-pound bag of marijuana; the strongbox was in a drawer of a filing cabinet in the master bedroom where marijuana transactions were conducted with an undercover buyer; a triple-beam balance and other drug paraphernalia, along with an additional onehalf pound of marijuana were discovered in the bedroom; and the cash was divided and placed in envelopes marked with money amounts, one of which contained a fiftydollar bill used in a controlled undercover marijuana purchase. Id. at 254-258.

C. Preclusion

Because forfeiture is a civil proceeding, the burden of proof is a preponderance of evidence. *N.J.S.A.* 2C:1-13f. *See also State v. Rodriguez* 130 *N.J. Super.* 57 (App. Div. 1974). Consequently, an acquittal or dismissal of the criminal charges will not preclude forfeiture. *N.J.S.A.* 2C:64-4b.

D. Allocation

The trial court should make a specific finding whether all or part of cash recovered from a vehicle transporting narcotics was to be used for drug purchases, and only that portion of the cash intended for drug purchases may be forfeited. The defendant bears the burden of proving allocation after the State has made a *prima facie* showing of substantial drug involvement. *State v. One* 1978 *Ford Van et. al.*, 218 *N.J. Super.* 374 (App. Div. 1987).

E. Disposal of Forfeited Property

Property which has been forfeited shall be destroyed if it can serve no lawful purpose or if it is dangerous, with the exception that weapons with military value may be donated to the National Guard Militia Museum, *N.J.S.A.* 2C:64-6. All other forfeited property, proceeds from the sale of forfeited property, or proceeds of illegal activity becomes the property of the entity funding the prosecuting agency. *N.J.S.A.* 2C:64-6.

F. Post-Judgment Forfeiture Administration

Matters of sharing, accounting, and the use and expenditure of forfeited property originally were addressed in the Administrative Code. *See N.J.S.A.* 2C:64-6; *see also* (former) *N.J.A.C.* 13:77-1.1 *et seq.* Administrative matters now are addressed in the Attorney General's Standard Operating Procedures for Forfeiture Program Administration.

G. Recovery of Seized Property

N.J.S.A. 2C:64-8 imposes a three-year limitation on persons seeking to recover seized property. *Dragutsky v. Tate*, 262 *N.J. Super.* 257 (App. Div. 1993). The State, however, can not prevail against even a belated claim of an innocent owner who was unaware of the seizure, unless the State has commenced or can commence a forfeiture action that was or can be pursued to judgment. *Id.* To avoid a "standoff as to the appropriate disposition of seized property," the State should, if nothing else, be able to avail itself of escheat provisions in *N.J.S.A.* 46:30B-1 *et seq.*, where forfeiture is not possible and no claim is made. *See Dragutsky v. Tate*, 262 *N.J. Super.* at 264.

H. Son of Sam Law, N.J.S.A. 52:4B-26 et seq.

Author and publisher of biography of convicted murdered were not "agents" of that murdered within the meaning of the "Son of Sam Law," *N.J.S.A.* 52-4B-26 *et seq.* intended to prevent perpetrators of sensational crimes benefitting from their acts, and it was error to place proceeds received from sale of that biography into interest-bearing account for ultimate benefit of victims survivors. *Fasching v. Kallinger,* 211 *N.J. Super* 26 (App. Div. 1986), *after remand* 227 *N.J. Super.* 270 (App. Div. 1988). *See, Romaine v. Kallinger 109* N.J. 282 (1988).

FORGERY

(See also, CHECKS, CREDIT CARDS, THEFT, this Digest)

I. HISTORY

Historically, "forgery" has been defined as the false making or materially altering, with intent to defraud, of any writing, which if genuine, might apparently be of legal efficacy, or the foundation of legal liability. *State v. Thrunk*, 157 *N.J. Super.* 265, 271 (App. Div. 1978).

The Code, however, expanded the scope of the crime to apply to any "writing," regardless of whether it has legal or evidentiary significance. Diplomas and professional certificates as well as private records such as diaries, books of account and letters all fall within the purview of the offense. The comprehensive definition allows for punishment of forgeries which are harmful to the good name or reputation of the purported author or which misrepresent the sentiments, opinion, character, conduct, prospects or interests of others. *II Final Report of the New Jersey Criminal Law Revision Commission, Commentary* at 238 (1971).

II. OFFENSE

Under *N.J.S.A.* 2C:21-1a, a person will be found guilty of forgery if, with the purpose to or knowledge of defrauding or injuring anyone, he alters or changes any writing of another without authorization, or he makes, authenticates, issues or transfers any writing so that it purports (1) to be the act of either another who did not authorize it, or of a fictitious person, (2) to have been executed at a time or place or in a numbered sequence other than was in fact the case, or (3) to be a copy of an original when no such original existed. A person will also be found guilty of forgery if he utters any writing which he knows to have been forged in any of the foregoing respects. *Id.*

For forgeries involving driver's licenses and motor vehicle registrations, *see N.J.S.A.* 2C:21-2.1.

III. INSTRUMENTS SUBJECT TO FORGERY

A. Writings

The offense of forgery applies to any "writing," which is defined comprehensively to include "printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, access devices, and other symbols of value, right, privilege, or identification. *N.J.S.A.* 2C:21-1a(3).

B. Access Devices

In 1997, the definition of "writing" was expanded further to include access devices. L.1997, c.6. An "access device" is defined as a telephone calling card number, credit card number, account number, mobile identification number, electronic serial number, personal identification number, or any other data intended to control or limit access to telecommunications or other computer networks in either human readable or computer readable form, including copies or originals that can be used to obtain telephone services. *N.J.S.A.* 2C:20-1s.

C. Sound and Audiovisual Recordings

Offenses that come within the purview of the Anti-Piracy Act, prohibiting the unlawful making or distribution of sound and audiovisual recordings, may not be prosecuted under general forgery provisions relating to writings and objects. *State v. El Moghrabi*, 316 *N.J. Super.* 139, 141-43 (App. Div. 1998); *see also N.J.S.A.* 2C:21-1, 2C:21-2, and 2C:21-21.

In *El Moghrabi*, the Appellate Division noted that forgery of video tapes could be prosecuted under the general forgery statutes, were it not for the existence of the Anti-Piracy Act, *N.J.S.A.* 2C:21-21. 316 *N.J. Super.* at 143. The Court was satisfied that the Legislature deliberately established the offense of pirating recordings in *N.J.S.A.* 2C:21-21 as a separate and distinct crime from the general forgery provisions, *N.J.S.A.* 2C:21-1 and 2C:21-2. *Id.* at 142. This was largely because of the more severe punishments in the Anti-Piracy Act as compared to the far lesser punishments of the general forgery sections of Chapter 21. *Id.*

D. Forgery Devices

A person is guilty of possession of forgery devices when he makes or possesses a "forgery device", with the purpose to use, or to aid or permit another to use for purposes of forging written instruments. *N.J.S.A.* 2C:21-1c. A "forgery device" is defined to include any device used for the purposes of forging written instruments, including access devices, or a computer, or computer equipment, computer software or any article specifically designed or adapted for such use. *Id.* Forgery is a crime of the third degree if the writing is or purports to be part of an issue of money, securities, postage or revenue stamps, or other instruments, certificates or licenses issued by the government, New Jersey Prescription Blanks as referred to in *N.J.S.A.* 45:14-14, or part of an issue of stock, bonds or other instruments representing interest in or claims against any property or enterprise, or an access device. *N.J.S.A.* 2C:21-1b. Otherwise, forgery is a crime of the fourth degree. *Id.*

Forgery of a withdrawal slip is fourth degree forgery because it does not constitute a writing which purports to be "part of an issue of money, securities, postage, or revenue stamps or other instruments," within the meaning of the language defining third-degree forgery. *State v. Reed*, 183 *N.J. Super.* 184, 191-92 (App. Div.), *certif. denied*, 91 *N.J.* 228 (1982). Likewise, forgery of a check or other like instrument is also a crime of the fourth degree. *State v. Ott*, 181 *N.J. Super.* 559, 561-62 (Law Div. 1981).

Possession of forgery devices is a crime of the third degree. *N.J.S.A.* 2C:21-1c.

V. CULPABILITY

The culpability requirement for forgery is satisfied by proof that the defendant acted with a purpose to defraud or injure another either by injuring that person's reputation or integrity, or by causing pecuniary gain or loss. The requirement is also satisfied by proof that the defendant knowingly facilitated a fraud or injury to be perpetrated by another person. *N.J.S.A.* 2C:21-1a.

The intent to defraud, injure, or damage another person is an essential element which must be alleged and proven in a forgery prosecution. *State v. Weigel*, 194 *N.J. Super.* 451 (App. Div. 1984); *State v. Bulna*, 46 *N.J. Super.* 313, 318 (App. Div. 1957). However, the very act of forgery itself may be sufficient to imply an intent to defraud. *State v. Bulna, supra*, 46 *N.J. Super.* at 318. In *Bulna, supra*, for example, the court found the defendant's forgery of a motor vehicle ownership certificate and consequent registration of the car in that name gave rise to the natural inference that he intended to convert the car. *Id.* at 318-19.

It is not necessary to prove that the person intended to be defrauded was actually defrauded. The act of forgery itself implies the intent to defraud, even if the person who receives the instrument does not realize it is a forgery. *State v. Gledhill*, 67 *N.J.* 565, 572 (1975); *State v. Weigel, supra*, 194 *N.J. Super.* at 458.

If the forger has the requisite intent, and the writing could have been relied on as legally significant, the crime of forgery is complete. *State v. Schultz*, 71 *N.J.* 590, 599-600 (1975); *State v. Weigel, supra*, 194 *N.J. Super.* at 458.

Knowledge or purposeful intent may be inferred from the fact that the defendant is attempting to cash a forged instrument, due to his possession of the instrument and his uttering that it is genuine. *State v. Sabo*, 86 *N.J. Super.* 508, 513 (App. Div. 1965).

The "person" defrauded within the meaning of the forgery statutes may be "any one" in general. *State v. Thrunk, supra,* 157 *N.J. Super.* at 274. It could also be a governmental unit. *State v. Johnson,* 115 *N.J. Super.* 6, 9 (App. Div. 1971).

VI. ALTERATION OF INSTRUMENT

The first type of conduct which constitutes forgery under the Code is the altering or changing any writing of another without his authorization. *N.J.S.A.* 2C:21-1a(1). The Code does not require the State to prove that the alteration of an instrument be material. The prior statute relating to forgery also had no such requirement. *See N.J.S.A.* 2A:109-1 (repeated 1979).

Rather, the requirement that the alteration be material was read into the statute by the Appellate Division in *State v. Thrunk, supra*, 157 *N.J. Super.* at 272 (holding that for an alteration of an instrument to constitute forgery, it must be "material"). Under *Thrunk*, a material alteration is one that makes the instrument "speak a language different in legal effect from that which it originally spoke or which carries with it some change in the rights, interests, or obligations of the parties to the writing. *Id.* The materiality of the alteration charged has been held to be a question of law for the court. *Id.* at 273; *but see, State v. Anderson*, 127 *N.J.* 191 (1992), (holding that materiality in a perjury prosecution must be found by the jury).

It is questionable whether the same approach can applied under the present law as it pertains to the forgery of private documents or records. While the alteration may have no legal effect, it still may have the capacity to injure. It has been suggested that the culpability requirement of a purpose to defraud or injure or of a knowledge of facilitating a fraud is a sufficient measure of the propriety of applying criminal sanctions. *See Model Penal Code and Commentaries*, § 224.1, p. 298 (1980).

Consent is a defense to a charge of altering or changing another's writing. Also, ratification after the act will not render the alteration or change noncriminal. *See* N.J.S.A. 2C:21-1a(1).

VII. MAKING FALSE INSTRUMENT OR SIGNATURE

The second type of proscribed conduct under the statute is the making of a false instrument without authorization. *See N.J.S.A.* 2C:21-1a(2).

Forgery cannot be committed by the making of a genuine instrument, even though statements made therein may be untrue. The false nature of the writing required under *N.J.S.A.* 2C:21-1 is defined as a falsity which must relate to the authenticity of the document rather than to some extrinsic misrepresentation contained therein. *State v. Weigel, supra,* 194 *N.J. Super.* at 463. For example, a check drawn on an account where the maker has no money is not a forgery where both the maker and the account genuinely exist. *State v. Berko,* 75 *N.J. Super.* 283, 291-92 (App. Div. 1962).

Also, the falsity must change the legal operation and effect of the instrument, or at least have the potential for doing so. *See, e.g. State v. Thrunk, supra*, 157 *N.J. Super.* at 271-72 (holding that alteration in a deed of the description of land conveyed was "material" such that it supported a charge of forgery); *State v. Schultz, supra*, 71 *N.J.* at 599-600 (holding that an intentionally false endorsement on a check that has the capacity to have been relied upon as legally significant constitutes forgery).

Regarding the use of fictitious persons in the making of false instruments, it has been held that a check made payable to a fictitious or nonexistent person is treated as payable to the bearer when both the maker and bearer are aware that the payee is fictitious. State v. Weigel, supra, 194 N.J. Super. at 461-62. In Weigel, defendants issued checks payable to fictitious payees as part of a conspiracy to illegally transport and dispose of toxic waste. Id. at 456. The checks were given to a co-conspirator as payment for illegally transporting the toxic waste. Id. They were then endorsed in the name of the fictitious payee and were cashed and cleared through a check cashing service. Id. The Appellate Division held that the Weigel defendants were not guilty of forgery against the State because the use of the fictitious name was known to both the maker of the check and the party cashing the check, and because the checks were negotiable as bearer instruments and were in fact negotiated. *Id.* at 461-62.

A fictitious person could also be a fictitious corporation. *State v. Berko, supra*, 75 *N.J. Super.* at 292. In either case, the State bears the burden of proving that the person or corporation is fictitious. *Id.* at 292-93.

VIII. UTTERANCE OF FORGED INSTRU-MENT

The third type of proscribed conduct is the uttering of any writing which the defendant knows to be forged pursuant to *N.J.S.A.* 2C:21-1a(1) or (2). A forged instrument is uttered when it is offered as genuine accompanied by words or conduct indicating that it is genuine, without regard to whether it is so accepted. *State v. Gledhill, supra,* 67 *N.J.* at 572. This includes a person's display of the instrument, such as a false medical diploma, regardless of whether he actually issued it. *State v. Ready,* 77 *N.J.L.* 329, 335 (Sup. Ct. 1909), *reversed on other grounds,* 78 *N.J.L.* 599 (E. & A. 1910).

If a person utters five checks at one time, it is a single transaction constituting one offense. *State v. Wright*, 154 *N.J. Super.* 174, 177 (App. Div. 1977).

IX. MULTIPLE OFFENSES: MERGER

Under pre-Code law, forgery was deemed to be a more serious offense than theft by deception or obtaining money under false pretenses. *See State v. Wright, supra,* 154 *N.J. Super.* at 181-82 (holding that obtaining money under false pretenses merged with the "high misdemeanor" of uttering forged instruments so that defendant could only be sentenced solely on conviction of the latter); *State v. Reed, supra,* 183 *N.J. Super.* at 189 (holding under pre-Code law that offense of attempting to obtain money under false pretenses merged into offense of uttering a forged instrument because "the lesser crime should give way to the greater").

Under the Code, except where the amount involved is less than \$200, theft is the greater offense, whether it be theft by unlawful taking or disposition, or theft by deception. *Cannel, Criminal Code Annotated, N.J.S.A.* 2C:21-1, comment 2 (Gann 2000); *see also N.J.S.A.* 2C:20-3 and -4. Thus the Appellate Division has held that only a single crime is committed when a theft by deception is accomplished by uttering a forged instrument and the latter offense should merge into the former. *See State v. Streater,* 233 *N.J. Super.* 537, 544 (App. Div.), certif. denied, 117 N.J. 667 (1989); State v. Alevras, 213 N.J. Super, 331, 339-42 (App. Div. 1986).

Similarly, conspiracy to commit forgery and falsifying records merge into conspiracy to commit theft, provided the former acts are an integral part of the theft and not part of an independent scheme. *State v. Jurcsek*, 247 *N.J. Super*: 102, 109-110 (App. Div. 1991).

However, in *State v. Rosenberger*, 207 *N.J. Super.* 350, 360 (Law Div. 1985), the Law Division sentenced the defendant therein for both theft under *N.J.S.A.* 2C:20-3 and forgery under this statute, apparently arising out of the same episode.

The offense of passing a bad check under *N.J.S.A.* 2C:21-5 is not a lesser included offense of uttering a forged check, because each crime requires different elements to be proved. *State v. Passafiume*, 184 *N.J. Super.* 447, 449 (App. Div.), *certif. denied*, 91 *N.J.* 280 (1982).

FOURTEENTH

AMENDMENT

I. DUE PROCESS

A. Burden of Proof and Presumptions

Victor v. Nebraska, 511 U.S. 1 (1994), held that the "beyond a reasonable doubt" standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as matter of course. So long as the trial court instructs the jury on the necessity that defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising jury of government's burden of proof. See also State v. Medina, 147 N.J. 43 (1996), cert. denied, 520 U.S. 1190 (1997) (reasonable doubt instructions must be considered in their entirety; only those instructions that overall lessen the State's burden of proof violate due process); State v. Dreher, 302 N.J. Super. 408 (App. Div.), certif. denied, 152 N.J. 10 (1997), cert. denied, 524 U.S. 943 (1998) (same); State v. Kittrell, 145 N.J. 112 (1996); State v. Love, 245 N.J. Super. 195 (App. Div.), certif. denied, 126 N.J. 321 (1991) (trial court's instructions to jurors that it was their sole interest to ascertain the truth did not dilute State's burden of proof and deprive defendant of due process).

According to *Medina v. California*, 505 *U.S.* 437 (1992), a State may presume that a defendant is competent and require him to shoulder the burden of proving his incompetence by a "preponderance" of the evidence. However, a state law requiring a defendant to prove incompetence by "clear and convincing" evidence violates due process. *Cooper v. Oklahoma*, 517 *U.S.* 348 (1996).

Carella v. California, 491 *U.S.* 263 (1989), held that instructions that grand theft defendant "shall be presumed to have embezzled" vehicle if it was not returned within five days of expiration of rental agreement, and that "intent to commit theft by fraud is presumed" for failure to return rented property within 20 days of demand, constituted mandatory presumptions relieving state of proving elements of crime, in violation of defendant's due process rights. *See also Sandstrom v. Montana*, 442 *U.S.* 510 (1979); *In re Winship*, 397 *U.S.* 358 (1970).

State v. Swed, 255 *N.J. Super.* 228 (App. Div. 1992). Establishing that defendant obtained electrical service by deception or other means inclusive of tampering with

electric meter, that defendant did so purposely, and that defendant knew that services were available for compensation formed basis for permissive inference that person being provided with electrical service created tampered condition, and, thus, defendant's due process rights were not violated.

In *State v. Erazo*, 126 *N.J.* 112 (1991), a jury instruction which authorized the jury to return a guilty verdict on passion provocation manslaughter if defendant caused the death in heat of passion under circumstances that would otherwise be murder, placed on defendant burden of proving passion/provocation and violated due process, even though jury was also instructed that burden of proof remained on State throughout case.

State v. Walten, 241 N.J. Super. 529 (App. Div. 1990), held that a statutory presumption which mandates a finding that the presumed fact exists simply by proving the underlying fact offends due process because it undermines the defendant's presumption of innocence and diminishes the State's obligation to prove guilt beyond a reasonable doubt. In order to observe demands of due process, the court may not accord any greater weight than that of a permissive inference to a statutory presumption, no matter how mandatory the phraseology creating the presumption appears to be. See also N.J.R.E. 303(c) (trial judge may not use term "presumption" or "presumed" in jury instruction).

Martin v. Ohio, 480 *U.S.* 228 (1987) held that the due process clause does not preclude placing the burden of proving self-defense upon a defendant charged with aggravated murder, which is defined as "purposely, and with prior calculation and design causing the death of another." Since defendant, in proving self-defense, did not have the burden of disproving any element of the state's case, the burden of proving the elements of the crime was not unconstitutionally shifted to defendant.

Rose v. Clark, 478 *U.S. 570* (1986) ruled that reversal of conviction for murder is not mandated by a jury instruction which unconstitutionally shifts the burden of proof to a defendant by stating that a homicide is presumed to be malicious. A reviewing court should not set aside an otherwise valid conviction if, after viewing the entire record, it determines that the error in question is harmless beyond a reasonable doubt. Compare, *Connecticut v. Johnson*, 460 *U.S.* 73 (1983); *California v. Chapman*, 389 *U.S.* 1 (1967).

State v. O'Connor, 220 *N.J. Super.* 104 (App. Div. 1984). *N.J.S.A.* 39:4-50a, which prohibits driving with a blood alcohol concentration of .10%, or more, does not

create a mandatory presumption of intoxication. Hence, the statute does not violate due process.

In *State v. Ingram,* 98 *N.J.* 489 (1985), the statutory presumption created by *N.J.S.A.* 2C:39-2b was interpreted by the Court as a permissive inference which thereby did not violate defendant's due process right. Once the State proves possession of a weapon and the accused fails to present evidence of a proper permit or license, the State may employ the inference to establish the absence of the required permit to sustain a conviction under *N.J.S.A.* 2C:39-5b (unlawful possession of a weapon without a permit). *Accord, State v. McCandless,* 190 *N.J. Super.* 75 (App. Div. 1983).

State v. Burnett, 198 *N.J. Super.* 53 (App. Div. 1984). *R.* 3:12-1, requiring defendants to give notice before trial of an insanity defense or a defense based on mental incapacity, does not unconstitutionally burden defendants' right to contest sanity so as to violate due process. Relying on *State v. Whitlow,* 45 *N.J.* 3 (1965), the court ruled that the pretrial notice of an insanity claim gives the State reasonable time to respond to an insanity defense.

B. Capital Cases

In Romano v. Oklahoma, 512 U.S. 1 (1994), admission of evidence that defendant already had been sentenced to death in another case, although that conviction had been reversed on appeal, did not infect capital murder sentencing proceeding with unfairness so as to render jury's imposition of death penalty a denial of due process. If jurors followed state trial court's instructions, that evidence should have had little, if any, effect on deliberations, as instructions clearly and properly described jurors' paramount role in determining sentence and explicitly limited jurors' consideration of aggravating factors to the four which state sought to prove. Finally, regardless of evidence as to defendant's death sentence in the prior case, jury had sufficient evidence to justify its conclusion that the four aggravating circumstances existed.

Arave v. Creech, 507 *U.S.* 463 (1993), held that to satisfy the Eighth and Fourteenth Amendments, capital sentencing scheme must suitably direct and limit the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action. State's capital sentencing scheme must also channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death.

Morgan v. Illinois, 504 *U.S.* 719 (1992). Based on the requirement of impartiality embodied in the due process clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who will automatically vote for the death penalty in every case, and thus will fail in good faith to consider evidence of aggravating and mitigating circumstances as required by jury instructions.

In *Lankford v. Idaho*, 500 *U.S.* 110 (1991), due process was violated at sentencing procedure in Idaho murder case, where defendant and his counsel did not have adequate notice that judge might sentence him to death. Nothing in record after state's response to presentencing order, which formally advised that state would not recommend death penalty, and before judge's remarks at end of sentencing hearing indicated that judge contemplated death as possible sentence or alerted parties that real issue at hearing was choice between life and death. It was reasonable for defense to assume that there was no reason to present argument or evidence directed at death penalty.

In *Walton v. Arizona*, 497 *U.S.* 639 (1990), a sentencing scheme did not violate Eighth and Fourteenth Amendments insofar as it placed on accused burden of proving by preponderance of evidence existence of mitigating circumstances or provided that sentencing court "shall impose" death penalty if one or more aggravating circumstances were found and mitigating circumstances were held insufficient to call for leniency.

In *Clemons v. Mississippi*, 494 *U.S.* 738 (1990), a capital murder defendant did not have an unqualified liberty interest under the due process clause to have the jury assess consequence of invalidation of one of the aggravating circumstances on which it had been instructed, as state court had authority under state law to decide for itself whether death sentence was to be affirmed and was not bound to vacate death sentence and to remand for a resentencing proceeding before a jury.

Saffle v. Parks, 494 *U.S.* 484 (1990). An instruction to avoid any influence of sympathy when imposing sentence in capital murder case did not run afoul of principle that Eighth and Fourteenth Amendments prohibit State from barring relevant mitigating evidence from being presented and considered during penalty phase of capital trial.

Penry v. Lynaugh, 492 U.S. 302 (1989). Special issue of future dangerousness in sentencing phase of capital

murder trial under Texas law did not provide vehicle for jury to give mitigating effect to defendant's evidence of mental retardation and childhood abuse, as required by Eighth and Fourteenth Amendment; even if retardation and abuse diminished defendant's blameworthiness, it at same time could indicate that there was probability that he would be dangerous in future. It is precisely because punishment should be directly related to personal culpability of defendant that jury must be allowed to consider and give effect to mitigating evidence relevant to defendant's character or record or circumstances of offense; rather than creating risk of unguided emotional response, full consideration of evidence that mitigates against death penalty is essential if jury is to give reasoned moral response to defendant's background, character, and crime, as required by the Eighth and Fourteenth Amendments.

Murray v. Giarratano, 492 *U.S.* 1 (1989), held that neither Eighth Amendment nor due process clause requires states to appoint counsel for indigent death row inmates seeking state post-conviction relief.

Lowenfield v. Phelps, 484 U.S. 231 (1988). Combination of polling of jury and supplemental instruction encouraging jury to reach verdict as to penalty in capital murder prosecution was not coercive in such a way as to deny defendant any constitutional right, including due process and rights under the Eighth Amendment, despite the fact that one purpose served by such a charge, avoiding the societal costs of retrial, was not present in that state law provided that if jury did not decide, court would impose sentence of life imprisonment, since State has interest in having jury express the conscience of the community on the ultimate question of life or death. The polling of the jury did not ask for numerical division of jurors on how they stood on the merits, but how they stood on the question of whether further deliberations might assist them in returning a verdict.

In *Summer v. Shuman,* 483 *U.S.* 66 (1987), neither Nevada's interest in deterrence or retribution justified the mandatory imposition of a death sentence for inmate convicted of murder who was serving a life term since a guided discretion sentencing procedure which provides for consideration of individualized factors fulfills these goals while protecting the defendant's constitutional rights. The mandatory capital sentencing provision precluded consideration of factors which may have called for a less severe sentence. *State v. Martini V*, 160 *N.J.* 248 (1999), held that the trial court's failure to inform the jury during penalty phase about a capital defendant's aggregate parole ineligibility, which could have exceeded 30 years, did not violate due process, where the State did not offer defendant's future dangerousness as an aggravating factor, nor could it have done so, and defense counsel effectively made argument that defendant was not likely to live long enough to be released after 30-year period of parole ineligibility.

State v. Loftin, 146 *N.J.* 295 (1996). Given the unique nature of the death penalty, the Eighth and Fourteenth Amendments require in nearly every capital case that sentencer not be precluded from considering, as a mitigating factor, any aspect of defendant's character or record and any circumstances of offense that defendant proffers as basis for sentence less than death. Due process is satisfied if either trial judge or defense counsel provides sentencing jury with relevant information about capital defendant's parole ineligibility.

In *State v. Harris*, 141 *N.J.* 525 (1995), the decision to seek death penalty after offering plea to life sentence was not abuse of prosecutorial discretion; prosecution's original decision to proceed with trial as capital case continued to be appropriate when defendant chose not to plead.

In State v. Martini I, 131 N.J. 176 (1993), defendant was not denied his rights to due process, equal protection and fair trial under Federal and State Constitutions when trial court informed prospective jurors in capital murder case that defendant was incarcerated in county jail, where instructions were designed to ensure that jurors would not draw negative inferences from defendant's status or from presence of sheriff's officers. The trial court did not deprive defendant of his due process right to reliable sentencing procedure or subject defendant to cruel and unusual punishment by not instructing jurors during penalty phase of capital murder trial that alternative to death sentence possibly included period of parole ineligibility in excess of 30 years, based on defendant's kidnapping conviction; defendant had not yet been sentenced for kidnapping, and defense counsel did not request such instruction.

State v. Biegenwald IV, 126 *N.J.* 1 (1991), held that exclusion for cause of a potential juror because he acknowledged that imposing death penalty would be "very difficult" did not deny defendant his right to due process and fair and impartial jury during resentencing in capital murder prosecution; potential juror indicated his

dissatisfaction with limited sentencing options available and could not say he could sentence person to death even in case of gruesome killing, providing basis for trial court's decision that his ability to act as juror would be substantially impaired. Application of "depravity of mind" statutory aggravating factor during sentencing phase of capital murder trial did not violate due process on grounds defendant was not given notice of conduct that could produce capital verdict; any notice requirement was fulfilled by use of "other murder conviction" aggravating factor.

In *Buchanan v. Kentucky*, 483 *U.S.* 402 (1987), defendant's right to an impartial jury was not infringed by

the "death qualification" of the jury in his joint trial with codefendant against whom the death penalty was sought. Kentucky had a legitimate interest in a joint trial where the conduct of defendants arose from the same events, and a single jury would obtain a more complete view of the conduct and could reach a decision as to both defendants in both phases and assess the appropriateness of the death penalty for codefendant.

C. Discovery and Disclosure

State v Russo, 333 N.J. Super. 119 (App. Div. 2000). Brady disclosure rule applies only to information of which the prosecution is actually or constructively aware. To establish a Brady violation, defendant must show that: (1) prosecution suppressed evidence; (2) evidence is favorable to the defense; and (3) evidence is material. "Exculpatory evidence" includes not only material that is directly exculpatory of a defendant, but also evidence that may impeach credibility of a state witness. Materiality standard is satisfied if defendant demonstrates that there is a reasonable probability that had evidence been disclosed to the defense, result of proceeding would have been different. Court must look to aggregate of evidence suppressed, rather than view in isolation the impact of each discrete item withheld. Issue of materiality is a mixed question of law and fact, and therefore, trial judge's conclusion is not entitled to same deference as judge's factual findings.

The seminal case regarding the prosecutor's duty to disclose evidence is *Brady v. Maryland*, 373 *U.S.* 83 (1963). There, the Court held that suppression by the prosecution of evidence favorable to an accused following a defense request, violates due process where the evidence is material either to guilt or to punishment, regardless of the prosecutor's good faith or bad faith. *See also Strickler v. Greene*, 527 *U.S.* 263 (1999); *Kyles v. Whitley*, 514 *U.S.*

419 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police"); *Pennsylvania v. Ritchie*, 480 *U.S.* 39 (1987); *United States v Agurs*, 427 *U.S.* 97 (1976) (the prosecutor's duty to disclose evidence favorable to defendant is applicable even though there has been no request by defendant); *United States v. Bagley*, 473 *U.S.* 667 (1985) (the prosecutor's duty to disclose evidence includes impeachment evidence). The duty to disclose such evidence extends to quasi-criminal proceedings. *State v. Garthe*, 145 *N.J.* 1 (1996).

The failure to provide exculpatory evidence will constitute reversible error only when such evidence is "material," that is, where its disclosure might have changed the verdict. *Pennsylvania v. Ritchie*, 480 *U.S.* 39 (1987); *United States v. Bagley*, 473 *U.S.* 667 (1985); *State v. Marshall III*, 148 *N.J.* 89, *cert. denied*, 522 *U.S.* 850 (1997) (due process clause does not require prosecutor to deliver his entire file to defense counsel); *State v. Carter*, 91 *N.J.* 86 (1982).

In *State v. Landano*, 271 *N.J. Super.* 1 (App. Div.), *certif. denied*, 137 *N.J.* 164 (1994), a murder defendant's due process rights were violated by state's failure to release evidence that its chief witness had committed numerous armed robberies similar to charged robbery, that witness and his closest associate committed earlier armed robbery in which gun used to kill police officer in charged robbery had been fired, that principal identification witness' earlier tentative identification of defendant became positive on day that he was questioned about bribing police officer, and that only eyewitness to shooting of officer, and another witness, both viewed defendant's photograph and rejected him as perpetrator.

In *State v. Rodriguez*, 262 *N.J. Super.* 564 (App. Div. 1993), defendant's due process rights were violated by codefendant's surprise incriminating testimony that was offered by codefendant to curry favor with State on another pending charge, in light of State's failure to inform defendant about pending charge which deprived defendant of opportunity to cross-examine codefendant on motivation for his testimony; codefendant's counsel admitted that he had not entered plea bargain on pending charge to avoid placing obligation on State to inform defendant of pending charge for use in cross-examination.

In *State v. VanRiper*, 250 *N.J. Super*. 451 (App. Div. 1991), a municipal judge's *sua sponte* amendment of complaint to charge careless driving, rather than

improper entry of intersection controlled by stop or yield sign, when it became apparent intersection was not controlled by sign, deprived driver of opportunity to prepare and defend against new charge, denied fundamental fairness, and violated due process.

Arizona v. Youngblood, 488 U.S. 51 (1988), held failure of police to preserve potentially useful evidence is not a denial of due process of law unless defendant can show bad faith on part of police; requiring defendant to show bad faith both limits extent of police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where interests of justice most clearly require it, that is, those cases in which police themselves by their conduct indicate that evidence could form basis for exonerating defendant. Failure of police to test semen samples with newer test device, in investigation of sexual assault of ten-year-old boy, did not violate due process clause.

California v. Trombetta, 467 *U.S.* 479 (1984), held evidence must possess an exculpatory value that was apparent before it was destroyed and defendant must be unable to obtain the evidence by other reasonably available means.

State v. Marshall, 123 N.J. 1 (1991), cert. denied, 507 U.S. 929 (1993), ruled that defendant's due process rights were not violated when State cut out a portion of tire from defendant's automobile in order to photograph the slit in the tire, despite defendant's claim that an intact tire could have been tested to determine if there were other leaks besides the slit, thus corroborating defendant's story that he had pulled off into secluded area where his wife was murdered because of a flat tire, where conclusions of state's expert were subjected to crossexamination and defendant's expert could have conducted an identical examination even though part of the tire had been excised.

See also State v. Dreher, 302 N.J. Super. 408 (App. Div.), certif. denied, 152 N.J. 10 (1997), cert. denied, 524 U.S. 943 (1998); State v. Montijo, 320 N.J. Super. 483 (Law Div. 1998); State v. Bohuk, 269 N.J. Super. 581 (App. Div.), certif. denied, 136 N.J. 29, cert. denied, 513 U.S. 865 (1994); State v. Gordon, 261 N.J. Super. 462 (App. Div. 1993); State v. Dohme, 223 N.J. Super. 485 (App. Div. 1988); State v. Colasurdo, 214 N.J. Super. 185 (App. Div. 1986); State v. Hollander, 201 N.J. Super. 453 (App. Div. 1985); State v. Casele, 198 N.J. Super. 462 (App. Div. 1985); State v. Casele, 176 N.J. Super. 484

(App. Div. 1980), *certif. denied*, 87 *N.J.* 316 (1981); *State v. Washington*, 165 *N.J. Super.* 149 (App. Div. 1979).

In the Matter of DeMarco, 224 *N.J. Super.* 105 (App. Div. 1988). Contemnor, an attorney, was not denied due process by the court's denial of his request to obtain more complete copies of transcripts of the underlying action in the summary contempt proceeding since contemnor and the judge were aware of the material facts and there was no reason offered why the limited portions of transcripts that might have been necessary could not have already been obtained.

In *State v. Cusik,* 219 *N.J. Super.* 452 (App. Div. 1987), defendant's due process rights were not infringed by the court's refusal to grant defendant access to Division of Youth and Family Services files regarding the eight-year-old victim of sexual assault where the court examined the files *in camera* and concluded that not only was the information available elsewhere but it was not determinative of any issue before the court.

State v. Nicastaro, 218 *N.J. Super.* 231 (Law Div. 1987). Where the police failed to have rules and regulations in place to provide a defendant who had submitted to a breathalyzer test with an opportunity to procure a timely and independent sample of his blood as he was statutorily entitled to do, evidence of the breathalyzer test results were suppressed because defendant was denied the only opportunity he had to defend against the charge.

D. Entrapment

N.J.S.A. 2C:2-12a(2) provides:

A public law enforcement official or a person engaged in cooperation with such an official or one acting as an agent of a public law enforcement official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such offense by...(2) Employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

State v. Florez, 134 *N.J.* 570 (1994), held that the entrapment defense can be based on a statute, *N.J.S.A.* 2C:2-12, or on standards of due process. The statutory entrapment defense is an issue that the jury must determine. The burden of proof is on the defendants.

Due process entrapment, on the other hand, is a legal determination which must be made by the trial court, not the jury. After a defendant has presented evidence supporting a due process entrapment defense, the State must then disprove this defense by "clear-andconvincing" evidence. The trial court should rely on the evidence adduced at trial and any additional hearings which might be necessary to decide the due process issue.

State v. Johnson, 127 N.J. 458 (1992) explained that due process entrapment concentrates on the "egregious or blatant wrongfulness" of the government's conduct. In New Jersey, the standards applicable to an entrapment defense will be based upon state, not federal constitutional law. The relevant factors to be considered are: (1) whether the government or the defendant was primarily responsible for creating and planning the crime, (2) whether the government or the defendant primarily controlled and directed the commission of the crime, (3) whether objectively viewed the methods used by the government to involve the defendant in the commission of the crime were unreasonable, and (4) whether the government had a legitimate law enforcement purpose in bringing about the crime. Here, the government's conduct of soliciting a police officer and his girlfriend into a crime involving theft and the sale of illegal drugs did not constitute due process entrapment because the original idea for the crime came from defendant without any involvement by the State.

In State v. Grubb, 319 N.J. Super. 407 (App. Div.), certif. denied, 161 N.J. 333 (1999), the trial court erroneously required defendant to prove due process entrapment as an affirmative defense, rather than properly requiring the prosecution to disprove entrapment by clear and convincing evidence. The court's misallocation of the burden of proof constituted plain error. Evaluation of the Johnson factors for establishing due process entrapment centers around two major recurrent concerns, 1) justification for police in targeting and investigating defendant as criminal suspect, and 2) nature and extent of government's actual involvement in bringing about the crime. Defendant, a police officer, was entrapped where police targeted defendant based on the mistaken belief of a steroid drug's illegal status, defendant lacked prior record, informant failed or lacked ability to provide police with specific information concerning previous allegedly illegal transactions with defendant, conversation on sole tape recording between informant and defendant was equivocal and defendant drove away from meeting without purchasing steroids.

See also State v. Fogarty, 128 N.J. 59 (1992) (statutory defense of entrapment does not apply to motor vehicle offense of driving while intoxicated); State v. Riccardi, 284 N.J. Super. 459 (App. Div. 1995) (fact that officer had a general telephone conversation with defendant prior to obtaining evidence of drug activity did not compel finding of entrapment); State v. Abdelnoor, 273 N.J. Super. 321 (App. Div. 1994) (State's limited role in cooperating with participant in scheme to import heroin did not constitute due process entrapment); State v. Soltys, 270 N.J. Super. 182 (App. Div. 1994) (While defendant, as accomplice or conspirator may be liable for conduct of another who commits substantive offense, until such act is committed, defendant can assert entrapment defense; however, there can be no justification for entrapment once plan is culminated).

E. Evidence

Montana v. Egelhoff, 518 U.S. 37 (1996) held that an accused does not have unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. Restriction on the right to present relevant evidence violates due process clause only where it offends some principle of justice so rooted in traditions and conscience of the people as to be ranked as fundamental. Defendant's right to have the jury consider evidence of his voluntary intoxication in determining whether he possessed mental state required for conviction was not "fundamental principle of justice," and therefore, Montana's statutory ban on consideration of such evidence, consistent with state interests in deterring crime, holding one responsible for consequences of his actions, and excluding misleading evidence, did not violate due process clause.

State v. Dimitrov, 325 *N.J. Super*. 506 (App. Div. 1999) explained that the demands of due process are never more seriously tested than when a defendant in a criminal case is, for any reason, denied an opportunity to present a witness whose testimony has ostensible exculpatory value. Here, the preclusion of a defense witness's testimony as the sanction for a discovery violation deprived defendant of a fair trial.

State v. Timmendequas, 161 *N.J.* 515 (1999) held that excluding a hearsay statement by defendant's housemate indicating knowledge of the murder before the defendant confessed did not violate the defendant's due process right to present evidence of third-party guilt; no evidence linked the housemate to the crime itself.

In *State v. Marshall III*, 148 *N.J.* 89, *cert. denied*, 522 *U.S.* 850 (1997), the State's plea agreement with murder codefendant, conditioned upon codefendant's truthful cooperation and truthful testimony, in which codefendant pled guilty to conspiracy to commit murder and escaped charge of capital murder, did not violate defendant's due process rights by providing codefendant with irresistible reasons to provide perjured testimony against defendant. The fact that codefendant may have been motivated to lie did not establish that codefendant in fact perjured himself concerning material aspects of his testimony, and State was not precluded from entering into plea agreement at issue.

State v. James, 144 N.J. 538 (1996), explained that an accused's right to due process of law protects him from introduction of identification testimony that is determined to be patently unreliable because it was the result of unduly suggestive police practices. Once out-ofcourt and in-court identification evidence is excluded as impermissibly suggestive, it is error to admit this evidence substantively under the "opening the door" doctrine if defendant sought to question carjacking victim about an earlier misidentification of another as the perpetrator or about his earlier description of the perpetrator. Forcing defendant to chose between his right to cross-examine the victim about the earlier misidentification and his due process right to exclusion of unreliable identification evidence was reversible error. The State was entitled to rebut evidence that victim identified another with subsequent retraction but not with suppressed identification testimony.

Estelle v. McGuire, 502 *U.S.* 62 (1991). Evidence that infant victim suffered from battered child syndrome was relevant in second-degree murder prosecution to establish intent, so that admission of such evidence did not violate due process, although defendant did not claim that victim died accidentally.

Payne v. Tennessee, 501 *U.S.* 808 (1991). In the event that victim impact evidence introduced at sentencing phase of criminal case is so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief.

State v. Baker, 270 N.J. Super. 55 (App. Div.), aff'd o.b., 138 N.J. 89 (1994), ruled that the mere fact that plea bargain involves illegal sentence does not deny due process of law to defendant against whom person receiving benefit of that bargain gives testimony.

Delaware v. Fensterer, 474 U.S. 15 (1985), held that the admissibility of expert opinion testimony does not violate due process, even when the expert is unable to recall the basis for his opinion. Since defendant crossexamined the expert concerning his lapse of memory and suggested to the jury the unreliability of the testimony, the trial court did not deprive defendant of due process by letting the jury decide the weight to be given the opinion testimony rather than excluding it.

South Dakota v. Neville, 459 U.S. 553 (1983) ruled the admission at trial of a drunk driver's refusal to take a blood-alcohol test does not violate due process. The absence of specific warnings that the test results could be used at trial could not be equated with the failure to give *Miranda* warnings, which involve basic Fifth Amendment protections. Since the police officer warned that failure to take the test could result in a suspension of driving privileges, defendant had sufficient notice concerning the adverse consequences of refusing to give consent. *See also State v. Quaid*, 172 N.J. Super. 533 (Law Div. 1980).

Ake v. Oklahoma, 470 U.S. 68 (1985). Due process requires that the State provide an indigent defendant with a psychiatrist to examine him and help prepare a defense, if the accused makes a preliminary showing that his insanity at the time of the crime is likely to be a significant factor at trial. An indigent defendant is entitled to similar assistance for the sentencing phase of a capital case if the State introduces psychiatric evidence concerning the defendant's future dangerousness.

Rock v. Arkansas, 483 *U.S.* 44 (1987), held defendant's due process right to be heard, which includes the right to testify in her own behalf, cannot arbitrarily be restricted by a state's evidentiary rule which excludes all post-hypnotic testimony.

Crane v. Kentucky, 476 *U.S.* 683 (1986), held the exclusion of evidence regarding the physical and psychological circumstances surrounding defendant's confession, which bore on the issues of voluntariness and credibility, deprived defendant of his due process right to a fair opportunity to present a defense.

State v. R.G.D., 108 *N.J.* 1 (1987), held in a waiver hearing to determine whether a juvenile is to be tried as an adult, the juvenile defendant was not entitled to the appointment of a psychiatrist. A due process right to an expert will accrue when the issue is guilt or innocence and loss of liberty is at stake, not in a waiver hearing where the issue is the proper court to hear the case.

State v. Sanchez, 224 *N.J. Super.* 231 (App. Div. 1988). When defendant's inculpatory admission was made in response to the officer's open-ended, general question directed at another, defendant's due process rights were not infringed entitling him to suppression of the admission. This was especially true since the setting was not custodial, the question was not related to arrest, it is not an essential part of the investigation and it did not call for an admission of guilt.

State v. Malik, 221 *N.J. Super.* 114 (App. Div. 1987) held that due process is not offended by the admission into evidence of the results of defendant's urinanalysis taken without a warrant where it was not unreasonable for the arresting officer to believe that the delay necessary to obtain a warrant would result in destruction of evidence.

State v. Barrett, 220 *N.J. Super.* 308 (Law Div. 1987), determined a defendant's due process rights are not infringed by the introduction of evidence on codefendant's direct case which has been excluded from the State's case-in-chief on the basis of a Fourth Amendment violation where the evidence was obtained through private action.

F. Prisoners' Rights

Williams v. Department of Corrections, 330 N.J. Super. 197 (App. Div. 2000). Prisoners are not entitled to the same due process rights as those guaranteed to persons charged with the commission of a crime. Although prisoners are not entitled to the same level of due process rights as free persons, they are not entirely stripped of constitutional protections once they enter prison. See also Russo v. New Jersey Dept. of Corrections, 324 N.J. Super. 576 (App. Div. 1999); Bryan v. Department of Corrections, 258 N.J. Super. (App. Div. 1992) (Process due inmate charged with serious infraction includes notice of charges and general notice of prison rules, offenses, sanctions and the like).

Blyther v. New Jersey Dept. of Corrections, 322 N.J. Super. 56 (App. Div.), certif. denied, 162 N.J. 196 (1999), explained that defining metes and bounds of inmate's due process protections requires intricate balancing of prison management concerns with inmate's liberty. Court must afford appropriate deference and flexibility to state officials trying to manage a volatile environment. Such flexibility is especially warranted in the fine-tuning of ordinary incidents of prison life. Under due process standard of Sandin v. Conner, 515 U.S. 472 (1995), administrative transfer of inmate to less amenable quarters with consequent loss of associational rights for nonpunitive purposes constitutes ordinary incident of prison sentence. Assignment of prisoner to nonpunitive Security Threat Group Management Unit (STGMU) program for leaders of violent gangs does not require protection of full panoply of due process rights attendant to criminal trials or even those rights attendant to prison disciplinary hearings.

See also Allah v. Department of Corrections, 326 N.J. Super. 543 (App. Div. 1999) (An inmate does not have a liberty interest in being assigned to the general prison population); Walker v. Department of Corrections, 324 N.J. Super. 109 (App. Div. 1999) (Contact-visit termination for drug infraction by inmate did not violate due process); Lorusso v. Pinchak, 305 N.J. Super. 117 (App. Div. 1997) (Prison work assignments are not liberty interests protected by Due Process Clause).

Edwards v. Balisok, 520 *U.S.* 641 (1997). While due process requirements for prison disciplinary hearings are in many respects less demanding than those for criminal prosecution, requirements are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence.

Muhammad v. Balicki, 327 N.J. Super. 369 (App. Div. 2000) held prisoner serving life sentence for firstdegree murder, who had once escaped and tried to escape, and who had been accorded reduced custody status under former version of regulation, had no liberty interest in being classified under that version, forfeited eligibility for reduced custody status only for prisoners actually serving sentence for escape, and was not denied due process when he was denied reduced custody status pursuant to amended regulation, which forfeited eligibility for reduced custody status based upon two instances of escape or attempted escape.

Auge v. New Jersey Dept. of Corrections, 327 N.J. Super. 256 (App. Div. 2000), determined a statutory 10% surcharge upon purchases from prison commissaries, which surcharge creates revenue to fund program for victims of violent crime, does not violate substantive due process; raising additional revenue to compensate victims of violent crimes is a legitimate legislative purpose, and a surcharge upon purchases of commodities by persons incarcerated for crimes is reasonably related to that purpose. See also Mourning v. Correctional Medical Services (CMS) of St. Louis, Mo., 300 N.J. Super. 213 (App. Div.), certif. denied, 151 N.J. 468 (1997) (Statute providing for inmate copayments for medical care did not violate inmates' due process rights; inmates could challenge imposition of copayments through grievance procedures).

Dougherty v. New Jersey State Parole Bd., 325 N.J. Super. 549 (App. Div. 1999), certif. denied, 163 N.J. 77 (2000). To ensure a parolee procedural due process, Parole Board must adhere to its rules regarding preliminary and final revocation hearings, rather than disregard them. Due process requires prompt preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that parolee has committed acts which would constitute violation of parole conditions, and also requires a hearing prior to final decision to revoke parole.

Curry v. New Jersey Parole Bd., 309 *N.J. Super.* 66 (App. Div. 1998), concluded penalizing defendant for exercising right to appeal, or threat of penalty for exercising that right, is a flagrant violation of Fourteenth Amendment.

Sandin v. Conner, 515 U.S. 472 (1995). States, by adopting prison regulations, may, under certain circumstances, create liberty interests which are protected by due process clause. Due process liberty interests created by prison regulations will be generally limited to freedom from restraint which, while not exceeding sentence in such unexpected manner as to give rise to protection by due process clause of its own force, nonetheless imposes atypical and significant hardship on inmate in relation to ordinary incidents of prison life.

Wakefield v. Pinchak, 289 *N.J. Super*. 566 (App. Div. 1996). In prison disciplinary proceeding, due process requires that prison's interest in confidentiality of evidence against inmate not be applied categorically or as absolute; need for confidentiality must be particularly evaluated in every case because, to extent charged inmate is denied access to any information bearing upon pending charges, limits are placed on his or her ability to defend against those charges.

Engel v. New Jersey Dept. of Corrections, 270 *N.J. Super*. 176 (App. Div. 1994). Disciplinary proceeding in which prisoner was found guilty of planning escape violated prisoner's limited procedural due process rights, where adjudication was based exclusively on information provided to prison investigators by single confidential informant, where there was no corroboration of informant's statements and where informant's allegations were presented to hearing officer in form of hearsay. In such circumstances, considerations of minimal due

process required that prisoner be allowed to take polygraph test.

Riggins v. Nevada, 504 U.S. 127 (1992), held due process allows mentally ill inmate to be treated involuntarily with antipsychotic drugs where there is a determination that the inmate is dangerous to himself and others and that the treatment is in his medical interest, but forcing antipsychotic drug on a convicted prisoner is impermissible absent a finding of overriding justification, and at least as much protection as also provided to persons detained for trial. Due process would have been satisfied in connection with administration of antipsychotic drugs to defendant during trial if state court had found that treatment was medically appropriate and, considering less intrusive alternatives, essential for the sake of defendant's own safety or the safety of others. See also Washington v. Harper, 494 U.S. 210 (1990).

Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989). In order to create a protected liberty interest in the prison context, state regulations must use explicitly mandatory language in connection with the establishment of specific substantive predicates to limit official discretion, and thereby require that a particular outcome be reached upon a finding that the relevant criteria have been met. Kentucky prison regulations containing a list of types of visitors who might be excluded from visitation did not give inmates a liberty interest protectable by the due process clause in receiving visitors.

State v. Howard, 110 *N.J.* 113 (1988) concluded temporary imprisonment in county jail pending admission to the ADTC to which he was sentenced as a repetitive sex offender with the resultant delay in treatment did not constitute a violation of defendant's due process rights.

Gerardo v. N.J. State Parole Bd., 221 *N.J. Super.* 442 (App. Div. 1987) held a five day delay in holding a parole recission hearing does not violate an inmate's due process rights where the delay was not unreasonable and the inmate was not prejudiced by the delay. Thus, the inmate was not entitled to automatic release when his hearing was not held within 60 days.

New Jersey State Parole Bd. v. Manson, 220 *N.J. Super.* 566 (App. Div. 1987). Neither defendant's due process rights nor principles of fundamental fairness were violated by the reconvening of a parole revocation hearing before the hearing officer since there had been no final determination and no adjudication on merits.

Artway v. Commissioner, Department of Corrections, 216 N.J. Super. 213 (App. Div. 1987). There was no denial of defendant-sex offender's due process rights when he was transferred back to ADTC after he had first been transferred from ADTC to the general prison population, because defendant's record had been reviewed prior to the decision and the transfer was not effected solely to avoid resentencing defendant pursuant to the new Code of Criminal Justice.

State v. Gillespie, 225 *N.J. Super.* 435 (Law Div. 1987), concluded an inmate's due process rights are not infringed by prison authorities by the seizure of sexually explicit photographs from an envelope addressed to the inmate, as the regulations involving such seizure were unambiguous and provided inmates with procedural safeguards.

According to *White v. Fauver*, 219 *N.J. Super.* 170 (App. Div. 1987), the reclassification of an inmate's custodial status as the result of change in policy rather than as a result of any activity on the inmate's part did not violate the inmate's due process rights. The inmate had no constitutionality protected "liberty interest" in his status as long as his status was within the sentence imposed and did not otherwise violate the Constitution. Nor did the inmate have a legitimate claim of entitlement to the reduced status such as to constitute a protectable right.

Matter of Commitment of J.L.J., 196 *N.J. Super.* 34 (App. Div. 1984). The preponderance of the evidence standard to justify the continuing commitment of former criminal defendants found not guilty by reason of insanity (NGI) does not violate the Constitution. *N.J.S.A.* 2C:4-8b(3). Relying on *Jones v. United States*, 463 *U.S.* 354 (1983), the court found no due process violation since the State retained the burden of demonstrating that the individual remained mentally ill and dangerous. The court also found no equal protection violation because NGIs, as a class, were distinguishable from those civilly committed, who were less likely to be dangerous than individuals who had been previously involved with the law. *Accord, In re A.L. U.*, 192 *N.J. Super.* 480 (App. Div. 1984).

G. Prosecutorial Conduct

In *Blackledge v. Perry*, 417 *U.S.* 21 (1974), the Supreme Court set forth the principle that due process bars the State from obtaining an indictment for more serious charges after a defendant has sought a trial *de novo* following the successful appeal of a lesser conviction. The

Supreme Court based the *Blackledge* holding on the possibility of prosecutorial vindictiveness and retaliation for a defendant's exercising the statutory right to a trial *de novo* after a successful appeal.

In *Thigpen v. Roberts*, 468 *U.S.* 27 (1984), a presumption of vindictiveness arose under the due process clause when the State prosecuted defendant for a felony after he successfully appealed misdemeanor traffic convictions based on the same incident. The Court analogized this case to a court's imposing a stiffer sentence, absent articulable reasons, after a successful appeal and reconviction. Relying on *Blackledge v. Perry*, the Court noted that the post-appeal felony indictment suggested that the State was retaliating against defendant for lawfully attacking the original conviction. (*See also*, **INDICTMENT**, this Digest).

In State v. Bauman, 298 N.J. Super. 176 (App. Div.), certif. denied, 150 N.J. 25 (1997), defendant failed to demonstrate any vindictiveness by the prosecutor in obtaining a superseding 39-count indictment after defendant failed to enter into plea bargain on 29 charges originally filed against him, where evidence supporting additional charges in the superseding indictment was presented to original grand jury, and it could be inferred that additional charges were omitted from original indictment through inadvertence. Mere fact that defendant refused to plead guilty and forced government to prove its case was insufficient to support presumption that subsequent changes in charging decision, which resulted in substitution of 39-count indictment for original 29-count indictment, was result of prosecutorial vindictiveness.

State v. Harris, 141 *N.J.* 525 (1995), held the decision to seek death penalty after offering plea to life sentence was not abuse of prosecutorial discretion; prosecution's original decision to proceed with trial as capital case continued to be appropriate when defendant chose not to plead.

State v. Long, 119 N.J. 439 (1990), concluded the presumption did not arise that prosecution's adding of four charges to superseding indictment was result of prosecutorial vindictiveness due to defendant's successful challenge to county's jury selection process, where the four new charges could not result in more severe punishment than those in original indictment.

In *State v. King,* 215 *N.J. Super.* 504 (App. Div. 1987), the state prosecution of defendant, who had been convicted on federal bank robbery charges, for crimes

arising from a police chase following that robbery did not constitute prosecutorial vindictiveness, as the events could be broken up into two separate occurrences.

In *State v. Antieri*, 186 *N.J. Super*. 20 (App. Div. 1982), *certif. denied*, 91 *N.J.* 546 (1982), a new trial following a mistrial because of the jury's inability to reach a verdict does not constitute prosecutorial vindictiveness when defendant was retried on the same charges. The prosecutor's action in obtaining a second, revised, indictment did not violate due process since it neither increased the number of offenses nor the potential penalty.

United States v. Goodwin, 457 U.S. 368 (1982). Increasing charges before trial against a defendant who exercises his right to a jury trial does not create a presumption of vindictiveness, in violation of due process. Defendant bears the burden of demonstrating that the prosecutor's decision to enhance the charges was motivated by defendant's election to seek a jury trial. The Court distinguished *Blackledge* because, in this case, the prosecutor filed more serious charges before trial, rather than after the post-trial exercise of legal rights.

It is improper for a prosecutor, without support in the evidence, to accuse a defendant of conspiring with his counsel to conceal and distort the truth. *State v. Bauman*, 298 *N.J. Super*. 176, 209 (App. Div.), *certif. denied*, 150 *N.J.* 25 (1997); *State v. Setzer*, 268 *N.J. Super*. 553, 565 (App. Div. 1993), *certif. denied*, 135 *N.J.* 468 (1994); *State v. Sherman*, 230 *N.J. Super*. 10, 19 (App. Div. 1988).

In *State v. Brown*, 118 *N.J.* 595 (1990), the Court held that evidence of pre-arrest silence, particularly in the absence of official interrogation, does not violate any right of the defendant involving self-incrimination. The probative worth of such pre-arrest silence should be considered objectively and neutrally, without added coloration attributable to any legal right in such silence.

Relying on *Brown* and *Jenkins v. Anderson*, 447 *U.S.* 231 (1980), the Appellate Division, in *State v. Dreher*, 302 *N.J. Super.* 408 (App. Div.), *certif. denied*, 152 *N.J.* 10 (1997), *cert. denied*, 524 *U.S.* 943 (1998), held that using prearrest silence to impeach a defendant does not violate either the Fifth Amendment prohibition against self-incrimination or the Fourteenth Amendment guarantee of due process. The court went further and held that where there is no governmental compulsion associated with defendant's prearrest silence, evidence of that silence is admissible for any relevant purposes

regardless of whether defendant takes the stand. This position is contrary to that taken by another Appellate Division panel in *State v. Marshall*, 260 *N.J. Super.* 591 (App. Div. 1992). That court held that a defendant's prearrest silence is inadmissible as substantive evidence of guilt if defendant does not testify, and the prosecutor's assertion during summation that defendant's failure to report a robbery he allegedly witnessed was evidence of his guilt constituted reversible error.

Greer v. Miller, 483 *U.S.* 756 (1987), held a prosecutor's single question to defendant at trial regarding defendant's silence at the time of his arrest did not constitute a violation of defendant's due process rights where the trial court immediately sustained defendant's objection to the question and no further questioning or argument on the matter was permitted. In addition, in light of the curative instruction and the particular facts in this case, the prosecutor's unsuccessful attempt to use defendant's silence did not in itself so unfairly infect the trial as to constitute a violation of due process for prosecutorial misconduct.

In *Wainwright v. Greenfield*, 474 *U.S.* 284 (1986), the prosecutor's use of defendant's post-*Miranda* warnings silence as evidence of sanity violated the Due Process Clause.

Darden v. Wainwright, 477 U.S. 168 (1986), reh. denied, 478 U.S. 1036 (1986), held offensive comments by the prosecutor on summation, while clearly undesirable, did not so infuse the proceedings with unfairness as to constitute a denial of due process. Since the comments neither manipulated nor misstated the evidence and were, for the most part, made in response to defendant's summation with the defense having an opportunity to rebut, defendant was not deprived of a fair trial. See also State v. Timmendequas, 161 N.J. 515 (1999).

Smith v. Phillips, 455 *U.S.* 209 (1982). The failure of the State to disclose to the defense that one juror had sought employment with the prosecutor's office did not constitute prosecutorial misconduct. To warrant reversal, defendant has the burden of demonstrating that the fairness of the trial was affected by the alleged prosecutorial misconduct. A post-trial hearing in this case failed to establish any bias on the juror's part so as to infringe upon defendant's due process right.

H. Sentencing and Parole

In a series of decisions, the United States Supreme Court has addressed the distinction between aspects of a crime which are elements and those which can be considered sentencing factors. Due process requires that an element be determined by a jury beyond a reasonable doubt. A sentencing factor can be found by the sentencing court based on a mere preponderance of the evidence. A statute attempting to denominate an element as a sentencing factor is unconstitutional since it violates a defendant's due process right to have the jury find each element of the offense beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). Apprendi was charged with a second degree offense which carried a prison term of 5 to 10 years. The statute provided for an enhanced sentence, however, if the sentencing judge found, by a preponderance of the evidence, that defendant committed the crime with a purpose to intimidate a person because of race. Here, the sentencing court invoked that provision and sentenced defendant to a 12 year term. The Court found the New Jersey statute to be unconstitutional. The Fifth and Fourteenth Amendments' Due Process Clauses and the Sixth Amendment's notice and jury trial guarantees require that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.

Jones v. United States, 526 U.S. 227 (1999), concluded provisions of the federal carjacking statute that established higher penalties to be imposed when offense resulted in serious bodily injury or death set forth additional elements of offense, not mere sentencing considerations. See also United States v. Gaudin, 515 U.S. 506 (1995) (issue of materiality in perjury indictment must be determined by jury, not judge, since it is an element of the crime).

Almendarez-Torres v. United States, 523 U.S. 224 (1998), held Congress' decision to treat recidivism, and in particular the fact that an alien is deported following his conviction of aggravated felony, merely as a sentencing factor upon alien's subsequent conviction of illegal reentry offense, rather than as an element of that offense, did not exceed due process or other constitutional limits on Congress' power to define elements of the crime.

In *Wisconsin v. Mitchell*, 508 *U.S.* 476 (1993), the Supreme Court upheld a Wisconsin statute which provided for an enhanced sentence if the criminal act (in this case an assault) is intentionally committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of the victim. The Court found that the conduct condemned by the statute was not protected by the First Amendment and that it was permissible for a state to enhance punishment for assaults motivated by a discriminatory motive more severely than other assaults.

McMillan v. Pennsylvania, 477 *U.S.* 79 (1986), explained due process does not demand that the State prove beyond a reasonable doubt that defendant had visible possession of a firearm in order to impose a statutorily mandated minimum sentence. Due process is satisfied by a preponderance of the evidence that defendant visibly possessed a firearm during commission of a crime.

In *State v. Weeks*, 107 *N.J.* 396 (1987), defendant was not denied his due process rights by the imposition of a Graves Act penalty factually based upon the use of a weapon during armed robbery as established by the jury verdict. Due process did not require that the issue of eligibility for the mandatory sentence be submitted separately to the jury.

State v. Oliver, 162 *N.J.* 580 (2000), held due process at sentencing typically requires that the government prove sentence-enhancing factors by a preponderance of the evidence. Due process requires a higher standard of proof when the sentence-enhancing factor to be proved would have an extremely disproportionate effect on sentence relative to the offense of conviction. The three strikes law, *N.J.S.A.* 2C:43-7.1a, provided defendant with sufficient procedural protections under the due process clause; given the necessary flexibility required by the penal code, the Supreme Court was satisfied that trial courts would exhibit under the preponderance standard "the degree of confidence our society thinks he [or she] should have in the correctness of [its] factual conclusions."

State v. Williams, 317 *N.J. Super.* 149 (App. Div.), *certif. denied*, 157 *N.J.* 647 (1999), held sentence of mandatory extended term of life imprisonment with a 25 year parole disqualifier, imposed on defendant convicted of armed robbery, did not violate due process, even though his codefendant, who pleaded guilty, received more lenient sentence, since codefendant provided meaningful cooperation with prosecution, which was

taken into account by sentencing court, and defendant was principal protagonist, repeatedly terrorizing elderly victims with gun, while his codefendant acted in sympathetic fashion to victims. According to *State v. Haliski*, 140 *N.J.* 1 (1995), the critical inquiry in assessing whether principles of due process and double jeopardy bar imposition of a sentence greater than the one initially imposed is whether defendant maintains a legitimate expectation of finality with respect to sentence. What was sought by defendant's appeal, rather than the relief, if any, obtained, defines what constitutes a legitimate expectation of finality.

State v. Orji, 277 *N.J. Super*. 582 (App. Div. 1994) concluded that due process normally requires hearing on both ability to pay restitution and time period for making payments. *See also State v. Jamiolkoski*, 272 *N.J. Super*. 326 (App. Div. 1994); *State v. Topping*, 248 *N.J. Super*. 86 (App. Div. 1991); *State v. Zoppi*, 196 *N.J. Super*. 596 (Law Div. 1984).

State v. Townsend, 222 *N.J. Super*. (App. Div. 1988), held that the Fourteenth Amendment precludes state court from automatically revoking probation and imposing prison term for nonpayment of restitution. Where, as here, however, defendant willfully failed to comply with the court's restitution order while on probation, defendant's due process rights were not violated by the court's failure to consider whether alternatives to imprisonment were appropriate upon revocation of defendant's probation.

In State v. Mastapeter, 290 N.J. Super. 56 (App. Div.), certif. denied, 146 N.J. 569 (1996), the sentencing court's refusal to give defendant "jail time" credits for time he participated on electronic monitoring wristlet program as condition of his pretrial release did not violate defendant's rights to equal protection and due process. See also State v. Grate, 311 N.J. Super. 544 (Law. Div. 1997), aff'd 311 N.J. Super. 456 (App. Div. 1998) (The granting of a credit for time served is discretionary, based on the general equities of the situation, and is not a matter of due process).

State v. Williams, 299 *N.J. Super*. 264 (App. Div. 1997). Because loss of liberty may occur, defendants charged with violating terms of their probation must be accorded their constitutional due process rights. Trial judge did not infringe upon probationer's due process rights when he sentenced probationer for violating terms of his probation based on his convictions for new offenses which had not yet run the gamut of appeal process; if new convictions were later reversed on appeal and those

convictions were sole basis for finding probation violation, probationer could then seek to renew challenge to his violation of probation. *See also State v. Lavoy*, 259 *N.J. Super*. (App. Div. 1992).

Nichols v. U.S., 511 *U.S.* 738 (1994). Consistent with Sixth and Fourteenth Amendments, uncounseled misdemeanor conviction, valid due to absence of imposition of prison term, is also valid when used to enhance punishment at subsequent conviction.

According to *Parke v. Raley*, 506 *U.S.* 20 (1992), at sentencing, due process does not require prosecution to prove validity of prior conviction by clear and convincing extra-record evidence where no transcript of prior proceeding exists.

Neither due process nor double jeopardy will prevent amendment of a sentence to correct any illegality therein. *State v. Baker*, 270 *N.J. Super.* 55, 72-73 (App. Div.), *aff'd o.b.*, 138 *N.J.* 89 (1994); *State v. Tavares*, 286 *N.J. Super.* 610, 617 (App. Div. 1996); *State v. Koch*, 256 *N.J. Super.* 207 (Law Div. 1991); *R.* 3:22-12.

According to *State v. LeFurge*, 222 *N.J. Super*. 92 (App. Div.), *certif. denied*, 111 *N.J.* 568 (1988), delay of defendant's sentencing for three and one-half years did not violate Sixth Amendment or due process rights of defendant. The charge on which defendant was convicted was dismissed post-conviction, State appealed, and appeal was held up for a lengthy period as result of significant delays on defendant's part, with no suggestion of purposeful stalling by government, appellate issues raised by State were substantial and resulted in reinstatement of defendant's conviction, defendant never claimed speedy trial right, his defense was not impaired, and no cognizable prejudice to him resulted.

North Carolina v. Pearce, 395 U.S. 711 (1969), held that due process prohibits imposing a more severe sentence to discourage defendants from exercising their statutory right to appeal. The Court ruled that a) whenever a court imposes a harsher sentence upon a defendant after a new trial, the reasons for the sentence must affirmatively appear on the record, and b) those reasons must be based on objective information concerning identifiable conduct by defendant occurring after the time of the original sentence.

State v. Ferguson, 273 N.J. Super. 486 (App. Div.), certif. denied, 138 N.J. 265 (1994), held that due process of law requires that vindictiveness against defendant who is successful on appeal play no part in his or her new

sentence, but more severe sentence upon defendant's reconviction after successful appeal is not automatically prohibited.

In *Texas v. McCullough*, 475 *U.S.* 134 (1986), the presumption of judicial vindictiveness did not apply, or was overcome, where the trial judge granted a post-trial motion for new trial on the ground of prosecutorial misconduct, but after defendant's reconviction imposed a more severe sentence, since the trial court based the harsher sentence on evidence not presented at the first trial concerning defendant's responsibility for the crime and his prior criminal history.

In *Wasman v. United States,* 468 *U.S.* 559 (1984), the Court held a defendant may receive an increased sentence, on reconviction after a successful appeal, if the sentencing court relies on a criminal conviction after the first proceeding. The sentencing court may consider intervening events between the two sentencing proceedings, such as a conviction, to justify an enhanced sentence, to sufficiently rebut the presumption of improper motive under the due process clause.

According to *State v. Pomo*, 95 *N.J.* 13 (1983), defendants who appeal municipal court sentences to the Superior Court, Law Division, risk increased sentences if they misrepresent their prior criminal record to the lower court. While the court repeated the general rule that defendants' appealing municipal court convictions to the Superior Court should not face sentence enhancement, policy considerations dictate that defendants may not lie to a municipal judge, with impunity, and then, on appeal, restrict the Law Division to the sentence imposed below.

In *State v. Heisler*, 192 *N.J. Super*. 586 (App. Div. 1984), the sentencing court violated due process by imposing a sentence five times greater than originally imposed, following defendant's successful appeal to correct an illegal sentence. The court cautioned that sentencing judges must articulate reasons to justify a substantially enhanced sentence, not mandated by law, after a defendant successfully challenges the initial illegal sentence.

State v Decher, 196 *N.J. Super.* 157 (Law Div. 1984). held due process and fundamental fairness mandate that a sentence imposed and served shall not be enhanced at a later date. This rule applies if the State mistakenly fails to notice and to count, for sentencing purposes on a subsequent offense, a prior offense on which defendant already has served the sentence.

State v. Howard, 110 *N.J.* 113 (1988), explained proof by a preponderance of the evidence that a defendant is a repetitive and compulsive offender is sufficient to satisfy due process when sentencing defendant to a term at the Adult Diagnostic and Treatment Center (ADTC). Since defendant's "liberty interest" implicated by the sentence is weak due to the fact an ADTC term is not necessarily longer than a prison term, but the state's interest in rehabilitation the sex offender is substantial, in balancing the countervailing interests due process will not demand proof beyond a reasonable doubt.

In *N.J. Parole Bd v. Byrne*, 93 *N.J.* 192 (1983), the Court, against a due process challenge, sustained the 1979 Parole Act's framework of classifying multiple offenders for parole eligibility purposes, but construed the statute to provide constitutionally required procedural guarantees. *N.J.S.A.* 30:4-123.5j and *N.J.S.A.* 30:4-123.53a, taken together, create a protected liberty interest under the due process clause as to when inmates are eligible for parole. The court enumerated procedural requirements that must be followed by the prosecutor or sentencing judge if either seeks to delay an offender's parole release date because the punitive aspects of the sentence have not been fulfilled.

State v. Bianco, 103 N.J. 383 (1986), held defendant's due process rights are not infringed by the Appellate Division's excessive sentence oral argument program. The fact that no briefs are submitted, no transcription of the proceeding is made, (it is tape recorded, R. 2:9-11), and no formal order is issued, does not constitute a due process violation since the court is provided with all relevant documents from below, hears oral argument, confers and then issues orders with a brief statement of reasons, thereby providing defendants with a meaningful opportunity to present their cases.

I. Void for Vagueness and Overbreadth

State v Allen, 334 *N.J. Super*. 133 (Law. Div. 2000). Whether law is unconstitutional on grounds of vagueness is essentially a procedural due process concept grounded in notions of fair play; vagueness test demands that a law be sufficiently clear and precise so that people are given adequate warning of the law's reach, and that law enforcement is not so uncertain as to become arbitrary. Where the prohibited behavior is not susceptible to a precise definition, the vagueness doctrine should not lead to legislative paralysis. When interpreting criminal

statutes, court looks to common definitions, the context of the words that they are associated with in the statute, and the intent of the Legislature. Absent any explicit indications of special meanings, the words used in the statute carry their ordinary and well understood meanings.

Bias crimes statutes, to extent they enhanced degree of assault and harassment and enhanced punishment for other offenses committed against victim with "handicap," but did not define that term, were not unconstitutionally vague on their face or as applied to crimes committed against victim who was learning disabled, of low I.Q., exceptionally short, deaf in one ear, speech impaired, and who had a pin hole in his heart.

The void for vagueness doctrine rests on procedural due process principles and examines whether a law is sufficiently clear so that citizens have adequate notice of the proscribed conduct and law enforcement officers have adequate guidelines to prevent arbitrary and discriminatory enforcement.

The overbreadth doctrine rests on principles of substantive due process and examines whether the reach of the law extends farther than permitted or necessary to fulfill the State's interest, *i.e.*, does the statute inhibit constitutionally protected conduct as well as unprotected conduct. Vagueness and overbreadth are often both argued in the same cases.

United States v. Lanier, 520 U.S. 259 (1997), explained that there are three related manifestations of the "fair warning requirement": first, the "vagueness doctrine" bars enforcement of a statute which either forbids or requires doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application; second, the "canon of strict construction of criminal statutes," or "rule of lenity," ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered; and third, although clarity at the requisite level may be supplied by a judicial gloss on otherwise uncertain statute, due process bars courts from applying novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that defendant's conduct was criminal.

City of Chicago v. Morales, 527 U.S. 41 (1999), held that for due process purposes, an ordinance that required a police officer, upon observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse and remove themselves from the area, and made failure to obey such an order promptly a violation, was unconstitutionally vague in failing to provide fair notice of prohibited conduct; ordinance failed to distinguish between innocent loitering and conduct threatening harm, and it was unclear what was required in order to comply with an order to disperse from the area. See also Maynard v. Cartwright, 486 U.S. 356 (1988); City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 (1982); Allen v. Bordentown, 216 N.J. Super. 557 (Law Div. 1987).

State, Tp. of Pennsauken v. Schad, 160 N.J. 156 (1999), held vagueness in any regulation creates a denial of due process because of failure to provide notice and warning to individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution. See also Binkowski v. State, 322 N.J. Super. 359 (App. Div. 1999).

In *State v. Saunders*, 302 *N.J. Super.* 509 (App. Div. 1997), the Appellate Division rejected defendant's claim that the stalking statute, *N.J.S.A.* 2C:12-10, as it stood prior to its amendment in June 1996 was vague and overbroad. Any vagueness was mitigated by a scienter requirement. The statute did not reach a substantial amount of constitutionally protected conduct and therefore was not overbroad, especially as applied to a defendant who repeatedly watched his victim from a number of different locations. The court noted that the statute as amended appeared to be clearer regarding the conduct prohibited.

According to *State v. Warriner*, 322 *N.J. Super*. 401 (App. Div. 1999), a criminal statute listing "M1 carbine type" as an illegal assault weapon was not unconstitutionally vague on its face; the term "M1 carbine" had an essential meaning, that is, the basic design of a weapon. The term "type" simply gave notice that a firearm with that basic design would qualify as an assault weapon.

State v. Rogers, 308 N.J. Super. 59 (App. Div.), certif. denied, 156 N.J. 385 (1998), held a statute criminalizing the unauthorized practice of law for a benefit was not facially vague, since term "practice of law" had been defined by courts in some contexts, and, therefore, statute proscribed conduct with sufficient clarity.

State v. Marvin J. Friedman, 304 *N.J. Super.* 1 (App. Div. 1997), concluded a municipal anti-noise ordinance was unconstitutionally vague as applied to complaints alleging that defendant's dog's barking awakened their neighbors on eight occasions.

In *Guidi v. City of Atlantic City*, 286 *N.J. Super.* 243 (App. Div. 1996), the court found unconstitutional a municipal ordinance prohibiting "any matter, thing, condition or act which is or may become an annoyance, or interfere with the comfort or general well-being of the inhabitants of this municipality," as void for vagueness and overbroad. A citizen had been charged for feeding birds resulting in heavy accumulation of bird feces on building roof tops and vehicles on residential streets.

In *State v. Piemontese*, 282 *N.J. Super.* 307 (App. Div. 1995), the court reversed defendant's conviction for violating a municipal ordinance against allowing lawns hedges and bushes to become "overgrown and unsightly," finding the ordinance to be unconstitution-ally vague and overbroad. The ordinance did not give reasonable notice to those who wished to avoid its penalties, nor did it permit the enforcement officer acting in good faith to be able to point to objective facts that would lead a reasonable person to realize that his or her conduct was a violation of the ordinance.

State v. Maldonado, 137 *N.J.* 536 (1994), explained the constitutional due process limitations on strict liability criminal statutes apply when underlying conduct is so passive, so unworthy of blame, that persons violating proscription would have no notice that they were breaking the law. Illegal drug distribution did not fit that categorization and statute imposing strict liability on manufacturers and distributors of narcotics when a death resulted was constitutional. *See also State v. Kittrell*, 145 *N.J.* 112 (1996).

State v. Alexander, 136 *N.J.* 563 (1994), explained that the Court's obligation properly to instruct and guide jury includes duty to clarify statutory language that prescribes elements of crime when clarification is essential to ensure that jury will fully understand and actually find those elements in determining defendant's guilt.

State v. Baez, 238 *N.J. Super*. 93 (App. Div.), *certif. denied*, 121 *N.J.* 644 (1990), held that principles of due process require that penal statutes be strictly construed to

protect defendant from incriminating interpretation if nonincriminating interpretation is also reasonable.

Osborne v. Ohio, 495 U.S. 103 (1990), held the Ohio Supreme Court's narrowing construction of child pornography statute in order to avoid overbreadth and its application of that construction when evaluating defendant's overbreadth challenge complied with due process; defendant possessed photographs of adolescent boys in sexually explicit situations and had notice of criminality of his conduct. Even if construed to obviate overbreadth, applying statute to pending cases might be barred by due process clause.

State v. Ogar, 229 *N.J. Super*. 459 (App. Div. 1989), determined the provision prohibiting distribution and possession of drugs within 1,000 feet of school property or school bus was not unconstitutionally vague on its face, and did not violate due process or equal protection as applied. *See also State v. Brown*, 227 *N.J. Super*. 429 (Law Div. 1988); *State v. Morales*, 224 *N.J. Super*. 72 (Law Div. 1987).

State v. Cameron, 100 *N.J.* 586 (1985), held a zoning ordinance that excluded churches and other places of worship from a township's residential area was void for vagueness and impermissibly violated the rights of a minister who held services in his home on a temporary basis. The degree of vagueness the Constitution tolerates partly depends on the nature of the contested enactment. Due process demanded utmost clarity when the activity prohibited trenches on First Amendment rights and the statute, as enforced, is penal and/or quasi-criminal.

See State v. Lee, 96 N.J. 156 (1984).

State v. Wright, 96 N.J. 170 (1984), app. dism. 469 U.S. 1146 (1985). The Court rejected the claim that N.J.S.A. 2C:39-5d, prohibiting possession of a weapon other than certain firearms "under circumstances not manifestly appropriate for such lawful uses as it may have," was unconstitutionally vague. The language was clear enough that a reasonable person had a sufficient degree of certainty as to the proscribed conduct. The court also rejected an overbreadth challenge, holding that this doctrine applied to First Amendment rights, while the statute reached only the unlawful, knowing possession of a weapon in circumstances not manifestly appropriate for the object's lawful use.

State v. Jones, 198 *N.J. Super.* 533 (App. Div. 1985), relying on *State v. Lee, supra,* upheld against a vagueness challenge the constitutionality of *N.J.S.A.* 2C:39-7, the

former felon possession statute. The statute was sufficiently precise to apprise ordinary citizens of the proscribed conduct and to preclude arbitrary and discriminatory enforcement by law enforcement officers. The overbreadth doctrine was inapplicable because the statute did not implicate any First Amendment rights. *Jones,* in effect, overruled *State v. Williams,* 194 *N.J.* 590 (Law Div. 1984), which held that the former-felon possession statute was unconstitutionally overbroad, insofar as it proscribed the mere possession, without more, of a weapon.

According to *State v. Gately,* 204 *N.J. Super.* 332 (App. Div. 1985), a reviewing court may save the constitutionality of a statute by avoiding a construction that renders a penal law vague and indefinite. Under this principle, the court determined that a defendant could not be convicted of refusing to submit to a breathalyzer test, *N.J.S.A.* 39:4-50.2, absent proof that he actually operated the motor vehicle.

State v Sharkey, 204 *N.J. Super.* 192 (App. Div. 1985), upheld the constitutionality of the "look-alike drug" statute, *N.J.S.A.* 24:21-19.1 *et seq.* The statute was held to be readily understandable and phrased in a plain and easily construed manner, and reasonably related to a proper legislative purpose.

In State In the Interest of H.D., 206 N.J. Super. 58 (App. Div. 1985), the "offensive language statute," *N.J.S.A.* 2C:33-2b, was found to be unconstitutionally overbroad. The court held that this statute did not significantly differ from the predecessor statute, *N.J.S.A.* 2A:170-29(1), which similarly was invalidated in *State v.* Rosenfeld, 62 N.J. 594 (1973). The court concluded that there is no statutory authority for prosecutions based upon the public use of coarse or abusive language which does not go beyond offending the sensibilities of a listener.

State v. Roth, 95 *N.J.* 334 (1984), concluded the state's right to appeal sentences under *N.J.S.A.* 2C:44-1f(2) was not unconstitutionally vague, since the penal code's sentencing provisions set forth sufficiently clear standards to foster more uniform sentences and did not offend principles of fundamental fairness.

According to *State v. Morales,* 224 *N.J. Super.* 72 (Law Div. 1987), the statute which made the distribution or possession with intended distribution of controlled dangerous substances within 1,000 feet of any school property of school bus a crime was not overbroad since the police power clearly encompasses the statutorily

expressed goal of protecting children. Additionally, defendant's due process rights were not violated despite the fact that the statute did not require knowledge of the proximity of the school. *Accord, State v. Brown, 227 N.J. Super.* 429 (Law Div. 1988).

State v. Passante, 225 N.J. Super. 439 (Law Div. 1987), held the New Jersey RICO statute was not void for vagueness because the statute employed the generic term "gambling" to denote types of gambling activity. When the conduct prohibited is not fairly susceptible of definition in other than general terms, there is no constitutional impediment to use of the general language. It was also not unconstitutionally overbroad because it only provided enhanced criminal and civil sanctions for conduct already prohibited by federal and state law.

In *State v. Harris*, 218 *N.J. Super*. 251 (Law Div. 1987), the court determined that *N.J.S.A.* 2C:39-1, which defines weapons, was unconstitutionally vague as applied to stun guns prior to a 1985 amendment which specifically included them. The statute did not give fair notice that the guns were illegal as the language was unclear whether stun guns were included within the definition of "weapons."

In *Allen v. Bordentown*, 216 *N.J. Super.* 557 (Law Div. 1987),a local curfew ordinance which prohibited all minors from being in a public place between 9:00 p.m. and 6:00 a.m. every day with only severely limited exceptions was held to be overbroad. The court found that the ordinance contained unnecessarily sweeping restrictions of the fundamental liberties of both adults and children, including freedom of speech, assembly and religion and the right to travel. The purpose of the ordinance could have been achieved by less drastic means which would not have infringed constitutional rights.

Tri-State Metro Naturists v. Township of Lower, 219 *N.J. Super.* 99 (Law Div. 1986), determined that a municipal ordinance which banned public nudity was not void for vagueness where the language of the ordinance was specific as to nudity although arguably vague with respect to "indecent or lewd dress."

State v. Curtis, 195 *N.J. Super*. 354 (App. Div. 1984), concluded that the manslaughter statute was not unconstitutionally overbroad. The court noted that overbreadth attacks involve First Amendment rights, and that the statute did not reach any constitutionally protected conduct.

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), explained that a party may not facially challenge an allegedly overbroad statute on behalf of third parties whose conduct may or may not be constitutionally protected, unless it shows that the statute will have a real and substantial effect on the free speech rights of those persons not before the court.

In Town Tobacconist v. Kimmelman, 94 N.J. 85 (1983), New Jersey's Drug Paraphernalia Act, N.J.S.A. 24:21-46 to 53, withstood a constitutional challenge from retailers of drug paraphernalia ("head shop" operators), claiming the statute was unconstitutionally overbroad and void for vagueness. Rejecting the overbreadth contention, the court said that the doctrine did not apply to commercial speech and that the head shop operators lacked standing to assert the commercial speech rights of others. Applying statutory construction principles, the court clarified the definition of drug paraphernalia, and interpreted the retailer's knowledge requirement. The statute then was determined not to be facially void, since retailers could conform their conduct to the statute's proscriptions, and law enforcement officers had sufficient guidelines to preclude arbitrary and discriminatory enforcement.

J. Miscellaneous

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Miranda's warningbased approach to determining the admissibility of a statement made by an accused during custodial interrogation is constitutionally based, and can not be, in effect, overruled by legislative act. There are two constitutional bases for the requirement that a confession must be voluntary in order to be admitted into evidence, the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.

U.S. v. Martinez-Salazar, 120 S.Ct. 774 (2000), held defendant's due process rights were not violated when he exercised peremptory challenge to remove a potential juror after the district court erroneously refused to dismiss the potential juror for cause. Defendant received precisely what federal law provided when he was accorded the exact number of challenges allowed in his case under rule governing peremptory challenges. Although the peremptory challenge plays an important role in reinforcing a defendant's constitutional right to trial by an impartial jury, such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. *See also Ross v. Oklahoma*, 487 *U.S.* 81 (1988).

Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed. 2d 736 (2000). As a practical matter, the equal protection and due process clauses of the Fourteenth Amendment largely converge to require that a state's procedure affords adequate and effective appellate review to indigent defendants, and a state's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal. *Bousley v. United States*, 523 U.S. 614 (1998) explained that a plea does not qualify as "intelligent" unless a criminal defendant first receives real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process. See also State v. Garcia, 320 N.J. Super. 332 (App. Div. 1999).

State v. P.Z, 152 *N.J.* 86 (1997). If defendant's statement was product of essentially free and unconstrained choice, statement was made "voluntarily" and may be used against defendant, but if defendant's will was overborne and his capacity for self-determination critically impaired, use of statement offends due process; issue can be resolved only after assessment of totality of circumstances surrounding statement. Test for voluntariness of statement is barred by due process, is much like test used to determine whether defendant is in custody under Fifth Amendment, except that voluntariness review includes consideration of both characteristics of accused and details of interrogation.

State v. Bisaccia, 319 N.J. Super. 1 (App. Div. 1999), held "due process" does not require a new trial every time a juror has been placed in a potentially compromising situation, but rather, a jury capable and willing to decide the case solely on the evidence before it and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. See also Bracy v. Gramley, 520 U.S. 899 (1997); State v. Dreher, 302 N.J. Super. 408 (App. Div.), certif. denied, 152 N.J. 10 (1997), cert. denied, 524 U.S. 943 (1998).

State v. McCague, 314 *N.J. Super.* 254 (App. Div.), *certif. denied*, 157 *N.J.* 542 (1998). Mens rea is not a constitutional prerequisite to enforcement of criminal statute as long as fundamental justice is not offended such as when the conduct proscribed was so blameless as to trap the unknowing or unwary. Prosecution of members of nonprofit organization operating needle exchange

program, for furnishing or giving hypodermic needle or syringe to another, did not violate due process, even if police chief did not threaten organization members with arrest and told newspaper that program's goals were admirable; whatever the prior statements of police chief, members were not immune to enforcement of the law, and prosecution for clear statutory violation could not in any sense be considered violative of fundamental fairness or shocking to a sense of justice.

State v. Burgess, 154 *N.J.* 181 (1998), held proper explanation of elements of crime is crucial to satisfaction of defendant's due process rights.

State v. Ortisi, 308 N.J. Super. 573 (App. Div.), certif. denied, 156 N.J. 383 (1998). Allowing trial to proceed in pro se defendant's absence without requiring standby counsel to defend did not deny defendant effective assistance of counsel, meaningful trial by jury, or due process of law; defendant had voluntarily absented himself from trial and instructed standby counsel only to take notes, and, since standby counsel objected when he believed it was appropriate and made requests on defendant's behalf despite this admonition and judge protected defendant's rights by objecting himself to improper questions and evidence, integrity of trial process was preserved.

United States v. Gaudin, 515 U.S. 506 (1995). Due process clause and Sixth Amendment right to jury trial required trial judge to submit to jury question of materiality of defendant's allegedly false statements in matter within jurisdiction of federal agency; defendant had right to demand that jury find him guilty of all elements of crime, and materiality was element of crime. *See also State v. Anderson*, 127 *N.J.* 191 (1992).

State v. Mello, 297 *N.J. Super.* 452 (App. Div. 1997)., held that although the United States Constitution does not impose on states the requirement of indictment by grand jury, Sixth Amendment guarantees right to be informed of nature and cause of accusation and due process clause requires reasonable notice and information of specific charge. *See also Application of Hart*, 265 *N.J. Super.* 285 (Law Div. 1993).

State v. Dishon, 297 *N.J. Super*. 254 (App. Div.), *certif. denied*, 149 *N.J.* 144 (1997), opined defendant has constitutional right to be present at every critical stage of his or her trial, including the impaneling of the jury; right to be present is derived from the Sixth Amendment confrontation clause, the due process clause of the Fifth

and Fourteenth Amendments, and the common-law privilege of presence. *See also State v. Hudson*, 119 *N.J.* 165 (1990); *State v. Fann*, 239 *N.J. Super*. 507 (Law Div. 1990).

State v. Corpi, 297 N.J. Super. 86 (App. Div.), certif. denied, 149 N.J. 407 (1997), held conditional plea agreement whereby prosecutor agreed to lower recommended custodial exposure if defendant paid restitution to victims under all counts did not deny defendant due process, though defendant contended he received greater sentence because of his nonpayment of restitution, where it was defendant who first advanced idea of restitution, he acknowledged at retraxit proceeding that greater sentence could be imposed absent restitution, and possibility of restitution never matured to point that it could be considered at sentencing.

In *State v. Marshall III*, 148 *N.J.* 89, *cert. denied*, 522 *U.S.* 850 (1997), refusal of law enforcement personnel to be interviewed by defense counsel seeking evidence to support murder defendant's post-conviction relief (PCR) claims did not violate defendant's rights to due process, confrontation of witnesses, or fair PCR hearing.

State v. Marsh, 290 *N.J. Super*: 663 (App. Div. 1996) decided that the due process clause did not require that State fulfill police officer's promise to dismiss drunk driving summons if driver cooperated in unrelated drug investigation, even if driver detrimentally relied on promise by cooperating in investigation; defendant suffered no constitutional or legal prejudice with regard to his pending trial as consequence of municipal prosecutor's refusal to carry out officer's promise. *See also State v. Riley*, 242 *N.J. Super*. 113 (App. Div. 1990) (Due process requires that government fulfill its immunity agreements when defendant relies on agreement to his detriment and cooperates with government).

In *State In the Interest of J.G.*, 151 *N.J.* 565 (1997), the Court upheld the constitutionality of *N.J.S.A.* 2A:4A-43.1 and *N.J.S.A.* 2C:43-2.2, involving the testing for AIDS and HIV of defendants charged with aggravated sexual assault and sexual assault. An exception to the Warrant Clause of Fourth Amendment may apply when "special needs," beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, and though generally there must be some showing of individualized suspicion, in appropriate cases even this requirement may be unnecessary where special needs are found. Applying the special needs analysis to this situation, the Court held

that the testing of accused or convicted sex offenders for HIV are warranted by special circumstances. Prior to testing, there must be a showing of probable cause to believe that there had been a possible transfer of bodily fluids. Further, the test results may not be used against an accused sex offender in a criminal prosecution. With those procedural safeguards, the statutes do not violate a defendant's due process rights.

In *State v. Robinson*, 289 *N.J. Super*. 447 (App. Div.), *certif. denied*, 146 *N.J.* 497 (1996), the trial court's failure to define specific offense defendant intended to commit after he entered building did not violate defendant's due process rights so as to constitute plain error in burglary prosecution in which defense essentially asserted misidentification of perpetrator, absent any reasonable basis upon which jury might have convicted defendant for entering dwelling with purpose to engage in lawful activity; defendant was observed late at night, hanging out of window in dwelling that had been forced open, and was stranger to dwelling's occupants.

State v. Damon, 286 *N.J. Super*. 492 (App. Div. 1996) held requiring defendant to remain handcuffed in presence of jury denied defendant his right to fair trial, in violation of due process, even though there was a shortage of security personnel during trial, and even though jury later heard testimony that defendant was incarcerated.

In *State v. Abronski*, 281 *N.J. Super.* 390 (App. Div. 1995), *certif. denied*, 145 *N.J.* 265 (1996), defendant was not deprived of due process, even though court stenographer lost notes of one day of suppression hearing regarding defendant's inculpatory statements, where defendant did not claim prejudice from loss of his or witness' testimony, but claimed prejudice as a result of trial judge's findings. *See also State v. Izaguirre*, 272 *N.J. Super.* 51 (App. Div.), *certif. denied*, 137 *N.J.* 167 (1994) (Loss of stenographic notes of entire trial did not violate due process, where record was promptly reconstructed).

In *Albright v. Oliver*, 510 *U.S.* 266 (1994), arrestee's incarceration, following his arrest pursuant to warrant subsequently found to have been obtained without probable cause, did not violate his substantive due process rights; violation, if any, implicated Fourth Amendment.

Withrow v. Williams, 507 *U.S.* 680 (1993). Totality of circumstances approach is used when addressing claim that introduction of involuntary confession has violated due process. *See also State v. Jackson*, 272 *N.J. Super.* 543 (App. Div. 1994), *certif. denied*, 138 *N.J.* 265 (1995).

Herrera v. Collins, 506 *U.S.* 390 (1993). Refusal of Texas, which requires new trial motion based on newly discovered evidence to be made within 30 days of imposition or suspension of sentence, to entertain murder defendant's new evidence claim eight years after his conviction did not violate principle of fundamental fairness, and thus did not violate due process, given Constitution's silence on subject of new trials, historical availability of new trials based on newly discovered evidence, federal criminal procedure rule imposing time limit for filing new trial motions based on newly discovered evidence, and contemporary practice of States, only nine of which had no time limits for filing of such motions.

Doggett v. United States, 505 U.S. 647 (1992) explained the effect of delay between formal accusation and trial on adjudicative accuracy is not exclusively matter for consideration under Due Process Clause; rather, once triggered by arrest, indictment, or other official accusation, speedy trial inquiry must weigh effect of delay on accused's defense just as it has to weigh any other form of recognized prejudice. Defendant may invoke due process to challenge delay both before and after official accusation. See also State v. Alexander, 310 N.J. Super. 348 (App. Div.), certif. denied, 156 N.J. 408 (1999) (Actual prejudice, not possible or presumed prejudice, is required to support claim that preindictment delay violated defendant's due process rights); State v. Little, 296 N.J. Super. 573 (App. Div.), certif. denied, 150 N.J. 25 (1997) (same); State v. Aguirre, 287 N.J. Super. 128 (App. Div.), certif. denied, 145 N.J. 585 (1996).

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) held absent exigent circumstances, the Due Process Clause of the United States Constitution requires the government in a civil forfeiture proceeding to afford notice and a meaningful opportunity to be heard before seizing real property.

State v. Bzura, 261 N.J. Super. 602 (App. Div.), certif. denied, 133 N.J. 433 (1993). For purposes of determining whether jury verdict is unanimous when defendant is alleged to have committed separate acts, any one of which could constitute offense charged, when applying test of whether statute recognizes that single offense may be committed by different means and that those means are not so disparate as to exemplify two inherently different offenses, historical and contemporary acceptance of state's definition of offense and verdict practice is strong indication that they do not offend due process. State v. Sette, 259 N.J. Super. 156 (App. Div.), certif. denied, 130 N.J. 597 (1992) held it does not violate due process to require a defendant to bear the burden of proving a justification or excuse defense, so long as the jury considers the same evidence as it bears on the basic elements of the crime; if evidence of an excuse such as insanity is inadequate to meet a defendant's burden of proof to establish a complete defense, jury must be permitted to also consider that evidence in deciding whether the State has proved the elements of the charge.

In *State v. Paige*, 256 *N.J. Super*. 362 (App. Div. 1992), the trial court's failure to *sua sponte* dismiss an indictment after second hung jury did not violate due process in prosecution for first-degree robbery and aggravated assault; eyewitness who could identify defendant surfaced after second trial, although eyewitness did not testify at third trial, and outcome of deliberations of hung juries was unknown.

State v. Kamienski, 254 N.J. Super. 75 (App. Div.), certif. denied, 130 N.J. 18 (1992), held voir dire of prospective jurors without them being sequestered did not deprive defendant of due process in criminal case, even though prospective jurors' views were expressed from jury box and were heard by others, and even though better practice would have been to have prospective juror privately inform judge and counsel of any personal reason for not being fair and impartial; trial judge hammered home point that verdict had to be based on evidence, and the allegedly damaging responses related to experiences of family members with drug problems.

State v. Falcone, 254 *N.J. Super*. 492 (Law Div. 1992) determined defendant's due process rights were violated when court permitted defendant to waive counsel and proceed *pro se* to try case, despite his limited facility in use of English language, then fined defendant, and incarcerated him for ten days and suspended his license beyond allowable maximum for driving with suspended license.

Griffin v. United States, 502 *U.S.* 46 (1991) held due process clause does not require that in federal prosecution, general guilty verdict on multiple-object conspiracy charge must be set aside if evidence is inadequate to support conviction as to one object.

According to *Schad v. Arizona*, 501 *U.S.* 624 (1991), conviction of first-degree murder under instructions that did not require jury to agree on one of alternative theories of premeditated and felony-murder did not deny due process. Criminal defendant's right to unanimous

verdict is more accurately characterized as due process right than as one under the Sixth Amendment. *See also State v. Parker,* 124 *N.J.* 628 (1991).

In *Mu'Min v. Virginia*, 500 *U.S.* 415 (1991), the trial judge's refusal to question prospective jurors about specific contents of news reports to which they had been exposed did not violate defendant's Sixth Amendment right to an impartial jury or his right to due process under the Fourteenth Amendment, where court asked entire venire of jurors four separate questions about effect on them of pretrial publicity or information obtained by other means, and court then conducted further voir dire in panels of four, and each time individual juror indicated that he acquired knowledge of facts from outside sources, juror was asked whether he had formed an opinion.

Dowling v. United States, 493 *U.S.* 342 (1990) held introduction of testimony of victim of house burglary that defendant was involved in that burglary did not violate due process test of fundamental fairness, even though defendant was acquitted of charges arising out of house burglary, particularly as trial judge gave limiting instructions and twice told jury of defendant's prior acquittal.

State v. Muniz, 118 *N.J.* 319 (1990), decided charge that makes jury aware of lesser-included motor vehicle offenses in prosecution for death by auto would address due process concerns about defendant not having opportunity to have jury consider guilt on lesser-included offenses.

In *State v. Vassos*, 237 *N.J. Super.* 585 (App. Div. 1990), the trial court's interruption of key defense witness' trial testimony to warn him that it could subject him to prosecution for perjury, and the court's subsequent striking of witness' testimony when he refused to continue testifying, violated burglary defendant's due process right to fair trial; giving of testimony which prosecutor or court considered to be perjured was not valid basis for warning witness about his privilege against self-incrimination.

Graham v. Connor, 490 *U.S.* 386 (1989). Claim that law enforcement officials have used excessive force, deadly or not, in course of arrest, investigatory stop or other "seizure" of a person is properly analyzed under Fourth Amendment's "objective reasonableness" standard, rather than under substantive due process standard.

State v. Bulu, 234 *N.J. Super*. 331 (App. Div. 1989), held imposition of drug enforcement and demand reduction penalties as condition of entry into Pretrial Intervention Program (PTI) does not violate procedural due process; procedural safeguards built into the PTI system are more than sufficient to satisfy the notice and hearing requirements of procedural due process.

In *State v. Hunt*, 115 *N.J.* 330 (1989), the trial court's refusal to permit attorney-conducted *voir dire* did not violate defendant's rights to impartial jury, to freedom from cruel and unusual punishment, or to due process.

State v. Gonzalez, 114 *N.J.* 592 (1989), explained that determining what process is due to suspect necessitates analysis of underlying factors and circumstances, including not only threat to suspect's liberty but also hindrance of law enforcement that process would create.

New Jersey Ass'n of Ticket Brokers v. Ticketron, 226 N.J. Super. 155 (App. Div.), certif. denied, 113 N.J. 364 (1988), ruled State antiticket-scalping statute satisfied due process under both State and Federal Constitutions; statute addressed abuses found to exist in reselling of tickets, was reasonably related to proper legislative purpose, and promoted public welfare without discrimination or arbitrariness.

McCoy v. Court of Appeals of Wisconsin, 486 *U.S.* 429 (1988). The State-imposed requirement that a court appointed attorney who wishes to withdraw as appellate counsel, on the ground that the appeal is wholly frivolous, include a discussion why the issues lack merit does not violate his client's due process rights. The discussion is no more burdensome than the conclusion itself. The explanation requirement assures that counsel has protected his client's rights by necessitating a zealous review of the record. Moreover, the discussion requirement is of assistance to the court in determining the motion and may forestall precipitous motions to withdraw.

Kirk v. City of Newark, 109 *N.J.* 173 (1988), held an officer-defendant is entitled to qualified immunity in a 42 *U.S.C.* § 1983 action claiming that plaintiff was deprived of his due process rights by the arrest because it has been clearly established by law that once the officer reasonably believes probable cause to arrest exists, the officer must exercise due diligence before effecting the arrest.

State v. Leavitt, 107 *N.J.* 534 (1987), held a suspect is not denied due process because he was not afforded an opportunity to consult with counsel prior to the administration of a breathalyzer test. Accordingly, it is proper to advise the suspect that he has no right to refuse to give a breath sample on the ground that he has not been afforded counsel.

In *Kentucky v. Stincer*, 482 *U.S.* 730 (1987), defendant's due process right to be present at critical stages of criminal proceedings against him was not violated by his exclusion from a competency hearing where the only questions asked of the child witnesses concerned their competence to testify, not substantive testimony.

Pennsylvania v. Finley, 481 *U.S.* 551 (1987) held an indigent defendant has no Fourteenth Amendment due process right to appointed counsel in post-conviction proceedings when attacking a conviction that has become final upon exhaustion of the appellate process. States are under no obligation to provide post-conviction relief, and when they do, fundamental fairness does not require the state to provide counsel.

State v. Malik, 221 *N.J. Super.* 114 (App. Div. 1987). Where there is a probable cause to believe that an arrestee has recently ingested a controlled dangerous substance, there is no violation of due process by requiring a urine sample from the arrestee.

In the Matter of Daniels, 118 N.J. (1990), held summary contempt power should only be used against attorney appearing before court when attorney's conduct in actual presence of court has capacity to undermine court's authority and to interfere with or obstruct orderly administration of justice. Where the person subject to court's summary contempt power is an experienced trial attorney, due process does not require extending right to counsel to that attorney. In determining whether to exercise its summary contempt power, a court should take the following steps: it should immediately evaluate the gravity of the misconduct and decide whether it should invoke its power to adjudicate contempt; once the court has determined it should exercise contempt power, it should immediately inform party that it considers act contemptuous and afford party opportunity to explain circumstances and thus avoid any need for adjudication; depending on degree of contempt, the court must evaluate whether it calls for immediate adjudication; if immediate adjudication is called for, the court must evaluate whether the record will adequately disclose essence of contempt; if contempt involves personal insult to the court, court should consider whether there is any appearance of personal confrontation or loss of objectivity that would require reference of matter to another judge; and if conduct appears to be such that imprisonment may be warranted and immediate action is not essential, both more formal charging process and reference to another judge would ordinarily be required.

Bowers v. Hardwick, 478 *U.S.* 186 (1986). The due process clause does not confer a fundamental right upon a homosexual to engage in consensual sodomy. Thus, the Georgia statue criminalizing such conduct did not violate defendant's Fourteenth Amendment rights.

In *Holbrook v. Flynn*, 475 *U.S.* 560 (1986), presence of four uniformed state police in the courtroom during defendant's trial did not violate defendant's due process right to have his case decided on the evidence rather than circumstances not adduced at trial. Unlike the practices of shackling or gagging a defendant, the noticeable deployment of security personnel was not an inherently prejudicial practice only to be justified by an essential state interest. In making a determination of the prejudicial effect of a courtroom procedure which may single out an accused the question to be resolved by the court is whether "an unacceptable risk is presented of impermissible factors coming into play rather than an articulation by jurors of consciousness of prejudice."

State v. Mercer, 211 *N.J. Super.* 388 (App. Div. 1986), decided that a defendant, prosecuted for driving under the influence, was not denied due process as a result of the police officer's failure to inform defendant of his entitlement to have an independent blood test performed where the State has already had defendant's blood tested for alcoholic content.

State in the Interest of K.A.W., 104 N.J. 112 (1986) held a juvenile defendant is not denied due process where the complaint charging him with sexual assault upon a child fails to set forth the precise date of the offense but the time period set forth is sufficient to give defendant fair notice.

State v. Hardy, 211 *N.J. Super.* 630 (App. Div. 1986), concluded defendant's due process right to be present at every critical stage of his trial was violated by a municipal court judge who conducted a remand hearing with neither defendant, nor his attorney being present.

A. General

Smith v. Robbins, 120 S.Ct. 746 (2000). As a practical matter, the equal protection and due process clauses of the Fourteenth Amendment largely converge to require that a state's procedure affords adequate and effective appellate review to indigent defendants, and a state's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal. State v. Oliver, 162 N.J. 580 (2000), held the Three Strikes law, N.J.S.A. 2C:43-7.1a, was not subject to equal protection challenge on basis that it vested arbitrary discretion in a prosecutor to decide whether to charge a defendant as three-strikes defendant; law was mandatory once offender fell within scope of act.

Allah v. Dept. of Corrections, 326 N.J. Super. 543 (App. Div. 1999), concluded transfer of inmate to Security Threat Group Management Unit (STGMU) behavior modification program at Northern State Prison, which was created to segregate individuals who were either leaders or "core" members of particular gangs, did not violate inmate's equal protection rights.

Merola v. Dept. of Corrections, 285 *N.J. Super.* 501 (App. Div. 1995), *certif. denied*, 143 *N.J.* 519 (1996), held State statutory prohibition against applying work and commutation credits to murder defendant's mandatory minimum sentence did not violate equal protection; classification in question was not suspect, and rational basis existed for distinguishing between inmates based on severity of crimes committed.

Percy v. Dept. of Corrections, 278 *N.J. Super.* 543 (App. Div. 1995), concluded security risks, scarce resources and equal protection concerns were sufficient, valid penological concerns which justified deference to decision of Department of Corrections prohibiting inmate from procreating through efforts to artificially inseminate his wife, despite any constitutional right to procreate.

Binkowski v. State, 322 *N.J. Super*. 359 (App. Div. 1999). Since Hunter Harassment Statute regulated only conduct, and did not impermissibly endorse viewpoint of hunters at expense of anti-hunting protestors, it did not violate equal protection.

In State v. Zapata, 297 N.J. Super. 160 (App. Div. 1997), certif. denied, 156 N.J. 405 (1998), when

detective gave inadmissible testimony that he had made over 100 arrests since defendants' arrest, "including one of the people that is on trial today," it was not denial of equal protection to grant mistrial motion of defendant to whom detective was referring and to deny other defendant's mistrial motion, where trial court specifically informed jury that detective was referring to one defendant and not other; defendants were not similarly situated.

State v. Mortimer, 135 *N.J.* 517 (1994). Statute, increasing penalty for certain harassment crimes if they were committed with "purpose to intimidate an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity," had rational relationship to legitimate state interest of protecting citizens against bias-motivated crimes and, thus, did not violate equal protection clause; statute criminalized biasmotivated harassment to prevent conduct from occurring and imposed heavy penalties for such conduct, effecting deterrent and retributive policy, to discourage conduct's future occurrence.

State in Interest of J.M., 273 *N.J. Super*. 593 (Ch. Div. 1994). Statute which provides for minimum term of incarceration for juvenile who is adjudicated delinquent for theft of motor vehicle if juvenile has previous adjudication of delinquency for unlawful taking of motor vehicle and prohibits credit for time served, does not serve legitimate state interest, and violates equal protection guarantee since there is no rational reason to distinguish between adults and juveniles with regard to credit for time served. *See also State in the Interest of W.M.*, 147 *N.J. Super*. 24, 370 A.2d 519 (App. Div. 1977).

In *State v. Baker*, 270 *N.J. Super*. 55 (App. Div.), *aff'd o.b.*, 138 *N.J.* 89 (1994), defendant was not denied equal protection guarantees of State or Federal Constitutions, even though defendant's sentence was longer than codefendant's sentence, where sentence ultimately imposed upon defendant was only the statutorily mandated minimum sentence, and sentence imposed upon codefendant was illegal.

State v. Lagares, 127 *N.J.* 20 (1992) held rational relationship test applies when determining whether classifications of offenders for purposes of fixing penalties created by Legislature violates equal protection rights under State Constitution. Legislature may provide different punishments for offenders convicted of same crimes so long as there is rational connection between classification of offenders and proper legislative purpose. Enhanced sentencing provision of state Comprehensive

Drug Reform Act did not violate defendant's equal protection rights under State Constitution since provision was rationally related to legitimate governmental interest of battling crime by punishing recidivists more severely; repeat offenders are more dangerous than first-time convicts and more deserving of punishment. Mandatory Drug Enforcement and Demand Reduction penalties did not violate drug defendant's equal protection rights under State Constitution; use of collected penalties to finance drug rehabilitation programs and law enforcement activities was reasonable. *See also State v. Bulu,* 234 *N.J. Super.* 331 (App. Div. 1989).

According to *State in Interest of L.M.*, 229 *N.J. Super*. 88 (App. Div. 1988), *certif. denied*, 114 *N.J.* 485 (1989), in determining whether federal equal protection clause is violated, New Jersey courts apply traditional rational basis test, where Legislature has created nonsuspect classifications of offenders for purposes of fixing penalties. Legislature's decision to deal harshly with drug law offenders as class is not constitutionally defective as violative of federal equal protection. Treatment accorded to both juveniles and adults as drug offenders under statute providing for mandatory imposition of fines as part of the Comprehensive Drug Reform Act does not amount to suspect classification, for purposes of claim state and federal equal protection rights are violated.

In *State v. Ogar*, 229 *N.J. Super*. 459 (App. Div. 1989), provision prohibiting distribution and possession of drugs within 1,000 feet of school property or school bus was not unconstitutionally vague on its face, and did not violate due process or equal protection as applied. *See also, State v. Brown,* 227 *N.J. Super.* 429 (Law Div. 1988); *State v. Rodriguez,* 225 *N.J. Super.* 466 (Law Div.1988); *State v. Morales,* 224 *N.J. Super.* 72 (Law Div. 1987).

State v. Rodriguez, 225 N.J. Super. 466 (Law Div. 1988). N.J.S.A. 2C:35-7, which provides for a minimum three year period of parole ineligibility for people convicted of possessing controlled dangerous substances within 1,000 feet of a school with intent to distribute, does not violate the Fourteenth Amendment equal protection clause since it was rationally related to the State's legitimate interest in protecting school age children and the statute did not have a racially discriminatory intent or purpose.

State v. McMinn, 197 *N.J. Super.* 621 (App. Div. 1984), held the classification of cocaine as a Schedule II narcotic under *N.J.S.A.* 24:21-1 *et seq.* does not deny

defendant equal protection or due process. The court also held that the term "pure free base drug" was not unconstitutionally vague, since it was commonly understood to mean undiluted or unadulterated. Also, the distinctions in *N.J.S.A.* 24:21-19b(2), for sentencing purposes, between more than an ounce of cocaine and less than an ounce, and between 3.5 grams of pure free base drug and less than 3.5 grams, were proper legislative classifications reasonably related to the government's objective to impose greater punishment for more serious degrees of harm.

In *New Jersey Ass'n of Ticket Brokers v. Ticketron*, 226 *N.J. Super.* 155 (App. Div. 1988), since plaintiffs, challenging the anti-ticket scalping statute on equal protection grounds, failed to demonstrate any classification, invidious or otherwise, as support for its challenge, the statute did not violate the Fourteenth Amendment.

State v. Morales, 224 *N.J. Super.* 72 (Law Div. 1987). Where all defendants are treated similarly and all are given the same choices, statutes which provide for different penalties depending on whether defendants plead guilty or are found guilty at a jury trial do not violate the equal protection clause. *Accord, State v. Brown,* 227 *N.J. Super.* 429 (Law Div. 1988).

In Allen v. Bordentown, 216 N.J. Super. 557 (Law Div. 1987), a local curfew ordinance which prohibited minors from being in public places between the hours of 9:00 p.m. and 6:00 a.m. except in certain severely limited circumstances was a violation of minors' right to the equal protection of the law. The court applied the "compelling interest" test in reaching this determination, as the fundamental rights of freedom of speech, assembly and religion were involved. The test requires that state restrictions which inhibit fundamental rights of minors "are valid only if they serve any significant state interest that is not present in the case of an adult." The court found that here, the ordinance prohibited activities which the government had a compelling interest to encourage; the ordinance therefore denied minors and their parents equal protection.

State v. Bianco, 103 *N.J.* 383 (1986), held the excessive sentence oral argument program instituted by the Appellate Division, which in effect created a subclass of indigent defendants, did not deny defendants equal protection. The classification was rationally related to the state's legitimate interest in alleviating delays in the appellate process and securing prompt justice for all.

In *Holbrook v. Flynn,* 475 *U.S.* 560 (1986), the Equal Protection Clause was not offended by the deployment of uniformed troopers in the courtroom during defendant's trial by arbitrarily discriminating against those not on bail, since the deployment was intimately related to the State's interest in maintaining custody during the proceedings, which could not otherwise be insured.

State v. Fernandez, 209 N.J. Super. 37 (App. Div. 1986), held denial of an opportunity to earn commutation credits to a defendant sentenced to an indeterminate term under the pre-Code Sex Offender Act was not a denial of equal protection. Defendant did not establish that similarly situated individuals were being treated dissimilarly since individuals serving determinate terms under the Code were a different class from defendant. Moreover, even if defendant had established a *prima facie* case of dissimilar treatment, such difference was reasonably related to the State's interest in preventing release of individuals in defendant's situation prior to satisfactory rehabilitation.

According to *State v. Moore*, 192 *N.J. Super.* 437 (App. Div. 1983), *certif. denied*, 96 *N.J.* 271 (1984), imposing criminal sanctions on NGIs (defendants not guilty by reason of insanity) for an unauthorized departure from detention does not violate defendant's equal protection right. *N.J.S.A.* 2C:29-5a. The court ruled that equal protection does not require that all persons be treated identically, and that the criminal statute justifiably applied different treatment for civil committees, as opposed to insanity acquitees with a history of dangerous conduct.

Abramowitz v. Kimmelman, 200 N.J. Super. 303 (Law Div. 1984), concluded an amendment to the State's Sunday closing law, N.J.S.A. 2A:171-5.8, allowing large cities to decide whether to permit Sunday sales in counties with blue laws, did not violate the equal protection rights of residents of other, smaller municipalities in the same county. Applying conventional equal protection analysis, the court initially found that government regulation of Sunday sales has long been recognized. It next determined that the special classification (this case involved the city of Jersey City, which contains about 40% of Hudson County's population) was rationally related to a legitimate government objective of permitting citizens of economically troubled urban centers to choose themselves whether to have Sunday sales as a means of improving their economy. Finally, the court rejected the contention that the amendment diluted the voting rights

of non-Jersey City residents in Hudson County, since all county residents still could vote in a countywide referendum concerning Sunday openings.

State v. Musto, 187 *N.J. Super.* 264 (Law Div. 1982), *aff'd* 188 *N.J. Super.* 106 (App. Div. 1983), upheld the public office forfeiture statute, *N.J.S.A.* 2C:51-2, as not violating the federal constitution's equal protection guarantee. Automatic disqualification from public office, for those convicted of offenses "involving or touching" their public office, represents a proper restriction reasonably related to legitimate government interests, as well as being an appropriate penal measure.

- B. Jury Selection
 - 1. Use of Peremptory Challenges

United States v. Martinez-Salazar, 120 S.Ct. 774 (2000). Under the equal protection clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race. Defendant's due process rights were not violated when he exercised peremptory challenge to remove a potential juror after the district court erroneously refused to dismiss the potential juror for cause. Defendant received precisely what federal law provided when he was accorded the exact number of challenges allowed in his case under rule governing peremptory challenges. Although the peremptory challenge plays an important role in reinforcing a defendant's constitutional right to trial by an impartial jury, such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension.

In State v. Clark, 324 N.J. Super. 558 (App. Div. 1999), certif. denied, 163 N.J. 10 (2000), a prosecutor did not exercise peremptory challenge in discriminatory manner, in violation of defendants' rights to equal protection and to jury drawn from representative cross-section of community, when prosecutor exercised peremptory challenge against black prospective juror on basis that juror refused to make eye contact, that juror seemed angry, and that juror had two sons and might thus relate too much to defendants as her sons.

According to *J.E.B. v. Alabama ex rel. T.B.*, 511 *U.S.* 127 (1994), whether trial is criminal or civil, potential jurors, as well as litigants, have equal protection right to jury selection procedures that are free from group stereotypes rooted in and reflective of historical

prejudice. Intentional discrimination on the basis of gender in use of peremptory strikes in jury selection violates equal protection clause.

Georgia v. McCollum, 505 *U.S.* 42 (1992). Criminal defendant's exercise of peremptory challenges was "state action" for purposes of equal protection clause, despite adversary relationship between defendant and prosecution and defendant's exercise of challenge to further interest in acquittal; in exercising peremptory challenge, defendant was wielding power to choose governmental body. *See also Hernandez v. New York*, 500 U.S. 352 (1991).

In *State v. Bey III*, 129 *N.J.* 557 (1992), defendant failed to make *prima facie* showing that prosecutor exercised his peremptory challenges unconstitutionally, where prosecutor exercised one peremptory challenge against black potential juror and another four against potential jurors who were not black, and at least one prospective black juror was excused for cause on motion of defense counsel.

Powers v. Ohio, 499 *U.S.* 400 (1991). Under equal protection clause, defendant has standing to object to race-based exclusions of jurors through peremptory challenges whether or not defendant and excluded jurors share same race. Race-based peremptory challenges do not survive equal protection scrutiny merely because members of all races are subject to like treatment, which is to say that white jurors are subject to same risk of peremptory challenges based on race as are all other jurors.

Batson v. Kentucky, 476 *U.S.* 79 (1986), held the systematic exclusion of African-Americans from a black defendant's jury through the use of the prosecution's peremptory challenges violated defendant's equal protection guarantee. The Equal Protection Clause precludes a prosecutor from challenging potential jurors solely on account of race or on the assumption that those of a particular race will be unable to fairly decide the State's case against a member of their race.

A *prima facie* case of purposeful racial discrimination may be made solely on the basis of the selection process employed in his case. Defendant must establish that he is a member of a cognizable racial group, that the prosecutor has eliminated members of that group through the use of peremptory challenges and that the relevant circumstances support an inference that the veniremen were excluded on account of race. The burden then shifts to the State to provide a neutral explanation for the manner in which its challenges were exercised. *Accord, State v. Gilmore*, 103 *N.J.* 508 (1986) (reaching the same result under the New Jersey Constitution). *See Allen v. Hardy,* 478 *U.S.* 255 (1986) (rejecting a retroactive application of *Batson* to a collateral proceeding).

2. Composition of Grand and Petit Jury Panels

State v. Timmendequas, 161 *N.J.* 515 (1999). Empaneling a foreign jury from county with low African-American population, rather than county with racial composition similar to county of defendant's residence, did not violate the equal protection clause or the Sixth Amendment in capital-murder prosecution; the chosen county was closer to the home of the victim's parents, selecting the other county would increase the risk to jurors from crime, the defendant and victim were the same race, and nothing indicated racial motivation by the judge or anticipation of a racially discriminatory effect.

State v. Paige, 256 *N.J. Super*. 362 (App. Div. 1992). Alleged racial disparity between composition of venire panel and percentage of minorities in county's total population would not alone violate fair cross-section requirement or equal protection clause; there was no demonstration of pattern of racially disparate treatment.

In *State v. Bey III*, 129 *N.J.* 557 (1992), defendant failed to adduce sufficiently reliable statistical data to establish discriminatory underrepresentation of blacks on petit jury panels, as required to establish *prima facie* equal protection claim, and failed to adduce sufficiently reliable statistical data to establish unfair and unreasonable representation over time and systematic exclusion, as required to make out *prima facie* fair crosssection claim, and therefore, defendant was not entitled to evidentiary hearing on motion to challenge racial composition of petit jury panels.

To establish *prima facie* claim of denial of equal protection in underrepresentation of group on petit jury panel, defendant must establish constitutionally cognizable group, substantial underrepresentation over significant period of time and discriminatory purpose. Fact that percentage of blacks on defendant's petit jury panel was lower than their proportionate representation in the county was insufficient to establish *prima facie* denial of equal protection or of jury composed of fair cross-section of community. *See also State v. Hightower I*, 120 *N.J.* 378 (1990); *State v. Coyle*, 119 *N.J.* 194 (1990); *State v. Ramseur*, 106 *N.J.* 123 (1987) (Under equal protection clause, selection of both grand and petit jurors must be free from any taint of discriminatory purpose).

In *State v. Dixon*, 125 *N.J.* 223 (1991), underrepresentation of minorities in county jury pool did not rise to constitutional deprivation. Although the comparative disparity concerning underrepresentation of Hispanics and Puerto Ricans was disturbing, the statistical significance of discrepancy was very close to two or three standard deviations from the expected and thus was not constitutionally suspect and evidence was based on only one survey of 500 jurors from mailing surveys earlier, before reforms were made to system.

In State v. Russo, 213 N.J. Super. 219 (Law Div. 1986), defendant failed to make a prima facie showing of an equal protection violation in the jury selection process where he could not demonstrate the procedure employed resulted in the substantial underrepresentation of blacks. The proper measure for analyzing jury representativeness was "absolute disparity," measurement which in this case would have called for a disparity of 10% between the percentage of blacks on the jury list from the percentage of blacks in the population in order to establish a prima facie case. Only a 3.95% absolute disparity was proven. Even if defendant had established that there was a significant underrepresentation of blacks, defendant failed to prove systematic exclusion. Consequently, defendant failed to make a *prima facie* showing of an equal protection violation.

State v. Ramseur, 197 N.J. Super. 565 (Law Div. 1984), held a county grand jury's selection procedure does not violate equal protection principles unless defendant demonstrates that a recognizable, identifiable group has been singled out for separate treatment by its substantial under-representation in the jury system. Substantial under-representation may be shown by comparing the distinct group's proportional representation in the total population with its participation on grand juries.

C. Selective Enforcement

State v. Velez, 335 *N.J. Super*. 552 (App. Div. 2000). Defendant adverted to the issue of selective enforcement in the course of his Fourth Amendment motion to suppress, which was ultimately denied. He thereafter pleaded guilty to various drug offenses. The Appellate Division ruled that the guilty plea did not constitute a waiver of defendant's profiling claim where it was "raised or is related to a claim asserted at the motion to suppress."

The court remanded to determine the scope of discovery and for further proceedings before the trial court.

State v. Willamson, 335 N.J. Super. 544 (App. Div. 2000). Defendant was tried and convicted of various drug offenses, after which he moved for a new trial contending that the Attorney General's Interim Report constituted newly discovered evidence. He only inferentially raised the issue of selective enforcement at a pre-trial motion to suppress. Nonetheless, the appellate court regarded the issue as preserved, and generally permitted that defendants who have "been convicted and sentenced, may assert a claim of selective enforcement...while...direct appeal is pending." The instant selective enforcement claim could be raised in the form of a motion for a new trial or on the basis of "plain error, since infringement of constitutional rights, if established, was clearly capable of producing an unjust result."

State v Ross, 335 *N.J. Super*. 536 (App. Div. 2000). Defendant preserved his racial profiling or selective enforcement challenge to warrantless stop and search of automobile, where issue was raised at suppression hearing by codefendant's counsel, although defendant failed to present any evidence of selective enforcement. Trial court's determination that there was no evidence to support claim that stopping officer engaged in racial profiling, which determination was made before release of the interim report of state police review team regarding allegations of racial profiling, did not preclude reconsideration of the issue, after defendant had an opportunity to conduct discovery, as that information on racial profiling was not known at the time the motion to suppress was denied.

In United States v. Armstrong, 517 U.S. 456 (1996), the defendants sought to dismiss a federal indictment on the grounds that they had been discriminated against by means of selective prosecution. The Court indicated that "a selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." The burden that a defendant must meet to establish such a claim "is a demanding one." Defendant must demonstrate that the criminal laws were "directed so exclusively against a particular class" so as to amount to a "practical denial" of equal protection under the law. Such a classification could be based on race, religion, or other arbitrary classification. In order for a defendant to obtain discovery from the government to assist in his claim of selective prosecution, the defendant must first present "some evidence" of each of the elements of selective prosecution, as discussed below. While recognizing that such a standard was rigorous, the Court concluded that it was necessary in order to avoid insubstantial claims by defendants.

To prevail on a claim of selective prosecution, the defendant must provide "clear evidence" to overcome the presumption that the prosecutor has not acted unconstitutionally, given the general deference to which prosecutorial decisions are entitled. However. the requirements for showing discrimination in the prosecution process draw on "ordinary equal protection Thus, the defendant must show that standards." similarly situated individuals of a different class were not prosecuted for similar crimes. In other words, in order to prevail on a selective prosecution claim, a defendant must prove that the prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose,' " and that "similarly situated individuals of a different race" were treated differently.

State v. Ballard, et al., 331 N.J. Super. 529 (App. Div. 2000). The Appellate Division consolidated these cases after the State moved for leave to appeal. The State had challenged conflicting discovery orders entered in Bergen, Burlington, and Hunterdon Counties regarding document discovery arising from claims that the State Police had selectively enforced the motor vehicle laws against minority drivers, so-called "racial profiling." After discussing the standards set forth United States v. Armstrong, 517 U.S. 456 (1996), and State v. Kennedy, 247 N.J. Super. 21 (App. Div. 1991), for a defendant to obtain discovery regarding alleged selective prosecution, the court held that these defendants had satisfied that threshold. The court based its decision, in part, on the April 1999 Attorney General's Interim Report on the State Police which revealed that the State Police, as an organization, may have treated minorities differently during routine traffic stops. The State will have the opportunity, however, to challenge, at the pre-discovery stage, defendants who claim to have been profiled, by proving, on a case-by-case basis, that a particular stop was non-discretionary and that the trooper's post-stop conduct was not discriminatory. The court determined that the differing scope of discovery granted, just in these three counties, proved the need for uniformity. To achieve that uniformity, the court held that the statewide judge designated by the New Jersey Supreme Court was best suited to determine the final scope of discovery. Regarding the discovery issues raised, the court did comment, however, 1) that the lower court should not release drafts of the *Interim Report* or any other official documents or reports, absent an actual showing of particularized need, 2) that the State need not produce documents prepared in response to the *Report* reflecting subsequent remedial efforts, 3) that the State need not create data compilations for the defendants that do not already exist, so long as it provides the underlying records, and 4) open investigative files involving specifically named troopers need not be produced unless the trial court, after *in camera* review, determines there is a sufficient need which overcomes the State's interest in keeping open investigations confidential.

Whren v. United States, 517 *U.S.* 806 (1996), held that claims of selective prosecution arising from an arrest following a search and seizure are based on the equal protection clause, not the Fourth Amendment.

State, v. Schad, 160 N.J. 156 (1999). Under the equal protection clause, government is afforded broad discretion to decide whom to prosecute based on such factors as strength of case and general deterrence value. Conscious exercise of some selectivity in enforcement of ordinance does not violate equal protection unless decision to prosecute is based on unjustifiable standard such as race, religion, or other arbitrary classification. Town sign ordinance was not selectively enforced against operator of adult entertainment businesses, in violation of equal protection, where zoning officials initiated dialogue with operator before issuing citations, operator refused to take corrective action, other potential violators cooperated with town and ceased their potentially illegal activity, and there was no evidence that town failed to prosecute any similar violators.

Township of Saddle Brook v. A.B. Family Center, 307 N.J. Super. 16 (App. Div. 1998), aff'd, 156 N.J. 587 (1999), held that the mere fact that a law has not been fully enforced against others does not give defendant the right to violate it. The party asserting selective enforcement of law has heavy burden of proof. In this case, however, the record demonstrated that the township selectively enforced its site plan, parking, and sign requirements, so as to prevent operation of an adult video and bookstore.

State v. Smith, 306 *N.J. Super.* 370 (App. Div. 1997). The constitutionality of a search and seizure is not based upon an individual officer's underlying motives, but rather on whether objectively reasonable actions are supported by probable cause. Further, the alleged motives of an individual police officer are not enough to

compel the discovery of numerous documents from the New Jersey State Police. Rather, such discovery is only permitted "when there is a colorable claim that a police agency has an officially sanctioned or *de facto* policy of selective enforcement against minorities." The validity of statistical information claimed to show selective enforcement of traffic laws by race depends on an accurate identification of the group of persons who violate traffic laws on trooper-patrolled roads. The court affirmed defendants' convictions, holding that the evidence presented by defendants to support their selective enforcement claim was "less satisfactory" than the evidence presented in *State v. Kennedy*, 247 *N.J. Super.* 21 (App. Div. 1991), discussed below, which was deemed to be only "marginally sufficient."

In *State v. Soto*, 324 *N.J. Super*. 66 (Law Div. 1996), statistical evidence of disproportionate traffic stops against African-American motorists established a discriminatory effect on African-Americans and a de facto policy by the New Jersey State Police of targeting them for investigation on the southern end of the New Jersey Turnpike. This evidence established a pattern of selective enforcement which violated the equal protection clause and required suppression of all contraband and evidence seized.

State v. Perry, 124 *N.J.* 128 (1991), held that the prosecution in capital murder case did not engage in impermissible selectivity by prosecuting defendant and not his companion; both had been subjected to polygraph tests in early stages of investigation, and companion was under investigation up to point that defendant confessed to crime.

State v. DiFrisco I, 118 *N.J.* 253 (1990). In order to prevail on claim of discriminatory enforcement, defendant must plead and prove intentional selectivity as well as an unjustifiable basis for the discrimination. Murder defendant failed to prove that an unjust disproportionality, which allegedly involved the nonprosecution of individual who hired him to commit murder, invalidated his death sentence; defendant made no showing of invidious discrimination but rather premised his proportionality challenge on basis that reason for nonprosecution proffered by State had no support in the record.

State v. Kennedy, 247 *N.J. Super.* 21 (App. Div. 1991). In order to obtain discovery to support a claim of selective prosecution, a defendant must demonstrate a "colorable basis" supporting the allegation. When statistics are used to establish such a claim, their validity

depends upon an accurate identification of the group or population from which the selection was made.

In McCleskey v. Kemp, 481 U.S. 279 (1987), defendant's statistical study failed to establish that in its application Georgia's capital punishment system violated the Equal Protection Clause by unconstitutionally discriminating against blacks. Further, defendant failed to prove that racial considerations were of any moment in the determination of his particular case, a requisite element. Because the nature of the capital sentencing decision and its relationship to statistics is fundamentally different from other cases where statistics may be used as proof of intent to discriminate, general statistical proof of discrimination is insufficient to establish an equal protection violation in a particular capital sentencing case. To establish state violation of equal protection clause by adopting capital punishment statute and allowing statute to remain in force despite allegedly discriminatory application, defendant must prove that legislature acted or maintained death penalty because of anticipated racially discriminatory effect.

Vasquez v. Hillery, 474 *U.S.* 254 (1986) held a conviction is void under equal protection clause if prosecutor deliberately charges defendant on account of his race.

Wayte v. United States, 470 *U.S.* 598 (1985). To demonstrate "passive" selective enforcement requires proof that the enforcement policy had a discriminatory effect and was motivated by a discriminatory purpose. The government did not violate petitioner's equal protection right since it similarly treated all nonregistrants of the draft, including individuals who publicly said they would not register, as well as those who were reported by others but did not publicly protest.

State v. Smith, 202 *N.J. Super.* 578 (Law Div. 1985). Where defendant presented fifteen cases similar to his in which the prosecutor had not sought the death penalty, the court denied the prosecutor's motion to quash defendant's subpoena for office guidelines on selection of capital prosecutions to support selective prosecution contention.

FRAUD

I. CRIMINAL SIMULATION

Criminal simulation is a crime of the fourth degree. *N.J.S.A.* 2C:21-2. In contrast to forgery, it concerns the making, altering or uttering of objects as opposed to writings. *Id.* It also deals with conduct that was not generally treated as criminal prior to the adoption of the Code. *Id.*

There are three material elements to this crime. First, defendant must have acted with the purpose to defraud an individual or with the knowledge that he is facilitating a fraud to be perpetrated by someone else. Second, defendant must make, alter, or utter the object so that is appears to have value. Third, it must have appeared to have value because of antiquity, rarity, source, or authorship which it does not possess. *N.J.S.A.* 2C:21-2.

The culpability requirement is more limited than that for forgery in that it does not require a purpose to injure anyone or knowledge that such an injury is being facilitated. *Id.*; *cf. N.J.S.A.* 2C:21-1a.

II. SALE OF SIMULATED DOCUMENTS

In 1999 the Legislature significantly increased the number of offenses relating to false identification or age verification documents, and elevated some from disorderly persons offenses to crimes. See L. 1999, c.28, § 14.

It is a third degree crime to sell, offer or expose for sale or otherwise transfer, or to possess with intent to sell, offer or expose for sale, or transfer a document or other writing, which falsely appears to be a driver's license or other document issued by a governmental agency and which could be used as a means of verifying a person's identity or age. *N.J.S.A.* 2C:21-2.1a.

It is a third degree crime to knowingly make, or possess devices or materials to make, a document or other writing which falsely purports to be a driver's license or other document issued by a governmental agency and which could be used as a means of verifying a person's identity or age. *N.J.S.A.* 2C:21-2.1b.

It is a fourth degree crime to knowingly exhibit, display or utter a document or other writing that falsely

purports to be a driver's license or other document issued by a governmental agency and which could be used as a means of verifying a person's identity or age. *N.J.S.A.* 2C:21-2.1c.

It is a disorderly persons offense to knowingly possess a document or other writing which falsely purports to a be driver's license or other document issued by a governmental agency and which could be used as a means of verifying a person's identity or age. *N.J.S.A.* 2C:21-2.1d.

In addition to any other disposition for a violation of these statutes, the court must order as part of the sentence the suspension of driving privileges in New Jersey of between six months and two years to commence on the day sentence is imposed. *N.J.S.A.* 2C:21-2.1e.

If the offender is less than 17 years of age, the suspension, which also prohibits the operation of motorized bicycles, will commence on the day sentence is imposed and run from the period fixed by the court between six months and two years after the day the offender reaches age 17. *Id.*

If the offender's driving privileges have already been suspended on the day of sentencing, the suspension period is to commence as of the date of termination of the existing suspension. *Id.*

The court at time of sentence must collect the offender's New Jersey driver's license or licenses and forward it or them to the Director of the Division of Motor Vehicles along with a report indicating the first and last day of the suspension period. *Id.*

If the court is unable to collect the license or licenses of the offender, it must file a report of the conviction or adjudication of delinquency with the Director. The report must include the complete name, address, date of birth, eye color and sex of the offender and indicate the first and last day of the suspension period. *Id.*

At the time of sentencing, the court must inform the offender orally and in writing that if he or she is convicted of personally operating a motor vehicle during the period of license suspension or postponement imposed upon conviction, the offender will be subject to the penalties for driving while suspended pursuant to *N.J.S.A.* 39:3-40. *Id.*

The offender must acknowledge receipt of the written notice in writing. However, failure to receive or

to acknowledge in writing the receipt of a written notice is not a defense to a subsequent charge of driving while one's license is suspended. *Id.*

If the offender is the holder of a driver's license from another jurisdiction, the court does not collect the license, but notifies the director who must notify the appropriate officials in that licensing jurisdiction. The court, however, must revoke the offender's resident driving privileges in New Jersey. *Id.*

If the offender is admitted into Pretrial Intervention in addition to any other condition imposed, a court in its discretion, may suspend, revoke or postpone the driving privileges without a plea of guilty or finding of guilt. *Id.*

III. TRANSFER OF CERTAIN LAW ENFORCE-MENT BADGES WITH AUTHORIZATION PROHIBITED

These three disorderly persons offenses relate to the unauthorized transfer of law enforcement agency badges.

The first prohibits the sale of any law enforcement agency badge, the prescribed form of which is presently or has been in use in New Jersey during any of the five years preceding the sale, to a person other than a member of law enforcement agency who presents a letter authorizing the purchase, signed by the commanding officer of that law enforcement agency. *N.J.S.A.* 2C:21-2.2a.

The second prohibits the purchase of a law enforcement badge as described in subsection a, unless the purchaser is a member of a law enforcement agency who presents a letter authorizing the purchase, signed by the commanding officer of that law enforcement agency. *N.J.S.A.* 2C:21-2.2b

The third offense prohibits the giving or lending of such a badge, unless the person to whom a badge was given or loaned is a member of a law enforcement agency who presents a letter authorizing the transfer, signed by the commanding officer of that law enforcement agency. *N.J.S.A.* 2C:21-2.2c.

It is arguable whether the culpability requirement of knowledge is implied in the language of this statute. See *Cannel, Criminal Code Annotated, N.J.S.A.* 2C:21-2.2, comment 2 (Gann 2000).

IV. SIMULATING A MOTOR VEHICLE INSURANCE IDENTIFICATION CARD

This statute, enacted in 1997, makes it a fourth degree crime to knowingly sell, offer or expose for sale a document, printed form or other writing which simulates a motor vehicle insurance identification card. *N.J.S.A.* 2C:21-2.3. In addition to any other disposition for a violation of this offense, the court shall impose on the convicted offender a period of 30 days community service. *Id.*

V. FRAUDS RELATING TO PUBLIC AND RECORDABLE INSTRUMENTS

A. Fraudulent Destruction, Removal or Concealment of Recordable Instruments

It is a third degree crime for a person, with the purpose to deceive or injure anyone, to destroy, remove, or conceal any will, deed, mortgage, security instrument or other writing for which the law provides public recording. *N.J.S.A.* 2C:21-3a.

This offense relates to writings for which the law provides for public recording. There is no offense unless defendant's actions had a purpose to injure someone other than himself or herself. Defendant's acts of destroying, removing or concealing should not be an offense if he is the only person injured by the action. See *State v. Redstrake*, 39 *N.J.L.* 365, 370 (Sup. Ct. 1877).

B. Offering a False Instrument for Filing

It is a disorderly persons offense for a person who, knowing that a written instrument contains false information or a false statement, offers or presents it to a public office or public servant with knowledge or belief that it will be filed with, registered or recorded in, or otherwise become a party of the records of such public office or public servant. *N.J.S.A.* 2C:21-3b.

VI. FALSIFYING OR TAMPERING WITH RECORDS

These offenses are concerned with non-public records.

A. Falsifying or Tampering

It is a fourth degree crime to falsify, destroy, remove, or conceal any writing or record, or utter any writing or record knowing it contains a false statement or information, with the purpose to deceive or injure anyone or to conceal any wrongdoing. *N.J.S.A.* 2C:21-4a.

A conviction for exhibiting a driver's license of another under *N.J.S.A.* 39:3-39c merges with this subsection for the same act. *State v. Rondinone*, 291 *N.J. Super.* 489, 499-500 (Law. Div. 1996, *aff'd.*, 300 *N.J. Super.* 495 (App. Div. 1997).

B. Issuing a false financial statement

It is a third degree crime to issue a false financial statement. *N.J.S.A.* 2C:21-4b. This occurs when a person, by oath or affirmation, with a purpose to deceive or injure anyone or conceal any wrongdoing:

1. knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of some person and is inaccurate in some substantial respect; or

2. represents in writing that a written instrument purports to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to such person's current financial condition or ability to pay, when he knows it is substantially inaccurate in that respect. *Id.*

A "person" under this section includes a corporation or an unincorporated association. *N.J.S.A.* 2C:1-14g.

VII. DESTRUCTION, FALSIFICATION, OR ALTERATION OF RECORDS RELATING TO MEDICAL CARE

This offense was added as part of the Professional Medical Conduct Reform Act of 1989. L. 1989, c. 300, § 15.

It is a fourth degree crime to purposely destroy, alter or falsify any record relating to the care of a medical, surgical or podiatric patient in order to deceive or mislead any person as to information, including, but not limited to, a diagnosis, test, medication, treatment or medical or psychological history concerning the patient. *N.J.S.A.* 2C:21-4.1.

VIII. HEALTH CARE CLAIMS FRAUD

In 1997, the Legislature amended the Code to specifically address health care claims fraud. L. 1997, c.

353, § 2. These crimes are greater in scope than the various pre-Code health fraud crime statutes. For these new crimes, the punishment can be more severe and the State has to prove a lesser culpability.

A. Definitions

"Health care claims fraud" means making, or causing to be made, a false, fictitious, fraudulent, or misleading statement of material fact in, or omitting or causing a material fact to be omitted from, any record, bill, claim or other document, in writing, electronically or in any other form, that a person attempts to submit, submits, causes or attempts to cause to be submitted for payment or reimbursement for health care services. *N.J.S.A.* 2C:21-4.2.

"Practitioner" is defined expansively to mean a person licensed in this State to practice medicine and surgery, chiropractic, podiatry, dentistry, optometry, psychology, pharmacy, nursing, physical therapy, or law; or any other person licensed, registered or certified by any State agency to practice a profession or occupation in this State; or any person similarly licensed, registered or certified in another jurisdiction. *Id.*

B. Offenses

It is a second degree crime for a practitioner to knowingly commit health care claims fraud in the course of providing professional services. *N.J.S.A.* 2C:21-4.3a.

It is a third degree crime for a practitioner to recklessly commit health care claims fraud in the course of providing professional services. *N.J.S.A.* 2C:21-4.3b.

For a person who is not a practitioner providing the services for which the claim is made:

(i) it is a third degree crime to knowingly commit health care claims fraud; *N.J.S.A.* 2C:21-4.3c;

(ii) it is a second degree crime to commit five or more acts of health care claims fraud and the aggregate pecuniary benefit obtained or sought to be obtained is at least \$1,000;

id.; and

(iii) it is a fourth degree crime to recklessly commit health care claims fraud. *N.J.S.A.* 2C:21-4.3d.

A defendant convicted of any of the offenses under this section may be subject to a fine of up to five times the pecuniary benefit obtained or sought to be obtained in addition to any other penalties imposed. *Id.*

Except as provided in subsection c herein, each act of health care claims fraud constitutes an additional, separate and distinct offense. *N.J.S.A.* 2C:21-4.3e.

C. Inferences

The falsity, fictitiousness, fraudulence or misleading nature of a statement may be inferred by the trier of fact when a practitioner who attempts to submit, submits, causes or attempts to cause to be submitted any record, bill, claim or other document for treatment or procedure without the practitioner, or his or her associate, having performed an assessment of the physical or mental condition of the patient or client necessary to determine the appropriate course of treatment. *N.J.S.A.* 2C:21-4.3f(1).

The falsity, fictitiousness, fraudulence or misleading nature of a statement may be inferred by the trier of fact where a person who attempts to submit, submits, causes or attempts to cause to be submitted any record, bill, claim or other document for more treatments or procedures were represented to have been performed. *N.J.S.A.* 2C:21-4.3f(2).

Proof that a practitioner signed or initialed a record, bill, claim or other document gives rise to an inference that the practitioner read and reviewed that record, bill or other document. *N.J.S.A.* 2C:21-4.3f(3).

D. Culpability

Under this section, a person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. *N.J.S.A.* 2C:21-4.3h. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. *Id.*

None of these offenses preclude an indictment or conviction for any other offense defined by the laws of this State. *N.J.S.A.* 2C:21-4.3i(1).

None of these offenses preclude an assignment judge from dismissing a prosecution of health care claims fraud

if the assignment judge determines the conduct charged to be a *de minimis* infraction. *N.J.S.A.* 2C:21-4.3i(2).

IX. BAD CHECKS

It is an offense under this section to issue or pass a check or similar sight order for payment of money, knowing that it will not be honored by the drawee. N.J.S.A. 2C:21-5. Property need not be obtained for a conviction under this section. However, if property is obtained, there can be a conviction under the theft statute. See N.J.S.A. 2C:20-4.

A. Presumptions and Culpability

The Code made significant changes from the prior statute relating to bad checks, especially with regard to the culpability requirement. Instead of having to prove an intent to defraud, *N.J.S.A.* 2A:111-15 (repealed 1979), the State now need only prove knowledge that the check would not be paid. *N.J.S.A.* 2C:21-5a and b.

The State has the benefit of two presumptions in proving the requisite knowledge. An issuer is presumed to know that the bad check or money order (other than a post-dated check or order) would not be paid if:

a. the issuer had no account with the drawee at the time the check or order was issued; or

b. payment was refused by the drawee for lack of funds, upon presentation within 30 days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal or after notice was sent to the issuer's last known address. *Id.* Notice of refusal may be given to the issuer orally or in writing in any reasonable manner by any person. *Id.*

Whenever a presumption would operate in a prosecution for bad checks, it would also apply in a prosecution for theft committed by means of a bad check. *N.J.S.A.* 2C:21-5.

These presumptions do not apply to post-dated checks or money orders. *Id.* Although post-dated checks are covered by the statute, the State must prove that the drawer knew at the time the post-dated check was drawn that it would not be honored. *State v. Kelm*, 289 *N.J. Super.* 55, 59 (App. Div.), *certif. denied*, 146 *N.J.* 68 (1996).

These presumptions operate as permissive inferences. *State v. Humphrey*, 183 *N.J. Super.* 580, 584 (Law Div. 1982), *aff'd.*, 209 *N.J. Super.* 152 (App. Div. 1986).

B. Grading

The crime is of the second degree if the amount of the check or money order is \$75,000 or more. *N.J.S.A.* 2C:21-5c(1). It is of the third degree if the amount is \$1,000 or more but is less than \$75,000. *N.J.S.A.* 2C:21-5c(2). It is of the fourth degree if the amount is \$200 or more but is less than \$1,000. *N.J.S.A.* 2C:21-5c(3). It is a disorderly persons offense if the amount is less than \$200. *N.J.S.A.* 2C:21-5c(4).

C. Merger

Whereby theft under *N.J.S.A.* 2C:20-4 and issuing a bad check under this section are charged and the property underlying the charges was received by means of issuing a bad check, the counts merge for sentencing purposes. *State v. Alevras,* 213 *N.J. Super.* 331, 341-42 (App. Div. 1986).

The offense of passing a bad check is not a lesser included offense of forgery. *State v. Passafiume*, 184 *N.J. Super.* 447, 449 (App. Div.), *certif. denied*, 91 *N.J.* 280 (1982). Conviction of the bad check offense requires proof of the element of knowledge that the check would not be honored by the drawee, which is not an element of the forgery offense. *Id.*

X. CREDIT CARDS

A. Provisions of the Statute

N.J.S.A. 2C:21-6c provides that it is a fourth-degree crime for any person to take, obtain, use, retain, receive, sign, sell, transfer, or accept a credit card with the intent to obtain or provide property or services if that person knows that the card is stolen, forged, lost, revoked, cancelled, expired or that the use is, for any other reason, unauthorized by the issuer or owner of the card.

It is also a fourth-degree crime to knowingly make a false statement in procuring the issuance of a credit card. N.J.S.A.~2C:21-6b.

N.J.S.A. 2C:21-6c(5) provides that is a third-degree crime to make, falsely emboss, or utter such a credit card with the intent to obtain property or services.

N.J.S.A. 2C:21-6d provides that it is a third-degree crime for a person with fraudulent intent to use a forged, expired, or non-issued credit card with knowledge of its nature to obtain property or services.

N.J.S.A. 2C:21-6e(1) provides that it is a thirddegree crime for a person authorized by the issuer to furnish property or services with fraudulent intent to furnish property or services upon presentation of an unauthorized credit card, with knowledge of its forged, expired, or revoked nature.

N.J.S.A. 2C:21-6e(2) provides that it is a fourthdegree crime for a person authorized by the issuer to furnish property or services with fraudulent intent to fail to furnish property or services upon presentation of a credit card, while reporting in writing to the issuer that he has furnished property or services.

N.J.S.A. 2C:21-6f provides that it is a third-degree crime for a person other than the cardholder to possess two or more incomplete credit cards or reproduction instruments with knowledge of their character with intent to complete or reproduce without consent of the issuer.

N.J.S.A. 2C:21-6g provides that it is a fourth-degree crime to receive property or services with the knowledge that such property or services were obtained in violation of this section.

N.J.S.A. 2C:21-6h provides that is a third-degree crime for a person with fraudulent intent to knowingly use a counterfeit, fictitious, altered, forged, lost, stolen or fraudulently obtained credit card to obtain property or services. It is also a third-degree crime for a person with unlawful or fraudulent intent to furnish, acquire, or use an actual or fictitious credit card, whether alone or together with names of credit card holders, or other information pertinent to a credit card account in any form.

B. Overlapping Statutes

In *State v. Gledhill*, 67 *N.J.* 565 (1975), the question presented in this pre-Code case was whether one who utters a false or forged credit card with intent to damage or defraud another may be prosecuted under *N.J.S.A.* 2A:109-1b, a section of the forgery statute, or whether prosecution had to come under *N.J.S.A.* 2A:111-43, a section of the credit card act.

The Supreme Court held that the fact that both N.J.S.A. 2A:109-1b and N.J.S.A. 2A:111-43 would apply to the same type of conduct and that the credit card act was a later enactment dealing specifically with offenses stemming from the possession of use of credit cards does not mandate a conclusion that prosecution under N.J.S.A. 2A:109-1b was precluded. Specific conduct may violate more than one statute.

C. Unauthorized Use of a Credit Card

Where the owner of the credit card had no knowledge of its use in a car rental transaction, and where the rental agency, unaware of the perpetrated fraud, furnished the automobile to the user, such unauthorized use amounted to a conversion and a criminal offense. *Zuppa v. Hertz Corporation*, 111 *N.J. Super*. 419, 421, 423 (Cty. Ct. 1970). Unauthorized use may also result in disbarment even without a criminal conviction. *In re Maurello*, 121 *N.J.* 466, 479-82 (1990).

XI. DECEPTIVE BUSINESS PRACTICES

This section of the Code, which is directed at various types of deceptive business practices, replaces a series of unrelated statutes dealing with such practices. It extends criminal liability in three ways. First, it eliminates the necessity that the defendant actually obtained property as a consequence of the deception. Second, it eliminates or dilutes the need for proof that the deceiver knew about the falsity. Third, in certain situations, it dispenses with the need for proof of misrepresentation. See *II, Final Report of the New Jersey Criminal Law Revision Commission*, Commentary, at 243 (1971).

Subsections (f) and (g) of this section were deleted by Amendment. P.L. 1981, c. 290.

A. Definitions

"Adulterated" is defined as varying from the standard of composition or quality prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage. *N.J.S.A.* 2C:21-7.

"Mislabeled" is defined as varying from the standard of truth or disclosure in labeling prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage. *Id.* B. Offenses

It is a disorderly persons offense for a person who, in course of business,

a. Uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity. *N.J.S.A.* 2C:21-7a; *N.J.S.A.* 2C:21-7.

b. Sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service. *N.J.S.A.* 2C:21-7b; *N.J.S.A.* 2C:21-7.

c. Takes or attempts to take more than the represented quantity of any commodity or service when as a buyer he furnishes the weight or measure. *N.J.S.A.* 2C:21-7c; *N.J.S.A.* 2C:21-7.

d. Sells, offers or exposes for sale adulterated or mislabeled commodities. *N.J.S.A.* 2C:21-7d; *N.J.S.A.* 2C:21-7.

e. Makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services. *N.J.S.A.* 2C:21-7e; *N.J.S.A.* 2C:21-7.

It is a fourth degree crime for a person who, in the course of business,

a. makes a false or misleading written statement for the purpose of obtaining property or credit. *N.J.S.A.* 2C:21-7h; *N.J.S.A.* 2C:21-7;

b. makes a false or misleading written statement for the purpose of promoting the sale of securities, or omits information required by law to be disclosed in written documents relating to securities. *N.J.S.A.* 2C:21-7.

N.J.S.A. 2C:21-7h was used in a prosecution against the manager of a car dealership who accepted used cars as trade-ins and then took as part of the purchase price of the new cars sold, money intended to pay the outstanding liens on the old cars. *State v. Damiano*, 322 *N.J. Super.* 22, 32-33 (App. Div. 1999), *certif. denied*, 163 *N.J.* 396 (2000). The defendant then resold the used cars to new customers without first paying off the existing liens and without disclosing the fact that the liens remained unpaid to the buyers. *Id.* Since the issue of the defendant's intent to pay off the liens on the trade-ins was unclear, the court held that the defendant would have committed a crime under this section only if he never intended to pay off the liens. *Id.* at 48-51.

The court in *Damiano* also noted that a conviction for theft under *N.J.S.A.* 2C:20-4 and a conviction under this section may merge. *Id.* at 51.

C. Defenses

It is an affirmative defense to prosecution under this section if the defendant proves by a preponderance of the evidence that his conduct was not knowingly or recklessly deceptive.

XII. SALE OF KOSHER FOOD

In 1988, the Legislature revised the statutes relating to the sale of kosher food. *N.J.S.A.* 2C:21-7.2; *N.J.S.A.* 2C:21-7.3; and *N.J.S.A.* 2C:21-7.4.

The words and phrases "advertise," "food," "food product," "food commodity," "food commodity in packaged form," "Kosher," and "false representation" are defined under the statute. *N.J.S.A.* 2C:21-7.2; *N.J.S.A.* 2C:21-7.3a.

The presence of any non-kosher food or food product in any place of business that advertises or represents itself in any manner as selling, offering for sale, preparing or serving kosher food or food product only, is presumptive evidence that the person in possession offers the same for sale in violation of the statute. *N.J.S.A.* 2C:21-7.3b.

It is a complete defense to a prosecution under this act that the defendant relied in good faith upon the representations of a slaughterhouse, manufacturer, processor, packer or distributor, or any person or organization which certifies or represents any food or food product at issue to be kosher, kosher for Passover, or as having been prepared under or sanctioned by Orthodox Jewish religious requirements. *N.J.S.A.* 2C:21-7.3c.

Four categories of disorderly persons offenses are created under this statute, prohibiting the false advertising, mislabeling, and improper sale, or display for sale of non-kosher food as kosher food. *N.J.S.A.* 2C:21-7.4.

However, commentators question whether a prosecution under this section of the Code can withstand constitutional attack. See *Cannel, supra, N.J.S.A.* 2C:21-7.4; see also *Ran-Dav's County Kosher, Inc. v. State*, 129 *N.J.* 141, 145 (1992), *cert. denied*, 507 U.S. 952 (1993).

In the *Ran-Dav's* case, certain purveyors of kosher food attacked the constitutionality of a consumer fraud statute which, like this section, regulated the sale of kosher foods. *Id.* The New Jersey Supreme Court held that the statute violated the establishment clause because it involved the state in deciding what practices were required by religious law and in enforcing them. *Id.* There appears to be no material difference between the statute at issue in the *Ran-Dav's* case and this section. *Cannel, supra, N.J.S.A.* 2C:21-7.4, comment 3. However, the effect of loss of this section would be small, since prosecutions for selling non-kosher food as kosher food can be brought under the deceptive business practices statute, *N.J.S.A.* 2C:21-7. *Id.*

XIII. MISREPRESENTATION OF MILEAGE OF MOTOR VEHICLE

It is a disorderly persons offense to sell, exchange, offer for sale or exchange or expose for sale or exchange a used motor vehicle on which the actor has changed or disconnected the mileage registering instrument on the vehicle to show a lesser mileage reading than that actually recorded on the vehicle or on the instrument with the purpose to misrepresent the mileage of the vehicle. *N.J.S.A.* 2C:21-8.

This statute does not prevent the servicing, repair or replacement of a mileage registering instrument which by reason of normal wear or through damage requires service, repair or replacement if the instrument is then set at zero or at the actual previously recorded mileage. *Id.*

This statute applies to individuals as well as dealers. A dealer who violates this statute is subject to having his license revoked, after notice and a hearing, in addition to other penalties assessed under this section. See *N.J.S.A.* 2C:2C:21-8.

An acquittal in a prosecution under this section will not bar a civil suit by the attorney general for consumer fraud. *Kugler v. Banner Pontiac-Buick Opel, Inc.*, 120 *N.J. Super.* 572, 580 (Ch. Div. 1972).

XIV. DEFINITION AND DETERMINATION OF DEGREE OF CHAPTER 21 OFFENSES

A. Definition

As used in Chapter 21, unless a different meaning plainly is required, "benefit derived" means the loss resulting from the offense or any gain or advantage to the actor, or coconspirators, or any person in whom the actor is interested, whichever is greater, whether loss, gain or advantage takes the form of money, property, commercial interests or anything else the primary significance of which is economic gain. *N.J.S.A.* 2C:21-8.1a.

B. Determination of Degree

The benefit derived or resulting harm in violation of Chapter 21 shall be determined by the trier of fact. *N.J.S.A.* 2C:21-8.1b. If such benefit or harm is related to one scheme or course of conduct, it may be aggregated in determining the degree of the offense, regardless of whether it involved the same person or several persons. *Id.*

For criminal liability for theft and sales tax offenses to attach to individual acts or a course of conduct engaged in by a businessman on the brink of insolvency, there must be criminal intent and criminal culpability as defined by criminal statutes. *State v. Damiano, supra,* 322 *N.J. Super.* at 36. Criminal liability cannot attach simply because civil liability attaches. *Id.*

XV. MISCONDUCT BY CORPORATE OFFI-CIAL

The Code criminalizes certain misconduct by corporate officials. The degree of the offense is dependent on the amount of benefit received. See *N.J.S.A.* 2C:21-9c. The corporate official may be criminally liable even if he is not the official who is receiving the benefit. The fraud committed can be directed at the corporation, a third person, *Kugler v. Banner Pontiac-Buick Opel, Inc., supra*, 120 *N.J. Super.* at 580, or the public. *State v. Ware*, 71 *N.J.L.* 53, 54 (Sup. Ct. 1904).

Under *N.J.S.A.* 2C:21-9a, it is a crime for a director of a corporation to knowingly, with purpose to defraud, concur in any vote or act of the directors of such corporation, or any of them, which has the purpose of:

1. making a dividend except in the manner provided by law;

2. dividing, withdrawing or in any manner paying to any stockholder any part of the capital stock of the corporation except in the manner provided by law;

3. discounting or receiving any note or other evidence of debt in payment of an installment of capital stock actually called in and required to be paid, or with purpose of providing the means of making such payment;

4. receiving or discounting any note or other evidence of debt with purpose of enabling any stockholder to withdraw any part of the money paid in by him on his stock; or

5. applying any portion of the funds of such corporation, directly or indirectly, to the purchase of shares of its own stock, except in the manner provided by law.

Under *N.J.S.A.* 2C:21-9b, it is a crime for a director or officer of a corporation, with purpose to defraud, to:

1. issue, participate in issuing, or concur in a vote to issue any increase of its capital stock beyond the amount of the capital stock thereof, duly authorized by or in pursuance of the law; or

2. sell, or agree to sell, or be directly interested in the sale of any share of stock of such corporation, or in any agreement to sell the same, unless at the time of such sale or agreement he is an actual owner of such share. The foregoing does not apply to a sale by or on behalf of an underwriter or dealer in connection with a bona fide public offering of shares of stock of such corporation. *Id.*

Under *N.J.S.A.* 2C:21-9c, it is a crime for a director or officer of a corporation to purposely or knowingly use, control or operate a corporation for the furtherance or promotion of any criminal object.

If the benefit derived from a violation of this statute is \$75,000, the crime is of the second degree. If the benefit exceeds \$1,000, but is less than \$75,000, the crime is of the third degree. If the benefit derived is \$1,000 or less, the crime is of the fourth degree. *Id.*

Subsection a involves the dissipating of corporate assets and is applicable only to directors of a corporation. *N.J.S.A.* 2C:21-9a.

Subsection b involves the improper issuance or sale of corporate stock and is applicable to both directors and officers of a corporation. *N.J.S.A.* 2C:21-9b.

Subsection c is directed against organized crime and the use of corporations to further criminal objectives. *N.J.S.A.*_2C:21-9c; see also *Cannel, supra,* at *N.J.S.A.* 2C:21-9, comment 2.

In *State v. Damiano, supra*, 322 *N.J. Super.* at 52-53, this section was held not to apply to a nearly bankrupt car dealer, apparently not involved in organized crime, who was prosecuted under this section for failure to remit sales tax he collected and other deceptive business practices. The court held that the statute contemplates conscious use of a corporation for illegal purposes. *Id.* at 55. Therefore, the statute did not encompass the defendant's actions in failing to deliver cars free of liens, failing to acquire extended warranties bought by customers, and failing to pay sales tax withheld, because they were not part of an intentional scheme to use the dealership to extort money. *Id.*

XVI. COMMERCIAL BRIBERY AND BREACH OF DUTY TO ACT DISINTERESTEDLY

This section extends the scope of pre-Code legislation dealing with commercial bribery and creates three separate offenses.

A. Breach of Duty of Fidelity

It is an offense to solicit, accept or agree to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

1. an agent, partner or employee of another;

2. a trustee, guardian, or other fiduciary;

3. a lawyer, physician, accountant, appraiser, or other professional adviser or informant;

4. an officer, director, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association;

5. a labor official, including any duly appointed representative of a labor organization or any duly appointed trustee or representative of an employee welfare trust fund; or

6. an arbitrator or other purportedly disinterested adjudicator or referee. *N.J.S.A.* 2C:21-10a.

The culpability for this offense requires a conscious disregard of a known duty of fidelity. *Id.* There is no breach of a duty of fidelity if the principal knows about a gift to an employee and acquiesces in the gift. See *Jaclyn*,

Inc. v. Edison Brothers Stores, Inc., 170 N.J. Super. 335, 357 (Law Div. 1979).

B. Breach of Duty to Act Disinterestedly

A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, real properties or services commits a crime if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism. *N.J.S.A.* 2C:21-10b. The benefit's acceptance must be in consideration of influencing the defendant's selection, appraisal or criticism. Also, the defendant must be acting with a purpose to have his decision affected. See *Model Penal Code and Commentaries* § 224.8, p.336 (1980).

C. Conferring, Offering or Agreeing To Confer a Benefit

It is a crime to confer, offer, or agree to confer any benefit, the acceptance of which would be criminal under subsection a or b of this section. *N.J.S.A.* 2C:23-10c.

D. Grading

If the benefit offered, conferred, agreed to be conferred, solicited, accepted or agreed to be accepted in violation of this section is \$75,000 or more, the crime is of the second degree. *N.J.S.A.* 2C:21-10. If the benefit is more than \$1,000 but less than \$75,000, the crime is of the third degree. *Id.* If the benefit is less than \$1,000, the crime is of the fourth degree. *Id.*

XVII. RIGGING PUBLICLY EXHIBITED CONTEST

The Code has expanded the pre-existing law regarding the commission of bribery or tampering with publicly exhibited contests. The offense now includes tampering and applies not only to sporting events but all publicly exhibited contests. *N.J.S.A.* 2C:21-11.

A. Bribery and Tampering

It is a crime for a person, with purpose to prevent a publicly exhibited contest from being conducted in accordance with the rules and usages which govern it, to

1. confer, offer or agree to confer any benefit upon, or threaten any injury to, a participant, official or other person associated with the contest or exhibition; or 2. tamper with any person, animal or thing. *N.J.S.A.* 2C:21-11a.

B. Acceptance of Bribery by Participants

It is a crime to knowingly solicit, accept, or agree to accept any benefit, the giving of which would be criminal under subsection a. *N.J.S.A.* 2C:21-11b.

C. Grading

Under *N.J.S.A.* 2C:21-11a and b, if the benefit offered, conferred, agreed to be conferred, solicited, accepted or agreed to be accepted in violation of this section is \$75,000 or more, the crime is of the second degree. *N.J.S.A.* 2C:21-11c. If the benefit is more than \$1,000 but less than \$75,000, the crime is of the third degree. *Id.* If the benefit is less than \$1,000, the crime is of the fourth degree. *Id.*

D. Failure to Support Solicitation for Rigging

It is a disorderly persons offense to fail to report, within reasonable promptness, a solicitation to accept any benefit or to do any tampering, the giving or doing of which would be criminal under subsection a. *N.J.S.A.* 2C:21-11d.

It is not clear under this statute to whom the duty extends. The pre-Code statute was directed at the participant and not someone who merely learns about the solicitation. See *N.J.S.A.* 2A:93-12 (repealed 1979). The limitation of the prior statute probably should be applied to the Code.

E. Participation in Rigged Contest

It is a fourth degree crime to knowingly engage in, sponsor, produce, judge, or otherwise participate in a publicly exhibited contest knowing that it is being conducted in violation of subsection a. *N.J.S.A.* 2C:21-11e. A person can be guilty of this offense even though he or she neither received nor solicited a benefit. *Id.*

XVIII. DEFRAUDING SECURED CREDITORS

It is a fourth degree crime to destroy, remove, conceal, encumber, transfer or otherwise deal with property subject to a security interest with the purpose to hinder enforcement of that interest. *N.J.S.A.* 2C:21-12.

This offense applies to fraudulent disposition of both real and personal property. The amount or value of

money or property involved does not affect the degree of the offense.

The State must prove that the offender had a fraudulent purpose. Removal of the secured property from the state without the purpose to defraud a creditor would not be an offense. See *State v. Moldenhauer*, 103 *N.J.L.* 238, 240 (Sup. Ct. 1927).

XIX. FRAUD IN INSOLVENCY

This section is designed to protect unsecured creditors and proscribes three types of conduct by persons who know that insolvency proceedings have been or are about to be initiated.

It is a crime for a person who, knowing that proceedings have been or are about to be instituted for the appointment of a receiver or other person entitled to administer property for the benefit of creditors, or that any other composition or liquidation for the benefit of creditors has been or is about to be made:

a. destroys, removes, conceals, encumbers, transfers, or otherwise deals with any property or obtains any substantial part of or interest in the debtor's estate with purpose to defeat or obstruct the claim of any creditor, or otherwise to obstruct the operation of any law relating to administration of property for the benefit of creditors;

b. knowingly falsifies any writing or record relating to the property; or

c. knowingly misrepresents or refuses to disclose to a receiver or other person entitled to administer property for the benefit of creditors, the existence, amount or location of the property, or any other information which the actor could be legally required to furnish in relation to such administration. *N.J.S.A.* 2C:21-13.

If the benefit derived from a violation of this section is \$75,000 or more, the crime is of the second degree. *Id.* If the benefit is more than \$1,000 but less than \$75,000, the crime is of the third degree. *Id.* If the benefit is less than \$1,000, the crime is of the fourth degree. *Id.*

Creditors who submitted claims against debtor financial institution's bankruptcy estate had no Seventh Amendment right to a jury trial when sued by the bankruptcy trustee to recover allegedly preferential transfers. *Langenkamp v. Culp*, 498 *U.S.* 42, 44-45 (1990). The creditors had brought themselves within the equitable jurisdiction of the bankruptcy court by filing claims. *Id.* at 45

XX. RECEIVING DEPOSITS IN A FAILING FINANCIAL INSTITUTION

It is a fourth degree crime for an officer, manager, or other person directing or participating in the direction of a financial institution to receive or permit the receipt of a deposit, premium payment or other investment in the institution knowing that (a) due to financial difficulties the institution is about to suspend operations or go into receivership or reorganization; and (b) the person making the deposit or other payment is unaware of the precarious situation of the institution. *N.J.S.A.* 2C:21-14.

XXI. MISAPPLICATION OF ENTRUSTED PROPERTY AND PROPERTY OF GOVERN-MENT OR FINANCIAL INSTITUTION

A. Offenses

It is a crime for a person to apply or dispose of property, either entrusted to him as a fiduciary or belonging to or required to be withheld for the benefit of the government or a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the property's owner or to the person for whose benefit the property was entrusted, regardless of whether or not the actor derives a pecuniary benefit. *N.J.S.A.* 2C:21-15.

"Fiduciary" includes a trustee, guardian, executor, administrator, receiver and any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary. *Id.*

This statute applies to persons who are entrusted with property in a capacity as trustee, guardian, executor, administrator, or similar functionary, as well as persons who are entrusted with property that belongs to, or is withheld for, the government or a financial institution. *State v. Damiano, supra,* 322 *N.J. Super.* at 43. A person who withholds sales tax and fails to pay it to the State is covered under the statute. *State v. Pescatore,* 213 *N.J. Super.* 22, 26 (App. Div. 1986), *aff'd. o.b.,* 105 N.J. 441 (1987). A 1987 amendment made the statute apply to persons who fail to charge tax despite an obligation to do so. L. 1987, c. 76, § 33; *cf. State v. Altenburg,* 223 *N.J. Super.* 289, 297 (App. Div.), *aff'd.,* 113 *N.J.* 508 (1988)(pre-amendment case holding that the statute did not apply to instances where no tax was charged).

The state must prove that the defendant knowingly misused trust funds. *State v. Manthey*, 295 *N.J.Super. 26*, *31* (App. Div. 1996). The State does not have to prove that the defendant had a fraudulent intent or purpose. *Id.*

In *Damiano, supra,* the Appellate Division held that the defendant, who ran a financially troubled automobile dealership, was liable to prosecution under this statute with respect to his failure to remit the balance of loans due to institutional lenders who held liens on trade-ins that the defendant took in partial satisfaction of the purchase price of new cars. 322 *N.J. Super.* at 43.

However, because Chrysler is not a financial institution, defendant was not liable to prosecution under this section for "floor plan financing charges" owed to Chrysler as payment for new cars or for charges relating to defendant's failure to obtain two extended warranties from Chrysler that his customers had paid for. *Id.* at 43-44. Also, defendant had never been entrusted with a sum of money specifically to pay off the lien. *Id.* Defendant is liable for his conduct in this regard under *N.J.S.A.* 2C:20-9.

Jury instructions regarding this section must relate principles of law to the facts of the case and indicate to the jury which of numerous sets of scenarios constituted transactions falling within the statute. *State v. Damiano, supra,* 322 *N.J. Super.* at 44-45.

B. Grading

The crime is of the second degree if the benefit derived is \$75,000 or more. *Id.* It is of the third degree if the benefit derived is more than \$1,000 but less than \$75,000. *Id.* It is of the fourth degree if the benefit derived is less than \$1,000. *Id.*

For purposes of this section, "benefit derived" includes, but is not limited to, the amount of any tax avoided, evaded or otherwise unpaid or improperly retained or disposed of. *Id.*

Where money is diverted to the defendant's own use and is later repaid, the "benefit derived" is the amount diverted and not the value of use. *State v. Modell*, 260 *N.J. Super.* 227, 250 (App. Div. 1992), *certif. denied*, 133 *N.J.* 432 (1993); cf. N.J.S.A. 2C:20-2b, grading theft offense by amount involved.

C. Merger

Where there is a prosecution under this section and under *N.J.S.A.* 2C:20-9 (theft by failure to make required disposition of property), for precisely the same facts, under the same proofs and involving the same victims, only one conviction may be entered and there should be a merger. *State v. Damiano, supra,* 322 *N.J. Super.* at 45; *State v. Pescatore, supra,* 213 *N.J.* Super. at 24-25; see also *State v. Crawley,* 149 *N.J.* 310, 316 (1997) (generally discussing constitutional issues involving merger).

XXII. SECURING EXECUTION OF DOCU-MENTS BY DECEPTION

It is a fourth degree crime for a person who, by deception as to the contents of the instrument, causes or induces another to execute any instrument affecting, purporting to affect, or likely to affect the pecuniary interest of any person. *N.J.S.A.* 2C:21-16.

This section fills a gap left by the theft statute, which deals with theft of property and theft of services, but does not deal with the securing of signatures on documents. See *N.J.S.A.* 2C:20-4; *N.J.S.A.* 2C:20-8.

"Deception" under this section follows the same definition given in the Theft by Deception statute. See N.J.S.A. 2C:20-4. The deceiver must act purposely to create or reinforce a false impression by (i) purposely preventing another from acquiring information which affects his judgment of a transaction or (ii) purposely failing to correct a false impression which the deceiver previously created or reinforced, or which he knows to be influencing another to whom he stands in a fiduciary or confidential relationship. *Id.*

The offense occurs only if the deception involves the contents of the instrument. A false promise to give a consideration for signing is not covered by this section. Also, the person whose pecuniary interest is affected need not be the person induced to execute the instrument at issue for the offense to occur. *Cannel, Criminal Code Annotated, N.J.S.A.* 2C:21-16, comment 2.

XXIII. IMPERSONATION; THEFT OF IDEN-TITY

A. Offenses

It is a crime for a person to:

1. impersonate another or assume a false identity for the purpose of obtaining a pecuniary benefit for himself or another or to injure or defraud another;

2. pretend to be a representative of some person or organization for the purpose of obtaining a pecuniary benefit for himself or another or to injure or defraud another;

3. impersonate another, assume a false identity, or make a false or misleading statement regarding the identity of any person, in an oral or written application for services for the purpose of obtaining services; or

4. obtain any personal identifying information pertaining to another and use that information, or assist another in using the information, in order to assume the identity of or represent himself as another, without that other person's authorization, and with the purpose to fraudulently obtain or attempt to obtain a pecuniary benefit or services, or avoid the payment of a debt or other legal obligation or avoid prosecution for a crime by using the name of the other person. *N.J.S.A.* 2C:21-17a.

"Personal identifying information" includes, but is not limited to, the name, address, telephone number, social security number, place of employment, employee identification number, demand deposit account number, savings account number, credit card number or mother's maiden name of an individual. *Id.*

It is a crime for a person who, in the course of making an oral or written application for services, impersonates another, assumes a false identity or makes a false or misleading statement with the purpose of avoiding payment for prior services. *N.J.S.A.* 2C:21-17b.

Purpose to avoid payment for prior services may be presumed upon proof that the person has not made full payment for prior services and has impersonated another, assumed a false identity or made a false or misleading statement regarding the identity of any person in the course of making an oral or written application for services. *Id.*

B. Grading

A violation of subsection a or b of this section is a second degree crime if the amount of pecuniary benefit, value of services received, payment sought to be avoided or injury or fraud perpetrated on another is \$75,000 or more. *N.J.S.A.* 2C:21-17c(1). It is a third degree crime if the amount is at least \$500 but less than \$75,000. *Id.* It is a fourth degree crime if the amount is at least \$200 but less than \$500. *Id.*

It is a disorderly persons offense if the amount is less than \$200 or if the benefit or services received or the injury or fraud perpetrated on another has no pecuniary value, or if the offender was unsuccessful in his attempts to receive a benefit or services or to injure or perpetrate a fraud on another. *N.J.S.A.* 2C:21-17c(2).

Violations of *N.J.S.A.* 39:3-37 for using the personal information of another to obtain a driver's license or register a motor vehicle or of *N.J.S.A.* 33:1-81 or 33:1-81.7 for using the personal information of another to illegally purchase an alcoholic beverage are not offenses under this section if the actor received only that benefit or service and did not perpetrate or attempt to perpetrate any additional injury or fraud on another. *N.J.S.A.* 2C:21-17d.

XXIV. SLUGS

It is a disorderly persons offense to:

1. insert or deposit a slug, key, tool, instrument, explosive or device in a coin, currency or credit card activated machine with the purpose to defraud; or

2. make, possess or dispose of a slug, key, tool, instrument, explosive or device with the purpose to enable a person to insert or deposit it in a coin, currency or credit card activated machine. *N.J.S.A.* 2C:21-18.

"Slug" is defined as an object or article which, by virtue of its size, shape or any other quality is capable of being inserted or deposited in a coin, currency or credit card activated machine as an improper substitute for money. *Id.*

This statute is directed toward the commission of fraud from vending machines and is meant to supplement and operate outside the provisions of the "Casino Control Act" (P.L. 1977, c. 110). *Id.*

XXV. WRONGFUL CREDIT PRACTICES AND RELATED OFFENSES

Criminal usury, wrongful credit practices and other related offenses are proscribed under this section. See *N.J.S.A.* 2C:21-19. The first three subsections are directed at loan-sharking activities. See *id.*

A. Criminal Usury

Criminal usury, the charging or receiving of excessive interest, is an offense under this section. A person is guilty of this offense when, not being authorized or permitted to do so by law, he (1) loans or agrees to loan, directly or indirectly, any money or property at a rate exceeding the maximum rate permitted by law; or (2) takes, agrees to take, or receives any money or other property as interest on the loan or on the forbearance of any money or other interest in excess of the maximum rate permitted by law. *N.J.S.A.* 2C:21-19a.

The interest rate on a loan which exceeds 30% per annum, or 50% per annum on a loan made to a corporation, is not permitted by law. *Id.*

While the state did not have to prove criminal intent under pre-Code law, under the Code, there is a presumption against strict liability and a presumptive culpability of knowledge. *See N.J.S.A.* 2C:2-2c(3).

Criminal usury is a second degree crime if the interest rate on a loan made to any person exceeds 50% per annum or the equivalent rate for a longer or shorter period. *N.J.S.A.* 2C:21-19a. It is a third degree crime if the interest rate on a loan made to any person, except a corporation, limited liability company, or limited liability partnership, does not exceed 50% per annum, but the amount of the loan or forbearance exceeds \$1,000. *Id.* Otherwise, it is a disorderly persons offense. *Id.*

In a case where a lender sought to recover the principal of a loan which carried a usurious interest rate, the Appellate Division held that the illegal interest-rate provision of the loan contract, while subject to prosecution, was severable, and courts would enforce the remainder of the contract. *Schuran v. Walnut Hill Assoc.*, 256 *N.J. Super.* 228, 232-33 (Law Div. 1991). The borrower who accepted the benefit of the loan knowing it to be usurious should not be relieved of his obligation to repay it. *Id.* at 233.

In a case where a New Jersey resident and a California lender agreed that the lender finance litigation between the New Jersey resident and a third party in exchange for a division of the final proceeds, the New Jersey District Court held that although New Jersey law governed the transaction, New Jersey's criminal usury statute did not apply because the collection of the entire interest was at risk, depending on the outcome of the litigation, and because the agreement was entered in good faith and without intent to evade usury law. *Dopp v. Yari*, 927 *F.Supp.* 814, 823-24 (D.N.J. 1996).

B. Business of Usury

It is a second degree crime to engage in the business of usury. *N.J.S.A.* 2C:21-19b. The offender convicted of this offense is subject to a fine of up to \$250,000, in addition to any other disposition at sentencing. *Id.* The material elements for this crime are the same as those for the offense of criminal usury, except that the state must prove the additional element that the offender is in the business of making loans or forbearances at the unauthorized rates. *Id.*

"Engaged in the business" means one who carries on an enterprise or a business for profit or improvement over time in contrast to a person who commits a single act or participates in an occasional transaction. *State v. Tillem*, 127 *N.J. Super.* 421, 425 (App. Div.), *certif. denied*, 66 *N.J.* 335, *cert. denied*, 419 U.S. 900 (1974). Since criminal usury is a lesser included offense of being in the business of criminal usury, the two convictions would merge. *Id.* at 428.

C. Possession of usurious loan records

It is a third degree crime for a person to possess, with knowledge of the nature thereof, any writing, paper, instrument or article used to record criminally usurious transactions prohibited under this section. *N.J.S.A.* 2C:21-19c.

D. Unlawful collection practices

It is a disorderly persons offense to use improper means to enforce a claim or judgment. *N.J.S.A.* 2C:21-19d. The prohibited conduct involves the person who, with the purpose to enforce a claim or judgment for money or property, sends, mails, or delivers to another person a notice, document or other instrument which has no judicial or official sanction and which in its format or appearance simulates a summons, complaint, court order or process or an insignia, seal, or printed form of a federal, State or local government or an instrumentality thereof, or is otherwise calculated to induce a belief that such notice, document or instrument has a judicial or official sanction. *N.J.S.A.* 2C:21-19d.

E. Making false statement of credit terms

It is a disorderly persons offense for a person to understate or fail to state the interest rate, or make a false or inaccurate or incomplete statement of any other credit terms. *N.J.S.A.* 2C:21-19e. While this statutory language does not set forth a culpability requirement, a presumptive culpability of knowledge should be imputed. See *N.J.S.A.* 2C:2-2c(3).

F. Debt adjusters

It is a fourth degree crime to act or offer to act as a debt adjuster. *N.J.S.A.* 2C:21-19f.

"Debt adjuster" is defined as a person who either (1) acts or offers to act for a consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding or otherwise altering the terms of payment of the debts of the debtor, or (2) who, to that end, receives money or other property from the debtor, or on behalf of the debtor for payment to, or distribution among, the creditors of the debtor. *Id.*

"Debtor" is defined as an individual or two or more individuals who are jointly and severally, or jointly or severally indebted. *Id.*

The following persons cannot be prosecuted as debt adjusters: attorneys licensed to practice in New Jersey who are not principally engaged as debt adjusters; licensed, nonprofit social service or consumer credit counseling agencies; a person who is a regular, full-time employee of a debtor who acts as an adjuster for the employer's debts; persons acting pursuant to court orders or the laws of New Jersey or the United States; creditors or agents of creditors of the debtor and whose services are rendered without cost to the debtor; persons who, at the request of the debtor, arrange for or make loans to the debtor and/or who act as an adjuster for the debtor at his authorization in the disbursement of the proceeds of a loan without compensation being received for adjusting the debts. *Id.*

This section is derived from pre-Code law, *N.J.S.A.* 2A:99A-1, *et seq.* (repealed), which was upheld as constitutional. See *American Budget Corp. v. Furman*, 67

N.J. Super. 134, 138-45 (Ch. Div.), *aff'd.*, 36 *N.J.* 129 (1961).

XXVI. PRACTICE OF MEDICINE AND SURGERY OR PODIATRY BY AN UNLI-CENSED PERSON

It is a third degree crime for a person who knowingly does not possess a license to practice medicine and surgery, or podiatry, or knowingly has had the license suspended, revoked, or otherwise limited by an order entered by the New Jersey State Board of Medical Examiners, to

a. engage in the practice of medicine and surgery or podiatry;

b. exceed the scope of practice permitted by the board order;

c. hold himself out to the public or any person as being eligible to engage in such practice;

d. engage in any activity for which such license is a necessary prerequisite, including, but not limited to, the ordering of controlled dangerous substances or prescription legend drugs from a distributor or manufacturer; or

e. practice medicine, surgery or podiatry under a false or assumed name or falsely impersonates another person licensed by the board. *N.J.S.A.* 2C:21-20.

In a case where defendant was charged with engaging in the practice of medicine under subsection a. and holding himself out to the public or any person as being eligible to engage in that practice under subsection d. of the statute, the New Jersey Supreme Court held that authorization forms informing the victim that defendant was not a doctor "flatly contradict[ed] the principle element" of the second charge under subsection d. *State v. Womack*, 145 *N.J.* 576, 589, *cert. denied*, 519 *U.S.* 1011 (1996). Since the "highly probative" medical forms evidence was known to the investigating agent and the prosecutor, it should have been submitted to the grand jury. *Id.*

The Court in *Womack* also held that if the State and trial court intended to punish defendant by imposing a civil fine against him prior to the State's institution of criminal proceedings for the same conduct, then the criminal prosecution would be barred on double

jeopardy grounds. *Id.* at 582-85. However, the State could still avoid the double jeopardy bar by returning the punitive portion of the civil fine to the defendant and then moving forward with the criminal proceeding. *Id.* at 585-86.

XXVII. SOUND RECORDINGS - ANTI-PIRACY

In 1991, the Legislature repealed the existing law concerning the unlawful making or distribution of sound recordings without consent of the owner. See *N.J.S.A.* 2A:111-52 through -55 (repealed). Due to technological advances, those statutes no longer afforded adequate protection relating to sound recordings and later developed recording media. *Assembly, Judiciary, Law Public Safety Committee Statement, Assembly* L. 1991, c. 125.

A. Definitions

"Sound recording" is defined as any phonograph record, disc, tape, film, wire, cartridge, cassette, player piano roll or similar material object from which sounds can be reproduced either directly or with the aid of a machine. *N.J.S.A.* 2C:21-21b(1).

"Owner" is defined as (a) the person who owns the sounds fixed in any master sound recording on which the original sounds were fixed and from which transferred recorded sounds are directly or indirectly derived; or (b) the person who owns the rights to record or authorize the recording of a live performance. *N.J.S.A.* 2C:21-21b(2).

"Audiovisual work" is defined as any work that consists of a series of related images, which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material object, such as film or tape, in which the work is embodied. *N.J.S.A.* 2C:21-21b(3).

B. Offenses

Four offenses are created under this section.

The first offense applies only to sound recordings initially fixed prior to February 15, 1972. *N.J.S.A.* 2C:21-2(c)(1). It is a crime to knowingly transfer, without consent of the owner, any sounds recorded on a sound recording with intent to sell that recording or to use it to promote the sale of any product. *Id.* The state

must prove that the defendant acted knowingly as to all material elements of the crime. *Id.*

It is also an offense to knowingly transport, advertise, sell, resell, rent or offer for rental, sale or resale, any sound recording or audiovisual work that the person knows has been produced in violation of this section. *N.J.S.A.* 2C:21-2c(2).

The third offense did not exist under prior law and is directed to the recording or video taping of live performances. It is a crime to knowingly manufacture or transfer, directly or indirectly by any means, or record or fix a sound recording or audiovisual work, with intent to sell or distribute for commercial advantage or private financial gain, a live performance with the knowledge that the performance was recorded without the consent of its owner. *N.J.S.A.* 2C:21-2c(3).

The fourth offense seeks to promote truth in labeling. Assembly, Judiciary, Law Public Safety Committee Statement, Assembly, L. 1999, c. 125. Sound recordings or audiovisual works being sold for financial gain clearly and conspicuously must disclose the true name and address of the manufacturer and, in the case of a sound recording, the name of the actual performer or group. N.J.S.A. 2C:21-21c(4). It is an offense for a person to knowingly advertise or sell, resell, rent or transport, or offer for sale, resale or rental, a sound recording or audiovisual work whose label, cover, box or jacket fail to clearly and conspicuously provide such information, for commercial advantage or private financial gain. Id.

Any sound recordings, audiovisual works and any equipment or components used in violation of this section are subject to forfeiture. *N.J.S.A.* 2C:21-21e; *see also N.J.S.A.* 2C:64-1 *et seq.*

Conduct falling within the proscriptions of this section cannot be prosecuted under the more general forgery provisions of the Code relating to writings or objects. *State v. El Moghrabi*, 316 *N.J. Super.* 139, 144 (App. Div. 1998).

C. Grading

If any of the four offenses under this section involve at least 1,000 unlawful sound recordings or at least 65 audiovisual works within any 180 day period, the crime is of the third degree and is subject to a fine of up to \$250,000. *N.J.S.A.* 2C:21-21d(1). If the offense involves more than 100 but less than 10,000 unlawful sound recordings or more than 7 but less than 65 audiovisual works within any 180 day period, the crime is of the third degree and is subject to a fine of up to \$150,000. *N.J.S.A.* 2C:21-21d(2). If it is a first offense and the number of prohibited items is less than that designated in subsections d(1) and d(2) of this section, the crime is of the fourth degree, subject to a fine of up to \$25,000. *N.J.S.A.* 2C:21-21d(3). If it is a second offense involving this smaller number of prohibited items, the crime is of the third degree, subject to a fine of up to \$50,000 for the second offense and \$100,000 for any subsequent offense. *Id.*

D. Exemptions

This statute does not apply to

1. any broadcaster who, in connection with or as part of a radio or television broadcast, or for purposes of archival preservation, transfers any sounds or images recorded on a sound recording or audiovisual work; and

2. any person who transfers any sounds or images recorded on a sound recording or audiovisual work in his own home, for his own personal use and without deriving any profit. *N.J.S.A.* 2C:21-21f.

XXVIII. UNAUTHORIZED PRACTICE OF LAW, PENALTIES

It is a disorderly persons offense to knowingly engage in the unauthorized practice of law. *N.J.S.A.* 2C:21-22a.

While the phrase "unauthorized practice of law" is not defined under the Code, the statute proscribes the engagement in the practice of law by one who is not a licensed attorney. See N.J.S.A. 2A:170-78a (repealed). Conduct encompassed within the statute includes that which was proscribed by statutes repealed when the Code was enacted, including, but not limited to (i) preparation of wills or conveyances for another; (ii) solicitation of a claim or demand for the purpose of taking legal action; (iii) representation of another in pursuit of a legal remedy; or (iv) representation of another suing, being sued or threatening suit. Id. The statute was also intended to encompass the unauthorized rendering of legal advice on how and when to answer a complaint and preparation of pleadings such as an answer to a complaint. State v. Rogers, 308 N.J. Super. 59, 69 (App. Div. 1998).

Certain exceptions, which were recognized under prior law and probably continue under the Code include: (1) persons engaged in the searching and guaranteeing of titles to real estate may prepare and execute legal instruments incidental thereto; and (2) persons exercising fiduciary functions such as trustees and receivers, or persons engaged in leasing or selling real estate, or persons engaged in the loaning of money on mortgages may prepare and execute legal instruments incidental to carrying out their fiduciary functions or their respective work. *N.J.S.A.* 2A:170-81 (repealed).

It is a fourth degree crime to knowingly engage in the unauthorized practice of law and (1) create or reinforce a false impression that the person is licensed to engage in the practice of law; or (2) derive a benefit; or (3) in fact cause injury to another. *N.J.S.A.* 2C:21-22b. If the defendant "in fact" causes injury to another, there is strict liability. *N.J.S.A.* 2C:21-22b(3).

"Benefit" under this section includes any gain or advantage, or anything regarded by the defendant as a gain or advantage, including pecuniary benefit or a benefit to any person or entity in which the defendant is interested. *N.J.S.A.* 2C:27-1a.

This statute has been upheld against constitutional attack on vagueness grounds. *State v. Rogers*, 308 *N.J. Super.* 59, 64-70 (App. Div.), *certif. denied*, 156 *N.J.* 385 (1998).

XIX. RUNNERS FOR PROVIDERS OF SER-VICES

A. Definitions

"Provider" is defined as an attorney, a health care professional, an owner or operator of a health care practice or facility, or any person who creates the impression that he or his practice or facility can provide legal or health care services, or any person employed or acting on behalf of any of these persons. *N.J.S.A.* 2C:21-22.1a.

"Runner" is defined as a person who, for a pecuniary benefit, procures or attempts to procure a client, patient or customer at the direction of, request of or in cooperation with a provider whose purpose is to seek to obtain benefits under a contract of insurance or assert a claim against an insured or an insurance carrier for providing services to the client, patient or customer. *Id.* This definition of "runner" does not include a person who procures or attempts to procure clients, patients or customers for a provider through public media or a person who refers clients, patients or customers to a provider as otherwise authorized by law. *Id.* "Public media" is defined as telephone directories, professional directories, newspapers and other periodicals, radio and television, billboards and mailed or electronically transmitted written communications that do not involve in-person contact with a specific prospective client, patient or customer. *Id.*

"Pecuniary benefit" is defined as a benefit in the form of money, property, commercial interest or anything else the primary significance of which is economic gain. *N.J.S.A.* 2C:27-1f.

B. Offense

It is a third degree crime for a person to knowingly act as a runner or use, solicit, direct, hire or employ another to act as a runner. *N.J.S.A.* 2C:21-22.1b.

The statute, enacted by L. 1999, c. 162, makes it a crime for a lawyer, a health care professional or the like to hire a person (i.e., a "runner") to procure customers where the actor's purpose is to make an insurance claim. *Cannel, supra, N.J.S.A.* 2C:21-22.1, comment 1.

Imposition of a term of imprisonment on the convicted offender is mandatory, unless the court, having regard to the character and condition of the offender, determines that imprisonment would be a serious injustice which overrides the need to deter such conduct by others. *N.J.S.A.* 2C:21-22.1c. If a non-custodial or probationary sentence is imposed, that sentence does not become final for 10 days to permit an appeal by the State. *Id.* This section does not preclude an indictment and conviction for any other offense defined by the laws of New Jersey. *Id.*

XXX. MONEY LAUNDERING AND ILLEGAL INVESTMENTS

A. Statement of Public Policy

In 1994, the Legislature created offenses relating to the financial facilitation of criminal activity and declared the following as a statement of public policy that

1. in the past, the Legislature has enacted criminal statutes which (a) recognized that the existence of organized crime and its activities present a serious threat to the political, social and economic interests of New Jersey; b)imposed strict civil and criminal sanctions against criminals who engage in conduct which includes money laundering; and (c) recognized the need to punish

the more culpable drug offenders with strict, consistently imposed criminal sanctions; *N.J.S.A.* 2C:21-23a to c;

2. despite these efforts, individuals continue to profit financially from illegal organized criminal activities and illegal drug trafficking, thereby continuously posing a threat to the health, safety and welfare of New Jersey citizens while simultaneously converting illegally obtained profits into "legitimate" funds; *N.J.S.A.* 2C:21-23d;

3. because increased drug trafficking and other organized criminal activities have strengthened the money laundering industry, the public must be safeguarded, and it is in the public's interest to make those engaging in money laundering activities subject to strict criminal and civil penalties. *N.J.S.A.* 2C:21-23e.

B. Definitions

"Attorney General" includes the Attorney General of the State of New Jersey, the Attorney General's assistants and deputies, and a county prosecutor or his or her designated assistant prosecutor, if a county prosecutor is expressly authorized in writing by the Attorney General pursuant to this section. *N.J.S.A.* 2C:21-24.

"Derived from" is defined as obtained directly or indirectly from, maintained by or realized through. *Id.*

"Person" is defined as any corporation, unincorporated association or any other entity or enterprise, as defined in *N.J.S.A.* 2C:20-1q, which is capable of holding a legal or beneficial interest in property. *Id.*

"Property" is defined as anything of value, as defined in *N.J.S.A.* 2C:20-1g, and includes any benefit or interest without reduction for expenses incurred for acquisition, maintenance or any other purpose. *Id.*

C. Financial Facilitation of Criminal Activity

It is a crime to

a. transport or posses property known to be derived from criminal activity; or

b. engage in a transaction involving property known to be so derived either with intent to facilitate or promote such activity, or knowing that the transaction is designed in whole or in part to (i) conceal or disguise the nature, location, source, ownership or control of the property derived from criminal activity, or (ii) avoid a transaction reporting requirement under the laws of New Jersey or any other state or of the United States; or

c. direct, organize, finance, plan, manage, supervise or control the transportation of or transactions in property known to be derived from criminal activity. *N.J.S.A.* 2C:21-25.

D. Culpability

For each offense defined under *N.J.S.A.* 2C:21-25, the State must prove a culpability of knowledge.

The offender knows the property is derived from criminal activity if he knows it represents proceeds from some though not necessarily which form of criminal activity. *N.J.S.A.* 2C:21-25d.

Among the factors to be considered by the fact-finder in determining that a transaction has been designed to avoid a transaction reporting requirement is whether the offender, acting alone or with others, conducted one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner. *Id.*

The phrase "in any manner" includes the breaking down of a single sum of currency exceeding the transaction reporting requirement into smaller sums, including sums at or below the transaction reporting requirement, or the conduct of a transaction, or series of currency transactions, including transactions at or below the transaction reporting requirement. The transactions need not exceed the transaction reporting threshold at any single financial institution on any single day in order to demonstrate a violation. *Id.*

E. Knowingly Inferred

The requisite knowledge may be inferred where the property is transported or possessed in a fashion inconsistent with the ordinary or usual means of transportation or possession of such property and where the property is discovered in the absence of any documentation or other indicia of legitimate origin or right to such property. *N.J.S.A.* 2C:21-26.

F. Grading

If the amount of money or property involved in a money laundering transaction is \$500,000 or more, the crime is of the first degree. *N.J.S.A.* 2C:21-27a. If the amount is at least \$75,000 but less than \$500,000, the

crime is of the second degree. *Id.* If the amount is less than \$75,000, the crime is of the third degree. *Id.*

The trier of fact determines the amount. *N.J.S.A.* 2C:21-27a. Amounts involved pursuant to one scheme or course of conduct may be aggregated for determining degree. *Id.* As part of the sentence, the court may also impose a fine of up to \$500,000. *Id.*

The offender convicted of a first degree crime under this section shall receive a sentence of imprisonment which includes a parole bar of between one third and one half of the base term imposed. *Id.*

In addition to any other disposition, the court may also sentence the defendant to pay an additional penalty calculated under *N.J.S.A.* 2C:21-28a. *N.J.S.A.* 2C:21-27b.

The sentence imposed upon a conviction of any money laundering crime must be ordered to be served consecutively to that imposed for a conviction of any offense constituting the criminal activity involved or from which the property was derived. *N.J.S.A.* 2C:21-27c.

G. Merger

A conviction for money laundering and illegal investing under this section does not merge with a conviction for any other offense constituting a criminal activity involved or from which the property was derived or a conviction of any offense of money laundering and illegal investing under this section. *N.J.S.A.* 2C:21-27c. However, despite this legislative prohibition against merger, the constitutional prohibition against double jeopardy may require the merger. *See State v. Maldonado*, 137 *N.J.* 536, 583 (1994); *State v. Dillihay*, 127 *N.J.* 42, 45 (1992).

The sections creating this offense should not be construed in any way to preclude or limit a prosecution or conviction for any other offense defined by the Code or any other criminal law of the State of New Jersey. *N.J.S.A.* 2C:21-27c.

XXXI. ANTI-MONEY LAUNDERING AND PROFITEERING PENALTIES

In 1999, the Legislature established criteria for imposing, calculating and revoking or reducing antimoney laundering and profiteering penalties. *See N.J.S.A.* 2C:21-27.1; *N.J.S.A.* 2C:21-27.2; *N.J.S.A.* 2C:21-27.3. Provisions allowing for payment schedules, establishing methods of collection and distribution as well as the penalty's relationship to other dispositions were also passed. See *N.J.S.A.* 2C:21-27.4; *N.J.S.A.* 2C:21-27.5; *N.J.S.A.* 2C:21-27.6.

A. Criteria for Imposition of Penalty

In addition to any other disposition under the Code, including but not limited to any fines which may be imposed, the court, upon application of the prosecutor, shall sentence the convicted offender of a crime defined in this section, or of an attempt or conspiracy to commit such a crime, to pay a monetary penalty in an amount determined under *N.J.S.A.* 2C:21-27.2, provided the court finds at a hearing, which may occur at the time of sentencing, that the prosecutor has established by a preponderance of the evidence that the offender was convicted of a money laundering or profiteering violation. *N.J.S.A.* 2C:21-27.1

B. Calculation of Penalty

Where the prosecutor has established by a preponderance of the evidence that the offender was convicted of a money laundering violation, the court must assess a monetary penalty as follows:

a. \$500,000.00 for a crime of the first degree; \$250,000.00 for a crime of the second degree; \$75,000.00 for a crime of the third degree; or

b. an amount equal to three times the value of any property involved in a money laundering activity;

c. Where the prosecution requests that the court assess a penalty under subsection b, the prosecutor has the burden to show, by a preponderance of the evidence, the appropriate amount of the penalty to be assessed. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at trial, plea hearing or other court proceedings and shall also consider the pre-sentence report and other relevant information, including expert opinion in the form of live testimony or by affidavit. *N.J.S.A.* 2C:21-27.2. The court's findings shall be incorporated in the record, and such findings shall not be subject to modification by an appellate court except upon a showing that the finding was totally lacking support in the record or was arbitrary and capricious. *Id.*

C. Revocation or Reduction of Penalty Assessment

The court shall not revoke or reduce a penalty imposed under *N.J.S.A.* 2C:21-27.2. An anti-money laundering profiteering penalty so imposed is not deemed a fine for purposes of *N.J.S.A.* 2C:46-3. *N.J.S.A.* 2C:21-27.3.

D. Payment Schedule

Under this section, the court may, for good cause shown, grant permission for the payment of an antimoney laundering profiteering penalty to be made within a specified period of time or in specified installments, provided however that the payment schedule fixed by the court shall require the defendant to pay the penalty in the shortest period of time consistent with the nature and extent of his assets and his ability to N.J.S.A. 2C:21-27.4 The prosecutor must be pay. afforded the opportunity to present evidence or information concerning the nature, extent and location of the defendant's assets or interest in property which are or might be subject to levy and execution. *Id.* In such event, the court may only grant permission for the payment to be made within a specified period of time or installments with respect to that portion of the assessed penalty which would not be satisfied by the liquidation of property which is or may be subject to levy and execution, unless the court finds that the immediate liquidation of such property would result in undue hardship to innocent persons. Id. If no such permission is embodied in the sentence, the entire penalty shall be payable forthwith. Ibid.

E. Relation to Other Disposition

An anti-money laundering profiteering penalty assessed pursuant to *N.J.S.A.* 2C:21-27.1:

a. shall be imposed and paid in addition to any penalty, fine, fee or order for restitution which may be imposed; and

b. shall be in addition to and not in lieu of any forfeiture or other cause of action instituted pursuant to chapter 41 or 64 of Title 2C of the New Jersey Statutes. *N.J.S.A.* 2C:21-27.6. Nothing in this chapter shall be construed in any way to preclude, preempt or limit any such cause of action. *Id.* A defendant shall not be entitled to receive credit toward the payment of an anti-money laundering profiteering penalty imposed for the value of property forfeited, or subject to forfeiture, pursuant to

the provisions of chapter 41 or 64 of Title 2C of the New Jersey Statutes. *Ibid.*

F. Collection and Distribution

All anti-money laundering profiteering penalties assessed shall be docketed and collected as provided for the collection of fines, penalties, fees and restitution in chapter 46 of Title 2C of the New Jersey Statutes. *N.J.S.A.* 2C:21.27.6. The Attorney General or prosecutor may prosecute an action to collect such penalties. *Id.* All anti-money laundering profiteering penalties assessed shall be disposed of, distributed, appropriated and used as if the collected penalties were the proceeds of property forfeited pursuant to chapter 64 of Title 2C of the New Jersey Statutes. *Id.*

G. Civil Actions for Treble Damages

The Attorney General may institute a civil action against any person whose conduct constitutes a violation of the money laundering and illegal investments crimes as defined under N.J.S.A. 2C:21-25. N.J.S.A. 2C:21-28a. Judgment may be against all persons who violate the statute. Id. Judgment is joint and several and may be for an amount equal to three times the value of all property involved in the criminal activity plus the costs incurred for resource and personnel used in the investigation and litigation of both criminal and civil proceedings. Id. The standard of proof in the civil action is the preponderance of the evidence. Id. The fact that a criminal action was not instituted or, was terminated without a conviction does not preclude a civil action. Id. A final judgement rendered in favor of the state in the criminal action precludes the defendant in that action from denying the same conduct in the civil action. Id.

The civil action authorized by this section is in addition to and not in place of any forfeiture or any other action, injunctive or any remedy available at law. *N.J.S.A.* 2C:21-28b.

All monies collected pursuant to any judgment recovered or order issued under this section must first be allocated to the payment of any State tax, penalty and interest due and owing to the state as a result of the conduct which is the basis of the action. Monies collected should next be allocated in accordance with the provisions of the disposal of forfeited property section of the Code, *N.J.S.A.* 2C:64.6, in an amount equal to the amount of all property involved in the criminal activity plus the costs incurred for the resources and personnel used in the investigation and litigation. *N.J.S.A.*

2C:21.28c. The remainder of the monies collected must be allocated to the general fund of the state. *Id.*

H. Investigative Interrogatories

This section gives the Attorney General authority to issue in writing to serve upon any person, investigative interrogatories requiring the person to answer and produce material for examination. *N.J.S.A.* 2C:21-29a. The Attorney General must first determine that there is reasonable suspicion that a violation of the act is occurring or has occurred or that it is in the public interest an investigation be made. *Id.* This is the same authority that the Attorney General was granted in a racketeering investigation. The person who is served with such a demand may seek an order modifying or setting aside the interrogatories asserting any constitutional or other legal right or privilege that the person may have. *N.J.S.A.* 2C:21-29b; see also *N.J.S.A.* 2C:41-5.

XXXII. UNLAWFUL PRACTICE OF DEN-TISTRY

This statute, enacted in 1995, makes it a third degree crime for a person who knowingly does not possess a license to practice dentistry, or knowingly has had the license suspended, revoked, or otherwise limited by an order entered by the New Jersey State Board of Dentistry, to

a. engage in the practice of dentistry;

b. exceed the scope of practice permitted by a board order;

c. hold himself out to the public or any person as being eligible to engage in the practice of dentistry;

d. engage in any activity for which such license is a necessary prerequisite, including, but not limited to, the ordering of controlled dangerous substances or prescription legend drugs from a distributor or manufacturer; or

e. practice dentistry under a false or assumed name or falsely impersonate another person licensed by the board. *N.J.S.A.* 2C:21-30.

XXXIII. UNLAWFUL PRACTICE OF IMMI-GRATION LAW

A. Definitions

"Immigration consultant" is defined as any person rendering services for a fee, including the completion of forms and applications, to another in furtherance of that person's desire to determine or modify his status in an immigration or naturalization matter under federal law. *N.J.S.A.* 2C:21-31a(1).

"Immigration or naturalization matter" is defined as any matter which involves any law, action, filing or proceeding related to a person's immigration or citizenship status in the United States. *N.J.S.A.* 2C:21-31a(2).

"Immigration related document" is defined as any birth certificate or marriage certificate, or any document issued by the government of the United States, any foreign country, any state, or any other public entity relating to a person's immigration or naturalization status. *N.J.S.A.* 2C:21-31a(3).

B. Offenses

It is a fourth degree crime for an immigration consultant not licensed as an attorney or counselor at law to

1. engage in this State in the practice of law; or

2. hold himself out to the public, either alone or together with, by or through another person, regardless of whether that person is a licensed attorney, as engaging in or entitled to engage in the practice of law, or as rendering legal service or advice, or as furnishing attorneys or counsel, in any immigration or naturalization matter; or

3. assume, use or advertise the title of lawyer or attorney at law, or equivalent terms, in English or any other language. *N.J.S.A.* 2C:21-31b.

It is a fourth degree crime to knowingly retain possession of another person's immigration-related document for more than a reasonable time after its owner has submitted a written request for its return. *N.J.S.A.* 2C:21-31c.

No offense occurs under this section by a person providing immigration services if that person has been accredited as a representative by federal law. *N.J.S.A.* 2C:21-31d.

XXXIV. COUNTERFEITING TRADEMARKS

The Legislature created this offense in 1997. The statute was then amended in 1999 to add protection for the U.S. Olympic Committee's trademark rights. L. 1997, c.57, § 1, amended by L. 1999, c.313.

A. Definitions

"Counterfeit mark" is defined as a spurious mark that is identical with or substantially indistinguishable from either a genuine mark that is registered on the principal register in the United States Patent and Trademark Office or registered in the New Jersey Secretary of State's office or the words, names, symbols, emblems, signs, insignias or any combination thereof, of the United States Olympic Committee or the International Olympic Committee. *N.J.S.A.* 2C:21-32b(1). The mark must also be used or intended to be used in conjunction with goods or services for which the genuine mark is registered and in use. *Id.*

"Retail Value" is defined as the counterfeiter's regular selling price for the item or service bearing or identified by the counterfeit mark. In the case of items bearing a counterfeit mark which are components of a finished product, the retail value shall be the counterfeiter's regular selling price of the product on or in which the component would be utilized. *N.J.S.A.* 2C:21-32b(2).

The quantity or retail value of items or services must include the aggregate quantity or retail value of all items bearing, or services identified by, every counterfeit mark the defendant manufactures, uses, displays, advertises, distributes, offers for sale, sells or possesses. *N.J.S.A.* 2C:21-32f(1).

B. Offense

It is a crime for a person to knowingly manufacture, use, display, advertise, distribute, offer for sale, sell, or possess with intent to sell or distribute within or in conjunction with commercial activities within New Jersey, any item or services bearing, or identified by, a counterfeit mark. *N.J.S.A.* 2C:21-32c. The defendant must perform the activity with the intent to deceive some other person. *Id.* The phrase "[s]ome other person"

includes within its protective sweep not only the immediate customer, but also the trademark owner and prospective future consumers of the goods. *State v. Marchiani*, __*N.J. Super.* _, 2001 *WL* 87861 at *5 (App. Div. 2001).

If the defendant has in his possession or control more than twenty-five items bearing a counterfeit mark, he or she is presumed to have committed the offense. *N.J.S.A.* 2C:21-32c. Possession or control includes both actual and constructive possession.

Any State or federal certificate of registration of any intellectual property is *prima facie* evidence of the facts stated in the certificate. *N.J.S.A.* 2C:21-32f(2).

Any person convicted of this offense is subject to an additional fine, which departs from the ordinary provisions relating to fines. *N.J.S.A.* 2C:21-32d. The defendant may be fined in an amount up to three times the retail value of the items or services involved, provided the fine does not exceed \$100,000 for a fourth degree crime, \$250,000 for a third degree crime, and \$500,000 for a second degree crime. *N.J.S.A.* 2C:21-32d.

All items bearing a counterfeit mark and all personal property including, but not limited to, any items, objects, tools, machines, equipment, instrumentalities or vehicles of any kind employed or used in connection with a violation of this section are subject to forfeiture. *N.J.S.A.* 2C:21-32e.

Conviction under this section does not preclude the defendant's liability for civil remedies under *N.J.S.A.* 56:3-13.16; *N.J.S.A.* 2C:21-32g.

C. Grading

The crime is of the fourth degree if it (i) involves fewer than 100 items bearing a counterfeit mark; (ii) involves a total retail value of less than \$1,000 for all items bearing or services identified by a counterfeit mark; or (iii) is a first conviction for the offense. *N.J.S.A.* 2C:21-32d(1).

The crime is of the third degree if it (i) involves 100 or more items but fewer than 1000 items bearing a counterfeit mark; (ii) involves a total retail value of \$1,000 or more but less than \$15,000 for all items bearing or services identified by a counterfeit mark; or (iii) is a second conviction for the offense. *N.J.S.A.* 2C:21-32d(2).

The crime is of the second degree if it (i) involves 1000 or more items bearing a counterfeit mark; (ii) involves a total retail value of \$15,000 or more for all items bearing or services identified by a counterfeit mark; or (iii) involves a third or subsequent conviction for the offense. *N.J.S.A.* 2C:21-32d(3).

XXXV. ELECTRICAL CONTRACTING WITH-OUT A PERMIT

In 1998, the Legislature made it a fourth degree crime for a person to knowingly engage in the business of electrical contracting without having a business permit issued by the Board of Examiners of Electrical Contractors and the person: (1) creates or reinforces a false impression that he or she is licensed as an electrical contractor or possesses a business permit; (2) derives a benefit, the value of which is more than incidental; or (3) in fact causes injury to another. *N.J.S.A.* 2C:21-33a. If the defendant "in fact" causes injury to another, there is strict liability. *N.J.S.A.* 2C:21-33b.

XXXVI. PENALTY FOR FALSE CONTRACT PAYMENT CLAIMS; REPRESENTATION FOR A GOVERNMENT CONTRACT; GRADING

In 1999, the Legislature made it a second degree crime to knowingly submit to the government any claim for payment or performance of a government contract in the amount of \$25,000 or above knowing such claim is false, fictitious or fraudulent. *N.J.S.A.* 2C:21-34a. It is a third degree crime if the claim exceeds \$2500, but is less than \$25,000. *Id.* It is a fourth degree crime if the claim is \$2500 or less. *Id.*

It is a second degree crime to knowingly make a false material representation in connection with the negotiation, award or performance of a government contract in the amount of \$25,000 or above. *N.J.S.A.* 2C:21-34b. It is a third degree crime if the contract amount exceeds \$2500, but is less than \$25,000. *Id.* It is a fourth degree crime if the amount is \$2500 or less. *Id.*

GAMBLING

I. INTRODUCTION

Certain changes have been made in the gradation of gambling offenses and the penalties available to the sentencing judge including, most significantly, the expansion of the defense that a person is merely a player in a "social game of chance," without the intent to either provide material assistance for gambling activities or to receive profits therefrom in addition to his personal winnings. *See N.J.S.A.* 2C:37-1c; *N.J.S.A.* 2C:37-2c; *N.J.S.A.* 2C:37-3b; *N.J.S.A.* 2C:37-6; *N.J.S.A.* 2C:37-7. A person may also establish a defense to prosecution if his participation in proscribed gambling activity was *de minimus*, that is, within a customary license or tolerance. *See State v. Nevens*, 197 *N.J. Super.* 531, 539 (Law Div. 1984).

While the former provisions in *N.J.S.A.* 2A:112-1 to -3; *N.J.S.A.* 2A:121-1 to -4 and *N.J.S.A.* 2A:170-18 have been repealed, the import of most of these provisions remains incorporated in the reformed penal code. Accordingly, much of the case law developed under the former statutes is still relevant to the application of *N.J.S.A.* 2C:37-1 *et seq.* in particular matters.

In addition, the possible effect of *N.J.S.A.* 5:112-1 *et seq.*, the Casino Control Act, should be considered in certain applications of the revised gambling statute, as discussed herein.

II. DEFINITIONS

N.J.S.A. 2C:37-1 prescribes the essential terminology for describing a particular activity as illegal gambling.

"Contest of chance," is defined as any contest, game, pool, gaming scheme or gaming device in which the outcome depends in a material degree on an element of chance, notwithstanding that the skill of the contestant or some other person may be a factor. *N.J.S.A.* 2C:37-1a. Under this definition, if luck plays a material part in the game, any skill that may also be involved is irrelevant. *See Boardwalk Regency Corp. v. Attorney General,* 188 *N.J. Super.* 372, 378-79 (Law. Div. 1982). For examples of games which have been held to constitute contests of chance, *see Martell v. Lane,* 22 *N.J.* 110, 117 (1956) ("Stop and Go" games involving mechanisms having lights, figures and numbers on a playing board); *Carll & Ramagosa, Inc. v. Ash,* 23 *N.J.* 436, 440 (1957) (boardwalk games in which prizes are awarded); *Zaft v.* Milton, 96 N.J.Eq. 576, 579 (Ch. 1924) (slot machines); Thrillo, Inc. v. Scott, 15 N.J. Super. at 134 (bingo type games); State v. Ricciardi, 18 N.J. 441, 445 (1955) (pinball machines); and Boardwalk Regency Corp. v. Attorney General, 188 N.J. Super. 372, 377 (Law Div. 1982) (backgammon tournaments).

"Gambling," is defined as the act of staking or risking something of value on the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain N.J.S.A. 2C:37-1b; see also, Carll and outcome. Ramagosa, Inc. v. Ash, 23 N.J. 436, 443 (1957); State v. W.U. Tel. Co., 12 N.J. 468, 470 (1953), appeal dism., 436 U.S. 869 (1953). Any publication of the event constitutes a presumption that the uncertain event has occurred. N.J.S.A. 2C:37-5. "Contest of chance" is also a defined term under N.J.S.A. 2C:37-1a and is discussed infra. The second form of gambling referenced under this definition includes betting on numbers generated from the "handle" at a race track or on the outcome of a sporting event over which bettors have no influence. Also, the sale of a share in a winning lottery ticket, where the ultimate proceeds are still to be determined, constitutes illegal gambling. Della Croce v. Ports, 228 N.J. Super. 581, 584 (Law Div. 1988).

"Player" is defined as a person who engages in any form of gambling solely as a contestant or better without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. N.J.S.A. 2C:37-1c. A person who gambles at a social game of chance on equal terms with the other participants does not render material assistance to the establishment, conduct or operation of the game if he performs, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of the premises or the supplying of cards or other equipment used. Id. A person who engages in "bookmaking" is not a "player" as defined under this section. Id.; see also N.J.S.A. 2C:37-1g.

This definition constitutes a valid defense to allegations of illegal gambling. The Code draws a clear distinction between a participant in a social game of chance and the person who is receiving money because he is part of a gambling business and exempts the former from prosecution. Under prior law, the participant in a gambling venture could have been prosecuted. *See N.J.S.A.* 2A:112-1 (repealed 1979).

The "player" defense was held to be inapplicable to the litigants in *Della Croce*, who engaged in the sale of a winning lottery ticket, when the ultimate proceeds were not yet determined. 228 *N.J. Super.* at 584-85. In this Law Division case, the court held that the defendant's agreement to sell her one-half interest in a winning lottery ticket to the plaintiff in exchange for \$3,000 was illegal gambling and that the litigants failed to qualify for the "player" defense, because they "invented, implemented and controlled the gambling game" for the purpose of making money by gambling. *Id.* at 582-85.

"Something of value" is defined broadly to include any money or property, any token, object or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge. *N.J.S.A.* 2C:37-1d. However, the definition excludes any form of promise involving extension of a privilege of playing at a game without charge on a mechanical or electronic amusement device, other than a slot machine as an award for the attainment of a certain score on that device. *Id.*

"Gambling device" is defined as any device, machine, paraphernalia or equipment used or usable in the playing phases of any gambling activity, whether such activity consists of gambling between persons or gambling by a person involving the playing of a machine. *N.J.S.A.* 2C:37-1e. Lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not included in this definition.

"Slot machine" is defined as any mechanical, electrical or other device which, upon the payment of a consideration, may deliver or entitle the person playing to receive cash or tokens exchangeable for cash. *N.J.S.A.* 2C:37-1f. This definition includes machines adaptable for conversion to use as a slot machine and slot machines which are not in working order.

"Bookmaking" is defined as the means of advancing gambling by unlawfully accepting bets from members of the public upon the outcome of future contingent events as a business. *N.J.S.A.* 2C:37-1g. *See also, State v. Romeo,* 43 *N.J.* 188, 207 (1964), *cert. denied,* 379 *U.S.* 970 (1965). The offense lies in the gambling aspect of the bookmaker's operation. It makes no difference whether

the bets are recorded on paper or the memory and thus, it is not necessary to prove that a tangible record was made. *State v. De Stasio*, 49 *N.J.* 247, 253 (1967), *cert. denied*, 389 *U.S.* 830 (1967). The courts must be alert to the frustration of prosecutions legitimately based on inferences drawn from furtive conduct and scanty records. *State v. Fiorello*, 36 *N.J.* 80, 92 (1961), *cert. denied*, 368 *U.S.* 967 (1962).

"Lottery" is defined as an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by some other media, one or more of which chances are to be designated the winning ones; (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive N.J.S.A. 2C:37-19h; N.J.S.A. something of value. 2C:37.6. See also, Lucky Calendar Co. v. Cohen, 19 N.J.L. 634 (1947). A lottery is unlawful where not specifically authorized by law. IGP-East v. Gaming Enforcement Div. 182 N.J. Super. 562, 565-566 (App. Div. 1982). A pyramid scheme has been held not to be a lottery. State v. DeLuzio, 274 N.J. Super. 101, 112 (App. Div. 1993), aff'd., 136 N.J. 363 (1994); State v. Bey, 261 N.J. Super. 182, 187 (App. Div. 1992).

"Gambling resort" is a place used by persons for the purpose of gambling. *N.J.S.A.* 2C:37-1j; *see also, State v. Costa* 11 *N.J.* 239, 246 (1953).

III. PROMOTING GAMBLING

New Jersey has shown a clear, longstanding and comprehensive policy against gambling, except where specifically authorized by its citizens. This public policy is set forth in *N.J. Const.* 1947, Art. 4, § 7, ¶ 2:

No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election....

See Carll & Ramagosa, 23 N.J. at 438-411; Boardwalk Regency Corp. v. Attorney General, 188 N.J. Super. 372, 375-376 (Law Div. 1982); see also Attorney General F.O. No. 9 (1978). Constitutional amendments have been approved to exempt casino gambling, state lotteries to aid education, raffles and bingo games sponsored by charitable organizations from the broad prohibition on gambling. See N.J.Const.1947, Art. 4, § 7, ¶¶ 2(A),(B),(C) and (D). Subparagraph (B) of § 7 was further amended to allow senior citizen associations or clubs to conduct raffles, as adopted on November 6, 1984. Pari-mutual wagering on horse races was approved in popular referendum held in 1939.

A. Promoting Gambling Defined

N.J.S.A. 2C:37-2 combines the separate, former statutory offense involving slot machines, bookmaking and lotteries as forms of conduct that promote gambling activity. The revised offense is defined more broadly as, alternatively, knowingly accepting or receiving money or property, pursuant to an agreement or understanding with any person whereby he participates or will participate in the proceeds of gambling activity, or knowingly engaging in conduct which, materially aids any form of gambling activity. *See N.J.S.A.* 2C:37-2a(1); *N.J.S.A.* 2C:37-2a(2). Such conduct includes, but is not limited to conduct directed.

1. toward the creation or establishment of the particular game, contest, scheme, device or activity involved;

2. toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor;

3. toward the solicitation or inducement of persons to participate therein;

4. toward the actual conduct of the playing phases thereof;

5. toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. *N.J.S.A.* 2C:37-2a(2).

Under *N.J.S.A.* 2C:37-2a(1), a person must receive money or property from gambling activity aside from personal winnings. The offense applies only to persons who assist bettors or profit from their losses. *N.J.S.A.* 2C:37-1c; *see also State v. Lennon*, 3 *N.J.* 337, 345 (1949) (Case, J. concurring). A person who receives money from another to place a bet at a racetrack and gains no benefit for himself from the transaction is not guilty of this offense. *State v. Andreano*, 117 *N.J. Super.* 498, 501 (App. Div. 1971); *but see Chomatopoulos v. Roma DeNotte Social Club*, 212 *N.J. Super.* 447, 449 (Law Div. 1985) (trial court suggested that the defendant in a tort action was involved in the illegal promotion of gambling when he established gambling games at his "club" and received compensation from "contributions" made by those engaging in the gambling activity therein).

One trial court interpreted participation in the proceeds of a gambling activity to include the person who receives gambling winnings. *See State v. Fischer*, 183 *N.J. Super.* 79, 84-85 (Law. Div. 1981). However, taking the statute as a whole, a player's gambling winnings seems less likely to be included, given that authorized gambling itself is not forbidden. *See N.J.S.A.* 2C: 37-1b.

Under *N.J.S.A.* 2C:37-2a(2), a person commits the offense where he engages in any of a variety of conduct that materially aids gambling. The specific, former offense of bookmaking, lotteries, etc. are encompassed within this non-exhaustive offense.

The offense of promoting gambling by lottery is committed when a person aids the distribution of prizes according to chance, except where authorized by any state. *See N.J.S.A.* 2C:37-1h; *N.J.S.A.* 2C:37-6; *see also, Lucky Calendar v, Cohen,* 19 *N.J.* at 412-413; *State v. Steever,* 103 *N.J. Super.* 149, 150 (App. Div. 1968). Hence, the transport of gambling requests and money to out-of-state gambling sites and the return of lottery tickets to gamblers in New Jersey "materially aids [a] form of gambling activity." *State v. Fiola,* 242 *N.J. Super.* 240, 244 (App. Div. 1990); *see also N.J.S.A.* 2C:37-2a(2).

Working for a lottery and possession of lottery slips are separate offenses. State v. Siebert, 126 N.J. Super. 534, 537 (App. Div. 1974); see also State v. Sims, 65 N.J. 359, 375 (1974). Possession of lottery slips or other memoranda is committed by any person, even a bettor, where there is knowing possession of papers connected to a lottery business. State v. Purdy, 51 N.J. 303, 308 (1968). The focus is on the character of the paper and not necessarily the role of the possessor. State v. Purdy, State v. Rucker, 46 N.J. Super. 162 (App. Div. 1957), certif. den. 25 N.J. 102 (1957). Working for a lottery includes persons acting as either messengers or writers of lottery memoranda. State v. Snow, 77 N.J. 459, 465 (1978). Indicia of employment includes records of the amount of play, of a running balance or the presence of duplicate slips. Id.

The offense of promoting gambling by bookmaking involves both the placing of bets and the collection or payment of such bets. *See N.J.S.A.* 2C:37-1g; *see also, State v. Gould,* 123 *N.J. Super.* 444, 448 (App. Div.

1973), *certif. den.* 64 *N.J.* 312 (1973). Intermediaries who place and collect payment of illegal bets are known as "sitters" or "writers" and are included within the scope of this section. *See State v. Hozer*, 19 *N.J.* 301, 309 (1955). The presence or absence of compensation for the sitter or writer's activities as an intermediary for a third person is immaterial to the offense. *State v. Benevento*, 138 *N.J. Super.* 211, 215 (App. Div. 1975). Since the intermediary is equally liable as part of a bookmaking operation, he may not be able to establish, as a defense, that he is merely a player. *Id.; see also N.J.S.A.* 2C:37-1c.

Certain tournaments of games of chance, such as backgammon, have been held to promote gambling where an entry fee is assessed in order to play the game or to underwrite prizes. *See N.J.S.A.* 2C:37-1a; *see also Boardwalk Regency Corp. v. Attorney General*, 188 *N.J. Super.* at 374, 377; Attorney General F.O. No. 1 (1980). However, authorized tournaments of games of chance, such as craps, have been held not to be illegal under this section, even if an entry fee is required. *See IGP-East v. Gaming Enforcement Div.*, 182 *N.J. Super.* at 567; *see also N.J.S.A.* 5:12-5.

Certain activities to promote participation in authorized games of chance are also a form of illegal gambling. For example, a bus tour promotion that offers money or property in exchange for participation in the tour, as determined in a drawing, is gambling. *Attorney General* F.O. No. 6 (1983). The source of payment of winnings to selected bus patrons is irrelevant. *Id.*

B. Grading

The degree of a particular offense is determined by the nature of the gambling operation, the amount of money received or accepted by the defendant, or the defendant's role in the operation. *See N.J.S.A.* 2C:37-2b.

Promoting gambling is a third degree offense if:

1. a person engages in bookmaking and receives or accepts more than five bets totaling more than \$1,000 in any one day, *N.J.S.A.* 2C:37-2b(1); or

2. a person receives in connection with a lottery or policy scheme or enterprise (a) money or written records from a person other than a player whose chances or plays are represented by such money or records, or (b) more than \$100 in any 1 day of money played in such a scheme or enterprise. *N.J.S.A.* 2C:37-2b(2).

It is a fourth degree crime if a person is engaging in bookmaking to the extent that he or she has received or accepted three or more bets in any two week period. *Id.*

In all other cases, promoting gambling is a disorderly persons offense. *Id.* However, notwithstanding that gradation, jurisdiction lies in the Superior rather than the Municipal Court. *See N.J.S.A.* 2C:37-8.

C. Player Defense

It is a defense to a prosecution under N.J.S.A. 2C:37-2a that the person participated only as a player. It shall be the burden of the defendant to prove by clear and convincing evidence his status as such player. N.J.S.A. 2C:37-2c.

While the player defense applies to a bettor or contestant, it also applies to a person who sets up or assists a social game of chance for which he receives no fee, remuneration or share in the profits of the gambling enterprise. *See N.J.S.A.* 2C:37-1c. The burden rests with the defendant to prove by clear and convincing evidence that he is a player. *See State v. Fischer,* 183 *N.J. Super.* at 84 (upholding the constitutionality of placing the burden on defendant). One trial court upheld the defense as constitutional in response to a claim that it impermissibly placed the burden of disproving an element of the offense on the defendant. *Id.* at 84-85.

IV. POSSESSION OF GAMBLING RECORDS

A. Offense Defined

N.J.S.A. 2C:37-3a makes *per se* possession of gambling records an offense. The offense is directed at writings, papers, instruments or articles used either in bookmaking or a lottery enterprise. *N.J.S.A.* 2C:37-3a(1) and (2). The essential elements of the offense are possession and knowledge. *See State v. Brown*, 67 *N.J. Super.* 450, 454 (App. Div. 1961).

Possession requires intentional control and dominion, that is, the ability to affect the item over time, *see N.J.S.A.* 2C:2-1; *see also, State* v. *Labato,* 7 *N.J.* 138, 148 (1951); *cf. State* v. *Davis,* 68 *N.J. Super.* at 455. Possession extends to any person, not merely one taking bets. *State* v. *Purdy,* 52 *N.J.* at 308; *State* v. *Rucker,* 46 *N.J. Super.* at 171. The two types of possession are actual or manual possession and constructive possession. Actual possession exists when the defendant has the object on his person at a given time and has knowledge of its character. *State* v. *Brown,* 67 *N.J. Super.* at 455. Constructive possession exists when the property, while not physically located on the person of the defendant, is so located that the defendant is able to exercise control over it. *State v. McCoy*, 116 *N.J.* 293, 299 (1989).

Possession may be sole or joint. Possession is joint when two or more persons share actual or constructive possession of an object. This means that they knowingly share control over it. *See State v. McCoy*, 116 *N.J.* at 299; *State v. Rajnai*, 132 *N.J. Super.* 530, 536 (App. Div. 1975).

Knowledge of possession of a gambling record is intent to possess that record. State v. Labato, 8 N.J. at 149-150. Knowing possession of an illegal record requires only a general relationship between the items possessed and the gambling activity, that is, an item that pertains in any way to gambling, including either one's betting record or a special type of paper used to record gambling activity. N.J.S.A. 2C:37-3a; see also, State v. Purdy, 51 N.J. at 310; State v. Snow, 149 N.J. Super. 276, 281 (App. Div. 1977), rev'd in part o.g., 177 N.J. (1978). How long a person possessed a record is relevant to his knowledge. See State v. Lanzo, 44 N.J. 560, 566 (1965). Inferences may assist the prosecution in proving defendant's knowledge. State v. Gawronski, 9 N.J. Super. 51, 53 (App. Div. 1950).

For offenses relating to bookmaking, this section specifically denominates certain proscribed papers, which include any paper or paper product in sheet form chemically converted to nitrocellulose having explosive characteristics including as well as any water soluble paper or paper derivative in sheet form. *N.J.S.A.* 2C:37-3a(1).

For offenses relating to a lottery, this section proscribes the possession of writings, papers, instruments or articles of a kind commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise. *N.J.S.A.* 2C:37-3a(2); *see also, State v. Mollica,* 214 *N.J. Super.* 658, 660-62 (Law Div. 1986), *aff'd.,* 217 *N.J. Super.* 95 (App. Div. 1987), *rev'd on other grounds,* 114 *N.J.* 329 (1989).

For examples of writings held to constitute such gambling records, *see State v. Fiola*, 242 *N.J. Super.* at 244-45 (lottery slips for lotteries legally run by other states); *State v. Sanders*, 212 *N.J. Super.* 599 (App. Div. 1986) (records involving establishment of a pyramid scheme), *rev'd on other grounds*, 107 *N.J.* 609 (1987); *State v. Mungioli*, 69 *N.J. Super.* 365, 370 (App. Div. 1961) (carbon paper copies with lottery bets); *State v.*

Pinsky, 6 *N.J. Super.* 90, 93 (App. Div. *1950) (lists of moneys owed to and from players); State v. Carrano,* 27 *N.J. Super.* 382, 385 (App. Div. 1953) (lists of customers' names may be records of a gambling enterprise).

B. Defenses

The Code establishes two defenses to a prosecution under this section. For each, the burden rests with the defendant to prove the defense by clear and convincing evidence. *N.J.S.A.* 2C:37-3b.

The first defense applies only to gambling records commonly used in a lottery or policy operation. The defendant must establish that the records represented his own play or bets and that the number of plays or bets do not exceed ten. *N.J.S.A.* 2C:37-3b(1).

The second defense applies both to a prosecution for possession of bookmaking and possession of lottery or policy records. The defendant must establish that the writing, paper, instrument, or article he possesses in fact was neither used nor intended to be used in a gambling operation. *N.J.S.A.* 2C:37-3b(2).

C. Grading

The degree of the offense is a function of the type, number and amount of the bets or chances listed in the record. *N.J.S.A.* 2C:37-3c.

Possession of gambling records is a third degree offense, subject to a fine of not more than \$35,000, notwithstanding the provisions of *N.J.S.A.* 2C:43-3, when the writing, paper, instrument or article:

1. constitutes, reflects or represents more than five bets totaling more than \$1,000 in a bookmaking scheme, *N.J.S.A.* 2C:37-3c(1); or

2. constitutes, reflects or represents more than 100 plays or chances in a lottery or policy scheme or enterprise. *N.J.S.A.* 2C:37-3c(2).

Otherwise, possession of gambling records is a disorderly persons offense subject to a fine of not more than \$20,000 notwithstanding the provisions of *N.J.S.A.* 2C:43-3 and any other disposition authorized by *N.J.S.A.* 2C:43-2b.

There is no right to trial by jury for a disorderly persons offense of possession of a gambling record even though the statute authorized a \$20,000 maximum fine, *N.J.S.A.* 2C:37-3c, and prosecution in Superior Court is further required. *N.J.S.A.* 2C:37-8; *see also State v. Tenriero*, 183 *N.J. Super.* 519, 521-24 (Law Div. 1982); *R.* 3:1-5.

V. MAINTENANCE OF A GAMBLING RESORT

The Code establishes two fourth degree offenses related to maintaining a gambling resort.

The first offense concerns a person who has a substantial proprietary or other authoritative interest over a premises and permits its use for the promoting of a gambling operation or the possession of gambling records. N.J.S.A. 2C:37-4a. The person must know his premises are used for gambling and both intend that other persons use the premises for that purpose and that he should profit from that activity. Id.; see also, State v. Costa, 11 N.J. at 246. In addition to all other dispositions available, the court may impose on the person convicted of this offense a fine of not more than \$25,000. Id. The offense has been committed when an owner shares in the proceeds of a gambling operation by permitting his premises to be used as a numbers bank or office for the tallying of a numbers operation. State v. Kaiser, 74 N.J. Super. 257, 264-70 (App. Div. 1962), certif. denied, 38 N.J. 310, cert. denied, 376 U.S. 950 (1964). However, a private club maintained by contributions of its members who engage in gambling activity therein may not violate this section because the premises are not open to the general public. See Chomatopoulos v. Roma DeNotte Social Club, 212 N.J. Super. 447, 449 (Law Div. 1985).

The second offense concerns a person who has a substantial proprietary or other authoritative interest over a premises that is held open to the general public, and permits its use for the purposes of a gambling activity. N.J.S.A. 2C:37-4b. Money or property does not have to pass to the person with control over premises open to the general public. Id.; see also, State v. Sachs, 69 *N.J. Super.* 566, 570, 574 (App. Div. 1961). For examples of premises that have been used for the purposes of gambling activity, see State v. Schneiderman, 20 N.J. 422, 424 (1956) (premises where people bet on a wheel of chance); State v. Costa, 11 N.J. at 239 (garage used for running a dice game); State v. Gallo, 128 N.J.L. 172, 179 (Sup. Ct.), aff'd., 129 N.J.L. 52 (E. & A. 1942) (premises used for a pool room); State v. Tuzenew, 15 N.J. Misc. 584, 585 (Sup. Ct. 1937), aff'd. sub nom., State v. Suckow, 120 N.J.L. 190, 198 (E. & A. 1938) (premises used for a horse race betting parlor); State v. Ford, 86

N.J.L. 73, 74 (Sup. Ct. 1914) (tavern in which patrons play cards and dice).

VI. SHIPBOARD GAMBLING

It is a crime under this section to:

1. knowingly cause, engage in or permit the promotion of illegal gambling, the possession of gambling records or the maintenance of a gambling resort on a vessel that embarks from any point within New Jersey, and disembarks at the same or another point within New Jersey, regardless of whether such gambling activities are conducted within or without the waters of New Jersey; or

2. manage, supervise, control, operate or own any vessel that embarks from any point within New Jersey and disembarks at the same or another point, while knowingly causing or permitting any of the aforementioned gambling activities to be conducted, regardless of whether the activities are conducted within or without the waters of New Jersey. *N.J.S.A.* 2C:37-4.1a; *see also N.J.S.A.* 2C:37-2 to -4.

A person who violates the provisions of *N.J.S.A.* 2C:37-4.1a is guilty of a crime of the same degree as the most serious crime committed in violation of *N.J.S.A.* 2C:37.2 (promoting gambling), 2C:37-3 (possession of gambling records), or 2C:37-4 (maintaining a gambling resort), as appropriate. *N.J.S.A.* 2C:37-4.1b.

This section does not apply to gambling activity conducted on United States-flagged or foreign-flagged vessels traveling to another state or nation, except when the ship is in New Jersey waters. *N.J.S.A.* 2C:37-4.1c.

VII. PRESUMPTION FOR GAMBLING OF-FENSES

The Code establishes a presumption to facilitate proof of a gambling offense. When necessary to prove the occurrence of a sporting event, a published report of its occurrence in any daily newspaper, magazine or other periodically printed publication of general circulation is admissible in evidence and constitutes a presumptive proof of the occurrence of the event. *N.J.S.A.* 2C:37-5. Given the effect allowed by the law of evidence under *N.J.S.A.* 2C:1-13e, the presumption is rebuttable and does not shift the burden of proof. Also, the jury is not told of the presumption. Rather, the jury is advised that it may draw a permissive inference from the publication as to whether the sporting event occurred. *See N.J.R.E.* 303; *State v. McCandless*, 190 *N.J. Super.* 75, 79-84 (App. Div. 1983); *State v. Humphreys*, 54 *N.J.* 406, 416 (1969). The presumption also creates a hearsay exception that provides for the admissibility of newspaper accounts of sporting events as proof of their existence.

VIII. LOTTERY OFFENSES; NO DEFENSE

It is no defense to a prosecution for conduct relating to an illegal lottery that the lottery is drawn or conducted outside New Jersey. *N.J.S.A.* 2C:37-6. No offense is committed, however, for possession of slips, memoranda or papers relating to a lottery authorized and sponsored by another state, if such slips, memoranda, or papers were purchased in the state where the lottery was authorized, sponsored or operated. *Id.* This exemption does not apply to receipts a defendant issues to persons for requests to purchase out-of-state lottery tickets sold in New Jersey. *State v. Fiola*, 242 *N.J. Super.* at 244-45.

IX. LOTTERY EQUIPMENT OR ADVICE FOR OUT-OF-STATE UTILIZATION -- MANUFAC-TURE, SALE AND TRANSPORT -- INAPPLICA-BILITY OF LAW PROVIDING PENALTY OR DISABILITY

This section was intended to assure that manufacture of equipment for use in legal gambling remains legal. It is not a violation under the Code to render consultation or advice or to manufacture, process, sell, possess or transport lottery tickets authorized for sale in a lottery conducted or intended to be conducted by another state, *N.J.S.A.* 2C:37-6.1a, or foreign country. *N.J.S.A.* 2C:37-6.1b. Tickets for such lotteries must be sent to addresses within the state or country in which they are conducted or intended to be conducted. The exemption applies to lottery tickets and any equipment or other materials, which are to be used in connection with those lotteries and are shipped to addresses in those jurisdictions. *N.J.S.A.* 2C:37-6.1

X. POSSESSION OF A GAMBLING DEVICE

It is a disorderly persons offense to knowingly possess, manufacture, transport, place, conduct or negotiate any transaction affecting or designed to affect ownership, custody. or use of a slot machine or other gambling device. *N.J.S.A.* 2C:37-7a and b. The knowledge element relates to knowledge that the item is a slot machine or gambling device. Also, if the

prosecution involves a gambling device other than a slot machine, the State must prove that the defendant believed the device would be used in the advancement of an unlawful gambling activity. *See N.J.S.A.* 2C:37-7b.

A "player" is exempt from prosecution under this statute. *N.J.S.A.* 2C:37-7.

Possession of one gambling device in the home for social purposes is not an offense. *N.J.S.A.* 2C:37-7b. Similarly, possession of one or more slot machines manufactured prior to 1941 (known as "antique slot machines") is also not a violation of the Code, provided such slot machines are not used for unauthorized gambling. *Id.*

If the possession of a gambling device violates the Casino Control Offense Act, *N.J.S.A.* 5:12-1 *et seq.*, the crime is elevated from a disorderly persons offense to a misdemeanor, subject to a maximum term of three years imprisonment and a \$25,000 fine. *Id.* The maximum fine is increased to \$100,000 if the violator is not a natural person. *N.J.S.A.* 2C:512-116.

This section does not preempt the municipal regulation of gambling devices. *State (City of Paterson) v. Khater*, 275 *N.J. Super.* 64 (Law Div. 1994).

XI. GAMBLING OFFENSES JURISDICTION

All gambling offenses under *N.J.S.A.* 2C:37-1 *et seq.* are to be prosecuted in the Superior Court. *N.J.S.A.* 2C:37-8. However, the prosecution of a disorderly person's gambling offense in the Superior Court does not entitle the defendant to a jury trial. *See State v. Tenriero,* 183 *N.J. Super.* 519, 521-23 (Law Div. 1981); *R.* 3:1-5.

Gambling cases have always received special sentencing treatment to insure uniformity and to deter people from entering what is frequently an organized crime field. *State v. Hartye*, 208 *N.J. Super.* 319, 324-26 (App. Div. 1986), *aff'd.*, 105 *N.J.* 411 (1987). By administrative directive, all persons convicted of gambling offenses are sentenced by the assignment judge or someone specifically designated by him. *Id.* at 124. This policy has withstood constitutional scrutiny, *State v. De Stasio*, 49 *N.J.* 247, 254-55, *cert. denied*, 389 *U.S.* 830 (1967), and its validity under the Code has also been upheld. *State v. Pych*, 213 *N.J. Super.* 446, 462 (App. Div. 1986).

A finding that organized crime was operating a particular gambling activity is sufficient to overcome the

presumption of non-imprisonment for a first offender, even if that person had a minor role in the operation. *State v. Hartye*, 208 *N.J. Super.* at 326. However, imprisonment on that basis may take the form of a sentence of probation with a conditional term of imprisonment of up to 364 days for the person convicted of a third-degree crime. *Id.*

XII. RELATIONSHIP TO THE CASINO CONTROL ACT

Nothing in this chapter shall be construed to prohibit any activity authorized by the "Casino Control Act," *N.J.S.A.* 5:12-1 *et seq.*, or to supersede any provision of that Act. *N.J.S.A.* 2C:37-9; *see also IGP-East, Inc. v. Gaming Enforcement Div.*, 182 *N.J. Super.* 562, 567 (App. Div. 1982) (holding that a casino craps tournament authorized by the Casino Control Commission was not illegal, even though it took on some indicia of a lottery).

GRAND JURY (See also, INDICTMENT, thisDigest)

I. GENERALLY

R. 3:6-1 requires the assignment judge of each county to order and organize one or more grand juries for each county not exceeding twenty-three members each.

R. 3:6-3 requires the judge to furnish promptly a written copy of the charge to each grand juror. The routine charge states that the burden of proof required for an indictment is "evidence, which if unexplained or uncontradicted, would carry the case to a jury and justify the conviction of the accused." *Trap Rock Industries Inc. v. Kohl,* 59 *N.J.* 471, *cert. denied,* 405 *U.S.* 1065 (1972).

In charging a grand jury under *R.* 3:6-3, the court should charge the jurors that those who join in indictment must have been present and have heard or otherwise have informed themselves of the evidence presented at each session. *State v. Del Fino*, 100 *N.J.* 154 (1985); *see also State v. Ciba-Geigy Corp.*, 222 *N.J. Super.* 343 (App. Div. 1988). Presentment can be made only upon the concurrence of twelve or more grand jurors, and the clerk's administrative error in failing to record that twelve or more were present at all the sessions to hear entire presentation of the evidence did not constitute grand jury misconduct rising to the level that would imperil fundamental fairness in violation of *N.J. Const.* art. 1, ¶ 8. *R.* 3:6-9(a); *State v. Del Fino*, 100 *N.J.* at 161-62.

Grand jury clerk's practice of recording "12 plus" votes in favor of indictment rather than recording the votes of individual grand jurors is disapproved of. *Id.* at 165.

R. 3:6-4 requires the judge to appoint one juror as foreperson, who will administer oaths and endorse all indictments, and another as deputy foreperson who will act as foreperson in the foreperson's absence.

II. CHALLENGES TO THE ARRAY AND TO INDIVIDUAL JURORS (See also, JURY, this Digest)

R. 3:6-2 provides that the prosecutor or defendant may challenge the array of the grand jury on the ground that it was improperly selected and may challenge an individual juror on the ground that he or she is not legally qualified. The Rule also provides that if the challenge is

made subsequent to indictment, it may be the basis of a motion to dismiss the indictment. *R.* 3:6-3 provides that the assignment judge may, when appropriate, ask potential jurors about their background so as to reveal possible bias or interest in a particular matter which would justify excusal.

There is no constitutional prohibition to the exercise of discretion in the selection of grand jurors so long as the process does not impermissibly discriminate by arbitrarily excluding identifiable groups. See State v. Rochester, 54 N.J. 85, 89 (1969). In New Jersey however, by statute, jurors are selected randomly. The names of people eligible for jury service are placed on one list compiled from a merger of lists of registered voters, licensed drivers, filers of state gross income tax returns, and filers of homestead rebate application forms. N.J.S.A. 2B:20-2. The merger of the different lists into the single juror source list must include a reasonable attempt to eliminate a duplication of names. Id. The drawing of the names from the juror source list of people to be summoned for grand jury service must be random. *N.J.S.A.* 2B:20-4.

Defendants may challenge the array or composition of the grand jury under either the Fourteenth Amendment's Equal Protection Clause or the Sixth Amendment's guarantee that grand jurors be drawn from a jury pool that represents a "fair cross-section" of the community. To make out a prima facie case under the equal protection clause, defendant must 1) identify a constitutionally cognizable group; 2) prove "substantial underrepresentation" over a significant period of time; and 3) show discriminatory purpose either by a statistical showing or by demonstrating the use of racially nonneutral selection procedures. Castaneda v. Partida, 430 U.S. 482, 494 (1977); State v. Dixon, 125 N.J. 223, 232 (1991); State v. Ramseur, 106 N.J. 123, 215-16 (1987). To make out a prima facie case under the Sixth Amendment, defendant must 1) identify a constitutionally cognizable group; 2) show that the representation of the particular group is not "fair and reasonable" over a period of time; and 3) show that the underrepresentation was due to systematic exclusion. Duren v. Missouri, 439 U.S. 357, 364 (1979); State v. Ramseur, 106 N.J. at 216-16.

Full-time college students and people of the clergy do not form cognizable groups for the purpose of determining systematic exclusion. *State v. Butler*, 155 *N.J. Super.* 270, 271-72 (App. Div. 1978). Additionally, young people, poor people, and people from a particular municipality do not form a cognizable

group. *State v. Ramseur*, 197 *N.J. Super.* 565, 576 (Law Div.), *aff'd in part and rev'd in part*, 106 *N.J.* 123 (1987).

Once defendant has established a *prima facie* case under the Fourteenth Amendment, the State must rebut the case and dispel the inference of intentional discrimination by showing that permissible racially neutral selection criteria and procedures produced the disproportionate result. *Castaneda v. Partida,* 430 *U.S.* at 497-98; *State v. Ramseur,* 106 *N.J.* at 216-17. To rebut a defendant's *prima facie* case under fair crosssection principles, the State must show that a significant state interest is advanced by those aspects of the jury selection process that result in underrepresentation of the cognizable group. *Duren v. Missouri,* 439 *U.S.* at 367-68; *State v. Ramseur,* 106 *N.J.* at 217.

Under both a Sixth and a Fourteenth Amendment challenge, defendant need not show that the jury that actually returned the indictment was underrepresented by a particular group. *State v. Ramseur*, 106 *N.J.* at 216. On the other hand, a particular grand jury does not have to mirror the community. Instead, the process must be random to ensure that each person has an equal opportunity to serve. *Id.* at 231; *State v. Long*, 204 *N.J. Super.* 469, 483-84 (Law Div. 1985); *State v. Porro*, 152 *N.J. Super.* 259, 267 (Law Div. 1977). Therefore, trial courts should not attempt to obtain racial balance by disqualifying prospective grand jurors on the basis of race. *State v. Ramseur*, 106 *N.J.* at 228-36.

In *Vasquez v. Hillery*, 474 *U.S.* 254, 262-64 (1986), the Supreme Court explained that intentional racial discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the State's power to prevent. A conviction does not cure the taint attributable to a grand jury selected on the basis of race, and the harmless error R. therefore will not apply.

The United States Supreme Court has determined that a white defendant has the requisite third-party standing to challenge the selection of grand jurors based on a claim of discrimination against black people. *Campbell v. Louisiana*, 523 *U.S.* 392, 397-400 (1998).

In challenging the grand jury selection process under the statutory requirement that such a selection be random (*N.J.S.A.* 2B:20-4), the party attacking the process must show by a preponderance of the believable evidence that the process is fatally flawed. *State v. Long*, 204 *N.J. Super.* at 485. In *State v. Russo,* 213 *N.J. Super.* 219, 226-28 (Law Div. 1986), it was held that the county selection procedure was defective because it omitted from a driver's license list licensed drivers residing in certain zip codes; those zip codes contained names of non-county residents as well as county residents. Also, the procedure used to merge the voter and driver's lists was deficient because it only eliminated exact duplicate names and failed to eliminate other obvious duplicate names.

In *State v. Chappee*, 211 *N.J. Super.* 321, 332-33 (App. Div.), *certif. denied*, 107 *N.J.* 45 (1987), the court held that defendant's rights to equal protection and to an impartial grand jury were not violated despite the underrepresentation of women as grand jury forepersons in grand juries which had equal amounts of men and women where there was clearly no intentional discrimination and where duties of foreperson were ministerial.

To serve as a grand juror one must 1) be eighteen years or older, 2) be able to read and understand English, 3) be a United States citizen, 4) be a resident of the county in which he or she is summoned, 5) not have been convicted of any indictable offense, and 6) not have any mental or physical disability which prevents the person from properly serving as a juror. *N.J.S.A.* 2B:20-1. A lack of any one qualification for service constitutes good cause to challenge a particular juror, and defendant need not show that a juror's failure to respond truthfully to a question that would have disqualified her for cause if answered truthfully was deliberate or prejudicial. *State v. Williams*, 190 *N.J. Super.* 111 (App. Div. 1983).

Regarding challenges to individual jurors based on bias or interest, once a grand juror reveals a basis for questioning his or her ability to proceed due to bias or interest, the prosecutor must make a threshold finding to ascertain whether the situation warrants excusal. If the circumstances appear sufficient to raise a reasonable inference of bias or interest, the prosecutor must refer the matter to the assignment judge. R. 3:6-3(a); State v. Murphy, 110 N.J. 20 (1988). In State v. Brown, 289 N.J. Super. 285 (App. Div. 1996), the indictment was properly dismissed when the prosecutor failed to notify the assignment judge that two grand jurors were possibly biased since they knew the police officers involved in the case. In State v. Schenkowlewski, 301 N.J. Super. 115 (App. Div.), certif. denied, 151 N.J. 77 (1997), the court held that, so long as the juror had the capacity to have tainted the other jurors, the indictment was properly dismissed based on the prosecutor's failure to advise the

judge of possible bias despite the fact that the juror at issue did not participate in the ultimate deliberation.

R 3:6-2 provides that any challenges to the array or to individual grand jurors must be made no later than the arraignment/status conference, but for good cause shown may be made via motion at any time. In *State v. Long*, 198 *N.J. Super.* 32, 37-38 (App. Div. 1984), the court held that the trial court in a capital case did not abuse its discretion in permitting defendant to challenge the grand jury array out of time where materials presented at the motion hearing were sufficient to support enlargement of the time period within which constitutional attacks could be made.

III. SECRECY AND DISCOVERY (See also, DISCOVERY, this Digest and RELEASE OF GRAND JURY MATERIALS in the Prosecutors' Grand Jury Manual)

The secrecy mandates of grand jury proceedings are firmly rooted in our common law and are reflected in the New Jersey Court Rules. R. 3:6-6; R. 3:6-7; see also United States v. Procter & Gamble Co., 356 U.S. 677, 681-83 (1958); State v. Doliner, 96 N.J. 236, 246-47 (1984). The rationale behind the secrecy policy is that it prevents potential indictees from escaping, facilitates free and open deliberation by the grand jurors, prevents potential indictees and people acting on their behalf from communicating and interfering with the grand jurors, encourages free and untrammeled disclosure by people with information regarding criminal activity, prevents subornation of perjury or witness tampering with those who appear before the grand jury and subsequently testify at trial, and protects accused yet innocent people who are eventually exonerated from disclosure of the fact that they have been under investigation. *State v. Doliner*, 96 N.J. at 247; In re Allegations of Official Misconduct, 233 N.J. Super. 426, 430-31 (App. Div. 1989). However, the reasons for secrecy must be weighed against defendant's demonstrated need for discovery. State v. CPS Chemical Co., Inc., 198 N.J. Super. 236, 243-45 (App. Div.), leave to appeal denied, 105 N.J. 502 (1985).

While the grand jury is in session, the only people who may be present are the jurors, the prosecutor, the clerk, the witness under examination, the stenographer or court reporter, and an interpreter if needed. R. 3:6-6(a). All persons other than witnesses permitted to be present must take an oath of secrecy prior to admission. R. 3:6-7. During deliberations, the only people who may be present are the jurors, the prosecutor, the clerk, and the stenographer or court reporter, but the jurors may request the prosecutor, the court reporter, and the clerk to leave. R. 3:6-6(a).

Defendant may receive a transcript of the grand jury proceedings after an indictment has been returned. However, the prosecutor may move for a protective order pursuant to R. 3:13-3(f) to preclude defendant's access to the transcript. R. 3:6-6(b).

The standard for disclosure of grand jury materials to government departments for use in a civil prosecution against the grand jury target is a strong showing of particularized need that outweighs the public interest in maintaining grand jury secrecy. State v. Doliner, 96 N.J. at 241. The Doliner standard is also to be used in reviewing a criminal defendant's motion for discovery of grand jury materials of another matter. State v. CPS Chemical Co., Inc., 198 N.J. Super. at 241-45. A deputy attorney general who presents an antitrust matter to a grand jury may not have continued access to those grand jury materials for purposes of litigating a civil antitrust matter without first obtaining a court order upon a showing of a particularized need. In deciding that question, the court may inquire as to whether there has been any evidence of grand jury abuse. State v. Arace Bros., 230 N.J. Super. 22, 32-36 (App. Div. 1989).

Despite confidentiality of tax returns, the Division of Taxation may disclose tax returns to the Attorney General for criminal prosecution relating to violations of tax law. *State v. Pescatore*, 213 *N.J. Super.* 22, 30 (App. Div.), *aff'd*, 105 *N.J.* 441 (1987).

Failure to object to defects in grand jury proceedings precluded reversal of defendant's conviction on the ground that the complaining witness should not have been used as interpreter for grand jury witnesses whose testimony was not merely cumulative. The State had made no discernible attempt to demonstrate that no disinterested person was available to translate. *State v. Lee,* 211 *N.J. Super.* 590, 594-00 (App. Div. 1986).

In *Grill v. City of Newark*, 311 *N.J. Super.* 149, 158-62 (Law Div. 1997), the court held that a police director permissibly used grand jury materials, for which no court order had been issued permitting disclosure, to determine whether to file disciplinary charges against indicted police officers.

Disclosure of grand jury transcripts subject to a disclosure order was proper under the circumstances where the parties met the *Doliner* requirements in seeking

disclosure of their own grand jury testimony and those of other potential witnesses for a civil action charging malicious prosecution and tortuous interference with a business. *Stewart v. Dexter*, 218 *N.J. Super.* 417, 419-21 (Law Div. 1986).

IV. WITNESSES (See also, SELF-INCRIMINA-TION, GRAND JURY, WITNESSES, this Digest and the Prosecutors' Grand Jury Manual)

In State v. Doliner, 96 N.J. at 249-50, the Supreme Court of New Jersey noted the limited rights of witnesses in the grand jury context. For example, prosecutors may subpoena witnesses upon short notice and without first explaining to them the need for their testimony. See In re Application of Waterfront Comm'n, 32 N.J. 323, 340 (1960). Prosecutors may conduct investigations without first establishing the likelihood that any offense has been committed. See In re Addonizio, 53 N.J. 107, 124-27 (1968). Prosecutors may grant witnesses immunity and use the court's contempt power to force compliance with the immunity order, and they may cause a recalcitrant witness to be imprisoned for the remainder of the grand jury's term. N.J.S.A. 2A:81-17.3. Grand jury witnesses have no absolute right to be informed of the privilege against self-incrimination unless he or she is a target, see State v. Vinegra, 73 N.J. 484, 488 (1977); no right to counsel in the grand jury room, see Van Horn v. City of Trenton, 80 N.J. 528, 536 n.2 (1979); no right to remain silent once immunity is granted, N.J.S.A. 2A:81-17.3; no right to prior notice of the subject matter under investigation, and no right to question whether the prosecutor's inquiries are relevant to the subject matter of the investigation, see United States v. Dionisio, 410 U.S. 1, 13-15 & n.12 (1973); In re Petition to Compel Testimony of Tuso, 73 N.J. 575, 579 (1977).

A subpoenaed witness must appear and testify before the grand jury unless he or she has a privilege to not testify or can show by clear and convincing evidence that testifying will have an extremely detrimental effect on his or her mental, physical, or emotional health beyond that suffered by any witness who is required to testify. *Matter* of L.Q., 227 N.J. Super. 41, 49-50 (App. Div. 1988).

After defendant was indicted, he was subpoenaed to appear before the grand jury and waived immunity. He was informed that he was a target but not that he had been indicted. The court held that although such action was improper, it was not an invasion of the grand jury's independence. The improper action merited suppression of improperly elicited testimony, but not dismissal of the indictment. *State v. Porro*, 175 *N.J. Super*. 49 (App. Div. 1980).

In *Matter of Gail D.*, 217 *N.J. Super.* 226, 228-33 (App. Div. 1987), the court declined to adopt a parentchild privilege barring a suspect's children and/or father from testifying before the grand jury about the suspect's potential involvement in his wife's murder. Also, a witness who is a potential grand jury target has no constitutional right to refuse to submit handwriting exemplars pursuant to a grand jury subpoena. *In re Grand Jury Investigation No. 2184-86*, 219 *N.J. Super.* 90, 95 (Law Div. 1987).

In *Matter of Nackson*, 221 *N.J. Super.* 187, 207 (App. Div.), *aff'd*, 114 *N.J.* 527 (1989), the court held that the attorney-client privilege barred the grand jury from compelling an attorney to answer questions regarding his client's location when the grand jury had already returned an indictment charging the client as a fugitive, where there were other means of obtaining the needed information, and where the prosecutor employed the grand jury as an investigative arm to obtain information unrelated to the indictment.

V. INDICIMENT (See also, INDICIMENT, this Digest)

A. Generally

A grand jury may indict for an offense for which a grand jury of another county has already indicted. A grand jury may also indict someone for an offense even though it has previously indicted him or her for a component part of the offense or even for the same offense (the superceding indictment). This is so even if the person has been arrested under the previous indictment, has pleaded not guilty, and a trial date has been fixed. In such cases the court may stay one indictment until the other is tried, consolidate the indictments returned in one county for trial, compel the prosecutor to elect which of such indictments he or she will pursue, or take such other steps as justice requires. However, there is no rule that the first indictment bars future indictments, or must be tried first. State v. Josephs, 79 N.J. Super. 411, 414-15 (App. Div. 1963).

In *Bordenkircher v. Hayes*, 434 *U.S.* 357, 364-65, (1978), the United States Supreme Court held that if a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he or she does not plead guilty to the offense

with which they were originally charged, no due process violation occurs.

B. Challenging the Adequacy of Proofs

In *State v. Holsten,* 223 *N.J. Super.* 578, 585-86 (App. Div. 1988), the court held that although testimony was largely or exclusively incompetent by virtue of leading questions, testimony of the victim and of the investigating police officer was sufficient to sustain charges of possession of a firearm without a permit, possession of a firearm with the purpose to use it unlawfully against the person or property of another, purposely or knowingly causing bodily injury with a deadly weapon. The fact that the victim was hit with a BB pellet gave rise to at least an inference of an unlawfull purpose sufficient to return an indictment.

In *State v. Ciba-Geigy Corp.*, 222 *N.J. Super.* at 351-52, the court determined that while dismissal of an indictment is addressed to the sound discretion of the trial court, it may only be dismissed on the clearest and plainest grounds -- when the indictment's insufficiency is palpably shown. A presumption of validity attaches to all grand jury proceedings until proof is submitted which rebuts this presumption. Moreover, proof of alleged irregularities in the internal operations of a grand jury must be based on something more than "information and belief."

A grand jury may indict a defendant based largely or wholly on hearsay testimony, especially when the grand jury does not require the victims' presence for a second proceeding. *State v. McBride,* 213 *N.J. Super.* 255, 274 (App. Div. 1986).

An indictment may be based wholly on hearsay testimony and other evidence not legally competent or admissible at trial. *See State v. Scherzer*, 301 *N.J. Super*. 363, 428 (App. Div.), *certif. denied*, 151 *N.J.* 466 (1997); *State v. Schmidt*, 213 *N.J. Super*. 576, 583-84 (App. Div.), *rev'd o.g.*, 110 *N.J.* 258 (1988). The alleged inadequacy of the proofs presented to the grand jury cannot be raised for the first time on appeal. *R.* 3:10-2; *State v. Stern*, 197 *N.J. Super*. 49, 54 (App. Div. 1984).

VI. PRESENTMENTS

As previously stated, *R.* 3:6-9(a) provides that a presentment may be made only upon the concurrence of twelve or more jurors. A grand jury may investigate conditions affecting the morals, health, sanitation, or

general welfare of a county, as well as of county institutions, and may return a presentment thereon. *In re Presentment of Bergen County Grand Jury*, 193 *N.J. Super*. 2, 9 (App. Div. 1984). Not only may a grand jury refer to public affairs and conditions, but it may censure a public official where his or her association with the deprecated public affairs or conditions is intimately and inescapably a part of them. Criticism of a public official is permitted only where it is integrally associated with the main purpose of the report, *i.e.*, to draw critical attention to some undesirable condition in the affairs of the public. *In re Presentment of the Camden County Grand Jury*, 124 *N.J. Super.* 16, 20 (App. Div. 1973) (citing *In re Presentment by Camden County Grand Jury*, 34 *N.J.* 378 (1961)).

The term "public official" as used in *R.* 3:6-9 means a specific, identifiable individual and not an undifferentiated group such as "numerous members" of a particular police department. Id. at 18-21. If a public official is censored, the proof must be conclusive that the condemned activity is inextricably linked to the official's non-criminal failure to discharge his or her public duties. R. 3:6-9(c); In re Presentment of Bergen County Grand Jury, 193 N.J. Super. at 7-8. Where a presentment is returned concerning public affairs, special precaution must be taken to protect against censure, embarrassment or disgrace of public officials unless the evidence of official impropriety is conclusive and falls short of the commission of an indictable offense. See R. 3:6-9(c); State v. Porro, 152 N.J. Super. 179, 186 (App. Div. 1977).

The assignment judge must examine the presentment and, if it appears that a crime has been committed, he or she must refer the presentment back to the grand jury for consideration of indictment. *R.* 3:6-9(c); *Investigation into Hamilton Tp. Bd. of Edu.*, 205 *N.J. Super.* 248, 250 (App. Div. 1985). If it appears that the presentment is improper, the assignment judge must strike it. *R.* 3:6-9(c).

VII. PROSECUTOR'S CONDUCT (See also, PROSECUTORS, this Digest and THE ROLE OF THE PROSECUTOR in the Prosecutors' Grand Jury Manual)

While a prosecutor may assist the grand jury, he or she may not participate in its deliberations, express views on questions of fact, comment on the weight or sufficiency of the evidence, or in any way influence or direct the grand jury in its findings. The grand jury must act independently of any outside source. Thus, where an assistant prosecutor informed grand jurors that their refusal to indict was wrong, the jury's subsequent indictment on representment was improper. *State v. Hart*, 139 *N.J. Super*. 565 (App. Div. 1976); *see also State v. Childs*, 242 *N.J. Super*. 121, 129 (App. Div.), *certif. denied*, 127 *N.J.* 321 (1990). However, without expressing his or her own personal views on questions of fact, a prosecutor may explain the significance of evidence before the grand jury to aid its understanding of a complex or unfamiliar matter. *State v. Childs*, 242 *N.J. Super*. at 129.

In State v. Schamberg, 146 N.J. Super. 559, 562-65 (App. Div.), certif. denied, 75 N.J. 10 (1977), the prosecutor told a target witness in the presence of the grand jury that he had reason to believe that he had perjured himself. The prosecutor then asked the witness whether he desired to change his testimony. The court criticized the prosecutor's conduct but determined that it did not impermissibly interfere with the independence of the grand jury. While the prosecutor should not attempt to influence the grand jury in its findings, he or she is not expected to limit his or her participation to innocuous presentation. There is no legal bar to the use of vigorous and skillful questioning which will elicit and compel truthful responses from reluctant witnesses. *Ibid.*

As an officer of the court, the prosecuting attorney has a responsibility to bring to the attention of the presiding judge any evidence of partiality or bias that would affect the impartial deliberations of any of the grand jurors. *R.* 3:6-3(a); *State v. Murphy*, 110 *N.J.* at 33; *see also State v. Marchitto*, 132 *N.J. Super.* 511, 515-17 (App. Div.) (court has duty to investigate potential juror bias), *certif. denied*, 68 *N.J.* 163 (1975); *RPC* 3.3 (attorney's obligation of candor toward tribunal). Upon such a disclosure, the court should determine whether any partiality or bias exists and whether it justifies excusal of the grand juror either from the particular case being considered or from the panel. *State v. Murphy*, 110 *N.J.* at 33.

Ordinarily, appellate courts defer to a trial court's findings of fact unless they were was based on inadequate evidence, incorrect principles of law, or unless there was a clear mistake of judgment. Thus, in formulating remedies for violations of grand jury selection practices, violations of procedural requirements warrant dismissal of an indictment only when "they substantially undermine the randomness and objectivity of the selection mechanism or cause harm to the defendant." *See State v. Ramseur*, 106 *N.J.* at 232. "Unless the

prosecutor's misconduct . . . is extreme and clearly infringes upon the jury's decision-making function, it should not be utilized . . . to dismiss an indictment. [A]n indictment should only be quashed on the clearest and plainest grounds." *State v. Schamberg*, 146 *N.J. Super*. at 564.

However, even in the absence of such prejudice, a conviction may be reversed if the prosecutor's conduct in obtaining an indictment amounted to an intentional subversion of the grand jury process. See State v. Murphy, 110 N.J. at 35-36. In Murphy, the deputy attorneys general demonstrated extremely poor judgment in not advising the assignment judge that two of the grand jurors had connections with insurance companies that were allegedly victimized by defendant. The Law Division found this conduct to be "contrary" to the practice established for county-level grand juries. However, the lack of clear direction in the Attorney General's Grand Jury Manual and the absence of any directly applicable court rule combined to convince the court that the prosecutor's conduct, although strongly disapproved, was not a willful and deliberate violation of established procedures. In the future, however, violations of the established procedures by a prosecuting attorney will result in dismissal of an indictment prior to trial. Ibid.

In United States v. Mechanik, 475 U.S. 66, 70 (1986), the United States Supreme Court held that a violation of *Fed. R. Crim. P.*, which prohibits the simultaneous presence of two witnesses before the grand jury, constituted harmless error and thus did not require a reversal and dismissal of the indictment.

In *State v. Schmidt,* 213 *N.J. Super.* at 584, the court held that the prosecutor's instructions to the grand jury regarding constructive possession were not incorrect, although possibly imprecise and incomplete, and therefore did not warrant dismissal of the indictment.

In *State v. Weston,* 216 *N.J. Super.* 543, 547-48 (Law Div. 1986), the court held that although the better practice is to apply for subpoena *duces tecum,* it would not grant a mistrial or dismiss the indictment where the prosecutor subpoenaed defendant's jail records. The records did not disclose trial strategy, and could not have infringed on defendant's right to privacy or effective assistance of counsel.

In New Jersey, prosecutors have a limited duty to present exculpatory evidence to a grand jury when the evidence directly negates defendant's guilt and is clearly exculpatory. *State v. Hogan*, 144 *N.J.* 216, 236-39 (1996). To negate defendant's guilt, the evidence must "squarely refute an element of the crime." In determining whether the evidence is clearly exculpatory, the quality and reliability of the evidence must be examined in the context of the nature and source of the evidence, and the strength of the State's case. This limited prosecutorial duty to disclose exculpatory evidence to the grand jury is only to be applied in exceptional cases. *Ibid.* Prosecutors similarly have a limited duty to instruct the grand jury on possible exculpatory defenses when the facts known to the prosecutor clearly indicate the appropriateness of such an instruction. *State v. Hogan*, 336 *N.J. Super.* 319 (App. Div. 2001).

A prosecutor may not use the grand jury solely to prepare and preserve the testimony of a witness for the trial of a pending indictment. *State v. Johnson*, 287 *N.J. Super.* 247, 259-60 (App. Div.), *certif. denied*, 144 *N.J.* 587 (1995). However, such improper use of the grand jury will not necessarily result in a reversal. In *Johnson*, the court declined to reverse defendants' convictions on that basis because the State had not obtained an undue advantage in the presentation of its case, because the witness' subsequent trial testimony suggested that she was simply reluctant and not intimidated about testifying before the grand jury, and because the use of the witness' grand jury testimony was not capable of denying defendants a fair trial. *Id.* at 260-61.

A prosecutor may screen questions that the grand jurors wish to ask of witnesses so long as the prosecutor does not infringe upon the independence of the grand jury. *State v. White*, 326 *N.J. Super.* 304, 305 (App. Div.), *certif. denied*, 163 *N.J.* 397 (2000). The New Jersey Court rules do not provide for a specific method of witness examination before the grand jury, and allowing the prosecutor to screen the grand jury's questions helps to prevent unintentional admission of prejudicial matters and allows framing of the issues in an intelligent manner. *Id.* at 313. The assignment judge's instructions to the grand jury can eliminate the potential problem of prosecutors screening out legitimate questions. *Id.* at 314.

VIII. SUBPOENA (See also, DISCOVERY, SUBPEONAS, this Digest and GRAND JURY SUBPOENA in the Prosecutors' Grand Jury Manual)

Where the validity of a grand jury subpoena *duces tecum* is challenged, the State merely needs to establish

the existence of a grand jury investigation and the nature and subject matter of that investigation to overcome the challenge. These matters need not be established by affidavit or other formal proofs, but may be satisfied by a simple representation by counsel to the court that a grand jury investigation has commenced and an explanation of the nature of the investigation. *In re Grand Jury Subpoena Duces Tecum*, 167 *N.J. Super.* 471, 472-73 (App. Div. 1979). The State need only show that the requested documents bear some possible relationship to the grand jury investigation. *Id.* at 473.

IX. VENUE

R. 3:14-1(k) provides that the county of venue for purposes of trial of an indictment returned by the State grand jury shall be designated by the assignment judge appointed to impanel and supervise the State grand jury, or grand juries, pursuant to *R.* 3:6-11(b). *See N.J.S.A.* 2B:22-7; *State v. Zicarelli,* 122 *N.J. Super.* 225 (App. Div.), *certif. denied,* 63 *N.J.* 252, *cert. denied,* 414 *U.S.* 875 (1973); *State v. Mullen,* 126 *N.J. Super.* 355 (App. Div. 1974).

X. JUDICIAL MISCONDUCT

In *State v. Meneses,* 219 *N.J. Super.* 483, 487-90 (App. Div., *certif. denied,* 110 *N.J.* 156 (1988), the court held that the trial judge's improper comments at the outset of the trial, in response to defense counsel's opening statement that defendant was not permitted to be at the grand jury presentation, was harmless error. The trial judge advised the jury as part of his instructions at the end of the case to disregard any comments the court addressed to counsel.

GUILTY PLEAS AND PLEA BARGAINING

R.. 3:9-2 provides that a defendant may plead only guilty or not guilty to an offense.

I. PREREQUISITE TO ENTRY OF GUILTY PLEA

A. Factual Basis

1. R. 3:9-2 requires that prior to the acceptance of a guilty plea, the court must personally address defendant and determine that there is a factual basis for the plea. While due process does not require rejection of a guilty plea accompanied by a protestation of innocence, North Carolina v. Alford, 400 U.S. 25 (1970), our courts will not accept such a plea. State v. Reali, 26 N.J. 222 (1958); State v. Pena, 301 N.J. Super. 158 (App. Div. 1997); State v. Sands, 138 N.J. Super. 103 (App. Div. 1975), aff'd o.g. 76 N.J. 127 (1978). To accept a guilty plea to a noncapital offense, the court must be convinced that defendant, based on his or her own words and in light of the surrounding circumstances, has committed the crime. In re T.M., 166 N.J. 319 (2001); State v. Henries, 306 N.J. Super. 512 (App. Div. 1997). A court cannot accept a guilty plea to a crime which defendant did not commit even if defendant nevertheless wants to plead guilty to it. R. 3:9-2; State v. Smullen, 118 N.J. 408 (1990). The factual basis should contain every element of the crime to which defendant is pleading guilty. State v. Pena, 301 N.J. Super. at 162. However, if defendant's guilt is apparent upon the record, an appellate court may treat the failure to elicit a factual basis as harmless error. State v. Fisher, 132 N.J. Super. 313 (App. Div.), certif. denied, 68 N.J. 144 (1975); see also State v. D.D.M., 140 N.J. 83 (1995).

Despite the general finality of unconditional guilty pleas, defendants may challenge the validity of the plea on appeal by asserting that there was an insufficient factual basis. *State v. Butler*, 89 *N.J.* 220 (1982); *State v. Kadonsky*, 288 *N.J. Super.* 41 (App. Div.), *certif. denied*, 144 *N.J.* 589 (1996). A lack of an adequate factual basis may also be raised in a petition for post-conviction relief. *State v. Owczarski*, 236 *N.J. Super.* 52 (Law Div. 1989). When it is determined on appeal that a plea lacked a sufficient factual basis, the conviction must be vacated and both defendant and the State must be returned to their pre-plea positions. *State v. Barboza*, 115 *N.J.* 415 (1989); *State v. Pena*, 301 *N.J. Super.* at 164. During the taking of the factual basis, inquiry may be made of

defendant and others, *R.* 3:9-2; *State v. Belton*, 48 *N.J.* 432 (1967), but the court is not required to call witnesses sua sponte. *State v. Nolan*, 205 *N.J. Super.* 1 (App. Div. 1985).

In *State v. Lightner*, 99 *N.J.* 313 (1985), our Supreme Court held that if, on appeal, any charge to which a defendant has pled guilty is vacated because an adequate factual basis had not been established, the State cannot claim that their reasonable expectations under the plea bargain have been defeated, and thus seek to reinstate the charges dismissed pursuant to the plea bargain.

In *State v. Nolan*, 205 *N.J. Super.* at 5, defendant challenged the factual basis of his plea to uttering terroristic threats, claiming that the trial judge erred in accepting the plea without taking the victim's testimony that he subjectively perceived himself to be immediately endangered. The trial judge correctly exercised his discretion in accepting defendant's statement which fully established all of the statutory elements.

In *State v. Humphrey*, 209 *N.J. Super.* 152 (App. Div. 1986), the court held that the transcript of a defendant's plea of guilty to a prior charge of receiving stolen goods, entered in municipal court, could be used to establish defendant's guilty knowledge for purposes of pleading guilty to a subsequent charge of receiving stolen goods. *See N.J.S.A.* 2C:20-7b(2), which provides that the guilty knowledge requisite to the proof of receiving may be found where the person on trial "[h]as received stolen property in another transaction within the year proceeding the transaction charged...."

In addition to defendant's admissions of guilt and factual version of the crime, a trial court may look to other evidence in the record to establish a factual basis for a guilty plea. *State v. Sainz,* 107 *N.J.* 283 (1987).

When accepting a guilty plea to an offense that involves restitution at sentencing, the court must make sure that an adequate factual basis has been established for both the plea and the restitution order. *State v. Kennedy*, 152 *N.J.* 413 (1998). A factual basis must be elicited on charges to be dismissed if restitution is to be based on those charges. *State v. Krueger*, 241 *N.J. Super.* 244 (App. Div. 1990). Prosecutors who plea bargain crimes that may form a basis for tier classification under Megan's Law should ensure that sufficient factual bases for sex offenses that are dismissed pursuant to the plea bargain are established. *In re C.A.*, 146 *N.J.* 71 (1996). In *State v. Eisenman*, 153 *N.J.* 462 (1998), it was determined that defendant's factual basis was adequate but barely sufficient. In *State v. Pena*, 301 *N.J. Super.* at 162-63, it was determined that defendant did not give a sufficient factual basis to sustain his guilty plea. A conviction based on a guilty plea without a sufficient factual basis will not necessarily make the sentence illegal for purposes of the post-conviction relief time limitation pursuant to *R.* 3:22-12. *State v. D.D.M.*, 140 *N.J.* at 95; *State v. Mitchell*, 126 *N.J.* 565 (1992).

2. Exception to the requirement that defendant must give an adequate factual basis

R. 3:9-2 provides that "when a defendant is charged with a crime punishable by death, *no factual basis shall be required from defendant* before entry of a plea of guilty to a capital offense or to a lesser included offense, provided the court is satisfied from the proofs presented that there is a factual basis for the plea." (Emphasis added). *See State v. Simon*, 161 *N.J.* 416 (1999). The purpose of the rule is to avoid forcing a defendant who is exposed to the death penalty to state anything that might support any aggravating factors within the death penalty statute. *Id.* When a defendant pleads guilty to a crime punishable by death, the factual basis must establish the attendant circumstances necessary to sustain the death penalty. *State v. Davis,* 116 *N.J.* 341 (1989).

B. Voluntariness and Understanding the Consequences of the Plea

A guilty plea must be knowing, voluntary, and intelligent, defendant must have a full understanding of the consequences of the plea, and defendant must have either properly waived the right to counsel or must have received reasonably competent legal advice prior to entering the plea. R. 3:9-2; McMann v. Richardson, 397 U.S. 759 (1970); State v. Simon, 161 N.J. at 443; State v. Kiett, 121 N.J. 483 (1990); State v. Samuels, 253 N.J. Super. 335 (Law Div. 1991). In determining whether defendant's plea is voluntary and whether defendant fully understands the consequences of the plea, the court may, but does not have to, question not only defendant but also any others with information relevant to the decision. State v. Belton, 48 N.J. at 437-40. Defendant has the right to not be misinformed about any material elements of the plea negotiation, but misinformation that is not material to defendant's decision to plead guilty does not render the plea involuntary. State v. McQuaid, 147 N.J. 464 (1997).

A validly entered plea will not be vacated merely because defendant did not understand collateral consequences of the conviction. Thus, even though the accused was not advised that his guilty plea might subject him to deportation, he was not entitled to withdraw the plea. *State v. Chung*, 210 *N.J. Super.* 427 (App. Div. 1986); *State v. Reid*, 148 *N.J. Super.* 263 (App. Div.), *certif. denied*, 75 *N.J.* 520 (1977); *But see, State v. Vieira*, 334 *N.J. Super.*681, 688 (Law Div. 2000). However, when defense counsel misinforms, rather than fails to inform, defendant of the deportation consequences of the plea, defendant may have grounds for relief. *State v. Garcia*, 320 *N.J. Super.* 332 (App. Div. 1999).

When considering a motion to withdraw a guilty plea, the material mistake alleged must relate to the penal consequences of the plea, rather than to a collateral consequence, such as loss of public employment. *State v. Riggins*, 191 *N.J. Super*. 352 (Law Div. 1983). Penal consequences include potential sentence exposure and any possible periods of parole ineligibility, *State v. Kovack*, 91 *N.J.* 476 (1982), any periods of mandatory parole ineligibility, *State v. Bailey*, 226 *N.J. Super*. 559 (App. Div. 1988), and fines, *State v. Alford*, 191 *N.J. Super*. 537 (App. Div. 1983).

In State v. Heitzman, 107 N.J. 603 (1987), the Supreme Court of New Jersey held that a trial judge is not obliged to advise a defendant of the possibility of loss of public employment as a prerequisite to accepting a guilty plea. Thus, the Court affirmed the Appellate Division decision which held that "defendant need be informed only of the penal consequences of his plea and not the collateral consequences, such as loss of public or private employment, effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, or anything else." State v. Heitzman, 209 N.J. Super. 617, 622 (App. Div. 1986); see also State v. Reid, 148 N.J. Super. at 266-67; State v. Riggins, 191 N.J. Super. at 355-58. Although the Court in *Heitzman* clearly holds that the trial judge need only advise a defendant of the penal consequences of a guilty plea, relief for failure to advise of other matters may still be available to defendant under R. 3:21-1 to correct a manifest injustice. See State v. Taylor, 80 N.J. 363 (1979).

A defendant's misunderstanding of jail time credits may effect his or her understanding of maximum exposure, and a guilty plea premised on such a misunderstanding might not rise to the level of "voluntary and intelligent." *State v. Mastapeter*, 290 *N.J.* *Super.* 56 (App. Div.), *certif. denied*, 146 *N.J.* 569 (1996).

In *Hill v. Lockhart*, 474 *U.S.* 52 (1985), the Court held that where a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases, and the twoprong *Strickland* test for evaluating such claims applies. To satisfy the second, or "prejudice" requirement, defendant must show that there is s reasonable probability that he or she would not have pled guilty but for counsel's error. Where defendant fails to allege in the petition that he or she would not have pled if correctly informed of a parole eligibility date, the allegations are insufficient to satisfy the prejudice requirement and defendant was not entitled to an evidentiary hearing or habeas relief. *Id.* at 56-59.

Retraction may be permitted, however, if defendant has been erroneously advised regarding the elements of the offense, State v. McQuaid, 147 N.J. at 489; State v. Rhein, 117 N.J. Super. 112 (App. Div. 1971), or the maximum exposure is misrepresented by defense counsel, the prosecutor and the trial court, State v. Kiett, 121 N.J. at 488-90; State v. Nichols, 71 N.J. 358 (1976); State v. Lightfoot, 208 N.J. Super. 475 (App. Div. 1986), or there has been a misunderstanding regarding the sentence to be recommended by the prosecutor, State v. Brown, 71 N.J. 578 (1976). In State v. DiFrisco, 137 N.J. 434 (1994), cert. denied, 516 U.S. 1129 (1996), defendant was not permitted to withdraw his guilty plea to a capital offense based on the fact that he had entered the plea based on counsel's advice that by doing so, he would avoid the death penalty.

Generally, it is advisable for defendant to be apprised of the maximum sentence he or she may receive. *State v. Smith*, 109 *N.J. Super.* 9 (App. Div.), *certif. denied*, 56 *N.J.* 473 (1970). With respect to indeterminate terms, plea bargains should include a specific proviso if the statutory five year maximum is to be increased. *State v. Jackson*, 138 *N.J. Super.* 431 (App. Div. 1976).

The mental illness of a defendant precludes the taking of a guilty plea only if the mental condition renders defendant unable to comprehend his or her situation and to intelligently consult with counsel. *State v. Norton*, 167 *N.J. Super.* 229 (App. Div. 1979).

A defendant cannot voluntarily plead guilty when unrepresented and he or she has not waived the right to counsel. *State v. Melendez*, 165 *N.J. Super*. 182 (App. Div. 1979). A voluntary and intelligent plea of guilty made by an accused who has been advised by competent counsel, though, may not be collaterally attacked. *Mabry v. Johnson*, 467 *U.S.* 504 (1984).

In *State v. Howard*, 110 *N.J.* 113 (1988), it was held that the trial court must inform sex offenders of the possibility and parole consequences of a sentence to the Adult Diagnostic Treatment Center before accepting a guilty plea pursuant to a plea agreement. The *Howard* R. is not retroactive. *State v. D.D.M.*, 140 *N.J.* at 100. A statute requiring registration and community notification of convicted sex offenders does not impose additional punishment; since registration and community notification only amount to collateral consequences of a guilty plea, the statute does not invalidate or violate plea agreements. *Doe v. Poritz*, 142 *N.J.* 1 (1994).

Before accepting a plea of guilty to a Graves Act offense, the trial court must inform defendant of the mandatory parole ineligibility term prescribed by the Act. The plea may not be vacated despite the court's omission, however, if defendant is nonetheless aware of the consequences of his or her plea. *State v. Bailey*, 226 *N.J. Super*. 559 (App. Div. 1988). A defendant must be informed of any period of parole ineligibility that is likely to be imposed when a court accepts a guilty plea subject to the No Early Release Act. *State v. Burford*, 163 *N.J.* 16 (2000); *State v. Meyer*, 327 *N.J. Super*. 50 (App. Div.), *certif. denied*, 164 *N.J.* 191 (2000).

In *State v. Garland*, 226 *N.J. Super.* 356 (App. Div.), *certif. denied*, 114 *N.J.* 288 (1988), the Appellate Division held that a trial court has no obligation under *Kovack* or *Howard*, to inform a defendant pleading guilty to a crime, committed while he or she was on probation, that conviction for this crime may subject them to probation revocation and imposition of consecutive sentences upon violation of probation.

In *State v. Cartier*, 210 *N.J. Super.* 379 (App. Div. 1986), the court held that a trial judge must be assured that a defendant is aware of the increased number of years to which he or she may be sentenced pursuant to the Code's extended term provisions before the guilty plea may be accepted. Therefore, where the prosecutor reserves the right to move for an extended term, it becomes the responsibility of the trial judge at the time of the plea to assure that defendant is aware of the sentencing consequences under *N.J.S.A.* 2C:43-7. *See State v. Kovack,* 91 *N.J.* at 481.

When defendant's mental state is pivotal to the question of whether the crime amounts to a capital

offense, the court must explain to defendant what the State must prove to establish a capital crime before accepting a plea. *State v. Jackson*, 118 *N.J.* 484 (1990). Defendants need not be advised of the effect of a plea on future, uncommitted crimes. *State v. Wilkerson*, 321 *N.J. Super*. 219 (App. Div. 1999).

A guilty plea need not be vacated when a defendant is not advised, prior to entering into the plea, of the potential merger of separate offenses, when the merger issue had not yet been resolved at the time of the plea. *State v. Crawley*, 149 *N.J.* 310 (1997). A defendant need not be advised that any statements made in connection with the plea can be used in a subsequent perjury prosecution even if the plea is withdrawn. *State v. Rodriguez*, 280 *N.J. Super.* 590 (App. Div. 1995). In *State v. Simon*, 161 *N.J.* at 442-46, the Supreme Court found that defendant's guilty plea to capital murder was voluntary despite the alleged threats made to defendant and his family.

II. PLEA BARGAINS GENERALLY

The process of plea bargaining is beneficial to both defendant and the State -- defendant benefits from a reduced penalty and the State benefits from the certainty of some punishment and the conservation of resources. See State v. Barboza, 115 N.J. 415 (1989); State v. Williams, 277 N.J. Super. 40 (App. Div. 1994). R. 3:9-3(a) permits the prosecutor and defense counsel to engage in discussions relating to pleas, sentences, and other matters that will promote a fair and expeditious disposition of the case. The judge is not to take part in such negotiations, and should only have advance knowledge of the negotiations if the parties either ask the court whether it will concur in a tentative agreement or ask what maximum sentence it would impose if defendant were to plead guilty. R. 3:9-3(c). The court may not, however, dismiss or downgrade any charges without the prosecutor's consent. R. 3:9-3(c). The full agreement between the parties should be placed on the record in open court at the time the plea is entered. R. 3:9-3(b) and (c). The terms of the agreement should be meticulously observed and, if the sentencing judge in the interests of justice cannot accept the terms, the accused should be permitted to withdraw the plea. *R.* 3:9-3(e). The decision whether to engage in plea bargaining rests solely with the prosecutor, and defendant cannot demand a plea offer or compel the prosecutor to engage in plea negotiations. State v. Williams, 277 N.J. Super. at 46. A plea offer is an all-or-nothing arrangement, and if the offer is rejected by either party or the court the parties must be returned to their pre-bargaining positions. State v. Pennington, 154 N.J. 344 (1998).

An admission by an unrepresented defendant which is made as a result of a prosecutorial promise regarding sentencing is treated as a statement made during plea negotiations and is not admissible in court. State v. Watford, 261 N.J. Super. 151 (App. Div. 1992). A defendant's acceptance of a proposed plea bargain does not create a constitutional right to have the bargain specifically enforced. Mabry v. Johnson, 467 U.S. at 510-11 (1984); State v. Matos, 273 N.J. Super. 6 (App. Div. 1994). Likewise, if the plea agreement is rejected by the sentencing judge, defendant is not entitled to specific performance but, rather, only to withdraw the plea. State v. Brockington, 140 N.J. Super. 422 (App. Div.), certif. denied, 71 N.J. 364; cert. denied, 429 U.S. 940 (1976). A defendant has no right to accept a plea offer that has lapsed, been withdrawn, or that has been previously rejected by him or her unless the State re-offers it. A court therefore cannot enter a plea based on a lapsed, withdrawn, or rejected offer. State v. Williams, 277 N.J. Super. at 47-49. A court may not reject a negotiated plea simply because it disagrees with the prosecutor's exercise of a discretion so long as the exercise is not arbitrary or an abuse of office. State v. Muller, 246 N.J. Super. 518 (App. Div. 1991).

Upon acceptance of a guilty plea by the trial judge, he or she, "for good cause shown," may order that the plea cannot be used as evidence in any civil proceeding. *R.* 3:9-2. However, mere exposure to devastating civil liability does not *per se* constitute good cause as to invoke the protection of this rule. *State v. Schlanger,* 203 *N.J. Super.* 289 (Law Div. 1985).

Once accepted, the terms of the plea agreement must be meticulously adhered to, and defendant's reasonable expectations from the negotiations should be accorded deference. *State v. D.S.*, 289 *N.J. Super*. 413 (App. Div.), *certif. denied*, 146 *N.J.* 69 (1996). Thus, the Supreme Court in *State v. Jones*, 66 *N.J.* 524 (1975), remanded the matter to the sentencing judge for reconsideration of the consecutive terms imposed in view of the prosecutor's inadvertent failure to make a promised recommendation of concurrent sentences.

Entry of a knowing and voluntary unconditional plea of guilty constitutes a waiver of non-jurisdictional constitutional challenges. *State v. DeLane*, 207 *N.J. Super.* 45 (App. Div. 1986) (*Miranda* issue waived). However, a defendant may preserve the right of an appellate challenge to the denial of a suppression motion despite the entry of a plea of guilty. *R.* 3:5-7(d); *State v. Keegan*, 188 *N.J. Super.* 471 (App. Div.), *certif. denied*, 93 *N.J.* 320 (1983). To preserve other issues on appeal, a defendant must enter a conditional plea pursuant to *R.* 3:9-3(f) with the approval of the court and consent of the prosecuting attorney. *See State v. Morales*, 182 *N.J. Super.* 502 (App. Div. 1981), *certif. denied*, 89 *N.J.* 421 (1982).

A court may not accept a negotiated plea subsequent to the pretrial conference and setting of a trial date without the approval of the criminal presiding judge based on a material change of circumstances or the need to avoid a protracted trial or a manifest injustice. *R.* 3:9-3(g).

Failure to raise on defendant's first appeal the issue that restitution was not contemplated by the plea agreement barred relitigation of the scope of the plea agreement on subsequent appeal. *State v. Rhoda,* 206 *N.J. Super.* 584 (App. Div.), *certif. denied,* 105 *N.J.* 524 (1986).

In *State v. Thomas*, 61 *N.J.* 314 (1974), the Supreme Court ordered dismissal of a murder indictment which issued after defendant had entered into a plea bargain regarding a charge of atrocious assault and battery upon the same victim. At the time of the plea, the victim had not yet died, and defense counsel advised his client that a plea to the assault would probably preclude a possible subsequent charge of murder. Dismissal of the murder indictment was deemed necessary to fulfill defendant's reasonable expectation that the plea bargain would terminate his criminal liability for the incident.

In *Ohio v. Johnson*, 467 *U.S.* 493 (1984), the United States Supreme Court held that the double jeopardy clause was not violated when a state continued to prosecute a defendant on charges of murder and aggravated robbery where defendant, who was indicted on four related charges arising out of a murder and robbery, pled guilty to the lesser offenses of involuntary manslaughter and grand theft as charged but pled not guilty to the more serious offenses of murder and aggravated robbery.

In *Bordenkircher v. Hayes*, 434 *U.S.* 357 (1978), the United States Supreme Court held that it was permissible for a prosecutor to threaten to reindict defendant on a more serious charge, for which defendant was clearly subject, while negotiating a plea bargain. A prosecutor may also condition a plea agreement on its acceptance by codefendants. *State v. Smith*, 306 *N.J. Super.* 370 (App. Div. 1997).

In *State v. Fort,* 101 *N.J.* 123 (1985), our Supreme Court held that plea agreements cannot prohibit

codefendants from testifying on each others' behalf. This "no testimony" agreement violated defendant's constitutional rights to due process and compulsory process.

In Rickets v. Adamson, 483 U.S. 1 (1987), a plea agreement was entered into between the State and defendant wherein defendant would plead guilty to second degree murder and testify against his codefendants in return for a specified prison term. In addition, the agreement also provided that if defendant refused to testify "this entire agreement is null and void and the original charge (first-degree murder) will be automatically reinstated." *Id.* at 3-4. This plea agreement was accepted by the trial court, and defendant testified against his codefendants who were eventually Co-defendants' convictions were later convicted. reversed by the Arizona State Supreme Court, and at codefendants' second trial defendant refused to testify, claiming that his obligation to testify under the agreement terminated when he was sentenced. The State then filed a new information charging him with firstdegree murder, and his resulting conviction was affirmed on appeal. Id. at 4-7. The Court in Rickets held that defendant's prosecution for first-degree murder did not violate the constitutional prohibition against double jeopardy. His breach of the plea agreement removed the double jeopardy bar that otherwise would prevail, assuming that second-degree murder is a lesser-included offense of first-degree murder. Id. at 8.

As long as the trial court adheres to the applicable sentencing provisions of the Code, a plea agreement permitting the trial court to increase the sentence for defendant's failure to appear at sentencing is enforceable. *State v. Subin, 222 N.J. Super. 227* (App. Div.), *certif. denied,* 111 *N.J.* 580 (1988). Also, plea agreements that require a defendant to appear voluntarily for sentencing as a condition of the State's waiver of a mandatory minimum term are enforceable. *State v. Shaw,* 131 *N.J.* 1 (1993). A prosecutor may not, however, reserve the right to withdraw from the plea agreement if the judge imposes a lesser sentence than that which was negotiated. *State v. Warren,* 115 *N.J.* 433 (1989).

Defense counsel's failure to inform defendant of a favorable plea bargain amounts to a prima facie case of ineffective assistance. *State v. Powell*, 294 *N.J. Super.* 557 (App. Div. 1996).

Plea negotiations are prohibited in drunk driving cases. *R.* 7:6-2(d); *State v. Hessen*, 145 *N.J.* 441 (1996). *But see L.* 2000, *c.* 75 (creating offense of driving or operating a motor vehicle in an unsafe manner and

providing that municipal prosecutors may recommend the court to accept a plea to a lesser or other offense and may move to amend the original charge in those cases).

III. PLEA BARGAINING UNDER THE CODE

N.J.S.A. 2C:43-6c, commonly referred to as the Graves Act, requires that any defendant convicted under N.J.S.A. 2C:39-4a (possession of a fireman with a purpose to use it unlawfully against the person of another), N.J.S.A. 2C:11-3 (murder), N.J.S.A. 2C:11-4 (manslaughter), N.J.S.A. 2C:12-1b (aggravated assault), N.J.S.A. 2C:13-1 (kidnapping), N.J.S.A. 2C:14-2a (aggravated sexual assault), N.J.S.A. 2C:14-3a (aggravated criminal sexual contact), N.J.S.A. 2C:15-1 (robbery), N.J.S.A. 2C:18-2 (burglary), or N.J.S.A. 2C:29-5 (escape) who, while committing or attempting to commit the crime, used or was in possession of a firearm as defined in N.J.S.A. 2C:39-1f, "shall be sentenced to a term of imprisonment by the court" including a minimum term during which defendant shall be ineligible for parole. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or 3 years, whichever is greater, or 18 months in the case of a fourth degree crime. The Graves Act also provides for extended terms for repeat Graves Act offenders.

On April 27, 1981, in an attempt to assure that the mandatory three year prison term was strictly enforced in accordance with the legislative intent, our Supreme Court issued a memorandum directing all trial judges that approval may not be given to negotiated pleas which involve the dismissal of offenses carrying mandatory custodial terms under the Graves Act. The only exceptions are if the prosecutor represents on the record that there is insufficient evidence to warrant a conviction, or that the possibility of acquittal is so great that dismissal is warranted in the interests of justice; or that the plea being entered by defendant either includes the parole ineligibility term under the Graves Act or defendant acknowledges that a parole ineligibility term is to be imposed at least equal in length to that which would have been required under the Graves Act for the offense being dismissed; or that the prosecutor states on the record, either *in camera* or in open court, that the plea bargain is essential to assure defendant's cooperation with the prosecution.

This memorandum further directed the trial judge to ascertain at the time of the entry of the plea or at sentencing whether a firearm was used or possessed in connection with an offense to be dismissed pursuant to a plea bargain. Such a finding is required since neither use nor possession of a firearm is a necessary element of a Graves Act offense. These same requirements apply to the dismissal or downgrading of an indictment or counts therein.

N.J.S.A. 2C:43-6.2 provides a limited exception to the Graves Act mandatory minimum. Under that section, a prosecutor may move before the assignment judge and urge that imposition of the mandatory minimum under *N.J.S.A.* 2C:43-6c on a first-time Graves Act offender does not serve the interests of justice.

There has been some question regarding the ability of prosecutors to enter into plea bargains in capital cases because of the language of N.J.S.A. 2C:11-3. That statute provides that the "conviction" of certain persons for purposeful or knowing murder shall require the court to "conduct a separate sentencing proceeding," N.J.S.A. 2C:11-3c(1), and that the sentencing proceedings . . . shall not be waived by the prosecuting attorney," N.J.S.A. 2C:11-3d. However, these provisions do not prohibit a prosecutor from choosing to indict a defendant for a lesser-included offense, felony murder, or noncapital knowing or purposeful homicide. The law only prohibits waiver of the sentencing phase by the prosecutor, and that phase is triggered by a conviction of knowing and purposeful homicide committed by defendant's own conduct, in a murder for hire situation, or at the command of a leader of a narcotics trafficking network in furtherance of a conspiracy. N.J.S.A. 2C:11-3c; R. 3:7-3(b). Thus, prior to conviction, N.J.S.A. 2C:11-3d is not applicable.

Persons convicted of certain violations of the Comprehensive Drug Reform Act are subject to mandatory minimum terms and parole disqualifiers. N.J.S.A. 2C:35-1 et seq. Prosecutors may waive the mandatory minimums by entering into a negotiated plea agreement or post-conviction agreement with defendant. N.J.S.A. 2C:35-12. The statute does not unconstitutionally penalize a defendant for exercising his or her right to a jury trial. State v. Brown, 227 N.J. Super. 429 (Law Div. 1988); State v. Morales, 224 N.J. Super. 72 (Law Div. 1987). The prosecutor's exercise of discretion is subject to judicial review, and he or she should state on the record the reasons for waiving or not waiving the mandatory term and penalty. A defendant who can establish by clear and convincing evidence that the prosecutor's exercise of discretion was arbitrary and capricious is entitled to relief. State v. Vasquez, 129 N.J. 189 (1992).

At the request of the Supreme Court, in 1992 the Attorney General promulgated Plea Agreement Guidelines for the exercise of prosecutorial discretion in waiving mandatory sentences to promote uniformity throughout the State. See State v. Vasquez, 129 N.J. at 195-96; State v. Lagares, 127 N.J. 20 (1992). The guidelines allowed individual prosecutors to enact stricter standards, which caused significant differences between counties. It was eventually determined that the guidelines allowed individual counties too much discretion, and new guidelines were ordered. State v. Brimage, 153 N.J. 1 The new guidelines allow some flexibility (1998).among the counties, but local differences must be justified and must fall within uniform statewide guidelines. When a defendant challenges the prosecutor's application of the Attorney General's Guidelines, he or she must show by clear and convincing evidence that the prosecutor's decision amounts to a gross and patent abuse of discretion. State v. Coulter, 326 N.J. Super. 584 (App. Div. 1999).

IV. WITHDRAWAL OF GUILTY PLEAS

If at the time of sentencing the court determines that the interests of justice would not be served by the plea agreement, defendant may withdraw the plea. *R.* 3:9-3(e). A motion to withdraw a guilty plea shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice. *R.* 3:21-1; *see also State v. Fischer,* 38 *N.J.* 40 (1962). Once the plea has been entered it can only be withdrawn by leave of court, and that determination is addressed to the court's discretion. *State v. Deutsch,* 34 *N.J.* 190 (1961).

With respect to a motion to withdraw before sentencing, courts should exercise their discretion liberally to allow withdrawal of the plea. State v. Smullen, 118 N.J. at 415-16; State v. Deutsch, 34 N.J. at 198-99. Nevertheless, a whimsical change of mind or a mere belated assertion of innocence will not suffice. Rather, defendant must present some plausible basis for the request, as well as his or her good faith in asserting a defense on the merits. This burden is heavier when the plea is entered pursuant to an agreement. State v. Smullen, 118 N.J. at 416-17; State v. Gonzalez, 254 N.J. Super. 300 (App. Div. 1992); State v. Rodriguez, 179 N.J. Super. 129 (App. Div. 1981); State v. Huntley, 129 N.J. Super. 13 (App. Div.), certif. denied, 66 N.J. 312 (1974). If misinformation materially influences defendant's decision to plead guilty and causes defendant to suffer prejudice, or if defendant is not afforded his or her reasonable expectations generated by the plea, he or she should be permitted to withdraw the plea. State v.

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McQuaid, 147 *N.J.* at 486-91; *State v. D.S.*, 289 *N.J. Super.* at 423-24. Innocence or guilt is a relevant factor for the court to consider in determining whether withdrawal of the plea will be permitted. *State v. Johnson*, 131 *N.J. Super.* 252 (App. Div. 1974); *State v. Phillips*, 133 *N.J. Super.* 515 (App. Div. 1975). Also, the materiality of the mistake or omission and the resulting prejudice to defendant are pertinent factors when determining whether defendant should be permitted to withdraw a plea of guilty. *State v. Rodriquez*, 179 *N.J. Super.* at 135-36.

When the application to withdraw the plea is first made after defendant has been sentenced, the court will not interfere absent a strict showing of manifest injustice which requires a vacation of the conviction. *State v. Deutsch*, 34 *N.J.* at 198. Although it is defendant who usually seeks to withdraw a guilty plea, under certain circumstances the State may move to withdraw the plea. *See State v. Smith*, 306 *N.J. Super.* at 383 (plea agreement conditioned on absence of prior convictions and State discovered prior conviction after the plea was entered); *State v. Ismail*, 292 *N.J. Super.* 590 (App. Div. 1996) (defendant made false post-plea statement to police and intended to lie at codefendant's trial). Evidence of a withdrawn guilty plea is inadmissible at trial. *State v. Boone*, 66 *N.J.* 38 (1974).

In State v. Chapee, 211 N.J. Super. 321 (App. Div.), certif. denied, 107 N.J. 45 (1986), a plea agreement was proposed by the State wherein defendant would be exposed to a maximum of only two years' incarceration. Defendant, however, hesitated to accept this offer and, consequently, the State rescinded it--before it was put on the record and before defendant accepted or rejected it. Subsequently, defendant was sentenced to a custodial term of seven years. Id. at 324-25. On appeal, defendant argued that the State wrongfully withdrew from the plea bargaining agreement. Upon affirming defendant's conviction and sentence below, the court held that the trial court was not obliged to enforce this particular plea agreement in light of the fact that defendant's plea of guilty had not been entered on the record before the State withdrew its offer and since defendant had not been prejudiced in asserting any defense by the State's change in position. Id. at 331-32.

The State may not withdraw a plea offer after defendant has accepted it, pled guilty, and begun serving the sentence, or when the State makes a mistake in calculating the sentence recommendation pursuant to *Brimage* and the Attorney General's Guidelines. However, the State may be able to withdraw its plea offer if it has made an honest mistake in calculating the sentence recommendation and moves to withdraw the offer before defendant is sentenced. *State v. Veney*, 327 *N.J. Super.* 458 (App. Div. 2000).

Defendants were not permitted to withdraw their guilty pleas based on the sentencing court's failure to set forth the mandatory periods of parole ineligibility when the prosecutor set forth the State's recommendation for parole disqualification in open court, defendants acknowledged that they heard and understood the prosecutor's recommendation, and they signed plea forms which indicated the minimum and maximum periods of parole ineligibility. *State v. Smith*, 306 *N.J. Super.* at 381-83.

A defendant may not withdraw a guilty plea when the court enhances the sentence for his or her failure to appear at sentencing, in violation of condition of defendant's release after entry of plea. *State v. Cooper*, 295 *N.J. Super.* (Law Div. 1996).

Defendant was not permitted to withdraw his guilty plea to felony murder and theft fourteen years after entry of the plea, based on the fact that he was misinformed about his eligibility for the death penalty, because the misinformation did not materially and prejudicially influence his decision to plead guilty, the evidence against him was overwhelming, and the State would have been prejudiced by the fourteen year delay. *State v. McQuaid*, 147 *N.J.* at 486-99.

V. CONDITIONAL PLEAS AND EFFECT OF GUILTY PLEAS ON APPEAL

Entering a knowing and intelligent unconditional guilty plea generally precludes defendant from raising both nonjurisdictional claims, including deprivation of constitutional rights, which occurred prior to entry of the plea, and prior events of a nonconstitutional dimension. *State v. Crawley*, 149 *N.J.* at 316; *State v. Giordano*, 281 *N.J. Super.* 150 (App. Div. 1995); *State v. Rosenberg*, 160 *N.J. Super.* 78 (App. Div.), *certif. denied*, 78 *N.J.* 322 (1978).

However, R. 3:5-7(d) provides that the denial of a motion to suppress physical evidence based on an alleged unlawful search may be reviewed on appeal despite the entry of a judgment of conviction following a plea of guilty. On appeal, reviewing courts must determine whether the suppression motion was correctly decided

based solely upon the evidence presented at the motion hearing. *See State v. Gibson*, 318 *N.J. Super.* 1 (App. Div. 1999).

R. 3:9-3(f) provides that a defendant may enter a conditional plea of guilty, with the approval of the court and consent of the prosecuting attorney, while reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. *See State v. Morales,* 182 *N.J. Super.* at 507-09. The rule further provides that if defendant prevails on appeal, he or she shall be afforded the opportunity to withdraw the guilty plea.

The right to appeal the denial of a motion to suppress a confession must be reserved under *R.* 3:9-3(f), and not under *R.* 3:5-7(d). See State v. Smith, 307 N.J. Super. 1 (App. Div.), certif. denied, 153 N.J. 216 (1998). Wiretap challenges must also be reserved under *R.* 3:9-3(f). See State v. Keegan, 188 N.J. Super. at 473-76.

A defendant who pleads guilty to an offense retains the right to raise on appeal the question as to whether there was in fact a sufficient factual basis for the plea. *State v. Butler*, 89 *N.J.* 220 (1982). Additionally, a defendant who pleads guilty does not necessarily waive issues involving sentencing. *State v. Vasquez*, 129 *N.J.* at 194-95; *State v. Peters*, 129 *N.J.* 210 (1992); *State v. Meyer*, 327 *N.J. Super.* at 55.

A bargained sentence may be appealed as excessive by the defendant. However, the appellate court should consider every element of the agreement and defer to the presumed reasonableness of a bargained sentence. Only in compelling circumstances will appellate modification be appropriate. *State v. Spinks*, 66 *N.J.* 568 (1975); *State v. Sainz*, 210 *N.J. Super*. 17 (App. Div. 1986).

Waiver of defendant's right of appeal may be an element of a plea bargain. Nevertheless, defendant may repudiate the agreement and elect to take a timely appeal. In this situation, the prosecutor may, no later than seven days prior to the scheduled oral argument or submission of the appeal, annul the plea agreement, reinstate any dismissed charges, and restore the parties to their prebargaining positions. *R.* 3:9-3(d); State *v. Gibson,* 68 *N.J.* 499 (1975).

A defendant may waive his or her right to merger of offenses if the waiver is part of the consideration for the plea agreement. *State v. Crawley*, 149 *N.J.* at 312.

GUN PERMITS

I. LICENSING PROVISIONS RELATING TO FIREARMS

A. General Licensing Provisions

Chapter 58 governs the regulatory provisions for firearms. *N.J.S.A.* 2C:58-1 *et seq.* These provisions include requiring the following gun permits: permit to purchase a handgun, *N.J.S.A.* 2C:58-3, firearms purchaser identification card, *N.J.S.A.* 2C:58-3, permit to carry a handgun, *N.J.S.A.* 2C:58-4, and license to possess and carry machine guns and assault firearms, *N.J.S.A.* 2C;58-5. Such provisions are distinct from the substantive criminal offenses arising out of unlawful possession of firearms. *N.J.S.A.* 2C:39-1 *et seq.*

B. Statutory Construction

These licensing requirements will be construed so as to limit the availability of firearms. *See, e.g., In re Preis,* 118 *N.J.* 564 (1990); *Crossroads Gun Shop v. Edwards,* 214 *N.J. Super.* 244 (Law Div. 1986); *Service Armament Co. v. Hyland,* 70 *N.J.* 550 (1976); *Siccardi v. State,* 59 *N.J.* 545 (1971).

II. PURCHASE OF FIREARMS (N.J.S.A. 2C:583)

A. Permit To Purchase A Handgun

No person shall receive, purchase, or otherwise acquire a handgun unless that person has first secured a permit to purchase a handgun. *N.J.S.A.* 2C:58-3a. This will even include renting handguns. *Crossroads Gun Shop v. Edwards*, 214 *N.J. Super.* 244 (Law Div. 1986). Only one handgun may be purchased on each permit. *N.J.S.A.* 2C:58-3i.

B. Firearms Purchaser Identification Card

No person shall receive, purchase, or otherwise acquire an antique cannon or a rifle or shotgun unless that person possesses a firearms purchaser identification card. To obtain that firearm, the person must exhibit said card and sign a written certification. *N.J.S.A.* 2C:58-3b. There is no restriction as to the number of rifles or shotguns that may be purchased as long as the person possesses a valid card and signs the written certification for each transaction. *N.J.S.A.* 2C:58-3i.

Nothing in this section may be construed as authorizing the purchase or possession of a sawed-off shotgun. *N.J.S.A.* 2C:58-3k; *see N.J.S.A.* 2C:39-3b.

C. Exemptions

Permits or cards are not required for the following: licensed dealers (*N.J.S.A.* 2C:58-3a, b); antique rifles or shotguns (*N.J.S.A.* 2C:58-3b); inherited firearms (*N.J.S.A.* 2C:58-3j); distress signalling devices (*N.J.S.A.* 2C:58-3l); and temporary transfers of firearms for practice on a target range, for hunting, or for training purposes. (*N.J.S.A.* 2C:58-3.1; *N.J.S.A.* 2C:58-3.2).

D. Who May Obtain

The person must be of good character and good repute in the community in which he lives. Also, the person must not be subject to any of the listed disabilities. *N.J.S.A.* 2C:58-3c. As to the disabilities, a permit or card shall not be issued to:

1. Any person convicted of a crime, whether or not armed with or possessing a weapon at the time of such offense. N.J.S.A. 2C:58-3c(1); see In re Purcell, 137 N.J. Super. 369 (App. Div. 1975). The limiting words "in this State" were removed by statutory amendment, consequently barring a person convicted of an out-ofstate crime. An out-of-state conviction is a crime where a sentence of imprisonment in excess of six months is authorized under the law of the other jurisdiction. State v. G.P.N., 321 N.J. Super. 172, 175 (App. Div. 1999); see, In re Hart, 265 N.J. Super. 285 (Law Div. 1993). An applicant who has had a criminal conviction expunged is not barred by this particular disability. In re Hart, 265 N.J. Super. 285 (Law Div. 1993); see N.J.S.A. 2C:52-27. A permit to an applicant who has no criminal record and is otherwise eligible may be denied if the spouse who has been convicted of a crime will have access to any firearms kept in the house. In re Clark, 257 N.J. Super. 152 (Law Div. 1992).

2. Any drug dependent person as defined in *N.J.S.A.* 24:21-2; to any person who is confined for a mental disorder to a hospital, mental institution, or sanitarium; or to any person who is a habitual drunkard. *N.J.S.A.* 2C:58-3c(2). In determining if the person was a habitual drunkard, prior convictions for driving while under the influence and refusal to submit to a breathalyzer test are relevant. *State v. Freysinger*, 311 *N.J. Super.* 536 (Law Div.), *aff'd*, 311 *N.J. Super.* 509 (App. Div. 1997).

3. Any person who suffers from a physical defect or disease which would make it unsafe for him to handle firearms, to any person who has ever been confined for a mental disorder, or to any alcoholic unless any of the foregoing persons produces a certificate of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the handling of firearms. *N.J.S.A.* 2C:58-3c(3).

Also, a permit will be denied to any person who knowingly falsifies any information on the application form. *N.J.S.A.* 2C:58-3c(3).

4. Any person under the age of 18 years. *N.J.S.A.* 2C:58-3c(4).

5. Any person where the issuance would not be in the interest of the public health, safety, or welfare. N.J.S.A. This catch-all provision can include 2C:58-3c(5). criminal charges or domestic violence complaints which were ultimately dismissed or otherwise similarly disposed of, but the State bears the burden of proving that the applicant poses a continued public or personal danger. In re J.W.D., 149 N.J. 108 (1997) (domestic violence complaints dismissed); State v. Cunningham, 186 *N.J. Super.* 502 (App. Div. 1982) (charges surrounding shooting of wife no-billed); see Hoffman v. Union County Prosecutor, 240 N.J. Super. 206 (Law Div. 1990) (several assault and domestic violence charges dismissed). It can also include disorderly persons convictions. See In re Sbitani, 216 N.J. Super. 75 (App. Div. 1986) (disorderly persons conviction for possession of marijuana).

6. Any person subject to a domestic violence restraining court order against them forbidding the possession of firearms. *N.J.S.A.* 2C:58-3c(6); *see N.J.S.A.* 2C:25-21; 18 *U.S.C.* § 922(g)(8).

E. How To Obtain A Permit To Purchase A Handgun And Firearms Purchaser Identification Card

Applications for permits or cards shall be made in the form prescribed by statute. *N.J.S.A.* 2C:58-3e. Applications, with the payment of the required fee, must be made to the chief police officer of an organized full-time police department of the municipality where the applicant resides or to the superintendent in all other case. *N.J.S.A.* 2C:58-3d, e, f. The word "resides" is

synonymous with the term "domicile," so a secondary residence does not qualify. *In re Berkeley*, 311 *N.J. Super.* 99 (App. Div. 1998).

The chief police officer or the superintendent shall investigate the same, including obtaining the fingerprints of the applicant and shall have them compared with any and all records of fingerprints. *N.J.S.A.* 2C:58-3e, f. In *Weston v. State*, 60 *N.J.* 36 (1972), the Supreme Court held that the chief police officer or superintendent is obligated to investigate in good faith. Although the investigation is conducted through informal discretionary proceedings, the applicant should be given an opportunity to discuss the matter, to be informed of reasons for denial, and to offer explanations or information for purpose of meeting objections.

Unless good cause for the denial thereof appears, the chief police officer or superintendent shall grant and issue the permit or card within thirty days from the date of receipt of the application for residents of this State and within 45 days for nonresident applicants. *N.J.S.A.* 2C:58-3d, f. Where a chief police officer has not received fingerprint records from other agencies within thirty days, there is "good cause" for denying or withholding a decision for a permit or card. *Adler v. Livak* 308 *N.J. Super.* 219, 223 (App. Div. 1998).

F. Duration Of Authority

Once issued, a permit is valid for ninety days and may be renewed for good cause for an additional ninety days. A card is valid until such time as the holder becomes subject to any of the disabilities and must then be returned within five days. *N.J.S.A.* 2C:58-3f.

G. Appeal From Denial

Any person aggrieved by the denial of a permit or card may request a hearing in the Superior Court of the county in which he resides or, in all other cases, in the Superior Court of the county in which his application was filed. The request for a hearing shall be made in writing within thirty days of the denial and proper service given. No formal pleading or filing fee shall be required. The hearing shall be held within thirty days. *N.J.S.A.* 2C:58-3d.

In *Weston v. State*, 60 *N.J.* 36 (1972), the Supreme Court held that the standard of review of denial is *de novo*, with the introduction of relevant and material testimony. Hearsay testimony is admissible, but any decision may

not be based solely upon hearsay. The burden is on the State by a preponderance of the evidence.

Appeals from the results of such hearing shall be in accordance with law. *N.J.S.A.* 2C:58-3d.

H. Revocation

Any card may be revoked by the Superior Court of the county wherein the card was issued after a hearing with notice given to the holder and where there is a finding that the holder no longer qualifies. The county prosecutor of any county, the chief police officer of any municipality, or any citizen may apply to such court at any time for the revocation of such card. *N.J.S.A.* 2C:58-3f.

The State is not required to bring action to revoke a card within forty-five days after seizure of a weapon under the Prevention of Domestic Violence Act, but may do so at any time that holder no longer qualifies. *State v. G.P.N.*, 321 *N.J. Super.* 172 (App. Div. 1999); *see N.J.S.A.* 2C:25-21.

There is no statutory procedure for revocation of a permit. Such procedure is not needed because such permits limit purchase to a single handgun and would have already served its purpose, unlike cards which do not similarly limit the number of rifles or shotguns that can be purchased in the future. *Delaney v. Teaneck Tp.*, 144 *N.J. Super.* 483 (1976).

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

A. Permits Generally

Permits are required to carry handguns. Any person who holds a valid permit to carry a handgun is authorized to carry a handgun in all parts of this State, except as prohibited by *N.J.S.A.* 2C:39-5e. Only the actual and legal holder of the permit may carry a handgun, but one permit is sufficient for all handguns owned by the holder. *N.J.S.A.* 2C:58-4a.

B. Exemptions

Only a few particular classes of persons, such as law enforcement officers, are permitted to carry a handgun without a permit. N.J.S.A. 2C:39-6a, b, c.

C. Who May Obtain

All three statutory requirements are critical and must be met. *In re Preis*, 118 *N.J.* 564 (1990). These requirements are: (1) the applicant must demonstrate that he is a person good character who is not subject to any of the disabilities set forth in *N.J.S.A.* 2C:58-3c, (2) that he is thoroughly familiar with the safe handling and use of handguns, and (3) that he has a justifiable need to carry a handgun. *N.J.S.A.* 2C:58-4c.

As to the first requirement of good character and fitness, it may not be presumed that a former policeman satisfies this requirement. *In re Preis, supra.*

As to the second requirement of being thoroughly familiar with the handling and use of handguns, the fact that a person is a former policeman is not sufficient to satisfy this requirement. Even current police officers are required to qualify annually in the use of a revolver or similar weapon. *In re Preis, supra.*

As to the third requirement of justifiable need, in In re Preis, 118 N.J. 564 (1990), the Supreme Court declared that a private citizen must show an urgent necessity for self-protection. Generalized fears for personal safety or need to protect property alone are Specific threats or previous attacks inadequate. demonstrating a special danger to applicant's life that can not be avoided by other means are required. See In re Johnson, 267 N.J. Super. 600 (App. Div. 1993) (permit denied to mayor who had statutory duty as head of the police department because such duties were really only administrative and there was no particularized showing of urgent necessity for self-protection); Doe v. Dover Township, 216 N.J. Super. 539 (App. Div. 1987) (permit denied for person in jewelry business who carried large sums of money and jewelry between places of business where other vendors had had sample cases stolen, because no claims of previous threat or special danger); Reilly v. State, 59 N.J. 559 (1971) (permit denied for physicians required to carry narcotics in high-crime areas where there had been prior attacks, because no evidence of any recent attacks that involved substantial threat of injury); Siccardi v. State, 59 N.J. 545 (1971) (permit denied for theater manager required to carry substantial sums of money from theater to nearby bank depository in lateevening hours in high-crime area, because no personal attacks on manager over the thirty-five years in that area); In re "X", 59 N.J. 533 (1971) (permit denied for diamond dealer and salesman who carried loose

diamonds, because lived in an area relatively free of crime and no incidents showing special danger).

In In re Preis, 118 N.J. 564 (1990), the Supreme Court also declared that employees of security agencies may not rely upon their status as such employees alone to satisfy this requirement. The employees must demonstrate that they perform statutorily authorized duties under circumstances that present a substantial threat of serious bodily harm and that carrying of a handgun is necessary to reduce the threat of unjustifiable serious bodily harm to any person. Further, the employees are not entitled to general permits which allow them to decide in which cases there exists an urgent necessity for protection of a person. Instead, permits should be issued on a case-by-case basis. See In re Preis, supra (permits denied for security agency employees providing protection for executive officers of a tugboat company involved in a labor dispute with some violence because the employees did not show great need for executives to have armed protection); see contra, 515 Associates v. City of Newark, 132 N.J. 180 (1993) (suggesting permits would be issued to security guards of certain large high-rise buildings because the city council had made specific findings that such guards needed to be armed to reduce the threat of unjustifiable serious bodily harm to themselves and others).

D. How To Obtain A Permit To Carry A Handgun

Applications for original and renewal permits or cards shall be made in the form prescribed by statute. *N.J.S.A.* 2C:58-4b. Any application to carry a handgun by an employee of an armored car company shall also be accompanied by a letter from the chief executive officer of that company and containing the information prescribed by statute. *N.J.S.A.* 2C:58-4.1. Applications must be made to the chief police officer of the municipality where the applicant resides or to the superintendent in all other cases and if the applicant is an employee of an armored car company. *N.J.S.A.* 2C:58-4c.

The chief police officer or the superintendent shall investigate the same, including obtaining the fingerprints of the applicant and shall have them compared with any and all records of fingerprints. He must also determine and record a complete description of each handgun the applicant intends to carry. *N.J.S.A.* 2C:58-4c. The chief police officer or superintendent must approve or deny approval of the application within sixty days of filing. If no action is taken within this time, the application shall be deemed to have been approved unless the applicant agrees to an extension of time in writing. *N.J.S.A.* 2C:58-4c.

If the application has been approved by the chief police officer or the superintendent, the applicant must present it to the Superior Court of the county in which he resides or, in any other case, to the Superior Court of the county in which he intends to carry a handgun. The court shall issue the permit only if it is satisfied that the applicant meets all three of the statutory criteria. At the time of issuance, the required permit fee must be paid. *N.J.S.A.* 2C:58-4d.

The court has the discretion to issue a limited-type permit restricting the types of handguns to be carried as well as where and for what purposes such handguns may be carried. *N.J.S.A.* 2C:58-4d. These limiting conditions must be followed, and any violations of such conditions will be grounds for revocation. *State v. Neumann*, 103 *N.J. Super.* 83 (N.J. Co. 1968)

E. Duration Of Authority

Permits expire two years from the date of issuance. In the special case of an employee of an armored car company, the permits expire either two years from the date of issuance or upon termination of employment by the company, whichever is earlier. Permits may be renewed every two years in the same manner and subject to the same conditions as in the case of original applications. *N.J.S.A.* 2C:58-4a.

Any permit issued will be void if the holder becomes subject to any of the listed disabilities and must be immediately surrendered to the superintendent, who will notify the licensing authority. *N.J.S.A.* 2C:58-4f.

F. Appeal From Denial

Any person aggrieved by the denial of approval of a permit by the chief police officer or superintendent may request a hearing in the Superior Court of the county in which he resides or, in all other cases, in the Superior Court of the county in which his application was filed. The request for a hearing shall be made in writing within thirty days of the denial and proper service given. No formal pleading or filing fee shall be required. The hearing shall be held within thirty days. Appeals from the results of such hearing shall be in accordance with the law. *N.J.S.A.* 2C:58-4e.

If the chief police officer or superintendent approves an application and the Superior Court denies the application and refuses to issue the permit, the applicant may appeal such denial in accordance with the law. N.J.S.A. 2C:58-4e.

G. Revocation

Any permit may be revoked by the Superior Court after a hearing with notice to the holder and where there is a finding that the holder no longer qualifies. The county prosecutor of any county, the chief police officer of any municipality, or any citizen may apply to such court at any time for the revocation of such card. *N.J.S.A.* 2C:58-4f.

IV. LICENSES TO POSSESS AND CARRY MACHINE GUNS AND ASSAULT FIREARMS (*N.J.S.A.* 2C:58-5)

A. Licenses Generally

Licenses are required to purchase, possess, and carry a machine gun or assault firearm in this State. *N.J.S.A.* 2C:58-5.

B. Exemptions

Very few particular classes of persons, such as law enforcement officers, are permitted to carry such firearms without a permit. *N.J.S.A.* 2C:39-6a.

C. Who May Obtain

The person must be qualified for a permit to carry a handgun under *N.J.S.A.* 2C:58-4, and the court must find that the public safety and welfare so require. *N.J.S.A.* 2C:58-5b.

D. How To Obtain A License To Possess And Carry Machine Guns And Assault Firearms

A person may apply to the Superior Court. The Superior Court will refer the application to the county prosecutor for investigation and recommendation. A copy of the prosecutor's report, together with a copy of the notice of the hearing on the application, will be served on the superintendent and the chief police officer of every municipality in which the applicant intends to carry the machine gun or assault firearm, unless, for good cause shown, the court orders notice to be given wholly or in part by publication. *N.J.S.A.* 2C:58-5a.

E. Duration Of Authority

Any license shall generally expire two years from the date of issuance. *N.J.S.A.* 2C:58-5g. However, any license with conditions and limitations attached by the court shall expire one year from the date of issuance, unless otherwise provided by court order at the time of issuance. *N.J.S.A.* 2C:58-4d. Licenses may be renewed in the same manner and under the same conditions as apply to original applications. *N.J.S.A.* 2C:58-5d, g.

F. Appeal Of Denial

Any person aggrieved by the decision of the court in granting or denying an application may appeal said decision in accordance with the law. The applicant, the prosecutor, or any law enforcement officer entitled to notice who appeared in opposition to the application may appeal. *N.J.S.A.* 2C:58-5b.

G. Revocation

Any license may be revoked by the Superior Court after a hearing with notice to the holder and where there is a finding that the holder no longer qualifies. Any citizen may apply to such court at any time for the revocation of such card. *N.J.S.A.* 2C:58-5e.

HABEAS CORPUS

I. CONSTITUTIONAL BASIS

U.S. Const., art. I, § 9, cl. 2. "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

II. IMPLEMENTING STATUTES AND RULES

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) went into effect. This legislation substantially changed, both substantively and procedurally, habeas corpus practice in both capital and non-capital cases. See Felker v. Turpin, 518 U.S. 651, 654, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996); 28 U.S.C. § 2241 et seq. The law generally applies to petitions filed on or after April 24, 1996. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). 28 U.S.C. § 2253(c) governs appellate court proceedings filed after AEDPA's effective date; thus, a state prisoner whose petition predated the effective date of the AEDPA, but who seeks to appeal from an adverse decision on the petition, must apply for a certificate of appealability. Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); Hohn v. United States, 524 U.S. 236, 248, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). 28 U.S.C. § 2241 establishes jurisdiction to grant the writ and the basis therefor. 28 U.S.C. § 2244(b) addresses second or successive petitions and 28 U.S.C. § 2244(d) institutes a one-year time limitation for the filing of a habeas petition. 28 U.S.C. § 2253 addresses the need for a certificate of appealability to appeal from a final judgment in a habeas case. 28 U.S.C. § 2254(b) and (c) address exhaustion of 28 U.S.C. § 2254(d) sets out the state remedies. standard for the issuance of the writ and 28 U.S.C. § 2254(e) addresses factual findings and evidentiary 28 U.S.C. § 2255 relates to prisoners hearings. challenging federal convictions. 28 U.S.C. §§ 2261 through 2266 address prisoners in state custody pursuant to a capital sentence.

The *Rules Governing Section 2254 Cases, 28 U.S.C.* foll. § 2254 (Rules Governing Section 2254 Cases), are apparently still applicable, at least to the extent they do not conflict with the current law. These rules address, *inter alia,* the proper respondent (Rule 2); summary dismissal by the district court judge (Rule 4); discovery requests (Rule 6); expansion of the record (Rule 7);

applicability of the Federal Rules of Civil Procedure to habeas proceedings (Rule 11).

III. NATURE OF THE WRIT

"The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Wise v. Fulcomer*, 958 *F.*2d 30, 33 (3d Cir. 1992). In *Williams v. Taylor*, 529 *U.S.* 362, 120 *S.Ct.* 1495, 146 *L.Ed.*2d 389 (2000), the United States Supreme Court interpreted 28 *U.S.C.* § 2254(d)(1), which provides that a state prisoner whose claim has been adjudicated on the merits in the state courts may obtain federal habeas relief if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

According to the Court, a state court decision will be contrary to established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in the Court's cases" or "if the state court confronts a set of facts that are materially indistinguishable from" those underlying a Supreme Court decision and nevertheless arrives at a result different from Supreme Court precedent. *Williams v. Taylor*, 120 *S.Ct.* at 1519-20.

An unreasonable application of clearly established Supreme Court case law must be "objectively unreasonable." *Id.* at 1521. Moreover, an "unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 1522. A federal court may not grant habeas relief because in its independent judgment the state court decision applied the law "erroneously or incorrectly"; the application must also be unreasonable. *Id.* at 1522.

Finally, whatever Supreme Court case law would qualify as an "old rule" in the Supreme Court's jurisprudence engendered by *Teague v. Lane*, 489 *U.S.* 288, 109 *S.Ct.* 1060, 103 *L.Ed.*2d 334 (1989), will constitute "clearly established Federal law, as determined by the Supreme Court of the United States," 28 *U.S.C.* § 2254(d)(1). *Id.* at 1523.

Ramdass v. Angelone, 530 U.S. 156, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000), rejecting a capital defendant's claim under Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (when future dangerousness is at issue, due process requires that the jury be informed of defendant's parole ineligibility under state law if a life sentence rather than a sentence of death

is imposed), held that the Virginia Supreme Court's refusal to extend *Simmons* to the present case, where because the defendant had not yet been sentenced on another prior conviction his parole ineligibility under Virginia's "three strikes" law was not conclusively established at the time of the capital sentencing proceeding, was neither contrary to, nor an unreasonable application of, *Simmons*.

In *Hameen v. Delaware,* 212 *F.*3d 226 (3d Cir. 2000), the court of appeals held that when a petitioner challenges not only the sentence in his particular case but also a statutory scheme (here statutory amendments requiring jurors to impose a death sentence if the aggravating factors outweigh the mitigating), the federal court has an obligation to evaluate the claim under both the "contrary to" and "unreasonable application of" clauses of 28 *U.S.C.* § 2254(d)(1).

IV. "IN CUSTODY" REQUIREMENT

A. "In Custody"

Habeas corpus is available only if the petitioner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2241(c)(3); Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). The purpose of the "in custody" requirement is "to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973). "In custody" is a jurisdictional prerequisite. Young v. Vaughn, 83 F.3d 72 (3d Cir.), cert. denied sub nom. Abraham v. Young, 519 U.S. 944, 117 S.Ct. 333, 136 L.Ed.2d 245 (1996).

Carafas v. La Vallee, 391 *U.S.* 234, 238, 88 *S.Ct.* 1556, 1560, 20 *L.Ed.*2d 554 (1968), held that the petitioner must be in custody, pursuant to the conviction or sentence being challenged, at the time the petition is filed; however, expiration of a state prisoner's sentence before resolution of the habeas corpus petition will not terminate the jurisdiction of the federal court. *Accord, Pringle v. Court of Common Pleas,* 744 *F.*2d 297 (3d Cir. 1984).

Jones v. Cunningham, 371 *U.S.* 236, 83 *S.Ct.* 373, 9 *L.Ed.*2d 285 (1963), concluded that physical confinement is not necessary; a state prisoner who is on parole is considered "in custody" because of the conditional nature of his release.

In *Hensley v. Municipal Court*, 411 *U.S.* 345, 93 *S.Ct.* 1571, 36 *L.Ed.*2d 294, a petitioner enlarged on his own recognizance pending execution of sentence was in custody within the meaning of 28 *U.S.C.* § 2241(c)(3) and 28 *U.S.C.* § 2254(a), in light of the restraints on his liberty. Hensley's release on personal recognizance was subject to the conditions that he would appear when ordered by the court, that he would waive extradition if he was apprehended outside the State, and that a court could revoke the order of release and require that he be returned to confinement or post bail.

In Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984), restraints on liberty of individual who was released on personal recognizance after his first conviction was vacated were not sufficiently different from those in Hensley to mandate a different result. The failure of Lydon to appear for trial without sufficient excuse would constitute a criminal offense and if Lydon did fail to appear, he could be required to serve the original two-year sentence without further trial.

The sex offender registration statutes of Oregon, Washington and California do not place an individual in custody; the statutes do not impose any significant restraint on the liberty of someone required to register, as he or she is free to move so long as law enforcement is kept apprised of any new address. *McNab v. Kok*, 170 *F*.3d 1246 (9th Cir. 1999); *Williamson v. Gregoire*, 151 *F*.3d 1180 (9th Cir. 1998), *cert. denied*, 528 *U.S.* 1081, 119 S.Ct. 824, 142 *L.Ed.*2d 682 (1999); *Henry v. Lungren*, 164 *F.*3d 1240 (9th Cir.), *cert. denied sub nom. Henry v. Lockyer*, 528 *U.S.* 963, 120 *S.Ct.* 397, 145 *L.Ed.*2d 309 (1999).

According to *Barry v. Bergen County Probation Department,* 128 *F.*3d 152 (3d Cir. 1997), *cert. denied,* 522 *U.S.* 1136, 118 *S.Ct.* 1097, 140 *L.Ed.*2d 152 (1998), an individual resentenced to 300 hours of community service is "in custody" for purposes of challenging his state convictions. The court of appeals relied on *Dow v. Circuit Court of the First Circuit,* 995 *F.*2d 922 (9th Cir. 1993), *cert. denied,* 510 *U.S.* 1110, 114 *S.Ct.* 1051, 127 *L.Ed.*2d 372 (1994), which concluded that a defendant found guilty of driving while intoxicated and sentenced to fourteen hours attendance at an alcohol rehabilitation program satisfied the "in custody" requirement. According to the court of appeals in *Barry,* the "fine-only" cases were not relevant because they implicated property only, rather than a person's liberty.

B. Past or Future Confinement

Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), held that a habeas petitioner is not "in custody" under a 1958 conviction, the sentence for which has fully expired, solely because the conviction could be used to enhance a sentence imposed for any future crimes. In this case, however, the Court construed the pro se habeas petition as challenging petitioner's 1978 sentences currently being served (for other, later crimes), as enhanced by the allegedly invalid prior 1958 conviction, and concluded that petitioner satisfied the "in custody" requirement for subject-matter jurisdiction purposes. The Court "expressed no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentences which it was used to enhance."

Braden v. 30th Judicial Circuit Court of Kentucky, 410 *U.S.* 484, 93 *S.Ct.* 1123, 35 *L.Ed.*2d 443 (1973), concluded that an individual incarcerated in Alabama for later convictions is "in custody" for purposes of challenging an earlier Kentucky indictment, which engendered a detainer.

In Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968), the Court held that consecutive sentences are to be viewed in the aggregate rather than as discrete segments; thus, a petitioner serving consecutive sentences may challenge the conviction underlying a sentence still to be served.

In *Garlotte v. Fordice*, 515 *U.S.* 39, 115 *S.Ct.* 1948, 132 *L.Ed.*2d 36 (1995), a state prisoner who had served the sentence on his marijuana conviction and was serving his consecutive sentences for murder at the time he filed his habeas petition was "in custody" on, and could challenge, the marijuana conviction which continued to "postpone the prisoner's date of potential release." The Court distinguished *Maleng v. Cook*, 490 *U.S.* 488, 109 *S.Ct.* 1923, 104 *L.Ed.*2d 540, on the basis that Maleng was not seeking to challenge a consecutive sentence. "Garlotte's challenge, which will shorten his term of incarceration if he proves unconstitutionality, implicates the core purpose of habeas review."

In *Clark v. Commonwealth of Pennsylvania*, 892 F.2d 1142 (3d Cir. 1989), *cert. denied sub nom. Castille v. Clark*, 496 U.S. 942, 110 S.Ct. 3229, 110 L.Ed.2d 675 (1990), the court of appeals held that notwithstanding the district court's lack of jurisdiction over the state prisoner's two 1974 convictions because he was no longer in custody on those convictions, those "convictions

nonetheless are subject to limited review in the third petition [challenging the 1979 conviction, the sentence for which was currently being served by the state prisoner] because of their collateral consequences on the later 1979 conviction."

Young v. Vaughn, 83 F.3d 72 (3d Cir.), cert. denied sub nom. Abraham v. Young, 519 U.S. 944, 117 S.Ct. 333, 136 L.Ed.2d 245 (1996), relying on Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540, and Clark v. Pennsylvania, 892 F.2d 1142, reversed the district court's dismissal of a petition on subject matter jurisdiction grounds. Petitioner was sentenced in 1984 to probation and his 1989 conviction for robbery was the basis for a revocation of probation, for which petitioner ultimately was sentenced to five to ten years; petitioner was serving this latter sentence (the sentence for the robbery conviction having expired) when he filed his petition attacking the 1989 conviction. The court of appeals ruled that the district court should have construed the petition as attacking the current sentence as the filings by petitioner provided information regarding the relationship between the 1984 and 1989 convictions and that the petitioner could challenge a conviction for which the sentence is expired (here the 1989 robbery conviction) where the conviction was used to enhance his current term of incarceration or where, as here, the conviction "resulted," in the current sentence.

Coss v. Lackawanna County District Attorney, 204 *F.*3d 453 (3d Cir.), *petition for cert. granted*, 121 *S. Ct.* 297, 148 *L.Ed.*2d 238 (2000). Petitioner who challenged 1986 conviction, for which sentence had already been served, as adversely affecting the 1990 sentence imposed for a later, unrelated conviction satisfied the "in custody" requirement; district court properly considered the petition as challenging the later conviction.

The resolution of the "in custody" requirement in petitioner's favor does not automatically lead to a decision on the merits; petitioner must still satisfy the district court that the claim has been exhausted in the state courts. *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 *U.S.* at 489-90, 93 *S.Ct.* at 1127.

C. Mootness

The "'case-or-controversy requirement [of Article III, § 2 of the United States Constitution] subsists through all stages of federal judicial proceedings, trial and appellate....The parties must continue to have a "personal stake in the outcome" of the lawsuit." *Spencer*

v. Kemna, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). In Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 2 L.Ed.2d 963 (1960), the Supreme Court ruled that upon a habeas petitioner's unconditional release from state custody, his habeas case, commenced when the petitioner was still in custody, became "moot" and the Court could not proceed to adjudicate the merits of the petition. The Supreme Court overruled Parker in Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554. The petitioner in Carafas had filed his petition in 1963 and pursued it through the federal courts; he was unconditionally released from custody two weeks before he filed his petition for *certiorari*, which was subsequently The Court held it was "clear" that the granted. petitioner's case was not moot, in light of the several collateral disabilities resulting from his conviction, including a prohibition on voting in any New York election, serving as a juror and, in petitioner's case, serving as a labor union official. According to the Court, a habeas petitioner should not have to continue to suffer the consequential disabilities flowing from a conviction which the petitioner alleges is unconstitutional "simply because the path has been so long that he has served his sentence."

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). Criminal appeal of appellant who finished serving his six-month sentence while his appeal was pending in the New York courts was not "moot" because appellant took all expeditious steps necessary to get his case before the courts and his conviction engendered several disabilities, including that by New York statute the conviction could be used to impeach appellant's moral character if he should put it into issue at some later criminal trial and that a sentencing court in the future could use the conviction as a factor in sentencing.

Evitts v. Lucey, 469 *U.S.* 387, 105 S.Ct. 830, 83 *L.Ed.*2d 821 (1985). Habeas petitioner's case was not moot, notwithstanding that he was finally released from custody and his civil rights, including suffrage and the right to hold public office, were restored during the pendency of the appeal, because the petitioner had "not been pardoned and some collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony he might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future. This case is thus not moot." *Pollard v. United States*, 352 *U.S.* 354, 77 S.Ct. 481, 1 *L.Ed.*2d 393 (1957), held that "[t]he possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."

Minnesota v. Dickerson, 508 *U.S.* 366, 113 *S.Ct.* 2130, 124 *L.Ed.*2d 334 (1993), rejected a mootness contention in a case where the respondent was found guilty of a drug charge and sentenced to probation under a diversionary statute which provided that upon successful completion of the probation the original charges would be dismissed. Notwithstanding that the respondent's diversionary treatment was not considered a conviction for purposes of state disabilities or disqualifications, the Court found a "live controversy" because the otherwise nonpublic record could be used if the respondent had further difficulties with the law and could be used in calculating respondent's criminal history in the federal sentencing courts.

Pringle v. Court of Common Pleas, 744 *F.*2d 297, stated "Once established, habeas corpus jurisdiction cannot be defeated by the commutation or vacation of the petitioner's sentence unless the prior conviction carries with it no substantial collateral legal consequences." In this case, Pringle was still subject to a custodial sentence when she filed her habeas petition.

Lane v. Williams, 455 U.S. 624, 102 S.Ct. 1322, 71 L.Ed.2d 508 (1982). Convicted felons, who had completed their sentences and were challenging the mandatory period of parole (which they had violated) to be served at the end of their sentences, argued unsuccessfully in favor of non-mootness that the revocation of parole could be used against them in any other future parole proceedings. The Court found no disabilities such as those recognized in *Carafas v. LaValle*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554.

In *Spencer v. Kemna*, 523 *U.S.* 1, 118 *S.Ct.* 978, 140 *L.Ed.*2d 43, the habeas petition of individual challenging parole revocation was declared moot, that is, not presenting an Article II case or controversy, where sentence expired prior to district court's consideration of habeas petition. While most criminal convictions engender adverse collateral consequences, parole revocations do not; moreover, the petitioner failed to demonstrate any collateral consequences sufficient to satisfy the "injury-in-fact" requirement of Article III.

A. Forum

"The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973). 28 U.S.C. § 2241(a) provides that a writ of habeas corpus can be issued "by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." "Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction." Id. at 495, 93 S.Ct. at 1130. When a petitioner in held in one state and attacks a detainer lodged against him by another state, the state "holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of the prisoner's attack on the detainer." Here, the petitioner, confined in Alabama, but challenging a Kentucky indictment, properly filed in the district court in Kentucky. The Braden Court said: "We cannot assume that Congress intended to require the Commonwealth of Kentucky to defend its action in a distant State and to preclude the resolution of the dispute by a federal judge familiar with the laws and practices of Kentucky." The Court did recognize that the district court in the place of confinement could exercise concurrent jurisdiction over a habeas petition. Because that forum is not ordinarily as convenient as would be the district court in the state lodging the detainer, however, the court can transfer the suit to a more convenient forum, pursuant to 28 U.S.C. § 1404(a).

B. Proper Respondent

28 U.S.C. § 2242 states that a habeas petition must allege "the name of the person who has custody over" the petitioner "and by virtue of what claim or authority, if known." This same statutory section provides that the writ, if issued, or the order to show cause why the writ should not be granted, must be "directed to the person having custody of the person detained." The appropriately named respondent for applicants presently in custody pursuant to the challenged state judgment is "the state officer having custody of the applicant," whereas the proper respondents in cases where the petitioner is not currently in custody pursuant to the state court judgment but may be subject to such custody in the future are "the officer having present custody of the applicant and the attorney general of the state in which the judgment which [the petitioner] seeks to attack was entered...." *R.* 2(a) and *R.* 2(b), Rules Governing Section 2254 Cases in the United States District Courts, 28 *U.S.C.* foll. § 2254 (Rules Governing Section 2254 Cases); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 *U.S.* 484, 93 *S.Ct.* 1123, 35 *L.Ed.*2d 443.

In *Barry v. Bergen County Probation Department*, 128 *F.*3d 152 (3d Cir. 1997), *cert. denied*, 522 *U.S.* 1136, 118 *S.Ct.* 1097, 140 *L.Ed.*2d 152 (1998), petitioner properly named the Attorney General of New Jersey and the Bergen County Probation Department as respondents where that department retained jurisdiction over the petitioner notwithstanding that over a year before the petition was filed, petitioner's community service requirement had been transferred from Bergen County to the Morris County Probation Community Service Program.

Urrutia v. Harrisburg County Police Department, 91 *F.*3d 451 (3d Cir. 1996), held an assistant district attorney not proper respondent for habeas petition.

Yi v. Maugans, 24 *F.*3d 500 (3d Cir. 1994). Warden of facility or prison where detainee is held is the proper respondent; the warden has "day-to-day control over the prisoner" and "can produce the actual body."

Paydon v. Hawk, 960 *F. Supp.* 867 (D.N.J. 1997). Where habeas petitioner improperly named the director of the Bureau of Prisons as respondent, the district court substituted the name of the warden where petitioner was housed.

In *DeSousa v. Abrams*, 467 *F. Supp.* 511 (E.D.N.Y. 1979), habeas petitioner named only the Attorney General as respondent. While acknowledging that a failure to name the proper respondent is fatal to a habeas petition, in that the federal court is without jurisdiction to consider the action, the district court gave petitioner leave to amend his petition to name the proper respondent, the superintendent of the confining institution who, in any event, was represented by the Attorney General.

Dunlap v. 230th District Court, Harris County, Houston, Texas, 701 F. Supp. 752 (D. Nev. 1988). Petition dismissed for failure to exhaust and for failure to name an indispensable party, the District Attorney in Texas who placed the allegedly unlawful detainer on petitioner.

Reimnitz v. State's Attorney of Cook County, 761 *F.*2d 405 (7th Cir. 1985). Failure to name the proper respondent deprived the district court of jurisdiction.

VI. PRO SE PETITIONS

Pro se petitions are held to less stringent standards than pleadings prepared by lawyers. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), reh'g denied, 429 U.S. 1066, 97 S.Ct. 798, 50 L.Ed.2d 785 (1977). Consistent with Federal Rule of Civil Procedure 8(f), which states that "[a]ll pleadings shall be so construed as to do substantial justice," is the wellestablished principle that pro se pleadings are subject to less stringent rules of specificity and should be construed liberally. Lewis v. Attorney General, 878 F.2d 714 (3d Cir. 1989); United States v. Garth, 188 F.3d 99 (3d Cir. 1999). A pro se habeas petition "may be inartfully drawn"; judicial policy is to give such petitions "a liberal construction" and read them "'with a measure of tolerance." United States ex rel. Montgomery v. Brierley, 414 F.2d 552 (3d Cir. 1969), cert. denied, 399 U.S. 912, 90 S.Ct. 2206, 26 L.Ed.2d 566 (1970) (quoting from Wade v. Yeager, 377 F.2d 841, 846 (3d Cir. 1967), cert. denied, 393 U.S. 893, 89 S.Ct. 218, 21 L.Ed.2d 173 (1968)); Royce v. Hahn, 151 F.3d 116 (3d Cir. 1998).

VII. TIME LIMITATIONS

Before the Antiterrorism and Effective Death Penalty Act went into effect, there were virtually no time constraints on habeas corpus petitions. Indeed, the only time limitation was for a petition relying on a claim that could have been known earlier and was so "delayed" that the State was prejudiced in responding to it. Rule 9(a), Rules Governing Section 2254 Cases. See also Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998); Campas v. Zimmerman, 876 F.2d 318 (3d Cir. 1989) (To obtain dismissal on the basis of delay State must make a "particularized showing of prejudice" and must "relate its prejudice to the petitioner's delay and prove that the delay in filing was the very cause of the State's prejudice."); Clency v. Nagle, 60 F.3d 751 (11th Cir. 1995), cert. denied, 516 U.S. 1081, 116 S.Ct. 792, 133 L.Ed.2d 741 (1996).

While a petition may still be barred by application of Rule 9(a), *Ross v. Artuz*, 150 *F*.3d 97, the AEDPA now

provides for a one-year time limitation on the filing of a petition. 28 U.S.C. § 2244(d). This limitation period runs from the latest date that (1) direct review is concluded or the time for seeking such review has expired, 28 U.S.C. § 2244(d)(1)(A); (2) a State-created legal impediment in violation of the federal constitution or laws is removed, 28 U.S.C. § 2244(d)(1)(B); (3) a constitutional right asserted has been newly recognized by the Supreme Court and made retroactive to cases on collateral review, 28 U.S.C. § 2244(d)(1)(C), or (4) the factual predicate of a claim could have been discovered with reasonable diligence, 28 U.S.C. § 2244(d)(1)(D). A timely filed habeas petition may be amended after the limitations period has expired so long as the amendment merely clarifies or amplifies a claim or theory set out in the original petition and does not seek to add a new claim or theory. United States v. Thomas, 221 F.3d 430 (3d Cir. 2000).

A. 28 U.S.C. § 2244(d)(1)(A) and Direct Review

Barefoot v. Estelle, 463 *U.S.* 880, 103 *S.Ct.* 3383, 77 *L.Ed.*2d 1090 (1983). "[I]f a federal question is involved," the direct review process "includes the right to petition this Court for a writ of certiorari."

Kapral v. United States, 166 *F*.3d 565 (3d Cir. 1999), held that a state court criminal judgment is final for purposes of federal habeas corpus review "at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari review expires."

Morris v. Horn, 187 *F.*3d 333 (3d Cir. 1999). Where petitioner did not seek *certiorari* in the United States Supreme Court, his conviction became final for purposes of federal habeas corpus review ninety days after the state supreme court affirmed his death sentence. *Accord, Jones v. Morton*, 195 *F.*3d 153 (3d Cir. 1999).

B. Mailbox Rule

Burns v. Morton, 134 *F.*3d 109 (3d Cir. 1998), held that a *pro se* prisoner's habeas petition is deemed filed at the moment that he or she delivers it to prison officials for mailing to the court. The *Burns* court applied *Houston v. Lack,* 487 *U.S.* 266, 108 *S.Ct.* 2379, 101 *L.Ed.*2d 245 (1988), which established the "mailbox" rule: a *pro se* prisoner's notice of appeal is deemed filed at the moment it was delivered to prison officials for mailing to the court. *Accord, Morales-Rivera v. United States,* 184 *F.*3d 109 (1st Cir. 1999) (mailbox rule applies provided prisoner uses, if available, the prison system for recording legal mail and noting that the court's ruling did not preclude the government from arguing that the prisoner did not use the prison mail system or that the mailing was not properly addressed due to the petitioner's negligence); *Nichols v. Bowersox*, 172 *F*.3d 1068 (8th Cir. 1999); *Jones v. Bertrand*, 171 *F*.3d 499 (7th Cir. 1999); *Sonnier v. Johnson*, 161 *F*.3d 941 (5th Cir. 1998); *Hoggro v. Boone*, 150 *F*.3d 1223 (10th Cir. 1998); *Spotville v. Cain*, 149 *F*.3d 374 (5th Cir. 1998); *Peterson v. Demskie*, 107 *F*.3d 92 (2d Cir. 1997)(implying that the mailbox rule applies to the filing of habeas petitions).

C. "Grace period"

Burns v. Morton, 134 *F*.3d 109. Petitioners whose convictions were final before April 24, 1996, the effective date of the AEDPA, have until April 23, 1997, to file their habeas petitions. According to the *Burns* court, and the courts of other circuits, applying 28 *U.S.C.* § 2244(d)(1) to these petitioners would "be impermissibly retroactive."

D. Statutory Tolling

28 U.S.C. § 2244(d)(2) provides that the time during which a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

In Artuz v. Bennett, ____ U.S. ___, 121 S.Ct. 361, 148 L.Ed. 2d 213 (2000), the Supreme Court held that an application for post-conviction relief is "properly filed" "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." According to the Court, the question of whether an application is "properly filed" is separate from the issue of whether the claims are meritorious and not subject to a state procedural bar. In this case, the Court noted, the procedural bars did not involve conditions for filing, but, rather, they pertained to obtaining relief. Accord, Lovasz v. Vaughn, 134 F.3d 146 (3d Cir. 1998) (Rejecting the "notion" that a meritless application for post-conviction relief cannot be "a properly filed application" under § 2244(d)(2), the court held that "a properly filed application" "is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing.").

Ott v. Johnson, 192 *F*.3d 510 (5th Cir. 1999), *cert. denied*, ____ *U.S.* ___, 120 S.Ct. 1834, 146 *L.Ed.*2d 777 (2000); *Rhine v. Boone*, 182 *F*.3d 1153 (10th Cir.), *cert. denied*, 528 *U.S.* 1084, 120 S.Ct. 808, 145 *L.Ed.*2d 681 (2000); *Isham v. Randle*, 226 *F.*3d 691 (6th Cir. 2000). The term "pending" in 28 *U.S.C.* § 2244(d)(2) does not include the time for filing a petition for certiorari in the United States Supreme Court.

Swartz v. Meyers, 204 F.3d 417 (3d Cir. 2000). Where petitioner's state post-conviction relief proceeding was pending on April 24, 1996, the time for the filing of a habeas corpus petition was tolled until November 18, 1996, the date the petitioner's time for seeking an appeal in the Pennsylvania Supreme Court expired. The court of appeals rejected the Commonwealth's contention that the time was tolled only until October 18, 1996, when the lower court denied the petition, and the petitioner's assertion that the time should have been tolled until May 2, 1997, when the state supreme court denied his nunc pro tunc request for an appeal. The court of appeals held that the period of limitation of 28 U.S.C. § 2244(d)(2) tolls during the time between a judicial ruling and the timely filing of an appeal or request for an appeal; this conclusion is "consistent with the plain meaning of the statutory language as well as the firmly rooted principle of state-remedy exhaustion." Accord, Taylor v. Lee, 186 *F*.3d 557 (4th Cir. 1999), *cert. denied*, *U.S.* 120 S.Ct. 1262, 146 L.Ed.2d 117 (2000) (under 28 U.S.C. § 2244(d)(2), entire period of state postconviction relief proceedings "from initial filing to final disposition by the highest state court (whether decision on the merits, denial of certiorari, or expiration of the period of time to seek further appellate review), is tolled from the limitations period" for those petitioners whose state post-conviction relief proceedings were pending as of April 24, 1996).

In *Nino v. Galaza*, 183 *F*.3d 1003 (9th Cir. 1999), *cert. denied*, _____ *U.S.* ____, 120 *S.Ct.* 1846, 146 *L.Ed*.2d 787 (2000), the statute of limitations of 28 *U.S.C.* § 2244(d)(2) was tolled during the entire time petitioner was properly pursuing his state post-conviction relief remedy. In *Nino*, the statute began to run on April 24, 1996, and 314 days later, on March 4, 1997, petitioner filed his first collateral state petition, which was eventually resolved by the state supreme court's denial on August 27, 1997; after this latter denial, the petitioner had fifty-one days (365 less 314) to file his federal habeas petition.

In *Bratcher v. Snyder*, 2000 *WL* 718347 (D. Del. 2000), the court said that a petitioner whose state

conviction was final on February 24, 1997, "used" 136 days of his allotted 365 days by filing for state postconviction relief on July 10, 1997, and accordingly had 229 days remaining after his post-conviction relief proceedings became final on November 10, 1998 (when the state supreme court affirmed the denial of relief) to file a timely habeas petition. Hence, the petition for habeas corpus dated September 24, 1999 (318 days after November 10, 1998) was barred by 28 *U.S.C.* § 2244(d)(2).

Dictado v. Ducharme, 189 F.3d 889 (9th Cir. 1999). Petition is time-barred where petitioner did not file within the one-year limitations period and petitioner's fourth state post-conviction relief application, filed in February 1997, was ultimately determined to be successive and time-barred; the court of appeals, finding its reasoning consistent with *Lovasz v. Vaughn*, 134 F.3d 146, concluded that the fourth post-conviction relief application was not "properly filed" as it did not comply with the state's rules regarding time of filing. "Had Congress intended to toll the statute of limitations for the period during which even improper applications were pending in state court, it would not have included the 'properly filed' limitation."

Habteselassie v. Novak, 209 *F.*3d 1208 (10th Cir. 2000). A "properly filed" application for state post-conviction relief is one filed according to the requirements of the state regarding such applications; whether an application is not "properly filed" if the state judge has to evaluate the merits in deciding a petition is untimely is a "more difficult" question which the court did not need to address.

Weekley v. Moore, 204 F.3d 1083 (11th Cir.), reh'g and reh'g en banc denied, 220 F.3d 594, petition for cert. filed, ______U.S.L.W. _____(U.S. Sept. 5, 2000) (No. 00-6218), held that state post-conviction relief petitions, dismissed as successive by the state courts, were not "properly filed" and, thus, did not engender tolling of the time limitation of 28 U.S.C. § 2244(d)(2).

Hoggro v. Boone, 150 *F*.3d 1223 (10th Cir. 1998). For petitioners whose convictions were final before April 24, 1996, the one-year statute of limitations begins to run on April 24, 1996. The petition in this case, filed on May 9, 1997, was timely filed because the petitioner had a state post-conviction relief petition pending from September 26, 1996, until October 25, 1996; the 365-day time limitation was hence tolled for twenty-nine days. The court of appeals also noted, however, that the time after the denial of post-conviction relief during which petitioner appealed the denial could not be counted as additional tolling time because the appeal was untimely and the appellate court dismissed the appeal on that basis in December 1996.

Jones v. Morton, 195 F.3d 153 (3d Cir. 1999). The one-year statutory time limitation is not tolled under 28 U.S.C. § 2244(d)(2) during the time a habeas corpus petition is pending in federal court. Accord, Jiminez v. Rice, 222 F.3d 1210 (9th Cir. 2000); Grooms v. Johnson, 208 F.3d 488 (5th Cir.1999) . The Jones decision is in conflict with Walker v. Artuz, 208 F.3d 357 (2d Cir. 2000), cert. granted sub nom., 121 S. Ct. 480, 148 L.Ed.2d 454 (2000). Duncan v. Walker, 69 U.S.L.W. 3110 (U.S. Nov. 13, 2000) (No. 00-121), which affirmatively disagreed with Jones. According to Walker, "State" in the statute modifies only "post-conviction" and, therefore, "other collateral review" means federal habeas corpus. Thus, the statutory limitations period was tolled during the pendency of Walker's federal habeas corpus petition.

E. Equitable Tolling

Miller v. New Jersey Department of Corrections, 145 F.3d 616 (3d Cir. 1998); Jones v. Morton, 195 F.3d 153. The one-year filing requirement of 28 U.S.C. § 2244(d)(1) is a statute of limitations rather than a jurisdictional rule; hence, a habeas petition should not be dismissed if the petitioner establishes an equitable basis for tolling the limitations period. Accord, Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000); Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998), cert. denied, 526 U.S. 1074, 119 S.Ct. 1474, 143 L.Ed.2d 558 (1999); Brown v. Angelone, 150 F.3d 370 (4th Cir. 1998); Miller v. Marr, 141 F.3d 976 (10th Cir.), cert. denied, 525 U.S. 891, 119 S.Ct. 210, 142 L.Ed.2d 173 (1998); Calderon v. United States District Court, 128 F.3d 1283 (9th Cir. 1997), cert. denied, 522 U.S. 1099, 118 S.Ct. 899, 139 L.Ed.2d 884 (1998).

Miller v. New Jersey Department of Corrections, 145 *F.*3d 616, explained that equitable tolling is appropriate only when rigid adherence to the time limitation would be unfair. "Generally, this will occur when the petitioner has 'in some extraordinary way ... been prevented from asserting his or her rights.'" "The petitioner must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims.' Mere excusable neglect is not sufficient."

In *Jones v. Morton*, 195 *F*.3d 153, the court of appeals found no basis for equitable tolling where the petitioner

apparently misunderstood the exhaustion requirement and filed three petitions for habeas corpus, all containing unexhausted claims.

F. Affirmative Defense

The statute of limitations of 28 *U.S.C.* § 2244(d) is an affirmative defense to be pleaded by the respondents. *Acosta v. Artuz*, 221 *F.*3d 117, 121-22 (2d Cir. 2000). It is not inappropriate, however, for the federal court to raise the timeliness issue *sua sponte*, "the statute of limitation implicates the interests of both the federal and state courts, as well as the interests of society...." *Id.* at 123.

VIII. EXHAUSTION OF STATE REMEDIES

Whether a petitioner has exhausted available state remedies is a threshold question in every case in which a petitioner challenging a state conviction seeks habeas corpus relief. Mayberry v. Petsock, 821 F.2d 179, 182-83 (3d Cir.), cert. denied, 484 U.S. 946, 108 S.Ct. 336, 98 L.Ed.2d 362 (1987); Hull v. Kyler, 190 F.3d 88, 97 (3d. Cir. 1999); Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986). The exhaustion requirement furthers the policies of comity and federalism by giving state courts the first opportunity to pass upon federal constitutional claims. Granberry v. Greer, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987); Rose v. Lundy, 455 U.S. 509, 516-18, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Unless the state courts had the opportunity to consider a petitioner's constitutional complaint and rectify any errors in his conviction, or unless a petitioner demonstrates that there is no state forum available to consider his complaint, the federal court may not hear the claim. Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); Toulson v. Beyer, 987 F.2d 984, 986 (3d Cir. 1993); Landano v. Rafferty, 897 F.2d 661, 688 (3d Cir.), cert. denied, 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 23 (1990); Santana v. Fenton, 685 F.2d 71, 75-77 (3d Cir. 1982), cert. denied, 459 U.S. 1115, 103 S.Ct. 750, 74 L.Ed.2d 968 (1983). It is the petitioner's burden to demonstrate satisfaction of the exhaustion requirement. Lines v. Larkins, 208 F.3d 153 (3d Cir. 2000), cert. denied, __ U.S. __, 121 S. Ct. 785 (2001); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Toulson v. Beyer, 987 F.2d at 987; Landano v. Rafferty, 897 F.2d at 668. Of course, the exhaustion requirement applies only to constitutional claims otherwise cognizable in the federal habeas court; accordingly, it was error for the district court to dismiss a "mixed" habeas petition based upon petitioner's failure to exhaust a claim arising solely under state law (therein the alleged ineffectiveness of post-conviction relief counsel). *Tillett v. Freeman*, 868 *F*.2d 106 (3d Cir. 1989).

The petitioner must have "fairly presented" his claims to the state courts. O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); Vasquez v. Hillery, 474 U.S. 254, 257, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); Lines v. Larkins, 208 F.3d 153. Moreover, the petitioner must present his constitutional claim to each level in the state court appellate process. Evans v. Court of Common Pleas, 959 F.2d 1227, 1230 (3d Cir. 1992), cert. dismissed, 506 U.S. 1089, 113 S.Ct. 1071, 122 L.Ed.2d 498 (1993); Ross v. Petsock, 868 F.2d 639 (3d Cir. 1989). The federal claim must be the substantial equivalent of the claim presented to the state courts, Picard v. Connor, 404 U.S. at 278; both the legal theory and the factual support for the federal claim must have been advanced in the state proceedings. Picard v. Connor, 404 U.S. at 277-78; O'Halloran v. Ryan, 835 F.2d 506, 510 (3d Cir. 1987). "[I]f a habeas petitioner wishes to claim that an evidentiary ruling at the state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." Duncan v. Henry, 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). It is necessary to review the state court record, Duttry v. Petsock, 878 F.2d 123, 124 (3d Cir. 1989), and the briefs filed in the state courts, Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982), to make a determination as to whether the claim was "presented." A claim made for the first time on discretionary review does not constitute "'fair presentation'" of the claim. Castille v. Peoples, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989). Moreover, where a petition for discretionary review in the state's highest court "is a normal, simple, and established part of the [s]tate's appellate review process," state prisoners must seek that review in order to satisfy the exhaustion requirement. O'Sullivan v. Boerckel, 526 U.S. 838, 118 S.Ct. 1728, 144 L.Ed.2d 1. Finally, "[i]t is not enough to scatter the words 'due process' in a brief: counsel must sketch an argument about why the conviction violates that clause." *Riggins v.* McGinnis, 50 F.3d 492, 494 (7th Cir.), cert. denied, 515 U.S. 1163, 115 S.Ct. 2621, 132 L.Ed.2d 862 (1995); Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); Moleterno v. Nelson, 114 F.3d 669 (7th Cir. 1997).

"An exception [to the exhaustion doctrine] is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano,* 454 *U.S.* 1, 3, 102 *S.Ct.* 18, 70 *L.Ed.*2d 1 (1981). It may not be presumed that a state court will not entertain the claim, even if consideration seems highly unlikely. *Toulson v. Beyer*, 987 *F*.2d at 987-88. In questionable cases, the state courts should make the determination as to whether the claim is procedurally barred. *Lines v. Larkins*, 208 *F*.3d at 163. The federal court must be able to say with certainty that the state courts will not consider the substantive claim before exhaustion will be excused. *Id.* at 163.

Inexcusable or inordinate delay by the state in processing claims for relief may "render the state remedy effectively unavailable." Wojtczak v. Fulcomer, 800 F.2d 353, 354 (3d Cir. 1986) (thirty-three month delay in deciding post-conviction relief petition was sufficient to excuse exhaustion requirement); accord, Moore v. Deputy Commissioner(s) of SCI-Huntingdon, 946 F.2d 236 (3d Cir. 1991), cert. denied, 503 U.S. 949, 112 S.Ct. 1509, 117 L.Ed.2d 647 (1992) (where petition for postconviction relief had been pending in state court for nearly three years, exhaustion was futile and could be waived); Hankins v. Fulcomer, 941 F.2d 246 (3d Cir. 1991) (eleven-year delay); Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987) (five-year delay); Codispoti v. Howard, 589 F.2d 135 (3d Cir. 1978) (twelve years). Such delay will not automatically excuse exhaustion; rather, it shifts to the state the difficult burden of showing that exhaustion should still be required. Story v. Kindt, 26 F.3d 402, 405 (3d Cir. 1994).

Where state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied, notwithstanding that the claim has not been "fairly presented" in the state courts, "because there is 'an absence of available State corrective process." McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). In such cases, however, applicants are considered to have procedurally defaulted their claims and federal courts may not consider the merits of such claims unless the applicant establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse his or her default." Id.; Lines v. Larkins, 208 F.3d 153 (where the courts of Pennsylvania no longer had jurisdiction to entertain a successive post-conviction relief application, petitioner was foreclosed from further state review and it would be "futile" to require the petitioner to return to state court to exhaust, the petitioner was excused from the exhaustion requirement; petitioner was required, however, to establish "cause and prejudice" for the procedural default or a fundamental miscarriage of justice before the federal court could review the unexhausted claim).

The presence of an unexhausted claim usually requires the dismissal of the entire petition. *Rose v. Lundy*, 455 *U.S.* 509, 102 *S.Ct.* 1198, 71 *L.Ed.*2d 379. Upon such dismissal, the district court may appropriately instruct a petitioner to bring only exhausted claims when he or she returns to federal court or risk dismissal with prejudice. *Slack v. McDaniel*, 529 *U.S.* 473, 120 S.Ct. 1595, 1606, 146 *L.Ed.*2d 542 (2000).

Pursuant to 28 U.S.C. § 2254(b)(2), however, the district court may nonetheless deny the petition on the merits despite a petitioner's failure to exhaust state remedies. This discretion may be exercised only when "it is perfectly clear that the applicant does not raise a colorable federal claim," *Lambert v. Blackwell*, 134 F.3d at 512; *accord, Jones v. Morton*, 195 F.3d 153, 156 n. 2 (3d Cir. 1999). If a question exists as to whether the claim is colorable, 28 U.S.C. § 2254(b)(2) may not be invoked. *Id.* Moreover, under revised 28 U.S.C. § 2254(b)(3), a State's waiver of the nonexhaustion defense will not be inferred; an express waiver of the defense is required. *Lambert v. Blackwell*, 134 F.3d at 514.

IX. PROCEDURAL DEFAULT

The principles governing procedural default of claims have not been altered by the AEDPA. Moleterno v. Nelson, 114 F.3d 629 (7th Cir. 1997). A habeas petitioner who has suffered a procedural default of a constitutional issue is required to demonstrate "cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim." Murray v. Carrier, 477 U.S. 478, 485, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996). Accord, Harris v. Reed, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). "The procedural default doctrine and its attendant 'cause and prejudice' standard are 'grounded in concerns of comity and federalism." Edwards v. Carpenter, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (quoting from Coleman v. Thompson, 501 U.S. at 730, 111 S.Ct. 2546, 115 L.Ed.2d 640). If the decision of the highest state court considering a defendant's federal claims "rests on a state law ground that is independent of the federal question and adequate to support the judgment," then, with few exceptions, the federal court will not consider any question of federal law resolved by the state court. Coleman v. Thompson, 501 U.S. at 729; Cabrera v. Barbo, 175 F.3d 307, 312 (3d Cir.), cert. denied, 528 U.S. 886, 120 S.Ct. 205, 145 L.Ed.2d 173 (1999); Neely v.

Zimmerman, 858 F.2d 144, 147 (3d Cir. 1988). In Lee v. Kemna, 213 F.3d 1037 (8th Cir.2000), cert. granted, 2001 WL 178182 (Feb. 26, 2001) (U.S. No. 00-6933), the court of appeals held that petitioner's claim -- that he was denied due process when the trial judge refused to allow a continuance for alibi witnesses to appear after they were in court on that morning and suddenly disappeared -- was procedurally defaulted because the Missouri Court of Appeals rejected his claim based upon the failure of petitioner's motion for a continuance to comply with the court rules. The court of appeals also determined that petitioner failed to show cause for his default or "actual innocence." The dissenting judge disputed that the state court rules provided "any 'adequate' state law ground to bar federal habeas review " in the circumstances of this case, where the non-appearance of the alibi witnesses was "sudden or unexpected." Where the last state court providing reasons for its decision applied a state procedural rule that barred consideration of the claims, it may be presumed that any subsequent discretionary denial of review did not reflect a disregard of the bar and a consideration of the merits. Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 2593, 115 L.Ed.2d 706 (1991). In these circumstances, federal review of these claims is precluded. McBee v. Abramajtys, 929 F.2d 264, 267 (6th Cir. 1991); accord, Rust v. Zent, 17 F.3d 155, 161 (6th Cir. 1994); Willis v. Aiken, 8 F.3d 556, 566-67 (7th Cir. 1993), cert. denied, 511 U.S. 1005, 114 S.Ct. 1371, 128 L.Ed.2d 47 (1994). Moreover, so "long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision," "the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law" in an alternative holding. Harris v. Reed, 489 U.S. at 264 n.10, 109 S.Ct. at 1044 n.10; Cabrera v. Barbo, 175 F.3d at 314; Sistrunk v. Vaughn, 96 F.3d 666, 673-74 (3d Cir. 1996). In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity." Harris v. Reed, 489 U.S. at 264.

To obtain habeas review of a procedurally defaulted claim, the petitioner must show either "cause and prejudice" or actual innocence. *Bousley v. United States*, 523 *U.S.* 614, 622, 118 S.Ct. 1604, 1611, 140 *L.Ed.*2d 828 (1998); *Murray v. Carrier*, 477 *U.S.* at 485, 496; *Smith v. Murray*, 477 *U.S.* 527, 537, 106 S.Ct. 2661, 2667-68, 91 *L.Ed.*2d 434 (1986); *Wainwright v. Sykes*, 433 *U.S.* at 87, 97 S.Ct. at 2506-07. To show "cause" for his or her noncompliance with state court rules, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with

the State's procedural rule." *Caswell v. Ryan*, 953 *F.*2d 853, 862 (3d Cir.), *cert. denied*, 504 *U.S.* 944, 112 *S.Ct.* 2283, 119 *L.Ed.*2d 208 (1992); *Sistrunk v. Vaughn*, 96 *F.*3d at 675. While ineffective assistance of counsel may be adequate to establish cause for a procedural default, the constitutional claim of ineffective assistance must first be exhausted in the state courts as an independent claim. *Murray v. Carrier*, 477 *U.S.* 478, 106 S.Ct. 2639, 91 *L.Ed.*2d 397. Similarly, in order for a procedurally defaulted claim of ineffective assistance of counsel to be "cause" for another procedurally defaulted claim, the petitioner must first establish "cause and prejudice" for the default of the Sixth Amendment claim. *Edwards v. Carpenter*, 120 S.Ct. at 1591.

If a petitioner is unable to establish cause and prejudice, habeas review of an otherwise procedurally defaulted claim may still be obtained if petitioner can show that he or she is the "extraordinary" "actually innocent" state prisoner who, as a result of a constitutional violation, was nonetheless convicted. Bousley v. United States, 523 U.S. at 623; Sawyer v. Whitley, 505 U.S. 333, 340, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992); Murray v. Carrier, 477 U.S. at 496; Rust v. Zent, 17 F.3d at 161; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993); Hull v. Freeman, 991 F.2d 86, 91 n.3 (3d Cir. 1993). To establish "actual innocence," a habeas petitioner must demonstrate that, absent the constitutional violation, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" Schlup v. Delo, 513 U.S. 298, 327-28, 115 S.Ct. 851, 867-68, 130 L.Ed.2d 808 (1995). The focus is on "actual" innocence. Id. "In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to "make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." Id.

The procedural default doctrine in a habeas context is a matter of comity and federalism, rather than jurisdiction. *Trest v. Cain*, 522 *U.S.* 87, 89, 118 S.Ct. 478, 480, 139 *L.Ed.*2d 444 (1997). Thus, a court of appeals reviewing a district court's decision in a habeas matter is not required to raise the issue of procedural default *sua sponte. Id.* Indeed, the defending state is obligated to assert procedural default as an affirmative defense or forever lose the right to raise it. *Id.*; *Gray v. Netherland*, 518 *U.S.* at 165-66.

X. SUCCESSIVE PETITIONS

The Third Circuit has held that the "gatekeeper" provisions of 28 U.S.C. § 2244(b)(3) apply to all second or successive habeas corpus applications by state prisoners. In re Minarik, 166 F.3d 591, 599-600 (3d Cir. 1999). Pursuant to 28 U.S.C. § 2244(b)(3), a petitioner who wants to file a second or successive petition for a writ of habeas corpus must first move in the appropriate court of appeals for an order authorizing the district court to consider the habeas application. 28 U.S.C. § 2244(b)(3)(A); Felker v. Turpin, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). The court of appeals cannot grant leave to file such a petition unless the application makes a prima facie showing that the claims were not presented in a prior application and that the claims either rely upon a previously unavailable new rule of constitutional law made retroactive by the Supreme Court of the United States to collateral review or are predicated on facts that could not have been discovered previously through the exercise of due diligence and that, if proven, would be "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense...." 28 U.S.C. § 2244(b)(1), (2), (3)(C). The court of appeals has thirty days to grant or deny the motion for leave to file a successive petition and the grant or denial is not appealable and may not be the subject of a petition for rehearing or a writ of *certiorari*. 28 U.S.C. § 2244(b)(3)(D), (E). The preclusion of further review does not deprive the United States Supreme Court of its jurisdiction to entertain an original habeas corpus petition. Felker v. Turpin, 518 U.S. at 658, 116 S.Ct. at 2337.

On March 20, 2000, the Third Circuit adopted for § 2254 petitioners the holding of *United States v. Miller*, 197 *F.*3d 644 (3d Cir. 1999), and ruled that district courts must provide a pro se petitioner with notice of his or her available options in proceeding with a petition: (1) the petition can be ruled upon as filed, (2) if the application is not styled as a § 2254 petition, it can be recharacterized as such, but the petitioner "will lose his ability to file successive petitions absent certification by the court of appeals" or (3) the petition can be withdrawn and "one all inclusive" § 2254 petition can be filed within the one-year statutory period. *Mason v. Meyers*, 208 *F.*3d 414 (3d Cir. 2000). If, in the future, a district court fails to provide the necessary warnings, then the statute of limitations should be tolled for 120 days "to allow the petitioner an opportunity to file all of his claims in the correct manner." *Id.*

Federal Rule of Civil Procedure 60(b) provides for relief from judgment in the context of habeas corpus on grounds of mistake, inadvertence, surprise or excusable neglect, newly discovered evidence, fraud, "or any other reason justifying relief from the operation of the judgment." A petitioner's Rule 60(b) motion for relief from a judgment denying the habeas writ, or an equivalent motion in the court of appeals for a recall of the mandate, is to be treated as a second or successive petition and the criteria of 28 U.S.C. § 2244(b) must be satisfied. Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489, 1500, 140 L.Ed.2d 728 (1998) (prisoner's motion to recall mandate); Johnson v. United States, 196 F.3d 802, 805 (7th Cir. 1999) (after a fully adjudicated collateral attack, a R. 60(b) motion advancing new theories of relief "is a transparent attempt to avoid the need for prior appellate approval of a second collateral attack ... [and] must be seen for what it is and dismissed by the district judge."); Ortiz v. Stewart, 195 F.3d 520 (9th Cir, 1999); Burris v. Parke, 130 F.3d 782, 783 (7th Cir.), cert. denied, 522 U.S. 990, 118 S.Ct. 462, 139 L.Ed.2d 396 (1997); Fiero v. Johnson, 197 F.3d 147 (5th Cir. 1999), cert. denied, ____ U.S. ___, 120 S.Ct. 2204, 147 L.Ed.2d 237 (2000) (recognizing pursuant to Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728, but not deciding, that claims involving alleged fraud upon the court may still be considered under the court's inherent powers notwithstanding 28 U.S.C. § 2244(b)(1)); Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) ("cases of fraud upon the court are excepted from the requirements of section 2244").

In *West v. Vaughn*, 204 *F*.3d 53, 61 (3d Cir. 2000), the court of appeals held that "precedent that makes clear that a new constitutional rule fits the" retroactivity exception of *Teague v. Lane*, 489 *U.S.* 288, 109 *S.Ct.* 1060, 103.*Ed*.2d 334 (1989), "suffices to make a rule retroactive for purposes of successive habeas petitions under AEDPA. This is so even if the pronouncements are not made in the context of an actual retroactive application of the new rule on habeas review."

In re Minarik, 166 *F*.3d 591, governs in this circuit regarding the motion of a petitioner whose previous habeas petition was adjudicated on the merits before the effective date of the AEDPA, that is, April 24, 1996, and who is seeking leave to file a second or successive habeas petition after that date. According to Minarik, the second petition must be evaluated under the new

AEDPA standard of 28 U.S.C. § 2244(b) unless the petitioner can show that he or she would have been entitled to pursue a second or successive petition under pre-AEDPA law. *Id.* at 602. If the petitioner can make this showing, then 28 U.S.C. § 2244(b) may not be applied retroactively to bar a second petition. Without this showing, however, the AEDPA standard must be applied. *Id.* at 602.

A. Pre-AEDPA Law on Second or Successive Petitions

Under preexisting law, a federal district court was not permitted to reach the merits of a successive petition raising grounds identical to grounds decided on the merits in a previous habeas petition or a successive petition raising grounds that were available but not relied on in the previous petition unless the state prisoner demonstrated cause and prejudice or, alternatively, made a "colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 *U.S.* 436, 454, 106 *S.Ct.* 2616, 91 *L.Ed.*2d 364 (1986); *McCleskey v. Zant*, 499 *U.S.* 467, 111 *S.Ct.* 1454, 113 *L.Ed.*2d 517 (1991); *Sanders v. United States*, 373 *U.S.* 1, 17-19, 83 *S.Ct.* 1068, 10 *L.Ed.*2d 148 (1963); 28 *U.S.C.* § 2254 foll. *R.* 9(b).

To demonstrate actual innocence, a petitioner must show "that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 *U.S.* at 327. "The cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts to raise the claim in state court." *In re Minarik*, 166 *F.*3d at 604 (quoting from *McCleskey v. Zant*, 499 *U.S.* 467, which in turn was quoting from *Murray v. Carrier*, 477 *U.S.* 478, 488 (1986)). If a petitioner was subjectively unaware of a factual basis but the relevant facts could have been discovered with due diligence, then "cause" has not been demonstrated. *In re Minarik*, 166 *F.*3d at 604.

XI. STONE V. POWELL BAR

In *Stone v. Powell*, 428 *U.S.* 465, 494, 96 S.Ct. 3037, 3052, 49 *L.Ed.*2d 1067 (1976), the United States Supreme Court held:

where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in a unconstitutional search or seizure was introduced at his trial. [*Id.* at 481-82].

Accordingly, Stone v. Powell bars relitigation of Fourth Amendment claims if the State has provided the opportunity for full and fair adjudication. Cardwell v. Taylor, 461 U.S. 571, 572-73, 104 S.Ct. 30, 77 L.Ed.2d 1451 (1983)(Stone precluded petitioner's claim based upon Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)); Deputy v. Taylor, 19 F.3d 1485, 1491 (3d Cir.), cert. denied, 512 U.S. 1230, 114 S.Ct. 2730, 129 L.Ed.2d 853 (1994); United States v. Torres, 926 F.2d 321, 323 (3d Cir. 1991). A Fourth Amendment claim may not be relitigated in a federal habeas court even if the petitioner contends the issue was decided erroneously, Willett v. Lockhart, 37 F.3d 1265, 1270 (8th Cir. 1994), cert. denied, 514 U.S. 1052, 115 S.Ct. 1432, 131 L.Ed.2d 313; Deputy v. Taylor, 19 F.3d at 1491; Capellan v. Riley, 975 F.2d 67, 71 (2d Cir. 1992); United States ex rel. Petillo v. New Jersey, 562 F.2d 903, 907 (3d Cir. 1977), or attempts to "cloak his or her Fourth Amendment claim in due process clothing to circumvent Stone v. Powell," Gilmore v. Marks, 799 F.2d 51, 55-57 (3d Cir. 1986), cert. denied, 479 U.S. 1041, 107 S.Ct. 903, 93 L.Ed.2d 853 (1987) (rejecting petitioner's contention that state court's finding of harmless error in any Fourth Amendment violation could be reexamined by a federal habeas court as a due process claim).

Stone v. Powell is based upon "the special nature of Fourth Amendment protections in criminal cases and the consequences of the remedial exclusionary rule." Willett v. Lockhart, 37 F.3d at 1269. In Stone v. Powell, the Court found that any deterrent effect of permitting the review of Fourth Amendment issues in collateral proceedings was decidedly marginal and "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." Stone v. Powell, 428 U.S. at 494, 96 S.Ct. at 3052. Accordingly, the Court has refused to extend the bar of Stone v. Powell to other constitutional violations. E.g., Withrow v. Williams, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (statements obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)); Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (Sixth Amendment claim based on counsel's failure to file a timely suppression motion).

See also Willett v. Lockhart, 37 F.3d 1265, which reviewed the approach of other circuit courts in applying *Stone v. Powell.* For example, some circuits read *Stone* as requiring review of the state courts' factual findings to determine whether they were supported in the record and not unclear before the bar will be invoked, while other circuit courts of appeal have devised multi-part "tests" to determine if the petitioner had a full and fair opportunity to litigate the Fourth Amendment claim. *Id.* at 1270-72. The *Willett* court adopted the test of *Capellan v. Riley*, 975 *F.*2d 67, to decide that a Fourth Amendment claim may be reviewed in habeas "if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations'" or "if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process." *Id.* at 1271-72.

XII. STATE LAW CLAIMS

"State prisoners are entitled to relief on writ of habeas corpus in federal court only upon showing a violation of federal constitutional standards." Todaro v. Fulcomer, 944 F.2d 1079, 1082 (3d Cir. 1991), cert. denied, 503 U.S. 909, 112 S.Ct. 1271, 117 L.Ed.2d 498 (1992); 28 U.S.C. § 2241(c)(3) (writ shall not extend to a prisoner unless the prisoner is in custody "in violation of the Constitution or laws or treaties of the United States...."); 28 U.S.C. § (2254(a) (application for a writ of habeas corpus entertained only on ground that petitioner is in custody "in violation of the Constitution or laws or treaties of the United States."). Accord, Smith v. Phillips, 455 U.S. 209, 221, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); Smith v. Zimmerman, 768 F.2d 69, 71 (3d Cir. 1985). It is clear, however, "that 'federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (quoting from Lewis v. Jeffers, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990)). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. at 68. Thus, "a state court's misapplication of its own law does not generally raise a constitutional claim. The federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Johnson v. Rosemeyer, 117 F.3d 104, 109 (3d Cir. 1997) (quoting from Geschwendt v. Ryan, 967 F.2d 877, 888-89 (3d Cir.), cert. denied, 506 U.S. 977, 113 S.Ct. 472, 121 L.Ed.2d 379 (1992)); Kontakis v. Beyer, 19 F.3d 110, 117 & n.12 (3d Cir.), cert. denied, 513 U.S. 881, 115 S.Ct. 215, 130 L.Ed.2d 143 (1994).

Infirmities in a state post-conviction procedure are not cognizable claims in a habeas corpus proceeding, because a petitioner's claim as to errors or defects in the state post-conviction relief proceeding is not an attack on the actual detention. Williams v. Missouri, 640 F.2d 140, 143 (8th Cir.), cert. denied, 451 U.S. 990, 101 S.Ct. 2328, 68 L.Ed.2d 849 (1981); Trevino v. Johnson, 168 F.3d 173, 180 (5th Cir.), cert. denied, 527 U.S. 1056, 120 S.Ct. 22, 144 L.Ed.2d 825 (1999); Gee v. Groose, 110 F.3d 1346, 1351 (8th Cir. 1997); Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988); Kirby v. Dutton, 794 F.2d 245 (6th Cir. 1986); Mason v. Meyers, 208 F.3d 414 (3d Cir. 2000) (four-year delay in processing of state collateral relief claim not cognizable in a federal habeas proceeding; Hassine v. Zimmerman, 160 F.3d 941 (3d Cir. 1998), cert. denied, 526 U.S. 1065, 119 S.Ct. 1456, 143 L.Ed.2d 542 (1999) (same); Heiser v. Ryan, 15 F.3d 299 (3d Cir.), cert denied sub nom. Heiser v. Stepanik, 513 U.S. 926, 115 S.Ct. 313, 130 L.Ed.2d 276 (1994) (same). But see Dickerson v. Walsh, 750 F.2d 150 (1st Cir. 1984) (rejecting Williams rationale).

A claim that a jury instruction was allegedly incorrect under state law is not a basis for habeas relief unless "'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire,* 502 *U.S.* at 71-72.

A claim regarding the denial of a motion for a new trial is generally one of state law, unless the petitioner demonstrates the "denial of fundamental fairness or a violation of a specific constitutional right." *United States ex rel. Guillen v. De Robertis*, 580 *F. Supp.* 1551, 1556 (N.D. Ill. 1984).

Claims of actual innocence based on allegedly newly discovered evidence do not constitute grounds for federal habeas relief absent an independent constitutional violation occurring in the state criminal proceedings. *Herrera v. Collins*, 506 *U.S.* 390, 400, 113 *S.Ct.* 853, 122 *L. Ed.*2d 203 (1993).

"[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Townsend v. Sain*, 372 *U.S.* 293, 317 (1963); *Hill v. Lockhart*, 927 *F.*2d 340, 345 (8th Cir.), *cert. denied*, 502 *U.S.* 927, 112 *S.Ct.* 344, 116 *L.Ed.*2d 283 (1991); *DeMartino v. Weidenburner*, 616 *F.*2d 708, 711 (3d Cir. 1980). *See also Swindle v. Davis*, 846 *F.*2d 706 (11th Cir. 1988) ("newly discovered" evidence in form of testimony that victim was actually killed by another individual in second altercation subsequent to the petitioner's altercation with victim clearly goes to the question of Swindle's guilt or innocence" and "does not establish a ground for habeas relief"); *Fell v. Rafferty*, 736 *F. Supp.* 623 (D.N.J. 1990)

(claim that someone else confessed to the murder not cognizable in habeas proceeding absent constitutional violation). There is no constitutional requirement that a factual basis be established on the record before a guilty plea is accepted, Meyers v. Gillis, 93 F.3d 1147, 1148, 1151 (3d Cir. 1996); Higgason v. Clark, 984 F.2d 203, 207-08 (7th Cir.), cert. denied, 508 U.S. 977, 113 S.Ct. 2974, 125 L.Ed.2d 672 (1993); Riggins v. McMakin, 935 F.2d 790, 794-95 (6th Cir. 1991). Hence, a claim that there was an insufficient factual basis for a plea, without more, does not provide a ground for habeas corpus relief. Meyers v. Gillis, 93 F.3d at 1151. Too, "[t]here is no constitutional right to withdraw a guilty plea." Freeman v. Muncy, 748 F. Supp. 423, 429 (E.D. Va. 1990), appeal. dismissed, 934 F.2d 319 (4th Cir. 1991); Holtan v. Black, 838 F.2d 984, 986 n.4 (8th Cir. 1988) ("what may constitute a fair and just reason to withdraw a plea is an issue of state law and is not justiciable in a federal habeas claim."); Siers v. Ryan, 773 F.2d 37 (3d Cir. 1985), cert. denied, 490 U.S. 1025, 109 S.Ct. 1758, 104 L.Ed.2d 194 (1989).

A claim that petitioner's counsel during federal or state post-conviction relief proceedings was incompetent or ineffective is not cognizable as a basis for habeas corpus relief. 28 U.S.C. § 2254(i).

A "federal habeas court has no power to grant habeas corpus relief because it finds that the state conviction is against the 'weight' of the evidence...." Young v. Kemp, 760 F.2d 1097, 1105 (11th Cir. 1985), cert. denied, 476 U.S. 1123, 106 S.Ct. 1991, 90 L.Ed.2d 672 (1986); Robinson v. Scully, 683 F. Supp. 941, 943 (S.D.N.Y. 1988). Habeas relief is available only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 126 (1979); Singer v. Court of Common Pleas, 879 F.2d 1203 (3d Cir. 1989).

Sentencing is generally a matter of state law and "cannot justify the federal intervention of habeas corpus relief." *Ervin v. Beyer*, 716 *F. Supp.* 163, 165 (D.N.J. 1989).

Sufficiency of evidence "for purposes of instructing the jury is solely a matter of state law" "and does not present a cognizable issue on habeas review." Bush v. Stephenson, 669 F. Supp. 1322, 1327 (E.D.N.C. 1986), aff'd, 826 F.2d 1059 (4th Cir. 1987); Kontakis v. Beyer, 19 F.3d 110 (3d Cir.), cert. denied, 513 U.S. 1035, 115 S.Ct. 215, 130 L.Ed.2d 143 (1994) ("[n]othing in [Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)] permits us to grant habeas relief when a state court refuses to charge a jury that it may convict a defendant for an offense when under state law the evidence could not justify the conviction.").

XIII. DISCOVERY

Habeas petitioners are not entitled to discovery "as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 1796-97, 138 L.Ed.2d 97 (1997). In order to prevent abuse, prior court approval is required before discovery can be obtained. Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir.), cert. denied, 484 U.S. 946, 108 S.Ct. 336, 98 L.Ed.2d 362 (1987). Discovery in habeas cases is available in the district court's discretion only upon a showing of "good cause." Rules Governing Section 2254 Cases, R. 6(a), 28 U.S.C. foll. § 2254; Deputy v. Taylor, 19 F.3d 1485, 1493 (3d Cir.), cert. denied, 512 U.S. 1230, 114 S.Ct. 2730, 129 L.Ed.2d 853 (1994); Campbell v. Blodgett, 982 F.2d 1356, 1358 (9th Cir. 1993); Maynard v. Dixon, 943 F.2d 407, 412 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S.Ct. 1211, 117 L.Ed.2d 450 (1992). More than "bald assertions and conclusory allegations" are necessary, however, "to warrant the State to respond to discovery. . ." Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir.), cert. denied, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 232 (1991); Mayberry v. Petsock, 821 F.2d at 185. Indeed, a federal district court is required to permit discovery in a habeas proceeding only "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore, entitled to relief. . . ." Harris v. Nelson, 394 U.S. 286, 300, 89 S.Ct. 1082, 1091, 22 L.Ed.2d 281 (1969); Bracy v. Gramley, 117 S.Ct. at 1799. R. 6(a) does not allow a petitioner to engage in a "fishing expedition." Deputy v. Taylor, 19 F.3d at 1493.

XIV. EVIDENTIARY HEARING

A determination of a factual issue by a state court shall be presumed correct in a habeas corpus proceeding. 28 U.S.C. § 2254(e)(1). The petitioner is obligated to rebut the presumption of correctness by clear and convincing evidence. Id. If the petitioner "has failed to develop the factual basis of a claim in" the state courts, the district court may not hold an evidentiary hearing unless the petitioner demonstrates that the claim relies upon a new rule of constitutional law made retroactive to collateral proceedings or that the claim relies on facts that could not have been discovered through due diligence and the facts would be sufficient to establish by clear and convincing evidence that but for the constitutional violation "no reasonable factfinder would have found the [petitioner] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). A "failure" to develop the claim in the state courts "is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Hence, if the claim was not developed in the state courts, but there has been no lack of diligence, the petitioner is excused from compliance with 28 U.S.C. § 2254(e)(2)(A), (B). Id. at 1491. In Williams v. Taylor, the Supreme Court found a lack of diligence as to one of Williams' claims, but remanded for an evidentiary hearing on his claims of juror bias and prosecutorial misconduct.

XV. APPEALS

In the absence of a certificate of appealability issued by a circuit judge or a district court judge, see also United States v. Eyer, 113 F.3d 470, 472-74 (3d Cir. 1997), an appeal may not be taken to the court of appeals after April 24, 1996. 28 U.S.C. § 2253(c)(1)(A). The applicant must make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), that is, a showing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). Relying on *Slack*, the Third Circuit has expressly rejected any contention that non-constitutional issues may justify the grant of a certificate of appealability. United States v. Cepero, 224 F.3d 256 (3d Cir.), cert. denied 121 S.Ct. 861 (2001) When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability should issue when the petitioner makes both the above showing and the additional showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. The certificate of appealability must specify the issue or issues which satisfy the standard of 28 U.S.C. § 2253(c)(3). Coss v. Lackawanna County District Attorney, 204 F.3d 453, 461 (3d Cir.), petition for cert. filed, 68 U.S.L.W. 3749 (May 24, 2000) (No. 99-1884). The court of appeals must review the grant of a certificate of appealability by the district court to satisfy itself that the petitioner made the requisite showing of the constitutional deprivation and that, thus, the court of appeals properly had jurisdiction of the matter. United States v. Cepero, 224 F.3d 256 (finding that district court erred in granting the certificate because there was no

showing of a constitutional violation). No certificate of appealability is required when the government appeals. *Rios v. Wiley*, 201 F.3d 257, 262 n. 5 (3d Cir. 2000); *Lambert v. Blackwell*, 134 *F*.3d 506, 512 n. 15 (3d Cir 1997); Fed. R. App. Pro. 22.

Jurisdiction of the court of appeals is pursuant to 28 U.S.C. § 1291. Lines v. Larkins, 208 F.3d 153 (3d Cir. 2000). The court of appeals' review is plenary. Lines v. Larkins, 208 F.3d at 159 n.6; Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996); see also Coss v. Lackawanna County District Attorney, 204 F.3d at 461 (the court of appeals has plenary review over the legal component of an ineffective assistance of counsel claim); Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998). Review of the district court's interpretation of the AEDPA is plenary. West v. Vaughn, 204 F.3d 53 (3d Cir. 2000). E.g., Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000) (court of appeals has plenary review over statutory limitations period issue).

HARASSMENT

(See also, DISORDERLY PERSONS, this Digest)

I. HISTORY

The harassment statute, N.J.S.A. 2C:33-4, provides that a person commits a petty disorderly persons offense if, with purpose to harass another, he (a) makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annovance or alarm; (b) subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or (c) engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person. A communication under subsection (a) may be deemed to have been made either at the place where it originated or at the place where it was received. In addition, under subsection (d) a person commits a crime of the fourth degree if in committing and offense under this section, he acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity.

Under subsection (e) a person commits a crime of the fourth degree if, in committing an offense under this section, he was serving a term of imprisonment or was on parole or probation as the results of a conviction of any indictable offense under the laws of this State, any other state of the United States.

In *State v. Hoffman*, 149 *N.J.* 564, 578-79 (1997) the Court quoted the commentary to the American Law Institute's Model Penal Code ("MPC") section 250.4 on the purpose to be served by enactment of the harassment statute to make criminal, private annoyances that are not entitled to constitutional protection. *Id.* at 576. Thus, when enacting *N.J.S.A.* 2C:33-4, the Legislature sought to fill gaps in the Code of Criminal Justice. 2 Final Report, *supra*, commentary to section 2C:33-4, at 296. The commentary to the Final Report states:

Special provision for these private annoyances is required since Section 2C:33-2 (Disorderly Conduct) is limited to disturbance of some general impact [as opposed to impact on a particular individual]. The present Section is also needed to fill a gap caused by some exclusions from the provisions of Section 2C:12-1 (Assaults).

Subsection (d) was added in 1995 as part of a legislative design to treat bias-motivated crime more

harshly. It was subsequently amended to conform to the constitutional mandate in *R.A. V. v. City of St. Paul*, 505 *U.S.* 377, 112 *S.Ct.* 2538, 120 *L.Ed.*2d 305 (1992), by deleting the language which required that the actor acted "at least in part, with ill will, hatred or bias toward" members of the specific groups, leaving only the intimidation aspect of the crime. *See State v. Mortimer*, 135 *N.J.* 517, 533-34, *cert. denied*, 513 *U.S.* 970 (1994).

II. CONSTITUTIONALITY

In State v. Hoffman, 149 N.J. 564 (1997), defendant's former wife filed complaints against defendant for harassment and contempt for violating a final domestic restraining order after he twice mailed to her two torn-up copies of a support order. The trial court found defendant guilty, but a majority of the Appellate Division reversed, finding that the two mailings did not constitute harassment under N.J.S.A. 2C:33-4a because they were not likely to alarm or "seriously" annoy the victim. Appealed as of right to the Supreme Court on the basis of the dissent, the Supreme Court addressed the issue of whether the method or manner of communication established an harassing intent to annoy or alarm, and in that context considered constitutional challenges to the statute on vagueness and overbreadth grounds. It found that the statute was not vague. The Court defined annoyance as conduct that would "irritate, disturb or bother," and construed N.J.S.A. 2C:33-4a to proscribe a single act of communicative conduct when its "purpose is to harass." To avoid having the catchall phrase "any other manner" be found unconstitutionally overbroad, the Court interpreted the communication covered by subsection (a) to encompass only those types of communications that are also invasions of the recipient's privacy. It thus held that the two mailings constituted a violation of the final domestic violence restraining order but did not constitute harassment under N.J.S.A. 2C:33-4a because they did not invade the victim's privacy. The Court emphasized, however, that in determining whether conduct constitutes harassment under subsection (a), the trial court is permitted to examine the totality of the circumstances, especially and including the context of domestic violence, in determining whether a defendant's conduct is likely to cause the required annoyance.

In *State v. Mortimer*, 135 *N.J.* 517, *cert. denied*, 513 *U.S.* 970 (1994), the New Jersey Supreme Court rejected a constitutional challenge to the penalty enhancement provision of the harassment statute, *N.J.S.A.* 2C:33-4d, finding that it does not create a separate substantive crime but merely enhances the penalty for harassment as

defined in N.J.S.A. 2C:33-4a, b or c committed with a motive of bias. In rejecting claims that the statute was overbroad or infringed on protected First Amendment rights, the Court ruled that the statute reached only harassing conduct which was unprotected by the Constitution, and not expression. The Court stated that N.J.S.A. 2C:33-4a was not vague because the statutory requirement that a defendant act "with purpose to harass another" imposes a specific intent requirement that clarifies the proscribed conduct. Also, the Court "read out" the language in N.J.S.A. 2C:33-4d which required that a defendant act "at least in part with ill will, hatred or bias," finding this portion of the statute was unconstitutionally vague. Finally, the Court found that N.J.S.A. 2C:33-4d was rationally related to a legitimate state interest in protecting health, safety and welfare of its citizens and therefore did not violate the equal protection clause. Note, however, Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), which invalidated the New Jersey hate crime statute, holding a fact which causes the enhancement of a sentence must be submitted to the factfinder and proven by the State beyond a reasonable doubt.

III. ELEMENTS/PURPOSE TO HARASS

State v. B.H., 290 *N.J. Super.* 588 (App. Div. 1996), *aff'd in part, rev'd in part,* 149 *N.J.* 564 (1997), held that in order to be guilty of harassment, a person must act with the purpose to harass, and the purpose must be coupled with the performance of one of the acts proscribed by subsections (a), (b), or (c), of the harassment statute.

According to *Mortimer*, each of the subsections (a), (b), and (c), is "free-standing, because each defines an offense in its own right." 135 N.J. at 525. Subsection (a) proscribes a single act of communicative conduct when its purpose is to harass. Under that subsection, annoyance means to disturb, irritate, or bother. Subsection (b) (the assault and battery or physical contact harassment section) deals with touching or threats to touch, and it does not require the intended victim to be annoyed or alarmed. In contrast to subsection (a), which targets a single communication, subsection (c) targets a course of conduct. Subsection (c) proscribes a course of alarming conduct or repeated acts with a purpose to alarm or seriously annoy an intended victim. The purpose of subsection (c) is to reach conduct not covered by subsections (a) and (b). See State v. Hoffman, supra.

State v. Cardell, 318 *N.J. Super.* 175 (App. Div.), *certif. denied*, 158 *N.J.* 687 (1999). In affirming defendant's stalking conviction the Appellate Division

found no rational basis existed to charge that version of harassment involving "offensively coarse language," codified in N.J.S.A. 2C:33-4a, as a lesser-included offense of stalking absent proof of a purpose to harass. In State v. J.T., 294 N.J. Super. 540 (App. Div. 1996), the Appellate Division ruled that defendant's conduct in lurking outside the grounds of the marital residence and staring at his wife was a violation of the domestic violence restraining order prohibiting defendant from harassing his wife. The court found that defendant's intent to harass his wife could be inferred from the totality of the circumstances. The court also noted that although repeated acts were not involved it did not mean that defendant did not engage in a "course of alarming conduct" within the meaning of N.J.S.A. 2C:33-4c.

In *State v. L.C.*, 283 *N.J. Super.* 441 (App. Div. 1995), the Appellate Division held that harassment under the Domestic Violence Act requires a purpose to harass and found that the mere yelling of offensive words by a woman to her former husband did not constitute the type of harassment under *N.J.S.A.* 2C:33-4a which was prohibited by the domestic violence restraining order. A restraining order can only prohibit conduct, including a communication under *N.J.S.A.* 2C:33-4, which has a "purpose to harass."

According to *State v. Avena*, 281 *N.J. Super.* 327 (App. Div. 1995), grabbing the victim's hips and pulling her closer when not encouraged by the victim constituted harass because such conduct would create "alarm or annoyance" on the part of the victim.

In *State v. Berka*, 211 *N.J. Super.* 717 (Law Div. 1986), the court held that harassment is a lesser included offense of simple assault, since proof of the same facts suffice to prove the elements of either offense, and the source of the harassment statute was the former simple assault statute, *N.J.S.A.* 2A:170-26. Each statute protects against offensive bodily touching or the threat of same and the only difference is that harassment requires a less serious injury of alarm as opposed to fear.

State v. P.E., 284 *N.J. Super.* 309 (Law Div. 1994). In harassment prosecution, counsel should be appointed for defendant even if defendant is not facing consequences of magnitude.

IV. INSUFFICIENT EVIDENCE OF HARASS-MENT

State v. Bazin, 912 F. Supp. 106 (D.N.J. 1995). Defendant's statement to victim that he would use

violence "if he could" lacked sufficient basis for establishing that he had intended to harass the victim and, in any event, this statement, along with others made by the defendant, were too *de minimis* to warrant prosecution.

In *J.F. v. B.K.*, 308 *N.J. Super.* 387 (App. Div. 1998), the Appellate Division reversed a final domestic violence restraining order against defendant where the only evidence supporting the order was a note left by defendant on plaintiff's vehicle while it was parked at her work place asking to talk to her. The Court found that such conduct did not establish the predicate crime for a finding of domestic violence absent a showing of surrounding circumstances establishing an intent to harass under *N.J.S.A.* 2C:33-4. The court also noted that it was a denial of due process for the trial court to have found that the defendant had committed domestic violence based on acts not alleged in the complaint.

J.N.S. v. D.B.S., 302 *N.J. Super.* 525 (App. Div. 1997). Where defendant in the past had called plaintiff obscene names and on one occasion had made an obscene gesture, said offensive things about plaintiff's boyfriend, kicked over a garbage can, and returned their children to plaintiff late on one occasion, the court found insufficient credible evidence that defendant intended to "alarm" but only that the parties mutually annoyed each other.

In State v. Fuchs, 230 N.J. Super. 420 (App. Div. 1989), the defendant was convicted of harassment under N.J.S.A. 2C:33-4c, after a neighbor observed him "peering into" a woman's window. Although the woman was not alarmed and had not seen the defendant's "peeping Tom" actions, the trial court nonetheless found defendant guilty, reasoning that defendant's conduct was designed to cause alarm, annoy or bother. The Appellate Division reversed, finding insufficient evidence to satisfy the statute. It found that the presence of a person at the scene as an object of harassment is a necessary element which must be proven by direct evidence in order to establish a violation of the harassment statute. The appellate court also determined that the State had failed to prove the requisite "purpose to harass," since there was no proof that the victim ever saw defendant peering through the bedroom window, nor that he made any effort to bother the occupants. The court also noted in dicta that because the "peeping Tom" statute under N.J.S.A. 2A:170-31.1 was repealed and was not reenacted through either the harassment statute or the criminal trespass provision in N.J.S.A. 2C:18-3 under the Code, there was a legislative intent to decriminalize such conduct. For a similar case involving a "peeping Tom" who ran once detected but was found not to have a "purpose to harass" *see State v. Zarin*, 220 *N.J. Super.* 99 (Law Div. 1987).

HINDERING

N.J.S.A. 2C:29-3 bifurcates the crime of hindering into two sections. Section a outlaws the hindering of the detention, apprehension, investigation, prosecution, conviction or punishment of another. Section b of *N.J.S.A.* 29-3 covers defendants who hinder their own detention, apprehension, investigation, prosecution, conviction or punishment.

The two sections differ in that the purpose element in each is different. Thus, if a person is to be charged with hindering both one's own and another's prosecutions, the two charges must be in separate counts and charged separately to the jury. *State v. Krieger*, 285 *N.J. Super.* 146, 151-153 (App. Div. 1995).

In *Krieger*, the Appellate Division found that the crime of hindering the prosecution of another by witness tampering as set forth in *N.J.S.A.* 2C:29-3a is a different crime with different elements from hindering the prosecution of one's self by witness tampering as defined by *N.J.S.A.* 2C:29-3b. In this case the two crimes were improperly joined in a single count of the indictment and the jury was improperly permitted to rest a finding of guilt on one or the other. Additionally, there was no instruction to the jury and no proof of one of the elements of witness tampering under *N.J.S.A.* 2C:29-3b.

In *State v. Henry*, 323 *N.J. Super*. 157 (App. Div. 1999), the Appellate Division set aside defendant's hindering apprehension conviction because the charge to which he pled guilty, *i.e.*, concealing evidence of the crime, "specifically himself," did not set forth an offense. Hindering apprehension does not occur when defendant refuses to submit to arrest or avoids compliance with the law.

Similarly, a defendant who gave a false name in response to a law enforcement officer's inquiry did not "volunteer false information" to law enforcement officer within the meaning of the statute prohibiting volunteering false information to law enforcement officer to hinder one's own apprehension, prosecution, conviction or punishment. *State v. Valetin*, 105 *N.J.* 14 (1987).

Likewise, the hindering statute is applicable only to completed criminal acts, not to ongoing possessory crimes where possession of items or substance at that time was chargeable as separate offense. *State v. Fuqua*, 303 *N.J. Super*. 40 (App. Div. 1997).

In *State v. Casimono*, 250 *N.J.Super*. 173 (App. Div. 1991), the court found that even though state troopers violated defendant's Fourth Amendment rights by subjecting him to a pat-down search for weapons, the troopers' conduct did not bar defendant's convictions for hindering apprehension and resisting arrest. The decisive factor supporting the admission of evidence of defendant's resisting arrest and hindering apprehension was the intervening circumstance of defendant's voluntary commission subsequent to illegal police conduct of new criminal offenses with high potential for causing injury to law enforcement officers.

In *State v. Hunt*, 115 *N.J.* 330 (1989), defendant's conviction for hindering apprehension or prosecution of another was supported by evidence that, after the killing, defendant and the other person returned to the other person's apartment, removed their blood-stained clothes, changed into other person's clothes, and threw their clothes and the murder weapons into trash bags.

In *State v. McDougald*, 120 *N.J.* 523 (1990), a hindering conviction was supported by testimony regarding defendant's statements that victims pressed criminal charges against him and that defendant repeatedly asked one of the victims why they were trying to hurt him.

The crime of hindering apprehension was not a lesser-included offense of robbery, although robbery charge arose when defendant drove his companions from scene of robbery. *State v. Williams*, 232 *N.J. Super.* 432 (1989).

Consecutive sentences for hindering apprehension and attempted unlawful disposition of a handgun were legal, where offenses were distinct crimes, committed at different times and places. *State v. Smith*, 322 *N.J. Super*. 385 (App. Div. 1999), *State v. Perry*, 124 *N.J.* 128 (1991)(trial court validly made sentences for hindering and possession of drugs consecutive on noncapital counts of capital murder case; court had found as aggravating factors need for deterrence and prevention of recidivism); *but see State v. Childs*, 204 *N.J. Super*. 639, 641-42 (App. Div. 1985), *aff'd on other grounds*, 208 *N.J. Super*. 61 (App. Div.), *certif. denied* 104 *N.J.* 430 (1986)(hindering conviction treated as a lesser included offense to armed robbery).

HOMICIDE

(See also CAPITAL PUNISHMENT, COMPLIC-ITY, DEFENSES, INSANITY/DIMINISHED CAPACITY, INTOXICATION, SELF-DEFENSE)

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

A. Types of Murder

1. Purposeful Murder - actor purposely causes death or serious bodily injury resulting in death. *N.J.S.A.* 2C:11-3a(1).

2. Knowing Murder - actor knowingly causes death or serious bodily injury resulting in death. *N.J.S.A.* 2C:11-3a(2).

3. Felony Murder - actor, acting either alone or with others, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants. *N.J.S.A.* 2C:11-3a(3).

The mental states required to convict for purposeful murder and knowing murder are "equivalent expressions of moral culpability." *State v. Cooper*, 151 *N.J.* 326 (1997).

Where the evidence supports either purposeful or knowing murder or felony murder, all should be charged in the indictment and all should be charged to the jury. The jury should be permitted to return verdicts on *all* types of murder. In that way, the judge maximizes his options at sentencing and avoids the risk of merger, for example, of the underlying felony with the felony murder, limiting his ability to give separate sentences for the crimes. *State v. Arriagas*, 198 *N.J. Super.* 575 (App. Div. 1985), *aff'd, State v. Crisantos (Arriagas)*, 102 *N.J.* 265 (1986).

It is not a defense to purposeful or knowing murder that the actor intended only to inflict serious bodily injury and not death. *State v. Gerald*, 113 *N.J.* 40 (1988). The crime of non-capital serious bodily injury murder exists under the Code. To convict a defendant of purposeful or knowing non-capital serious bodily injury murder, the prosecution must prove that it was defendant's conscious object to cause serious bodily injury (purposeful) or that defendant knew that the conduct was practically certain to cause serious bodily injury (knowing), that defendant knew that the injury created a substantial risk of death, and that it was highly probable that death would result. *State v. Cruz*, 163 *N.J.* 403, 417-19 (2000).

Although a defendant may be guilty of murder if he purposely or knowingly causes death or serious bodily injury resulting in death, he may only be guilty of attempted murder if he acts purposely and his intent is to cause death. In other words, an actor cannot attempt to cause death unless death is the conscious object of his conduct. *State v. Rhett,* 127 *N.J.* 3 (1992).

In contrast to purposeful or knowing murder, felony murder is a strict liability crime. State v. Feaster, 156 N.J. 1 (1998). To be guilty of felony murder, a defendant need not have intended or contemplated the victim's death. State v. Cooper, 151 N.J. 326, 360 (1997). Felony murder is a crime of "transferred intent," based on the intent to commit the underlying felony even though there is no intent to kill. State v. Smith, 210 N.J. Super. 43, 50 (App. Div.), certif. denied, 105 N.J. 582 (1986). As a result, there is no crime of attempted felony murder because it is a self-contradiction. Felony murder is a wholly unintended killing which results from the commission of the underlying felony. A criminal attempt, however, requires that the actor have the purpose to cause the particular result. One cannot "attempt" an unintended result. If the conduct was intended to result in death, then the correct charge is attempted murder. State v. Darby, 200 N.J. Super. 327 (App. Div. 1984), certif. denied, 101 N.J. 226 (1985).

When the predicate offense and the murder are closely connected in point of time, place and causal connection and are integral parts of one continuous transaction, the actor may be found to be engaged in the course of committing, or attempting to commit the predicate offense or in immediate flight thereafter to justify a conviction for felony murder. Whether a defendant has reached a point of temporary safety is one factor for the jury to consider in determining whether the defendant was in immediate flight after commission or attempt to commit the offense. *State v. Spencer*, 319 *N.J. Super.* 284 (App. Div. 1999).

If more than one felony can serve as the basis for a conviction of felony murder, the jury should be instructed that it may only use the felonies of which it convicts the defendant as the basis for a felony murder conviction. If the jury convicts the defendant of more than one predicate felony, it need not be unanimous on which felony forms the basis of the felony murder conviction. *State v. Harris*, 141 *N.J.* 525, 561-63 (1995).

Manslaughter is not a lesser-included offense of felony murder. *State v. Pennington*, 273 *N.J. Super.* 289, 298-99 (App. Div.), *certif. denied*, 137 *N.J.* 313 (1994). Moreover, since felony murder is a strict liability crime, it cannot be mitigated to manslaughter by proof of provocation. *State v. Crisantos (Arriagas)*, 102 *N.J.* 265, 271-72 n.7 (1986).

A fetus not born alive cannot be the victim of a criminal homicide. *State in the Interest of A. W.S.*, 182 *N.J. Super.* 334 (J. & D.R. Ct. 1980), *aff'd*, 182 *N.J. Super.* 278 (App. Div. 1981).

B. Indictments

For the crime of purposeful or knowing murder, the indictment need not state whether the murder was committed by the defendant's own conduct. "Own conduct" is not an element of purposeful or knowing murder. It is merely a triggering device for the penalty phase of a capital prosecution. *State v. Simon*, 161 *N.J.* 416, 439 (1999).

A defendant may be convicted of felony murder based upon an unindicted predicate felony provided that he is given fair notice, at the time of trial, of the predicate felony used to satisfy the requirements of the felony murder statute. *State v. Branch*, 155 *N.J.* 317 (1998).

C. Time Limitations

There is no time limitation on a prosecution for purposeful or knowing murder, felony murder, aggravated manslaughter, or manslaughter. *N.J.S.A.* 2C:1-6a.

The length of time that elapses between an initial assault and the death of the victim is not a bar to prosecution for criminal homicide. *N.J.S.A.* 2C:11-2.1.

D. Causation

In a murder prosecution, where the State and the defendant offer different theories of causation, the jury should be instructed that if it determines that the victim's death occurred in a manner different than that designed or contemplated by the defendant, then it should decide whether the death was not too remote to bear on the defendant's liability. *State v. Martin*, 119 *N.J.* 2 (1990).

Liability for murder or manslaughter can be based on a failure to act where the duty to perform the omitted act is imposed by law. In this case, the defendant, who was the father of the three-year-old victim or who had assumed responsibility for his care, failed to act to stop the beating by the child's mother which resulted in the child's death. *State v. Bass*, 221 *N.J. Super.* 466, 488-90 (App. Div. 1987), *certif. denied*, 110 *N.J.* 186 (1988).

The defendant could be convicted of murder on the theory that the victim's death as a result of jumping from an eleventh story window was "purposefully" and "knowingly" caused by defendant's conduct where the victim was weak from defendant's beating with his fists and a shovel the day before to the point that she was unable to walk unaided, and where the victim, a drug user, called out for drugs and made repeated pleas and entreaties while defendant was beating her during the last fifteen minutes of her life. If the victim misjudged her circumstances, it was because defendant had caused her powers of perception to become impaired, an event which was foreseeable to defendant, if not within his actual design. *State v. Lassiter,* 197 *N.J. Super.* 2 (App. Div. 1984).

A defendant who caused "brain death" of the victim was criminally responsible for homicide even though the death did not actually occur until the respirator was turned off. *State v. Watson*, 191 *N.J. Super.* 464 (App. Div.), *certif. denied*, 95 *N.J.* 230 (1983).

The removal of life support from a victim who was not brain dead was not an intervening cause sufficient to insulate a defendant from liability for homicide. *State v. Pelham,* 328 *N.J. Super.* 631 (Law Div. 1998).

Defendant could be found guilty of knowing or purposeful murder where intoxicated victim's death from asphyxiation as a result of smoke inhalation and carbon monoxide poisoning was caused by defendant's setting fire with an accelerant to the wooden structure which he knew was occupied by individuals who had been drinking alcoholic beverages. *State v. Martin*, 119 *N.J.* 2 (1990).

Where a pregnant woman was assaulted, and, as a result of medical intervention, the fetus was born alive but subsequently died by reason of a chain of circumstances precipitated by the assault upon the mother, the actor may be criminally responsible for murder. The court rejected the defendant's argument that because the fetus was born alive only as a result of medical science and the skill of the doctor, that was an intervening event that should not transform his assault of the mother into a homicide of the surviving infant. *State v. Anderson,* 135 *N.J. Super.* 423 (Law Div. 1975), *aff'd,* 173 *N.J. Super.* 75 (App. Div.), *certif. denied,* 85 *N.J.* 124 (1980).

Causation for felony murder consists of two elements: the actor's conduct must have been the "but for" cause of death, and the death must have been "probable consequence" of the actor's conduct. *N.J.S.A.* 2C:2-3e; *State v. Martin*, 119 *N.J.* 2 (1990); *State v. Smith*, 210 *N.J. Super.* 43, 55-56 (App. Div.), *certif. denied*, 105 *N.J.* 582 (1986). A defendant should be exculpated from liability for felony murder only when a death occurs in a manner that is so unexpected or unusual, that is, it was too remote, accidental in its occurrence, or too dependent on another's volitional act, that he could not justly be found culpable for the result. *State v. Martin*, 119 *N.J.* at 33, *State v. Pantusco*, 330 *N.J. Super.* 424, 441 (App. Div. 2000).

A jury could properly convict the defendant of felony murder when he caused an automobile accident while fleeing from the commission of a robbery and the driver of other vehicle, who had a preexisting heart condition, suffered a fatal heart attack. *State v. Smith*, 210 *N.J. Super.* 43 (App. Div.), *certif. denied*, 105 *N.J.* 582 (1986).

II. MANSLAUGHTER (N.J.S.A. 2C:11-4)

1. Aggravated Manslaughter - actor recklessly causes death under circumstances manifesting extreme indifference to human life. *N.J.S.A.* 2C:11-4a.

2. Manslaughter - actor recklessly causes death. *N.J.S.A.* 2C:11-4b(1).

3. Passion/Provocation Manslaughter - actor commits a criminal homicide which would otherwise be murder but was committed in the heat of passion resulting from a reasonable provocation. *N.J.S.A.* 2C:11-4b(2).

4. Manslaughter While Eluding - actor causes the death of another while fleeing or attempting to elude a law enforcement officer. *N.J.S.A.* 2C:11-4b(3).

Manslaughter is not a lesser-included offense of felony murder. *State v. Pennington*, 273 *N.J. Super.* 289, 298-99 (App. Div.), *certif. denied*, 137 *N.J.* 313 (1994).

The difference between aggravated manslaughter and manslaughter is the degree of the risk of death. Manslaughter involves a possibility that death will occur, while aggravated manslaughter involves a probability. State v. Bowens, 108 N.J. 622, 638 (1987); State v. Curtis, 195 N.J. Super. 354, 364-65 (App. Div.), certif. denied, 99 N.J. 212 (1984). Where the State shows that there was a probability rather than a "mere possibility" that death would result, the reckless conduct will be found to have been committed "under circumstances manifesting extreme indifference to human life." State v. Bowens, 108 *N.J.* at 638. The distinguishing element between aggravated manslaughter and manslaughter, that the defendant recklessly caused death "under circumstances manifesting extreme indifference to human life," focuses on the circumstances under which the defendant acted, rather than on the defendant's state of mind. State v. Curtis, 195 N.J. Super. at 364-65.

Evidence that the defendant was suffering from an epileptic seizure at the time of the stabbing and was unaware of and unable to control his actions required a charge on the lesser-included offenses of aggravated manslaughter and manslaughter since the jury could have concluded that the defendant lacked the cognitive faculties to have acted "purposely" or "knowingly" but that he retained a sufficient awareness of what he was doing and control over his actions to have acted with a "conscious disregard of a substantial and unjustifiable risk." *State v. Washington*, 223 *N.J. Super.* 367 (App. Div.), *certif. denied*, 111 *N.J.* 612 (1988).

A person who fires a gun believing it is not loaded may be convicted of manslaughter if the State proves that the person was reckless in forming his belief that the gun was not loaded. *State v. Sexton*, 160 *N.J.* 93 (1999).

An honest but unreasonable belief in the need for the use of force, that is, "imperfect self-defense," does not constitute mitigation for either aggravated manslaughter or manslaughter because they are crimes with a reckless culpability requirement. *State v. Pridgen*, 245 *N.J. Super.* 239, 246-48 (App. Div.), *certif. denied*, 126 *N.J.* 327 (1991). *See also State v. Colon*, 298 *N.J. Super.* 569 (App. Div.), *certif. denied*, 150 *N.J.* 27 (1997).

In a prosecution for aggravated manslaughter as a result of vehicular homicide, the jury must find that the defendant caused the deaths by reckless operation of his vehicle under circumstances manifesting extreme indifference to human life. The relevant "circumstances" are those which occurred at a time immediately preceding the homicides, such as the operation of the vehicle at a high rate of speed, the failure to observe stop signs and traffic signals, turning out the vehicle's headlights, and the consumption of alcohol. Thus evidence of the defendant's lack of remorse for the deaths, and his callousness and lack of sympathy for the injuries sustained by his wife and friends, who were passengers in his vehicle, were not relevant circumstances of his reckless operation of his vehicle under circumstances manifesting extreme indifference to human life. State v. Pindale, 249 N.J. Super. 266 (App. Div. 1991). But where a defendant immediately fled the scene of the accident without offering any aid, that fact was evidence that he acted with extreme indifference to human life. State v. Radziwill, 235 N.J. Super. 557, 570 (App. Div. 1989), aff'd o.b., 121 N.J. 527 (1990).

Where the defendant drank to the point of being severely intoxicated, drove his truck on a main thoroughfare at an excessive rate of speed, and proceeded into an intersection on a red traffic light, both the decision to drive and the manner in which the defendant drove indicated a complete disregard for the lives of others to justify indictment and conviction for aggravated manslaughter. *State v. Bogus*, 223 *N.J. Super.* 409, 418-19 (App. Div.), *certif. denied*, 111 *N.J.* 567 (1988).

Because nothing short of a purposeful state of mind can constitute a criminal attempt, the concepts of attempted aggravated manslaughter and attempted manslaughter are self-contradictory. One cannot attempt/intend to cause an unintended result. *State v. Robinson*, 266 *N.J. Super.* 268, 276-77 (App. Div. 1993), *rev'd on other grounds*, 136 *N.J.* 476 (1994).

Attempted passion/provocation manslaughter, however, is cognizable under the Code as a lesser-included offense of attempted murder. Attempted passion/ provocation manslaughter would be attempted murder except that it was committed in the heat of passion or as a result of provocation. *State v. Robinson*, 136 *N.J.* at 486-88.

"Passion/provocation manslaughter is an intentional homicide committed under extenuating circumstances that mitigate the murder." *State v. Robinson*, 136 *N.J.* 476, 481 (1994). It is "a concession to the frailty of man, a recognition that the average person can understandably react violently to a sufficient wrong and hence some lesser punishment is appropriate." *State v. Mauricio*, 117 *N.J.* 402, 410 (1990); *State v. Crisantos (Arriagas)*, 102 *N.J.* 265, 274 (1986). Passion/provocation manslaughter consists of four elements: (1) the provocation must be adequate to inflame a reasonable person; (2) the defendant must not have had time to cool off between the provocation and the homicide; (3) the provocation must have actually impassioned the defendant; (4) and the defendant must not have actually cooled off. *State v. Mauricio*, 117 *N.J.* at 411. The first two elements are objective; the second two are subjective and are usually determined by the jury. *Id.* at 411-13.

Aggravated manslaughter is not reduced to manslaughter when it is committed in the heat of passion resulting from reasonable provocation. *State v. Grunow*, 102 *N.J.* 133 (1986). Nor can felony murder, a strict liability crime, be mitigated to manslaughter by proof of provocation. *State v. Crisantos (Arriagas)*, 102 *N.J.* 265, 271-72 n.7 (1986).

Passion/provocation may mitigate an otherwise purposeful or knowing murder where the homicidal act is a response to a provocation sufficient "to inflame the passions of a reasonable person" so that the defendant's loss of control is a "reasonable reaction." State v. Mauricio, 117 N.J. 402, 410 (1990). As a result, a defendant who has a personality disorder which made him more easily provoked was not entitled to a charge on passion/ provocation manslaughter where the claimed provocation would not have "inflamed the passions of a reasonable person." State v. Abrams, 256 N.J. Super. 390, 397-98 (App. Div.), certif. denied, 130 N.J. 395 (1992). In this same vein, the diminished ability of children to exercise reasonable self-control cannot be considered in determining whether a criminal homicide was committed in the heat of passion resulting for a reasonable provocation. A juvenile defendant is held to an adult standard of self-control. State v. Pratt, 226 N.J. Super. 307 (App. Div.), certif. denied, 114 N.J. 314 (1988). But testimony that the defendant suffered from post-traumatic stress disorder as a result of the victim's past course of sexual assaults of her was relevant to the question of whether the victim's conduct "actually impassioned" the defendant. State v. Hines, 303 N.J. Super. 311 (App. Div. 1997).

Mutual combat, when waged on equal terms and where no unfair advantage is taken of the victim, may reduce the homicide from murder to manslaughter. The offense is murder, however, and not manslaughter, where the accused alone is armed and takes unfair advantage of the victim. *State v. Crisantos (Arriagas)*, 102 *N.J.* 265 (1986); *State v. Copling*, 326 *N.J. Super.* 417 (App. Div. 1999), *certif. denied*, 164 *N.J.* 189 (2000). For mutual combat to constitute adequate provocation, the retaliation must be proportionate to the provocation. If the defendant, on slight provocation, attacks the victim with violence out of proportion to the provocation, the crime is murder. Thus, a single blow struck by an unarmed woman did not constitute objectively reasonable provocation to mitigate from murder to manslaughter the defendant's conduct in hacking and stabbing the victim fifty times with three knives. *State v. Oglesby*, 122 *N.J.* 522 (1991).

If the defendant himself creates the situation that causes his own passion or provocation, he should not benefit from it and is not entitled to a charge on passion/ provocation manslaughter. *State v. Harris*, 141 *N.J.* 525, 571-73 (1995). Thus, the passion of a defendant, aroused as a result of injuries inflicted by his victim in justifiable self-defense, is, as a matter of law, insufficient to mitigate the defendant's culpability for the resulting homicide. *State v. Pasternick*, 285 *N.J. Super.* 607, 615-17 (App. Div. 1995).

Battery, except for a light blow, is traditionally considered. "almost as a matter of law," to be objectively adequate provocation. *State v. Mauricio*, 117 *N.J.* 402, 414 (1990). In contrast, words alone, no matter how offensive or insulting, do not constitute adequate provocation to reduce murder to manslaughter. *State v. Crisantos (Arriagas)*, 102 *N.J.* 265, 274 (1986); *State v. Bonano*, 59 *N.J.* 515, 524 (1971). But verbal threats accompanied by a past history of violence and threatening gestures can provide a basis for a passion/ provocation manslaughter instruction, *State v. Vigilante, 257 N.J. Super.* 296 (App. Div. 1992), just as a threat with a gun or a knife can constitute adequate provocation. *State v. Mauricio*, 117 *N.J.* at 414.

A course of ill-treatment or abuse of the accused or someone with whom the accused has a close relationship, sufficient to prompt a homicidal response in a reasonable person, and which the accused reasonably believes is likely to continue, can be objectively reasonable provocation to warrant a charge on passion/provocation manslaughter. *State v. Coyle*, 119 *N.J.* 194, 225-28 (1990); *State v. Kelly*, 97 *N.J.* 178 (1984); *State v. Guido*, 40 *N.J.* 191, 209-11 (1963). Where the victim wanted to date other men and the defendant suspected her of "messing around," that did not constitute a course of illtreatment which could have provoked a homicidal response in an ordinary person, especially since the defendant himself was involved in a sexual relationship with another woman. *State v. Darrian*, 255 *N.J. Super.* 435, 451 (App. Div.), *certif. denied*, 130 *N.J.* 13 (1992).

Conduct which causes injury to a relative and renders the defendant "out-of-control" can constitute provocation to warrant a charge on passion/provocation manslaughter. *State v. Bishop*, 225 *N.J. Super.* 596 (App. Div. 1988). But where the defendant learned the next day that his brother had been attacked but was not injured, that was not objectively reasonable provocation to reduce the murder to manslaughter. *State v. Copling*, 326 *N.J. Super.* 417, 430 (App. Div. 1999), *certif. denied*, 164 *N.J.* 189 (2000).

Resisting the accused's sexual advances does not constitute provocation sufficient to reduce murder to manslaughter. *State v. Hollander*, 201 *N.J. Super.* 453, 474-75 (App. Div.), *certif. denied*, 101 *N.J.* 335 (1985). Nor does the victim's alleged inconsistent behavior of seeing the defendant freely on some occasions while enforcing the restraining orders against him on others. *State v. Cardona*, 268 *N.J. Super.* 38, 46-47 (App. Div. 1993), *certif. denied*, 135 *N.J.* 300 (1994).

A defendant was not entitled to an instruction on passion/provocation manslaughter where the claimed provocation of seeing his girlfriend in bed with another man occurred more than twenty-four hours earlier. The "heat of passion" defense presupposes that the defendant acted on a great provocation "before a time sufficient to permit reason to resume its sway had passed." *State v. Lassiter,* 197 *N.J. Super.* 2 (App. Div. 1984). Moreover, the trend is away from deeming infidelity to be a "reasonable provocation" for murder. *See Kontakis v. Beyer,* 19 *F.3d* 110, 113 (3d Cir.), *cert. denied,* 513 *U.S.* 881, 115 *S.Ct.* 215, 130 *L. Ed. 2d* 143 (1994) (noting that states "may prefer the more civilized approach of leaving the settlement of these disputes to the matrimonial courts").

A reasonable person would cool-off in two and one half hours after discovering that his brother was attacked, but not injured, the prior day. *State v. Copling*, 326 *N.J. Super.* 417 (App. Div. 1999), *certif. denied*, 164 *N.J.* 189 (2000). The defendant's involvement, however, in two violent physical confrontations with a bouncer less than one-half hour before he shot the victim in the mistaken belief that he was the bouncer entitled the defendant to a charge on passion/provocation manslaughter. *State v. Mauricio*, 117 *N.J.* 402 (1990)

Although passion/provocation does not reduce aggravated manslaughter to manslaughter, an otherwise

reversible error in a charge on passion/provocation manslaughter is not rendered harmless by virtue of the defendant's acquittal of murder and conviction of aggravated manslaughter. *State v. Grunow*, 102 *N.J.* 133 (1986).

The crime of manslaughter while eluding police makes a person strictly liable for manslaughter when the State proves a violation of *N.J.S.A.* 2C:29-2b, eluding, which resulted in the death of another person. *N.J.S.A.* 2C:11-4b(3).

Where a fatal accident occurs during a police chase as part of the flight from the predicate felony, manslaughter while eluding should be charged as a lesser-included offense of felony murder. *State v. Pantusco*, 330 *N.J. Super.* 424, 445-49 (App. Div. 2000).

III. INSTRUCTIONS

A. Generally

When the defendant requests a charge on a lesserincluded offense, the charge is warranted only when the evidence provides a "rational basis" for a verdict of the lesser offense. *State v. Crisantos (Arriagas)*, 102 *N.J.* 265, 273-78 (1986); *State v. Choice*, 98 *N.J.* 295, 298-99 (1985); *State v. Powell*, 84 *N.J.* 305, 318-19 (1980). When a defendant does not request a charge on a lesserincluded offense, the trial court has a duty to nonetheless charge on the lesser-included offense only "when the facts 'clearly indicate' the appropriateness of that charge." *State v. Choice*, 98 *N.J.* at 299. It is reversible error to charge an offense of a higher degree than is warranted by the evidence since it may cause a compromise verdict by the jury. *State v. Christener*, 71 *N.J.* 55 (1976).

Ordinarily, juries may not consider lesser-included offenses until they have acquitted of the greater offense. The rationale behind the sequential ordering of greaterand lesser-included offenses is that the jury must convict of the crime supported by the evidence, as opposed to compromising between jurors who want the greater charge and those who want to acquit. *State v. Cooper*, 151 *N.J.* 326, 366 (1997); *State v. Harris*, 141 *N.J.* 525, 552-53 (1995); *State v. Zola*, 112 *N.J.* 384, 405 (1988).

A passion/provocation charge, however, must be incorporated into the purposeful murder charge. *State v. Cooper*, 151 *N.J.* at 369; *State v. Coyle*, 119 *N.J.* 194, 223-24 (1990). The jury must be instructed that the absence of passion/provocation is an element of murder which the State must prove beyond a reasonable doubt

and that the jury may convict defendant only of manslaughter when the homicide would have been murder but for the existence of passion/provocation. *State v. Erazo*, 126 *N.J.* 112, 125-26 (1991); *State v. Coyle*, 119 *N.J.* at 224. The trial judge must instruct the jury that to convict of murder, it must be convinced beyond a reasonable doubt that the defendant did not kill in the heat of passion. *State v. Wilson*, 128 *N.J.* 233, 238-41 (1992); *State v. Grunow*, 102 *N.J.* 133, 145 (1986).

To determine if there is evidence to support an instruction on the lesser-included offenses of aggravated manslaughter and manslaughter, the focus of the inquiry is whether there is proof of accidental rather than intentional conduct. *State v. Tucker*, 265 *N.J. Super.* 296, 330 (App. Div.), *aff'd*, 137 *N.J.* 259 (1993), *cert. denied*, 513 *U.S.* 1090, 115 *S.Ct.* 751, 130 *L. Ed.* 2d 651 (1995).

A defendant is entitled to a charge on aggravated assault where a jury could conclude that although the defendant assaulted the victim, his death was solely as a result of the action of another. *State v. Vujosevic*, 198 *N.J. Super.* 435 (App. Div.), *certif. denied*, 101 *N.J.* 247 (1985). *See also State v. Clark*, 255 *N.J. Super.* 14 (App. Div. 1992).

B. Murder

The required jury charge for serious bodily injury murder is contained in *State v. Cruz*, 163 *N.J.* 403, 419-20 (2000). This instruction must be adapted for a non-capital prosecution.

In a murder prosecution where the State and the defendant offer different theories of causation, the jury should be instructed that if it determines that the victim's death occurred in a manner different than that designed or contemplated by the defendant, then it should decide whether the death was not too remote to bear on the defendant's liability. *State v. Martin*, 119 *N.J.* 2 (1990).

Because attempted murder requires that the defendant purposely intended to cause death, an instruction which states that the defendant could be convicted if he purposely or knowingly attempted to commit the killings is reversible error. *State v. Rhett*, 127 *N.J.* 3 (1992).

C. Felony Murder

In felony murder cases, courts should instruct juries that they may not convict a defendant of felony murder unless they convict him of the underlying offense that is a predicate to the felony murder conviction. *State v. Grey*, 147 *N.J.* 4 (1996); *State v. Spencer*, 319 *N.J. Super.* 284, 309 (App. Div. 1999). Where there is a so-called "inconsistent verdict," however, such as where the jury acquits the defendant of the underlying felony but convicts him of felony murder, and the reason for the inconsistent verdict cannot be determined, the verdict is permissible so long as the evidence is sufficient to support a conviction of the substantive offense beyond a reasonable doubt. *State v. Grey*, 147 *N.J.* 4.

If more than one felony can serve as the basis for a conviction of felony murder, the jury should be instructed that it may only use the felonies of which it convicts the defendant as the basis for a felony murder conviction. If the jury convicts the defendant of more than one predicate felony, it need not be unanimous on which felony forms the basis of the felony murder conviction. *State v. Harris*, 141 *N.J.* 525, 561-63 (1995).

The failure to instruct on "attempt" in conjunction with a charge on robbery, specifically on the concepts of purposeful conduct and substantial steps, was plain error requiring reversal of the felony murder conviction where the State failed to offer any evidence that the defendant robbed the victim. *State v. Gonzalez*, 318 *N.J. Super.* 527 (App. Div.), *certif. denied*, 161 *N.J.* 148 (1999).

It is an affirmative defense to felony murder that the defendant: (a) did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid its commission; and (b) was not armed with a deadly weapon or any instrument, article, or substance readily capable of causing death or serious bodily injury and of a sort not ordinarily carried in public places by lawabiding persons, and (c) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument, and (d) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily *N.J.S.A.* 2C:11-3a(3). Where the evidence injury. warrants a charge on this defense, a proper instruction must advise the jury that the State has the burden to disprove the defense beyond a reasonable doubt. State v. Smith, 322 N.J. Super. 385 (App. Div.), certif. denied, 162 N.J. 489 (1999).

D. Manslaughter

If there is plausible evidence in the record to support a conviction of a lesser degree of criminal homicide, a defendant is entitled to an instruction on the lesser offense even if it is not consistent with his defense. *State v. Powell*, 84 *N.J.* 305, 317 (1980).

A court may withhold a passion/provocation manslaughter charge only where no jury could rationally conclude that the State had not proven beyond a reasonable doubt that the asserted provocation was insufficient to inflame the passions of a reasonable person. But where there is no evidence in the record of "passion" or "extreme emotional disturbance," there is no basis to convict a defendant of passion/provocation manslaughter and the trial court may not charge the jury on that offense. *State v. Crisantos (Arriagas)*, 102 *N.J.* 265 (1986).

When a defendant places passion/provocation in issue, the jury must be instructed that to prove a purposeful and knowing murder, the State must prove beyond a reasonable doubt that the defendant's actions were not the result of passion. *State v. Grunow*, 102 *N.J.* 133, 145 (1986); *State v. Powell*, 84 *N.J.* 305, 315 (1980).

Where there is evidence that the victim has, in the past, consistently physically abused the defendant or someone with whom he has a close relationship, and that the defendant knows about the abuse, the jury must be told that the finding of provocation may be premised on a course of ill-treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue. *State v. Coyle*, 119 *N.J.* 194, 225-28 (1990); *State v. Kelly*, 97 *N.J.* 178 (1984).

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

A. Generally

Criminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel recklessly. L.1995, c. 285, § 1 raised vehicular homicide from a third to a second degree crime and provided that nothing in the vehicular homicide statute would preclude, if the evidence warrants, an indictment and conviction for aggravated manslaughter.

When a defendant is charged with (reckless) manslaughter arising from an automobile accident, the

State must prove that the defendant operated his vehicle recklessly by consciously disregarding a substantial and unjustifiable risk that death would result from his conduct. *N.J.S.A.* 2C:2-2b(3); *State v. Jamerson*, 153 *N.J.* 318, 334 (1998); *State v. Choinacki*, 324 *N.J. Super.* 19, 47-48 (App. Div.), *certif. denied*, 162 *N.J.* 197 (1999). Since the death is caused by a motor vehicle, the jury also has for its consideration the defendant's guilt of death by auto, now vehicular homicide, as a lesser-included offense. The culpability element of recklessness required for manslaughter is greater than that required for death by auto. The State must prove "causative acts of recklessness that are different in kind from the acts involved in reckless driving that support a conviction for death by auto." *State v. Jamerson*, 153 *N.J.* at 334.

While driving under the influence may alone satisfy the reckless element of the death by auto charge, State v. Labrutto, 114 N.J. 187, 204 (1989), more is required for a conviction of manslaughter. When the State relies on drinking as an additional act of recklessness which caused death, the drinking must be more than casual drinking and more than intoxication. It must be "exceptional drinking to a marked extent." State v. Jamerson, 153 N.J. at 335; State v. Scher, 278 N.J. Super. 249, 269 (App. Div. 1994), certif. denied, 140 N.J. 276 (1995). The deviation from reasonable care must be gross in order to satisfy the recklessness element of reckless manslaughter. State v. Choinacki, 324 N.J. Super. at 48. The conduct while or before driving must be "extraordinary" and "extreme" to satisfy the recklessness element for manslaughter. State v. Scher, 278 N.J. Super. at 269.

The need for this distinction may be obviated by the Legislature's regrading of vehicular homicide to a second degree crime. Thus it seems that where an individual causes death by recklessly driving his vehicle, the appropriate charge will be vehicular homicide rather than (reckless) manslaughter. The statute makes clear, however, that prosecutions for aggravated manslaughter are still contemplated where the evidence so warrants. *N.J.S.A.* 2C:11-5d.

Evidence that the defendant was extremely intoxicated, that he dismissed his chauffeur to drive himself, and that he drove at an excessive speed and in a daredevil manner supported his conviction for (reckless) manslaughter as opposed to the lesser-included offense of death by auto. *State v. Scher*, 278 *N.J. Super.* 249 (App. Div. 1994), *certif. denied*, 140 *N.J.* 276 (1995).

B. Double Jeopardy Problems

Reckless and careless driving are lesser-included offenses of vehicular homicide (death by auto). State v. Muniz, 118 N.J. 319, 325 (1990); State v. Dively, 92 N.J. 573 (1983). A municipal court prosecution for a lesserincluded motor vehicle violation could bar a subsequent criminal prosecution for vehicular homicide on principles of double jeopardy. State v. Dively, 92 N.J. Double jeopardy would also bar successive 573. prosecutions for vehicular homicide and driving while intoxicated (DWI) if the prosecutions were based on the same evidence, specifically that the evidence of defendant's recklessness was the fact that he was driving while intoxicated. State v. DeLuca, 108 N.J. 98, cert. denied, 484 U.S. 944, 108 S.Ct. 331, 98 L. Ed. 2d 358 (1987).

In order to avoid the double jeopardy problems which can arise when indictable offenses, such as aggravated manslaughter and vehicular homicide, and violations of the motor vehicle code, such as DWI and reckless driving, arising from the same occurrence are tried separately, the Supreme Court of New Jersey has determined that the charges should proceed simultaneously in Superior Court. The same judge will preside over the trial for the indictable offenses and will sit as a municipal court judge with respect to the motor vehicle violations. The judge will base his decision on the proofs adduced at trial. If in the indictable offense case, the sole proof of recklessness is the defendant's intoxication, the jury's determination of that issue precludes a conviction for the DWI charge. State v. DeLuca, 108 N.J. 98. Code standards do not permit, and common-law policies do not require, the simultaneous submission to and disposition by a jury of motor vehicle violations in conjunction with its determination of the indictable offenses. State v. Muniz, 118 N.J. at 327-32. To mitigate the potential coercive influence of an all-or-nothing charge and to reduce the likelihood of an all-or-nothing verdict, the jury should be advised that there are lesserincluded motor vehicle offenses and that the determination of the defendant's guilt of those offenses is the responsibility of the judge. Id. at 332.

A defendant was tried in Superior Court on charges of, among others, aggravated manslaughter, death by auto, and several motor vehicle violations, including DWI. The judge found him guilty of DWI while the jury was deliberating on the other charges. The jury was unable to reach a verdict on the aggravated manslaughter and death by auto charges so the court declared a mistrial on those two counts. The court granted the State's motion to vacate the defendant's DWI conviction. On retrial, the jury acquitted the defendant of aggravated manslaughter but convicted him of death by auto. Based on the proofs presented at trial, the court again convicted the defendant of DWI. The defendant argued on appeal that his conviction for DWI in the first trial barred his subsequent prosecution for aggravated manslaughter and death by auto. Because the retrial was a continuation of the first trial, which was incomplete because the jury was unable to reach a verdict on those two charges, jeopardy never terminated in the first trial. Therefore, the DWI conviction in the first trial could not prevent the State from retrying the defendant on all of the charges against him. Moreover, the offenses of DWI and death by auto differ under the statutory elements analysis and, because defendant's intoxication was only one element of the evidence the State used to establish his recklessness on the charge of death by auto, under the "same evidence" test. Thus, there could be no double jeopardy bar to defendant's retrial on the charge of death by auto. State v. Devlin, 234 N.J. Super. 545 (App. Div.), certif. denied, 117 N.J. 653 (1989).

When defendant's trial on his indictment for death by auto and on motor vehicle violations was pending, his guilty plea to the motor vehicle violations in municipal court did not bar his subsequent prosecution for death by auto on grounds of double jeopardy, where it was clear that by pleading guilty to the motor vehicle violations, the defendant offered to resolve only some of the charges against him. *State v. Loyle*, 208 *N.J. Super.* 334 (App. Div. 1986).

V. SENTENCES

A. Murder (N.J.S.A. 2C:11-3b)

Upon conviction for murder, if a defendant is not sentenced to death, he shall be sentenced to between 30 years and life imprisonment, of which 30 years shall be without eligibility for parole. *N.J.S.A.* 2C:11-3b(1).

If the victim was a law enforcement officer and was murdered while performing his official duties or because of his status as a law enforcement officer, and the defendant is not sentenced to death, he shall be sentenced to life imprisonment without parole. *N.J.S.A.* 2C:11-3b(2).

If the victim was less than 14 years old and was murdered in the course of the commission, whether the defendant was alone or with others, of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, or criminal sexual contact, and the defendant is not sentenced to death, he shall be sentenced to life imprisonment without parole. *N.J.S.A.* 2C:11-3b(3).

Where a defendant is convicted of purposeful or knowing murder, a felony conviction does not merge with the murder conviction. State v. Arriagas, 198 N.J. Super. 575, 581 (App. Div. 1985), aff'd, State v. Crisantos (Arriagas), 102 N.J. 265 (1986). Where a defendant is convicted of both purposeful or knowing murder and felony murder, the felony murder conviction merges with the conviction for knowing or purposeful murder and the conviction for the underlying felony survives for purposes of sentencing. State v. Brown, 138 N.J. 481, 560-61 (1994). When a jury convicts a defendant of felony murder, but not purposeful or knowing murder, the conviction for the underlying felony merges with the felony murder conviction. State v. Rodriguez, 97 N.J. 263 (1984). Where, however, a defendant is convicted of more than one felony in addition to felony murder, the felony conviction which is the basis for the felony murder merges with the felony murder conviction and the other felony convictions survive for purposes of sentencing. State v. Manning, 234 N.J. Super. 147, 164 (App. Div.), certif. denied, 117 N.J. 657 (1989).

B. Manslaughter (N.J.S.A. 2C:11-4c)

Aggravated manslaughter is a first degree crime, but upon conviction a defendant shall be sentenced to a term of imprisonment between 10 and 30 years.

Manslaughter, including passion/provocation manslaughter, is a second degree crime and upon conviction a defendant shall be sentence to a term of imprisonment between 5 and 10 years, unless the conviction is for manslaughter while eluding, *N.J.S.A.* 2C:11-4b(3), in which case the defendant shall be sentenced to a term of imprisonment between 5 and 15 years.

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

Vehicular homicide is a first degree crime if the defendant was driving while intoxicated or refused a breathalyzer test *and* the offense was committed within 1,000 feet of school property or driving through a school crossing. *N.J.S.A.* 2C:11-5b(1). Otherwise, it is a second degree crime.

When vehicular homicide is a second degree crime, if the defendant was driving while intoxicated, or while his license was suspended or revoked for DWI or for refusing a breathalyzer test or for reckless driving, the court must sentence the defendant to a term of imprisonment which shall include a parole disqualifier of one-third to one-half the sentence, or three years, whichever is greater. *N.J.S.A.* 2C:11-5b(3).

IDENTIFICATION

I. DUE PROCESS

A defendant's due process rights are violated only when the pretrial confrontation procedure is unnecessarily suggestive and creates a substantial likelihood of misidentification. *Manson v. Brathwaite*, 432 *U.S.* 452 (1977); *Neil v. Biggers*, 409 *U.S.* 188 (1972); *State v. Wilkerson*, 60 *N.J.* 452 (1972).

In *Neil v. Biggers*, the Court observed that the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." 409 *U.S.* at 198, quoting from *Simmons v. United States*, 390 *U.S.* 377, 384 (1968). Thus, suggestiveness alone does not require exclusion of identification testimony. *Biggers*, 409 *U.S.* at 199; *State v. Johnson*, 138 *N.J. Super.* 579 (App. Div. 1976), *certif. denied*, 71 *N.J.* 340 (1976). Rather, "reliability" is the central question or "linchpin" in determining the admissibility of such evidence. *Manson v. Brathwaite*, 432 *U.S.* at 114; *State v. Carter*, 91 *N.J.* 86, 129 (1982). The question of reliability must be evaluated in the "totality of the circumstances" which:

include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation. [*Neil v. Biggers*, 409 *U.S.* at 199; *State v. Carter*, 91 *N.J.* at 239-230].

"Against these factors must be weighed the corrupting effect of the suggestive identification itself." *Manson v. Brathwaite,* 432 *U.S.* at 199; *State v. Little,* 298 *N.J. Super.* 573 (App. Div. 1997).

Law enforcement authorities should make a complete record of an identification procedure if it is feasible to the end that the event may be reconstructed in the testimony. The identity of persons participating in a lineup should be recorded, and a picture should be taken if it can be. If the identification is made or attempted on the basis of photographs, a record should be made of the photographs exhibited. A failure to follow such procedures will not itself invalidate an identification, but such an omission, if not explained, should be weighed in deciding upon the probative value of the identification, out-of-court and in-court. *State v. Earle,* 60 *N.J.* 550, 552 (1972).

Where an in-court identification is challenged as the tainted product of an improper out-of-court identification procedure, the trial court is required to reach the issue of taint only if it finds that the out-of-court procedure was both unduly suggestive and created a substantial likelihood of misidentification. State v. Cooper, 165 N.J. Super. 57, 66 (App. Div. 1976); see also State v. Catlow, 206 N.J. Super. 186 (App. Div. 1985), certif. denied 103 N.J. 465 (1986); State v. Hickman, 204 N.J. Super. 409 (App. Div. 1985) (where the evidence as a whole did not lead forcefully to the conclusion that either the out-of-court or in-court identifications were not those of the eye witnesses but were imposed by impermissibly suggestive police action thereby requiring exclusion); State v. Davis, 204 N.J. Super. 181 (App. Div. 1985) (irrespective of any allegedly "tainted" identification, the in-court identification would not have been rendered excludable since the witness had an independent source for his in-court identification not derived from the post arrest identification). Where the out-of-court identification is ruled to be improper, the in-court identification will nonetheless be admissible if it is based upon the witness' observations of defendant at the time of the criminal event and is not the product of the impermissibly suggestive prior identification. State v. Edge, 57 N.J. 580, 587 (1971); State v. Cooper, 165 N.J. Super. at 66.

A Wade hearing is a preliminary inquiry to determine the admissibility of an identification. United States v. Wade, 388 U.S. 218 (1967). To secure this hearing, a defendant must make a threshold showing of an impermissibly suggestive identification, or a violation of his Sixth Amendment right to counsel. State v. Ortiz, 203 N.J. Super. 518 (App. Div.), certif. denied, 102 N.J. 335 (1985). A Wade hearing should be granted if defendant presents "some evidence of impermissible suggestiveness" in the identification process. State v. Rodriquez, 264 N.J. 261, 269 (App. Div. 1993), aff'd o.b. 135 N.J. 3 (1994) (citing State v. Ortiz, 203 N.J. Super. at 522).

The trial court has the discretion to deny a *Wade* hearing request unless the defendant makes a threshold showing of some evidence of impermissible suggestivity in the identification procedure; defendant's demand is not sufficient in the absence of such a proffer. *State v. Long*, 119 *N.J.* 439 (1990); *State v. Rodriguez*, 264 *N.J. Super.* 261, 269 (App. Div.), *aff'd o.b.* 135 *N.J.* 3 (194); *State v. Ortiz*, 203 *N.J. Super. at* 522; *State v. Rodriguez*, 262 *N.J. Super.* 564 (App. Div. 1993); *see also State v. Cherry*, 289 *N.J. Super.* 503 (App. Div. 1996) (the failure to conduct a *Wade* hearing does not mandate reversal).

A trial court's ruling upon the conclusion of a *Wade* hearing admitting identification evidence is "entitled to a very considerable weight" on appeal. *State v. Farrow*, 61 *N.J.* 434, 451 (1972), *cert. denied*, 410 *U.S.* 937 (1973); *State v. Scott*, 236 *N.J. Super.* 264, 267 (App. Div. 1989). It should not be disturbed so long as the ruling reasonably could have been reached on the evidence presented. *State v. Ford*, 79 *N.J.* 136 (1979), *rev'g on dissent*, 165 *N.J. Super.* 249, 254 (App. Div. 1978) (and cases cited therein). At the hearing, defendant must prove by a preponderance of the evidence that the pretrial identification procedure was so suggestive as to result in a substantial likelihood of misidentification. *State v. Santoro*, 229 *N.J. Super.* 501, 504 (App. Div. 1990).

As to problems concerning in-court and out-of-court identification procedures, *see State v. Grice*, 109 *N.J.* 379 (1988) (where the Court affirmed the admissibility of the out-of-court identifications made within hours of the commission of the crimes under reliable circumstances by the victim and the arresting officer); *State v. Catlow*, 206 *N.J. Super.* 186 (App. Div. 1985), *certif. denied*, 103 *N.J.* 495 (1986); *State v. Davis*, 204 *N.J. Super.* 181 (App. Div. 1985), *certif. denied*, 104 *N.J.* 378 (1986); *State v. Ortiz*, 203 *N.J. Super.* 519 (App. Div. 1985), *certif. denied*, 102 *N.J.* 335 (1985).

Neither the Confrontation Clause of the Sixth Amendment nor Federal Rule of Evidence 802 is violated by the admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification. *United States v. Owens*, 484 *U.S.* 554, 108 *S.Ct.* 838, 98 *L.Ed.*2d 951 (1988).

In an identification case where a testifying witness has made a prior identification of a party "under circumstances precluding unfairness or unreliability," *see State v. Williams*, 80 *N.J.* 472 (1979), the witness's statement is not hearsay and is therefore admissible. *State v. Johnson*, 216 *N.J. Super.* 588 (App. Div. 1987). Expert testimony offered to prove that eyewitness testimony is unreliable is not admissible. *State v. Long*, 119 *N.J.* 439 (1990); *but cf. State v. Gunter*, 231 *N.J. Super.* 34 (App. Div. 1989).

II. PROCEDURES

A. Lineups

The admissibility of an identification arising from a lineup procedure is to be judged by the totality of the circumstances. If, under the totality of the circumstances, the lineup was "conducted fairly and without unnecessary suggestiveness," no violation of due process has occurred. *State v. Mustacchio, 57 N.J.* 265, 270 (1970); *see also Foster v. California*, 394 *U.S.* 440 (1969).

The New Jersey Supreme Court has concluded that a criminal defendant has no constitutional right to a pretrial lineup and that the State is under no obligation to conduct such a lineup. *State in the Interest of W.C.*, 85 *N.J.* 218, 221 (1981). However, a trial court has the inherent authority to order such a lineup on a defendant's behalf upon proper motion by the defendant. *Id.* at 221-226.

B. Show-Ups

It is well established that a show-up (a one-to-one confrontation) is not in and of itself an unnecessarily suggestive identification procedure which violates due process. *Neil v. Biggers*, 409 *U.S.* at 198; State v. Edge, *57 N.J.* at 587; *State v. Johnson*, 138 *N.J. Super.* 579, 585 (App. Div. 1976), *certif. denied*, 71 *N.J.* 340 (1976). Rather, the totality of the circumstances must be considered to determine whether the manner of the show-up was so unnecessarily suggestive and unfair as to amount to a denial of due process. *Neil v. Biggers, supra, State v. Edge, supra.*

A show-up conducted shortly after the commission of the crime is far from being conducive to misidentification. Rather, such a confrontation "promotes fairness to the accused by allowing a viewing while the witness' mental image of the perpetrator is still fresh." State v. Carter, 91 N.J. 86, 130 (1982); State v. Wilkerson, 60 N.J. 452, 461-461 (1972). One-on-one "show-up" identifications, in which a suspect is apprehended promptly after a crime and brought to the victim, are not prohibited. *Id.* at 461-62 (1972)(approving "one-on-one identifications made at the scene of the initial observation -- whether or not it be the scene of the crime -- or within a reasonably short time thereafter"); State v. Brent, 265 N.J. Super. 577, 584 (App. Div. 1993), rev'd on o.g., 137 N.J. 107 (1994); State v. Thomas, 107 N.J. Super. 128 (App. Div. 1969).

C. Photographic Identifications

The United States Supreme Court has recognized that initial identification by photograph is a widely used and effective procedure in criminal law enforcement. *United States v. Simmons,* 390 *U.S.* 377 (1969). The propriety of a photographic identification procedure must be evaluated on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on due process grounds only if the photographic identification procedure was so impermissible as to give rise to a very substantial likelihood of irreparable misidentification. *Id.*

Impermissive suggestibility in photographic identification is to be determined by the totality of the circumstances. *State v. Farrow*, 61 *N.J.* 434 (1972), *cert. denied*, 410 *U.S.* 937 (1973). The exclusion of evidence is required only where all the circumstances lead forcefully to the conclusion that the identification was not actually that of the eyewitness but was imposed upon him so that a substantial likelihood of irreparable misidentification can be said to exist. *Id.*

Although it has been stressed that the viewing of a variety of photographs is the more desirable police procedure, identification predicated upon the viewing of a single photograph have been admitted. *See, e.g., Manson v. Brathwaite,* 432 *U.S.* 98 (1977); *State v. Matlock,* 49 *N.J.* 491 (1967), *cert. denied* 389 *U.S.* 1009 (1967). Ordinarily, the showing of a single photograph goes to the weight, and not the admissibility, of an identification. *State v. Farrow,* 61 *N.J.* 434 (1972), *cert. denied,* 410 *U.S.* 937 (1973).

An element of suggestibility does not necessarily preclude the admission of photographic identification testimony. See, e.g., State v. Farrow, supra (fact that defendant's photo was approximately one inch larger in length and breadth than four other photographs in array did not warrant exclusion of evidence of identification, particularly where defendant's photo was otherwise similar to other in style and subject depicted); State v. Thompson, 59 N.J. 396 (1971) (inclusion of two photos of defendant in seven photo array not grounds for exclusion, particular where photos of defendant were taken two years apart and depicted significant changes in his appearances). See also State v. Ford, 79 N.J. 136 (1979), rev'g on dissent, 165 N.J. Super. 249, 254 (App. Div. 1978); State v. Peterkin, 226 N.J. Super. 25 (App. Div.), certif. denied 114 N.J. 295 (1988)(improper police procedures employed in constructing photographic lineup resulted in suppression of out-of-court identifications).

Repeated single photograph presentation identification procedure was not so suggestive as to render witness's identification of defendant inadmissible, where witness had given detailed description of defendant shortly after crime and as certain in his identification. *State v. Nunez*, 209 *N.J. Super.* 127 (App. Div. 1986).

A photographic array that depicted defendant and others in orange prison attire should have been excluded from theft trial on ground that its probative value to the issue of identification was substantially outweighed by the danger of undue prejudice; the prison attire would draw the jury's attention to the fact that the defendant had previously been arrested and incarcerated, and no instruction could effectively and realistically neutralize the prejudice to defendant. State v. Burton, 309 N.J. Super. 280 (App. Div. 1998); see also State v. Madison, 109 N.J. 223 (1988)(showing victim 38 color photographs, 13 or 14 of which depicted defendants as the center of attention at a birthday party in his honor, was impermissibly suggestive); State v. Taplin, 230 N.J. Super. 95 (App. Div. 1988) ("Mug shot" display should not have been introduced in evidence where defendant elected not to testify because of his prior criminal record and agreed to stipulate that he was the person at scene of crime); State v. Onysko, 226 N.J. Super. 599 (App. Div. 1988) (Defendant, charged with burglary, is entitled to a new trial because his "mug shot" used in photo lineup was admitted into evidence and contained information on reverse side including defendant's use of an alias and listing his occupation as a "burglar"); State v. Cribb, 281 N.J. Super. 156 (App. Div. 1995) (Appellate Division reversed conviction because the detective who arranged the photographic identification testified in a way that indicated to the jury that defendant was the only legitimate suspect in the photo array and implied that defendant was known to the police, and the victim referred to the photographs as "mug shots.").

D. Voice Identifications (*See also,* **VOICEPRINTS**, this Digest)

All the principles that apply to visual identification apply to voice identifications. *State v. Gallagher*, 286 *N.J. Super*, 1 (App. Div. 1995), *certif. denied*, 146 *N.J.* 519 (1996). *State v. Johnson*, 138 *N.J. Super*. 579 (App. Div. 1976), *certif. denied*, 71 *N.J.* 340 (1976).

Testimony by a witness that he recognized defendant by his voice is generally admissible provided the witness has an adequate basis for comparison of defendant's voice with the voice he identifies as that of the accused. The hazards to the trustworthiness of identification of a voice through auditory senses, however, are even more apparent than those to the trustworthiness of eyewitness identification. Therefore, it is incumbent upon the trial court to conduct a *voir dire* in order to determine whether an out-of-court voice identification was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. The court must evaluate the totality of the circumstances surrounding the voice identification through the weighing of the general identification factors set forth in *Neil v. Biggers, supra*.

III. RIGHT TO COUNSEL

It is well established that the right to counsel at a pretrial confrontation does not arise until the initiation of adversary judicial criminal proceedings against the accused, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Moore v. Illinois*, 434 *U.S.* 220 (1977); *Kirby v. Illinois*, 406 *U.S.* 680 (1972); *see also State v. Burden*, 155 *N.J. Super.* 462 (App. Div. 1977). A mere arrest does not initiate adversary judicial criminal proceedings against an accused and, hence, does not trigger the Sixth Amendment right to counsel at a pre-trial confrontation. *Kirby v. Illinois, supra; State v. Earle*, 60 *N.J.* 550 (1972); *State v. Siebold*, 138 *N.J. Super.* 87, 91 (App. Div. 1975).

Absence of counsel at a lineup conducted after the initiation of adversary judicial criminal proceedings renders the out-of-court identification inadmissible. *Moore v. Illinois, supra; Gilbert v. California,* 380 *U.S.* 263 (1967). Similarly, the absence of counsel at such a lineup renders any in-court identification inadmissible unless the in-court identification is based upon observations of the suspect other than at the lineup identification. *United States v. Wade,* 338 *U.S.* 218 (1967).

A criminal defendant has no right to have counsel present during a post-indictment photograph identification procedure. United States v. Ash, 413 U.S. 300 (1973); State v. Carter, 185 N.J. Super. 576. 579 (Law Div. 1982). In Ash, the court held that the risks inherent in the use of photographic displays are not so pernicious that an extraordinary system of safeguards, namely, the presence of counsel, is required. Id. at 321.

IV. JURY INSTRUCTION CONCERNING IDENTIFICATION

Where identification is a crucial issue in the case, that is, where the victim is the only eyewitness, the defendant claims that the victim has incorrectly identified him as the assailant and there are discrepancies in the victim's description of the assailant, the court should charge the jury that: 1) it is the State's burden to

prove beyond a reasonable doubt that it was defendant who was the assailant, 2) it is not defendant's burden to prove that he was elsewhere when the offense occurred, and 3) the State's case depended on the eyewitness identification by the victim, setting forth the respective factual contentions relative to the victim's descriptions. State v. Green, 86 N.J. 281, 292-293 (1981); see also State v. McNeil, 303 N.J. Super. 266 (App. Div. 1997) (lack of an identification charge constituted reversible error); State v. Middleton, 299 N.J. Super. 22 (App. Div. 1997) (the Appellate Division reversed convictions finding that the trial court inadequately responded to a jury question involving the State's identification evidence, inadequately charged identification to the jury by failing to give Green charge); State v. Green, 313 N.J. Super. 385 (App. Div. 1998).

The court need not give a specific instruction on identification upon request or *sua sponte* where there exists a positive, accurate and consistent identification by the witness, substantial corroborating evidence, and defense counsel has an opportunity to attack the credibility of identification testimony through cross-examination and summation. *State v. Salaam, 225 N.J. Super.* 66, 72-73 (App. Div. 1988). *Compare State v. Jones, 224 N.J. Super.* 527, 534 (App. Div. 1988), where the Court concluded that the significance of the identification testimony therein warranted a specific charge on identification if requested by defendant).

Whether the model "identification" charge must be tailored to the facts of each case is an issue which is in a state of flux. For example, in *State v. Edmonds*, 293 *N.J. Super.* 113 (App. Div.), *certif. denied*, 148 *N.J.* 459 (1996), the court held that giving the model charge was error because the victim had made inconsistent identifications. Specifically, in *Edmonds* the victim identified the defendant to the police as the person who grabbed a chain from her neck, but in court she identified the co-defendant as the one who grabbed the chain. The court held that the giving of a truncated model charge was misleading because it referred to the victim's in court identification without making reference to her inconsistent out-of-court identification.

Yet in *State v. Malloy*, 324 *N.J. Super.* 525 (App. Div. 1999), another Appellate Division panel reversed a conviction when the trial court failed to discuss the evidence regarding identification in his charge to the jury. Although the trial judge's truncated version of the identification instruction was deemed to require reversal, the court went on to hold that the judge was required to point out in his instruction to the jury on identification

the evidence introduced which cast doubt upon the identification of defendant. *Id.* at 535-36.

On the other hand, a third Appellate Division panel held that a judge is not required to give special credibility instructions on the issue of identification when questions regarding the reliability of the identification were adequately developed during the trial, particularly by way of cross- examination of the identification witnesses, and on summations. *State v. Walker, 322 N.J. Super.* 535, 547-50 (App. Div.), *certif. denied*, 162 *N.J.* 487 (1999). The *Walker* court also rejected defendant's contention that the trial judge was required to give a jury instruction summarizing inconsistencies between the victim's in-court identification of defendants and her description of the perpetrators given shortly after the commission of the crimes. *Id.* at 552.

Finally, in *State v. Swint*, 323 *N.J. Super.* 236 (App. Div.) *certif. denied*, 165 *N.J.* 492 (2000), the court found that the trial court did not err in not giving a factually tailored identification charge. The *Swint* court reasoned that a corollary to the right of a judge to comment on the evidence, is the right not to comment on the evidence. *State v. Swint*, 328 *N.J. Super.* at 259, citing *State v. Biegenwald*, 106 *N.J.* 13, 44, 524 (1987). The court in *Swint* articulated its concern that when a trial court comments extensively on the facts developed during the trial, it runs the risk of being perceived by the jury, as well as the parties, as an advocate. Thus, the *Swint* court found that commenting on the relative strengths or weaknesses of the identification is best left to the attorneys rather than the judge.

Recently in *State v. Robinson*, 163 *N.J.* 80 (2000), the New Jersey Supreme Court addressed the issue of whether a trial court is required to use fact-specific jury instructions regarding a witnesses' identification of a defendant. The Court held that a trial court may but is not required to refer to the facts of the case when providing instructions on identification.

In *State v. Cromedy*, 158 *N.J.* 112 (1999), the Supreme Court of New Jersey decided that a cross-racial identification charge should be given to the jury in certain cases. "The simple fact pattern of a white victim of a violent crime at the hands of a black assailant" does not automatically give rise to the need for the charge, however. The instruction should be given only when identification is a critical issue, and when the eyewitness identification is not corroborated by other evidence giving it independent reliability. *But see State v. Kelly*, 302 *N.J. Super.* 145 (App. Div. 1997) (Appellate

Division rejected defendant's claim that an identification charge should have been given, noting that not only was the charge not requested, identification was not an issue because no witness identified defendant); State v. Ridout, 299 N.J. Super. 233 (App. Div. 1997) (the Appellate Division reversed defendant's convictions finding the trial judge should not have instructed the jury that the out-of court identifications were admissible and that he had found the identifications reliable and trustworthy). In conformance with the Supreme Court's decision in State v. Cromety, supra, the Model Jury Charge on identification was revised on October 18, 1999. The revised identification charge instructs the jury to consider the fact that often people have greater difficulty in accurately identifying members of a different racial group.

In *State v. Little*, 296 *N.J. Super.* 573 (App. Div), *certif. denied*, 150 *N.J.* 25 (1997), the Appellate Division upheld defendant's convictions for a variety of drug offenses, ruling that the undercover officer was properly allowed to make an in-court identification of the defendant, the photographic array in the out-of-court identification was not impermissibly suggestive, and the defendant did not receive ineffective assistance of counsel because his counsel did not request a *Wade* hearing.

In State v. James, 144 N.J. 538 (1996), the Supreme Court held that once out-of-court and in-court identification evidence is excluded as impermissibly suggestive, it was error to admit this evidence substantively under the "opening the door," "completeness" or "curative admissibility" doctrines if defendant sought to question carjacking victim about an earlier misidentification of another as the perpetrator or about his earlier description of the perpetrator. Forcing defendant to chose between his right to cross-examine the victim about the earlier misidentification and his due process right to exclusion of unreliable identification evidence was reversible error. The State was entitled to rebut evidence that victim identified another with subsequent retraction but not with suppressed identification testimony.

IMMUNITY

The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. When a person is compelled to testify despite claiming the Fifth Amendment privilege, State law gives the person immunity from prosecution by the use of the testimony and evidence derived therefrom. N.J.S.A. 2A:81-17.3; see also 2A:81-17.2a2 (providing for immunity for public employees compelled to testify on the threat of removal). Immunity statutes are not incompatible with the values protected by the Fifth Amendment; they instead seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. Kastigar v. United States, 406 U.S. 441, 445-46 (1972). The existence of immunity statutes reflects the importance of testimony, and the fact that, for many offenses, the only persons capable of giving useful testimony are implicated in the crime. Id. at 446.

I. FORMS AND SCOPE OF IMMUNITY

There are two forms of immunity: "transactional immunity" and "use immunity."

A. Transactional Immunity

Transactional immunity protects the witness from subsequent prosecution for any crime related to the transaction about which the witness testifies.

B. Use and Derivative Use Immunity

Use immunity is more limited. It guarantees that the testimony and evidence derived from the immunized testimony will not be used against the witness. The witness may, however, be prosecuted for any crime related to the transaction, so long as the State can prove that the evidence in the subsequent proceeding was obtained from a source independent of the immunized testimony. *See, generally, Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 *U.S.* 52 (1964). Although a witness would prefer transactional immunity, the United States Supreme Court has held that, for Fifth and Fourteenth Amendment purposes, use and derivative use immunity is a sufficient substitute for the privilege against self-incrimination. *Kastigar v. United States*, 406 *U.S.* 441.

New Jersey's immunity statutes confer use and derivative use immunity, rather than transactional immunity, to prevent the use of immunized testimony in any criminal proceeding, except those involving perjury or false swearing. *N.J.S.A.* 2A:81-17.2a(2); *N.J.S.A.* 2A:81-17.3.

N.J.S.A. 2A:81-17.3 prohibits the State from using evidence against a person that is "directly or indirectly derived" from his compelled testimony. In order to pass constitutional muster, a grant of immunity must be as comprehensive as the privilege against self-incrimination. The immunity grant must leave the testifying witness in substantially the same position as if the witness had made no statement at all, as if he had claimed the Fifth Amendment privilege. Kastigar v. United States, 406 U.S. 441. To ensure that a compelled witness will be placed in this position the New Jersey Supreme Court in State v. Strong, 110 N.J. 583 (1988), erected a strict "but for" standard that bars the State's use of all afteracquired testimony and evidence that would not have been developed or obtained but for the compelled testimony.

In *State v. Irizarry*, 271 *N.J. Super.* 577 (App. Div. 1994), the Appellate Division noted that based on *Strong*, it appears that New Jersey extends immunity to non-evidential uses such as focusing an investigation, deciding whether to file charges or to plea bargain, and planning trial strategy. 271 *N.J. Super.* at 587, n.1.

C. Burden of Proof

In *State v. Strong, supra*, the New Jersey Supreme Court concluded that our state-law privilege against self-incrimination is, if anything, more protective than the Fifth Amendment. 110 *N.J.* at 595.

The Court in Strong specifically held that when the State seeks to use against a defendant evidence relating to criminal acts or events that were the subject of previously compelled testimony obtained from the defendant in exchange for use and derivative use immunity conferred pursuant to N.J.S.A. 2A:18-17.3, the State has the burden of proving that the evidence it seeks to use was "developed or obtained from sources or by means entirely independent of and unrelated to the earlier compelled testimony." 110 N.J. at 595-96. Compare Kastigar v. United States, 406 U.S. at 461. In State v. Irizarry, 271 N.J. Super. 577, the trial court had dispensed with a Kastigar hearing, but disqualified the entire County Prosecutor's office on the grounds of conflict of interest in the prosecution of a capital defendant who had given immunized testimony at a codefendant's trial. The Appellate Division, on interlocutory appeal, held that at a minimum a Kastigar hearing was required, and that it was for the State to decide who should prosecute its case, with the hearing to establish whether the evidence to be presented was truly independent of the immunized testimony.

The State must make the showing that the evidence is truly independent by clear and convincing evidence. *State v. Strong,* 110 *N.J.* at 596. A trial court's determination that the State's evidence was wholly independent is subject to limited review on appeal. The test is whether the trial court's findings could reasonably have been reached on sufficient credible evidence in the record. *See State v. Barrone,* 147 *N.J.* 599, 615 (1997).

D. Use of Immunized Testimony by the Grand Jury

The receipt by a grand jury of evidence obtained in violation of a person's Fifth Amendment right does not infect an indictment based on such testimony. Suppression of the grand jury evidence (and fruits thereof) at trial adequately protects a defendant's Fifth Amendment rights. *State v. Vinegra*, 73 *N.J.* 484 (1977). This conclusion was not overruled by *State v. Strong, supra. State v. Maiorana*, 240 *N.J. Super.* 352, 365-66(App. Div. 1990), *certif. denied*, 127 *N.J.* 327 (1991).

E. Compelled Business Records

1. Contents of Records

In Matter of Grand Jury Proceedings of Guarino, 104 N.J. 218 (1986), the New Jersey Supreme Court confronted the question of whether and to what extent the voluntarily-prepared records of a sole proprietor are privileged against compelled self-incrimination. Guarino arose from a State Grand Jury investigation of Green Acres Estates, a real estate concern organized as a sole proprietorship. Guarino, the sole proprietor, was served with a subpoena duces tecum directing him to produce certain business records pertaining to sales of real property by Green Acres Estates. Guarino moved to quash the subpoena. The trial court ordered him to At his appearance before the Grand Jury, appear. Guarino, relying on his Fifth Amendment privilege against self-incrimination, refused to produce the documents called for in the subpoena. Upon application by the Attorney General, the trial court entered an order pursuant to N.J.S.A. 2A:81-17.3, compelling Guarino to produce the records and immunizing him from the "use of the evidence against him of the act of production of said records...." Guarino again moved to quash on the ground that the use of the *contents* of the subpoenaed documents violated his privilege under the United States

Constitution and the laws of New Jersey. The trial court, relying on *United States v. Doe*, 465 *U.S.* 605 (1984), denied the motion. The court further noted its reluctance to find that the New Jersey privilege against self-incrimination was broader than the Fifth Amendment. The Appellate Division reversed. The Supreme Court granted certification. The Court reversed the Appellate Division's decision and elected to follow the United States Supreme Court's decision in *United States v. Doe, supra.*

Under *Doe*, the *Guarino* Court noted, "it is clear that the *contents* of the business records, whether from a corporation, a partnership, or a sole proprietorship, are no longer privileged under the Fifth Amendment." As in *Doe*, Guarino did not contend that the requested records were prepared involuntarily, or that the subpoena would force him to affirm the truth of their contents. Moreover, Guarino was accorded use immunity for the act of producing the documents. Therefore, the order compelling the production of the documents did not run afoul of the Fifth Amendment.

The *Guarino* Court then turned to the issue whether, under New Jersey law, the privilege against selfincrimination extends to the non-required business records of a sole proprietor. Because New Jersey's common law privilege against self-incrimination protects an individual's right "to a private enclave where he may lead a private life," the Court was required to decide whether the documents sought by the government fell within the "sphere of personal privacy" protected under New Jersey law. To accomplish that task, the Court reasoned that it must look to the contents of the documents. In examining the nature of the documents the Court departed from the teachings of Doe, supra, which did not recognize a fundamental privacy principle as a component of the Fifth Amendment privilege against self-incrimination. Because, however, the subpoenaed documents were business records, the Court in Guarino reasoned that they fell outside "that special zone of privacy" protected by the New Jersey privilege against self-incrimination." The Court found that the business records of a corporation, partnership or sole proprietorship are not an extension of the more intimate aspects of one's life.

A corporation may not invoke the privilege against self-incrimination, nor may a custodian of corporate records rely on his or her personal privilege to refuse to produce the corporation's records. The principle that a corporation may not invoke the privilege was reaffirmed by the Appellate Division in *Verneiro v. Beverly Hills, Ltd,*

Inc., 316 *N.J. Super.* 121 (App. Div. 1998), which held also that a custodian of corporate records may not rely on his or her personal privilege against self-incrimination as a basis for refusing to produce corporate records. Thus the Consumer Fraud Act, *N.J.S.A.* 56:8-1 to 20, which confers immunity only on those entitled by law to assert the privilege, did not confer immunity on the defendant corporation which was compelled to produce its documents.

2. Act of Producing Records

Hubbell v. United States. 530 U.S. 27. 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000), involved a second prosecution of Webster Hubbell by the Independent Counsel (IC) to investigate possible violations of federal law relating to the Whitewater Development Corporation. As part of Hubbell's plea bargain disposing of charges related to Hubbell's law firm billing practices, Hubbell agreed to provide information related to the Whitewater investigation. Attempting to determine if Hubbell had violated his promise, the IC served him with a subpoena calling for the production of 11 broad categories of documents. Hubbell invoked his privilege against self-incrimination, refusing to state whether he possessed documents responsive to the subpoena. Hubbell was granted immunity to the extent allowed by law. He then produced 13,120 pages of documents and responded to a series of questions from the prosecutors that established that those were all of the documents in his custody or control that were responsive to the subpoena.

The contents of those documents led to this second prosecution for various tax-related crimes. The District Court dismissed the indictment, however, because all of the IC's evidence derived from the testimonial aspects of Hubbell's immunized act of producing those documents. The IC admitted that he was not investigating tax-related issues when he issued the subpoena, which the District Court characterized as "the quintessential fishing expedition." *Id.*, quoting *United States v. Hubbell*, 11 *F.Supp.*2d 25, 37 (D.D.C. 1998).

The Court of Appeals vacated the district court judgment and remanded the matter to allow the IC to demonstrate a prior awareness on the part of the government that the documents existed and were in Hubbell's possession, instead of the government having learned the information from Hubbell's compelled production. *United States v. Hubbell*, 167 F.3d 552, 581 (D.C. Cir. 1999). The IC acknowledged that he could not make the showing, and entered into a plea agreement with Hubbell that provided for dismissal of the charges unless the United States Supreme Court clarified that Hubbell's immunity would not bar his prosecution. The Supreme Court granted the IC's petition for *certiorari* to determine the precise scope of a grant of immunity for the compelled production of documents.

The Supreme Court explained, citing Fisher v. United States, 425 U.S. 391 (1976), and United States v. Doe, supra, that a person may be required to produce specific incriminating documents because the creation of the documents was not "compelled" within the meaning of the privilege. The act of producing documents, on the other hand, may have a testimonial aspect. The act of production itself communicates certain facts, such as the existence of the papers, that they are in the person's custody, and their authenticity. The person may also, as was Hubbell, be compelled to answer questions to determine whether he has produced everything demanded by the subpoena. All of these questions are distinct from the question whether the contents of the documents are incriminating. And even if the information communicated by the act of production is itself not incriminating, information that may lead to incriminating evidence is also privileged.

It was apparent from the text of the subpoena that the IC needed Hubbell's assistance to identify potential sources of information and to produce those sources. The subpoena could be characterized as a "fishing expedition" that did produce a fish, albeit not the one the IC expected to hook. Hubbell's production of the documents, his truthful reply to the subpoena, was the first step leading to the tax prosecution. It was necessary for Hubbell to use the contents of his own mind to identify the hundreds of documents responsive to the subpoena. The Supreme Court analogized that the assembly of these documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox. The IC's "anemic" view of Hubbell's act of production as merely physical and principally nontestimonial was rejected. The IC's overbroad argument that a businessman will always possess business and tax records that fall within the broad categories of the subpoena did not cure the deficiency of the government's failure to show any prior knowledge of the existence or whereabouts of the documents. Accordingly, the indictment was dismissed. Id.

F. Immunized Testimony Cannot Generally be Used For Impeachment

In a significant case involving New Jersey's immunity statute covering public employees, N.J.S.A. 2A:81-17.2a(2), the United States Supreme Court ruled that a person's statutorily immunized testimony before a grand jury cannot constitutionally be used to impeach the person when he is a defendant in a later criminal trial on extortion charges. New Jersey v. Portash, 440 U.S. 450, 459-460 (1979). Finding that the testimony obtained by the promise of immunity was by definition coerced and therefore involuntary, the Court determined that the immunity conferred under the New Jersey statute specifically was designed to protect defendant from the use of this compelled testimony in later criminal prosecutions. Id. at 457-459. This rule, however, does not apply to a subsequent perjury prosecution. Point III, infra.

II. AN ADEQUATELY IMMUNIZED WITNESS MUST TESTIFY (See also, CONTEMPT, this Digest)

An immunized witness may be held in criminal contempt for refusing to testify. *N.J.S.A.* 2A:81-17.3; *State v. Sotteriou*, 123 *N.J. Super.* 434, 439-441 (App. Div. 1973). A recalcitrant witness may be incarcerated or subjected to other penalties deemed appropriate by the court to compel the immunized testimony. *Id.* at 441-442. However, a witness refusing to testify should be released from custody if no substantial likelihood exists that further incarceration will achieve the goals intended by the contempt order. *Catena v. Seidl*, 68 *N.J.* 224 (1975).

A trial court lacks the authority to hold a defendant in contempt based upon his statement that he did not intend to testify at some time in the future. *State v. Matos*, 273 *N.J. Super.* 6, 17 (App. Div. 1994). There is no doctrine of "anticipatory contempt." *Id.*, at 18. If current procedures for contempt are inadequate, the Court suggested, then it is for the Legislature to extend the Court's power. *Id.* at 22.

There are times when the court, out of Fundamental Fairness, will grant a defendant immunity from prosecution because of delay caused by a recalcitrant prosecution witness, even though the prosecution is not at fault, and the Double Jeopardy Clause has not been violated. *State v. Dunns*, 266 *N.J. Super.* 349 (App. Div. 1993), *certif. denied*, 134 *N.J.* 567 (1993). Acknowledg-

ing the limits of the contempt power in some cases, the Court philosophized, "Not all prosecutions turn out perfectly. Sometimes the essential piece of evidence remains just beyond the State's grasp, and in the end, there is nothing the State can do about it." 266 *N.J. Super.* at 380.

III. TESTIMONY MUST BE TRUTHFUL

N.J.S.A. 2A:81-71.2a(2) provides that when a public employee is compelled to testify over a claim of a Fifth Amendment privilege, "such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding ...; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying." For private persons, *N.J.S.A.* 2A:81-17.3, in slightly broader terms, bars the use of immunized testimony in future criminal proceedings, except "for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order."

The United States Supreme Court has held that immunized testimony, protected by the federal use immunity statute, nonetheless may be used to form the basis for a perjury prosecution. *United States v. Apfelbaum*, 445 *U.S.* 115 (1980). Neither the immunity statute nor the Fifth Amendment privilege precludes the use of immunized statements, whether true or untrue, at a subsequent prosecution for perjury or false declarations, so long as the testimony conforms to otherwise acceptable rules of evidence. *Id.* at 131-132.

New Jersey courts have applied the perjury or false swearing exception to the subsequent use of immunized testimony in other contexts. In Stone v. Keyport Boro Police Dep't., 191 N.J. Super. 554 (App. Div. 1983), the court held that immunity was unavailable to prevent impeachment that may uncover the perjurious basis of a criminal defendant's civil claim. Id. at 558. The plaintiff made previous statements to establish a factual basis for a guilty plea to an assault charge. The civil case stemmed from the same incident. Id. at 557. Plaintiff sought to immunize his statements made at the entry of the plea under R. 3:9-2, providing: "For good cause shown the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding." The court ruled that defendant waived any immunity protection under *R*. 3:9-2, by offering testimony to support his civil claim that was materially inconsistent with the testimony given to support the plea. *Id.* at 558.

IV. AUTHORITY TO GRANT IMMUNITY

N.J.S.A. 2A:81-17.3 and *N.J.S.A.* 2A:81-17.2a(2) set forth, respectively, the procedures to be used to grant use immunity for private persons and public employees.

A. Private Individuals

For private individuals, use immunity may be granted only in criminal cases at the request of a county prosecutor with the consent of the Attorney General or at the direct request of the Attorney General. *N.J.S.A.* 2A:81-17.3. The State Commission of Investigation also may grant use immunity. *See N.J.S.A.* 52:9M-17; *In Re Ippolito*, 75 *N.J.* 435, 443 (1978). Absent compliance with the prescribed statutory scheme, the trial court may not grant immunity to compel a witness to testify. *Whippany Paper Board Co. v. Alfano*, 176 *N.J. Super.* 363, 370 (App. Div. 1980).

B. Public Employees

Unlike private individuals, public employees are required to appear and testify before any court, grand jury or the State Commission of Investigation regarding matters directly related to the conduct of their office. *N.J.S.A.* 2A:81-17.2a(1). Should they refuse to do so under these circumstances, they may be discharged under certain enumerated conditions. *Id.* When a public employee asserts the Fifth Amendment privilege, then use immunity may be conferred in exchange for the compelled testimony. *N.J.S.A.* 2A:81-17.2a(2). *See, State v. Vinegra,* 73 *N.J.* 484, 487 n.1 (1977).

The statute is no longer self-executing. State v. Korkowski, 312 N.J. Super. 429, 434 (App. Div. 1998). While *Vinegra* was pending, *N.J.S.A.* 2A:81-17.2a(2) was amended to require a public employee to claim the privilege against self-incrimination to receive immunity under the statute. Id., at 434-35. Moreover, the grant of immunity under N.J.S.A. 2A:81-17.2a(2) applies only to public employees who are targets of the grand jury investigation. 312 N.J. Super. at 436. Targeted employees must be warned of their right to assert the privilege against self-incrimination, and the prosecutor will then determine whether to grant use and fruits immunity. Should immunity be granted, the employee must testify or lose his or her employment. 312 N.J. Super. at 437.

C. Defense Witnesses

As noted, *supra*, New Jersey law establishes that use immunity may be conferred in criminal cases at the request of the county prosecutor with the consent of the Attorney General or at the direct request of the Attorney General. *N.J.S.A.* 2A:81-17.3. The trial court lacks authority to grant such use immunity. *State v. Jordan*, 197 *N.J. Super.* 489, 503 n.5 (App. Div. 1984).

This principle was unequivocally set forth in *Whippany Paper Board Co. v. Alfano*, 176 *N.J. Super.* 363, where the court held that the trial court lacked authority under *N.J.S.A.* 2A:81-17.3 to grant defendants a protective order in a civil proceeding that, in effect, would have conferred a form of judicial immunity after defendants had invoked their Fifth Amendment privilege. *Id.* at 369-370. Apart from the absence of statutory authority for a judicial grant of immunity in a civil proceeding, the court observed that the trial court's protective order was insufficient guarantee for defendants that the compelled testimony would not later become available to other parties. *Id.* at 370-371.

In a criminal case, however, a New Jersey Law Division case held, for the first time, that trial judges have inherent powers to grant use immunity to defense witnesses to vindicate the witnesses' Fifth Amendment privilege and the defendant's due process rights. *State v. Summers*, 197 *N.J. Super.* 510, 514-515 (Law Div. 1984). Such grants of immunity should be limited to those rare cases when it is compelled by due process considerations. *Id.* at 516. Relying on *Government of Virgin Island v. Smith*, 615 *F.*2d 964 (3d Cir. 1980), the court established a careful balancing test to determine appropriate circumstances that might require grants of immunity to defense witnesses. *Id.* at 516-518.

The *Summers* reasoning has come under attack. In *State v. Jordan*, 197 *N.J. Super.* at 503 n.1, the court rejected Summers' premise of inherent judicial powers to confer immunity, and reiterated that grants of use immunity were strictly statutory.

One of the issues in *State v. Cito*, 213 *N.J. Super.* 296 (App. Div. 1986), *certif. denied*, 107 *N.J.* 141 (1987), involved the authority of a trial judge to grant use immunity to a defense witness. The court held that the trial judge properly denied defendant's request since: (i) the witness intended to invoke the Fifth Amendment; (ii) there was no evidence that defendant had sought to have the Attorney General or the prosecutor with consent of the Attorney General apply for use immunity for the

witness; and (iii) there was nothing to indicate what the witness' proffered testimony would be.

State v. Robinson, 253 N.J. Super. 346 (App. Div. 1991), involved a new trial motion based on newlydiscovered evidence. The newly-discovered evidence was information from a codefendant who was unavailable, as a matter of law, at the time of trial. The witness was unavailable because a defendant has no right to call a codefendant to the stand during a joint trial. 253 N.J. Super. at 365. As only the State, and not a defendant, can immunize a witness, the Court concluded that "[t]here may be constitutional issues and questions of fundamental fairness" projected by the inability of a defendant to call a witness to the stand to assert his Fifth Amendment privilege before the jury and obtain a beneficial inference. Given this state of affairs, the Appellate Division rejected the State's contention that the defendant's failure to seek immunity for the codefendant amounted to a lack of due diligence and would preclude his new trial motion. Id. at 365-66.

V. THE EFFECT OF ONE SOVEREIGN'S GRANT OF IMMUNITY ON A SUBSEQUENT CRIMINAL PROSECUTION BY ANOTHER SOVEREIGN

It is well-settled that once a witness has been granted statutory immunity by one jurisdiction, whether state or federal, the witness' immunized testimony may not be used in a criminal proceeding brought against the witness in another jurisdiction. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 *U.S.* 52 (1964); *In re Zicarelli*, 55 *N.J.* 249 (1970). Thus, an immunized state witness may not be compelled to give testimony and its fruits cannot be used in any manner by federal officials as part of a criminal prosecution against the witness. *Kastigar v. United States*, 406 *U.S.* at 456-457.

A promise not to prosecute is not a grant of immunity and does not bind another sovereign. A federal plea agreement containing a promise not to prosecute is not the equivalent of a grant of immunity and hence it does not bar the derivative use in New Jersey courts of defendant's testimony at proffer sessions. *State v. Barrone,* 147 *N.J.* at 610-11. The conferral of use immunity and subsequent use of immunized testimony varies depending on whether the person from whom evidence is sought is a private person or public employee, a target or non-target witness, and whether the State gives certain statutorily-mandated warnings.

A non-target witness is an individual not identified or reasonably identifiable by the prosecutor as an object of a grand jury inquiry or investigation. The State is not required to advise a non-target witness of the Fifth Amendment privilege if the person is called to testify before a grand jury conducting a general investigation. Failure of the witness to invoke the privilege in these circumstances allows the State to use the testimony against the individual in subsequent proceedings. *State v. Fary*, 19 *N.J.* 431 (1955).

If the individual witness does assert a Fifth Amendment privilege against self-incrimination, the person must demonstrate to the court a factual basis to justify the privilege claim. *State v. McGraw*, 129 *N.J.* 68, 77 (1992); *In re Ippolito*, 75 *N.J.* 435 (1978); *In Re Boiardo*, 34 *N.J.* 599 (1961); *See also N.J.R.E.* 502. If the witness answers questions without asserting the Fifth Amendment privilege, the individual waives his or her Fifth Amendment rights. *State v. Toscano*, 13 *N.J.* 418 (1953).

The target doctrine provides that targets of a grand jury proceeding must be informed that they are targets and be advised of their Fifth Amendment rights. *In re Addonizio*, 53 *N.J.* 107 (1968). If the State fails to meet these requirements, the witness' testimony is suppressed and the indictment is dismissed if based on the tainted testimony. *State v. Williams*, 59 *N.J.* 493, 503 (1971). Target witnesses need only show that they are targets of a criminal investigation to sufficiently justify invocation of the Fifth Amendment privilege. *In re Addonizio, supra*, 53 *N.J.* at 116-117.

As opposed to private individuals, the target doctrine does not *per se* apply to public employees and officials because of their duty to testify on matters directly related to conduct of their office. *State v. Vinegra, supra,* 73 *N.J.* at 489. For these individuals, the immunity conferred under *N.J.S.A.* 2A:81-17.2a(2) adequately protects their Fifth Amendment rights and common-law privilege against self-incrimination. *Id.* at 490. *See* IV.B., *supra.*

VII. GRANTS OF IMMUNITY BASED ON COMPELLED INCRIMINATING CONDUCT

A. Statutes Requiring the Surrender of Contraband

The privilege against self-incrimination does not shield only against compelled testimony, but also against actions compelled by law if the compelled act threatens to implicate the actor in an illegal act. *State v. Patton*, 133 *N.J.* 389 (1993); *see also* I.E.2, *supra*, discussing the compelled production of documents.

1. N.J.S.A. 2C:35-10c

In *Patton*, the New Jersey Supreme Court considered a constitutional challenge to *N.J.S.A.* 2C:35-10c, which requires a possessor of a controlled dangerous substance to voluntarily deliver the substance to the nearest law enforcement officer. The statute was said to violate a defendant's privilege against self-incrimination, because it requires a person to surrender to police tangible evidence of guilt of violating *N.J.S.A.* 2C:35-10a, the statute against unlawful possession of a controlled dangerous substance. To preserve the validity of the statute, the Court construed it to confer use and derivative-use immunity on any person who complies with its mandate, as well as transactional immunity for offenses defined in *N.J.S.A.* 2C:35-10.

In *State v. Gredder*, 319 *N.J. Super.* 420 (App. Div. 1999), the Appellate Division held that the immunity of *N.J.S.A.* 2C:35-10c is not implicated where the defendant's surrender of the drugs was not voluntary because it was compelled by a confrontation with police officers. 319 *N.J. Super.* at 425.

2. *N.J.S.A.* 2C:39-12

This provision provides immunity for the voluntary surrender of weapons before any charges have been filed or investigation has commenced for the unlawful possession. The statute explicitly states that the immunity is limited to the unlawful possession offense.

VIII. EFFECT ON CODEFENDANTS

N.J.S.A. 2C:2-6f provides that an accomplice may be convicted of the offense even though the principal has an immunity to prosecution. The same principle holds true with respect to conspiracy. A conspirator is still liable

even though the coconspirator has an immunity to prosecution for the crime. *N.J.S.A.* 2C:5-3a(2).

INCOMPETENCY TO STAND TRIAL

IX. JUVENILES

N.J.S.A. 2A:4A-29 provides that no testimony of a juvenile at a waiver hearing shall be admissible for any purpose in any hearing to determine delinquency or guilt of any offense. A family part decision, State v. Y.B., 264 N.J. Super. 423 (Ch. Div. 1993), ruled that the provision of the juvenile waiver statute, N.J.S.A. 2A:4A-26, placing on the juvenile the burden of proving the probability that he can be rehabilitated by age 19 unconstitutionally conflicted with the juvenile's right against compelled self-incrimination. The Appellate Division rejected Y.B. in In re A.L., 271 N.J. Super. 192 (App. Div. 1994). Any Fifth Amendment concerns in the juvenile-waiver statute are removed by the N.J.S.A. 2A:4A-29 grant of immunity. 271 N.J. Super. at 207-08. To save its constitutionality the Appellate Division read the statute as conferring derivative-use immunity as well as use immunity. Id. at 211-13.

(See also, INSANITY, WITNESSES, this Digest)

I. MENTAL INCOMPETENCE EXCLUDING THE FITNESS TO PROCEED (*N.J.S.A.* 2C:4-4)

A defendant who lacks the capacity to understand the proceedings against him or to assist in his own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures. N.J.S.A. 2C:4-4a; Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975); State v. Spivey, 65 N.J. 21, 36 (1974); See also Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685 (1993). To bring a legally incompetent defendant to trial would violate due process. Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 1376 (1996); Medina v. California, 505 U.S. 437, 439, 112 S.Ct. 2572, 2574 (1992); Drope v. Missouri, 420 U.S. at 171-72; State v. Lambert, 275 N.J. Super. 125, 128 (App. Div. 1994); State v. Cecil, 260 N.J. Super. 475, 480 (App. Div. 1992), certif. denied, 133 N.J. 431 (1993).

The capacity to stand trial relates to a defendant's present ability, *i.e.*, at the time of trial, to stand trial. *See State v. Otero*, 238 *N.J. Super.* 649, 655 (Law Div. 1989) (court-ordered medication, if administered in a medically accepted manner, may be utilized to achieve sufficient competency); *see also Riggins v. Nevada*, 504 *U.S.* 127, 133-36, 112 *S.Ct.* 1810, 1814-15 (1992) (a state may be able to justify medically appropriate, involuntary treatment of medication by establishing that it could not obtain an adjudication of the defendant's guilt or innocence by using less intrusive means).

Pursuant to *N.J.S.A.* 2C:4-4b, a person is considered mentally competent to stand trial on criminal charges if the proofs establish the following:

1. That the defendant has the mental capacity to appreciate his presence in relation to time, place, and things; and

2. That the defendant's elementary mental processes are such that he understands that:

- a. He is in a court charged with a criminal offense;
- b. There is a judge on the bench;

c. There is a prosecutor who will try to convict him;

d. He has a lawyer who will defend him;

e. He would be expected to tell, to the best of his ability, the facts surrounding him at the time and place where the alleged violation was committed if he decided to testify, but also understands that he has a right not to testify;

f. There is or may be a jury present to consider evidence as to his guilt or innocence of the charge or, if he chooses to enter into plea negotiations or plead guilty, that he understand the consequences of a guilty plea, and that he be able to waive those rights knowingly, intelligently, and voluntarily upon entry of a guilty plea; and

g. He has the ability to participate in his defense. *N.J.S.A.* 2C:4-4b; *State v. Lambert,* 275 *N.J. Super.* at 130; *State v. Cecil,* 260 *N.J. Super.* at 485.

Thus, the inquiry on the incompetency question remains simply whether or not the defendant understands his position and can assist counsel in his own defense. See State v. Sinclair, 49 N.J. 525, 549 (1967); State v. Caralluzzo, 49 N.J. 152, 155 (1967); State v. Snell, 136 N.J. Super. 506, 508-509 (App. Div. 1975), certif. denied, 69 N.J. 387 (1976); State v. Latif, 134 N.J. Super. 441, 446 (App. Div. 1975); State v. Pugh, 117 N.J. Super. 26, 30 (App. Div. 1971), certif. denied, 60 N.J. 22 (1972); see also Cooper v. Oklahoma, 517 U.S. at 354; Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 788-89 (1960). In State v. Moya, 329 N.J. Super. 499, 507 (App. Div. 2000), the court stated: "More should not be expected of a concedely mildly retarded defendant than we expect of jurors unless the individual has demonstrated, following simple instruction no less comprehensive than those given to prospective jurors, an inability to process or comprehend enough of the information to meet N.J.S.A. 2C:4-4b(2) standards."

A trial court is required to be "alert" to circumstances which would suggest a change that would render the defendant incompetent to stand trial. *State v. Lambert*, 275 *N.J. Super*. at 129 (citing *Drope v. Missouri*, 420 *U.S.* at 181). However, it is also expected that defense counsel, who is in a far better position than the trial judge to assay the facts concerning the defendant's fitness to stand trial and assist in his own defense, would make the initial request for a hearing on the issue. *State v. Lambert*, 275 *N.J. Super*. at 129 (citing *State v. Lucas*, 30 *N.J.* 37, 74 (1959)); *see also State v. Ehrenberg*, 284 *N.J. Super*. 309, 314-15 (Law Div. 1994) (the importance of the role of counsel is to alert the court of the possibility that the defendant is incompetent has long been recognized); *cf. State v. Cecil*, 260 *N.J. Super.* at 481 (a lawyer's representations concerning the competence of the defendant is a factor to be considered, however, the court does not need to accept that representation without question) (citing *Drope v. Missouri*, 420 *U.S.* at 177, n. 13).

The standards for determining a defendant's competency to stand trial are different from the criteria employed in determining criminal responsibility for an alleged criminal offense. *State v. Otero*, 238 *N.J. Super.* at 654. Thus, one may suffer from mental illness, but nevertheless, be competent to stand trial. *Id.; see also State v. Cecil*, 260 *N.J. Super.* at 485 (evidence that a defendant may be suffering from a mental illness does not necessarily raise a *bona fide* doubt as to the defendant's competence to stand trial); *State v. Badger*, 229 *N.J. Super.* 288, 293 (Law Div. 1988) (defendant suffering from a multiple-personality disorder was competent to stand trial).

Accordingly, the inquiry regarding the capacity to stand trial is distinct from the insanity defense. See State v. Spivey, 65 N.J. at 39; Aponte v. State, 30 N.J. 441, 450 (1959); see also Medina v. California, 505 U.S. at 448. In fact, an insane defendant may be capable of standing trial. State v. Spivey, 65 N.J. at 39. In Cecil, the trial court was not required to hold a competency hearing to determine whether the defendant was fit to stand trial, even though there was evidence that the defendant suffered from a mental illness, and thus, the defendant was sufficiently competent to waive the defense of insanity and diminished capacity. 260 N.J. Super. at 485-90; see also State v. Khan, 175 N.J. Super. 72, 82-83 (App. Div. 1980) (inquiry into a defendant's decision to waive insanity defense must focus on defendant's awareness of his right and available alternatives, comprehension of the consequences of failing to assert the defense and voluntariness of the decision to waive it).

A defendant who lacks the capacity to stand trial also lacks the capacity to enter a guilty plea. *State v. Norton*, 167 *N.J. Super.* 229, 231 (App. Div. 1979). In *Godinez v. Moran*, 509 *U.S.* at 391, the United States Supreme Court held that the competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial, *i.e.*, "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him."

II. PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION OF THE DEFENDANT WITH RESPECT TO THE FITNESS TO PROCEED (*N.J.S.A.* 2C:4-5)

A court should hold a competency hearing, even when not requested, where the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial. Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 842 (1966); State v. Spivey, 65 N.J. 21, 37 (1974); State v. Lambert, 275 N.J. Super. 125, 128 (App. Div. 1994); State v. Cecil, 260 N.J. Super. 475, 480 (App. Div. 1992), certif. denied, 133 N.J. 431 (1993); State v. Otero, 238 N.J. Super. 649, 652 (Law Div. 1989); see also United States v. DiGilio, 538 F.2d 972, 987 (3d Cir. 1976), cert. denied sub nom. Lupo v. United States, 429 U.S. 1038, 97 S.Ct. 733 (1977) ("due process requires that the trial court inquire *sua sponte* into the defendant's competence if there is reason to doubt it"). Once a defendant raises a "bona fide doubt" as to competency, the burden rests with the State to establish competency to stand trial by a preponderance of the evidence. State v. Lambert, 275 N.J. Super. at 129; State v. Otero, 238 N.J. Super. at 652-53; State v. Ehrenberg, 284 N.J. Super. 309, 313 (Law Div. 1994); cf. Cooper v. Oklahoma, 517 U.S. 348, 355, 369, 116 S.Ct. 1373, 1377, 1384 (1996) (the State may presume that a defendant is competent and place upon him the burden of proving his incompetence by a preponderance of the evidence, but may not impose a burden on the defendant to prove incompetence by clear and convincing evidence) (citing in part Medina v. California, 505 U.S. 437, 449, 112 S.Ct. 2572, 2579 (1992)). Moreover, when a *bona fide* doubt is raised as to the competence of a mentally ill defendant to proceed pro se, the court should appoint counsel to aid in the competency determination, as well as to assist the defendant in trying the case. State v. Ehrenberg, 284 N.J. Super. at 315.

A. The Examination

Whenever there is a doubt as to a defendant's fitness to proceed, the competency issue may be raised at any time, by either party, or by the court on its own motion. *N.J.S.A.* 2C:4-5a; *State v. Otero*, 238 *N.J. Super.* at 652. The court may then appoint at least one qualified psychiatrist or licensed psychologist to examine and report on the condition of the defendant. *N.J.S.A.* 2C:4-5a.

Alternatively, the court may order an examination of the defendant by the Department of Human Services, which shall be conducted at a jail, prison, or psychiatric hospital. *Id.* To ensure that a defendant is not unnecessarily hospitalized for the purpose of the examination, a defendant shall not be admitted to a State psychiatric hospital for such an examination unless the psychiatrist or psychologist determines that hospitalization is clinically necessary to perform the examination; if so, the defendant may be placed in a State hospital for that purpose for no more than 30 days. *Id.*

B. The Report

The report of the examination must include the following:

1. A description of the nature of the examination;

2. A diagnosis of the mental condition of the defendant; and

3. An opinion as to the defendant's capacity to understand the proceedings against him and to assist in his own defense. *N.J.S.A.* 2C:4-5b.

The examiner may ask the defendant questions regarding the crimes for which he is charged when such questions are necessary to form an opinion as to a "relevant issue." Id.; see also State v. Moya, 329 N.J. Super. 499, 511 (App. Div. 2000) (one of the "relevant issues" is the question of danger, *i.e.*, an appropriate inquiry of the crimes charged is not only pertinent to the issue of competency, but also to the issue of danger). However, the evidentiary character of any inculpatory statement is limited expressly to the question of competency and is not admissible on the issue of guilt. Id.; see also United States v. Alvarez, 519 F.2d 1036, 1042, 1044 (3d Cir. 1975) (in accordance with the privilege against selfincrimination, and by federal statute, statements made by the defendant as a result of a court-ordered psychiatric examination may be used for the purpose of determining competency to stand trial, but may not be used against the defendant at trial).

If the examination cannot be conducted due to the unwillingness of the defendant, it is to be so stated in the report, and include, if possible, an opinion as to whether it is due to mental incompetence. *N.J.S.A.* 2C:4-5c.

Upon the filing of such a report, the court may permit the following:

1. Examination without cooperation;

2. Appointment of a different psychiatrist or psychologist; or

3. Commitment of the defendant for observation for no more than 30 days if good cause is shown; or

4. Exclusion or limitation of the testimony of the defense psychiatrist or psychologist. *Id.*

III. DETERMINATION OF THE FITNESS TO PROCEED; EFFECT OF FINDING UNFIT-NESS; PROCEEDINGS IF FITNESS IS RE-GAINED; AND POST-COMMITMENT HEAR-INGS (*N.J.S.A.* 2C:4-6)

A. Determination of Fitness to Proceed

The determination of a defendant's fitness to proceed must be decided by the court. *N.J.S.A.* 2C:4-6a; *see also State v. Moya*, 329 *N.J. Super.* 499, 506 (App. Div. 2000) (it is the court and not the experts who ultimately determine competency and the likelihood of danger to self or society). Review of such determinations are highly deferential. *Id.*

If neither the prosecutor, nor the defense attorney, contests the findings of the report, the court may make the determination on the basis of the report. *N.J.S.A.* 2C:4-6a. However, if the findings are contested, or there is no report, the court must hold a hearing. *Id.*

B. Finding of Unfitness

If the court determines that the defendant lacks the fitness to proceed, the proceedings against the defendant shall be suspended. *N.J.S.A.* 2C:4-6b. The court may then commit the defendant to the custody of the Department of Human Services for placement in an institution if the defendant is a danger to himself or others, or it shall proceed to determine whether placement in an outpatient setting or release is appropriate. *Id.* However, the defendant may not be placed in an institution beyond which it can be determined as to whether there is a substantial probability that the defendant could regain his competence within the foreseeable future. *Id.; see also*

Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858 (1992).

If a defendant is found unfit to proceed, the court may resolve legal objections to the prosecution which may be fairly resolved prior to trial and without the personal participation of the defendant. *N.J.S.A.* 2C:4-6f.

C. Finding of Fitness

If the court determines that the defendant is fit to proceed, but suffers from a mental illness which does not require institutionalization, the court shall order the defendant to be provided appropriate treatment in jail or in prison. *N.J.S.A.* 2C:4-6b.

Even though a defendant may be competent to stand trial, the defendant may not have the mental capacity to knowingly waive his right to counsel, and thus, such a determination should not ordinarily result in allowing a mentally ill defendant to conduct his own defense. *State v. Ehrenberg*, 284 *N.J. Super.* 309, 314, 316 (Law Div. 1994). In *Ehrenberg*, the court held that even if a defendant is found competent to stand trial, a mentally ill defendant may still be incompetent to waive certain rights, such as an insanity or diminished capacity defense, and therefore, in that case, the municipal court should have appointed counsel to safeguard such rights. *Id.* at 315-16.

D. Failure to Regain Fitness

The indefinite commitment of a defendant based solely on his incompetency to stand trial violates due process. Jackson v. Indiana, 406 U.S. at 731. In Jackson, the United States Supreme Court stated that "due process requires that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed." Id. at 738. Pursuant to Jackson, a defendant who is committed solely due to his incapacity to stand trial, "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." Id. If it is determined that the defendant will not regain competency, the State must either commence the customary civil proceeding for indefinite commitment or release the defendant. Id.

In New Jersey, if the defendant has not regained his fitness to proceed within three months, the court must hold a hearing to determine whether the charges against the defendant should be dismissed with prejudice or held in abeyance. *N.J.S.A.* 2C:4-6c; *State v. Moya*, 329 *N.J. Super.* at 510. Notice of the hearing must be provided to the prosecutor with an opportunity to be heard. *N.J.S.A.* 2C:4-6c. If the charges are not dismissed, the case is to be reviewed by the court at six-month intervals until there is a court order that the defendant stand trial or that the charges be dismissed. *Id.*

There is a presumption that charges against an incompetent defendant shall be held in abeyance, which can only be overcome if the court determines that continuance of the criminal prosecution would constitute a "constitutionally significant injury" to the defendant because of the undue delay in being brought to trial. *Id.*; *State v. Moya*, 329 *N.J. Super.* at 511. In *Moya*, the court explained that a "prime issue" is whether the defendant is a danger to himself or others as to require institutionalization, or whether placement in an outpatient setting or release is more appropriate. *Id.* (citing *N.J.S.A.* 2C:4-6b).

The court must weigh the following factors in deciding whether the charges should be dismissed or held in

abeyance:

1. The defendant's prospects for regaining competency;

2. The period of time during which the defendant has remained incompetent;

3. The nature and extent of the defendant's institutionalization;

4. The nature and gravity of the crimes that are charged;

5. The effects of delay on the prosecution;

6. The effects of delay on the defendant, which includes any likelihood of prejudice to the defendant in the trial arising out of the delay; and

7. The public interest in prosecuting the charges. *N.J.S.A.* 2C:4-6c; *State v. Moya*, 329 *N.J. Super.* at 510, 514-15; *see also State v. Gaffey*, 92 *N.J.* 374, 386 (1983).

It was noted in *Moya*, that in making the determination of dismissal with prejudice or imposing some form of monitoring for a reasonable period of time, the court must not only consider the nature and gravity

of the crimes that are charged, but must also balance the societal interest in protection against the rights of the incompetent defendant. Id. at 512. To accomplish this, the court must conduct a factual exploration to determine the likelihood that the defendant committed the offenses charged, not for use at trial as to guilt, but solely to determine competency and danger. As explained in Moya, the determination of dangerousness involves a prediction of the defendant's future conduct, rather than a mere characterization of his demonstrated past conduct. Id. at 513 (citing State v. Krol, 68 N.J. 236, 260-61 (1975)). However, past conduct is probative of future conduct and should be given substantial weight in the dangerousness determination. State v. Moya, 329 *N.J. Super.* at 513.

Issues pertaining to unconstitutional delay, *i.e.*, claims related to the speedy trial right, should be made on a case-by-case basis in terms of actual prejudice to the defendant's rights that can be demonstrated or reasonably inferred from the delay. Id. at 514 (citing State v. Gaffey, 92 N.J. at 388-89). In weighing the effects of delay on the defendant and the prosecution, the court should consider the availability of witnesses, preservation of evidence, and the extent to which the delay may have resulted from causes attributable to the defense, which includes the several professional examinations made after the issue of competency was raised by a defendant. State v. Moya, 329 N.J. Super. at 515; see also United States v. Tobin, 155 F.3d 636, 642 (3d Cir. 1998), cert. denied, 525 U.S. 1171, 119 S.Ct. 1094 (1999) (a defendant's unwillingness to comply with a valid competency examination order should not be counted against the government on federal statutory speedy trial grounds).

The responsibility of the trial court to prevent the trial of a defendant who lacks the requisite ability to understand and participate in the proceedings is ongoing. *State v. Latif*, 134 *N.J. Super.* 441, 447 (App. Div. 1975). Thus, even though a defendant has previously been found competent, a lengthy delay in the trial proceedings or evidence that the defendant's condition has changed may necessitate a further inquiry into the defendant's present competence. *See State v. Khan*, 175 *N.J. Super.* 72, 77-78 (App. Div. 1980); *see also State v. Jasuilewicz*, 205 *N.J. Super.* 558, 576 (App. Div. 1985), *certif. denied*, 103 *N.J.* 467 (1986).

E. Regaining of Fitness to Proceed

When the court, on its motion, or upon the application of the Department of Human Services, or either party, determines after a hearing, if such a hearing

is requested, that the defendant has regained his fitness to proceed, the proceedings shall be resumed. *N.J.S.A.* 2C:4-6d.

A defendant who raises competency to stand trial for the first time on appeal must establish that "it clearly and convincingly appears that the defendant was incapable of standing trial." *State v. Lucas*, 30 *N.J.* 37, 73-74 (1959); *State v. Norton*, 167 *N.J. Super.* 229, 232 (App. Div. 1979).

INDICTMENT

(See also, GRAND JURY and JOINDER AND SEVERANCE, this Digest)

I. SUFFICIENCY

The standards for determining the sufficiency of an indictment are well-settled. The fundamental inquiry is whether the indictment misleads or misinforms the accused as to the crime charged. The key is intelligibility. The indictment must charge defendant with the commission of a crime in reasonably understandable language setting forth "all of the critical facts and each of the essential elements which constitute the offense alleged" so that defendant may prepare an adequate defense, to prevent an accusation which violates double jeopardy principles, and to preclude substitution by a trial jury of an offense for which the grand jury has not indicted. R. 3:7-3(a); State v. Wein, 80 N.J. 491, 497 (1979); State v. Spano, 128 N.J. Super. 90, 92 (App. Div.), aff'd, 64 N.J. 566 (1974); see also State v. Branch, 155 N.J. 317, 324 (1997); State v. New Jersey Trade Waste Ass'n, 96 N.J. 8, 18-19 (1984); State v. Talley, 94 N.J. 385, 391-92 (1983); State v. Mello, 297 N.J. Super. 452, 462 (App. Div. 1997); State v. Lopez, 276 N.J. Super. 296, 301-02 (App. Div.), certif. denied, 139 N.J. 289 (1994). However, defendant may waive his or her right to indictment and may be tried on accusation. R. 3:7-2.

While a grand jury cannot indict upon mere whim or caprice, it is only required to find that a crime was committed and that the accused person should stand trial on the charges. State v. Muniz, 150 N.J. Super. 436, 446 (App. Div.), certif. denied, 77 N.J. 473 (1978). Specifically, the grand jury should be charged that the burden of proof to return an indictment is evidence, which if unexplained or uncontradicted, would justify the conviction of the accused. Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471, 487, cert. denied, 405 U.S. 1065 (1972). An indictment should be dismissed only on the clearest and plainest grounds when the indictment's insufficiency is palpably shown. State v. Hogan, 144 N.J. 216, 228 (1996); State v. Ciba-Geigy Corp., 222 N.J. Super. 343, 351-52 (App. Div. 1988); State v. Muniz, 150 N.J. Super. at 446. New Jersey's discovery policy, including defendant's right to move for a bill of particulars, ordinarily obviates the potential for prejudice of any alleged insufficiencies in the indictment. State v. Mello, 297 N.J. Super. at 463.

In charging the grand jury on the elements of the crime for which it is considering indictment, it is

sufficient if the prosecutor simply reads the applicable statute and does not elaborate with a further explanation. *See State v. Ball*, 268 *N.J. Super.* 72, 118-20 (App. Div.), *aff'd*, 141 *N.J.* 142 (1995). Regardless, errors in the grand jury charge are usually rendered harmless by defendant's subsequent conviction. *See State v. Warmbrun*, 277 *N.J. Super.* 51, 60 (App. Div.), *certif. denied*, 140 *N.J.* 277 (1995).

The defense that an indictment fails to charge an offense may be raised for the first time on appeal. *R.* 3:10-2(d); *State v. Kyles*, 166 *N.J. Super.* 343, 347 (App. Div. 1979); *State v. Newell*, 152 *N.J. Super*, 460, 465-66 (App. Div. 1977). However, all other defenses and objections based on defects in the indictment must be raised by motion before trial. Failure to do so constitutes a waiver thereof except that the court for good cause shown may grant relief from the waiver. *R.* 3:10-2(c).

The failure of an indictment to state defendant's age or the disparity between his age and the underage victim of the sexual assault was not a fatal defect since the indictment indicated the victim's age, specifically referred to *N.J.S.A.* 2C:14-2b, and because there was no motion to dismiss the indictment. *State v. Gray,* 206 *N.J. Super.* 517, 519-20 (App. Div.), *certif. denied,* 103 *N.J.* 463 (1986).

Where an indictment charged that defendant "did threaten bodily injury upon [the victim], in the course of committing a theft, contrary to the provisions of *N.J.S.A.* 2C:15-1," it failed to provide adequate notice to defendant that he was charged with anything more than second degree robbery. Therefore, the submission of first degree robbery to the jury was error and defendant's conviction for that crime was set aside. *State v. Catlow*, 206 *N.J. Super.* 186, 194-95 (App. Div.), *certif. denied*, 103 *N.J.* 465 (1986).

In *State v. Holsten*, 223 *N.J. Super.* 578, 585-86 (App. Div. 1988), the court held that even though the grand jury testimony was largely or exclusively incompetent by virtue of leading questions, there was sufficient evidence before the grand jury to sustain the indictment. A grand jury may indict a defendant based largely or wholly on hearsay testimony. *State v. McBride*, 213 *N.J. Super.* 255, 274 (App. Div. 1986).

In *State v. Smith,* 210 *N.J. Super.* 43, 58-60 (App. Div.), *certif. denied,* 105 *N.J.* 582 (1986), the court found that the indictment charging attempted kidnapping was sufficient, despite the fact that it did not contain the words "substantial period," because the use

of the word "confined" in the indictment and the statutory reference gave defendant sufficient notice as to which clause of the statute the State would rely upon.

In *State v. Bonaccurso*, 227 *N.J. Super.* 159, 172-74 (Law Div. 1988), defendant was indicted for unlawful discharge of pollutants in violation of *N.J.S.A.* 58:10A-6a, 58:10A-10f and 2C:2-7, unlawfully operating a facility for the collection, treatment or discharge of pollutants, in violation of *N.J.S.A.* 58:10A-6b, 48:10A-10f and 2C:2-7. Defendant sought to dismiss the latter counts, alleging that insufficient information had been placed before the grand jury from which it could find defendant guilty. The Law Division held that while the proffered evidence may not be sufficient to support the State's case at trial, the grand jury is entitled to consider all the evidence as a whole and each count does not have to stand on its own is considering the sufficiency of the indictment.

Generally, no more than one offense may be charged in a single count of an indictment. *See State v. McDougald*, 120 *N.J.* 523, 563 (1990). Although such a requirement may be waived, in a case where two separate crimes were charged in a single count of an indictment and where it was impossible to ascertain from the charge or the verdict sheet which of those two crimes defendant was convicted of, the conviction was reversed. *State v. Krieger*, 285 *N.J. Super.* 146, 153 (App. Div. 1995).

II. AMENDMENT AND TECHNICAL ERROR

A. Generally

R. 3:7-4 permits the amendment of an indictment to correct an error in form or the description of the crime intended to be charged or to charge a lesser-included offense so long as the amendment does not charge a different offense and so long as defendant will not be prejudiced in his or her defense on the merits. An indictment may be amended in form but not in substance and a court may not amend an indictment to charge an offense which was not found by the grand jury. See State v. Newell, 152 N.J. Super. at 467. An indictment cannot be amended to charge a more serious offense. State v. Orlando, 269 N.J. Super. 116, 138 (App. Div.), certif. denied, 136 N.J. 30 (1993); State v. Koch, 161 N.J. Super. 63, 66 (App. Div. 1978). Also, an indictment may not be amended to include another defendant. State v. Wagner, 180 N.J. Super. 564, 568 (App. Div. 1981).

In *State v. Burden,* 203 *N.J. Super.* 149, 151 (Law Div. 1985), the court held that second degree statutory

rape has different and greater elements relating to the ages of the victim and actor than first degree aggravated sexual assault. Thus, second degree statutory rape is not a lesserincluded offense and cannot be submitted to a jury without the consent of defendant, who was charged in the indictment only with first degree aggravated sexual assault.

In *State v. Blackman*, 125 *N.J. Super.* 125, 129-30 (App. Div. 1973), the initial indictment did not spell out a crime. However, the trial court should have amended the indictment rather than dismissing it because the factual recitation of defendants' conduct in the indictment, if proven, clearly would have qualified as a crime. An amendment of the indictment to recite the appropriate statutes would not have impaired defendants' ability to prepare a defense nor would it have brought them to trial for a crime substantially different than that which the grand jury found sufficient cause to charge them with.

B. Mere Change in Dates

In *State v. Stefanelli*, 78 *N.J.* 418, 429 (1979), the amendment of an indictment for conspiracy to reflect an earlier date regarding an overt act did not result in charging a different offense and did not prejudice the defense on its merits. Where time is not crucial either to the defense or prosecution, an amendment changing or correcting a date is not objectionable. *See State v. Bowens*, 219 *N.J. Super.* 290, 294 (App. Div. 1987). However, when an amendment of the date and time initially set forth in the indictment substantially prejudices defendant's opportunity to prepare a defense, defendant should be granted a continuance or such other relief as contemplated by *R.* 3:7-4. *State v. Middleton*, 299 *N.J. Super.* 22, 33-35 (App. Div. 1997).

In *State in re K.A.W.*, 104 *N.J.* 112, 120-24 (1986), the indictment gave defendant adequate notice of the charges even though it did not specify one or more exact dates of the alleged sexual assaults. The key is to balance juvenile defendants' right to fair notice and the State's interest in prosecuting child molesters and protecting an extremely vulnerable class of victims. The indictment need not specify the date and time, but need only give defendant sufficient notice so that he or she may adequately plan and assert a defense.

C. Technical Error

A minor misnomer before the grand jury or in the indictment is of little significance. Thus, an indictment

will withstand attack where the alleged perpetrator was clearly identified before the grand jury by the alleged victim even though misnamed. *State v. Gillison*, 153 *N.J. Super.* 65, 68-71 (Law Div. 1977).

A specification of the particular intimate parts touched is not an essential element of sexual assault. Thus, the amendment of the indictment to clarify the description of the crime intended to be charged did not violate the proscription of *R.* 3:7-4 against charging another or different offense. *State v. J.S.*, 222 *N.J. Super.* 247, 257-58 (App. Div.), *certif. denied*, 111 *N.J.* 588 (1988). Similarly, a specification of the deadly weapon used in the commission of an armed robbery may be amended so long as the nature of the weapon does not expose defendant to a greater penalty than that to which he or she would have been exposed under the initial indictment. *State v. Lopez*, 276 *N.J. Super.* at 301-08.

In *State v. Berka*, 211 *N.J. Super.* 717, 721-22 (Law Div. 1986), a municipal court properly amended a complaint on its own motion at the end of the entire presentation of evidence to charge defendant with harassment, a lesser-included offense of simple assault.

In State v. Maioranna, 225 N.J. Super. 365, 371 (Law Div.), aff'd and remanded, 240 N.J. Super. 352 (App. Div. 1990), certif. denied, 127 N.J. 327 (1991), defendant, charged with official misconduct in violation of N.J.S.A. 2C:30-2 without reference to the subsection, moved to dismiss the indictment alleging that the "informally established administrative procedures and policies" which she had allegedly breached did not create "official functions" and were not duties imposed by law. First, the Law Division found no error with the indictment, which tracked the language of subsection (a) of the statute verbatim. The court also rejected defendant's argument that the State's reliance on her "inherent duties" amounted to an attempt to amend the indictment to charge a "new or different" crime than that found by the grand jury. The fact that the indictment employed the affirmative "duty to act" language of subsection (a) did not prevent the State from also alleging "omissions to act" in violation of subsection (b). N.J.S.A. 2C:30-2 is intended to consolidate the law as to both malfeasance and nonfeasance by public officials, and includes all offenses constituting common misconduct.

D. Superseding Indictments

In *State v. Buckrham*, 173 *N.J. Super.* 87, 89-90 (App. Div. 1980), the court held that the prosecution overcame the presumption of prosecutorial vindictive-

ness or retaliation suggested by a superseding indictment, which charged an additional count of welfare fraud, by the State's explanation that the superseding indictment was a necessary and appropriate correction of an incorrect indictment rather than an incorporation of previously ignored material into a wholly new count. The superseding indictment corrected the obvious variation between the proofs presented to the grand jury and the form of the incorrect indictment.

In *State v. Bauman*, 298 *N.J. Super.* 176, 206 (App. Div.), *certif. denied*, 150 *N.J.* 25 (1997), the court found that there was no presumption of prosecutorial vindictiveness when the State amended the indictment despite its addition of charges in the superseding indictment, particularly because evidence supporting those additional charges was presented to the grand jury and it can be inferred that those charges were inadvertently omitted from the original indictment.

In *State v. Long,* 119 *N.J.* 439, 465-67 (1990), the Court held that the superseding indictment, which included four additional charges, was not returned in retaliation for defendant's exercise of his constitutional and procedural rights. The Court commented that there was no presumption of prosecutorial vindictiveness because the superseding indictment did not significantly increase the potential punishment.

III. DISMISSAL OF INDICTMENT (See also,
PROSECUTORS, this Digest)

A. Generally

An indictment should stand unless manifestly deficient or palpably defective. Judicial discretion to dismiss indictment is not to be exercised except upon the clearest and plainest grounds. State v. Ramseur, 106 N.J. 123, 231-36 (1987); State v. Kyc, 257 N.J. Super. 600, 603 (Law Div.), rev'd o.g., 261 N.J. Super. 104 (App. Div. 1992), certif. denied, 133 N.J. 436 (1993). A violation of the grand jury selection process requires dismissal only when the violation substantially undermines the randomness and objectivity of the selection process or when it causes harm to defendant. In Ramseur, dismissal was not warranted where the trial court excluded potential jurors on the basis of race in an attempt to achieve greater racial balance. State v. Ramseur, 106 N.J. at 231-36. However, in State v. Russo, 213 N.J. Super. 219, 226-37 (App. Div.), certif. denied, 126 N.J. 322 (1991), defendant was entitled to a dismissal of the indictment when he timely objected to the statutorily defective grand and petit jury selection process.

Unless the prosecutor's misconduct before a grand jury is extreme and clearly infringes the grand jury's decision-making function, it should not result in the dismissal of an indictment. Thus, where the prosecutor indicates to a witness in the presence of the grand jury that he believes that the witness had perjured himself, there was no need to dismiss the indictment. *State v. Schamberg*, 146 *N.J. Super.* 559, 563-65 (App. Div.), *certif. denied*, 75 *N.J.* 10 (1977); *see also State v. Porro*, 175 *N.J. Super.* 49, 51-52 (App. Div. 1980); *State v. Hart*, 139 *N.J. Super.* 565, 567-68 (App. Div. 1976).

Even if an indictment appears sufficient on its face, it cannot stand if the State fails to present the grand jury with at least "some evidence" as to each element of a *prima facie* case. The quantum of evidence required as to each element is not great, but if the State fails to meet it the indictment should be dismissed. *State v. Schenkolewski*, 301 *N.J. Super.* 115, 137 (App. Div.), *certif. denied*, 151 *N.J.* 77 (1997); *State v. Bennett*, 194 *N.J. Super.* 231, 233-34 (App. Div. 1984).

In *State v. Sugar*, 100 *N.J.* 214, 244-45 (1985), the Court held that, under the peculiar circumstances of this case where a police detective intentionally and illegally eavesdropped on an attorney-client conversation, the detective who had eavesdropped was tainted and should not have testified at either the suppression hearing or at trial. The Court further intimated that if that detective had testified at the grand jury proceeding, defendant could have moved to dismiss the indictment on the basis of the tainted testimony. However, even if the first indictment had been dismissed, the State could have proceeded anew in its attempt to prosecute if evidence, unsullied by constitutional violations, existed.

A dismissal of an indictment against an incompetent defendant who has remained unfit to stand trial for such time as the court may deem adequate must be with prejudice, but a dismissal of an indictment against an incompetent defendant when the court determines it is not substantially probable that defendant will regain competence in the foreseeable future may be with or without prejudice depending on the circumstances. *State v. Gaffey,* 92 *N.J.* 374, 383-90 (1983).

In *State v. DelFino*, 100 *N.J.* 154, 159-66 (1985), where defendant moved to dismiss the indictment after the dismissal of the indictment against a codefendant, the Supreme Court of New Jersey held that defendant could

not successfully make an out-of-time challenge to the indictment despite the fact that a coconspirator successfully challenged his indictment arising from the same grand jury proceedings. Additionally, the Court determined that in the present matter the administrative error by the clerk of the grand jury in failing to tally the individual votes of the grand jurors "cannot be tolerated," but because no fundamental injustice occurred declined to dismiss the indictment.

In State v. Lynch, 79 N.J. 327, 334-37, 340-43 (1979), the Court held that the trial court erred in dismissing the indictment and granting a judgment of acquittal at the conclusion of the opening statements. The court explained that trial courts must be reluctant to dismiss based on the opening statements of counsel, especially in view of the double jeopardy factor in criminal cases. Here, the trial court's dismissal reflected an adjudication on the merits, and barred any further prosecution of the case. On the other hand, in State v. Laganella, 144 N.J. Super. 268, 282-90 (App. Div. 1976), appeal dismissed, 74 N.J. 256 (1976), the trial court erroneously dismissed the criminal indictment as a sanction for the State's alleged failure to adhere to principles of fairness in prosecuting that indictment. Double jeopardy considerations did not bar an appeal by the State, or a reversal and remand for trial.

An indictment which was based chiefly on the testimony of a witness who subsequently admitted to perjury remains valid and should not be dismissed if returned by a legally constituted, unbiased grand jury. *Bracy v. United States,* 435 *U.S.* 1301, 1301-03 (1978).

In *State v. Peterkin*, 226 *N.J. Super*. 25, 38-39 (App. Div.), *certif. denied*, 114 *N.J.* 295 (1988), the State appealed from the trial court's order dismissing the indictments against certain narcotics defendants because the police had failed to preserve pretrial photo arrays which identified defendants and then fabricated other arrays. The Appellate Division reversed the order and held that the issue of whether fundamental fairness requires dismissal of the prosecutions must be considered in the context of the values involved. Upon remand, the trial court must determine whether in-court identification of defendants can be made independent of the taint from the failure of the police to preserve the photographic arrays and their subsequent cover-up.

Not all infirmities involving missed or overlooked evidence by the grand jury poses a clear capacity to produce an unjust and different result concerning particular counts. If defendant fails to show a nexus between the evidence that was overlooked or not properly presented and specific counts of the indictment, such counts should not be dismissed. The State can rebut by demonstrating that the missing evidence was not exculpatory, cumulative or so necessary to some of the counts so as to warrant dismissal of those counts. Defendant bears the burden of proof in this regard. *State v. Ciba-Geigy Corp.,* 222 *N.J. Super.* at 355-56.

Even in the absence of prejudice to defendant, a conviction may be reversed and the indictment dismissed if the prosecutor's conduct in obtaining an indictment amounted to an intentional subversion of the grand jury process. *State v. Murphy*, 110 *N.J.* 20, 35-37 (1988); *State v. Engel*, 249 *N.J. Super.* 336, 360 (App. Div.), *certif. denied*, 130 *N.J.* 393 (1991).

B. Deadlocked Juries and Decision to Retry Case

A trial court may dismiss an indictment with prejudice after successive juries have failed to agree on a verdict when it determines that the chance of the State's obtaining a conviction upon further retrial is highly unlikely. The trial court must carefully and expressly consider the following factors, which shall govern its ultimate decision whether to dismiss the indictment: (1) the number of prior mistrials and the outcome of the jury's deliberations, so far as is known; (2) the character of prior trials in terms of length, complexity, and similarity of evidence presented; (3) the likelihood of any substantial difference in a subsequent trial, if allowed; (4) the trial court's own evaluation of the relative strength of each party's case; and (5) the professional conduct and diligence of respective counsel, particularly of the prosecuting attorney. The court must also give due weight to the prosecutor's decision to reprosecute, assessing the reasons for that decision, such as the gravity of the criminal charges and the public's concern in the effective and definitive conclusion of criminal prosecutions. Conversely, the court should accord careful consideration to the status of the individual defendant and the impact of a retrial upon him or her in terms of untoward hardship and unfairness. State v. Abbati, 99 N.J. 418, 427-36 (1985); see also State v. Simmons, 331 N.J. Super. 512 (App. Div. 2000); State v. Paige, 256 N.J. Super. 362, 367-71 (App. Div.), certif. denied, 130 N.J. 17 (1992).

C. Duplicity

Separate and distinct offenses cannot be charged in the same count of an indictment. However, an indictment is not impermissibly duplicitous if it charges

several offenses in separate counts if the offenses are of similar character, or if they are based on the same act or transaction or if they are connected together by a common scheme or plan. R. 3:7-6. A single crime of conspiracy may include several unlawful objects of that conspiracy as long as the acts relate to a single transaction or a common plan. State v. New Jersey Trade Waste Ass'n, 96 N.J. at 21-27. Similarly, multiple thefts committed pursuant to one scheme or course of conduct may be included in separate counts within the same indictment. State v. Childs, 242 N.J. Super. 121, 131-33 (App. Div.), certif. denied, 127 N.J. 321 (1990). Although separate and distinct offenses cannot be charged in the same count in an indictment, counts may include more than one issue when the statute addresses several things disjunctively. See State v. McDougald, 120 N.J. at 562-64.

D. Due Process (See also, DUE PROCESS in this Digest)

The prosecution of defendant for a felony (manslaughter) following the invocation of his statutory right to appeal for a trial *de novo* of the misdemeanor convictions which are based on the same conduct involved in the manslaughter prosecution violates the due process clause. *Thigpen v. Roberts*, 468 *U.S.* 27, 28-32 (1984).

In *State v. Jones*, 183 *N.J. Super.* 172, 181-84 (App. Div. 1982), due process did not bar an indictment charging rape following the dismissal of a prior indictment charging carnal abuse, which was dismissed because that particular offense had been abrogated by the Code. A second indictment may be sought following the dismissal or quashing of the first prior to, at the very least, the impaneling the jury.

E. De Minimis

An indictment charging defendant with shoplifting by stealing three pieces of bubble gum was subject to dismissal pursuant to *N.J.S.A.* 2C:2-11, which allows dismissal of a prosecution based on defendant's *de minimis* conduct. *State v. Smith*, 195 *N.J. Super.* 468, 470-77 (Law Div. 1984). The complaint upon which defendant was convicted of theft for taking five pieces of fruit from a buffet restaurant after paying for the meal was subject to dismissal as a *de minimis* infraction. *State v. Nevens*, 197 *N.J. Super.* 531, 534-37 (App. Div. 1984).

Pursuant to *N.J.S.A.* 2C:2-11b, the *de minimis* statute, the summary judgment procedure is available to

criminal defendant even for a serious offense (as opposed to trivial charges) where defendant "did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation and conviction" In determining whether to dismiss, the court may consider the "attendant circumstances", *i.e.*, the facts surrounding the charge and not necessarily set forth in the indictment. *State v. Evans*, 193 *N.J. Super.* 560, 565-67 (Law Div. 1984).

In State v. Zarrilli, 216 N.J. Super. 231, 236-40 (Law Div.), aff'd, 220 N.J. Super. 517 (App. Div. 1987), the complaint charging defendant, a 20 year-old college student, with underage consumption of alcoholic beverages on licensed premises (a disorderly offense) was subject to dismissal pursuant to N.J.S.A. 2C:2-11b. Defendant's admission of actually performing the prohibited act did not resolve the crucial issue of whether the conduct caused or threatened the harm "only to an extent too trivial to warrant the condemnation of conviction." The *de minimis* statute is applicable to *all* prohibited conduct, not just disorderly offenses, and defendant's knowledge that the conduct is prohibited is not a relevant consideration. Nor does the purpose of the deterrence measure triviality. Thus, the statute permits dismissal of prosecutions if society as a whole will be benefitted and protected. Factors to be considered include the circumstances surrounding the commission of the offense, the existence of contraband, the amount and value of property involved, the use or threat of violence, and the use of weapons. See also State v. Ziegler, 226 N.J. Super. 504, 505-06 (Law Div. 1988).

N.J.S.A. 2C:2-11 does not apply to juvenile delinquency proceedings. *State v. I.B.*, 227 *N.J. Super.* 362, 365-67 (App. Div. 1988).

IV. JOINDER AND SEVERANCE (See also, JOINDER AND SEVERANCE, this Digest)

N.J.S.A. 2C:1-8b and *R.* 3:15-1(b) provide that defendants shall not be subject to separate trials for multiple criminal offenses based on the same conduct or arising from the same episode if the offenses are known to the prosecutor at the time of the first trial and if they are within the jurisdiction and venue of a single court. *See also State v. Gregory,* 66 *N.J.* 510, 521-23 (1975). This "single trial" requirement frequently arises in situations where merger and double jeopardy issues present themselves, but as set forth in the Code and the court rules is broader and therefore applies in situations where neither merger nor double jeopardy issues surface. *See*

State v. Mello, 297 N.J. Super. at 463-64; State v. Clark, 227 N.J. Super. 204, 209-10 (App. Div. 1988). In State v. Yoskowitz, 116 N.J. 679, 701 (1989), our Supreme Court set forth the four-part test to determine whether the mandatory joinder rule applies: 1) all of the charges must be crimes; 2) the charges must be based on the same conduct or must arise from the same episode; 3) the prosecutor must be aware of all of the offenses when the first trial begins; and 4) all of the offenses must be within the jurisdiction and venue of a single court.

Notwithstanding the preference for joinder, N.J.S.A. 2C:1-8c and R. 3:15-2(b) provide that when a defendant is charged with two or more criminal offenses based on the same conduct or arising from the same episode, the court may order separate trials if it appears that defendant or the State will be unfairly prejudiced by a joinder of offenses. In deciding whether the offenses should be tried together or separately, the court should consider whether, if the charges were tried separately, evidence of the offenses sought to be severed would be admissible under N.J.R.E. 404(b) in the trial of the remaining charges. State v. Morton, 155 N.J. 383, 451 (1998); State v. Chenique-Puey, 145 N.J. 334, 341 (1996). For example, when defendant is charged with contempt of a domestic violence restraining order as well as terroristic threats against the person whom the restraining order was issued to protect, the charges should be tried separately upon defendant's request if he or she will be prejudiced by a presentation to the jury of allegations regarding the multiple offenses when the jury is expected to decide defendant's guilt as to each charge separately. State v. Chenique-Puey, 145 N.J. at 340-43.

V. MISCELLANEOUS

A. Effect of Suppression

An order suppressing drugs seized in defendant's apartment, upon which a drug possession charge was based, in no way affected the State's ability to try defendant for an earlier distribution, gave defendant no reasonable expectation that he would not be prosecuted for distribution, and was not a justifiable basis upon which to dismiss the indictment. *State v. Phillips*, 150 *N.J. Super.* 75, 76-77 (App. Div.), *certif. denied*, 75 *N.J.* 523 (1977).

B. Improper Remarks

Neither the trial court nor the prosecutor may tell the jury that an indictment by itself constitutes a prima facie finding by a grand jury that defendant is guilty. *State v.*

Johnson, 65 N.J. 388, 391 (1974); State v. Green, 313 N.J. Super. 385, 391-92 (App. Div. 1998).

C. Lesser-Included Offenses (See also, COURTS, this Digest)

A defendant may be found guilty of an offense not included in the indictment if it amounts to a lesserincluded offense of a greater offense charged in the indictment. N.J.S.A. 2C:1-8d; State v. Talley, 94 N.J. at 392; see also State v. Branch, 155 N.J. at 324-25; State v. Mancine, 241 N.J. Super. 166, 180 (App. Div.), aff'd in part and rev'd in part, 124 N.J. 232 (1991).

In State v. Sloane, 111 N.J. 293, 299-04 (1988), defendant, who had stabbed the victim through the arm and in the back, was indicted for second degree aggravated assault (purposely or knowingly causing serious bodily injury to another) and possession of a weapon for an unlawful purpose. Defendant was acquitted of the possession charge. The trial court declined to charge the jury on any assault offense other than that of causing serious bodily injury to another, and none was requested by the defense. Thus, on the assault count the jury had to choose between acquitting defendant or finding him guilty of second degree aggravated assault, the latter of which they did. The Appellate Division affirmed the conviction, believing that, because of the added element of a weapon, thirddegree aggravated assault was not a lesser-included offense of second degree aggravated assault.

The Supreme Court of New Jersey reversed and held that the jury should have been permitted to consider whether the victim's stab wounds were "bodily injuries" so as to allow a conviction for the lesser-included offense of third-degree aggravated assault (purposely or knowingly causing bodily injury with a deadly weapon). Defendant was charged with the highest degree of assault in the Code. He was therefore on notice, and indeed it was to his advantage, that the jury be permitted to consider the lesser-included offenses of assault that require a lesser degree of injury. Defendant knew, because of the second count of the indictment, that a deadly weapon was involved in the charges. He did not object to the charge here; indeed, he requested the charge. Thus, he can be assumed to have been aware that the jury was able to enter a verdict of guilt of any of the appropriate lesser-included offense. See also State v. Farrell, 250 N.J. Super. 386, 392 (App. Div. 1991).

In *State v. Queen*, 221 *N.J. Super.* 601, 605-08 (App. Div. 1988), the court determined that simple assault is

not an included offense of sexual assault or criminal sexual contact because it is not established "by proof of the same or less than all the facts required to establish" either offense charged under the indictment. Rather, it requires proof of the additional element of bodily injury or of an attempt to cause bodily injury. Thus, the trial court was not required to *sua sponte* charge the jury on simple assault because conviction, except for an offense charged by indictment or for a lesser-included offense of an offense charged by indictment, is a violation of defendant's constitutional rights.

In *State v. Graham*, 223 *N.J. Super.* 571, 576-77 (App. Div. 1988), the court found that where the facts of a particular case are such that the State is required to prove that second degree assault was committed with a deadly weapon, fourth-degree recklessly causing bodily injury to another with a deadly weapon is a lesser-included offense. Where the lesser-included offense analysis turns on a comparison of the particular factual circumstances, and not the elements, of the offenses being compared, defendant may not be convicted of the lesser-included offense unless the grand jury intended that result and defendant had fair notice that he was being tried for that offense. *See also State v. Sloane*, 111 *N.J.* at 299-04.

VI. UNINDICTED COCONSPIRATORS

If a grand jury determines that a known individual was a coconspirator but decides to not indict him or her, the individual shall not be named in the indictment as an unindicted coconspirator. However, the grand jury minutes should reflect that it has determined that the individual was a coconspirator but decided, for reasons which need not be stated, to not indict him or her. The indictment may charge defendant with conspiring with any codefendant and/or with other persons known and/ or unknown, as the case may be. Although an unindicted coconspirator should not be named in the indictment, the indictment should contain appropriate language to indicate that one or more other persons are involved, known or unknown, as the case may be. State v. Porro, 152 N.J. Super. at 190-91.

VII. VARIANCE

An indictment need only sufficiently identify the event for which criminal accountability is sought to enable the accused to defend against the charges, to preclude substitution by a jury of an offense for which no indictment was returned, and to defeat a subsequent prosecution for the same offense. As long as the proofs substantially support the charge, a minor variance between the proofs and the charge will be deemed immaterial. *State v. Lawrence*, 142 *N.J. Super*. 208, 215 (App. Div. 1976); *State v. Lamb*, 125 *N.J. Super*. 209, 217 (App. Div. 1973).

A variance between the averment of time laid in the indictment and the proofs presented will prove fatal only where time is of the essence for the offense. The test of whether time is of the essence depends upon whether the prohibited act may be innocent if committed at one time but criminal at another. If time is not of the essence for the crime charged, the State may offer proof that the offense was committed on any day prior to the return of the indictment and within the period not covered by the statute of limitations. See State v. Laws, 50 N.J. 159, 186 (fact that conspiracy indictment specified certain date did not preclude State from introducing evidence of an earlier meeting; the specified date was not the essence of the conspiracy, and evidence that the conspiracy may have started at an earlier date and then continued on specified date did not prejudicially depart from charge in the indictment), cert. denied, 393 U.S. 971 (1968); State v. Middleton, 299 N.J. Super. 22, 34-35 (App. Div. 1997) (finding defendant was prejudiced by an amendment of the date in the indictment because he claimed to have had an alibi for the amended date); State v. Kuske, 109 N.J. Super. 575, 583-86 (App. Div. 1970) (defendant indicted on one charge of incest and one charge of sodomy was not convicted of any offense not charged by the grand jury, even though the indictment was amended to change the dates of the offenses from a specific date to "divers dates in the month of July, 1963" and even though testimony as to additional incidents was developed; State at no time contended that there was more than one act of intercourse or more than one act of sodomy, and proof of the additional incidents was developed by defendant on cross-examination); State v. Goldman, 95 N.J. Super. 50, 53 (App. Div.) (where time is not of the essence or a legal constituent of crime charged, it need not be proved as precisely as laid in the indictment), certif. denied, 50 N.J. 288 (1967).

INFORMANTS

I. GOVERNMENTAL PRIVILEGE TO WITH-HOLD INFORMER'S IDENTITY

The informer's privilege - the privilege against disclosure of the identity of persons who supply the government with information concerning the commission of crimes - is an ancient doctrine with its roots in the English common law and is codified in *N.J.S.A.* 2A:84A-28 and *N.J.R.E.* 516 which both provide in full:

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

The privilege is most frequently asserted in criminal prosecutions. *State v. Salley*, 264 *N.J. Super.* 91, 96 (App. Div. 1993). It is founded upon sound public policy to protect effective law enforcement by encouraging citizens to cooperate with government officials without fear of reprisals. *Maudsley v. State*, 323 *N.J. Super.* 579, 589 (App. Div. 1999).

In general, the informer's privilege permits the State to withhold disclosure of an informer's identity. This privilege, however, is not absolute. *Grodjesk v. Faghani*, 104 *N.J.* 89, 98 (1986). It yields when it is shown that disclosure would be "relevant and helpful to the defense of an accused" or "essential to a fair determination" of the case. *State v. Florez*, 134 *N.J.* 570, 578 (1994); *State v. Salley*, 264 *N.J. Super.* at 97. The burden rests upon the party opposing the privilege to show exceptional circumstances justifying disclosure. *State v. Florez*, 134 *N.J.* at 578.

There is no fixed rule with respect to when disclosure is justified and the decision should be fact specific. Whether disclosure should be made depends upon a proper balance of "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro v. United States*, 353 *U.S.* 53, 62, 77 *S.Ct.* 623, 629 (1957). In *Roviaro*, the Court identified three instances where the privilege would not apply: 1) when the disclosure of a communication would not reveal the identity of the informer, 2) when the identity of the informer was disclosed to those who would have cause to resent the communication, and 3) when the principles of fundamental fairness so required. 353 *U.S.* at 60-61, 77 *S.Ct.* at 627-28.

Whether the circumstances warrant disclosure is a matter addressed to the sound discretion of the trial court. *State v. Milligan*, 71 *N.J.* 373, 384 (1976). The court's discretion is tempered by a presumption in favor of protecting an informer's identify, which can be overcome only if defendant demonstrates a "substantial showing of a need." *Cashen v. Spann*, 77 *N.J.* 138, 142 (1978); *State v. Oliver*, 50 *N.J.* 39, 47 (1967).

"Under most circumstances ... an informer's identify will be kept secret and will not be revealed for insignificant or transient reasons." State v. Foreshaw, 245 N.J. Super. 166, 181 (App. Div.), certif. denied, 126 N.J. 327 (1991); see also Matter of Application for Protective Order, 282 N.J. Super. 244, 253-54 (App. Div. 1995). For instance, New Jersey courts have not required disclosure where defendant merely speculated that the informer's testimony was needed to show that defendant was mistakenly identified, State v. Milligan, 71 N.J. at 391; State v. Booker, 86 N.J. Super. 175, 179 (App. Div. 1965); where defendant alleged that the informer's testimony would refresh defendant's recollection, State v. Milligan, 71 N.J. at 392; or where defendant sought disclosure of the informer's identity only to impeach the credibility of a witness on a collateral matter, State v. Medina, 201 N.J. Super. 565, 582-583 (App. Div.), certif. denied, 102 N.J. 298 (1985). Likewise, our courts have denied requests for disclosure where defendant speculated that the informer would say something that would lead to defendant's acquittal. State v. Oliver, 50 N.J. at 42; State v. Morelli, 152 N.J. Super. 67, 74-5 (App. Div. 1977).

The extent of the informer's participation in the crime is a significant factor in deciding whether his or her identify should be disclosed. For example, our courts generally do not require disclosure where the informer merely supplied information to the police or participated in the preliminary investigation. *State v. Milligan*, 71 *N.J.* at 387-89; *State v. Biancamano*, 284 *N.J. Super*. 654, 660 (App. Div. 1995), *certif. denied*, 143 N.J. 516 (1996); *State v. Foreshaw*, 245 *N.J. Super*. at 183; *State v. Singleton*, *158 N.J. Super*. 517, 526 (App. Div.), *certif. denied*, 79 *N.J.* 470 (1978); *State v. Infante*, 116 *N.J.*

Super. 252, 258-59 (App. Div. 1971). Disclosure is also generally denied where an informer merely introduces police to defendant but does not participate in the crime. State v. Florez, 134 N.J. at 579; State v. Varona, 242 N.J. Super. 474, 479-80 (App. Div.), certif. den., 122 N.J. 386 (1990). Moreover, mere presence at the criminal event is not enough to warrant disclosure. State v. Salley, 264 N.J. Super. at 101; State v. Booker, 86 N.J. Super. at 179. As the Salley Court explained, "we know of no case holding that an informer must be revealed when he was no more than a witness to the criminal event." 264 N.J. Super at 100-01. Where, however, the informer is an active participant and/or a material witness on the issue of guilt or innocence, when defendant may reasonably assert the defense of entrapment, or when fundamental principles of fairness so require, disclosure may be required depending on the various facts and circumstances. State v. Florez, 134 N.J. at 579 (where the informer was employed on a contingent fee basis and played a central and critical role in the reverse drug sting which resulted in defendant's arrest, the trial court erred in failing to require the State to reveal the informer's identity); State v. Oliver, 50 N.J. at 45; State v. Roundtree, 118 N.J. Super. at 31-32; see also Roviaro v. United States, supra (disclosure was required where informer was sole participant in criminal event and a material witness to facts of relevance to issues of guilt and testimony was critical to entrapment claim).

The informer's privilege covers the informer's identity and not the contents of his communications with the State. However, if disclosure of those contents would tend to reveal the informer's identity, such disclosure might be foreclosed. *Grodjesk v. Faghani*, 104 *N.J.* at 96; *State v. Milligan*, 71 *N.J.* at 383.

While *N.J.R.E.* 516 literally protects only the identity of those who have disclosed information "to a representative of the State or the United States or a governmental division thereof," it was stated in State v. Gallagher, 274 N.J. Super. 285, 301-303 (App. Div. 1994), in dictum, that the informer's privilege would apply to communications made by an informer to private security personnel where the information received from the informer is immediately passed to the police. See also State v. Biancamano, 284 N.J. Super. at 660 (extended protection of privilege to an informer who provided information to a school official). The suggestion in *State* v. Postorino, 253 N.J. Super. at 107, that the privilege only applies to a "paid professional confidential informant with a continuing law enforcement relationship" is not supported by other relevant case law. See Biunno, Current

N.J. Rules of Evidence, Comment 2 on *N.J.R.E.* 516 (2000).

R. 3:13-3(c)(6) requires pretrial disclosure of the names and addresses of any persons whom the prosecutor knows to have relevant evidence or information, including a designation by the prosecutor as to which of those persons may be called as witnesses. Thus, under this rule, the State must provide this information about the informer unless it moves for a protective order under R. 3:13-3(f). See State v. Wright, 312 N.J. Super. 442, 449 (App. Div. 1998), certif. denied, 156 N.J. 425 (1998); State v. Postorino, 253 N.J. Super. 98, 103 (App. Div. 1991). R. 3:13-3(f)(1) allows the court to deny, restrict or defer defendant's discovery request for good cause on the State's motion. One of the factors the rule specifically allows the court to consider in determining the propriety of a protective order is the "maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity."

Where someone who may be a confidential informant is involved in an illicit transaction, that participation must be reported without identifying the individual. State v. Cooper, 301 N.J. Super. 298 (App. Div. 1997). Without this information, defendant would have no effective opportunity to address the significance of this information. Id. at 304. In Cooper, the failure of the police report to mention the involvement of a confidential informant during an undercover drug buy was held to have denied defendant a fair trial and resulted in a reversal of his conviction. In State v. Wright, 312 N.J. Super. at 453, the Court held that neither double jeopardy nor fundamental fairness precluded a retrial of a defendant after the trial court vacated the defendant's conviction for the failure of the police to disclose the existence of a confidential informant. However, the Wright Court issued a stern warning that under similar circumstances, it would "not hesitate to bar reprosecution if law enforcement officers fail to disclose in their report the existence of a confidential informant." Id. at 454.

II. THE PRIVILEGE OF NON-DISCLOSURE REGARDING THE VALIDITY OF WARRANTS

Disclosure of the identify of an informer is more difficult to obtain in an attack on the validity of a warrant where the issue is the preliminary one of probable cause and not the guilt or innocence of the defendant. Whether to require disclosure rests largely within the discretion of the trial judge. *McCray v. Illinois*, 386 *U.S.* 300, 87 *S.Ct.* 1056 (1967); *State v. Burnett*, 42 *N.J.* 377, 388 (1964); *State v. Petillo*, 61 *N.J.* 165, 173 (1972), *cert. denied*, 410

U.S. 945 (1973). The Court in *McCray* differentiated cases like *Roviaro* where guilt or innocense was at stake and cases like *McCray* where probable cause was at issue. In *McCray*, the Court wrote "[w]e have repeatedly made clear that federal officers need not disclose an informer's identity in applying for an arrest or search warrant." *Id.* at 311, 87 *S.Ct.* at 1062. The *McCray* Court would seem to warrant disclosure in instances where the trial judge deemed it necessary to assess credibility or accuracy. The responsibility for striking the proper balance lies within the sound discretion of the trial judge.

III. INFORMERS AND THE DETERMINA-TION OF PROBABLE CAUSE

Where an affidavit relies on an informant's tip, the probable cause determination requires an examination of the totality of the circumstances. *Illinois v. Gates*, 462 *U.S.* 213, 238, 103 *S.Ct.* 2317, 2332 (1983). The standard was adopted under the New Jersey Constitution in *State v. Novembrino*, 105 *N.J.* 95 (1987). The informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant. *Gates*, 472 *U.S.* at 230, 103 *S.Ct.* at 2328. Independent corroboration is necessary to ratify the informant's veracity and validate the truthfulness of the tip. *State v. Smith*, 155 *N.J.* 83, 95 (1998), *cert. denied*, 525 *U.S.* 1033 (1998); *State v. Zutic*, 155 *N.J.* 103 (1998).

INSANITY

(See also, INCOMPETENCY TO STAND TRIAL, INTOXICATION, PRESUMPTIONS AND INFERENCES, this Digest)

N.J.S.A. 2C:4-1 continues this State's adherence to the *M'Naghten* test for determining when a defendant should be acquitted by reason of insanity. *N.J.S.A.* 2C:4-1 provides:

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

This "right and wrong" test excuses a defendant from criminal liability, if at the time the defendant commits the offense, the defendant lacked the capacity to distinguish right from wrong; it also focuses on the defendant's ability to perceive the wrongfulness of his conduct, and not on the actual knowledge of the defendant. *State v. Worlock*, 117 *N.J.* 596, 610 (1990). Under this test, the defendant need not be insane at the time of trial; temporary insanity at the time the criminal offense occurred may justify an acquittal. *See State v. Maik*, 60 *N.J.* 203, 218-19 (1972).

I. RAISING THE INSANITY DEFENSE

A defendant who intends to raise the insanity defense must serve timely notice on the State. *N.J.S.A.* 2C:4-3a; *R.* 3:12. Otherwise, the defendant may be barred from presenting evidence in support of the defense at trial. *State v. Burnett*, 198 *N.J. Super.* 53, 57-62 (App. Div. 1984), *certif. denied*, 101 *N.J.* 269 (1985).

Even if a defendant fails to properly raise the insanity defense or refuses to rely on the defense, the court may *sua sponte* interpose the insanity defense on a defendant's behalf, if the defendant is not capable of making a knowing, intelligent and voluntary waiver of the defense. *See State v. Khan*, 175 *N.J. Super.* 72, 82-84 (App. Div. 1980); *See also State v. Ehrenberg*, 284 *N.J. Super.* 309, 316 (Law Div. 1994) (where facts and attendant circumstances suggest that an insanity or diminished capacity defense is possible, the trial court must determine that the defendant is aware of the defense, and that the defendant has made a knowing, intelligent, and voluntary waiver of the defense; the inquiry should be in terms of the defendant's awareness of his rights and

available alternatives, his comprehension of consequences of failing to assert the defense, and that he is free to waive the defense); and *See State v. Cecil*, 260 *N.J. Super*. 475, 487-90 (App. Div. 1992), *certif. denied*, 133 *N.J.* 431 (1992). The waiver determination should not be confused with a determination whether a defendant is competent to stand trial. *State v. Khan*, 175 *N.J.* at 78-79. (*See also*, **INCOMPETENCY**, this Digest).

If the defense of insanity is raised on a defendant's behalf despite the defendant's objection, the possibility of presenting conflicting defenses such as insanity and self-defense at a single trial could be fundamentally unfair. See State v. Kahn, 175 N.J. at 83. Hence, in such circumstances, the issue must be bifurcated with the insanity issue to be tried first. Id. at 84. If the jury finds that the defendant was not insane at the time of the offense, then a trial on the general issue of the defendant's guilt or innocence of the crime charged should proceed. Id.; cf. State v. Haseen, 191 N.J. Super. 564, 565 (App. Div. 1983) (bifurcated trial is not required when a defendant voluntarily raises inconsistent defenses of insanity and alibi); see also State v. Johnston, 257 N.J. Super. 178, 196-98 (App. Div.), certif. denied, 130 N.J. 596 (1992) (no principle violated requiring the jury to consider a defendant's guilt before considering the issue of sanity).

The issue of insanity is to be determined by the jury, and not by the court pursuant to a pretrial application. *See State v. Lopez*, 188 *N.J. Super*. 170, 173 (App. Div. 1983); *see also State v. Jasuilewicz*, 205 *N.J. Super*. 558, 565-70 (App. Div. 1985), *certif. denied*, 103 *N.J.* 467 (1986) (the defendant should have been afforded the right to *voir dire* prospective jurors regarding any prejudice concerning the insanity defense due to its use in another unrelated, but highly publicized matter). The verdict of acquittal by reason of insanity in a criminal trial must be by an unanimous vote of the jury. *State v. Gadson*, 148 *N.J. Super*. 457, 463-64 (App. Div. 1977).

II. BURDEN OF PROOF

The State is under no obligation to prove that a defendant was sane at the time of the commission of the crimes in question. *State v. DiPaglia*, 64 *N.J.* 288, 293 (1974). Rather, insanity is an affirmative defense which the defendant must raise and prove by a preponderance of the evidence. *N.J.S.A.* 2C:4-1; *State v. Delibero*, 149 *N.J.* 90, 99 (1997); *State v. DiPaglia*, 64 *N.J.* at 293; *see also State v. Harris*, 141 *N.J.* 525, 552 (1995); *State v. Worlock*, 117 *N.J.* 596, 601 (1990).

III. JURY INSTRUCTIONS

Instructions to the jury should make clear that evidence of insanity may be relevant to the jury's determination of whether the State has proven beyond a reasonable doubt that at the time of the offense the defendant possessed the requisite mental state to be convicted of the offense that is charged. State v. Delibero, 149 N.J. 90, 93 (1997). When instructing the jury on the issue of the defendant's burden of proof, the trial court should not use the term "presumption," but instead, should instruct the jury that the defendant is "assumed" sane. State v. DiPaglia, 64 N.J. 288, 294 (1974). The trial court should also instruct the jury what it means for a defendant to have to prove insanity by a preponderance of the evidence. State v. Lewis, 67 N.J. 47, 50 (1975). In addition, the jury should be instructed "as to the consequences of a verdict of not guilty be reason of insanity so that the jury does not act under the mistaken impression that defendant will necessarily be freed or be indefinitely committed to a mental institution." State v. Krol, 68 N.J. 236, 265 (1975); see also State v. Jasuilewicz, 205 N.J. Super. 558, 573 (App. Div. 1985), certif. denied, 103 N.J. 467 (1986) (when a defendant's sanity is at issue and the defendant has testified before the jury in an artificially-placid state that has been induced by tranquilizers, anti-psychotic drugs or other medication, the defendant has the right to have the jury informed that his demeanor has been altered by medication).

IV. INTOXICATION (See also, INTOXICA-TION, this Digest)

N.J.S.A. 2C:2-8c provides that intoxication does not, in itself, constitute a mental disease within the meaning of Chapter 4 of the Code.

As the Code contains a separate intoxication defense in *N.J.S.A.* 2C:2-8, the trial court should not permit a defendant to rely upon the insanity defense when the intoxication defense is more appropriate. The insanity defense may be available, however, when the voluntary use of the intoxicant or drug results in a fixed state of insanity after the influence of the intoxicant or drug has spent itself. *State v. Stasio*, 78 *N.J.* 467, 473 (1979); *State v. Maik*, 60 *N.J.* 203, 215 (1972); *see also State v. Sette*, 259 *N.J. Super.* 156, 172-73 (App. Div.), *certif. denied*, 130 *N.J.* 597 (1992) (if a defendant can understand the nature and quality of his criminal acts, an involuntary intoxication defense would not apply, since the defendant could not be temporarily insane under the *M'Naghten* standard applicable to pathological and involuntary intoxication); and *see State v. Inglis*, 304 *N.J. Super.* 207, 210 (Law Div. 1997) (because driving while intoxicated is not an offense under the New Jersey Code of Criminal Justice, the Code's defense of insanity is inapplicable to such a charge).

V. MENTAL DISEASE OR DEFECT

A. Diminished Capacity

N.J.S.A. 2C:4-2, the diminished capacity statute, provides: "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense." Mental disease or defect is a separate concept from insanity. *See State v. Nataluk*, 316 *N.J. Super.* 336, 343 (App. Div. 1998).

Diminished capacity describes a disease or defect of the mind that may negate the mental state that is an element of the offense charged. State v. Delibero, 149 N.J. 90, 92, 98 (1997); State v. Reyes, 140 N.J. 344, 354 (1995); see also State v. Nataluk, 316 N.J. Super. at 343. The jury considers evidence of diminished capacity in relation to the State's burden to prove the essential elements of the crime. State v. Delibero, 149 N.J. at 98; State v. Harris, 141 N.J. 525, 555 (1995). Thus, evidence of diminished capacity is admissible whenever relevant to prove that the defendant did not have the state of mind, which is an element of the offense. N.J.S.A. 2C:4-2; State v. Delibero, 149 N.J. at 101. It permits the introduction of evidence which is relevant to the question of whether the State has proven the required mental state beyond a reasonable doubt. State v. Johnson, 309 N.J. Super. 237, 268 (App. Div.), certif. denied, 156 N.J. 387 (1998).

An insane defendant, by contrast, may act in accordance with the elements required to commit an offense, but the insanity absolves the defendant of criminal responsibility. *State v. Delibero*, 149 *N.J.* at 99. However, a verdict of not guilty by reason of insanity does not result in the defendant being set free, but rather, subjects the defendant to further commitment proceedings; on the other hand, a verdict of not guilty because of a defendant's diminished capacity, would result in the defendant's freedom. *Id.* at 104-105. It should be noted that evidence of diminished capacity and insanity may overlap, *i.e.*, facts adduced in support of one claim may be relevant to the other. *Id.* at 101.

The determination that a condition constitutes a mental disease or defect for purposes of the diminished capacity statute is one to be made in each case by the jury after the court has determined that evidence of the condition in question is relevant and sufficiently accepted within the psychiatric community to be found reliable for courtroom use. State v. Galloway, 133 N.J. 631, 643 (1993). All mental deficiencies, including conditions that cause a loss of emotional control, may satisfy the diminished capacity defense if the record shows that experts in the psychological field believe that the mental deficiency can affect a person's cognitive faculties, and if the record also contains evidence that the claimed deficiency did in fact affect the defendant's cognitive capacity to form the mental state necessary for the commission of the crime. State v. Bey, 161 N.J. 233, 288 (1999), cert. denied, 120 S.Ct. 2693 (2000); State v. Galloway, 133 N.J. at 647; see also State v. Bauman, 298 N.J. Super. 176, 197 (App. Div.), certif. denied, 150 N.J. 25 (1997). Moreover, the term "mental disease or defect" under the diminished capacity statute does not preclude evidence of mental condition consisting of a borderline personality disorder; in fact, forms of psychopathology other than clinically-defined mental disease or defects may affect the mental process and diminish cognitive capacity, and therefore, may be regarded as a mental disease or defect in the statutory or legal sense. State v. Galloway, 133 N.J. at 641, 643.

B. Burden of Proof and Jury Instructions

Unlike insanity, diminished capacity is not an affirmative defense. *See State v. Delibero*, 149 *N.J.* at 98-99. The former version of the diminished capacity statute imposed a burden upon the defendant of proving diminished capacity by a preponderance of the evidence. *See State v. Breakiron*, 108 *N.J.* 591, 611 (1987); *see also State v. Zola*, 112 *N.J.* 384, 399-403 (1988), *cert. denied*, 489 *U.S.* 1022, 109 *S.Ct.* 1146 (1989). Under the former statute, it required for the defendant to show the existence of a mental disease or defect relevant to an element of the offense. *Ibid*, *see also State v. Delibero*, 149 *N.J.* at 100-101.

However, in *Humanik v. Beyer*, 871 *F.*2d 432, 441-43 (3d Cir.), *cert. denied*, 493 *U.S.* 812, 110 *S.Ct.* 57 (1989), the United States Court of Appeals for the Third Circuit ruled that imposing such a burden on a defendant violated federal due-process requirements. The Third Circuit held that such a burden impermissibly imposed a "filter" that relieved the burden of the state to prove every element of the crime. *Id.* at 443; *see also State v.* Moore, 122 N.J. 420, 431 (1991); State v. Oglesby, 122 N.J. 522, 528 (1991).

Subsequently, the Legislature amended the diminished capacity statute. *See N.J.S.A.* 2C:4-2. The current statute does not impose a burden of proof; rather evidence of diminished capacity is admissible "whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense." *N.J.S.A.* 2C:4-2; *see also State v. Delibero*, 149 *N.J.* at 101. Accordingly, New Jersey courts no longer instruct the jury that a defendant asserts an affirmative defense when presenting evidence of diminished capacity. *Id.*; *see also State v. Harris*, 141 *N.J.* at 551.

In *Delibero*, the Supreme Court held that trial courts should explicitly instruct juries that in considering the prosecution's burden to prove every element of an offense beyond a reasonable doubt, the jury must consider all evidence of a defendant's mental state, including that offered as evidence of diminished capacity or of insanity. *Id.* at 106. Thus, when the issue of diminished capacity is raised, the trial court is required to instruct the jury to consider relevant evidence tending to show that the defendant did not have the requisite state of mind to commit the offense that is charged. *State v. Johnson*, 309 *N.J. Super.* at 268.

For cases where a defendant pleads both insanity and diminished capacity and a discussion regarding the proper instructions incorporating these concepts, see State v. Delibero, supra, and State v. Harris, supra. In Harris, the Supreme Court found that it was permissible to instruct the jury that it should consider the insanity defense first before considering the issue of diminished capacity. 141 N.J. at 553-57. As a whole, the jury instructions conveyed to the jury that it had to consider evidence of diminished capacity in relation to the State's burden and was told to ignore evidence of diminished capacity only if it found the defendant not guilty by reason of insanity. Id. at 555-57. In Delibero, the Supreme Court upheld the reverse situation, *i.e.*, an instruction was given which charged the jury to consider diminished capacity first before a determination of insanity. 149 N.J. at 102. The instruction in Delibero was proper because it correctly explained to the jury that it must consider evidence as to a defendant's mental state in determining whether or not the State had proven beyond a reasonable doubt the defendant's mental state in relation to the elements of the crime, regardless of whether the jury believed that the defendant had proven diminished capacity. Id. Thus, whether or not there is evidence of a diminished capacity, the State remains

obligated to prove that the defendant acted with the requisite mental state, and the defendant bears no burden. *State v. Nataluk,* 316 *N.J. Super.* at 343.

Where evidence is presented in support of an insanity defense which also clearly supports a diminished capacity defense, the jury must be charged as such, even where there is no request to charge. See State v. Juinta, 224 N.J. Super. 711, 720 (App. Div.), certif. denied, 113 N.J. 339 (1988); see also State v. Jasuilewicz, 205 N.J. Super. 558, 574-75 (App. Div. 1985), certif. denied, 103 N.J. 467 (1986). A charge will not be given on whether a defendant suffered from a diminished capacity unless there is some evidence that the defendant's mental condition was such that the defendant's ability to form the requisite culpable state is in question. See State v. Oglesby, 122 N.J. at 531; State v. Pitts, 116 N.J. 580, 607-10 (1989); State v. Moore, 113 N.J. 239, 283-84 (1988); see also State v. Reyes, 140 N.J. at 364-65; State v. Kotter, 271 N.J. Super. 214, 221 (App. Div.), certif. denied, 137 N.J. 313 (1994); State v. Watson, 261 N.J. Super. 169, 178 (App. Div. 1992), certif. denied, 133 N.J. 441 (1993); State v. Carroll, 242 N.J. Super. 549, 557 (App. Div. 1990), certif. denied, 127 N.J. 326 (1991); State v. Glover, 230 N.J. Super. 333, 339 (App. Div. 1988), certif. denied, 121 N.J. 621 (1990). Moreover, if the record cannot support a diminished capacity defense, application of the incorrect Breakiron standard may still constitute harmless error. See State v. Reyes, 140 N.J. at 362; State v. Smith, 322 N.J. Super. 385, 397-98 (App. Div.), certif. denied, 162 N.J. 489 (1999); State v. Watson, 261 N.J. Super. at 178-81; State v. Carroll, 242 N.J. Super. at 557.

For cases involving the issue of whether a court should provide a diminished capacity charge, see, State v. Jasuilewicz, 205 N.J. Super. at 574-75 (the trial court's failure to charge the jury on the defense of diminished capacity, in the absence of a request to charge, was error in a murder trial, even though the defendant failed to give pretrial notice required by R. 3:12, because evidence adduced at a hearing on the issue of the defendant's competence to testify at trial clearly indicated that the defendant's mental condition was a crucial issue in the case); State v. Serrano, 213 N.J. Super. 419, 424 (App. Div. 1986), certif. denied, 107 N.J. 102 (1987) (the failure to charge the jury on the defense of diminished capacity was held to be reversible error where the defense expert testified that the defendant suffered from a mental "disease" which rendered the defendant incapable of acting purposely or knowingly and the State's expert testified that the defendant suffered from a mental "disorder" or "dysfunction"); State v. Juinta, 224 N.J.

Super: at 720-25 (because the defendant gave notice of an insanity defense and adduced evidence relevant to his ability to form the requisite mental state, the trial court should have *sua sponte* charged the jury as to diminished capacity even as it applied to an offense with a reckless mental element such as aggravated manslaughter).

C. Sufficiency of Evidence

If there is reasonable doubt as to whether a defendant's mental condition permitted him to form the requisite knowledge or purpose which constitutes an essential element of the crime, the defendant is entitled to an acquittal. *State v. Nataluk*, 316 *N.J. Super.* at 343.

In State v. Sexton, 311 N.J. Super. 70, 88 (App. Div.), aff'd, 160 N.J. 93 (1998), it was held that evidence that the defendant was a special education student with limited mental ability was relevant to the issue of whether the defendant had the requisite reckless mental state. See also State v. Kotter, 271 N.J. Super. at 221-22 (diminished capacity is applicable in cases involving reckless conduct). In State v. Washington, 223 N.J. Super. 367, 375-76 (App. Div.), certif. denied, 111 N.J. 612 (1988), evidence that the defendant suffered from a diminished capacity was relevant in determining whether it was appropriate to charge manslaughter as a lesser included offense; although the defendant's diminished capacity may have prevented him from acting purposely, he may have retained an awareness and control over his actions to have acted recklessly.

VI. PROCEEDINGS NECESSARY UPON AN ACQUITTAL BY REASON OF INSANITY

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

N.J.S.A. 2C:4-8a provides that after a defendant has been acquitted by reason of insanity, the court must order a psychiatric examination of the defendant by a psychiatrist of the prosecutor's choice. If the examination cannot take place because of the unwillingness of the defendant to participate, the court must proceed as provided in *N.J.S.A.* 2C:4-5c. *N.J.S.A.* 2C:4-8a. The defendant may also be examined by a psychiatrist of his own choice. *Id.*

The disposition of the defendant shall be made by the court in the following manner:

1. If the court finds that the defendant may be released without danger to the community or himself

without supervision, the court must release the defendant; or

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

3. If the court finds that the defendant cannot be released with or without supervision or conditions without posing a danger to the community or to himself, the court must commit the defendant to a mental health facility, and is to be treated as a person civilly committed. *N.J.S.A.* 2C:4-8b; *see also Kansas v. Hendricks*, 521 *U.S.* 346, 363, 117 *S.Ct.* 2072, 2083 (1997) (the state may take measures to restrict the freedom of the dangerously mentally ill, which is an historic and legitimate non-punitive government objective).

If a defendant is committed to a mental health facility by reason of insanity or pursuant to *N.J.S.A.* 2C:4-6 (*i.e.*, a defendant who lacks the fitness to proceed), the prosecuting attorney maintains the right to appear and be heard at all proceedings, including any periodic review hearing. *N.J.S.A.* 2C:4-8b(3); *see In the Matter of the Commitment of Calu*, 301 *N.J. Super.* 20, 31 (App. Div. 1997).

The State has the burden to prove the need for a defendant's continued commitment under the law governing civil commitment, which shall be established by a preponderance of the evidence during the maximum period of imprisonment that could have been imposed, as an ordinary term of imprisonment, for any charge on which the defendant has been acquitted by reason of insanity. N.J.S.A. 2C:4-8b(3); In re Commitment of W.K., 159 N.J. 1, 4 (1999); see also In the Matter of Commitment of Edward S., 118 N.J. 118, 130, n. 4 Expiration of the maximum period of (1990).imprisonment is to be calculated by crediting the defendant with any time spent in confinement for the charge(s) on which the defendant has been acquitted by reason of insanity. N.J.S.A. 2C:4-8b(3); see also In re Commitment of W.K., 159 N.J. at 6 (in cases involving multiple offenses, a defendant may remain under commitment for the maximum ordinary aggregate terms that he would have received if convicted of the offenses charged, taking into account the usual principles of sentencing, e.g., merger). Moreover, a person committed by reason of insanity may not be confined in a penal or correctional institution. N.J.S.A. 2C:4-8.

The underlying decision in both State v. Krol, 68 N.J. 236 (1975) and State v. Fields, 77 N.J. 282 (1978) was that a person who is committed pursuant to a verdict of not guilty by reason of insanity ("NGI committee"), was entitled to the same commitment proceedings as a civil committee. Matter of Commitment of Edward S., 118 N.J. at 141. In Krol, the Court found that an NGI committee was entitled to a determination of dangerousness as a condition to initial confinement. Matter of Commitment of Edward S., 181 N.J. at 141; State v. Krol, 68 N.J. at 257. In Fields, the Court held that an NGI committee was entitled to automatic period review hearings. Matter of Commitment of Edward S., 118 N.J. at 141; State v. Fields, 77 N.J. at 293. Moreover, it is within the sound discretion of the reviewing judge to determine the degree of restraints. Matter of Commitment of Calu, 301 N.J. Super. at 29-30; see also State v. Fields, 77 N.J. at 303.

Although the Supreme Court held that civil and NGI committees must be afforded the same proceedings, it "emphatically stressed that in fact they must be treated differently." Matter of Commitment of Edward S., 118 N.J. at 141. NGI committees are to be afforded "substantial equality" with civil committees rather than absolute equality of treatment. Id. at 128-29; see also State v. Fields, 77 N.J. at 297; State v. Krol, 68 N.J. at 250-51, 253. For instance, in terms of continued commitment, for a civil committee, the burden of proof is clear and convincing evidence, while for an NGI committee, it is a preponderance of the evidence. In re Commitment of W.K., 159 N.J. at 4 (citing Matter of Commitment of Edward S., 118 N.J. at 130, n. 4); see also Foucha v. Louisiana, 504 U.S. 71, 75-76, 112 S.Ct. 1780, 1783 (1992); Jones v. United States, 463 U.S. 354, 363, 103 S.Ct. 3043, 3051 (1983).

B. Release of Persons Committed by Reason of Insanity (*N.J.S.A.* 2C:4-9)

A committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous; however, may be held as long as he is both mentally ill and dangerous, but no longer. *Foucha v. Louisiana*, 504 *U.S.* at 77 (citing in part *Jones v. United States*, 463 *U.S.* at 368); *see also O'Connor v. Donaldson*, 422 *U.S.* 563, 573-77, 95 *S.Ct.* 2486, 2492-94 (1975) (as a matter of due process it is unconstitutional for a state to continue to confine a harmless, mentally ill person).

If a person has been committed pursuant to *N.J.S.A.* 2C:4-8 or 2C:4-6, and if the Commissioner of Human Services, or his designee, or the superintendent of the institution to which the person has been committed, is of

the view that the person may be discharged or released on condition without a danger to himself or others, or that he may be transferred to a less restrictive setting for treatment, the commissioner or the superintendent shall make an application for the discharge or release of such person in a report to the court, and shall also transmit a copy of the application and the report to the prosecutor, defense counsel, and the court. *N.J.S.A.* 2C:4-9a. The court may, in its discretion, appoint at least two psychiatrists, neither of whom may be on the staff of the hospital to which the defendant had been committed, to examine the person and to report their opinion as to the person's mental condition within 30 days, or within a longer period if deemed necessary by the court. *Id.*

The court shall then hold a hearing to determine whether the committed person may be safely discharged, released on condition without danger to himself or others, or be treated as a civil committee. *N.J.S.A.* 2C:4-9b. The hearing shall be held upon notice to the prosecutor and with the prosecutor's opportunity to be heard. *Id.; see also Matter of Commitment of Calu*, 301 *N.J. Super.* at 31. The case would be reviewed as provided by the law governing civil commitment. *N.J.S.A.* 2C:4-9d; *see also R.* 4:74-7.

The committed person may also make an application for his discharge or release to the court; the procedure is the same as that prescribed above in the case of an application by the commissioner. *N.J.S.A.* 2C:4-9c.

In the Matter of Commitment of Edward S., 118 N.J. at 120, the Supreme Court applied the reasoning regarding the differences between civil and NGI commitment, and concluded that the statutory mandate requiring that periodic review hearings be held in camera for civil committees does not apply to NGI committees. The Court held in *Edward S.* that such hearings for NGI murder committees shall be open to the public, unless good cause to the contrary is shown. Id. at 147; see also R. 3:19-2. For NGI murder committees, good cause presumptively exists, which places the burden on the committee to show that the hearing should be held in camera. Matter of Commitment of Edward S., 118 N.J. at The Court further noted that this ruling only 151. applies to hearings that might result in the release of the Id. at 138, n. 11; see also Matter of committee. Commitment of Calu, 301 N.J. Super. at 26. As explained by the Court, the primary reason for this rule is to preserve public confidence in the criminal justice system. Matter of Commitment of Edward S., 118 N.J. at 138-39.

In the Matter of Commitment of Calu, 301 N.J. Super. at 26, the Appellate Division found that the presumption of open hearings did not apply to periodic review hearings where the issue of release into the community is not a factor. However, the court explained that "release" is not synonymous with and limited to the discharge from an institution. *Id.* In fact, a "release" includes a committee's unescorted access to the community outside the institution. *Id.* In such a case, the committee would have the burden to show that the hearing should be held *in camera. Id.* at 26-27.

Further note, commitment following an acquittal by reason of insanity is an official detention within the meaning of *N.J.S.A.* 2C:29-5a, which defines the crime of escape. *See also State v. Moore*, 192 *N.J. Super.* 437, 441 (App. Div. 1983), *certif. denied*, 96 *N.J.* 271 (1984). Thus, an unauthorized departure from such a detention may be prosecuted as an escape. *Id.* at 441, 443.

C. Statements for Purposes of Examination or Treatment Inadmissible Except on Issue of Mental Condition (*N.J.S.A.* 2C:4-10)

A statement made by a person subjected to a psychiatric or psychological examination or treatment pursuant to N.J.S.A. 2C:4-5, 2C:4-6, or 2C:4-9 for the purposes of such examination or treatment is not admissible against the person in any criminal proceeding on any issue other than that of mental condition. N.J.S.A. 2C:4-10. However, it shall be admissible upon that issue, whether or not it would be deemed a privileged communication. Id. If a statement constitutes an admission of guilt of the crime charged, or an element thereof, it is only admissible where it appears at trial that conversations with the examining psychiatrist or psychologist were necessary to enable the expert to form an opinion as to a matter in issue. Id.

INTENSIVE SUPERVISION PROGRAM (ISP)

(For general rules and provisions, see R. 3:21-10(b)(5) and (E); N.J.S.A. 2C:43-11)

In response to the prison overcrowding crisis, the New Jersey Supreme Court created the Intensive Supervision Program (ISP) in 1983. The Court derived its powers from Article VI, Section II, Paragraph 3 of the New Jersey Constitution. Subsequently, the Chief Justice issued an Order that relaxed *R.* 3:21-10b(1) to permit entry into the program, established a three-judge ISP resentencing panel and approved commencement of the program itself. On July 22, 1983, *R.* 3:21-10b was amended and Paragraph (e), was adopted, effective September 12, 1983 to provide for the establishment of the ISP program. That same year, the Legislature formally approved the Program and allocated operation funds.

In 1993, the Legislature adopted L. 1993, C. 123, § 2, now codified as *N.J.S.A.* 2C:43-11, to clarify ISP eligibility restrictions, as well as procedural matters. The statute currently restricts an inmate from participating in ISP if he: 1) is serving a sentence for a first degree crime; 2) is substantially likely to be involved in organized crime; *see also N.J.S.A.* 2C:44-1a(5); 3) is serving any sentence with statutorily or judicially mandated parole ineligibility; 4) previously completed a program of intensive supervision, or 5) has previously been convicted of a first-degree crime in New Jersey, or in another jurisdiction committed a crime that would constitute a first-degree crime in New Jersey and was released within five years the offense for which he is seeking ISP.

Additionally, inmates serving state prison sentences for violent crimes such as homicide, robbery, aggravated assault and sex offenses are ineligible for ISP participation. Inmates serving sentences for non-violent crimes who have a history of violent or assaultive conduct are also generally excluded. The Program is geared for inmates serving time for non-violent crimes who have no history of violent or assaultive behavior.

The 1993 adoption, however, eliminated the ISP bar against all first or second degree offenders. Certain groups of second degree offenders may participate, absent prosecutorial objection. *N.J.S.A.* 2C:43-11b. The 1993 adoption also provides for victim input in deciding whether or not to sentence the inmate to ISP.

Eligibility and conditional release under ISP can occur only after defendant serves at least 60 days in the state facility. Each defendant will, therefore, have experienced some period of confinement, and will have experienced the deterrent benefit of confinement. Thus, ISP is a sentencing disposition, "albeit a modification of a sentence." *State v. Stewart*, 136 *N.J.* 174, 180 (1994).

For a detailed explanation on the mechanics of ISP, as well as the studies and policies underlying ISP, *see* State v. Clay, 118 *N.J. Super.* at 509, 512-17. (App. Div. 1989).

Procedurally, ISP motions made pursuant to R. 3:21-10(b)(5) are addressed entirely to the sound discretion of the three judge panel assigned to hear them. Because of the nature of the program, there is no administrative or judicial review at the second level of eligibility established under the program, nor any appellate review of the panel's substantive decision. R. 3:21-10(e).

A three-member Screening Board screens applications for the program, interviews applicants and recommends placement to the Resentencing Panel for its review. The Board is composed of a representative of the Department of Corrections, the Director of ISP, and a public member appointed by the Chief Justice.

A Resentencing Panel, consisting of three Superior Court judges, was created to review the ISP application and case plan of those inmates receiving favorable recommendations from the Screening Board. If the Panel determines after a hearing that the defendant is a desirable candidate for ISP, it grants the application for resentencing and adjourns the hearing for 90 days while placing the defendant on recognizance to the community sponsor. The defendant is thereafter expected to adhere to his case plan and to the conditions of ISP. After the 90 day period, the defendant may reapply to the Resentencing Panel for another 90-day release period. If the Panel is satisfied with his progress, it will continue his release pending resentence for a second 90-day period. Successful completion of this period will trigger a resentencing hearing at which defendant will be resentenced pursuant to R. 3:21-10(b) to the original term of incarceration less the time served. Sentence then will be suspended in accordance with 2C:45-1, subject to the defendant's continuing compliance with his plan and ISP conditions. The maximum period of suspension will be the maximum term which was initially imposed or five years, whichever is less, minus credit for time served. All ISP participants must successfully complete a minimum of one year of intensive supervision. Thereafter, they may be transferred from intensive supervision to regular probation supervision or be discharged entirely at the discretion of the Resentencing Panel. All decisions are unanimous by the Resentencing Panel.

The Program provides for solicitation of responses from such sources as the sentencing judge, prosecutor's office, probation office, victim/complainant and ISP officer as to the suitability of the inmates for participation. The prosecutor's office has two opportunities to provide input. Initially, it may respond after a defendant submits an ISP application. Then, the prosecutor's office can respond prior to an ISP Resentencing Panel hearing. At this second opportunity, it will review the exact materials to be relied upon by the Resentencing Panel, including institutional records of the inmate.

The courts do not consider ISP participants to be under custody, because they are free to be in the community, although under strict supervision. Thus, our Supreme Court held that an ISP participant who leaves the State of New Jersey without appropriate authorization is not guilty of "escape" under *N.J.S.A.* 2C:29-5. *State v. Clay*, 118 *N.J.* 251 (1990), *aff* g 230 *N.J. Super.* 509, 530 (App. Div. 1989). Rather, the Legislature currently classifies unauthorized leave from the state while on ISP as a third-degree crime under *N.J.S.A.* 2C:29-5b, the statute which proscribes parole violations.

INTERSTATE AGREEMENT ON DETAINERS (I.A.D.)

(See also, EXTRADITION, this Digest)

I. CONSTRUCTION, PURPOSE AND NATURE OF THE AGREEMENT

The Interstate Agreement on Detainers (*N.J.S.A.* 2A:159A-1 et seq.) was adopted to expeditiously dispose of outstanding charges, indictments, informations or complaints pending against persons imprisoned in another state in order to implement the right to a speedy trial and to minimize interference with a prisoner's treatment and rehabilitation. The IAD is a compact entered into by 48 States, the United States, and the District of Columbia to establish procedures for resolution of one state's outstanding charges against a prisoner of another state. See N.J.S.A. 2A:159A-1 et. seq; State v. Millett, 272 N.J. Super. 68, 102 (App. Div. 1994). A state seeking to bring charges against a prisoner in another state's custody begins the process by filing a detainer, which is a request by the state's criminal justice agency that the institution in which the prisoner is housed hold the prisoner for the agency or notify the agency when release is imminent. Fex v. Michigan, 507 U.S. 43, 44, 113 St. Ct. 1085, 122 L.Ed.2d 406 (1993). After a detainer has been lodged against him, a prisoner may file a "request for a final disposition to be made of the indictment, information, or complaint." N.J.S.A. 2A:159A-3a. Upon such a request, the prisoner "shall be brought to trial within one hundred eighty days," "provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Ibid.

Resolution of the charges can also be triggered by the charging jurisdiction, which may request temporary custody of the prisoner for that purpose. N.J.S.A. 2A:159A-4a. In such a case, "trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state," subject again to continuances for good cause shown in open court. N.J.S.A. 2A:159A-4c. If a defendant is not brought to trial within the applicable statutory period, the IAD requires that the indictment be dismissed with prejudice. N.J.S.A. 2A:159A-5c. The IAD was drafted to remedy problems associated with long-standing and dormant detainers such as stricter custodial supervision, loss of favorable work assignments, and general uncertainty about one's future freedom. State v. Moreau, 287 N.J. Super. 179, 186-187 (Law Div. 1995).

It is important to note that the IAD does not apply to all cases where there are outstanding charges. Rather, a formal detainer must be filed by a state against an inmate before the inmate may invoke the provisions of the IAD. *See United States v. Mauro*, 436 *U.S.* 340, 98 *S.Ct.* 1834, 56 *L.Ed.*2d 329 (1978). A "detainer" contemplated by the IAD is "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." *Carchman v. Nash*, 473 *U.S. 7*16, 729, 105 *S.Ct.* 3401, 87 *L.Ed.*2d 516 (1985).

The IAD does not require a state to file a detainer against a prisoner in the first instance. The purpose of the statute is not to ensure the speedy disposition of every charge, or even of those charges which potentially could form the basis for a detainer being lodged. *State v. Johnson,* 269 *N.J. Super.* 276, 287 (App. Div. 1993), *certif. denied,* 136 *N.J.* 296 (1994) (holding that New Jersey did not violate the IAD when it abandoned a previous detainer and no detainer existed when defendant attempted to assert his rights under the IAD).

Since the purpose of the IAD is remedial, it should be accorded liberal construction in favor of prisoners within its purview. *State v. Lippolis*, 101 *N.J. Super.* 435 (Law Div. 1968), *aff'd*, 107 *N.J. Super.* 137 (App. Div. 1969), *rev'd o.g.*, 55 *N.J.* 354 (1970).

II. MECHANICS OF THE AGREEMENT

A. Article III

Under Article III, the State must bring a defendant to trial "[w]ithin 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment...." The running of the 180 day period is not triggered by the mere execution and delivery of these documents to the warden or other official having custody of the defendant. Rather, the period begins to run only upon actual receipt of the notice and request by the prosecutor and the court. State v. Ternaku, 156 N.J. Super. 30 (App. Div. 1978), certif. denied, 77 N.J. 478 (1978). Defendant, however, is neither responsible for the inaction of prison officials nor for administrative failures, and the 180 day period should commence shortly after the request is made by defendant. State v., Wells, 186 N.J. Super. 497 (App. Div. 1982); Cf. N.J.S.A. 2A:159A-3b (appropriate corrections official shall promptly forward defendant's written notice and request to final disposition). Nor will defendant be denied relief under Article III where he was misled and

given inaccurate information regarding the action he should take with respect to his outstanding detainer by the county prosecutor's office, acting upon instructions by the court, and defendant relied on their advice and followed their instructions carefully to his detriment. Carchman v. Nash, supra. In any event, the 180 day period provided by this section for commencement of trial after proper request cannot be triggered earlier than defendant's sentencing date, although defendant can provide notice to the appropriate authorities before that time, and his demand for speedy disposition of the charges is then effective as of his sentencing. Id. New York v. Hill, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000), holds that a defense counsel's agreement to a trial date outside the IAD period bars the defendant from seeking dismissal on the ground that trial did not occur within that period. A defendant must give notice or make a demand for trial as required by N.J.S.A. 2A:159A-3a. Such notice and demand is mandatory to invoke the agreement provisions requiring the trial to commence before the prisoner's return to the original place of confinement. N.J.S.A. 2A:159A-3d. The procedures for compliance with the IAD are to be strictly complied. See State v. Stiles, 233 N.J. Super. at 306.

Article III provides for the tolling of the 180 day period if a continuance is granted or if defendant is unavailable to stand trial. The statute does not expressly limit the time within which a continuance may be granted to this 180 day period, but provides "[t]hat for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance" at any time prior to the actual entry of an order dismissing the indictment pursuant to Article V (N.J.S.A. 2A:159A-5c). See State v. Lippolis, 55 N.J. 354 (1970), rev'g on dissent, 107 N.J. Super. 137, 147 (App. Div. 1969). Cf. State v. West, 79 N.J. Super. 379 (App. Div. 1963) (sections of the Detainer Agreement providing for dismissal of indictments are not selfexecuting: the interstate agreement contemplates a judicial proceeding). The question of whether good cause exists for a continuance must be resolved from a consideration of the totality of circumstances in the particular case upon the background of the considerations which motivated the Agreement as expressed in Article 1 (N.J.S.A. 2A:159A-1). State v. Lippolis, supra; Cf. State v. Johnson, 188 N.J. Super. 416 (App. Div. 1982) (Lippolis standard applies to N.J.S.A. 2A:159A-4c as to what circumstances will constitute "good cause" for Moreover, despite demand for a continuance). disposition by a defendant the 180 day period is properly tolled with respect to New Jersey charges during the

period that defendant was imprisoned in another state pending resolution of those charges pursuant to N.J.S.A. 2A:159A-6a. State v. Binn, 196 N.J. Super. 102 (Law Div. 1984). In State v. Binn, 208 N.J. Super. 443 (App. Div. 1986), certif. denied, 104 N.J. 471 (1986), modifying 196 N.J. Super. 102 (Law Div. 1984), the Appellate Division held that it cannot be suggested that a defendant can request speedy trial in various jurisdictions simultaneously and then complain that his Sixth Amendment rights are violated by the absence of contemporaneous dispositions. IAD prescriptions requiring defendant to be brought to trial within 180 days after delivery to the prosecutor in receiving state of notice of place of imprisonment and request for final disposition, did not apply after defendant was released from prison in sending state. State v. Rodriguez, 239 N.J. Super. 455 (App. Div.), certif. denied, 122 N.J. 321 (1990). Outstanding charges pending in a sending state renders a defendant "unable to stand trial" in the receiving state and, thus, will toll statutory time period within which defendant must be brought to trial under IAD. State v. Cook, 330 N.J. Super. 395 (App. Div.), certif. denied, 165 N.J. 486 (2000); State v. Miller, 299 N.J. Super. 387 (App. Div. 1997).

B. Article IV

Under Article IV, the State must bring a defendant to trial "[w]ithin 120 days of the arrival of the prisoner in the receiving State...."

Article IV provides for the tolling of the 120 day period if the defendant is unavailable to stand trial or a continuance is granted pursuant to *N.J.S.A.* 2A:159A-4c. The question of whether good cause exists for the continuance of a criminal prosecution beyond 120 days after defendant's arrival in this state pursuant to the Interstate Agreement on Detainers must be resolved in consideration of the totality of the circumstances in the particular case and background of considerations which motivated the Detainer Agreement. *State v. Johnson*, 188 *N.J. Super.* 416 (App. Div. 1982).

Article IV requires a waiting period of 30 days after receipt by the appropriate authorities in the custodial state of a request for temporary custody during "[w]hich period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner" pursuant to *N.J.S.A.* 2A:159A-4a. If the prisoner does not move to contest the legality of his delivery within this period, he waives his right to do so, since under the statutory scheme the filing of a detainer is designed to inform a prisoner that criminal charges have been brought against him in another state, and the 30 day period affords a reasonable time within which to contest the legality of his delivery. State v. Thompson, supra; Cf. State v. Masselli, 43 N.J. 1 (1964) (the 30 day period is measured from the time of the warden's receipt of request for custody). In overruling *Thompson* in part, however, the Supreme Court held in Cuyler v. Adams, 449 U.S. 433 (1981), that whereas a prisoner initiating the transfer procedure under Article III waives rights which the sending state affords persons being extradited, including rights provided under the Extradition Act, a prisoner's extradition rights are preserved when the receiving state seeks his involuntary transfer under Article IV of the Detainer Agreement. Cf. N.J.S.A. 2A:160-18 (right to a hearing).

III. CUSTODIAL CREDIT PURSUANT TO R. 3:21-8

R. 3:21-8 provides "[t]he defendant shall receive credit on the term of a custodial sentence for any time he has served in custody in jail or in a state hospital between his arrest and the imposition of sentence."

Where a prisoner suffers no additional restriction on his freedom as a result of a detainer filed against him, he is not entitled to credit on a subsequent sentence.

Unexpressed in R. 3:21-8, but the key to its application, is the requirement that the presentence confinement be "directly attributable to the particular offenses" for which sentence is being imposed. State v. Allen, 155 N.J. Super. 582, 584 (App. Div. 1979). In other words, a defendant may not receive credit for time served attributable to an unrelated offense, even though that confinement occurs between arrest and sentencing for the offense in question. State v. Lynk, supra; see, e.g., State v. Allen, supra (no credit for confinement in out-ofcounty New Jersey jail while awaiting disposition of unrelated charges pending there), and State v. Council, 137 N.J. Super. 306, 308 (App. Div. 1975) (no credit for confinement in federal penitentiary where defendant serving federal sentence). See also, State v. Jones, 184 N.J. Super. 626 (Law Div. 1982) (no credit for confinement where bail not revoked and no warrant or detainer prevented defendant's release with respect to those charges). See also State v. Mercadante, 299 N.J. Super. 522, 534 (App. Div.) certif. denied, 150 N.J. 26 (1997) (defendant not entitled to credit for time attributable to federal probation but was entitled to credit for custodial time after expiration of federal parole sentence); State v. Black, 153 N.J. 438, 456 (1998). Detention pursuant to IAD does not entitle a defendant to jail credits where the incarceration was attributable to a sentence in another State, not to indictments in State. *State v. Dela Rosa*, 327 *N.J. Super.* 295, 297 (App. Div. 2000).

A defendant is entitled to credit, however, where he suffers additional restrictions on his freedom as a result of a detainer filed against him.

Where defendant was detained in a foreign penal institution after his latest release date as the result of a New Jersey detainer, it was held, upon his subsequent New Jersey conviction, that he was entitled to credit on his sentence for time spent in foreign custody whether the original action taken by New Jersey officials found its source in the robbery charges or the violation of parole charge then pending against defendant. State v. Beatty, 128 N.J. Super. 488 (App. Div. 1974). However, it has been held that a detainer based on a probation violation does not fall within the ambit of Article III of the Detainer Agreement. Carchman v. Nash, supra. In any event, a defendant resisting extradition to New Jersey cannot be denied credit for time served in the foreign jurisdiction since such denial would chill his constitutional right to contest extradition. State v. Johnson, 167 N.J. Super. 62 (App. Div. 1979), certif. den. 87 N.J. 419 (1981).

(For additional cases and text concerning the application of this rule, *see also* **SENTENCING** and **EXTRADITION**, this Digest.)

IV. SPEEDY TRIAL AND PROCEDURAL RIGHTS

A. Speedy Trial

The 180 day period encompassed within Article III of the Detainer Agreement, requiring dismissal of a criminal prosecution for the state's failure to bring defendant to trial within 180 days of his formal request therefore, is merely the statutory analogue to the date fixed by the court in nonstatutory cases for trial of an indictment on demand of defendant for a speedy trial. *State v. Lippolis*, 107 *N.J. Super.* 137 *(App. Div. 1969), rev'd o.g.*, 55 *N.J.* 354 (1970). The right to a speedy trial as guaranteed by the State Constitution is the right to move for such a trial and to have the indictment dismissed after the state fails to proceed at a time for trial fixed by the court. *Id.*

In *State v. Holmes,* 214 *N.J. Super.* 195 (App. Div. 1986), the State appealed from an order dismissing the indictment returned against defendant on the basis that the State failed to comply with *N.J.S.A.* 2A:159A-3a.

The Appellate Division, in reversing the trial court, noted that it was clear that an appropriate analysis for determining whether the indictment was properly dismissed under Article III involves a two-part test. First, if the fault lies with one of the jurisdictions involved, then substantial compliance by defendant with Article III requirements is sufficient. Second, even if substantial compliance is acceptable, it must still be determined whether defendant's actions reach such a level. Letters addressed to a Deputy Attorney General of New Jersey and a habeas petition, in which defendant specifically eschewed any intent to resort to I.A.D. remedies, could not be construed as a request by defendant under the I.A.D. for final disposition of his case, nor did either the letters or habeas petition constitute substantial compliance with the procedural requirements of Article III. Moreover, with regard to Articles IV and V of the I.A.D., the State made reasonable efforts to obtain custody of defendant, which efforts were frustrated by defendant's actions, and thus the State did not violate the time constraints imposed by those articles.

In any event, habeas corpus will not lie for an alleged violation of the 180 day period set forth in Article III where trial is held less than a month after the expiration of that time period since such relief, if granted, would trivialize the writ. *Casper v. Ryan*, 822 *F*.2d 1283 (3 Cir. 1987).

B. Procedural Rights

The Detainer Agreement does not eliminate a prisoner's rights provided by the Uniform Extradition Act, *N.J.S.A.* 2A:160-1 *et seq.* A prisoner may be transferred under Article IV of the Detainer Act only after being afforded an opportunity for a hearing as provided in the Extradition Act. *Adams v. Cuyler*, 592 *F.*2d (3d Cir. 1979), *aff'd sub nom. Cuyler v. Adams*, 449 *U.S.* 433 (1981).

United States v. Mauro, 436 U.S. 340 (1978), in which the Supreme Court held that a writ of habeas corpus ad prosequendum issued by a federal district court is not a "detainer" for purposes of the IADA although, when preceded by a proper detainer, the writ can serve as a "written request for temporary custody" which, if honored, will trigger the speedy trial and anti-shuttling provisions of the IADA, does not apply retroactively under the newly announced rule of *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987), since, unlike *Griffith*, a violation of the IAD is not an infringement of a constitutional right. *Diggs v. Owens*, 833 F.2d 439 (3 Cir. 1987), *cert. denied*, 485 U.S. 979, 108 S.Ct 1277 (1988).

INTOXICATION

I. AS A DEFENSE TO CRIME

Intoxication of the actor is not a defense unless it negatives an element of the offense. *N.J.S.A.* 2C:2-8a; *State v. Cameron*, 104 *N.J.* 42, 51 (1986).

To satisfy the statutory requirement to negative an element of the offense, intoxication must be of such a degree that it causes "prostration of the faculties" to render the actor incapable of forming the requisite intent to commit the crime. *State v. Mauricio*, 117 *N.J.* 402, 418-19 (1990); *State v. Cameron*, 104 *N.J.* 42, 54 (1986). The factors to consider to determine if intoxication was sufficient for prostration of the faculties include the quantity of intoxicant consumed, the period of time involved, the actor's conduct as perceived by others, the odor of alcohol or other intoxicating substances, the results of any tests to determine intoxication and its level, and the actor's ability to recall significant events. *State v. Cameron*, 104 *N.J.* at 54.

There is no legal distinction between intoxication induced by drugs or by alcohol. *N.J.S.A.* 2C:2-8e(1); *State v. Sette,* 259 *N.J. Super.* 156, 173-74 (App. Div.), *certif. denied,* 130 *N.J.* 597 (1992).

The involuntary intoxication defense has no application to the motor vehicle violation of driving while intoxicated because the charge of drunk driving arises under the Motor Vehicle Act and not the Code of Criminal Justice. Moreover, driving while intoxicated is a strict liability offense and intoxication can only be a defense where voluntary conduct is an element of the offense. *State v. Hammond*, 118 *N.J.* 306 (1990).

Pursuant to R. 3:12, a defendant who intends to claim the defense of intoxication must serve written notice on the prosecutor no later than seven days before the arraignment/status conference and, if defendant requests or has received discovery, shall furnish the prosecutor with discovery pertaining to the defense at that time.

A. Voluntary Intoxication

"Self-induced" or "voluntary" intoxication is intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime. *N.J.S.A.* 2C:2-8e(2).

Self-induced or voluntary intoxication may be a defense only to crimes requiring either purposeful or knowing mental states. When the requisite culpability is purposeful or knowing, evidence of intoxication is admissible to disprove the requisite mental state. *State v. Cameron*, 104 *N.J.* 42, 52-53 (1986).

Voluntary intoxication can reduce murder to aggravated manslaughter or manslaughter. *State v. Mauricio*, 117 *N.J.* 401, 418 (1990); *State v. Warren*, 104 *N.J.* 571, 577 (1986).

Self-induced or voluntary intoxication is not a defense to crimes predicated on any degree of recklessness or negligence. *State v. Bey*, 112 *N.J.* 123, 144-45 (1988); *State v. Warren*, 104 *N.J.* 571, 576-80 (1986). When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial. *N.J.S.A.* 2C:2-8b.

Voluntary intoxication was evidence of extreme indifference to human life to support a conviction of aggravated manslaughter. *State v. Bogus*, 223 *N.J.* 409, 419 (App. Div.), *certif. denied*, 111 *N.J.* 567 (1988).

Where a diagnosed mental condition required ingestion of prescription medication which, when combined with alcohol, affected cognitive abilities, it was the combination of drugs and alcohol, not the mental condition, which caused the "highly intoxicated state." A defendant cannot under these circumstances avail himself of a charge on the defense of diminished capacity to contravene the Legislative prohibition on self-induced or voluntary intoxication as a defense for a crime premised on recklessness or negligence. *State v. Kotter*, 271 *N.J. Super.* 214, 219 (App. Div.), *certif. denied*, 137 *N.J.* 313 (1994).

B. Pathological Intoxication

"Pathological" intoxication means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible. *N.J.S.A.* 2C:2-8e(3). It is a severe intoxication which the actor had no reason to expect and which happened because of some underlying organic

condition. *State v. Holzman*, 176 *N.J. Super.* 590 (Law Div. 1980).

Pathological or involuntary (not self-induced) intoxication is a complete defense which absolves a defendant from criminal liability. It is an affirmative defense so that the defendant has the burden to prove by clear and convincing evidence that the intoxication was involuntary in that it was either not self-induced or was unexpected in nature and that the level of intoxication rose to the M'Naughten standard, that is, the level of the intoxication was such that it prevented the defendant from knowing the nature and quality of his acts or from knowing that those acts were wrong. *State v. Sette*, 259 *N.J. Super.* 156, 169-71 (App. Div.), *certif. denied*, 130 *N.J.* 597 (1992).

There is no pathological intoxication defense when intoxication results from the combination of voluntary ingestion of illegal intoxicants, or of legal intoxicants from which the actor should reasonably expect an adverse reaction, such as an overdose, or both, and a pathological hypersensitivity to those intoxicants. *State v. Sette*, 259 *N.J. Super*. 156, 179 (App. Div.), *certif. denied*, 130 *N.J.* 597 (1992).

II. JURY CHARGE AND ITS BASIS

Jury charge on intoxication is required only when facts "clearly indicate" a rational basis to conclude that defendant suffered from a "prostration of faculties" to render him incapable of forming the requisite mental state to commit the crime. *State v. Mauricio*, 117 *N.J.* 402, 418-19 (1990); *State v. Cameron*, 104 *N.J.* 42, 53-56 (1986).

When intoxication is an issue, the jury must be instructed how the defense relates to each charge. Therefore, where the court instructs the jury on voluntary intoxication as a defense to a charge of knowing and purposeful murder, it must also instruct the jury that voluntary intoxication is not a defense to aggravated manslaughter or manslaughter. To determine whether defendant consciously disregarded a substantial and unjustifiable risk, the jury must view defendant's conduct objectively, as if he were sober. *State v. Warren*, 104 *N.J.* 571, 577-78 (1986).

The trial court correctly refused to instruct on intoxication where the facts demonstrated that murder defendant was not only able to function during the hour preceding the murder, but also to prepare for the homicide. *State v. Mauricio*, 117 *N.J.* 402, 418-20 (1990).

There was no error in refusing to give an intoxication charge where expert testified that capital murder defendant was "a drug-dependent person who on [the day of the murder] had sunk into a delusional state," and there was evidence that defendant had stolen and used a gram of methamphetamine on the day of the crime, but where there was no evidence of intoxicant-induced prostration of faculties on the murder date. *State v. Zola*, 112 *N.J.* 384, 423-25 (1988).

Evidence of heavy drinking, without more, does not warrant an intoxication instruction. Where witness testified that defendant did not appear to be intoxicated, where defendant's testimony reflected a clear and detailed recollection of events, and where there was no expert testimony about the probable effect of the alcohol defendant had consumed, the trial court did not err in not giving the charge *sua sponte. State v. Micheliche,* 220 *N.J. Super.* 532 (App. Div.), *certif. denied,* 109 *N.J.* 40 (1987).

Trial court properly refused an intoxication charge where defendant had consumed less than a pint of wine and her trial testimony, which containing conclusory statements as to her own alleged intoxication, reflected explicit and specific recall of all the details of the assault as she explained she allegedly acted in self-defense. *State v. Cameron*, 104 *N.J.* 42 (1986).

Where the record in a murder prosecution indicated that defendant shared a half pint of vodka with her cofelon prior to the murder, that she had total recall of the circumstances surrounding the killing, and that she went back to the car for another drink to regain her initial nerve, *sua sponte* charge on intoxication was not warranted. The court found a logical inconsistency for defendant, who claimed that she was so intoxicated that she could not form the intent to kill, to make the rational decision to take another drink because she was afraid of what she was doing and had to get her "nerves back up." *State v. Moore*, 178 *N.J. Super.* 417 (App. Div.), *certif. denied*, 87 *N.J.* 406 (1981). I. OFFENSES IN THE SAME INDICTMENT OR ACCUSATION

A. Permissive joinder of offenses

Joinder of two or more offenses in the same indictment or accusation is permitted, but not required, if the offenses are "of the same or similar character" or based on the same act or transaction connected together or constituting parts of a common scheme or plan. *R.* 3:7-6. *See State v. Morton*, 155 *N.J.* 383, 451(1998).

R. 3:15-1(a) authorizes joinder of two or more indictments or accusations if the offenses and the defendants, if there are 2 or more, "could have been joined in a single indictment or accusation".

B. Mandatory Joinder of Offenses

Two or more offenses shall be joined in the same indictment if the offenses are based upon "the same conduct" or arise "from the same episode" and if such offenses are known to the appropriate prosecuting attorney at the time of the commencement of the trial and are within the jurisdiction and venue of a single court. *R. 3:15-1(b); N.J.S.A.* 2C:1-8b. *See State v. Catanoso,* 269 *N.J. Super.* 246, 272 (App. Div.), *certif. denied,* 134 *N.J.* 563 (1993) (although court rule and statute have slightly different terminology, there is no substantive difference when applying them).

The genesis of this statute and rule is *State v. Gregory*, 66 *N.J.* 510 (1975). The purposes of mandatory joinder are not grounded upon constitutional considerations, but upon notions of fundamental fairness, economy, and reasonable expectations. *State v. Yoskowitz, 116 N.J.* 679, 704-07 (1989); *State v. Godfrey,* 139 *N.J. Super.* 135, 141 (App. Div.), *certif. denied,* 73 *N.J.* 40 (1976).

For purposes of mandatory joinder, the determinative question is "whether defendant's criminal activity constituted criminal offenses based on the same conduct, or arising from the same criminal episode." *State v. Catanoso*, 269 *N.J. Super.* at 273. In addressing this issue, courts should apply a flexible approach considering the nature of the offenses, the time and place, whether the evidence submitted on one charge is necessary or sufficient to convict on another, whether one indictment is an integral part of a larger scheme, the intent of the accused, and the consequences of the criminal actions. *Ibid.; State v. Colbert*, 245 *N.J. Super.* 53, 58 (App. Div. 1990).

Offenses involving separate and distinct incidents generally do not constitute "same conduct" for purposes of mandatory joinder. *State v. Pillot*, 115 *N.J.* 558 (1989) (six separate robberies against six separate victims in six different locations over a nine-week period did not constitute "same conduct"); *State v. Catanoso, supra* (separate acts of conspiracy and bribery against different victims in different locations over a period of years did not constitute "same conduct").

R. 3:15-3(a)(1) requires joinder of non-indictable offenses with indictable offenses "based on the same conduct or arising from the same episode," except as provided in paragraph (b). *State v. Capak*, 271 *N.J. Super.* 397, 404 (App. Div.), *certif. denied*, 137 *N.J.* 164 (1994).

C. Severance of Offenses

R. 3:15-2(b) vests a trial court with discretion to order separate trials if joinder would unfairly prejudice a defendant. *State v. Keys*, 331 *N.J. Super.* 480 (Law Div. 1998), *aff'd* 331 *N.J. Super.* 429 (App. Div. 2000). The rule states in pertinent part that "[i]f for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses . . . in an indictment or accusation the court may order an election or separate trial of counts. . . or direct any other appropriate relief."

Central to deciding whether defendant's right would be prejudiced by joinder is "whether, assuming the charges were tried separately, evidence of the offense sought to be severed would be admissible under Evidence *R*. 55 [now *N.J.R.E.* 404(b)] in the trial of the remaining charges." State v. Urcinoli, 321 N.J. Super. 519, 541 (App. Div.), certif. denied, 162 N.J. 132 (1999); see also State v. Morton, 155 N.J. at 451; State v. Oliver, 133 N.J. 141, 150-51 (1993); State v. Pitts, 116 N.J. 580, 599-603 (1989); State v. Alfano, 305 N.J. Super. 178 (App. Div. 1997). If the evidence would be admissible at both trials, then joinder is appropriate because "a defendant will not suffer any more prejudice in a joint trial then he would in separate trials." State v. Urcinoli, 321 N.J. Super. at 541; State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div.), certif. denied, 94 N.J. 531 (1983). Stated in the alternative, if the evidence that would be presented at one trial would be inadmissible at the second trial, severance is appropriate. State v. Chenique-Puey, 145 N.J. 334, 343 (1996).

In *Chenique-Puey*, the Supreme Court reversed a decision not to sever a contempt count (stemming from a violation of a domestic violence order) from a terroristic threats count. In that case, the Court set forth the procedure to be followed by trial courts when trying sequentially charges of contempt of a domestic-violence restraining order and of an underlying criminal offense when the charges arise from the same criminal episode. *Id. at* 343.

D. Time for Making a Motion for Severance

A motion for severance of counts of an indictment must be made pursuant to R. 3:10-2, unless the court, for good cause shown, enlarges the time. R. 3:15-2(c).

II. DEFENDANTS

Joinder of defendants in a criminal trial is governed by *R.* 3:7-7 which provides:

Two or more defendants may be charged in the same indictment or accusation if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. The disposition of the indictment or accusation as to one or more of several defendants joined in the same indictment or accusation shall not affect the right of the State to proceed against the other defendants. Relief from prejudicial joinder shall be afforded as provided by R. 3:15-2.

Under *R.* 3:15-2(a), a court should grant a severance of defendants if it appears that a *Bruton* problem exists, *i.e.*, effective deletions of a codefendant's confession cannot be made. *State v. Buonadonna*, 122 *N.J.* 22, 34 (1991). *R.* 3:15-2(a) sets forth the procedure for the State to follow if two or more defendants are to be jointly tried and the State intends to introduce at trial a confession or admission of one defendant involving any other defendant:

If two or more defendants are to be jointly tried and the prosecuting attorney intends to introduce at trial a statement, confession or admission of one defendant involving any other defendant, the prosecuting attorney shall move before trial on notice to all defendants for a determination by the court as to whether such portion of the statement, confession, or admission involving such other defendant can be effectively deleted therefrom. The court shall direct the specific deletions to be made, or, if it finds that effective deletions cannot practically be made, it shall order separate trials of the defendants. R. 3:15-2(a)

Note that if the prosecuting attorney fails to so move before trial, "the court may refuse to admit such statement, confession or admission into evidence at trial, or take such other action as the interest of justice requires." R. 3:15-2(a).

A severance should generally be ordered where spouses are jointly indicted and it appears likely that one will testify against the other. *State v. Ospina*, 239 *N.J. Super.* 645 (App. Div.), *certif. denied*, 127 *N.J.* 321 (1990).

Counsel may waive a defendant's severance rights accorded by this rule without obtaining the defendant's own voluntary waiver. *State v. Buonadonna*, 122 *N.J.* at 35-43.

As a general rule, persons jointly indicted on similar evidence should be tried together. *State v. Sanchez*, 143 *N.J.* 273, 281 (1996); *State v. Brown*, 118 *N.J.* 595, 605 (1990). The ordering of separate trials requires unusual circumstances and the power to do so is entrusted to the sound discretion of the trial court. *Id.* at 603; *State v. Scioscia*, 200 *N.J. Super.* 28, 42 (App. Div. 1985), *certif. den.*, 101 *N.J.* 277 (1985). Review on appeal is limited: denial of such a motion will not result in a reversal absent a clear showing of prejudice or a mistaken exercise of the trial court's discretion. *State v. Sanchez*, 224 *N.J. Super.* 231, 245 (App. Div.), *certif. den.*, 111 *N.J.* 653 (1988). *R.* 3:15-2(b) provides relief from prejudicial joinder:

If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder ... of defendants in an indictment or accusation the court may ... grant a severance of defendants, or direct other appropriate relief.

Prejudice is the touchstone of a *R.* 3:15-2(b) motion for severance. The "danger by association" which underlies all joint trials is not, standing alone, a basis for finding prejudice. *State v. Brown, 118 N.J.* at 605. Less drastic measures than a severance, such as limiting instructions, generally will suffice to cure any risk of prejudice. *State v. Scioscia,* 200 *N.J. Super.* at 43. Prejudice is not found merely because defendants may have a better chance of acquittal in separate trials. *State v. Johnson,* 274 *N.J. Super.* 137, 151 (App. Div.), *certif.* denied, 138 N.J. 265 (1994); State v. Morales, 138 N.J. Super. 225, 231 (App. Div. 1975).

In order for a defendant to be granted severance on the basis of conflicting defenses, he must demonstrate that "the defenses are antagonistic at their core." *State v. Brown.*, 118 *N.J.* at 606. The standard is a "rigorous one." *Id.* at 605-06. The determination of core antagonism focuses on the "mutual exclusivity of defenses," *i.e.,* "the defenses themselves, must force the jury to choose between the defendants' conflicting accounts, and to find only one defendant guilty." *State v. Johnson, 274 N.J. Super. at 151.* It is not enough that the defendants are hostile to one another or their defenses conflict with each other. *Id.* at 151; *State v. Sanchez,* 224 *N.J. Super.* at 247-48.

To obtain a severance based on the anticipated exculpatory testimony of a codefendant, a defendant must show that the codefendant is likely to testify at a separate trial and that the testimony would exculpate State v. Sanchez, 143 N.J. at 286-87; State v. him. DeRoxtro, 327 N.J. Super. 212 (App. Div. 2000). Under the Sanchez test, in order to be entitled to a severance on the basis of a codefendant's anticipated exculpatory testimony, the court must be "reasonably certain that (1) the defendant will call his codefendant as a witness in a separate trial; (2) the codefendant, although unwilling to testify at a joint trial, will testify at a separate trial either prior to or subsequent to his own trial; and (3) that codefendant's proffered testimony will be credible and substantially exculpatory." State v. Sanchez, 143 N.J. at 293. A court reviewing such a motion should focus on "the exculpatory value of the proffered testimony" and not on "whether the defendant requests to be tried before his codefendant." Ibid.

Situations where severance was deemed appropriate involved the admission of evidence at a joint trial which had been suppressed for purposes of use by the prosecution, *State v. Morant*, 241 *N.J. Super.* 121 (App. Div.), *certif. denied*, 127 *N.J.* 323 (1990); and an unwieldy number of defendants (27) who would have been tried together in a single indictment creating a "mega" trial, *State v. Garafola*, 226 *N.J. Super.* 657 (Law Div. 1988).

JUDGMENT

(See also, APPEALS, COURTS and DOUBLE JEOPARDY, this Digest)

A judgment in a criminal matter is prepared and signed by the court and entered by the clerk pursuant to R. 3:21-5. A judgment of conviction should "set forth the plea, the verdict or findings, the adjudication and sentence, a statement of the reasons for such sentence, and a statement of the credits received pursuant to R. 3:21-8" for confinement pending sentence. Id.; see also, *R.* 3:21-6 (judgment of conviction of a corporation). In any conflict between an oral pronouncement of sentence and the written judgment of conviction, the oral pronouncement prevails. State v. Rivers, 252 N.J. Super. 142, 147 (App. Div. 1991). The written judgment merely embodies the determinations and the reasons for them made at the time of sentencing. State v. Womack, 206 N.J. Super. 564, 570 (App. Div. 1985).

R. 1:13-1, however, permits a court to correct clerical mistakes in judgments. Clerical errors may be corrected notwithstanding the pendency of an appeal. See State v. Matlack, 49 N.J. 491, 501-502 (1967), cert. denied, 389 U.S. 1009 (1967) (correction of clerical error so that sentence actually intended by trial court may be given to a defendant does not violate double jeopardy protection); State v. Connors, 129 N.J. Super. 476, 484-485 (App. Div. 1974) (court has power to amend record which misstates real verdict, or judgment which misstates court's opinion). But see, State v. Schneider, 156 N.J. Super. 53 (App. Div. 1978) (trial court does not have power to correct illegal sentence while appeal from the conviction is pending). However, R. 3:21-10(d) was amended in 1981 to permit a trial court to reconsider a sentence during the pendency of an appeal upon notice to the Appellate Division.

With regard to the finality of a defendant's sentence in the context of a Fifth Amendment double jeopardy analysis, jeopardy generally attaches when the defendant begins to serve the sentence. *State v. Dively*, 92 *N.J.* 573, 588 (1983); *State v. Ryan*, 86 *N.J.* 1, 10 (1981). Double jeopardy protection does not prohibit the State from appealing a too lenient sentence, even though the sentence has been partially served, so long as the appeal is authorized by statute. *State v. Roth*, 95 *N.J.* 334, 344-345 (1984). However, "the judgment of conviction cannot embody a sentence which constitutes an increase above that originally imposed by the trial judge, unless an appellate court orders an increase or reconsideration or unless an illegal sentence is subsequently corrected." *State v. Womack, supra,* 206 *N.J. Super.* at 570 (citations omitted).

Generally, a judicial determination is appealable when it is a "final judgment." R. 2:2-1; R. 2:2-3. Exceptions are certain interlocutory determinations that are deemed final, *see* R. 3:28(f) and interlocutory determinations that are appealable by leave of court. *See* R. 2:2-4. For purposes of appeal, a judgment is final when it adjudicates all claims involving all parties, and anything less is interlocutory. Pressler, *Current N.J. Court Rules*, comment 2 on R. 2:2-3 (2000).

Pursuant to N.J.S.A. 2C:46-1, fines, restitution, and other monetary requitals imposed in accordance with the Code are to be entered on the record of docketed judgments, where they "have the same force as ... civil judgment[s] docketed in the Superior Court." N.J.S.A. 2C:46-1a. In addition to specific means of enforcement, for example, through contempt power, the Code authorizes collection of monetary portions of a criminal sentence by the "measures ... authorized for the collection of an unpaid civil judgment entered against [a] defendant in an action of debt." N.J.S.A. 2C:46-2b. Anti-drug profiteering penalties imposed pursuant to N.J.S.A. 2C:35A-1 et seq. and anti-money laundering penalties imposed pursuant to N.J.S.A. 2C:21-23 et seq., likewise, are to be docketed and collected as monetary judgments in accordance with the provisions of N.J.S.A. 2C:46-1 et seq. N.J.S.A. 2C:21-27.6; N.J.S.A. 2C:35A-8.

R. 3:9-2 provides that the court, for good cause shown, may order that a guilty plea in a criminal matter not be used in any civil matter. R. 3:9-2. The purpose of this provision is to avoid the unnecessary trial of a criminal case where a defendant will not plead guilty because of the civil implications of the guilty plea. State v. Haulaway, Inc., 257 N.J. Super. 506, 508 (App. Div. 1992). In State v. Schlanger, 203 N.J. Super. 289 (Law Div. 1985), numerous defendants who pled guilty to racketeering charges involving a long-term, profitable conspiracy sought a no-civil-use order to avoid civil responsibility for their conduct. The court denied defendants' application, concluding that mere avoidance of civil liability is not "good cause," particularly in light of the Legislature's repeatedly expressed concern for crime victims. Id. See also State v. Haulaway, 257 N.J. Super. at 509 ("'good cause' exists for a no-civil-use agreement when such an agreement is necessary to

remove an obstacle to a defendant's pleading guilty to a criminal charge.")

N.J.R.E. 803(c)(22) establishes an exception to the hearsay rule and provides: "evidence of a final judgment against a party adjudging him guilty of an indictable offense ... [is admissible] as against that party, to prove any fact essential to sustain the judgment." In *Sassano v. BLT Discovery, Inc.*, 245 *N.J. Super.* 539 (App. Div. 1991), two individual defendants had been tried and found guilty by a jury in related criminal matters while the civil case was pending. One of the defendants died before sentencing. The Appellate Division held that the guilty verdict was not a final judgment of conviction and could not be admitted into evidence in the civil case against the deceased individual defendant. *Id.* at 546-548.

JURIES

I. RIGHT TO JURY TRIAL

A. Generally

1. See N.J.Const. 1947, art. 1, ¶s 9 and 10.

2. Defendant is entitled to an impartial jury, not to one considered most favorably disposed. *State v. Ramseur,* 106 *N.J.* 123, 215-16, 242-43 (1987); *State v. Bisaccia,* 319 *N.J.Super.* 1, 12 (App. Div. 1999).

3. When a crime carries a sentence greater than six months, it is considered a serious crime requiring a jury trial. *Codispoti v. Pennsylvania*, 418 *U.S.* 506, 511 (1974); *State v. Apprendi*, 304 *N.J.Super.* 147, 160 (App. Div. 1997) (Stein, J., concurring), *aff'd*, 159 *N.J.* 7, *rev'd* o.g., 530 *U.S.* 466, 120 *S.Ct.* 2348, 147 *L.Ed.* 2d 435 (2000).

4. Absent legislative mandate, the right to a jury trial is confined to those matters where it existed under common law. *GEI Int'l Corp. v. St. Paul Fire and Marine Ins. Co.,* 287 *N.J.Super.* 385, 392 (App. Div. 1996), *aff'd* 149 *N.J.* 278 (1997).

5. Defendants may waive a jury trial on notice to the prosecutor and with the trial court's approval, except in capital cases where the State does not consent. *N.J.S.A.* 2C:11-3c(1); *R.* 1:8-1(a); *State v. Radziwil,* 235 *N.J.Super.* 557, 571-72 (App. Div. 1989), *aff'd o.b.* 121 *N.J.* 527 (1990). However, defendant must personally, or in writing, waive the right to a jury trial under the court rule. *State v. Mazza,* 330 *N.J.Super.* 467, 471-72 (App. Div. 2000); *State v. Wyman,* 232 *N.J.Super.* 565 (App. Div. 1989).

B. No Right to a Jury Trial

1. Juvenile cases. *State in re J.W.,* 57 *N.J.* 144, 145-46 (1970); *State in re J.S.,* 272 *N.J.Super.* 338, 345 (Law Div. 1993).

2. Summary criminal contempt proceedings where punishment is less than six months imprisonment or fine of \$1,000 or both. *State v. Hamm*, 121 *N.J.* 109, 112 (1990), *cert. denied*, 499 *U.S.* 947 (1991); In *re Yengo*, 84 *N.J.* 111, 120 (1980); *Matter of Daniels*, 219 *N.J. Super.* 550 (App. Div. 1987), *aff'd*, 118 *N.J.* 51, *cert. denied*, 498 *U.S.* 951, 111 *S.Ct.* 371, 112 *L.Ed.*2d 333 (1990).

3. Drunk driving offenses. *State v. Hamm*, 121 *N.J.* at 122-29.

4. Disorderly persons gambling offense. *State v. Tenriero*, 183 *N.J.Super.* 519, 523-24 (Law Div. 1981).

5. Attorney fee disputes. *Application of LiVolsi*, 85 *N.J.* 576, 581-82 (1981).

6. Hearing on mental competency issue, unless alleged incompetent or person on his or her behalf requests one. *N.J.S.A.* 3B:12-24; *In re D.K.*, 204 *N.J.Super.* 205, 217 (Ch. Div. 1985); *In re Schiller*, 148 *N.J.Super.* 168, 179-80 (Ch. Div. 1977).

C. No right to Non-jury Trial

Although an accused charged with a crime has a constitutional right to a jury trial, no correlative constitutional right exists to a trial by a judge alone. Accordingly, no constitutional infirmity arises from denying defendant's request to waive a jury trial. *State v. Dunne*, 124 *N.J.* 303, 310-11 (1991); *State v. Davidson*, 225 *N.J.Super.* 1, 8-9 (App. Div.), *certif. denied*, 111 *N.J.* 594 (1988). Defendant in a capital murder trial has no "automatic right to insist on a non-jury determination of the sentencing issues." *State v. Biegenwald*, 106 *N.J.* 13, 48 (1987); *see State v. DiFrisco*, 118 *N.J.* 253, 283 (1990); *N.J.S.A.* 2C:11-3c(1); *R.* 1:8-1(a).

II. NUMBER OF JURORS REQUIRED ON PANEL

R. 1:8-2(a) provides that in criminal cases a deliberating jury shall consist of 12 persons. Except in a capital case, at any time before the verdict the parties may stipulate in writing, and with the court's approval, that the jury can consist of any number less than 12. *State v. Hightower*, 146 *N.J.* 239, 262-63 (1996); *State v. Dunns*, 266 *N.J.Super.* 349, 366 (App. Div.), *certif. denied*, 134 *N.J.* 567 (1993).

The United States Supreme Court concluded that a 12 person jury is not a constitutional necessity, but a panel of less than 6 is inadequate. *Ballew v. Georgia*, 435 *U.S.* 223, 239-45 (1978); *Williams v. Florida*, 399 *U.S.* 78, 86-103 (1970).

R. 1:8-2 sets no specific number of alternate jurors. *State v. Williams*, 113 *N.J.* 393, 445 n.13 (1988); *see N.J.S.A.* 2B:23-3. III. VOIR DIRE; EXCUSAL FOR CAUSE;
PEREMPTORY CHALLENGES

- A. Generally
 - 1. R. 1:8-3 addresses:

examination of jurors, challenges in the array, peremptory challenges in criminal actions, and order of exercising peremptory challenges. See N.J.S.A. 2B:23-10 and 13. Traditionally, voir dire standards and procedures rest within the trial court's broad discretion. State v. Papasavvas, 163 N.J. 565, 595 (2000); State v. Hunt, 115 N.J. 330, 362 (1989). While the right to peremptory challenges is not fundamental, it is substantial. State v. Dishon, 297 N.J.Super. 254, 272 (App. Div.), certif. denied, 149 N.J. 144 (1997); State v. Scher, 278 N.J.Super. 249, 262 (App. Div. 1994), certif. denied, 140 N.J. 276 (1995). Trial courts cannot avoid asking certain questions simply because the answers may be unfavorable to a party, and should explain to prospective jurors that an indictment is not evidence of guilt, ask if close family members or friends have been accused of violating the law, ask if they have previously served on a grand or civil jury, and explain that they judge the facts and that the court decides the law. State v. Oates, 246 N.J.Super. 261, 267-68 (App. Div. 1991); see State v. Loftin, 287 N.J.Super. 76, 104-05 (App. Div.), certif. denied, 144 N.J. 175 (1996).

Where defendant does not exhaust peremptory challenges during jury *voir dire*, any error attendant to the trial court's refusal to excuse a juror for cause, which causes defendant to use such a challenge, is harmless. *State v. Bey*, 112 *N.J.* 123, 152-54 (1988); *State v. Wilson*, 266 *N.J.Super.* 681, 682-86 (App. Div. 1993). Likewise, error in failing to remove a prospective juror for cause -- a challenge to be made before evidence is presented -- because he or she will automatically vote for the death penalty if defendant is guilty of murder is harmless where defendant removes that potential juror via a peremptory challenge. *Ross v. Oklahoma*, 487 *U.S.* 81, 85-88 (1988); *State v. Reynolds*, 124 *N.J.* 559, 566 (1991).

Use of a struck jury system (where peremptory challenges are used only when an adequate number of potential jurors have been qualified) is left to the trial court's sound discretion. *State v. Bey*, 112 *N.J.* at 150-51; *State v. Ramseur*, 106 *N.J.* at 239-43; *State v. Halsey*, 218 *N.J.Super.* 149, 162-64 (Law Div. 1987) (struck jury system may be appropriate in capital murder trials involving multiple homicides).

2. Examples

a. Trial courts cannot fail to conduct or permit further juror voir dire if responses to standard inquiries indicate that grounds for bias exist. State v. Deatore, 70 N.J. 100, 105-06 (1976); see State v. Singletary, 80 N.J. 55, 64 (1979) (juror's profession of impartiality accorded a great deal of weight). In capital cases the trial court controls individual *voir dire* of the potential jurors, and in its discretion may permit or restrict supplemental questioning. R. 1:8-3(a); State v. Koedatich, 112 N.J. 225, 290-92 (1988), cert. denied, 488 U.S. 1017 (1989); State v. Zola, 112 N.J. 384, 395-97 (1988), cert. denied, 489 U.S, 1022 (1989). Trial courts may estimate the trial's length and exclude jurors unable to serve in a protracted matter. State v. Biegenwald, 106 N.J. at 30. Trial court's failure to examine or excuse a juror observed crying during rape victim's testimony does not warrant reversal. State v. Grice, 109 N.J. 379, 386 (1988).

b. Jurors who have formed an opinion as to defendant's guilt or innocence must be excused. *State v. Williams*, 93 *N.J.* 39, 61 (1983).

c. To establish a *prima facie* claim of purposeful racial discrimination against potential jurors, defendant essentially must show that he or she is a member of a cognizable group and raise an inference that the prosecutor used a jury selection process to exclude potential jurors based on their race. Batson v. Kentucky, 476 U.S. 79, 96 (1986); see State v. Clark, 316 N.J.Super. 462, 468 (App. Div. 1998); State v. Gilmore, 103 N.J. 508, 522, 526-39 (1986) (in context of state constitution, potential jurors excluded were members of a cognizable group and substantial likelihood existed that peremptory challenges were based on assumptions about group bias; once defendant makes out a prima facie claim, State shoulders burden to prove that peremptory challenges are justifiable); State v. Hughes, 215 N.J.Super. 295, 299-00 (App. Div. 1986). The test involves (1) the establishment of a prima facie claim of racial discrimination, (2) the burden shifting to the party seeking to strike the potential juror to come forward with a race-neutral reason, and (3) if such a reason is proffered, the trial court determines if the party challenging the strike has proven purposeful racial discrimination. Purkett v. Elem, 514 U.S. 765, 767 (1995); State v. Clark, 316 N.J.Super. at 469 (as to second prong, Gilmore requires prosecutor to give reasons reasonably relevant to the case). If defendant establishes under Gilmore that the prosecutor improperly excluded potential jurors based on race, the entire panel must be dismissed. State v. Scott, 309 N.J.Super. 140, 149-52 (App. Div.), certif. denied,

154 N.J. 610 (1998). Defendant cannot exclude potential jurors because of group bias, either. Georgia v. McCollum, 505 U.S. 42, 48-59 (1992); State v. Johnson, 325 N.J.Super. 78, 84-87 (App. Div. 1999), certif. granted in part, 163 N.J. 393 (2000).

d. Gender and ethnicity, like race, are unconstitutional proxies for juror competence and impartiality. Using peremptory challenges to exclude potential jurors based on gender or ethnicity violates equal protection of the law. *J.E.B. v. Alabama*, 511 *U.S.* 127, 128-31 (1994); *Hernandez v. New York*, 500 *U.S.* 352, 355 (1991); *State v. Clark*, 316 *N.J.Super.* at 467-68 n.1.

e. Party denied fair trial when juror on *voir dire* fails to disclose potentially prejudicial material. *State v. Cooper*, 151 *N.J.* 326, 349 (1997); *In re Koslov*, 79 *N.J.* 232, 234-39 (1979). Defendant need not prove actual prejudice because harm comes from loss of opportunity to excuse juror and failure of impartial jury to judge accused. *Id.* at 239; *see State v. Deatore*, 70 *N.J.* at 105-06; *State v. Scher*, 278 *N.J.Super. at 264.*

f. Defendant is not entitled to new trial because codefendants at joint trial were denied their proper number of peremptory challenges. *State v. Hoffman*, 82 *N.J.* 184, 187 (1980).

g. Rule may permit challenge for cause after presentation of evidence where cause was not previously discoverable or occurred after commencement of trial, provided there are sufficient untainted jurors. *See R.* 1:8-3; *cf. State v. Boiardo,* 111 *N.J.Super.* 219 (App. Div.), *certif. denied,* 57 *N.J.* 130 (1970), *cert. denied,* 401 *U.S.* 948 (1971); *State v. Brewer,* 142 *N.J.Super.* 70, 75 (App. Div. 1975), *aff'd o.b.* 70 *N.J.* 329 (1976).

h. Defendant improperly denied right of a peremptory challenge where trial court denied challenge for cause based upon the proposed venireman's jury service during the prior year and thereby forced defendant to exercise a peremptory challenge that he would not have otherwise used. *State v. Williams*, 113 *N.J.* at 443; State *v. Pereira*, 202 *N.J.Super*. 434, 437-39 (App. Div. 1985); *see N.J.S.A.* 2A:69-4 (repealed 1995).

i. Defendant's right to maintain a numerical advantage regarding peremptory challenges in a final round of jury selection is not absolute. For example, it was not error for a trial court to require a defendant to exercise two challenges and the State one for the first eight rounds of *voir dire*, rather than alternate the exercise of peremptory challenges between defendant and the State on a one-to-one basis throughout. *State v. Brunson*, 101 *N.J.* 132, 143-45 (1985); *see State v. Papasavvas*, 163 *N.J.* at 600-05.

j. Trial court cannot interview prospective jurors at sidebar without counsel's presence, *State v. Lomax*, 311 *N.J.Super.* 48, 50-56 (App. Div. 1998), and defendant is entitled to be present with counsel during any *voir dire. State v. Dishon*, 297 *N.J.Super.* 254, 266-75 (App. Div.), *certif. denied*, 149 *N.J.* 144 (1997).

k. Trial court's limitation of number of defendant's peremptory challenges does not require *per se* reversal of convictions, particularly where challenges allotted were not all used. *State v. Wilson,* 266 *N.J.Super.* at 682-86.

l. Presence on jury of some members of a group alleged to have been improperly excluded does not relieve trial court of responsibility to determine if any prospective juror was peremptorily challenged on a discriminatory basis. *State v. McDougald*, 120 *N.J.* 523, 556 (1990); *State v. Clark*, 324 *N.J.Super.* 558, 568 (App. Div. 1999), *certif. denied*, 163 *N.J.* 10 (2000).

B. Voir Dire Examination on Particular Topics

1. Death Penalty (*See also,* CAPITAL PUNISH-MENT, this Digest)

a. Motion seeking order prohibiting "death qualification" of jurors and limiting prosecutor's use of peremptory challenges against minority groups denied. *State v. Bass,* 191 *N.J.Super.* 343 (Law Div. 1983) (citing *Dobbert v. State,* 409 *So.2d 1053 (Sup. Ct. Fla. 1982),* and *Dobbert v. Strickland,* 532 *F.Supp.* 545 (M.D.Fla. 1982)); *see Adams v. Texas,* 448 *U.S.* 38 (1980); *State v. Simon,* 161 *N.J.* 416, 465, 474 (1999).

b. Prospective juror must be individually questioned in *voir dire*, apart from other prospective jurors, as to his or her attitudes about the death penalty. *State v. Feaster*, 156 *N.J.* 1, 55 (1998); *State v. Timmons*, 192 *N.J.Super*. 141 (Law Div. 1983). Potential jurors biased in favor of the death penalty must be removed for cause at defendant's request. *Morgan v. Illinois*, 504 *U.S.* 719, 729 (1992); *State v. Marshall*, 148 *N.J.* 89, 333 (1991) (Handler, J., dissenting), *cert. denied*, 522 *U.S.* 850 (1997). Trial courts may not impose a time limit for *voir dire* questioning in a death penalty case. *State v. Erazo*, 126 *N.J.* 112, 129 (1991). c. In a capital murder trial where the court has decided to impanel 16 jurors who have been death qualified, the number of peremptory challenges allotted to both defendant and the State should be increased proportionately. *State v. Halsey,* 218 *N.J.Super.* 149, 159-60 (Law Div. 1987); *R.* 1:8-3(d).

2. Racial Prejudice

a. Fourteenth Amendment requires trial judge, on defendant's request, to interrogate prospective jurors on *voir dire* regarding racial prejudice and thereby expose potential bias. Ham v. South Carolina, 409 U.S. 524 (1973); State v. McDougald, 120 N.J. 523, 551 (1990); State v. Loftin, 287 N.J. Super. at 105; State v. Horcey, 266 N.J.Super. 415, 421 (App. Div. 1993). But trial judge not required to put the question in any particular form, or to ask any particular number of questions on the subject. Ham v. South Carolina, 409 U.S. at 527; State v. McDougald, 120 N.J. at 551. And questioning regarding racial prejudice is mandated only where the circumstances of particular case present "constitutionally significant likelihood" defendant may be denied due process by State's failure to impanel impartial jury. Ristaino v. Ross, 424 U.S. 589, 596 (1976). When defendant is charged with committing a racially motivated crime such as ethnic terrorism (N.J.S.A. 2C:33-10 and 11), the trial court should exercise extraordinary care in questioning potential jurors. State v. Davidson, 225 N.J.Super. 1, 9-10 (App. Div.), certif. denied, 111 N.J. 594 (1988).

Fact that victim was white and defendants were black did not automatically suggest significant likelihood that racial prejudice might infect trial. *See State v. Long*, 137 *N.J.Super.* 124, 128-33 (App. Div. 1975) (absent request by counsel, trial court not required on own motion to pose questions on *voir dire* relating to any specific type of prejudice, racial or otherwise, but where defendant requests *voir dire* as to potential prejudice because of color or other physical characteristics, better practice is for court to accede to the request under exercise of its discretion), *certif. denied*, 70 *N.J. 143 (1976); see also State v. Murray*, 240 *N.J.Super.* 378, 392 (App. Div.), *certif. denied*, 122 *N.J.* 334 (1990).

b. A sentencing judge in a capital case, by refusing defense counsel's request to question potential jurors concerning racial prejudice, fails to adequately protect defendant's right to an impartial jury. *Turner v. Murray*, 476 *U.S.* 28 (1986); *see State v. Perry*, 124 *N.J.* 128, 157-58 (1991).

It is within trial judge's discretion to refuse to permit *voir dire* questioning on prospective juror's attitudes toward a substantive defense, such as insanity. *State v. Kelly,* 118 *N.J.Super.* 38, 50-51 (App. Div.), *certif. denied,* 60 *N.J.* 350 (1972).

C. Number of Peremptory Challenges *See N.J.S.A.* 2B:23-13 and *R.* 1:8-3(d).

IV. DISQUALIFICATION OF JUROR

N.J.S.A. 2C:51-3 disqualifies a person convicted of a crime from serving as a juror. *See N.J.S.A.* 2B:20-1, 9 and 10. One who has been pardoned may serve, however. *Storcella v. New Jersey,* 296 *N.J.Super.* 238, 243-44 (App. Div.), *certif. denied,* 149 *N.J.* 141 (1997).

Where juror asks to be disqualified, trial judge must ascertain basis for request out of jury's presence, but with all counsel present, before ruling. *State v. Lemon*, 107 *N.J.Super.* 101, 107 (App. Div. 1969).

Court has authority to remove juror after defense counsel indicated juror was sleeping during his summation. *State v. Scherzer,* 301 *N.J.Super.* 363, 491 (App. Div.), *certif. denied,* 151 *N.J.* 466 (1997); *State v. Reevey,* 159 *N.J.Super.* 130, 133-35 (App. Div.) (remanded to hold hearing to determine accuracy of allegation), *certif. denied,* 79 *N.J.* 471 (1978).

Verdict cannot be upset or voided by virtue of ineligible juror's participation in the absence of an objection following *voir dire* which reveals ineligibility. *State v. McNamara,* 212 *N.J.Super.* 102, 106-07 (App. Div. 1986), *certif. denied,* 108 *N.J.* 210 (1987) (juror had served on another jury within one year of defendant's trial, contrary to then *N.J.S.A.* 2A:69-4, but defendant, who was aware of this fact, never exercised a challenge for cause); *compare, State v. Pereira,* 202 *N.J.Super.* at 438.

V. ALTERNATES; SUBSTITUTION See R. 1:8-2(d).

A. Generally

State v. Miller, 76 *N.J.* 392 (1978), upholds the constitutionality of *R.* 1:8-2(d), emphasizing the requirement that the jury be instructed after substitution is made that deliberations must begin anew. *See also State v. Holloway,* 288 *N.J.Super.* 390, 403 (App. Div. 1996).

Failure to instruct the jury on the necessity to recommence deliberations constitutes plain error requiring reversal of defendant's convictions. *State v. Trent*, 79 *N.J.* 251 (1979); *State v. Anderson*, 173 *N.J.Super*. 75 (App. Div.), *certif. denied*, 85 *N.J.* 124 (1980). Requirement that 12 persons reach unanimous verdict is not met unless they reach their consensus through deliberations which are the common experience of all of them. *State v. Corsaro*, 107 *N.J.* 339, 349 (1987); State *v. Trent*, 79 *N.J.* at 256. Rule was intended to strike a balance between need for judicial economy and defendant's fair trial rights. *State v. Valenzuela*, 136 *N.J.* 458, 467 (1994); *State v. Phillips*, 322 *N.J.Super.* 429, 436 (App. Div. 1999).

Juror bias discovered before deliberations commence generally results in discharge of offending juror, but once case has gone to the jury the taint calls for a mistrial. *State v. Hightower*, 146 *N.J.* 239, 254-56 (1996); *State v. Adams*, 320 *N.J.Super.* 360, 366-67 (App. Div.), *certif. denied*, 161 *N.J.* 333 (1999). Discharge of juror and substitution during deliberations is permitted sparingly, and only where the juror falls ill or otherwise is unable to continue for strictly personal reason; juror's interaction with other jurors does not suffice. *State v. Valenzuela*, 136 *N.J.* at 468; *State v. Williams*, 336 *N.J. Super*, 115, 120 (App. Div. 2000); *State v. Adams*, 320 *N.J.Super.* at 367; *State v. Singleton*, 290 *N.J.Super.* 336, 347 (App. Div. 1996).

B. Examples

1. Substitution of a juror after the return of partial verdicts for the purpose of continuing deliberations to reach final verdicts on the remaining counts is plain error. *State v. Corsaro,* 107 *N.J.* at 352-54.

2. Juror's removal during deliberations unwarranted where she mentioned a bad experience with the police and smiled at defendant. These factors did not render her "unable to continue," as that phrase has been narrowly construed, pursuant to *R.* 1:8-2(d)(1). *State v. Cruz,* 330 *N.J.Super.* 274, 280 (App. Div. 2000); *see State v. Hightower,* 146 *N.J.* at 254; *State v. Valenzuela,* 136 *N.J.* at 468; *State v. Phillips,* 322 *N.J.Super.* at 436-42.

3. Defendant's right not to be placed twice in jeopardy is not violated when a juror is substituted during or after counsel's opening statements but before the presentation of evidence, so long as the replacement juror is fully acquainted with the opening statements. R. 1:8-2(d), which permits the replacement of jurors only before the opening statements, is not implicated since

opening statements are not evidence. *State v. Boyer*, 221 *N.J.Super.* 387, 397 (App. Div. 1987), *certif. denied*, 110 *N.J.* 299 (1988); *see State v. Mance*, 300 *N.J.Super.* 37, 54-55 (App. Div. 1997).

4. Trial court cannot remove a juror who, during deliberations that a relative told him or her that police often beat criminals. Proper remedy generally will be a mistrial when jury is exposed to extraneous information during deliberations. *State v. Adams*, 320 *N.J.Super.* at 364-68; *see State v. Harvey*, 318 *N.J.Super.* 167, 173-74 (App. Div. 1999); *but see State v. Mance*, 300 *N.J.Super.* at 54-57.

5. Juror's removal during deliberations because he needed to get back to work was not compelling, and he was not unable to perform his duties as a juror and continue to deliberate. *State v. Williams*, 336 *N.J. Super.* at 118-23.

VI. FAIR CROSS-SECTION REQUIREMENTS

A. Generally

1. Defendant is entitled to jury panel selected without intentional systematic exclusion of identifiable substantial class of citizens. *Taylor v. Louisiana*, 419 *U.S.* 522 (1975); *State v. Timmendequas*, 161 *N.J.* 515, 561 (1999) (defendant has right to an impartial jury drawn from a representative cross-section of the community).

2. Defendant not entitled to jury of any particular composition, but jury pool must not systematically exclude distinctive groups within the community. *Taylor v. Louisiana,* 419 *U.S.* at 538; *State v. Timmendequas,* 161 *N.J.* at 563; *accord, State v. Zicarelli,* 154 *N.J.Super.* 347 (App. Div. 1977).

3. Prospective grand and petit jury panel members must be chosen on a random basis, whether the method of selection so employed is manual or mechanical, so as not to offend defendant's right to a fair and impartial trial. *State v. Long,* 204 *N.J.Super.* 469 (Law Div. 1985).

4. Cross-section requirement does not require that panel from which petit jury drawn reflects panel drawn from county where offense occurred. *State v. Harris,* 282 *N.J.Super.* 409, 415-21 (App. Div. 1995).

5. Age is not determinative, and neither students nor clergy form "cognizable group" which, if excluded, would deprive jury of cross-sectional quality. *State v. Butler*, 155 *N.J.Super*. 270 (App. Div. 1978); *see also*

Hamling v. United States, 418 U.S. 87 (1974); State v. Anderson, 132 N.J.Super. 231 (App. Div.), certif. denied, 68 N.J. 143 (1975).

6. Use of voter registration lists as source of names for jury service valid even though qualified members of particular class are under-represented on such lists. *State v. Ramseur*, 106 *N.J.* at 225; *State v. Smith*, 102 *N.J.Super*. 325 (Law Div. 1968), *aff'd* 55 *N.J.* 476, *cert. denied*, 400 *U.S.* 949 (1970); *see also State v. Porro*, 152 *N.J.Super*. 259 (Law Div. 1977), *after remand* 158 *N.J.Super*. 269 (App. Div.), *cert. denied*, 439 *U.S.* 1047 (1978).

Jury selection process reforms should have 7. prospective application only. State v. Long, 216 *N.J.Super.* 269 (App. Div. 1987). Trial court determination that Atlantic County jury selection process did not meet statutory randomness requirement is not applicable to defendant's challenge to the selection process where the retroactive application of the rule would have a negative impact on the administration of justice, where there would be no purpose served by dismissing indictments pursuant to the grand jury challenge, and where defendant had suffered no prejudice by the jury process at the time of his conviction. State v. Long, 204 N.J.Super. at 485-90; see also State v. Russo, 213 N.J.Super. 219 (Law Div. 1986).

VII. SEQUESTRATION; DISPERSAL; REAS-SEMBLY OF JURORS

A. Generally

N.J.S.A. 2C:27-2b prohibits bribing a juror, and *N.J.S.A.* 2C:29-8 criminalizes corrupting or influencing a jury. *See R. 1:8-6.*

Trial judges should avoid jury sequestration except in compelling circumstances. *State v. Allen,* 73 *N.J.* 132, 142 (1977), *abrogated o.g. State v. Williams,* 93 *N.J.* 39 (1983). But their decisions on sequestration will not be reversed absent abuse of discretion. *State v. Harris,* 156 *N.J.* 122, 228 (1998); *State v. Harvey,* 151 *N.J.* 117, 214 (1997), *cert. denied,* 528 *U.S.* 1085, 120 *S.Ct.* 811, 145 *L.Ed.* 2d 683 (2000). Factors to be considered by the court in permitting dispersal include identity of defendant, length of trial, kind of public interest evidenced, and day and hour deliberations begin.

B. Reassembly Following Verdict, Discharge, Dispersal

Essential factor in determining whether discharged jury can be reassembled to further deliberate or report on

verdict already rendered is whether it has dispersed and has had an opportunity to mingle with others. Subsequent proceedings are allowed provided jury remained in jury box or "otherwise within continuous control of court." *State v. Fungone,* 134 *N.J.Super.* 531, 535 (App. Div. 1975), *certif. denied,* 70 *N.J.* 526 (1976).

VIII. EXTRANEOUS INFLUENCES ON JU-RORS; EX PARTE CONTACTS

A. Generally

The test is whether misconduct or irregular influence had the capacity to influence the jury to reach a verdict in a manner inconsistent with the legal proofs and court's charge. *Panko v. Flintkote, 7 N.J.* 55, 61 (1951); *State v. Bisaccia,* 319 *N.J.Super.* at 12.

1. If yes, new trial granted without further inquiry into actual effect because test only requires *capacity* to influence jury. *Panko v. Flintkote*, 7 *N.J.* at 61; *State v. Scherzer*, 301 *N.J.Super*. at 486.

2. Evidence of actual effect of extraneous matter upon juror's minds should be excluded. However, evidence as to existence of a condition or happening of an event with capacity for adverse prejudice should be received. *State v. Kociolek,* 20 *N.J.* 92 (1955); *see In re Koslov,* 19 *N.J. at 239* (trial judge must seek out and expose outside factors impinging on jury's freedom of action, impartiality and essential integrity); *State v. Bisaccia,* 319 *N.J.Super.* at 14-15.

B. Examples

1. If the record shows affirmatively that a communication had no tendency to influence the verdict, the judge's impropriety in communicating with the jury out of defendant's presence does not require reversal. *State v. Auld*, 2 *N.J.* 426 (1949); *State v. Brown*, 275 *N.J.Super*. 329, 332-33 (App. Div.), *certif. denied*, 138 *N.J.* 269 (1994). Even an unrecorded *ex parte* communication between the trial judge and a juror can be harmless error. *Rushen v. Spain*, 464 *U.S.* 114 (1983); *see State v. Brown*, 275 *N.J.Super*. at 333; *State v. Vergilio*, 261 *N.J.Super*. 648, 653-54 (App. Div.), *certif. denied*, 133 *N.J.* 443 (1993).

2. Conviction reversed where jurors consulted dictionary for definition to aid in deliberations. *Palestroni v. Jacobs,* 10 *N.J.Super.* 266, 269-76 (App. Div. 1950).

3. Courts will not tolerate conduct by court officers which might influence jurors in reaching verdict. *State v. Walker*, 33 *N.J. 580 (1960)* (sheriff referred to defendant as "murderer" outside court, within possible earshot of jurors, and arranged bus ride for jury without knowledge of court; court should have conducted inquiry), *cert. denied*, 371 *U.S.* 850 (1962).

4. Juror approached defense counsel in corridor and said "I'm surprised at you." Counsel unsuccessfully requested that trial court interrogate juror to determine meaning of remark. Judge should have made inquiry, and prejudice presumed unless proven otherwise. *State v. Marchitto,* 132 *N.J.Super.* 511, 514-17 (App. Div.), *certif. denied,* 68 *N.J.* 163 (1975). However, juror's perceived attempt to communicate with corrections officers during trial, while improper, did not warrant either removal or a mistrial. *State v. Mance,* 300 *N.J.Super.* at 56-57.

5. Use of special interrogatories in criminal trial is generally discouraged due to their potential for destroying ability of jury to deliberate upon issue of guilt or innocence free of extraneous influences. *State v. Simon*, 79 *N.J.* 191, 199-00 (1979). But properly prepared special verdict sheets, submitted with appropriate instructions, can alleviate most risks inherent in using them. Thus, trial courts in their discretion may submit special verdicts to juries where a compelling need to do so exists. *R.* 3:19-1(b); *State v. Diaz*, 144 *N.J.* 628, 643-45 (1996) (where defendant charged with a substantive offense and possessing a weapon for unlawful purposes against another person or property); *State v. Petties*, 139 *N.J.* 310, 320-21 (1995).

6. Alcohol and/or narcotics abuse by a juror during trial is not an "outside influence" pursuant to the federal rules of evidence about which jurors may testify to impeach their verdict. *Tanner v. United States*, 483 *U.S.* 107 (1987).

7. Trial judges should not enter jury room during deliberations to seek clarification of a jury question *ex parte.* State v. Brown, 275 N.J.Super. at 331-34.

IX. PUBLICITY

A. Pretrial

All pretrial proceedings in criminal prosecutions shall be open to the public and press. *State v. Crandall*, 120 *N.J.* 649, 659 (1990); *State v. Williams*, 93 *N.J.* at 63; see also Globe Newspaper Co. v. Superior Court, 457 *U.S.* 596 (1982); *State v. Martini*, 160 *N.J.* 248, 302 n.4 (1999) (Handler, J. dissenting).

1. The only exception will arise in instances where the trial court is clearly satisfied that if the pretrial proceeding is conducted in open court a realistic likelihood of prejudice to a fair trial by an impartial jury exists as a result of adverse publicity, and that such prejudice cannot be overcome by resort to various methods relating to the selection of jurors. State v. Feaster, 156 N.J. at 50-51; State v. Williams, 93 N.J. at 63. Pervasive pretrial publicity, though, does not necessarily preclude the likelihood of an impartial jury. See State v. Harvey, 151 N.J. at 214; State v. Engel, 249 N.J. Super. 336, 371-72 (App. Div.), certif. denied, 130 N.J. 393 (1991). Trial courts need not presume the existence of prejudice prior to *voir dire*, and the passage of time can be a highly relevant fact that rebuts any presumption of partiality or prejudice. State v. Biegenwald, 106 N.J. at 30-37.

The right to an open, public trial is a shared right of the accused and the public and, while not absolute, "prevails unless defendant can demonstrate that there is a realistic likelihood that his right to an impartial jury will be threatened from adverse publicity emanating from an open trial proceeding and means other than closure are not available to preserve the fairness of the trial." *State v. Halsey,* 218 *N.J.Super.* at 153-54; *see State v. Sugar,* 100 *N.J.* 214, 244 (1985).

a. Defendant must move for closure, and bears the burden of demonstrating at a hearing that his or her fair trial rights will be jeopardized by adverse pretrial publicity. *State v.* Bey, 112 *N.J.* 45, 84 n.24 (1988); State *v. Williams*, 93 *N.J.* at 64. The State, too, can move for closure under proper circumstances. *State v. Sugar*, 100 *N.J.* at 243-44.

b. In evaluating a closure application, the court must assess all the evidence and circumstances that are relevant to determining the likelihood of jury prejudice, *i.e.*, the publicity that the particular hearing will generate and its cumulative impact in conjunction with all preexisting publicity, the nature of the particular pretrial proceeding for which closure is sought, the contested issues that are the subject of the particular proceeding, the nature and form of the anticipated evidence that will be material to these issues, and the character of the adverse publicity that may be generated from an open hearing disclosing such evidence. *State v. Williams*, 93 *N.J.* at 64-65. The trial court is free to utilize its own "special judicial expertise and experience" to determine the efficacy of alternatives to closure, which may include use of "foreign jurors," a change of venue, exhaustive *voir dire*, postponing trial, or frequent cautionary instructions. *Id. at 67-69; see State v. Williams*, 113 *N.J.* at 429; *State v. Harris*, 282 *N.J.Super*. at 412-15.

c. Upon completion of the hearing, the court must reach an ultimate determination as to the realistic likelihood of prejudice and the need for closure based upon (1) the evidence relevant to the nature and extent of the adverse publicity generated by the open pretrial proceeding, including any inferences as to its potential for prejudice against a fair trial by an impartial jury, and (2) the evidence relating to the efficacy of the available means of selecting jurors and conducting the trial to assure the integrity and impartiality of the jury. *State v. Williams*, 93 *N.J. at* 69; *see State v. Williams*, 113 *N.J.* at 428. It must state its findings of fact and the basis for its conclusion. *State v. Williams*, 93 *N.J. at* 73.

d. The press and "other interested parties" should have the opportunity to be heard in any closure application. *Id. at* 72.

2. On a retrial, the relevant question in determining whether a jury is impartial is not whether the community remembered the first trial, but whether the jurors at the second trial had such fixed opinions that they could not impartially judge defendant's guilt. *Patton v. Yount,* 467 *U.S.* 1025, 1035 (1984); *State v. Dixon,* 125 *N.J.* 223, 272 (1991)..

3. When during trial local newspaper articles referred to defendant as an unemployed laborer and noted that he was represented by the Public Defender, perceived prejudice could be "weeded out" through *voir dire. State v. Royster,* 57 *N.J.* 472, *cert. denied,* 404 *U.S.* 910 (1971).

4. Constitutional standard for fair trial requires panel of impartial, indifferent jurors, but jurors actually impaneled need not be ignorant of case's facts. *State v. Marshall*, 123 *N.J.* at 77-79, 86; *State v. Williams*, 113 *N.J.* at 429.

B. Publicity During Trial

1. If publicity during the proceedings threatens its fairness, a new trial should be ordered. The trial court has the power to control publicity during criminal trials, and may limit the press' presence at judicial proceedings to prevent prejudice to defendant. *Shepard v. Maxwell*, 384 *U.S.* 333, 357-59 (1966); *Hammock v. Hoffman*-

LaRoche, Inc., 142 N.J. 356, 373-76 (1995); see also Seattle Times Co. v. Rhinehart, 467 U.S. 20, 22-38 (1984).

2. When a post-impanelment motion to question the jury about exposure to midtrial publicity is presented, the trial court should analyze the merits of counsel's proffer through a two-part inquiry. First, it should examine the disseminated information to determine if it has the capacity to prejudice defendant. The timing of the media coverage, reports of inculpatory physical evidence or a confession that has been suppressed, or publicity regarding a prior conviction or pending indictment are some factors that could "gravely prejudice defendant's right to a fair trial. State v. Bey, 112 N.J. 45, 85 (1988); State v. Scherzer, 301 N.J.Super. at 487. Second, if the court determines that the published information has the capacity to prejudice the defense, it should decide whether a realistic possibility exists that such information may have reached one or more of the jurors. If so, the court should voir dire each juror to ascertain whether actual exposure has occurred. Those jurors exposed to media coverage should be questioned individually to establish whether they could continue in their capacity as impartial triers of fact. State v. Bey, 112 N.J. at 86-87; State v. Scherzer, 301 N.J. Super. at 487.

Where defendant is charged with committing aggravated assaults and terroristic threats against his wife, the trial court properly handled possible jury contamination by a local newspaper article concerning wife-beating. The court designated the potentially tainted jurors as alternates, who ultimately did not participate in deliberations. *State v. McBride,* 213 *N.J.Super.* 255, 274 (App. Div. 1986).

C. Change of Venue

1. In capital proceedings, standard to apply in determining propriety of change of venue is whether change is necessary to overcome realistic likelihood of prejudice from pretrial publicity. *State v. Biegenwald*, 126 *N.J.* 1, 22-27 (1991); *State v. Bey*, 96 *N.J.* 625, 630 (1984).

2. Test for whether change of venue required due to pretrial publicity is if impartial jury could be obtained from citizens of county or whether they had been "so aroused as to be disqualified." *State v. Mayberry, 52 N.J.* 413, 420, *cert. denied,* 393 *U.S.* 1043 (1969).

A. Generally

1. Jurors take an oath to follow the law as charged, and are expected to follow it. With few exceptions, once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into the jury's thought processes. *United States v. Powell*, 469 *U.S.* 57, 66-67 (1984); *see McDonough Power Equipment v. Greenwood*, 464 *U.S.* 548 (1984); *State v. Bisaccia*, 319 *N.J.Super.* at 17.

2. The jury's fact-finding function is all-inclusive and encompasses the evaluation of witness credibility and the weight and worth of evidence. *State v. Ingenito*, 87 *N.J.* 204, 211 (1981); *State v. Branch*, 301 *N.J.Super*. 307, 320-21 (App. Div. 1997), *rev'd o.g.* 155 *N.J.* 317 (1998). Jurors are free to accept or reject, in whole or in part, any aspect of testimonial evidence based on credibility. *State v. Coleman*, 46 *N.J.* 16, 43 (1965), *cert. denied*, 383 *U.S.* 950 (1966); *State v. Pickett*, 241 *N.J.Super.* 259, 266-67 (App. Div. 1990).

3. Jurors generally cannot testify about their mental processes leading to a verdict. *State v. Grey*, 147 *N.J.* 4, 39-40 (1996); *State v. Scherzer*, 301 *N.J.Super.* at 494-95. Though the trial judge cannot examine the jurors' thought processes in reaching a verdict, evidence can be received as to the existence of conditions or the occurrence of events to determine whether they had prejudicial impact on the verdict. *State v. Levitt,* 36 *N.J.* 266, 271 (1961); *State v. Riley,* 216 *N.J.Super.* 383, 392 (App. Div. 1987).

No inflexible rule, however, can be employed because cases do arise where "the plainest principles of justice" demand that an inquiry be made, State v. Koedatich, 112 N.J. at 288, but the law raises a privilege against disclosure of jurors' communications during deliberations, which will yield only to "some greater public need." State v. LaFera, 42 N.J. 97, 106 (1964); see State v. Phillips, 322 N.J.Super. 429, 441 (App. Div. 1999); State v. Baker, 310 N.J.Super. 128, 136 (App. Div. 1998). A mistrial may be granted in the court's discretion if it learns a juror has expressed his or her view with apparent finality to fellow jurors or persists in premature discussions with them despite the court's contrary instructions. State v. LaFera, 42 N.J. at 109; State v. Scherzer, 301 N.J.Super. at 489-90. Inquiry into possible bias of a juror, and whether he or she manifested such bias in considering the case, will be made only upon

sufficient preliminary showing that the juror carried prejudice into the jury room. *Green v. New Jersey Manufacturers Ins. Co.,* 160 *N.J.* 480, 496-98 (1999); *State v. LaFera,,* 42 *N.J.* at 110.

4. A trial judge has discretion to return the jurors for further deliberations after they announce their inability to arrive at a verdict. *State v. Harris*, 156 *N.J.* at 184; State *v. Czachor*, 82 *N.J.* 392 (1980). They may do so for a reasonable period of time before declaring a deadlock. *State v. Hightower*, 146 *N.J.* 239, 258 (1996).

B. Examples

1. Content of a single newspaper article appearing after defendant's conviction and sentencing, which quoted several jurors as knowing of his involvement in another murder, is hearsay and cannot be the sole basis for the extraordinary procedure of a post-trial juror interrogation. *State v. Koedatich*, 112 *N.J.* at 289.

2. Mistrial can be declared after only two and a half hours of deliberations where the jury repeatedly informed the court that it was hopelessly deadlocked. The courts determine on a case-by-case basis whether "reasonable time for deliberation has been allowed" pursuant to *N.J.S.A.* 2C:1-9d(2), and the trial judge's decision in this regard will be upset only for an abuse of discretion. *State v. Paige*, 256 *N.J.Super.* 362, 380 (App. Div.), *certif. denied*, 130 *N.J.* 17 (1992); *State v. Roach*, 222 *N.J.Super.* 122, 128-29 (App. Div. 1987), *certif. denied*, 110 *N.J.* 317 (1988).

3. Trial court properly refused to recall jurors and question them based on a letter sent to court by a woman who knew both defendant and the decedent personally. The letter, which recounted a conversation she had with a juror shortly after the trial's conclusion, was inadmissible hearsay. Moreover, any discussions the jurors had among themselves while considering the verdict could not be used to impeach their finding. *State v. Freeman,* 223 *N.J.Super.* 92, 120-21 (App. Div. 1988), *certif. denied,* 114 N.J. 525 (1989).

4. Although the jurors' betting on the verdict's anticipated time and date was wrong, nothing in the record suggests that the \$14 or \$15 betting pool influenced, or had a tendency to influence, the verdict reached. *Id.* at 116-20.

5. *R.* 1:16-1, which prohibits an attorney from questioning jurors following trial except by leave of court

upon a finding of good cause, applies only to willful, investigatory efforts and does not prohibit an inadvertent meeting with a juror whose comments were unsolicited. *State v. Riley*, 216 *N.J.Super.* at 386-90. Here post-trial information that a juror volunteered regarding his personal bias against defendant convicted of murder was admissible at an evidentiary hearing because it did not relate to details of jury deliberations but, rather, only to the entirely improper reasons on which the juror based his guilty vote. Thus defense counsel's violation of *R*. 1:16-1 did not automatically exclude the information revealed as a result. *State v. Scher*, 278 *N.J.Super.* at 258-62 (sins of defense counsel in violating *R*. 1:16-1 will not be visited upon defendant); *State v. Riley*, 216 *N.J.Super.* at 390.

6. Personal threats by one juror to another during deliberations that did not overbear the juror's will, but rather which caused no more than mere discomfort, would not provide a basis for reversing the jury's verdict. *State v. Williams,* 213 *N.J.Super.* 30, 34-35 (App. Div. 1986), *certif. denied,* 107 *N.J.* 104 (1987).

XI. DEFENDANT'S APPEARANCE BEFORE JURY

A. Restraints

The trial court has the discretion to keep defendant manacled or otherwise restrained, but only upon a strong showing of necessity. Where the court determines that defendant must be handcuffed or shackled, the jury should be instructed to give such restraint no consideration in assessing the proofs and determining guilt. *State v. Mance*, 300 *N.J.Super.* at 50-52; *see State v. Damon*, 286 *N.J.Super.* 492, 496-99 (App. Div. 1996); *State v. Roberts*, 86 *N.J.Super.* 159, 165 (App. Div. 1965).

B. Jurors' View of Restraints

Brief exposure of jurors to handcuffed defendant in hallway not sufficiently prejudicial to impair right to fair trial. *State v. Jones*, 130 *N.J.Super.* 596 (Law Div. 1974).

C. Prison Clothing

The State cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes, but failure to object constitutes waiver. *Estelle v. Williams*, 425 *U.S.* 501, 512-14 (1976); *see State v. Coon*, 314 *N.J.Super.* 426, 434-35 (App. Div.), *certif. denied*, 157 *N.J.* 543 (1998).

Defendants who appear disheveled and dirty before the jury through no fault of their own because the jail refused to supply him some necessities such as food, soap, water, a comb, and clean bedding will be entitled to a new trail if denied a fair one and fundamental fairness. *State v. Maisonet,* ____ *N.J.* ___, ___ (2001).

JURISDICTION

(See also, APPEALS, COURTS, DISORDERLY PERSONS, JUVENILES, VENUE, this Digest)

I. ORGANIZATION AND JURISDICTION OF NEW JERSEY COURTS

Jurisdiction in a criminal case requires that the court involved have jurisdiction over the defendant and the offense. Jurisdiction over the person requires that the defendant be brought personally before the court. *Goodlelt v. Goodman,* 34 *N.J.* 358 (1961), *cert. denied,* 368 *U.S.* 855 (1961). Jurisdiction over the person can be obtained by waiver. *State v. Ashby,* 43 *N.J.* 273 (1964). A court has jurisdiction over the offense when the crime occurs within the territory in which the court has power, *State v. McDoweny,* 49 *N.J.* 471 (1967), and a crime is of a type over which the court has power. *State v. Smith,* 6 *N.J. Super.* 85 (App. Div. 1949).

II. MUNICIPAL COURT (*See also*, DISOR-DERLY PERSONS, this Digest)

A municipal court is a court of limited jurisdiction. It does not have the authority to process an offense of the third degree. A municipal court's jurisdiction within its geographical territory is limited to the following:

1. Violations of county or municipal ordinances;

2. Violations of the motor vehicle and traffic laws;

3. Disorderly persons offenses, petty disorderly persons offenses and other non-indictable offenses except where exclusive jurisdiction is given to the Superior Court;

4. Violations of the fish and game laws;

5. Proceedings to collect a penalty where jurisdiction is granted by statute;

6. Violations of laws regulating boating; and

7. Any other proceedings where jurisdiction is granted by statute.

See N.J.S.A. 2B:12-17; State v. Still, 330 N.J. Super. 50, 54 (App. Div. 2000).

Municipal courts also have jurisdiction over those crimes where punishment does not exceed a sentence of

one year incarceration and where the defendant has waived indictment and trial by jury in writing, and where the county prosecutor has consented in writing. *N.J.S.A.* 2B:12-18. These indictable offenses include crimes enumerated in chapter 17 (arson, criminal mischief, and other property destruction), 18 (burglary and other criminal intrusion), 20 (theft and related offenses) and 21 (forgery and fraudulent practices) of the Code, provided that the injury or loss to the victim is \$500.00 or less. *N.J.S.A.* 2A:8-22a.

Municipal court lacked jurisdiction over bigamy offense since conduct constituting the offense of bigamy, i.e. defendant's second marriage, took place in Pakistan, not New Jersey. *State v. Ishaque*, 312 *N.J. Super.* 207 (Law Div. 1997).

A municipal court can exercise jurisdiction over offenses which occur on a bridge owned and operated by the county bridge commission. *State v. Garcia,* 297 *N.J. Super.* 108 (Mun. Ct. 1996).

A municipal court is not limited in the amount of restitution it can order from a dependant who is guilty of meter tampering. *State v. Kennedy*, 152 *N.J.* 413, 424, (1998); *cf. State v. Paone*, 290 *N.J. Super.* 494, 497 (App. Div. 1996)(upholding municipal court restitution award of \$102,545.49 subject to hearing regarding defendant's ability to pay).

A municipal court has jurisdiction to adjudicate charges of disorderly persons violations and municipal violations which take place in areas "bounding the municipality," and beaches and "bathing facilities" "bordering on the municipality." *State v. Oliver*, 320 *N.J. Super.* 405, 418 (App. Div. 1999).

If a complaint has been filed in a municipal court without territorial jurisdiction over the offense, that court nevertheless has the power to transfer the matter to an appropriate municipal court. *State v. Ryfa*, 315 *N.J. Super.* 376 (Law Div. 1998).

Municipal courts have jurisdiction to entertain motions to suppress evidence obtained by warrantless searches "in matter subject to trial within the municipal court." *R.* 7:5-2; *State v. Giordano,* 281 *N.J. Super.* 150 (App. Div. 1995); *but see State v. Maure,* 240 *N.J. Super.* 269 (App. Div. 1990), *aff'd o.b.* 123 *N.J.* 457 (1991) (Appellate Division entertained a direct appeal from an interlocutory order of the municipal court respecting the admissibility of breathalyzer evidence); *see generally State v. Downie,* 117 *N.J.* 450 (1990); *State v. Mazurek,* 237 *N.J. Super.* 231 (App. Div. 1989), *certif. denied*, 121 *N.J.* 623 (1990); *State v. Bodtmann*, 239 *N.J. Super.* 33 (App. Div. 1990). Where suppression motions are not based on constitutional grounds, however, denials of the motions are not subject to further review following a guilty plea as provided by this rule. *State v. Giordano*, 281 *N.J. Super.* 150, 154 (App. Div. 1995).

III. SUPERIOR COURT

A. Law Division

The Superior Court of New Jersey, Law Division, has general jurisdiction of all indictable crimes. *N.J.S.A.* 2A:3-4; *R.* 3:1-5. This includes the power to adjudicate lesser-included non-indictable offenses. *State v. Saulnier,* 63 *N.J.* 199 (1973); *see also R.* 3:1-5. In addition, the Law Division hears proceedings involving charges constituting disorderly persons offenses or petty disorderly person offenses brought pursuant to *N.J.S.A.* 2C:34-2b (sale of obscene material to person 18 years of age or older), and *N.J.S.A.* 2C:37-8 (all gambling offenses). *R.* 3:1-6. All filed papers in indictable offenses are entitled in the Superior Court. *R.* 3:7-1.

In State v. Hall, 93 N.J. 552 (1983), cert. denied sub. nom. Hall v. New Jersey, 104 S.Ct. 526 (1983), the Court held that the Superior Court has jurisdiction to authorize investigative detentions. 93 N.J. at 559. The jurisdiction of the court was founded on the judiciary's constitutional powers over searches and seizures. N.J.Const. 1947, Art. I, ¶ 7 and U.S. Const., Amend IV; see also State v. Palle, 265 N.J. Super. 482, 486 (App. Div. 1993). In addition, a defendant convicted in a municipal court has a right to appeal to the Law Division. N.J. Const. 1947, art. VI, § VI; N.J.S.A. 2A:3-6; see also R. 3:23-1 et seq.; R. 7:8-1; but see State v. Hanemann, 180 N.J. Super. 544 (App. Div. 1981), certif. denied, 88 N.J. 506 (1981) (an appeal to the Superior Court deprives the municipal court of its power to grant a new trial).

Where jurisdiction of the trial court is invalid but jurisdiction is assumed because of a misrepresentation by defendant, the intervening contempt conviction for violation of a bail order is valid and must be obeyed until jurisdiction of the underlying criminal proceeding is determined to be invalid. *State v. Roberts*, 212 N.J. Super. 476, 485 (App. Div. 1986). The Appellate Division in *Roberts* held that the Law Division had jurisdiction to find defendant in contempt for violation, even if the bail order had been invalid because it was entered by the Superior Court while defendant was still a juvenile. The Superior Court, Law Division may assert jurisdiction over nonindictable offenses when they are lesser included offenses of indictable offenses. *State v. De Luca,* 108 *N.J.* 98 (1987) (court may preside over simultaneous prosecutions for death by auto for driving under the influence).

Dispositional rules governing incarceration of juveniles by Family Part have no effect on a juvenile who is waived to adult court. *State in the Interest of A.B.*, 109 *N.J.* 195 (1988); *State v. Scott*, 141 *N.J.* 457 (1995).

B. Appellate Division

The Appellate Division of Superior Court is the intermediate appellate court which hears criminal appeals of final judgments from the Law Division. *R.* 2:2-3. In certain cases, the Appellate Division may grant leave to appeal from an interlocutory order of a trial court. *R.* 2:2-4. For example, a juvenile waiver order is an interlocutory order which may be appealed only by leave granted under *R.* 2:2-4. *State in the Interest of R.L.*, 202 *N.J. Super,* 410 (App. Div. 1985); *see also State in the Interest of A.L.*, 271 *N.J. Super.* 192 (App. Div. 1994).

Normally, the filing of an appeal deprives the trial court of jurisdiction. *R.* 2:9-1; *but see R.* 2:9-4 (a trial judge may grant bail pending appeal), *R.* 3:21-10(d) (a trial court may reconsider and modify a sentence notwithstanding the pendency of an appeal) and *R.* 1:13-1 (correction of clerical mistakes).

The Appellate Division also hears appeals from administrative agencies. *R.* 2:2-3(a)(2). If an applicant rejected by the office of the Public Defender for representation seeks to challenge that rejection, he should file an appeal with the Appellate Division. *State v. Nilsen,* 214 *N.J. Super.* 23 (App. Div. 1986); *see also State v. Douglas,* 322 *N.J. Super.* 156, 164-165 (App. Div. 1999).

IV. TERRITORIAL APPLICABILITY OF THE CODE OF CRIMINAL JUSTICE

N.J.S.A. 2C:1-3 establishes the territorial jurisdiction of the criminal law. The Code makes clear that a person may be convicted under the laws of New Jersey where his conduct or conduct of another for which he is legally accountable, which is an element of the offense, or the result of such conduct, occurs within the State. *N.J.S.A.* 2C:1-3(a)(1)-(6).

N.J.S.A. 2C:1-3(f) provides that, notwithstanding the jurisdiction of the State, the court may dismiss, hold in abeyance for up to six months or place on the inactive list, any criminal prosecution under the laws of the State "where it appears that such action is in the interests of justice because the defendant is being prosecuted for an offense based on the same conduct in another jurisdiction and this State's interest will be adequately served by a prosecution in the other jurisdiction." *See State v. Ellis*, 280 *N.J. Super.* 533, 549-552 (App. Div. 1995).

N.J.S.A. 2C:1-3(e) defines "this State" for purpose of the Code as including the land, water and air spaces above such land and water with respect to which the State has legislative jurisdiction. It also includes any territory made subject to the criminal jurisdiction of this State by interstate compacts. *See State v. Holden,* 46 *N.J.* 361 (1966).

With respect to homicides, the Code provides that either the death of a victim or the bodily impact causing death constitutes a result within the meaning of the Code, and if the body of a victim is found within the State it may be inferred that such result occurred within the State. *N.J.S.A.* 2C:1-3(d); 2C:1-13e; *State v. Dirienzo*, 53 *N.J.* 360, 376 (1969). For example, in *State v. Farlow*, 176 *N.J. Super.* 548 (App. Div. 1980), *certif. denied* 87 *N.J.* 320 (1981), defendant shot and wounded the victim in Philadelphia. The victim died in Camden County, New Jersey. The court held that defendant could be prosecuted in the county where the victim died. *See also State v. Reldan*, 166 *N.J. Super.* 562 (Law Div. 1979), *aff* d 185 *N.J. Super.* 495 (App. Div. 1982), *certif. denied* 91 *N.J.* 543 (1982).

In State v. Schmidt, 213 N.J. Super 576 (App. Div. 1986), rev'd on o.g., 110 N.J. 258, the Appellate Division held that a defendant, who was outside New Jersey at the time his co-defendant was arrested in New Jersey for possession of cocaine in the trunk of his automobile was, as a co-conspirator, responsible for conduct of the codefendant who actually possessed cocaine in New Jersey. In State v. Schumann, 218 N.J. Super. 501 (App. Div. 1987), modified and remanded, 111 N.J. 470 (1988), the Appellate Division reserved defendant's conviction for endangering the welfare of a child and remanded for an entry of a judgement of acquittal. The offense occurred at Sandy Hook. The court held that jurisdiction was an element of the offense, and reversed defendant's conviction because the State did not prove beyond a reasonable doubt that the offense occurred in an area where the State had concurrent jurisdiction with the federal government. The Supreme Court held that the

determination of the areas of Sandy Hook that are subject to concurrent state-federal jurisdiction is a legal question to be decided by the court. The jury should then determine beyond a reasonable doubt whether the offense occurred within that area. The court remanded the case to the Law Division for a determination of the area subject to the jurisdiction of the State. *See also State v. Ingram,* 226 *N.J. Super.* 680 (Law Div. 1988) (State failed to produce facts establishing it had territorial jurisdiction over United States Army Corps of Engineers site on which defendant allegedly unlawfully abandoned or disposed of hazardous waste).

Where there is continuing course of conduct both within and outside New Jersey, New Jersey courts will have jurisdiction where the conduct or result occurring in New Jersey constitutes an element of the offense. 2C:1-3a(1). For example, in State v. Sanders, 230 N.J. Super. 233 (App. Div. 1989), the defendant was found to have endangered the welfare of a child in New Jersey when she admitted leaving the state with the express purpose of abandoning her infant son in Philadelphia. The court held that taking a substantial step towards abandoning the child constituted an attempt under 2C:5-1a(3) which itself is a completed crime conferring jurisdiction under 2C:1-3a(1). Similarly, a defendant's intention to distribute a controlled dangerous substance out of state does not raise a jurisdictional issue as the crime is complete in this state. See State v. Meltzer, 239 N.J. Super. 110, 114 (Law Div. 1989); see also State v. Jackson, 289 N.J. Super. 43, 50 (App. Div. 1996), certif. denied 148 N.J. 462 (1997)(possession of a weapon for an unlawful purpose charge was not subject to jurisdictional attack notwithstanding the fact that defendant intended to use the weapon to commit a crime outside of New Jersey).

Where it is disputed whether the crime was completed in New Jersey, a jury instruction must explain which element occurred where and for what purpose. *State v. Bragg,* 295 *N.J. Super.* 459 (App. Div. 1996). Establishing jurisdiction over a particular criminal act is an element of the offense, 2c:1-13a, 2C:1-14h. Thus, the issue of what act took place where is for the jury, and the State must prove beyond a reasonable doubt that acts constituting an offense took place in New Jersey. *State v. Schumann, supra; State v. Bragg, supra.*

Where the victim was threatened at gunpoint in a federal post office and her purse was taken, the State had jurisdiction over the armed robbery where the purpose was to get the victim's keys and steal her car. *State v. Jackson, supra,* applying 2C:1-3a(2).

In *State v. Streater*, 233 *N.J. Super*. 537, 543-544 (App. Div.), *certif. denied*, 117 *N.J.* 667 (1989), the court found that 2C:1-3a(4) conferred jurisdiction on New Jersey where defendant engaged in substantial conduct in New Jersey in preparation for theft by deception in Connecticut.

V. LACK OF JURISDICTION (See also, STATUTE OF LIMITATIONS, this Digest)

A jurisdictional defense may be noticed at any time during the pendency of the proceedings except at trial. R. 3:10-4.

The statute of limitations in criminal matters is jurisdictional and nonwaivable. *State v. Stillwell*, 175 *N.J. Super.* 244, 252 (App. Div. 1980); *State v. Short*, 131 *N.J.* 47, 55 (1993). In *State v. Stern*, 197 *N.J. Super.* 49 (App. Div. 1984), the Appellate Division rejected defendant's jurisdictional contention, on appeal from the Law Division following a trial *de novo*, that the municipal court lacked jurisdiction to hear the matter, because it was barred by the statute of limitations for disorderly persons offenses. The court relied upon *N.J.S.A.* 2C:1-6(d) which permits the downgrading at any time, if the original indictable offense was filed within the time applicable to that offense. 197 *N.J. Super.* at 53.

In *State v. Bernstein*, 189 *N.J. Super.* 212 (App. Div. 1983), the Appellate Division found that the municipal court did not have jurisdiction to convict defendant of a fourth degree theft offense and reversed defendant's conviction which was entered by the Law Division following a trial *de novo. R.* 3:23-8(d) does not preclude a dismissal for want of jurisdiction by the Appellate Division. 189 *N.J. Super.* at 217; *See R.* 3:10-4; *See R.* 1:13-4 (authorizes transfer from a court lacking subject matter jurisdiction to any court having such jurisdiction).

JUVENILES

I. PHILOSOPHY OF JUVENILE JUSTICE

Because of their age and unique susceptibility to peer group and environmental influence, juveniles traditionally have been treated differently than their adult counterparts. As a result, youths have not been subjected to the full rigors of the adult criminal justice system. The emphasis of the juvenile justice system has been placed upon the need to rehabilitate. In an effort to reform the youth, a sociological rather than strictly punitive approach has been utilized upon disposition. The primary focus has been placed upon an individualized diagnosis of the reasons for the particular juvenile's misbehavior, as well as an examination of the services or treatment he needs in order to effectuate his reformation. See generally, State in the Interest of Carlo, 48 N.J. 224 (1966); State v. Tuddles, 38 N.J. 565, 571 (1962); State in the Interest of D.B.S., 137 N.J. Super. 371, 375 (App. Div. 1975), certif. denied, 70 N.J. 144 (1976); State in the Interest of L.N., 109 N.J. Super. 278, 285-287 (App. Div.), aff'd o.b. 57 N.J. 165 (1970), cert. denied, 402 U.S. 1009 (1971); State in the Interest of W.O., 100 N.J. Super. 358, 362 (App. Div. 1962).

Traditionally, juvenile proceedings were viewed as civil, rather than criminal in nature. Consequently, juvenile hearings were characterized by informality and flexibility. In recent years, emphasis has been placed upon extending many adult constitutional safeguards to youths.

The most recent revision of the statutory laws pertaining to the juvenile justice system was enacted in conjunction with the abolition of the juvenile and domestic relations courts and the creation of the Family Part of the Chancery Division of the Superior Court in 1983. The Code of Juvenile Justice (N.J.S.A. 2A:4A-20 to 49) was enacted by L. 1982, c. 77 and became effective December 31, 1983. The revision recognized that the public welfare and best interests of juveniles could be served most effectively through an approach which provided for harsher penalties for juveniles who commit serious acts or who are repetitive offenders, while broadening family responsibility and the use of alternative dispositions for juveniles committing less serious offenses. See State v. H.B., 259 N.J. Super. 603, 607 (Ch. Div. 1992) (emphasis is on the family, rather than the juvenile, in developing a total rehabilitative plan).

The provisions of the new Code and other accompanying statutes were meant to reflect a philosophy which is pragmatic and realistic in nature rather than bound to any particular ideology, See Senate Judiciary Committee Statement to New Jersey Assembly Bill No. 641, and to deal more strictly with serious offenders. See State in the Interest of R.G.D., 108 N.J. 1, 9 (1987). Thus, while rehabilitation traditionally has been regarded as the overarching objective of juvenile delinquency statutory schemes, and remains a primary goal of our Juvenile Code, nevertheless, the Code also reflects a correlative emphasis on public safety and deterrence. State in the Interest of J.L.A., 136 N.J. 370, Punishment has now joined 377-379 (1994). rehabilitation as a component of the State's core mission concerning juvenile offenders. State v. Presha, 163 N.J. 304, 314 (2000).

II. JURISDICTION OF THE FAMILY COURT

A. Generally

The Family Court has exclusive jurisdiction over delinquency cases and matters relating to a juvenile-family crisis. Jurisdiction extends in these matters over the juvenile and his parent, guardian or any family member found to be contributory to a juvenile-family crisis. *N.J.S.A.* 2A:4A-24.

The court has jurisdiction over the cases of all individuals who are younger than 18 at the time of the commission of an offense. If over 18 when the offense is committed, a person is considered an adult and does not fall under the Family Court's jurisdiction. *N.J.S.A.* 2A:4A-22; *N.J.S.A.* 2A:4A-24.

Patterson v. Monmouth Regional High School, 222 *N.J. Super.* 448 (App. Div. 1987), although decided in the context of a statute of limitations issue in a personal injury suit, held that a person reaches the age of 18 on the actual date of his birthday, thereby rejecting the common law "coming of age" rule relied upon in *State In the Interest of F.W.*, 130 *N.J. Super.* 513 (J. & D.R. Ct. 1974), which held that a person is considered to be 18 on the day before his actual birthday.

State in the Interest of C.P. & R.D., 212 N.J. Super. 222 (Ch. Div. 1986), held that while the Family Court has exclusive jurisdiction over those under 18 years of age who are charged with committing a delinquent act, there is no statutory lower age limit. This case considered whether six and nine year old juvenile codefendants could be held for trial on charges of aggravated sexual assault. The court ruled they could be so held only if the juveniles understood the significance of the trial, aiding in their own defense, and if they were capable of each and every element of the charged crime. Here, the psychiatric evidence demonstrated that the juveniles could not possibly have formed the requisite intent to commit aggravated sexual assault, and thus the complaints were dismissed.

If, however, between ages 14 and 18 at the time of the alleged offense, a juvenile may request to be transferred to the adult criminal process. *N.J.S.A.* 2A:4A-27; *R.* 5:22-1. Any juvenile under the age of 14 charged with an offense which would constitute murder may also elect to be transferred to the adult criminal process. *Id.* A juvenile between ages 14 and 18 may be transferred to the adult criminal court against his will after a waiver hearing. *N.J.S.A.* 2A:4A-26; *R.* 5:22-2. However, prior to the actual occurrence of waiver (this procedure is also called transfer, referral or certification), either upon the youth's request, or against his will by the court, he is still considered a juvenile within the meaning of the statute.

B. Selected Matters Subject to the Family Court's Jurisdiction

1. Juvenile Delinquency

A juvenile may be charged with delinquency based upon the commission of an act, which, if perpetrated by an adult, would constitute a crime, a disorderly persons offense, a petty disorderly persons offense, or a violation of any other penal statute, ordinance or regulation. *N.J.S.A.* 2A:4A-23. See State in the Interest of M.S., 73 *N.J.* 238 (1977); State v. Bowen, 154 N.J. Super. 368, 374-376 (App. Div. 1977), certif. denied, 77 N.J. 479 (1978), decided under prior statute.

According to *State in the Interest of M.C.*, 303 *N.J. Super.* 624 (App. Div. 1997), a juvenile in possession of a firearm may be prosecuted under either *N.J.S.A.* 2C:58-6.1b (an offense limited, by definition, only to juveniles) or *N.J.S.A.* 2C:39-5c. Even if prosecuted under the former, the juvenile still will be subject to incarceration as a juvenile delinquent.

State in the Interest of A.B., 328 N.J. Super. 96 (Ch. Div. 1999) concluded that a 16 year old juvenile who took nude photographs of a 15 year old juvenile may be charged with delinquency on the basis of violating N.J.S.A. 2C:24-4b (endangering the welfare of a child).

The court holds that the child endangerment statute applies to juvenile actors.

State in the Interest of D.J.F. 336 *N.J. Super.* 214 (App. Div. 2001) concluded that a juvenile can be charged with delinquency for violation of *N.J.S.A.* 2C:33-17(a), which prohibits service of alcoholic beverages to minors.

2. Motor Vehicle, Bicycle, Smoking and Curfew Offenses

An individual age 17 or older who allegedly committed a traffic offense in violation of any section of N.J.S.A. 39:3, 4, 6, or 8 cannot be charged with delinquency, but must be proceeded against as an adult in the municipal court. N.J.S.A. 2A:4A-23; R. 5:23-1. Similarly, a juvenile of any age who allegedly committed a pedestrian or bicycle offense within articles 3 or 6 of N.J.S.A. 39:4, a motorized bicycle offense within N.J.S.A. 39:3 or 4 or a power vessel violation of N.J.S.A. 12:7 cannot be charged with delinquency and must be prosecuted as an adult in the municipal court. N.J.S.A. 2A:4A-23; R. 5:23-1. In such cases, the municipal court has jurisdiction regardless of whether the person possesses a driver's license. See Comment to former R. 5:9-6. Violations of a municipal ordinance enacted under N.J.S.A. 40:48-2.52 pertaining to curfew ordinances, and violations of the laws regarding smoking in public also are not considered delinquency matters and proceed in municipal court. *N.J.S.A.* 2A:4A-23. Nevertheless, if a municipal court orders detention or imposes imprisonment, for any of these matters, that term shall be served at a juvenile institution and not a county jail or county workhouse. N.J.S.A. 2A:4A-23.

3. Juvenile-Family Crisis

Under the law before 1974, a delinquency adjudication could be based on certain noncriminal acts, called status offenses (*e.g.*, habitual vagrancy, incorrigibility, immorality, etc.). As this approach too harshly penalized and unnecessarily stigmatized a youth for essentially noncriminal behavior, in 1974 the law changed to provide that these "status offenders" be charged not with delinquency, but with being in need of supervision (JINS).

With the revision of the juvenile justice code in 1983, the JINS category was eliminated, and a juvenile-family crisis category was enacted. Companion legislation established juvenile-family crisis intervention units in order to assist juveniles and their families whose behavior creates a crisis situation. These juvenile family crisis

intervention units provide a procedure to deal with those juvenile matters (i.e., chronic truancy, a serious conflict between parent and child, or unauthorized absence from the home) which do not result in delinquent acts, but which are sufficiently serious to necessitate intervention. Behavior by a juvenile which under the 1974 statute identified him as a JINS will, in many but not all cases, warrant juvenile-family crisis intervention. While the determination that a juvenile was in need of supervision under the 1974 statute was based totally on the conduct of the juvenile, the present statutory scheme views the juvenile's conduct as part of the family condition, and treatment is structured to treat the juvenile problem within the family context. See N.J.S.A. 2A:4A-22 (for a definition of juvenile family crisis); N.J.S.A. 2A:4A-76 through 91. In ordering disposition in a juvenile-family crisis matter, the court may utilize some of the nonrestrictive forms of disposition available for delinquents; however, a juvenile involved in a juvenile-family crisis may not be committed to an institution used for delinquents or placed in any physically restrictive facility, with the exception of mental hospitals, institutions utilized for the mentally retarded or for the care of *N.J.S.A.* 2A:4A-46. narcotics addicts. Similarly, a juvenile who is taken into short-term protective custody (see N.J.S.A. 2A:4A-31) may not be held in a detention facility or jail. N.J.S.A. 2A:4A-32.

In this respect, in *State in the Interest of M.S.*, 73 *N.J.* 238 (1977), decided under the 1974 statute, the Supreme Court determined that a juvenile who, without permission, leaves a JINS shelter where he was placed by court order, may not be found delinquent for escape. The unauthorized departure from a non-restrictive JINS facility was held to warrant only a JINS adjudication. However, the Court's ruling in this case did not preclude a delinquency adjudication for unauthorized departure by a youth from a physically restrictive detention facility where he was being held on an existing delinquency charge. *See State in the Interest of R.L.P.*, 159 *N.J. Super.* 267 (App. Div. 1978).

State in the Interest of J.S., 266 *N.J. Super.* 423 (Ch. Div. 1993), held that a status offender participating in a juvenile-family crisis intervention who knowingly violated a juvenile court's curfew order could be charged with criminal contempt, thereby effectively elevating the juvenile from status offender to delinquent.

4. Extradition

In *State in the Interest of D.N.H.*, 147 *N.J. Super.* 1 (App. Div. 1977), a 17 year old resident of New Jersey

was charged as an adult in Pennsylvania with the commission of criminal offenses in the latter state. Upon his return to New Jersey, a requisition warrant was issued by the Pennsylvania Court, certifying that since defendant was charged with murder, a crime for which one is generally treated as an adult in that state, the Juvenile Court's jurisdiction did not attach. Therefore, a warrant was issued for defendant by the State of New Jersey. In a subsequent proceeding, the New Jersey Juvenile Court ruled that extradition should be granted, and defendant was extradited as an adult to Pennsylvania. On appeal, defendant challenged the extradition, claiming a denial of due process based upon the New Jersey Juvenile Court's failure to conduct a preliminary hearing in order to determine his status as a juvenile or adult. Rejecting his contention, the Appellate Division ruled that no such determination was necessary. Since defendant had received all that he was entitled to, viz, an appropriate extradition hearing, at which he was represented by counsel, his complaints were barred.

C. Extra-Territorial Jurisdiction

In State in the Interest of D.B.S., 137 N.J. Super. 371 (App. Div. 1975), certif. denied, 70 N.J. 144 (1976), the juvenile was adjudicated delinquent for the perpetration of a property offense upon a private residence located in Fort Dix, over which exclusive control had been ceded to the United States. Rejecting the youth's contention that a New Jersey court did not have jurisdiction over crimes committed within such an enclave, the Appellate Division held that jurisdiction was properly vested in this state's Juvenile Court. Although the youth was subject to punishment in the courts of the United States, pursuant to federal law, a tribunal of this state could assume jurisdiction over such minors, where in the best interest of the juvenile, and the United States Attorney of the district agrees to forego prosecution and surrender the youth to the jurisdiction of the state. The act of the Fort Dix federal authorities in bringing the petition against the juvenile was interpreted as the equivalent of such a surrender. Moreover, although the youth resided on federal property, he received educational, as well as numerous other benefits from the surrounding community. Thus he was entitled to take advantage of the state's rehabilitative juvenile laws.

In re Olcott, 141 N.J. Eq. 8 (Ch. 1947), reached the opposite conclusion. In that case, the juvenile, a resident of a neighboring state, visited New Jersey only for a few hours, all the while intending to return to her domicile. Since she was not charged with the commission of a criminal offense within the borders of this state, the New

Jersey tribunal lacked jurisdiction to adjudge her delinquent. Nevertheless, the court noted that a New Jersey Juvenile Court would have jurisdiction over a youth who commits an offense in the state or is present therein for a prolonged period.

III. CUSTODY (ARREST)

A. Delinquency Cases

The taking of a juvenile into custody shall not be construed as an arrest, but shall be deemed a measure to protect the health, morals and well being of the juvenile. *N.J.S.A.* 2A:4A-31; *R.* 5:21-1. Nevertheless, a juvenile may be taken into custody pursuant to a warrant, or, without a warrant, pursuant to the "laws of arrest and the Rules of Court." *N.J.S.A.* 2A:4A-31; *see R.* 5:21-1 (upon probable cause to believe he is delinquent).

Despite the fact that an adult disorderly person or violator of a local ordinance may only be arrested without a warrant where the offense is committed in the arresting officer's presence, no such "in presence" requirement exists with regard to juveniles charged with acts of delinquency, regardless of the nature of the underlying charge. Thus, a juvenile may be taken into custody without a warrant, based solely upon the existence of probable cause to believe that he committed an act of delinquency. *State in the Interest of J.B.*, 131 *N.J. Super.* 6, 17-20 (J. & D.R. Ct. 1974).

R. 5:21-1 specifies that a law enforcement officer taking a juvenile into custody shall file a complaint "immediately." Nevertheless, where the juvenile is released virtually immediately thereafter and is not subject to further predisposition detention, the officer's failure to comply with the "forthwith" directive [of prior *R.* 5:8-2(e)] is not *ipso facto* fatal to the further prosecution of the charges. *State in the Interest of H.M.T.*, 159 *N.J. Super.* 104 (App. Div. 1978).

Any person taking a juvenile into custody (for delinquency or short-term) must immediately notify the parents or guardian. *N.J.S.A.* 2A:4A-33; *R.* 5:16-2; *R.* 5:21-1.

B. Short-Term Custody

Except where delinquent conduct is alleged, a juvenile may be taken into short-term custody by a law enforcement officer, without a warrant, when there are reasonable grounds to believe the health and safety of the juvenile are seriously in danger or that the juvenile has left

home without consent, or when the juvenile has run away from an out of home placement. *N.J.S.A.* 2A:4A-31; *R.* 5:16-1. A juvenile cannot be held for more than six hours and, where possible, should be transported home or to the home of a responsible adult. *N.J.S.A.* 2A:4A-32; *R.* 5:16-1. Short-term custody is intended to serve as protection of the juvenile.

State in the Interest of J.G., 227 *N.J. Super.* 324 (Ch. Div. 1988), held that a police officer had the authority to take a juvenile into short-term custody without a warrant based on mother's statement that the juvenile had left the home without parental consent, that there was a serious conflict between the parent and juvenile, that the juvenile was already under a "one-year rule" (*see N.J.S.A.* 2A:4A-43b(1)) and that the juvenile had been using drugs and drinking alcohol.

IV. DETENTION

A juvenile charged with delinquency may be released on his own recognizance. N.J.S.A. 2A:4A-35; R. 5:21-2. Where it will not adversely affect his health, safety, or welfare, a juvenile shall be released pending disposition of a case to a responsible person or agency. N.J.S.A. 2A:4A-34; *R.* 5:21-2. No juvenile may be placed in detention without permission of a judge or court intake service. N.J.S.A. 2A:4A-34. No juvenile 11 years old or younger may be placed in detention unless charged with an offense (if committed by an adult) which would constitute a crime of the first or second degree or arson. If the juvenile is not subsequently released by intake personnel at the detention facilities, a detention hearing is scheduled by the following morning, where the court will determine in accordance with statutory criteria whether the juvenile may be retained in detention pending disposition of the case. N.J.S.A. 2A:4A-34; R. 5:21-3; R. 5:21-5. If a juvenile is detained, a probable cause hearing must be conducted, as well as periodic detention review hearings. N.J.S.A. 2A:4A-38; R. 5:21-3.

Schall v. Martin, 467 *U.S.* 253, 104 *S.Ct.* 2403 (1984).

Section 320.5(3)(b) of the New York Family Court Act authorizes pretrial detention of an accused juvenile delinquent based on a judicial finding that there is a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." The United States Supreme Court held that preventive detention under this standard served a legitimate state objective of protecting both the child and community from consequences of future criminal conduct, was non-punitive in nature, and that the procedural protections afforded pretrial detainees (*e.g.*, notice, a hearing, a statement of facts and reasons, a formal probable cause hearing shortly thereafter) satisfied the due process clause of the Fourteenth Amendment. (*See N.J.S.A.* 2A:4A-34 and *R.* 5:21-5, for New Jersey's standards for detention.)

See N.J.S.A. 2A:4A-36; N.J.S.A. 2A:4A-37; N.J.S.A. 2A:4A-23; *R*. 5:21-4 and *R*. 5:22-3 concerning the place of detention. See also State in the Interest of M.S., 73 N.J. 238 (1977), decided under the 1974 statute, concerning the difference between a non-restrictive shelter facility for JINS and a physically restrictive detention facility.

State in the Interest of C.B., 173 N.J. Super. 424 (App. Div.), certif. denied, 84 N.J. 482 (1980), concluded that the prior rule governing a detention hearing [prior R. 5:8-6(d)] did not expressly mandate a dismissal of charges or release of the detainee if the adjudicatory hearing was not commenced within 30 days from the onset of detention, but merely required the scheduling of a hearing on the complaint within 30 days of the date of the first detention hearing at which the juvenile is represented. (Currently N.J.S.A. 2A:4A-38 and R. 5:21-7 require that the adjudicatory hearing be held, not merely scheduled, within the 30 day period, although this time is extendable by the court for good cause.)

V. WAIVER

A. Involuntary Transfer to Adult Court (*N.J.S.A.* 2A:4A-26; *R.* 5:22-2)

1. Provision of a Waiver Hearing with Counsel

Kent v. United States, 383 U.S. 541 (1966); State v. Lueder, 74 N.J. 62 (1977); State v. Tuddles, 38 N.J. 565. 572-573 (1962); State v. Van Buren, 29 N.J. 548, 554-558 (1959). In Kent, the United States Supreme Court held that prior to waiver of jurisdiction, a youth is entitled to a hearing, at which he is represented by counsel, as well as access to the records being considered by the court and a statement of the reasons for its It is unclear whether this ruling was of decision. constitutional import or merely based upon the Court's supervisory powers over federal and the District of Columbia tribunals. Since in *Tuddles* and *Van Buren* the New Jersey Supreme Court required the provisions of a waiver hearing and counsel in this state even prior to the United States Supreme Court's ruling in Kent, the issue is academic. In *Lueder*, our State Supreme Court assumed that *Kent* was of constitutional magnitude, but nevertheless, declined to specifically resolve the issue.

State v. Jack, 144 N.J. 240 (1996), held that a juvenile is entitled to the effective assistance of counsel at a waiver hearing, measured by the principles of Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984). However, more is required to justify a new waiver hearing than a *prima facie* showing that the juvenile's counsel failed to present evidence of a potential for rehabilitation. The juvenile must also show the reviewing court that there was evidence of a genuine potential for rehabilitation that counsel did not present to the juvenile court. If so, on remand, the juvenile court should then consider whether that potential for rehabilitation was not initially presented due to ineffectiveness of counsel and whether a showing of that potential by effective counsel could have made a difference in the waiver proceedings. Only if both answers are yes should a new waiver proceeding be ordered.

In State v. Bryant, 237 N.J. Super. 102 (App. Div. 1988), rev'd o.g. 117 N.J. 495 (1989), counsel for a 17 year old juvenile provided ineffective assistance at the waiver hearing by failing to adduce any meaningful evidence with respect to the juvenile's likelihood of rehabilitation. The failure was not a mere choice by tactics, but instead was based on counsel's incorrect belief that he could not present inconsistent defenses of likelihood of rehabilitation and lack of guilt. But for this error, there was a reasonable probability in this case that the result of the waiver hearing would have been different. The juvenile's adult convictions for simple assault, possession of a handgun for an unlawful purpose and possession of the handgun without a permit were thus reversed, and the matter remanded for a new waiver hearing.

In *State v. Ferguson*, 255 *N.J. Super.* 530 (App. Div. 1992), a 14 year - 8 month old juvenile convicted of murder and sentenced to a 30 year term without parole as an adult received ineffective assistance of counsel at his fundamentally flawed involuntary waiver hearing requiring a new waiver hearing. Counsel failed to inform the juvenile or his parents of his right to testify at the waiver hearing. The privately retained, inexperienced defense counsel, hampered by limited funds, also inadequately prepared for the waiver hearing. He spent little time interviewing witnesses, displayed little understanding of the function of a waiver hearing in a murder case, withheld or failed to obtain crucial data for his expert, and made a wholly inadequate presentation on

rehabilitation and the circumstances motivating the juvenile to carry a knife on the night in question.

2. Time and Nature of a Waiver Hearing

State v. Lueder, 74 N.J. 62, 77 (1977); State in the Interest of B.T., 145 N.J. Super. 268 (App. Div. 1976), certif. denied, 73 N.J. 49 (1977). A waiver hearing is a preliminary proceeding to determine the propriety of transferring jurisdiction over a youth to the adult criminal process. It is analogous to a probable cause hearing prior to indictment or the determination of a grand jury to indict. In contrast with an adjudicatory hearing, a waiver hearing plays no part in the process of deciding innocence or guilt. The demands of due process at such a preliminary stage of the proceedings only mandate a fair hearing where the youth is represented by counsel and has an opportunity to be heard and present evidence. Consequently, constitutional guarantees concerning the trial process and the rules of evidence do not apply to such a preliminary jurisdictional hearing.

State in the Interest of A. T., 245 *N.J. Super*. 224 (App. Div. 1991), explained that probable cause within the context of a juvenile waiver proceeding is no more than a well-grounded suspicion or belief that an offense has taken place and that the juvenile was a party to it. On the State's motion for waiver, the trial judge is not allowed to weigh the evidence to determine where the truth of the matter lay; hearsay evidence may be relied upon, and the judge's disapproval of both the manner in which the police conducted their investigation and the circumstances of the juvenile's identification are irrelevant.

State in the Interest of W.M., 265 *N.J. Super.* 413 (Ch. Div. 1992), concluded that the State cannot rely solely upon transcripts of unsworn, unsigned statements of the juveniles to satisfy the probable cause element of a waiver motion.

It is not clear whether at a waiver hearing the juvenile is entitled to present evidence on his own behalf with respect to the probable cause finding. The question was noted but not addressed in *State in the Interest of A. T.*, 245 *N.J. Super.* 224, 227 n.1 (App. Div. 1991). In *State in the Interest of B.G.*, 247 *N.J. Super.* 403, 423 (App. Div. 1991), the court found no denial of due process in the extended waiver hearing where the juveniles were permitted to proffer their own evidence as probable cause. *But see, State in the Interest of R.G.D.*, 108 *N.J.* 1, 16 (1987) (appearing to limit juvenile's probable cause evidence to that related to rehabilitation). State in the Interest of A.L., 271 N.J. Super. 192, 203, 211-213 (App. Div. 1994); State v. Ferguson, 255 N.J. Super. 530, 537-538 (App. Div. 1992); N.J.S.A. 2A:4A-29. A juvenile's testimony at a waiver hearing is immunized to ensure that he can participate fully at any stage of the waiver proceeding. This statutory immunity encompasses both use and derivative-use immunity.

State in the Interest of J.L.W., 236 N.J. Super. 336 (App. Div. 1989). When determining probable cause at a waiver hearing, the judge is limited to a consideration of the evidence presented, including its adequacy, and may not infer that the testimony of witnesses the State declined to produce would be adverse to its interests. Here, the evidence was adequate to establish probable cause where the State offered sworn statements of eyewitnesses, even though it did not offer live testimony (as the trial judge requested) from two eyewitnesses, and one eyewitness had made a request to "drop the charges." Moreover, no adverse inference should be drawn, because the prosecutor seeks to minimize the number of times a victim or witness must be exposed to the rigors of testifying, and no adverse inference was appropriate for the witness who dropped the charges - such a situation fairly implied the witness feared reprisal rather than that the charges were false.

State in the Interest of J.W., 287 N.J. Super. 157 (Ch. Div. 1995). N.J.S.A. 2A:4A-26d and R. 5:22-2 require the prosecutor to file a motion seeking waiver of Family Part jurisdiction within 30 days of receiving the complaint, which time shall not be extended except for good cause shown. Here, the State established good cause for filing the motion 91 days after the original complaint was filed in Hudson County, where change of venue to Middlesex County was not effected until 86 days after filing the original complaint, the juvenile's original attorney testified that the handling of the venue transfer was routine and timely, the juvenile was 15 years old and not prejudiced, there was no evidence that Hudson County had technology to permit a more expedited transfer, and the decision to change venue was mutually agreed to by both parties.

In *State in the Interest of J.S.*, 272 *N.J. Super.* 338 (Ch. Div. 1993), a delay of more than two years between the time the juvenile was charged with alleged acts of delinquency and the time of the waiver hearing did not prejudice him or violate his due process rights, where the juvenile could not have proven the likelihood of his rehabilitation by age 19 even if the waiver hearing had been conducted at the time he was charged. The juvenile was approximately 17 years, four months old when

charged with acts which would have constituted aggravated sexual assault, and the Pinelands rehabilitation program into which he was accepted (on a prior sexual assault case) took approximately three years to complete successfully.

State in the Interest of R.L., 202 N.J. Super. 410 (App. Div.), certif. denied, 102 N.J. 357 (1985); see also State v. Ferguson, 255 N.J. Super. 530, 536 (App. Div. 1992). A juvenile waiver order transferring jurisdiction to the adult criminal court is an interlocutory order which may be appealed to the Appellate Division only by leave granted pursuant to R. 2:2-4, or await the conclusion of the adult criminal action. This decision overrules the contrary holding of State v. Evangelista, 134 N.J. Super. 64 (Law Div. 1975), a decision which had considered waiver orders appealable as of right as "final" orders.

In *State in the Interest of G.W.*, 206 *N.J. Super.* 50 (App. Div.), *certif. denied*, 102 *N.J.* 355 (1985), G.W. at his detention hearing, offered to provide a factual basis and plead guilty to charges, which if committed by an adult, would constitute murder, aggravated sexual assault, robbery and burglary. The judge refused to accept the pleas because the State had already moved for waiver of the matter to the Law Division. The Appellate Division ruled that the trial judge correctly refused to accept the pleas. To do so would have circumvented the authority given the prosecutor under *N.J.S.A.* 2A:4A-26a to move for waiver "without the consent of the juvenile."

3. Criteria for Involuntary Waiver

In order to warrant the involuntary transfer of a juvenile to the adult criminal process, the Family Court must find at a waiver hearing that the following criteria exist:

a. The juvenile was 14 years of age or older at the time of the charged delinquent act; and

b. Probable cause to believe that the juvenile committed a delinquent act or acts which if committed by an adult would constitute:

(1) Criminal homicide other than death by auto, strict liability for drug induced deaths, first degree robbery, carjacking, aggravated sexual assault, sexual assault, second degree aggravated assault, kidnapping or aggravated arson; or (2) A crime committed at a time when the juvenile had previously been adjudicated delinquent, or convicted, on the basis of any of the offenses enumerated in subsection (2)(a); or

(3) A crime committed at a time when the juvenile had previously been sentenced and confined in an adult penal institution; or

(4) An offense against a person committed in an aggressive, violent and willful manner, other than an offense enumerated in subsection (2)(a), or the unlawful possession of a firearm, destructive device or other prohibited weapon, arson or death by auto if the juvenile was operating the vehicle under the influence of drugs or alcohol; or

(5) A violation of 2C:35-3, 35-4, or 35-5; or

(6) Crimes which are a part of a continuing criminal activity in concert with two or more persons and the circumstances of the crimes show the juvenile has knowingly devoted himself to criminal activity as a source of livelihood; or

(7) An attempt or conspiracy to commit any of the acts enumerated in paragraph (a), (d) or (e); or

(8) Theft of an automobile; or

(9) Possession of a firearm with a purpose to use it unlawfully against the person of another under 2C:39-4(a), or aggravated assault, aggravated criminal sexual contact, burglary or escape if, while in the course of committing or attempting to commit the crime including the immediate flight therefrom, the juvenile possessed a firearm; and

c. Except with respect to any of the acts enumerated in subsection (2)(a), or with respect to any acts enumerated in subsection 2(e) which involve the distribution for pecuniary gain of any CDS or analog within 1,000 feet of school property or on a school bus, or any attempt or conspiracy to commit any of those acts, the State has shown that the nature and circumstances of the charge or the prior record of the juvenile are sufficiently serious that the interests of the public require waiver.

However, if the juvenile can show that the probability of his rehabilitation by the use of the procedures, services and facilities available to the court prior to the juvenile reaching the age of 19 substantially outweigh the reasons for waiver, waiver shall not be granted. By virtue of P.L. 1999, ch. 373 (effective March 14, 2000), this opportunity for juveniles to defeat a waiver motion by demonstrating rehabilitation has been eliminated with respect to juveniles aged 16 and older who commit the most serious offenses: crimes enumerated in (2)(a), (2)(i); violations of 2C:35-3, 35-4 or 2C:39-4.1. Guidelines have been developed by the Attorney General (issued March 14, 2000) to insure the uniform application of the waiver provision in those cases where the juveniles cannot overcome the application by showing rehabilitation.

In 1983 there was a significant change in the waiver standard with respect to serious juvenile offenders. The process shifted toward waiver, creating a presumption of waiver for a juvenile over age 14 if there was probable cause that he committed a "chart 1" offense (*i.e.*, murder, robbery, sexual assault and other enumerated crimes). State in the Interest of R.G.D., 108 N.J. 1 (1987), rev'g208 N.J. Super. 385 (App. Div. 1986). See also State v. Jack, 144 N.J. 240, 246 (1996); State v. Onque, 290 N.J. Super. 578, 584-585 (App. Div.), certif. denied, 146 N.J. 497 (1996). The court still had to balance the value of probable rehabilitation, if shown, against the general deterrent value of adult prosecution, and the court still had to find that the probability of rehabilitation substantially outweighed the reasons for waiver (deterrence), and the juvenile bore the burden to demonstrate this.

This standard continues with respect to juveniles aged 14 to 16, but it has charged by virtue of P.L. 1999, ch. 373 (effective March 14, 2000), for juveniles over age 16 committing the most serious crimes (enumerated in *N.J.S.A.* 2A:4A-26e). For them, rehabilitation potential cannot defeat a prosecutorial decision to waive the case to adult court.

State ex rel. H.H., 333 N.J. Super. 141 (Ch. Div. 1999), aff'd o.b. 333 N.J. Super. 104 (App. Div. 2000). In denying the State's motion to waive jurisdiction to adult court for a 15 year old juvenile charged with attempted murder and related crimes arising from an alleged stabbing in the high school of an apparent love interest of the juvenile's ex-boyfriend, the court found the defense expert and testimony more persuasive than the State's in concluding that the probability of rehabilitation before age 19 substantially outweighed the sole reason for waiver (the gravity of the crime). Here, the juvenile was seriously depressed, had been suicidal, had no prior contact with the judicial system, had no prior

history of antisocial conduct, had obtained good grades in honors classes, and appeared to be "an exemplary adolescent who has exceptional intellect and artistic talent ... a motivated child who has shown a willingness to use her talents and intellect to benefit others."

State in the Interest of D. W., 317 N.J. Super. 138 (App. Div. 1998), held that a juvenile opposing waiver of the juvenile court's jurisdiction [under prior standard] is not required to demonstrate the need for general deterrence will be fulfilled by the time he reaches age 19. Here, where a 16 year old juvenile charged with four separate armed robbery offenses if committed by an adult provided extensive proofs that he could be rehabilitated by age 19, and the State relied solely upon the juvenile's prior record, the family judge erred in placing undue weight on the concept of general deterrence. The Appellate Division reversed the waiver order and remanded for reconsideration.

State in the Interest of A.A.M., 228 N.J. Super. 9 (Ch. Div. 1988). In a proceeding to determine whether a juvenile charged with a narcotics offense should be waived for adult prosecution, a critical question was whether the possession with intent to distribute the 60 grams of cocaine rose to the level of a "chart 1" offense. A "chart 1" offense is a serious crime such as murder or robbery for which there is a presumption for waiver. For lesser "chart 2" offenses, an additional showing by the State "that the nature and circumstances of the charge or the prior record of the juvenile are sufficiently serious that the interests of the public requires waiver," is necessary. The court focused on the key language in N.J.S.A. 2A:4A-26a(3): "which involve the distribution for pecuniary gain" to distinguish between chart 1 and chart 2 possession with intent to distribute offenses. Thus, if there is probable cause that the possession with intent to distribute was for profit, which here could be inferred from the factual circumstances, rather than as a gift to friends for personal consumption, then it is a presumptively waivable chart 1 offense.

In *State v. Torres*, 313 *N.J. Super.* 129 (App. Div.), *certif. denied*, 156 *N.J.* 425 (1998), the mere contention that the record from the juvenile waiver hearing did not indicate that the juvenile was advised of his right to testify was not a *prima facie* showing that there was a potential for rehabilitation that counsel did not present so as to require a new waiver hearing.

State v. Scott, 141 *N.J.* 457 (1995). In determining the rehabilitation potential of a mentally ill juvenile in the context of assessing a waiver of family court

jurisdiction, the cronic and incurable nature of the illness is highly relevant in predicting future conduct, if the illness contributes to criminal behavior. The court should consider the period of time available for treatment, the projected period of time required for improvement or remission to be achieved, the basis for that projection (including severity of illness), difficulty in identifying appropriate treatment or medication, the juvenile's response to prior treatment or medication, and the success rate of the proposed program for achieving and maintaining remission. Here, adequate evidence supported the family court's decision to waive jurisdiction over a juvenile suffering from chronic undifferentiated schizophrenia charged with first degree robbery and aggravated assault.

In *State v. Bessix*, 309 *N.J. Super.* 126 (App. Div. 1998), the juvenile court acted within its discretion in waiving a 14 year old offender for trial as an adult. The juvenile was the primary actor in an attack on an elderly unarmed victim for the purpose of robbery; the juvenile hit the victim twice with a baseball bat, and the victim was severely beaten.

State in the Interest of R.L.P., 159 N.J. Super. 267 (App. Div. 1978); State in the Interest of B.T., 145 N.J. Super. 268 (App. Div. 1976), certif. denied, 73 N.J. 49 (1977). One charged with aiding and abetting a homicide is subject to waiver similarly to a principal. (Decided under prior statute.)

An order referring a case shall incorporate not only the alleged act or acts upon which the referral is premised, but also all other delinquent acts arising out of or related to the same transaction. *N.J.S.A.* 2A:4A-26c; *R.* 5:22-2. *See State in the Interest of R.L.P.*, 159 *N.J. Super.* 267 (App. Div. 1978), decided under the prior statute; the waiver of possession of a weapon and escape charges was upheld where these charges were joined in the same complaint with homicide or charges of aggressive, violent and willful offenses against the person. Therefore, jurisdiction may properly be waived over the entire criminal episode where homicide or violence against the person is involved.

4. Waiver in a Developmentally Disabled Case

In *State in the Interest of A.B.*, 109 *N.J.* 195 (1988), *aff'g* 214 *N.J. Super.* 558 (App. Div. 1987), expert testimony presented by the juvenile at a waiver hearing failed to establish a "severe, chronic disability" which would justify his classification as "developmentally disabled" under *N.J.S.A.* 30:6D-3a and *N.J.S.A.* 2A:4A-

44c(2). Even if the record did support such classification, however, this would not preclude the waiver of charges against him to adult court if the criteria of *N.J.S.A.* 2A:4A-26 are met. The statute barring incarceration of developmentally disabled juvenile offenders in State correctional facilities does not bar their waiver to adult court.

5. Waived Case Returned to Family Part

In State in the Interest of J.M., 222 N.J. Super. 597 (App. Div. 1988), a 17 year old juvenile was charged with delinquency on the basis of conduct which would have constituted murder, weapons offenses and hindering apprehension if committed by an adult. Jurisdiction over the murder was waived pursuant to N.J.S.A. 2A:4A-26a(2)(a), and jurisdiction for the remaining offenses arising out of the same transaction was waived pursuant to N.J.S.A. 2A:4A-26c. The grand jury no-billed the murder charge and indicted J.M. on the two weapons charges. Thereafter the juvenile sought to have these charges returned to the Family Part. Upon the denial of relief on jurisdictional grounds by the Law Division and, after a first successful appeal, denial of relief by the Family Part on jurisdictional grounds, the Appellate Division on this second appeal clarified the jurisdictional issue. The appellate court ruled that upon a grand jury no-bill of the charge upon which waiver of Family Part jurisdiction is premised (here murder), the Law Division has jurisdiction by virtue of N.J.S.A. 2A:4A-25, and inherently, to return the lesser charges "arising out of or related to the same transaction" back to the Family Part.

B. Voluntary Transfer to Adult Court (*N.J.S.A.* 2A:4A-27; *R.* 5:22-1)

Any juvenile 14 years of age or older charged with delinquency may elect to have the action transferred to adult court. Any juvenile under age 14 charged with an offense which if committed by an adult would constitute murder under *N.J.S.A.* 2C:11-3, may elect to have the case transferred to adult court.

In *State v. N.G.*, 305 *N.J. Super.* 132 (Law Div. 1997), after a hearing in the Family Part (for which no record is available), a juvenile voluntarily waived to the Law Division. Following indictment as an adult on weapons and reckless manslaughter charges, the juvenile sought transfer back to Family Part. The Law Division ruled that transfer back was appropriate, since counsel was ineffective in failing to advise the juvenile and/or his mother regarding both the benefits and risks of voluntary waiver, particularly the harsh consequences of a

mandatory *Graves* Act sentence if convicted, the lack of prejudice to the State, the legislative intent of the Juvenile Code, no showing that the waiver hearing satisfied the basic requirements of due process and fairness, no record of the waiver hearing, the lack of a showing that the waiver was knowing, willing and voluntary, and an adult conviction would require the juvenile, who had never been in trouble before, to be removed from high school and sent to jail. The State will still be able, however, to apply for an involuntary waiver if it chooses.

VI. DISPOSITION

A. Factual Basis for Plea

B. Dispositional Alternatives (N.J.S.A. 2A:4A-43)

1. Adjourned Disposition

State v. Musucci, 156 *N.J. Super.* 272, 276 (Law Div. 1978). Adjudication of delinquency is entered, but disposition is adjourned for a period up to 12 months. If the juvenile makes a satisfactory adjustment during that period, the complaint is dismissed.

State in the Interest of V.M., 279 N.J. Super. 535 (App. Div. 1995); State in the Interest of N.S., 272 N.J. Super. 492 (Ch. Div. 1993). Although the placement of a delinquent juvenile under the 12-month adjustment (N.J.S.A. 2A:4A-43b(1)) is a "disposition," and the juvenile's conduct, if committed by an adult would have constituted receiving stolen property (a motor vehicle), the fines and penalties in N.J.S.A. 2C:20-2.1 applicable to defendants convicted of theft do not apply. The N.S. Court further ruled that the mandatory community service penalties required by N.J.S.A. 2A:4A-43e(1) of the juvenile code were required in this situation, while

the *V.M.* Court did not address that question as it was abandoned by the State on appeal. 279 *N.J. Super.* at 536, n.1.

2. Release of the juvenile to the supervision of his parent or guardian

3. Placement of the juvenile on probation for a period not longer than 3 years upon such written conditions as the court deems will aid in his rehabilitation.

State ex rel. K.O., 327 N.J. Super. 555 (App. Div. 2000), ruled that parents have standing to challenge continuation of their daughter's probation in a delinquency case. Here, the family court did not lose jurisdiction to extend probation once the one year term expired due to the other dispositions which were in force and effect, such as placement of the juvenile with another adult outside the family and other elements of the comprehensive treatment plan developed. Moreover, the parents were not entitled to notice and hearing prior to the juvenile's outside placement, and the evidence supported that placement where there was a risk of violence between the juvenile and her natural father, the parents had at one time refused to allow the juvenile to return home, and the parents made no attempt to participate in court-ordered counseling.

State v. H.B., 259 *N.J. Super.* 603 (Ch. Div. 1992), concluded that, pursuant to *N.J.S.A.* 2A:4A-43b(3), a juvenile can be placed on probation to someone other than the chief probation officer, such as a parent (here, the juvenile's mother), or DYFS. Also, there is broad discretion in fashioning probationary conditions to aid in rehabilitation, such as going to school and maintaining a C+ average and not going out after dark without a parent, both of which were imposed here upon a 15 year old juvenile charged with possession of a stolen automobile. Moreover, for a second violation of this probation, the juvenile could be sentenced to a one year period of incarceration.

4. Transfer of custody of the juvenile to any relative or other person determined by the court to be qualified to care for the youth.

5. Placement of the juvenile under the care of the Department of Human Services under the responsibility of the Division of Youth and Family Services for the purpose of providing in or out of home services in accordance with a service plan.

6. Placement of an eligible juvenile under the care and custody of the Commissioner of the Department of Human Services for the purposes of receiving the services of the Division of Developmental Disabilities.

7. Commitment of the juvenile, pursuant to civil commitment laws, to the Department of Human Services under the responsibility of the Division of Mental Health Services for placement in a facility for the treatment of persons who are mentally ill if the juvenile is in need of involuntary commitment.

8. Fine the juvenile an amount not exceeding the amount provided by law for such an offense if committed by an adult. The fine must be consistent with the juvenile's ability to pay, financial responsibility of the family, and be specially adapted to rehabilitation or deterrence.

State in the Interest of L.M., 229 *N.J. Super.* 88 (App. Div. 1988), *certif. denied*, 114 *N.J.* 485 (1989), held that the mandatory penalties provided as part of the Comprehensive Drug Reform Act (DEDR fine, lab analysis fee, and deprivation of privilege to secure driver's license) are constitutional as applied to juveniles.

9. Restitution (by juvenile - 2A:4A-43b(8) or by parent - 2A:4A-43b(19))

State in the Interest of M.C., 292 *N.J. Super.* 214 (Ch. Div. 1995), held that the court's authority to order restitution is sufficiently broad enough to encompass the expenses of psychotherapy (here \$2,380) and after school supervision (\$500) incurred on behalf of a minor sexually abused victim and paid for by the victim's mother, to the extent that the juvenile delinquent has the financial ability to pay.

State in the Interest of R. V., 280 N.J. Super. 118 (App. Div. 1995) concluded that the restitution amount imposed on a juvenile adjudicated delinquent for beating the victim with a baseball bat to a degree which required hospitalization was appropriate where the amount of the victim's medical expenses was undisputed (\$2,688), even though the juvenile might not have the present ability to pay either the entire amount or a lesser amount based on a reasonable payment schedule. The court is entitled to consider the future earning power and potential future expectations of the person ordered to make restitution. Nevertheless, this case was remanded for a hearing to set the conditions and terms of restitution.

10. Community Service

11. Participation in work programs designed to provide job skills and employment training.

12. Participation in programs emphasizing selfreliance, such as intensive outdoor programs teaching survival skills.

13. Participation in a program of academic or vocational education or counseling.

14. Placement in residential or nonresidential treatment program for alcohol or narcotics abuse.

15. Ordering the parents or guardian to participate in appropriate programs or services if their omission or conduct was a significant factor contributing towards the commission of the delinquent act, or if their omission or conduct has been a significant contributing factor towards the ineffective implementation of a court order previously entered in relation to the juvenile.

16. Placement in nonresidential public or private service programs and placement under the custody of the Juvenile Justice Commission for placement in a private residential group home or facility.

17. Postponement, suspension or revocation of a juvenile's driver's license and/or registration certificate for a period not exceeding two years if the juvenile used a motor vehicle in the course of committing the act for which he was adjudicated delinquent.

18. Incarceration (N.J.S.A. 2A:4A-44)

a. Propriety of Incarceration

State in the Interest of M.H., 131 *N.J. Super.* 288, 290-291 (App. Div. 1974), held that, generally, the public policy favors the treatment of juvenile delinquents by various alternative means, short of institutional commitment. *See also N.J.S.A.* 30:4-177.31.

State in the Interest of A.R., 246 N.J. Super. 241 (App. Div. 1991), held that a term of incarceration is not an available disposition for a juvenile who commits what would be a petty disorderly offense if committed by an adult. For these minor infractions, the panoply of alternative dispositions set forth in N.J.S.A. 2A:4A-43 may be available, but not incarceration.

The juvenile statute codifies some standards for imposition of incarceration. Among its other features, the statute enumerates aggravating and mitigating factors which must be considered by the court in evaluating the propriety of incarceration as a disposition. N.J.S.A. 2A:4A-44a. See also N.J.S.A. 2A:4A-43a. A presumption of nonincarceration is provided for any crime or offense of the fourth degree or less committed by a juvenile who has not previously been adjudicated delinquent or convicted of a crime or offense. N.J.S.A. 2A:4A-44b(1). Eligibility for release under parole must also be considered. N.J.S.A. 2A:4A-44b(2). Certain juveniles may not be committed to a State correctional facility: those under age 11 unless adjudged delinquent on the basis of arson or a first or second degree crime, and developmentally disabled juveniles. N.J.S.A. 2A:4A-44c.

State in the Interest of R.M., 141 N.J. 434 (1995), ruled that the Juvenile Code prohibits the incarceration of developmentally disabled juveniles. N.J.S.A. 2A:4A-44c(2). In defining a developmentally disabled juvenile for this purpose, paragraphs (1), (4) and (5) of N.J.S.A. 30:6D-3a are to be used. Thus, "developmental disability" means a severe chronic disability attributable to a mental or physical impairment, or combination of mental or physical impairments, results in substantial functional limitations in three or more areas of major life activity, and reflects the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services. The family court may order the Division of Developmental Disabilities to evaluate the juvenile if evidence offered at the dispositional hearing suggests a substantial likelihood that a delinquent juvenile is developmentally disabled. The juvenile bears the burden of offering sufficient evidence to warrant such a referral, although the court may independently refer it. Both the State and the juvenile are entitled to challenge the DDD's determination; a plenary hearing may be necessary, and the court must find by a preponderance of the evidence that the DDD's diagnosis was incorrect in order to reject it. Here, the evidence was insufficient to establish that the juvenile suffered from a developmental disability.

b. Length of Incarceration

Juveniles may be committed for terms not to exceed the following maximums:

Murder under *N.J.S.A.* 2C:11-3a(1) or (2) 20 years

Murder under N.J.S.A.	2C:11-3a(3) 10 years
Other first degree crimes 4 years	
Second degree crimes	3 years
Third degree crimes	2 years
Fourth degree crimes	1 year
Disorderly persons offenses 6 months	

Extended terms may be imposed in certain circumstances. *N.J.S.A.* 2A:4A-44d(3) and (4). Confinement continues until the juvenile is paroled. Parole before service of a specified portion of the term requires court approval. *N.J.S.A.* 2A:4A-44d(2). Every disposition that includes a term of incarceration shall also include a term of post-incarceration supervision equal to one-third of the term of incarceration imposed.

Alternatively, incarceration for up to 60 days in a county detention facility certified for such purpose is authorized where the delinquency is based on conduct which would constitute a crime or disorderly persons offense, incarceration is consistent with the rehabilitative goals of the juvenile code, and the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors. *N.J.S.A.* 2A:4A-43c.

State in the Interest of G.C., 136 N.J. 383 (1994); State in the Interest of J.L.A., 136 N.J. 370 (1994). Juveniles who have committed two or more acts of delinquency may be sentenced to consecutive terms of incarceration.

19. Ordering the juvenile to satisfy any other condition reasonably related to rehabilitation.

In *State in the Interest of O.W.*, 110 *N.J. Super.* 465 (App. Div. 1970), the propriety of ordering a juvenile offender to support his illegitimate child was upheld, even though this dispositional alternative was not legislatively specified.

20. Placement of eligible juvenile in a specialized juvenile offender program established under *N.J.S.A.* 30:8-61, *et seq.*

C. The Right of Allocution

State in the Interest of J.R., 244 N.J. Super. 630, 639 (App. Div. 1990). R. 3:21-4(b), applicable to the

Family Part by *R.* 5:1-1, gives a juvenile adjudicated delinquent the opportunity to address the judge directly prior to sentencing. Failure to comply with this right of allocution warrants remand for resentencing. *See also State in the Interest of A.H.*, 115 *N.J. Super.* 268, 272 (App. Div. 1971) (juvenile's right to allocution compelled by fundamental fairness).

D. Credit for Time Served

State in the Interest of W.M., 147 N.J. Super. 24 (App. Div. 1977), held that *R*. 3:21-8, providing that an adult defendant shall receive credit for time served in custody between his arrest and the imposition of sentence, applies to juveniles. Although *R*. 3:21-8 does not have a counterpart in the juvenile court rules or statute, due process and fundamental fairness require that the same time credit provided an adult be extended to juvenile proceedings.

State in the Interest of J.M., 273 N.J. Super. 593 (Ch. Div. 1994). N.J.S.A. 2A:4A-43e(2) and N.J.S.A. 2A:4A-43f, enacted in June 1993, amended the sentencing provisions for juvenile motor vehicle offenses to provide for mandatory minimum terms of incarceration for certain repeat offenders and to preclude the awarding of time served pending adjudication to the extent that it would be deducted from the mandatory minimum term. In interpreting these provisions, the Family Part held that (1) the minimum penalties apply to any juvenile who has a previous delinquency adjudication for unlawful taking or theft of a motor vehicle, regardless of whether that previous adjudication predates passage of the act and (2) the proscription against credit for time served is unconstitutional as violative of the equal protection clause.

State in the Interest of S. T., 273 *N.J. Super.* 436 (App. Div. 1994), held that a juvenile sex offender was not entitled to credit for time spent at the Pinelands Residential Group Center, a residential program for treatment of juvenile sex offenders, against his disposition for probation violation, because it was reasonable to treat juvenile sex offenders differently than adult sex offenders, and the residential nature of the treatment program was not punitive or custodial in nature.

E. Modification of Disposition Order

The court may correct, change or modify a disposition order at any time and may also grant postdisposition relief in accordance with the provisions of R. 3:22. R. 5:24-6. See, e.g., State in the Interest of Doe, 169 *N.J. Super.* 585 (J. & D.R. Ct. 1979); *State in the Interest of J.M.*, 103 *N.J. Super.* 88 (J. & D.R. Ct. 1968).

State in the Interest of C.B., 163 *N.J. Super.* 215 (J. & D.R. Ct. 1978). Where there has been no violation of probation, it is unconstitutional to allow modification to a disposition by an additional and extended dispositional condition (subsequently requested restitutionary provision not allowed).

F. Appeal of Disposition Order

State in the Interest of R.P., 198 N.J. Super. 105 (App. Div. 1984). In the absence of a specific statutory grant of authority, the State is not entitled to appeal from orders imposing probationary sentences on juveniles. Neither N.J.S.A. 2C:44-1f(2) nor R. 2:9-3(d), which permit the State to appeal a lenient sentence imposed on an adult for conviction of a crime, provide authority to appeal a juvenile disposition.

State in the Interest of S. T., 233 *N.J. Super.* 598 (App. Div. 1989). When there is potentially irreparable harm in delay, such as where the seriousness of a juvenile's problems raise an issue as to the propriety of the ordered disposition, particularized motions to accelerate should be made in all appeals in delinquency dispositions as a matter of course.

G. De Minimus Infractions

State v. I.B., 227 N.J. Super. 362 (App. Div. 1988), held that N.J.S.A. 2C:2-11, which enables an assignment judge to dismiss a prosecution on the ground that the infraction was *de minimus*, does not apply to persons charged with delinquency. In reaching this decision, the Appellate Division specifically disagreed with *State v.* Ziegler, 226 N.J. Super. 504 (Law Div. 1988), in which an assignment judge concluded that the *de minimus* statute did apply in delinquency proceedings. Nevertheless, the Ziegler court did not find that possession by a juvenile of a pipe with marijuana residue and 12 cans of beer, one of which was opened, was "trivial" conduct warranting dismissal under the *de minimus* provision.

H. AIDS/HIV Testing

State in Interest of J.G., 151 *N.J.* 565 (1997) concluded that the statute compelling the testing for AIDS/HIV virus of juvenile offenders charged with delinquency or adjudicated delinquent for an act which would constitute aggravated sexual assault or sexual

assault if committed by an adult, *N.J.S.A.* 2A:4A-43.1, is constitutional. Before testing may be ordered, a court must find probable cause to believe that the victim has been exposed to a risk that the transmission of the virus may have occurred. Results of the test may not be used against the offender in a criminal proceeding and must be maintained according to the confidentiality requirements of the statute.

See also N.J.S.A. 2A:4A-43.4, concerning similar AIDS/HIV testing for juveniles charged with or adjudicated delinquent for any crime or offense where someone suffers a hypodermic needle prick and there is probable cause to believe the juvenile is an intravenous drug user, or where someone had contact with the juvenile which likely involved the transmission of bodily fluids.

I. Megan's Law

State in the Interest of B.G., 289 N.J. Super. 361 (App. Div.), certif. denied, 145 N.J. 374 (1996), held that the registration and community notification provisions of "Megan's Law" (N.J.S.A. 2C:7-1 through-5 and N.J.S.A. 2C:7-6 through-11, respectively) are not inconsistent with the Code of Juvenile Justice and are applicable to juveniles such as B.G. who was adjudicated delinquent for conduct which would have constituted second degree sexual assault if committed by an adult. Moreover, the registration and community notification requirements do not constitute part of a disposition entered in a case under the Juvenile Code, and thus these Megan's Law requirements do not terminate on the juvenile's eighteenth birthday.

VII. CONSTITUTIONAL AND PROCEDURAL RIGHTS

A. Generally

By statute (*N.J.S.A.* 2A:4A-40), all defenses available to an adult charged with a crime, offense or violation shall be available to a juvenile charged with committing an act of delinquency. All federal and state constitutional rights guaranteed to criminal defendants, except the rights to indictment, trial by jury and bail, are applicable to cases arising under the juvenile justice act.

State v. Ferguson, 255 *N.J. Super.* 530 (App. Div. 1992).

Since all defenses available to an adult as well as all constitutional rights (except indictment, jury trial and

bail) are granted to a juvenile (*N.J.S.A.* 2A:4A-40), a juvenile has a right to testify at a jurisdictional waiver hearing. He also has the correlative right to be so advised by defense counsel. *Id.* at 538-539.

N.J.S.A. 2A:4A-39, in addition to specially providing for a right to counsel, provides standards for the waiving of any right afforded to a juvenile during a court proceeding. Specifically, a competent juvenile may not waive any rights except in the presence of and after consultation with counsel, and unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and juvenile's counsel regarding this decision. The parent or guardian may not waive the rights of a competent juvenile. An incompetent juvenile, however, may not waive any right. A guardian ad litem shall be appointed for an incompetent juvenile and may waive rights after consultation with the juvenile and All waivers shall be executed in juvenile's counsel. writing or recorded and be in the language regularly spoken by the juvenile. Before accepting a waiver, the court shall question the juvenile and his counsel to see if the waiver is knowing, willing and voluntary.

- B. Counsel
 - 1. Required

N.J.S.A. 2A:4A-39 and *R.* 5:3-4 provide that a juvenile has the right to be represented at every critical stage in the proceedings which may result in his institutional commitment or other consequence of magnitude. This standard is also applicable to any family member facing these potential consequences.

In re Gault, 387 U.S. 1 (1967). A proceeding where the issue is whether the child will be found to be 'delinquent' and subject to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. Assistance of counsel is essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution. The Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. *Accord, State in the Interest of J.M.*, 103 *N.J. Super.* 88 (J. & D.R. Ct. 1968).

Kent v. United States, 383 *U.S.* 541 (1966). Under District of Columbia law, a juvenile has a right to counsel at a hearing at which jurisdiction may be involuntarily waived to adult criminal court. It is unclear, however, whether this ruling was of constitutional import, but while the constitutional stature of such a right has not been conclusively established in New Jersey, the State Supreme Court has required a waiver hearing with counsel even prior to the *Kent* decision. *State v. Lueder*, 74 *N.J.* 62 (1977); *State v. Tuddles*, 38 *N.J.* 565, 572-573 (1962); *State v. Van Buren*, 29 *N.J.* 548, 554-558 (1959).

State in the Interest of G.J., 108 N.J. Super. 186 (App. Div. 1969), certif. denied, 55 N.J. 447 (1970). Where a juvenile is institutionally committed as the result of a violation of probation imposed as the disposition of a matter which had been listed on the informal calendar, the juvenile's right to counsel is satisfied if he is represented in the probation violation hearing even if he was not represented in the hearing on the original charge.

2. Waiver

State in the Interest of R.M., 105 N.J. Super. 372 (J. & D.R. Ct. 1969), concluded that a juvenile may understandingly and knowingly waive his right to counsel. It is a factual matter to be decided by the trial judge in consideration of such factors as the age, education, mental capacity, background and experience of the juvenile. [Note - *see N.J.S.A.* 2A:4A-39 regarding standards for the waiver of rights.] Here, a waiver of counsel was upheld where the juvenile was over 17, had been consistently promoted in school and had completed ninth grade even though he was a slow learner, who was mentally competent, who had been employed in various jobs since leaving school, and had prior court experience.

C. Fourth Amendment

New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), explained that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. Nevertheless, the United States Supreme Court ruled that school officials need not obtain a warrant before searching a student who is under their authority. Furthermore, the school officials need not adhere to a requirement that the searches be based upon probable cause. Rather, the legality of the search of a student should depend simply on the reasonableness of the search under all the circumstances. Under ordinary circumstances, a search will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction.

State in the Interest of J.G., 227 N.J. Super. 324 (Ch. Div. 1988). A juvenile involved in a juvenile-family crisis who is taken into custody is not distinguishable from a juvenile taken into custody for delinquency for Fourth Amendment purposes. Here, a police officer received a call from the juvenile's mother informing him that the juvenile had run away and had drug and alcohol problems. The juvenile was already under a "one-year adjustment" disposition. The officer later observed the juvenile on a highway and took him into short-term custody as a runaway in accord with prior directions from the crisis intervention unit. The officer patted him down prior to transporting him, and discovered a bag of marijuana in his pocket. No Fourth Amendment violation was found.

In State in the Interest of R.H., 170 N.J. Super. 518 (J. & D.R. Ct. 1979), the court addressed the question whether the Fourth Amendment prohibits the admission in a juvenile delinquency proceeding of evidence seized from a probationer by her probation officer without a search warrant or probable cause to justify a warrantless search. The juvenile had signed an acknowledgment of probation form requiring her to refrain from committing crimes, avoid injurious habits, answer all reasonable inquiries, and cooperate with the probation department in its efforts to help her maintain a satisfactory standard of conduct. The court held that the juvenile did not waive her constitutional rights as to search and seizure by signing such form. Thus, absent probable cause the warrantless search could not be justified by the juvenile's status as a probationer.

D. Fifth Amendment

1. Application of Miranda v. Arizona

State ex rel. O.F., 327 N.J. Super. 102 (App. Div. 1999); State in the Interest of B.T., 145 N.J. Super. 268 (App. Div. 1976), certif. denied, 73 N.J. 49 (1977); State in the Interest of J.P.B., 143 N.J. Super. 96 (App. Div. 1976). The requirements of Miranda v. Arizona, 384

U.S. 436 (1966), must be fully observed during the custodial interrogation of juveniles by law enforcement officers. The obligation to administer the *Miranda* warnings also extends to someone acting in an official capacity as an agent of the police. For instance, in *J.P.B.* a group instruction supervisor at a State-maintained custodial institution was found to be acting as a State agent by apprising a probation officer and State troopers of incriminatory information learned from a juvenile resident of the facility, and, subsequently, upon the trooper's request, further questioning the youth.

In re A.B., 278 N.J. Super. 380 (Ch. Div. 1994). A juvenile offender participating in the Juvenile Intensive Supervision Program (JISP) was not subject to custodial interrogation for *Miranda* purposes, when a JISP officer without the authority to make an arrest questioned the juvenile in his mother's living room and in the mother's presence, regarding a white powdery substance discovered by the mother hidden in the juvenile's bed. The mere fact that the juvenile had a general obligation, as a participant in the JISP program, to truthfully answer the officer's questions was not sufficient to convert an otherwise noncustodial situation into custodial interrogation.

In *State ex rel. O.F.*, 327 *N.J. Super.* 102 (App. Div. 1999), a 13 year old juvenile was subjected to "custodial interrogation" during an interview with two officers at the prosecutor's office, so as to trigger *Miranda* requirements, where the juvenile was told that he was lying and that the police had contrary information, interrogation was intense and included frequent assertions that the juvenile was withholding information, the juvenile was in an isolated room, his mother permitted police to take him into the room, and the mother was locked outside in the lobby. The statement was taken in violation of *Miranda* and was also involuntary.

State in the Interest of R. W., 115 N.J. Super. 286, 295 (App. Div. 1971), aff^{*}d o.b. 61 N.J. 118 (1972); State in the Interest of R.M., 105 N.J. Super. 372, 378 (J. & D.R. Ct. 1969). Every effort should be made to insure a youth's comprehension of the warnings by explaining the *Miranda* rights. A clearly expressed waiver of these rights must be obtained from the juvenile prior to interrogation. In construing the validity of a waiver of constitutional rights by a minor, his age, education, mental capacity, background and prior criminal experience are to be considered. In *State in the Interest of S.H.*, 61 *N.J.* 108 (1972), a 10 year old mental defective, was found incapable of understanding the *Miranda* warnings. Under those circumstances, the Supreme Court held that the juvenile clearly could not knowingly and intelligently waive his Fifth Amendment rights.

In Fare v. Michael C., 442 U.S. 707 (1979), a juvenile who was taken into custody on suspicion of murder was fully advised of his Miranda rights prior to questioning at the station house. At the beginning of the interrogation, the juvenile, who had a prior police record, asked for his probation officer. After the police refused this request, the juvenile agreed to speak without an attorney and proceeded to incriminate himself in the murder. The United States Supreme Court ruled that a juvenile's request to speak with his probation officer does not *per se* constitute an invocation of the juvenile's Fifth Amendment right to be free from compelled selfincrimination. Therefore, his subsequent incriminating statements did not have to be suppressed on the grounds that the police did not cease interrogating the juvenile. The question, whether a juvenile has waived his rights to remain silent and to have the assistance of counsel and accordingly whether any statement resulting from the juvenile's interrogation is admissible at trial, is to be resolved by examining the totality of the circumstances surrounding the interrogation.

2. Presence of a Juvenile's Parents During Interrogation

State v. Presha, 163 N.J. 304 (2000). The interrogation of a juvenile, especially in an environment such as a police station, without his parents or guardian, is considered likely to have a harmful effect upon his mind and will. When younger offenders are in custody, the parent serves as a buffer between the juvenile, who is entitled to certain protections, and the police, whose investigative function brings the officers necessarily in conflict with the juvenile's legal interests. Parents are in a position to assist juveniles in understanding their rights, acting intelligently in waiving those rights, and otherwise remaining calm in an unfamiliar setting. Therefore, whenever possible, a parent or legal guardian should be present in the interrogation room. The adult's absence should be viewed as "highly significant" and given enhanced weight when balanced against the totality of circumstances in evaluating the juvenile's waiver of rights. For a juvenile under the age of 14, the adult's absence will render the juvenile's confession inadmissible as a matter of law, unless the parent is unwilling to be present or is "truly unavailable."

Regardless of the juvenile's age, the law enforcement officers must use their best efforts to locate the adult prior to the interrogation and must demonstrate their efforts to the trial court's satisfaction.

See also State in the Interest of S.H., 61 N.J. 108, 114 (1972); State in the Interest of Carlo, 48 N.J. 224, 240 (1966); State ex rel. O.F., 327 N.J. Super. 102 (App. Div. 1999); State in the Interest of J.F., 286 N.J. Super. 89 (App. Div. 1995); State in the Interest of J.P.B., 143 N.J. Super. 96 (App. Div. 1976); State in the Interest of A.B.M., 125 N.J. Super. 162, 168 (App. Div.), aff'd o.b. 63 N.J. 531 (1973); State in the Interest of R.W., 115 N.J. Super. 286 (App. Div. 1971), aff'd o.b. 61 N.J. 118 (1972); State in the Interest of B.D., 116 N.J. Super. 585 (App. Div. 1969), aff'd o.b. 56 N.J. 325 (1970).

In *State in the Interest of J.D.H.*, _____ *N.J. Super.* _____ 2001 *WL* 69060 (App. Div. 2001) where a police officer suggested questions for a juvenile sexual assault victim to ask the juvenile defendant during a voluntary telephone conversation, the court concludes that the telephone conversation constitutes a police interrogation, which, because it was conducted with a juvenile who was the target of the police investigation and was undertaken whithout parental notification, was inadmissable.

Parental presence is also required during the administration of a polygraph test to a juvenile. *State in the Interest of J.P.B.*, 143 *N.J. Super.* 96, 110 (App. Div. 1976).

3. Voluntariness of a Juvenile's Confession

State in the Interest of S.H., 61 N.J. 108 (1972); State in the Interest of Carlo, 48 N.J. 224 (1966); State in the Interest of J.F., 286 N.J. Super. 89 (App. Div. 1995); State in the Interest of A.B.M., 125 N.J. Super. 162 (App. Div.), aff'd o.b. 63 N.J. 531 (1973); State in the Interest of R.W., 115 N.J. Super. 286 (App. Div. 1971), aff'd o.b. 61 N.J. 118 (1972); State in the Interest of B.D., 116 N.J. Super. 585 (App. Div. 1969), aff'd o.b. 56 N.J. 325 (1970). Since a minor is considered more impressionable and easily subjected to psychological coercion than an adult, a confession by a juvenile is generally held to a higher standard of voluntariness than one obtained from an adult under similar circumstances. Thus, special care must be taken to ensure the complete voluntariness of a youth's statement. Generally, a youth should not be questioned either as long or as vigorously as an adult. Relay or extremely intensive interrogation should also be avoided. A juvenile should not be held in isolation for prolonged periods or denied food, drink or medical

services. Force or coercive measures should not be employed.

Based on these factors, confessions have been found involuntary in the following cases: State in the Interest of Carlo, supra (confession of 13 and 15 year old boys held inadmissible where youths were relentlessly questioned at night for 6-1/2 to 7 hours in the oppressive environment of a police station, several inconsistencies appeared between the statements and the uncontroverted circumstantial and testimonial evidence, and on four or five occasions the juveniles' parents requested to see their children, but were refused access); State in the Interest of B.D., supra (statement by 16 year old excluded where the boy was persistently questioned by police on six separate occasions over a two-month period, five officers were present during the interrogation preceding the statement, the confession was at odds with the independent evidence of the crime, and no effort had been made to communicate with B.D.'s mother or to secure her presence during the questioning); State in the Interest of S.H., supra (confession of 10 year old mental defective found invalid where he was questioned for 90 minutes in a police station and his father was denied admission to the interrogation by the police); State ex rel. O.F., 327 N.J. Super. 102 (App. Div. 1999) (confession of 13 year old found invalid where he was extensively and intensively questioned in an oppressive environment at the prosecutor's office, his mother was excluded from the interview room, Miranda rights were not explained, and the officers failed to stop questioning once the juvenile began to implicate himself).

In State in the Interest of B.G., 289 N.J. Super. 361 (App. Div.), certif. denied, 145 N.J. 374 (1996), the confession of a 12 year old juvenile charged with conduct that would have constituted second degree sexual assault if committed by an adult was properly obtained and admitted in evidence in delinquency proceeding despite the juvenile's contention that he was neurologically impaired and suffered from attention deficit disorder. The juvenile was difficult in terms of behavior, was socially immature, was not a good student, did not have below average IQ, had chronological and intellectual ages of 12, knew how to read and write, appeared to have no difficulty answering questions posed to him, signed a waiver with his mother present, voluntarily spoke to the detective, and at no time asserted his confession was coerced.

4. Corroboration of a Juvenile's Confession

State in the Interest of Carlo, 48 N.J. 224, 245 (1966); State in the Interest of J.F. 286 N.J. Super. 89, 102 (App. Div. 1995); State in the Interest of J.P.B., 143 N.J. Super. 96, 111-112 (App. Div. 1976); State in the Interest of A.B.M., 125 N.J. Super. 162, 169-170 (App. Div.), aff'd o.b. 63 N.J. 531 (1973); State in the Interest of W.J., 116 N.J. Super. 462, 469-471 (App. Div. 1971); State in the Interest of B.D., 110 N.J. Super. 585, 595-596 (App. Div. 1969), aff'd o.b. 56 N.J. 325 (1970). Since juveniles are more susceptible to influence than adults, a higher quantum of corroboration is required. The trustworthiness of a statement made by a minor must be demonstrated by a showing that its particulars were not the product of suggestion by the authorities.

Corroboration has been deemed insufficient where substantial inconsistencies exist between the State's proofs and the confession, or if the police first advise the suspect of all major details of the crime and the eventual confession contains no information not supplied by the interrogators. See State in the Interest of J.F., supra, State in the Interest of J.P.B., supra; State in the Interest of W.J., supra. A finding of inadequate corroboration has also been coupled with serious questions about the voluntariness or trustworthiness of the youth's admissions. State in the Interest of W.J., supra; State in the Interest of B.D., supra. For instance, in B.D., the youth asserted that he confessed only to get the police "off his back" after they had persistently questioned him on six prior occasions, and had revealed all the details of the offense to him. Thus, the minor's inculpatory statement, which failed to embellish the previously disclosed information and conflicted with the evidence, was found inherently lacking in reliability. The opposite conclusion was reached in A.B.M., where the confession was obtained under circumstances indicating its trustworthiness and voluntariness, was not preceded by repetitious questioning, and was confirmed by independent proof.

5. Privilege Against Self-Incrimination

In re Gault, 387 *U.S.* 1 (1966). Juvenile proceedings which may lead to a youth's confinement are considered criminal for purposes of the privilege against self-incrimination. Thus, this privilege applies to a hearing as a result of which a youth may face institutionalization.

State in the Interest of L.M., 56 N.J. 358 (1970); State in the Interest of D.A.M., 132 N.J. Super. 192 (App. Div. 1975). A juvenile's failure to testify may not be utilized to create an inference of guilt. Therefore, comments by the Juvenile Court suggesting that an adverse inference may be drawn from such silence are tantamount to plain error.

State in the Interest of A.L., 271 N.J. Super. 192 (App. Div. 1994), upheld the constitutionality of the juvenile waiver statute, and in particular that portion which places upon the juvenile the burden of demonstrating the probability of his rehabilitation by age 19. N.J.S.A. 2A:4A-26a(3) neither compels a juvenile to testify at a waiver hearing, nor requires an admission of guilt by the juvenile, or any witness on his behalf, as a pre-condition for the case remaining in the Family Part. Even assuming an admission of guilt is impliedly required, that admission has no adverse legal consequences since fully immunized by N.J.S.A. 2A:4A-29. Thus, there is no Fifth Amendment violation of the privilege against compelled self-incrimination. Nor does the statute violate equal protection or due process. (Rejecting State v. Y.B., 264 N.J. Super. 423 (Ch. Div. 1993), which had concluded N.J.S.A. 2A:4A-26a(3) unconstitutionally violated a juvenile's Fifth Amendment rights against compelled self-incrimination.)

E. Due Process

In re Gault, 387 U.S. 1 (1967); State in the Interest of H.M.T., 159 N.J. Super. 104 (App. Div. 1978); State in the Interest of W.M., 147 N.J. Super. 24 (App. Div. 1977); State in the Interest of D.A.M., 132 N.J. Super. 192 (App. Div. 1975); State in the Interest of C.B., 163 N.J. Super. 215 (J. & D.R. Ct. 1978); State in the Interest of J.S., 132 N.J. Super. 464 (J. & D.R.Ct. 1975). Juveniles are entitled to the same due process standards as afforded adults, to the extent consistent with the basic rehabilitative purpose of the juvenile process. See also N.J.S.A. 2A:4A-40. Due process mandates that juvenile delinquency proceedings measure up to the essentials of due process and fundamental fairness. To satisfy this requirement, adequate and timely notice of such hearings must be given to the youth so that reasonable examination of witnesses is also extended to minors.

In re Gault, 387 U.S. 1 (1967); State in the Interest of L.N., 109 N.J. Super. 278, 284 (App. Div. 1970), aff'd o.b. 57 N.J. 165 (1970), cert. denied, 402 U.S. 1009 (1971); State in the Interest of J.J., 132 N.J. Super. 464 (J. & D.R. Ct. 1975); State in the Interest of L.B., 99 N.J. Super. 589, 595 (J. & D.R. Ct. 1968). Since it is only necessary to charge a youth with wrongful conduct, a juvenile complaint need not be drawn with the same exactitude as its adult counterpart. However, the complaint must set forth the alleged offense with particularity. A vague allegation of misconduct is inadequate to support charges against a juvenile. To comport with due process, the youth must be given sufficient notice of the facts constituting the alleged offense. (*See N.J.S.A.* 2A:4A-30a(3); *R.* 5:20-1).

State in the Interest of K.A.W., 104 N.J. 112 (1986). N.J.S.A. 2A:4A-30a(3) and R. 5:20-1a(3), requiring the date and time of an alleged offense to be included in a juvenile complaint are not to be read literally in their application to sexual assault offenses committed against child victims; their purpose (and due process) is fulfilled if the complaint sets forth sufficient information to permit a juvenile to plan and assert his defense, for literal application of the date and time provisions would effectively preclude prosecution of those who have sexually abused children who are unable to specify the date. The State is not required to specify one or more exact dates to give the juvenile adequate notice to permit him to prepare a defense, but the trial court must balance all the existing circumstances to determine whether "fair notice" has been given.

State in the Interest of A.R., 57 *N.J.* 71 (1970); *State in the Interest of J.M.*, 57 *N.J.* 442, 444-445 (1971); *State in the Interest of A.*, 130 *N.J. Super.* 138, 140 (App. Div. 1974).

Although in delinquency cases, the law upon which the juvenile's alleged violation is based should be specified, failure to do so does not warrant dismissal of the complaint if the juvenile has not been misled thereby to his prejudice. So long as the charges in the complaint are readily understandable and the factual allegations precise, the requirements of due process are satisfied. Even the miscitation of a statute on a complaint is not fatal unless the juvenile is prejudiced thereby. (*See N.J.S.A.* 2A:4A-30a(4); *R.* 5:20-1.)

F. Proof Beyond a Reasonable Doubt

In re Winship, 397 U.S. 357 (1970); State in the Interest of S.H., 61 N.J. 108, 116 (1972); State in the Interest of R.S., 132 N.J. Super. 200, 203 (App. Div. 1975); State in the Interest of J.M., 110 N.J. Super. 337, 339 (App. Div. 1970), rev'd o.g., 57 N.J. 442 (1971); State in the Interest of M.P.C., 152 N.J. Super. 519, 530-531 (J. & D.R. Ct. 1977); State in the Interest of B.H., 112 N.J. Super. 1, 4 (J. D.R.Ct. 1970). In delinquency proceedings, the State is required to prove the charges beyond a reasonable doubt. G. Speedy Trial

State in the Interest of H.M.T., 159 N.J. Super. 104 (App. Div. 1978), held that juveniles are entitled to the Sixth Amendment right to a speedy trial. The speedy trial rights of a nondetained juvenile are to be determined by application of the balancing test of Barker v. Wingo, 407 U.S. 514 (1972), with special consideration to be given by the Juvenile Court to the effect of dismissal or non-dismissal on the rehabilitative aspect of the juvenile justice system. The failure to file a complaint "forthwith" as required by (prior) R. 5:9-2(e) after a juvenile has been taken into custody, should not result in the automatic vitiation of further proceedings when the juvenile has been promptly released and is not further detained. Nevertheless, an unreasonable delay in the filing of a juvenile complaint may constitute a violation of the juvenile's due process rights.

In State in the Interest of C.B., 173 N.J. Super. 424 (App. Div. 1980), the right of the juvenile to a speedy trial was not denied where the juvenile, who was detained for 35 days after arrest, then released, was brought to trial about three and one-half months after arrest. The first scheduled adjudicatory hearing was postponed at the request of the juvenile's own counsel, and prejudice to the juvenile was neither asserted nor shown. See also State in the Interest of G.T., 143 N.J. Super. 73, 81 (App. Div. 1976), aff'd o.b. 75 N.J. 378 (1978) (a two and one-half month delay between the offense and the jurisdictional waiver hearing did not deny a juvenile's speedy trial rights).

H. Jury Trial

McKeiver v. Pennsylvania, 402 *U.S.* 441 (1971); *In re J.W.*, 57 *N.J.* 144 (1970). Since the jury is not a necessary component of accurate fact finding, jury trials are not mandated in juvenile proceedings. Imposing such a requirement upon the juvenile process would remake hearings into a fully adversary process and would destroy its informal protective approach. Thus, the efficacy of the separate and unique juvenile system would be destroyed. *See also N.J.S.A.* 2A:4A-40.

I. Statute of Limitations

State in the Interest of B.H., 112 *N.J. Super.* 1 (J & D.R.Ct. 1970), held the defense of statute of limitations applicable to juvenile cases. Since the complaint in *B.H.* had been filed more than one year after the disorderly persons offense, the lapse of the one year statute of

limitations applicable to such offenses mandated its dismissal.

J. Sequestration of Witnesses

State in the Interest of W.O., 100 N.J. Super. 358 (App. Div. 1968); State in the Interest of B.H., 112 N.J. Super. 1 (J. D.R.Ct. 1970). The procedural tool of sequestration of witnesses is available to juvenile defendants.

K. Insanity Defense

State in the Interest of R.G.W., 135 N.J. Super. 125 (App. Div. 1975), aff'd o.b. 70 N.J. 185 (1976). Pursuant to N.J.S.A. 2A:1-60 (now N.J.S.A. 2A:4A-40) which applies all adult defenses to delinquency proceedings, juveniles have every right to the defense of insanity. In this respect, State in the Interest of H.C., 106 N.J. Super. 583 (J. D.R.Ct. 1969), decided prior to the enactment of the above statute, was specifically overruled. In determining whether to grant a hearing to determine the sanity *vel non* of a juvenile at the time of the offense when he has been adjudged unable to stand trial by reasons of insanity, the court must not only consider the youth's interest in terms of criminal stigma, but must also consider the possibility of indefinite incarceration, and his right to avoid, in proper circumstances, the necessity to defend a complaint years later after much of the evidence pertinent to the issue of insanity at the time of the offense may have been lost. (See also N.J.S.A. 2C:4-1, 2, 6, 7, replacing N.J.S.A. 2A:163-2.)

L. Double Jeopardy

Breed v. Jones, 421 U.S. 519 (1975), invalidated the California statutory scheme, pursuant to which a youth was first tried in Juvenile Court, and, upon a finding that he had violated a criminal statute, and a subsequent determination that he was unfit for treatment as a juvenile, was retried as an adult for the very same offense. The United States Supreme Court held that the Fifth Amendment's proscription against double jeopardy applies to juvenile proceedings. Jeopardy was found to attach upon the inception of the juvenile proceedings, *i.e.*, upon the presentation of evidence during the adjudicatory hearing. Nevertheless, the Court's holding only invalidated waiver decisions made after an adjudication of guilt in the Juvenile Court and subsequent retrials in adult court. No limitation was placed upon the transfer of juveniles to the adult criminal process where no finding of guilt in the Juvenile Court preceded the waiver.

In State in the Interest of J.J., 132 N.J. Super. 464 (J. & D.R. Ct. 1975), the youth pleaded guilty to breaking and entering and larceny at an informal hearing without counsel, whereupon he was placed on probation. Subsequently, he was charged with violation of probation. In addition to a probation violation hearing, the Juvenile Court (a different judge) held a formal adjudicatory hearing with an attorney, on the original breaking and entering and larceny charges, in the event of the youth's institutionalization, which could only result if he was represented by counsel. This procedure was upheld as not constituting double jeopardy. *Cf. Breed v. Jones, supra.*

State in the Interest of S.Z., 177 N.J. Super. 32 (App. Div. 1981). At the conclusion of the State's case, the Juvenile Court erroneously granted the juveniles' untimely motions for dismissal on the ground that the acts alleged did not constitute a violation of the criminal mischief statute. The Appellate Division reversed and found that a retrial would not violate the double jeopardy rights of the juveniles because had the dismissal motions been properly made, they would not have been considered during trial. Further, there had been no verdict of acquittal on the facts.

In *State in the Interest of L.D.*, 174 *N.J. Super.* 263 (App. Div. 1980), *certif. denied*, 85 *N.J.* 122 (1980), the State was absent from a proceeding in the Juvenile Court at which only the juvenile appeared and related his version of the incident in question. The Appellate Division held that dismissal of a complaint against the juvenile after said proceeding did not bar, by reason of double jeopardy or due process, prosecution of a later complaint charging the juvenile with the same offense. The court added that some restraint should be exercised against a tendency to apply double jeopardy considerations automatically in a case such as this where the State did not even present a case.

State in the Interest of C. V., 146 N.J. Super. 573 (App. Div.), certif. denied, 74 N.J. 258 (1977). Soon after the commencement of testimony in an informal (no counsel) adjudicatory hearing in this case, the Juvenile Court considered the possible institutionalization of the youth, and therefore, declared a mistrial *sua sponte*. Thereupon the case was transferred to another judge who then held a formal hearing at which the youth was represented by counsel. Since no adjudication had been entered at the first hearing, double jeopardy did not bar the second hearing.

In State in the Interest of C.K., 198 N.J. Super. 290 (App. Div. 1984), a delinquency prosecution for joy riding and criminal mischief, the State presented a case based on the testimony of one of the juvenile coparticipants and a stipulation which identified the owner of each vehicle and the amount of damage caused. Following presentation of all evidence and summations, the court entered not guilty findings on the technical ground that the stipulation did not expressly state that the vehicles identified as damaged in the stipulation were the ones which had been damaged in the parking lot. Upon the prosecutor's vehement objection to this decision and request for a continuance to subpoena the victims, the court acceded. Thereupon, the stipulation was immediately amended, and the court found the juvenile guilty of all charges. The Appellate Division reversed on double jeopardy grounds, finding that the trial court's entry of findings of not guilty, whether fair or erroneous, reflected an adjudication on the merits which barred further prosecution.

In State in the Interest of A.H., 304 N.J. Super. 34 (Ch. Div. 1997), complaints charging a 14 year old juvenile with conduct which would constitute criminal trespass and mischief were administratively screened and scheduled for a "trial/non-mandatory counsel" proceeding before a referee appointed pursuant to *R*. 5:25-2. The matter was prosecuted by the complainant's privately retained counsel. The record consisted solely of sworn testimony by the complainant. The referee made a recommendation of innocence (dismissal) at the conclusion of this diversionary, informal proceeding subject to the acceptance of the recommendation by the court. Complainant appealed seeking a formal hearing *de* novo. On the juvenile's motion to dismiss, the Family Part judge ruled that double jeopardy did not bar the appeal and that the review would be *de novo* and not limited to the record below.

M. Amendment of Complaint

In *State in the Interest of W.E.C.*, 81 *N.J.* 442 (1979), the Juvenile Court did not err in allowing the State, just prior to commencement of the adjudicatory hearing, to amend the delinquency complaint so as to change the charge from simple assault and battery to assault and battery upon a police officer. This decision was based on the fact that the amendment did not charge the juvenile with another or different offense from that alleged in the original complaint, and the juvenile was not prejudiced thereby in his defense on the merits.

N. Victims Rights

State in the Interest of O.G., 274 *N.J. Super.* 182 (Ch. Div. 1993). In applying the provisions of the Crime Victims Bill of Rights to victims of juvenile offenders, the Family Part held that the victim of a crime for which a juvenile has been adjudicated delinquent may personally address the court prior to sentencing of that juvenile. (*See also N.J.S.A.* 2A:4A-60i, which was amended in 1994, to expressly provide that the court "shall permit a victim, or a family member of a victim to make a statement prior to ordering a disposition in any delinquency proceeding....")

O. Right to Education

State ex rel. G.S., 330 N.J. Super. 383 (Ch. Div. 2000), held that the State has a constitutional obligation to provide an education to a juvenile who has been adjudicated delinquent and placed on probation, even though his local school district has expelled him. Here, a juvenile was adjudicated delinquent for participating in the making of a false bomb threat call to his school by serving as a "lookout" for students placing the call. He was placed on probation, a condition of which was regular school attendance, with passing grades and attainment of a high-school diploma. Meanwhile, he was also expelled from school by the local school district in accord with its "Zero Tolerance" policy for bomb threats. Despite the proper expulsion from school of a juvenile adjudicated delinquent, however, he nonetheless retains his state constitutional right to further public education, which may be ordered by the Family Part. Here the State is ordered to provide an alternative school program.

VIII. JUVENILE RECORDS AND INFORMA-TION

- A. Confidentiality/Disclosure of Juvenile Information
 - 1. Generally

N.J.S.A. 2A:4A-60 governs the confidentiality and disclosure of social, medical, psychological, legal and other court and probation records, as well as law enforcement records, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis. These records must be "strictly safeguarded from public inspection" and will only be available without court order to statutorily designated persons or agencies such as the court, prosecutor, parents and attorney of the juvenile, institution where the juvenile is committed, the Juvenile Justice Commission and, in a limited capacity, to the

Victims of Crime Compensation Board (*e.g.*, payments owed on assessments and restitution). *N.J.S.A.* 2A:4A-60a. Other interested persons or agencies may obtain these records only by court order for good cause shown. *N.J.S.A.* 2A:4A-60a(6). Records of law enforcement agencies may be disclosed for law enforcement purposes to any other law enforcement agency in this country, and public disclosure of a juvenile's identity is allowed when necessary to execute a warrant for his arrest. *N.J.S.A.* 2A:4A-60b.

State v. Allen, 70 *N.J.* 474 (1976). The intent and tenor of the juvenile disclosure statute when read as a whole are to make the juvenile's records available to the designated persons without court order for use in conjunction with the treatment, care or other matter concerning the juvenile's welfare. However, the statutes and rules have always recognized that the juvenile's records should be available to third persons with a sufficient legitimate interest or whenever proper administration or justice so required. These competing policies must be weighed in the light of all the pertinent circumstances and, if possible, balanced to safeguard the purposes of both.

State in the Interest of D.G., 174 N.J. Super. 243 (App. Div. 1980). The statute is concerned exclusively with disclosure of court records, records of probation departments and law enforcement agencies. Thus. parents of a juvenile who was adjudged a juvenile in need of supervision and placed in a foster home were not allowed access to records developed by the Division of Youth and Family Services, because those records were neither court records, probation records nor law enforcement agency records. Although apparently conferring an absolute right to juvenile records to specified classes of persons, the statute, nevertheless, invests the court with residual discretionary control over the disclosure of such records even to those favored classes. Even when the statute allows disclosure of juvenile records, courts have the discretion to preclude disclosure in appropriate circumstances.

N.J.S.A. 2A:4A-60 also governs the release of information as to the identity of a juvenile charged with an offense, the offense charged, the adjudication and the disposition. This information may be disclosed, upon request, at the time of charge, adjudication or disposition to the victim or victim's immediate family, the investigating law enforcement agency, the complainant, any law enforcement agency in the municipality where the juvenile resides, a party in a subsequent legal proceeding involving the juvenile (upon court approval),

and, on a confidential basis to the school principal where the juvenile is enrolled for relevant purposes. *N.J.S.A.* 2A:4A-60c.

In Re: Release of Juveniles' Identities to Albert Wise, Applicant, 204 N.J. Super. 71 (Ch. Div. 1985), held that the disclosing of juvenile's identity to victim permitted by N.J.S.A. 2A:4A-60 applies only to juveniles charged with an offense. It is a means to discover the identities of juveniles who have acted in such a way as to merit disclosure. Here, the application for the juveniles' names and addresses and police and court records was denied, as the juveniles were never charged with any offense arising out of the incident.

The school principal must be advised by the law enforcement or prosecuting agency of the identity of the charged juvenile, the offense, the adjudication and the disposition in certain enumerated circumstances (*e.g.*, the offense occurred on school property, the crime involved a firearm or other weapon, there was a purpose to intimidate because of race, color, religion, sexual orientation or ethnicity, among other specified circumstances). *N.J.S.A.* 2A:4A-60d.

A law enforcement or prosecuting agency may also provide a school principal with information identifying juveniles who are under investigation or have been taken into custody if useful to the principal in maintaining order, safety or school discipline, or in planning relevant programs for the juvenile. *N.J.S.A.* 2A:4A-60e.

2. "Good Cause Shown" for Disclosure

The constitutional right of confrontation may supercede the policy of confidentiality of juvenile records. "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Davis v. Alaska, 415 U.S. 308, 320 (1974). Thus, a juvenile witness in a criminal trial may be cross-examined regarding his current juvenile probationary status or prior inconsistent juvenile court testimony. See also State v. Hare, 139 N.J. Super. 150 (App. Div.), certif. denied, 70 N.J. 525 (1976); State v. Parnes, 134 N.J. Super. 61 (App. Div. 1975); State in the Interest of A.S., 130 N.J. Super. 388 (J. & D.R. Ct. 1974). Note, however, that the right to cross-examination does not necessarily extend beyond a disclosure of a juvenile's current status to his overall juvenile record: "...the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through

cross-examination about his past delinquency adjudications or criminal convictions." *Davis v. Alaska, supra,* 415 *U.S.* at 321 (Stewart, J., concurring). *See also N.J.S.A.* 2A:4A-60c(4).

The right of a third party to juvenile court-related records for cross-examination purposes may extend to the State. *State v. Allen*, 70 *N.J.* 474 (1976). *(See also N.J.S.A.* 2A:4A-60c(4).)

State in the Interest of D.H., 153 N.J. Super. 490 (App. Div. 1977). Disclosure of a juvenile's identity is permitted in favor of a potential litigant contemplating civil action against the juvenile or his/her parents for delinquent acts allegedly committed by the juvenile. Such disclosure is limited to names and addresses of juveniles and their parents and does not extend to disclosure of police reports of the incident. Such disclosure may be permissible even though the juvenile is not found delinquent, primarily because civil liability is premised upon a much less stringent burden of proof than is an adjudication of delinquency. Moreover, the right of a "victim" of an act of delinquency to disclosure under former N.J.S.A. 2A:4-65b (now N.J.S.A. 2A:4A-60c(1)) extends to the victim's subrogee. See also Brookside Apartments Inc. v. C.S., 276 N.J. Super. 501 (App. Div. 1994), in a civil suit against juveniles and their parents for fire damage, the plaintiffs' attorneys committed misconduct in obtaining police reports of arson investigation in the absence of showing of need and in the absence of notice to attorneys for the juveniles and their parents.

3. Public Disclosure

N.J.S.A. 2A:4A-60f provides:

Information as to the identity of a juvenile adjudicated delinquent, the offense, the adjudication and the disposition shall be disclosed to the public where the offense for which the juvenile has been adjudicated delinquent if committed by an adult, would constitute a crime of the first, second or third degree, or aggravated assault, destruction or damage to property to an extent of more than \$500.00, unless upon application at the time of disposition the juvenile demonstrates a substantial likelihood that specific and extraordinary harm would result from such disclosure in the specific case. Where the court finds that disclosure would be harmful to the juvenile, the reasons therefor shall be stated on the record.

State in the Interest of B.C.L., 82 *N.J.* 362 (1980). The Legislature intended public disclosure of

information concerning juvenile offenders pursuant to N.J.S.A. 2A:4-65c (the former disclosure statute) to be the rule rather than the exception, and the burden is on the juvenile to demonstrate that the best interest of the juvenile and public would not be served by disclosure before the court may withhold public dissemination. The Supreme Court ruled that the juvenile must demonstrate a substantial likelihood of specific harm to constitute a showing of "good cause" for withholding disclosure.

In State in the Interest of K.B., 304 N.J. Super. 628 (App. Div. 1997), a thirteen year old juvenile adjudicated delinquent for repeatedly sexually assaulting his eight year old step-brother moved to modify dispositional order 40 days later to provide he be exempted from the disclosure requirements of N.J.S.A. 2A:4A-60. The Appellate Division ruled that the motion was timely even though not made at the time of disposition as required by N.J.S.A. 2A:4A-60f, because it was coupled with a good faith application to reopen the initial dispositional order to obtain other relief. However, the juvenile did not make the necessary particularized showing of significant and extraordinary harm, which must be both sufficiently grave and personand situation-particular (i.e., not shared by juvenile defendants in general), to warrant exemption from disclosure.

In *State in the Interest of H.N.*, 267 *N.J. Super.* 596 (App. Div. 1993), an order enjoining the news media from publishing the name, address and other identifying information about a 16 year old juvenile charged with scalding her infant nephew to death while bathing him, was reversed on appeal as overbroad to the extent that it prohibited the media from publishing information which had been lawfully obtained from sources other than those protected from disclosure by *N.J.S.A.* 2A:4A-60.

4. Press Attendance at Juvenile Hearings (*N.J.S.A.* 2A:4A-60i)

In *State in the Interest of Presha*, 291 *N.J. Super.* 454 (Ch. Div. 1995), newspapers sought to permit public attendance during all court proceedings in a juvenile delinquency matter involving the brutal armed attack and robbery of two senior citizens in their home by a juvenile and an adult. The Family Part ruled that *N.J.S.A.* 2A:4A-60i creates a presumption of public access upon application, which is defeated only by the juvenile establishing by a greater weight of the evidence that public attendance would pose a substantial

likelihood of a specific harm unique to that juvenile. Even if that standard is not met, however, the court retains inherent power to deny access, subject to constitutional requirements. Here, the juvenile relied only on the generalized harm of increased trauma to him and his family which would be caused by publicity which did not meet the standard, nor were there extraordinary circumstances warranting the court to independently deny public access.

State in the Interest of B.J.W., 250 N.J. Super. 619 (Ch. Div. 1991). Family Court exercises its discretion under *N.J.S.A.* 2A:4A-60g (currently designated subsection (i)), to prohibit newspaper from attending court proceedings in a case involving a 15 year old girl who killed her mother and brother, where there was evidence that the juvenile would be adversely affected by continued publicity, would especially suffer in bonding which the medical experts stated was beginning with the remaining family members, and there was scant need to protect the public by disclosure in an intra-familial homicide.

B. Fingerprinting (*N.J.S.A.* 2A:4A-61)

Pursuant to *N.J.S.A.* 2A:4A-61a, fingerprints of a juvenile <u>may</u> be taken only in the following circumstances:

1. Where latent fingerprints are found during the investigation of an offense and a law enforcement officer has reason to believe that they are those of a juvenile, he may, with the consent of the court or juvenile and his parent or guardian fingerprint the juvenile for the purpose of comparison with the latent fingerprints. Fingerprint records taken pursuant to this paragraph may be retained by the department or agency taking them and shall be destroyed when the purpose for the taking of fingerprints has been fulfilled.

2. Where a juvenile is detained in or committed to an institution, that institution may fingerprint the juvenile for the purpose of identification. Fingerprint records taken pursuant to this paragraph may be retained by the institution taking them and shall be destroyed when the purpose for taking them has been fulfilled, except that if the juvenile was detained or committed as the result of an adjudication of delinquency, the fingerprint records may be retained by the institution.

3. Where a juvenile 14 years of age or older is charged with delinquency on the basis of an act which, if committed by an adult, would constitute a crime, fingerprint records taken pursuant to this paragraph may be retained by a law enforcement agency for criminal identification purposes.

Fingerprints of a juvenile <u>shall</u> be taken if the juvenile is adjudicated delinquent on the basis of an act which would constitute a crime if committed by an adult. *N.J.S.A.* 2A:4A-61c. Fingerprints taken pursuant to subsection c shall be retained for law enforcement purposes. *N.J.S.A.* 2A:4A-61d.

State in the Interest of S.S., 273 *N.J. Super.* 31 (App. Div. 1994). *N.J.S.A.* 2A:4A-61a(3) allowed the fingerprinting of a 15 year old juvenile charged with delinquency based on an act which would constitute a crime if committed by an adult, and it permitted retention of those records for criminal identification purposes.

In re Fingerprinting of M.B., 125 *N.J. Super.* 115 (App. Div. 1973). Where an eighth grade class ring was discovered near the body of a homicide victim and the victim's automobile was found bearing latent fingerprints, the court properly permitted fingerprinting of all male members of the class for comparison purposes.

C. Photographing (N.J.S.A. 2A:4A-61b)

No juvenile under the age of 14 shall be photographed for criminal identification purposes without the consent of the court or of the juvenile and his parent or guardian.

D. Sealing and Expungement

The sealing of juvenile records is governed by *N.J.S.A.* 2A:4A-62. Expungement of juvenile records pursuant to *N.J.S.A.* 2C:52-1 *et seq.* is also an available remedy. *N.J.S.A.* 2A:4A-62f; *see also State in the Interest of R.C.C.*, 151 *N.J. Super.* 174 (J. & D.R. Ct. 1977). Under the express terms of *N.J.S.A.* 2C:52-4.1, adjudications of delinquency may be expunged if certain criteria are met. This statute thus effectively overrules that portion of *State v. W.J.A.*, 173 *N.J. Super.* 19 (Law Div. 1980), which held that an adjudication of delinquency could not be expunged.

E. Consideration of Delinquency Adjudication by Adult Sentencing Court

Prior adjudication of delinquency may be considered by an adult court for the purposes of imposing sentence. *State v. Ebron*, 122 *N.J. Super.* 552, 561 (App. Div.), certif. denied, 63 N.J. 250 (1973). See also State v. Hodgson, 44 N.J. 151, 164 (1965), cert. denied, 384 U.S. 1021 (1966).

F. Physician-Patient Privilege

State in the Interest of M.P.C., 152 *N.J. Super.* 519, 531 (J. & D.R. Ct. 1977), *aff'd o.g.* 165 *N.J. Super.* 131 (App. Div. 1979). The use of the word "crime" in the exception to physician-patient privilege (*N.J.S.A.* 2A:84A-22.6) includes an act of delinquency which is based on the commission of an adult offense of criminal magnitude.

KIDNAPPING, CRIMINAL RESTRAINT AND RELATED OFFENSES

I. KIDNAPPING

A. Generally - definition

An individual is guilty of kidnapping if he or she unlawfully removes or confines another with a purpose of holding that person for ransom or as a shield or hostage, or, with one of the unlawful purposes enumerated in N.J.S.A. 2C:13-1b(1) to (4), if he or she unlawfully removes another from that person's place of residence or business, or unlawfully confines another for a substantial period of time, or unlawfully removes another a substantial distance from the vicinity where the person was found. N.J.S.A. 2C:13-1 et seq. If the prosecution involves the purpose to permanently deprive a parent, guardian or other lawful custodian of the victim, N.J.S.A. 2C:13-1b(4), there are statutory affirmative defenses available based generally upon belief that there was consent for the taking by either the custodial parent or the child who was at least fourteen years old or upon the perceived need to protect the child or the custodial parent from imminent danger. N.J.S.A. 2C:13-1e,f,g.

B. Substantial Distance/Confinement for a Substantial Period of Time

State v. Masino, 94 N.J. 436 (1983), held that one is transported a "substantial distance" if that asportation is criminally significant in the sense of being more than merely incidental to the underlying crime. Factors to be considered are not only the distance traveled but the "enhanced" non-trivial "risk of harm resulting from the asportation and isolation of the victim." The Supreme Court reinstated Masino's conviction for kidnapping. Defendant pulled the victim from her car in the early hours of a Sunday morning, beat her and then dragged her across the road and down an embankment of a pond shrouded from view by trees. He continued his physical assault, removed some of her clothing, sexually assaulted her, plunged her head repeatedly into the pond, removed her remaining clothes which he took with him and left her naked and helpless.

State v. Matarama, 306 N.J. Super. 6 (App. Div. 1997), certif. denied, 153 N.J. 50 (1998). Judgment of acquittal was properly denied where victim was dragged twenty-three feet to a small alley at the end of her

residential building, so that defendant and his cohort could more easily assault her.

State v. La France, 117 *N.J.* 583 (1990), held that the *Masino* formulation is applicable to prosecutions for kidnapping based upon confinement for a substantial period of time. The defendant, a burglar, forced a woman who was seven months pregnant to tie up her husband; defendant then dragged the woman into the hallway where he sexually assaulted her. The husband was bound for at least thirty minutes while these events were transpiring, until he was able to free himself and rescue his wife.

In *State v. Lyles*, 291 *N.J. Super.* 517 (App. Div. 1996), *certif. denied*, 148 *N.J.* 460 (1997), evidence was insufficient to allow first-degree kidnapping charge to be considered by the jurors where any unlawful confinement was simply ancillary to the sexual assault; defendant's remaining outside the victim's door for an hour after the assault was not the requisite statutory confinement as she was no longer in any danger from defendant and if her perception was otherwise, she could have opened a window and screamed for help.

In *State v. Trochin*, 223 *N.J. Super.* 586 (App. Div. 1988), the evidence was insufficient to support a conviction for first-degree kidnapping where victim voluntarily was a passenger in defendant's car and, except for unsuccessfully telling him three times that she wanted to be driven home, felt no fear until he stopped the car in a dark and deserted park and sexually assaulted her.

C. Elements of Kidnapping

State v. Federico, 103 N.J. 169 (1986), construing N.J.S.A. 2C:13-1c, held that in order to obtain a first-degree conviction, the State is required to prove beyond a reasonable doubt that the victim was not released unharmed and in a safe place prior to the defendant's apprehension. According to the Court, harming or failing to release the victim fall within the definition of "element" as set forth in N.J.S.A. 2C:1-14h(a).

State v. Smith, 279 N.J. Super. 131 (App. Div. 1995), construing N.J.S.A. 2C:13-1c(2), viewing State v. Federico, 130 N.J. 169, as controlling, held the preconditions for an enhanced penalty of life with a parole disqualifier of twenty-five years are elements of the crime to be proved by the State beyond a reasonable doubt. Thus, for the enhanced penalty to be operative, the State has to establish that a first-degree kidnapping occurred, that the victim was less than sixteen years old and that during the kidnapping crimes under *N.J.S.A.* 2C:14-4, *N.J.S.A.* 2C:14-3a or *N.J.S.A.* 2C:24-4b were committed against the victim. The *Smith* court also held that an attempt to commit one of the enumerated crimes does not satisfy the statutory requirements.

D. Jury Instructions

According to *State v. Brent*, 137 *N.J.* 107 (1994), uncontradicted evidence that defendant removed victim from a public street, carried her across the street, struck her on the face to subdue her and dragged her by her shirt into the dense woods of an abandoned lot where he sexually assaulted her precluded a rational basis for a jury charge on the lesser-included offense of criminal restraint.

In *State v. La France*, 117 *N.J.* 583 (1990), the Court suggested that in a prosecution for kidnaping based on confinement for a substantial period of time the trial court should fashion a jury charge using the following factors for the jury to consider: the duration of the detention, whether the detention occurred during the commission of a separate offense, whether the detention was inherent in the separate offense and whether the detention created a significant danger to the victim or another independent of the separate offense.

In *State v. Johnson*, 309 *N.J. Super.* 237 (App. Div.), *certif. denied*, 156 *N.J.* 387 (1998), where defendant separated an upset three-year old child from her mother and left the child under the bushes at 9:00 p.m. near a closed daycare center on a rainy November night, the court found no error in the trial court's instruction to the jurors declining to define "safe place" and instructing the jurors to consider all the circumstances of the child victim's release, including her age, in determining whether the three-year old child was released in a safe place. Common sense dictated that what might be "safe" for an adult would be dangerous or precarious for a young child.

E. Jury voir dire

In *State v. Martini*, 131 *N.J.* 176 (1993), a capital case, where the State alleged as an aggravating factor that the murder was committed during the course of a kidnapping, the Court held prospective jurors must be questioned on the effect that the aggravating factor would have on their deliberations.

F. Sentencing

State v. Megargel, 143 N.J. 484, 503 (1996); State v. Matarama, 306 N.J. Super. 6, 24-25 (App. Div. 1997), certif. denied, 153 N.J. 50 (1998); State v. Ellis, 280 N.J. Super. 533, 552-53 (App. Div. 1995). The ordinary term of imprisonment for a first-degree kidnapping is fifteen to thirty years, with a presumptive of twenty years. N.J.S.A. 2C:44-1f(1)(a).

II. CRIMINAL RESTRAINT AND RELATED OFFENSES

A. Criminal Restraint

An individual is guilty of criminal restraint, a crime of the third degree, if he or she restrains another unlawfully in circumstances exposing the other to the risk of serious bodily, or if he or she holds another in a condition of involuntary servitude. *N.J.S.A.* 2C:13-2.

State v. Marchand, 227 N.J. Super. 92 (App. Div. 1988), aff'd o.b, 114 N.J. 569 (1989), relying on United States v. Kozminski, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988), construed N.J.S.A. 2C:13-2b (knowingly holding another in a condition of involuntary servitude) as requiring the State to prove "compulsion of services by the use or threatened use of physical or legal coercion." The statutory language "The creation by the actor of circumstances resulting in a belief by another that he must remain in a particular location shall for purposes of this section be deemed to be a holding in a condition of involuntary servitude" only expands and clarifies what is involuntary; servitude must still be proved by the State.

State v. Worthy, 329 *N.J. Super*. 109 (App. Div. 2000), held that the requisite mental state of "knowing" applies to all material elements of the offense of criminal restraint, *N.J.S.A.* 2C:13-2a, and the jury charge must make this clear to the jury. Thus, the State has to prove beyond a reasonable doubt that the defendant knew he or she was restraining, that the defendant knew the restraint was unlawful and that the defendant knew "the restraint [was] under circumstances exposing the victim to serious bodily injury." In this case, where the jurors could have found the defendant did not knowingly expose the victim to the risk of serious bodily, reversal was required.

B. False imprisonment

An individual is guilty of false imprisonment, a disorderly persons offense, if he knowingly and unlawfully restrains another "so as to interfere

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substantially with his liberty." *N.J.S.A.* 2C: 13-3. It is an affirmative defense to a prosecution under both this statutory provision and *N.J.S.A.* 2C:13-2 that the person held was less than eighteen years old, that defendant was the legal guardian or a relative of the person restrained and that defendant's only purpose was to assume control of the child.

State v. Bragg, 295 *N.J. Super.* 459 (App. Div. 1996). On retrial, upon request, false imprisonment must be charged to the jury as a lesser-included offense of criminal restraint where the facts demonstrated a question as to whether the defendant restrained the victim in circumstances exposing her to serious bodily injury.

C. Interference with Custody, Criminal Coercion, Enticing Child

A defendant is guilty of either a third-degree or fourth-degree offense if, with a purpose to unlawfully restrict another's freedom of action, the defendant threatens to take one of the actions enumerated in N.J.S.A. 2C:13-5a(1) through (7). Grading of the crime depends on whether defendant's purpose was criminal or whether the threat was to commit a crime more serious than one of the fourth degree.

In *State v. Monti*, 260 *N.J. Super.* 179 (App. Div. 1992), erroneous jury charge mandated reversal of defendant's conviction for third-degree conspiracy to commit criminal coercion. The trial judge failed to have the jury consider the seriousness of the threat defendant paid a "hit man" to undertake and failed to properly identify the threatened crime and its elements. In this case, defendant's non-criminal purpose in conspiring was to coerce another into refraining from interfering with defendant's use of his property.

LAW OF THE CASE

The law of the case doctrine reflects the principle that an unreversed decision on a question of law or fact made during the course of litigation should settle the question for all subsequent stages of the litigation. *State v. Hale*, 127 *N.J. Super.* 407, 410 (App. Div. 1974). The doctrine is based on the policy that once an issue is litigated and decided in a suit, relitigation of that issue should be avoided if possible and the decision should be treated as the law of the case. *State v. Reldan*, 100 *N.J.* 187, 204 (1985); *State v. Downey*, 237 *N.J. Super.* 4, 14-15 (App. Div. 1989); *Sisler v. Gannett Company, Inc.*, 222 *N.J. Super.* 153, 159 (App. Div. 1987).

When applied, the doctrine gives binding effect to a judicial decision. The doctrine is most commonly applied to give binding effect to appellate decisions if the case is remanded to a trial court for further proceedings, or if the case comes before a different reviewing court which may be asked to reconsider the same issue in a subsequent appeal. *State v. Hale*, 127 *N.J. Super.* 407 (App. Div. 1974). The principle applies in a more limited manner to decisions of a trial court. *Id.*

As with application of the doctrine of res judicata, application of the law of the case doctrine can not be challenged until a final judgment has been entered in the case. *State v. Hale, supra,* 127 *N.J. Super.* at 410. However, while res judicata operates as a matter of law to supersede discretion and preclude relitigation of an entire claim, *id.* at 411, the law of the case doctrine essentially is a non-binding decisional guide, and is a "discretionary rule of practice and not one of law." *State v. Sarto,* 195 *N.J. Super.* 565, 570 (App. Div. 1984); *State v. Hale,* 127 *N.J. Super.* at 411. *See also, R.* 3:22-5.

The law of the case doctrine comprises two separate and distinct branches: the first pertains to instances (often following mistrials) where a judge or a court of equal position has resolved an issue on an interlocutory basis; the second pertains to decisions by an appellate court where the matter has been remanded to a trial court. *Daniel v. New Jersey*, 239 *N.J. Super.* 563, 581-582 (App. Div. 1990). Application of the doctrine in the former instances is entirely discretionary; application in the latter is more stringent because "[i]t is the responsibility of a trial judge to comply with the pronouncements of a superior court." *Ibid.*

In *State v. Reldan*, 100 *N.J.* at 187, the trial court had decided to suppress evidence, following a hearing. The

State made no effort to appeal that decision. The trial ended in a mistrial because the jury was unable to reach a verdict. Before re-trial, the State sought and received a second suppression hearing, following which the trial court decided not to suppress evidence. Affirming the trial court, the Supreme Court held that "the law of the case' doctrine insofar as it is applied to orders of an interlocutory nature is itself discretionary. It should be applied flexibly to serve the interests of justice. A prior ruling of an interlocutory nature cannot be relitigated in a subsequent retrial if relitigation would disserve the interests of justice. Conversely, a prior ruling may be relitigated if these interests are advanced." Id. at 205; see also Hart v. City of Jersey City, 308 N.J. Super. 487, 497-499 (App. Div. 1998) (law of the case doctrine, an "adjective concept, ... should not be used to justify an incorrect substantive result").

To guide the exercise of discretion in applying the doctrine, a trial court should consider factors that bear on the "pursuit of justice and ... the search for truth," including: (a) whether the State has improperly sought an unfair advantage over the defendant; (b) whether the prosecutor is acting in good faith in relitigating an earlier interlocutory ruling, *i.e.*, whether the issue involved in the proposed relitigation is related to the circumstances which give rise to the opportunity to relitigate; (c) whether relitigation would be unfair to the defendant; (d) whether evidence was lost by the defendant or gained by the State as a result of the passage of time and later relitigation; and (e) whether the ends of the original ruling, e.g., deterring unlawful police conduct, would continue to be served by relitigation. State v. Reldan, 100 N.J. at 205-207.

In *State v. Stewart*, 196 *N.J. Super.* 138 (App. Div. 1984), the Appellate Division held that its decision in an earlier interlocutory appeal, that is, a decision precluding the defendant from raising the defense of duress in an escape prosecution, was the law of the case and was binding on the subsequent appeal. In the earlier appeal, the Appellate Division had granted the defendant leave to appeal and had reached the merits of the controversy, yet no review of that decision was sought in the Supreme Court. The fact that the prior Appellate Division decision precluding defendant from raising the duress defense was rendered summarily did not mean that the decision was one on the merits.

Similarly, in *State v. Sarto*, 195 *N.J. Super.* at 570-571, the State argued on appeal that the trial judge was barred by *R.* 3:22-5 and the law of the case doctrine from reopening a suppression issue and granting defendant post-conviction relief in order to apply a retroactive holding of the Supreme Court on a warrant requirement for a luggage search. The Appellate Division held that the trial judge's decision to reopen the suppression issue was not an abuse of discretion. The Appellate Division, however, held that its own earlier determination to suppress evidence found in the passenger compartment of defendant's vehicle, a determination which both the New Jersey Supreme Court and the United States Supreme Court refused to review, remained the law of the case, which the Law Division was bound to follow. Even if the issue raised is of constitutional dimension, it may not be relitigated it if was decided on the merits in a prior appeal. State v. Smith, 43 N.J. 67, 74 (1964), cert. denied, 379 U.S. 1005 (1965); State v. Tomaras, 184 N.J. Super. 551, 553 (App. Div. 1982); State v. Cusick, 116 N.J. Super. 482, 485 (App. Div. 1971).

Demonstrating that the doctrine is applied in a less stringent manner to a decision of the trial court is the case of State v. Hale, 127 N.J. Super. 408 (App. Div. 1974). At defendant's first trial, the court conducted a Miranda hearing and excluded defendant's confession because the State had failed to satisfy the Court beyond a reasonable doubt that the statement was given voluntarily. The first trial ended in a mistrial by virtue of the inability of the jurors to agree upon a verdict. The Appellate Division subsequently ruled that the trial court's initial ruling as to the inadmissibility of the confession was not the "law of the case" binding the court at the second trial. See also State v. Powell, 176 N.J. Super. 333 (1981) (allowed relitigation of admissibility of a confession implicating the defendant in five separate crimes); State v. Cooper, 165 N.J. Super. 57 (App. Div.), certif. dismissed, 81 N.J. 261 (1979) (determination in Wade proceeding not law of the case); cf. Texas Co. v. DiGaetano, 71 N.J. Super. 413, 423 (App. Div. 1962), aff'd 39 N.J. 120, 123-4 (1963) (ruling regarding propriety of injunction not law of the case because of public interest in subject matter; State v. Roccascca, 130 N.J. Super. 585 (Law Div. 1974); U.S. Pipe, etc. v. United Steelworkers of America, 37 N.J. 343, 352 (1962); Deverman v. Stevens Builders, Inc., 35 N.J. Super. 300, 302 (App. Div. 1955) (further demonstrating application of the law of the case doctrine).

In *State in the Interest of G.W.*, 206 *N.J. Super.* 50 (App. Div. 1985), defendants contended that the trial court misapplied the law of the case doctrine in refusing to conduct a second probable cause evidentiary hearing as part of the waiver proceedings, even though probable cause had already been established nine months earlier as an adjunct to the detention hearing held in juvenile

court. The court noted the procedural differences between the two probable cause hearings, as well as the markedly different consequences to the juvenile, and found that the law of the case doctrine should not be applied to bar careful reconsideration of probable cause at a waiver hearing. A second evidentiary hearing was not required, however. In this case, the trial judge made an independent determination of probable cause based upon the evidence in the transcript of the earlier hearing and the introduction of evidence that would minimize defendant's involvement in the offense in order to enhance his chances of being found amenable to rehabilitation. Since an independent search for the truth had been conducted, the denial of defendants' request for a second hearing was upheld.

LOANSHARKING

Criminal usury, or loansharking, is defined as an unauthorized agreement to loan, loaning, agreement to take, taking, or receiving money or other property at an interest rate in excess of the maximum rate permitted by law. *N.J.S.A.* 2C:21-19a.

Notwithstanding any law of the state permitting the parties to a loan to agree on the interest charged, the criminal usury rate generally is 30% per annum. *See N.J.S.A.* 2C:21-19a(2); *Daly v. Daly*, 179 *N.J. Super.* 344, 349 n. 2 (App. Div. 1981). For corporations, limited liability companies and limited liability partnerships, the maximum interest rate is 50% per annum. *See N.J.S.A.* 2C:21-19a(2).

Criminal usury constitutes a crime of the second degree if the interest rate exceeds 50%. It is a crime of the third degree if the interest rate charged is less than 50% and the amount involved is greater than \$1000. All other violations of *N.J.S.A.* 2C:21-19a(1) or a(2) constitute a disorderly persons offense. These provisions apply only to loans made to a "person," not to corporations or other limited liability business entities.

Engaging in the "business of criminal usury" is a crime of the second degree and carries a fine of up to \$250,000. *N.J.S.A.* 2C:21-19b. To obtain a conviction, the State must prove that the person "knowingly engage[d] in the business of making loans at an interest rate in excess of that permitted by statute. *Ibid.* In *State v. Tillem,* 127 *N.J. Super.* 421 (App. Div.), *certif. den.* 65 *N.J.* 557 (1974), *cert. denied,* 419 *U.S.* 900 (1974), *renewed petition for certif. denied,* 66 *N.J.* 335 (1974), the court held that a similar phrase, "engages in the business of making loans" in the predecessor statute, *N.J.S.A.* 2A:119A-3, was not void for vagueness.

The *Tillem* court also held that the trial court was not required to charge the jury that scienter and criminal intent were elements of the crime since a legislature may declare such an act unlawful without proof of wrongful intent. *Id.* at 425-426. However, the Code of Criminal Justice provides that, where no intent element is specifically identified, "knowingly" is the intent element which must be proven. *N.J.S.A.* 2C:2-2c(3). *See also N.J.S.A.* 2C:21-19b which uses the word "knowingly".

Tillem further held that where various usurious loans are made as a part of a continuing criminal "impulse," the individual transactions merge into the greater offense of

engaging in the business of criminal usury. *Id.* at 428-430. Finally, the prosecutor's comments during summation, which likened defendant to Shakespeare's Shylock in exacting a "pound of flesh," were justifiable. The court deemed the comments to be harmless in light of the trial court's instruction to base the verdict on the evidence. *Id.* at 426.

In *Dopp v. Yari*, 927 *F.Supp.* 814 (D.N.J. 1996), the court held that *N.J.S.A.* 2C:21-19 did not apply to a contract for financing a litigation in exchange for division of the proceeds of the litigation. The agreement was more in the nature of a joint undertaking than a loan, especially since collection of the entire interest depended on the outcome of the litigation. "Generally, in order to prove usury, a party must establish three elements: (1) a loan of money, (2) an absolute obligation to repay the principal and (3) the exaction of a greater compensation than that allowed by law for the use of the money." *Id.* at 820.

Under New Jersey law, the burden of proof is upon the one who asserts a claim of usury. *Ibid.*; *Ditmars v. Camden Trust Co.*, 10 *N.J.* 471, 498 (1952). The civil remedy for a usurious loan is to sever the interest portion of the loan and permit recovery only of the principal. *Dopp v. Yari, supra*; *Schuran, Inc. v. Walnut Hill Associates*, 256 *N.J. Super.* 228, 233 (Law Div. 1991). Statutes regulating usury impose duties or establish rights not recognized by common law. They are therefore to be interpreted strictly so as to effectuate only the plainly expressed legislative intent. *Schuran, Inc. v. Walnut Hill Associates, supra.*

In *Green v. Continental Rentals*, 292 *N.J. Super.* 241 (Law Div. 1994), the court held that the difference between the cash price and the total amount of installments under a business' rent-to-own agreement with consumers was forbearance with interest rates exceeding 30% per annum. Consequently, the interest rates constituted an unconscionable practice and were in violation of the Consumer Fraud Act, *N.J.S.A.* 56:8-1 *et seq.*

See also extortion (*N.J.S.A.* 2C:20-5), coercion (*N.J.S.A.* 2C:13-5), harassment (*N.J.S.A.* 2C:33-4), pawnbrokers (*N.J.S.A.* 2C:39-11), forgery and fraudulent practices (*see generally N.J.S.A.* 2C:21) and racketeering (N.J.S.A. 2C:41-1). *N.J.A.C.* 3:1-1.1 et seq. sets forth maximum permissible interest rates.

LOITERING

(See also, DISORDERLY PERSONS, this Digest)

I. DEFINITION

To be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to linger or to lag behind; spend time idly. Black's Law Dictionary (6th Ed. 1990). An ordinance which relies on such general language would be void for vagueness, because it would give no guide or standard by which to determine who is loitering. Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); State v. Caez, 81 N.J. Super. 315 (App. Div. 1963); see also State v. Zito, 54 N.J. 206 (1969) (failure to give good account or giving account that was bad not sufficient to support disorderly persons conviction); Borough of Dumont v. Caruth, 123 N.J. Super. 331 (Mun. Ct. 1973) (some warning to leave must be issued before conduct becomes unlawful); Allen v. City of Bordentown, 216 N.J. Super. 557 (Law Div. 1987). An ordinance which defined in detail the acts which constitute loitering and requires a request to move on before authorizing arrest, was not unconstitutionally overbroad or vague. Camarco v. City of Orange, 61 N.J. 463 (1972).

II. MUNICIPAL ORDINANCES

Prior to the enactment of the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 et seq., New Jersey's criminal law included specific prohibitions against vagrancy and loitering. N.J.S.A. 2A:170-1 to 4. However, these provisions were repealed and not reincorporated into the new Code. Consequently, in State v. Crawley, 90 N.J. 241 (1982), the New Jersey Supreme Court concluded that, when viewed in context with the legislative history surrounding the pre-code loitering provisions, the absence of any specific loitering statute in the new code evidences a legislative intent to decriminalize such conduct. Therefore, the Court held that, pursuant to N.J.S.A. 2C:1-5d, the code provisions contained in N.J.S.A. 2C:33-1 to 14 preempted concurrent municipal legislation with respect to "loitering" status per se. However, it should be noted that the type of conduct previously proscribed under N.J.S.A. 2A:170-1 to 4 and local municipal ordinances may fall within one of the disorderly persons offenses set forth under N.J.S.A. 2C:33-1 to 14. State v. Crawly, supra at 251-252. Moreover, the decision in Crawly does not preempt municipal ordinances dealing with the complementary areas of property offenses, vandalism, pollution and public health. Id. at 252.

III. LOITERING STATUTES

A. *N.J.S.A.* 2C:33-2.1 - prohibition against loitering for the purpose of illegally using, possessing, or selling controlled dangerous substance.

B. *N.J.S.A.* 32:1-146.6 - Prohibition against loitering in airports, bus terminals or marine terminals; penalty.

C. *N.J.S.A.* 32:23-79 - Prohibition against loitering at waterfront facility.

D. *N.J.A.C.* 19:2-5.9 - Administrative prohibition aginst loitering on Atlantic City Expressway.

IV. CASES

In Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999), a majority of the Supreme Court affirmed an Illinois Supreme Court ruling declaring unconstitutional a local ordinance prohibiting criminal street gang members from loitering in public places. For commission of the offense the state had to show that 1) the police reasonably believed that at least one of the two or more persons present in a "public place" is a criminal street gang member; 2) the person were loitering or "remaining in any one place with no apparent purpose;" 3) the officer ordered "all" of the persons to disperse and remove themselves "from the area;" and 4) a person, whether or not a gang member, disobeyed the officer's order. Rejecting the overbreadth doctrine as a basis for invalidating the ordinance because it did not prohibit speech or right of association, the Supreme Court nonetheless found that the ordinance was unconstitutionally vague on its face, and was an arbitrary restriction on personal liberties. It stated that the ordinance failed to give adequate notice as to "what loitering is covered by the ordinance and what is not." In this regard the ordinance failed to distinguish between innocent conduct and conduct threatening harm. It thus found that the ordinance was vague because no standard of conduct was specified at all. Furthermore, it found that the broad sweep of the ordinance failed to provide minimal guidelines for law enforcement to follow.

State v. Felder, 329 N.J. Super. 471 (App. Div. 2000), held that a municipal ordinance which prohibited knowingly loitering in a public place where controlled dangerous substance is being unlawfully distributed was preempted by the Code. See also State v. Schenck, 186 N.J. Super. 236 (Law Div. 1982); State v. Navarro, 162 N.J. Super. 434 (Mun. Ct. 1978) (statute prohibiting loitering or cresting a disturbance while under the influence of intoxicating liquor repealed by Alcoholism Treatment and Rehabilitation Act).

State v. Thomas Kazanes, 318 N.J. Super. 421 (App. Div. 1999). While sufficient evidence existed that defendant had engaged in conduct manifesting a purpose to obtain drugs pursuant to N.J.S.A. 2C:33-2.1b(2), there were insufficient proofs that he was "wandering" in a public place with such an illegal purpose as required under N.J.S.A. 2C:33-2.1b(1) where the evidence merely showed a meeting and an exchange. The Legislature enacted this statute to protect the quality of life in public places, and in using the word "wander" -- and the alternative words "remains" and "prowls" -- it required some sense of "hanging about" or "lingering" in an attempt to make a drug connection.

State v. Brian Green, 313 *N.J. Super.* 385 (App. Div. 1998).

Groups of persons cannot be arrested merely for loitering if not engaged in any illegal activity.

MEDICAID

Under N.J.S.A. 30:4D-17.

a. Any person who willfully obtains benefits under this act to which he is not entitled or in a greater amount than that to which he is entitled, and any provider who receives medical assistance payments to which he is not entitled or in a greater amount than that to which he is entitled is guilty of a high misdemeanor and, upon conviction thereof, shall be liable to a penalty of not more than \$10,000.00 or to imprisonment for not more than three years or both.

b. Any provider, or any person, firm, partnership, corporation or entity, who:

1. Knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any cost study, claim form, or any document necessary to apply for or receive any benefit or payment under this act; or. . . shall be liable for a penalty of not more than \$10,000.00 for the first and each subsequent offense or to imprisonment for not more than three years or both . . .

In State v. Loughrey, 149 N.J. Super. 264 (App. Div. 1977), a defendant was charged with aiding and abetting a nursing home in receiving medical assistance payments in a greater amount than that to which it was entitled contrary to the provisions of N.J.S.A. 30:4D-17. Defendant moved to dismiss the indictment based upon the statute of limitations. At the hearing on the motion, the State presented evidence which disclosed that the defendant had prepared a cost study in 1969. That cost study had subsequently been used in 1971 to obtain payments. The Appellate Division held that the statute of limitations did not bar prosecution of the defendant for unlawfully receiving medicaid funds when the money was received within the statute of limitations although the wrongful acts which induced the payment occurred beyond the statutory period. Thus, where payment was received within the statutory period, defendant could be convicted although his participation in the unlawful scheme occurred prior thereto.

Similarly, a course of conduct of obtaining excessive medicaid assistance payments spanning nine years was considered a continuous offense and the entire nine year period was permitted to be encompassed in the indictment. *State v. Tyson,* 200 *N.J. Super.* 137, 150

(Law Div. 1984); *see also Miller*, 33A *New Jersey Practice* §601-605 (2d ed.).

The subpoena power of the grand jury in Medicaid cases has been addressed by the courts. In In re Grand Jury Subpoena Duces Tecum, 143 N.J. Super. 526 (Law Div. 1976), the court examined a grand jury's subpoena power of documents relating to a Medicaid fraud investigations. The court determined that a period of six and one-half years was not unreasonable so as to constitute a detriment to movant's business where the State submitted evidence establishing that the period of time with which the subpoenaed records dealt bore a relation to the subject matter of the investigation. Id. at 536-538. Further, the court found that the subpoena was reasonable in all respects except insofar as its command for production of records that would not duly hamper the movant's business operations, but that the burden was on the movant to come forward and establish which records were necessary to carry on the normal operations of his business. Id. at 538-539.

In *State v. Doliner*, 96 *N.J.* 236 (1984), the New Jersey Supreme Court addressed the question of the applicable standards governing the disclosure of grand jury materials to government departments for use in civil prosecution. The *Doliner* court held that the standard was a strong showing of particularized need which outweighs the public interest in secrecy of the grand jury proceedings. *Id.* at 241. In announcing this standard, the court found that the record made before the trial court sustained its decision to release the records of the defendant medical providers, which were subpoenaed in connection with a Medicaid fraud investigation. *Id.*

I. INTRODUCTION

The merger doctrine descends from the longstanding principle that "an accused [who] has committed only one offense. . . cannot be punished as if for two." State v. Davis, 68 N.J. 69, 77 (1975). This proposition has been interpreted to prohibit multiple punishment for a single wrongdoing and mandates that convictions for lesser offenses that are necessary components of another offense must merge. As, however, noted by the Davis Court, "[w]ith whatever disarming ease the prohibition against double punishment may be articulated, its application is not without difficulties." Id. In fact, merger has spawned a steady stream of litigation over the years during which the Supreme Court of New Jersey has endorsed two alternate approaches to merger, which to date comprise the analytic framework for determining the merger of offenses.

II. TESTS FOR DETERMINING MERGER

Historically, the test for determining whether multiple convictions should merge was "whether a particular act involved in a single transaction is a distinct criminal affair or an integral part of the principal offense charged." *State v. Hill*, 44 *N.J. Super.* 110, 112 (App. Div. 1957). Although regarded as a correct enunciation of the law, this approach failed to define the precise meaning of a "single crime." *State v. Best*, 70 *N.J.* 56, 62 (1976). More recently, the court adopted two other, more sophisticated approaches to merger that have become the settled law.

The first approach is grounded in the statutory rule governing merger, *N.J.S.A.* 2C:1-8. As *N.J.S.A.* 2C:1-8d, explains, an offense is included within another when

1. It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

2. It consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein; or

3. It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

This statute has been regarded as a codification of the standard articulated in *Blockburger v. United States*, 284 *U.S.* 299 (1932), and the basis for what is now widely known as the *Blockburger* test. Principally a double jeopardy test, the *Blockburger* standard sets forth that whether there are two offenses or one is to be determined by "whether each provision requires proof of an additional fact which the other does not." *Id.* at 304; *see also State v. Fraction*, 206 *N.J. Super.* 532, 538-39 (App. Div. 1985), *certif. denied*, 104 *N.J.* 434 (1986). This test, however, has been severely criticized by the Court as being overly "mechanistic." *State v. Truglia*, 97 *N.J.* 513, 520 (1984).

Indeed, the Court essentially rejected this approach in favor of the more flexible one first introduced in *State v. Davis, supra. State v. Miller,* 108 *N.J.* 112, 116-18 (1987). *Davis,* which predates the statutory rule, focuses on the "episodic fragments of the events." *State v. Truglia,* 97 *N.J.* at 521. This requires a court to analyze offenses with respect to the "time and place of each purported violation; whether one act was part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed." *State v. Davis,* 68 *N.J.* at 81. The Court also permitted that other factors may be considered "along with the above, (and may be) accorded greater or lesser weight depending on the circumstances of the particular case." *Id.; accord, State v. Best, supra.*

The Court reaffirmed its preference for the flexible approach in State v. Cole, 120 N.J. 321, 327-28 (1990), reiterating that the focus of the merger test is on "the elements of crime and the Legislature's intent in creating them, and on the specific facts of each case." The Court, however, did not abandon the Blockburger test and, in fact, resolved the merger issue in the *Cole* case in light of a synthesis of statutory, constitutional and common law principles. Indeed, while New Jersey courts tend to rely fairly heavily and consistently on the flexible approach, still, as the caselaw indicates, neither the statutory nor the flexible approach has "achieved universal acceptance." State v. Warren, 186 N.J. Super. 35, 39 (Law Div. 1982); see State v. Dillihay, 127 N.J. 42, 50-51 (1992) (applying the *Blockburger* test); and *State v. Fraction*, 206 *N.J. Super*. at 538 (same); compare State v. Manthey, 295 N.J. Super. 26, 32 (App. Div. 1996) (applying the "flexible" test); and State v. Kamienski, 254 N.J. Super. 75, 124 (App. Div. 1992) (same), certif. denied, 130 N.J. 18 (1992); but see State v. Maldonado, 137 N.J. 536, 582 (1994) (applying both tests).

Apart from the Court's vacillatory position on its analytic approach to merger, there is still another aspect

of this body of law that has been left unresolved. Specifically, the courts have yet to decide the etiology of merger, particularly regarding whether its origins are rooted in "double jeopardy, substantive due process or some other legal tenet." *State v. Cole*, 120 *N.J.* at 326. Thus far the Court has only acknowledged that merger "implicates a defendant's substantive constitutional rights." *Id.*

III. MERGER GENERALLY

It is a cardinal rule of the merger doctrine that a crime of a greater degree cannot be merged into one of a lesser degree. State v. Dillihay, 127 N.J. at 54-55; State v. Battle, 256 N.J. Super. 268, 283 (App. Div.), certif. denied, 130 N.J. 393 (1992). Nonetheless, the courts have held that merger does not extinguish any merged convictions even though the merged conviction was embraced under a single sentence. State v. Pennington, 273 N.J. Super. 289, 295 (App. Div.), certif. denied, 137 N.J. 313 (1994). Thus, when the *Pennington* court reversed defendant's conviction for purposeful and knowing murder, the prosecutor was permitted to retry defendant on that charge or move before the trial court to un-merge the lesser offense of felony murder and sentence defendant thereon. Id. at 295-96; see State v. Smith, 279 N.J. Super. 131, 144 (App. Div. 1995) (where the sentencing court was instructed to un-merge a sexual assault conviction consequent to the appellate court's reversal of the greater offense of kidnaping for which retrial was precluded); State v. Pindale, 249 N.J. Super. 266, 289-90 (App. Div. 1991) (where the reversal of an aggravated manslaughter conviction was survived by a death by auto conviction), certif. denied, 142 N.J. 449 (1995); see also State v. Harrington, 310 N.J. Super. 272, 280-81 (App. Div.), certif. denied, 156 N.J. 387 (1998).

IV. MERGER AND APPEAL

In 1981, *N.J.S.A.* 2C:1-8a was amended to clarify that a determination of merger must be made postverdict rather than pre-verdict. The purpose of the amendment was to ensure that the State could appeal erroneous merger-related decisions without double jeopardy preclusions. *State v. Berrios*, 186 *N.J. Super.* 198, 202 n.2 (Law Div. 1982). The Supreme Court of New Jersey affirmed this principle in *State v. Rodriguez*, 97 *N.J.* 263 (1984), holding that a defendant could be re-sentenced following his successful appeal relating to the merger of underlying convictions without offending double jeopardy principles. The Court reasoned that defendant's attack of the underlying convictions on appeal was dispositive that he had no legitimate expectation of finality that would otherwise have precluded a remand and resentencing. *Id.* at 270-71.

Whether the appellate court will consider mergerrelated arguments on appeal depends on whether or not it was raised below. Where a defendant raises merger for the first time on appeal, he must demonstrate "by a preponderance of the evidence that the record supports his merger claim." *State v. Truglia*, 97 *N.J.* at 518-19; *see also State v. Strecko*, 244 *N.J. Super.* 463, 464-65 (App. Div. 1990). Once on appeal, the appellate court is permitted to review the merger of all offenses whether or not they are raised by defendant. In *State v. Pyron*, 202 *N.J. Super.* 502, 504-05 (App. Div. 1985), the court agreed with defendant that a third-degree threat-to-kill conviction and a robbery conviction should have merged, but un-merged the sentencing court's merger of the burglary and robbery convictions.

It is well to note that merger will not be deemed waived on appeal if a defendant was not made cognizant of the operative effects of merger on his or her convictions. State v. Truglia, 97 N.J. at 523-34. But, where a defendant has knowingly and intelligently waived merger pursuant to a plea agreement, such waiver will be enforced on appeal. State v. Crawley, 149 N.J. 310, 317-18 (1997). Notably, though, a plea will not necessarily fail even if a defendant was not properly informed of merger of his convictions, provided that such failure does not have the effect of misinforming a defendant of his or her potential sentence. The Crawley Court nonetheless underscored that the better practice is for the trial judge to appraise every defendant of the potential of merger of his or her convictions. Id. at 319; but see State v. Bull, 268 N.J. Super. 504, 516 (App. Div. 1993) (where defendant did not raise below the merger issue, but the court refused to penalize him with non-merger of his convictions in a set of facts that could have been the basis for either merger or non-merger absent any guidance from the indictment, the judge's jury instructions or the jury verdict), certif. denied, 135 N.J. 304 (1994); see also State v. Roddy, 210 N.J. Super. 62, 66-67 (App. Div. 1986) (where the appellate court merged two convictions that were part of a plea agreement, but where on resentencing the judge granted the State's motion for an extended term that altered the sentence to such an extent that the appellate court found that both the State and defendant were deprived of their reasonable expectations under plea agreement, necessitating vacation of the plea agreement and the return of both parties to their original pre-plea positions).

V. MERGER AND JURY INSTRUCTIONS

Whether or not multiple offenses will ultimately stand is an issue to be determined by the judge after the jury has rendered its verdict. *State v. Clark*, 227 *N.J. Super.* 204, 212 (App. Div. 1988); *see also State v. Berrios*, 186 *N.J. Super.* at 202 n.2. Of course, the judge's jury instructions, and particularly the submission or exclusion of lesser-included offenses, will ultimately establish the framework for the application of merger at sentencing.

But merger can also be affected by the form or nonspecificity of the judge's jury instructions. *State v. Hardison*, 99 *N.J.* 379 (1985), is a prime example of this circumstance. In that case, defendants was charged with conspiracy to rob and with two separate robbery offenses. The jury convicted defendant of conspiracy to rob and only one of the robbery offenses. The question then arose whether the conspiracy should merge into the robbery conviction. *Id.* at 386.

After reviewing the record below, the Hardison Court determined that the facts established that the objective of the conspiracy charge was to further the surviving robbery offense, and thus merged the two convictions. Id. at 391. The Court, however, advised that it would be appropriate in such situations to give the jury post-verdict interrogatories as a means of clarifying the nature of the verdict and thereby assist the sentencing judge in making the appropriate merger determinations. Id. Citing to State v. Simon, 79 N.J. 191 (1979), the Hardison Court, however, cautioned that in no event should such interrogatories be supplied to the jury prior to rendering its verdict. Id.; see also State v. Pantusco, 330 N.J. Super. 424, 444 (App. Div. 2000) (holding that absent a special verdict from the jury indicating which of the three robberies defendant was fleeing when he committed murder, the court was compelled to merge the robbery with defendant's felony murder conviction); State v. Bull, 268 N.J. Super. at 516 (citing to similar lack of guidance from the indictment, judge's instructions and jury verdict). A jury should likewise not be informed as to whether or not convictions may merge at sentencing because such information could compromise the verdict or distract the jury from focusing on each of the elements charged. State v. Carswell, 303 N.J. Super. 462, 478-80 (App. Div. 1997).

The doctrine of merger is a critical component of our penal code, which often determines the structure of a defendant's sentence. Indeed, merger has its application in all criminal conduct from the inception to the conclusionary stages of a crime. The following illustrates the effect of the merger doctrine on prepatory and substantive crimes.

VII. MERGER AND PREPATORY CRIMES

A. Conspiracy

Until *State v. Hardison*, 99 *N.J.* at 383-84, "the law traditionally considered conspiracy and the completed substantive offense to be separate crimes" which did not merge. *Id.* After the codification of *N.J.S.A.* 2C:1-8a(2), which provides that a person may not be convicted of more than one offense if "one offense consists only of a conspiracy or other form of preparation to commit the other," the *Hardison* Court rejected that once prevailing view. It rather held, in accord with the statutory rule, that where the conspiracy proven does not have criminal objectives beyond the substantive offense proven, the offenses will merge. *Id.* at 380, 386. Conversely, conspiracy will not merge if it exceeds the consummation of the substantive offense. *Id.* at 386-87.

There are numerous examples where the courts have merged conspiracy with its predicate offense. State v. Williams, 317 N.J. Super. 149, 159 (App. Div. 1998) (merging conspiracy into armed robbery conviction), certif. denied, 157 N.J. 647 (1999); State v. Kamienski, 254 N.J. Super. at 114-15 (holding that a single conspiracy involving the distribution of drugs could not be broken into two separate conspiracies); State v. Neal, 229 N.J. Super. 28, 34 (1988) (holding that conspiracy to commit armed robbery should be merged with the substantive offense of armed robbery); In Re M.A., 227 N.J. Super. 393, 395 (Ch. Div. 1988) (holding that conspiracy to possess a controlled dangerous substance merged with the substantive conviction for actual possession).

The offense for conspiracy will merge even where the conspiracy offense encompassed a variety of substantive crimes. *State v. Malone*, 269 *N.J. Super.* 414, 417 (Law Div. 1993); *but see State v. Taccetta*, 301 *N.J. Super.* 227, 257-58 (App. Div.) (where the court declined to merge defendant's racketeering conspiracy conviction with his two extortion convictions because the conspiracy

encompassed crimes that went beyond the extortion offenses), *certif. denied*, 152 N.J. 188 (1997).

B. Possessory Offenses

In the spirit of *State v. Hardison, supra*, the Court has also set as a general rule that a conviction for possession of a weapon for unlawful purposes merges with its predicate offense where a jury does not find that a defendant possessed the firearm for a purpose independent of the commission of the greater offense. In State v. Loftin, 287 N.J. Super. 76, 111-12 (App. Div. 1995), certif. denied, 144 N.J. 175 (1996), the court held that the use of a weapon for an unlawful purpose must merge with the substantive offenses absent a special verdict by the jury that the unlawful purpose was broader than the substantive offenses for which defendant was convicted. See also State v. Smith, 322 N.J. Super. 385, 400 (App. Div.), certif. denied, 62 N.J. 489 (1999); State v. Cook, 300 N.J. Super. 476, 490 (App. Div. 1996); State v. Vasquez, 265 N.J. Super. 528, 563-64 (App. Div.), certif. denied, 134 N.J. 480 (1993); State v. Nutter, 258 N.J. Super. 41, 59 (App. Div. 1992).

Of course, the converse is also true -- that where there existed an independent purpose for the weapon beyond the commission of the substantive offenses, then merger will not apply. In State v. Wilson, 128 N.J. 233, 245 (1992), the Court did not merge the offense of possession of a weapon for an unlawful purpose with defendant's murder conviction where the record indicated that defendant had used the murder weapon to threaten someone else. In State v. Mance, 300 N.J. Super. 37, 64 (App. Div. 1997), the court refused to merge defendant's conviction for a possession of a weapon for an unlawful purpose with other convictions since the unlawful purpose was to injure as many corrections officers as possible beyond those who were actually injured. Similarly, in State v. Anderson, 198 N.J. Super. 340, 358-59 (App. Div.), certif. denied, 101 N.J. 283 (1985), the court did not merge a conviction for possession of an unlawful weapon and a robbery conviction where defendant's transport of weapons to and from the scene implied that they were possessed with broader purpose beyond the commission of the robbery. And, in *State v.* DeLuca, 325 N.J. Super. 376, 392-93 (App. Div. 1999), certif. granted, 163 N.J. 79 (2000), the court did not permit merger of defendant's unlawful possession of a handgun with his conviction for robbery because the gravamen of each offense is different. See also State v. Bowser, 297 N.J. Super. 588, 592 n.1 (App. Div. 1997); State v. Johnson, 203 N.J. Super. 127, 135-36 (App. Div.), certif. denied, 102 N.J. 312 (1985).

The issue of merger becomes more difficult where the jury's verdict respecting the use of the weapon is ambiguous. The court in *State v. Williams*, 213 *N.J. Super.* 30, 36 (App. Div. 1986), *certif. denied*, 107 *N.J.* 104 (1987), enumerated the factors by which merger should be determined in such circumstances:

(1) the defendant must have been charged in the indictment with possession of the weapon with a broader unlawful purpose, either generally or specifically, than using the weapon to kill or assault the victim of the greater offense, (2) the evidence must support a finding that the defendant had a broader unlawful purpose, (3) the judge must have instructed the jury of the difference between possession with the specific unlawful purpose of using the weapon against the victim of the greater offense and a broader unlawful purpose and (4) the verdict must express the jury's conclusion that the defendant had a broader unlawful purpose.

Thus, in State v. Diaz, 144 N.J. 628, 636 (1996), the Court declined to merge defendant's possessory conviction where the jury instructions and record alike were insufficient to find a broader unlawful purpose for the murder weapon beyond the substantive crime. In State v. Bull, 268 N.J. Super. at 515-16, the court was compelled to merge defendant's conviction for possession of a weapon for an unlawful purpose with his armed robbery conviction on the grounds that, although two knives were involved, the court could not discern from the verdict whether or not the jury found that the facts supported merger and would not penalize defendant for this ambiguity. See also State v. Gibson, 318 N.J. Super. 1, 11-12 (App. Div. 1999) (holding that defendant's convictions for possession of a controlled dangerous substance and possession of a controlled dangerous substance with intent to distribute should have been merged, absent a special verdict sheet, because neither the judge's charges nor the verdict sheet gave the jury any indication that the two were distinct of one another; also the record suggests that defendant was simultaneously holding all substances).

In this regard, the Court lauded the use of special verdicts "to facilitate the determination of the grade of the offense under the Code of Criminal Justice or otherwise simplify the determination of a verdict when multiple charges are submitted to the jury" and particularly to "avoid reversal of ambiguous verdicts." *State v.* Diaz, 144 *N.J.* at 642-44. The Court, however, declined to require the use of such special verdicts as a *per se* rule, particularly since such a requirement would unnecessarily restrict the court's discretion concerning

merger of convictions at sentencing. *Id.* at 643; *see also State v. Camacho*, 153 *N.J.* 54, 69-70 (1998), *cert. denied*, 525 *U.S.* 864, (1998); *State v. Petties*, 139 *N.J.* 310, 313-14 (1995).

As these offenses implicate the Graves Act, it is well to note that when a Graves Act crime merges with a non-Graves Act crime, the sentence must be at least equal in length to the mandatory minimum sentence that is required for a Graves offense. *State v. Connell*, 208 *N.J. Super.* 688, 696 (App. Div. 1986). If, however, the sentencing guidelines do not allow for a sentence of that length for a non-Graves offense, than merger of the two offenses would be improper. *Id.* at 697.

VIII. MERGER AND SUBSTANTIVE OFFENSES

The guidepost for the merger of substantive offenses is that "convictions for lesser-included offenses, offenses that are a necessary component of the commission of another offense, or offenses that merely offer an alternative basis for punishing the same criminal conduct will merge." *State v. Brown*, 138 *N.J.* 481, 561 (1994), *overruled o.g., State v. Cooper*, 151 *N.J.* 326 (1997). There are numerous cases that exemplify these basic principles of merger.

The following are examples of the merger of lesser included offenses: In State v. Cooper, 151 N.J. at 406, the Court merged defendant's aggravated sexual assault conviction with his kidnaping conviction since sexual assault was subsumed in the kidnaping statute, N.J.S.A. 2C:13-1c(2). In State v. Lawson, 217 N.J. Super. 47, 50 (App. Div. 1987), defendant's convictions for seconddegree robbery and fourth-degree theft merged since the former was a necessarily included element in the robbery. See also State v. Zeidell, 154 N.J. 417, 433 (1998) (merging lewdness with sexual assault); State v. Van Valen, 316 N.J. Super. 20, 21 (App. Div. 1998) (merging terroristic threats with first-degree robbery), certif. denied, 163 N.J. 78 (2000); State v. Doss, 310 N.J. Super. 450, 462 (App. Div.) (merging terroristic threats with aggravated assault), certif. denied, 155 N.J. 589 (1998); State v. Robinson, 266 N.J. Super. 268, 282 (App. Div. 1993) (merging aggravated assault with attempted murder), rev'd o.g., 136 N.J. 476 (1994).

The following illustrates the merger of offenses that are a necessary component of the commission of another offense: In *State v. Wallace*, 313 *N.J. Super.* 435, 438-39 (App. Div.), *aff'd* 158 *N.J.* 552 (1998), the court merged careless driving with a second-degree eluding offense because both embodied the same elements. In *State v.*

Rondinone, 291 N.J. Super. 489, 499-00 (Law Div. 1996), aff'd 300 N.J. Super. 495 (App. Div. 1997), the court merged defendant's conviction for exhibiting another's drivers license and falsifying records because proof of the former was required to prove the latter offense. In State v. Streater, 233 N.J. Super. 537, 544 (App. Div.), certif. denied, 117 N.J. 667 (1989), the court merged theft by deception and a conviction for uttering a forged instrument, also on the premise that the evidence relied upon by the State to support the two convictions was identical. Likewise, in State v. Manning, 234 N.J. Super. 147, 164 (App. Div.), certif. denied, 117 N.J. 657 (1989), which involved two counts of felony murder for the same victim and two underlying felonies -- escape and robbery -- the court concluded that the offense regarded as the basis for the felony murder, in this case robbery, must merge; defendant was sentenced separately for the escape conviction. See also State v. Mirault, 92 N.J. 492, 503-04 (1983); State v. Pyron, 202 N.J. Super. at 505.

Notably, the court will also merge offenses that are factually inseverable from one another. In *State v. Ramos*, 217 *N.J. Super.* 530, 540 (App. Div. 1987), the court merged second-degree burglary with attempted aggravated sexual assault because defendant was convicted of the greater offense of attempted sexual assault only because he committed the burglary. And, in *State v. Lore*, 197 *N.J. Super.* 277, 283-84 (App. Div. 1984), the court merged a conviction for simple assault with the offense of misconduct in office since the State relied on the simple assault to establish the latter offense.

The court will likewise merge offenses that are temporally connected, as well as those that involve the same victims. In *State v. Kamienski*, 254 *N.J. Super.* at 113, the court found that the convictions for distribution of drugs between Florida and New Jersey arose out of a single activity and thus merged. In *State v. Parsons*, 270 *N.J. Super.* 213, 222 (App. Div. 1994), the court merged two counts of resisting arrest against two different officers, as both represented the State. And, in *State v. Latimore*, 197 *N.J. Super.* 197, 215 (App. Div. 1984), *certif. denied*, 101 *N.J.* 328 (1985), the court merged two separate convictions for possession of weapons because the possessory offenses evolved out of the same criminal episode.

These aforesaid principles of merger, of course, operate in the converse, too. That is, the court will not merge convictions that are comprised of non-inclusive offenses. For example, the court will not merge an offense of possession of a handgun for an unlawful purpose and possession of a handgun without a permit since they are distinct offenses. *State v. Cooper*, 211 *N.J. Super.* at 23. Similarly, a conviction for burglary of a motor vehicle will not merge with the theft of a motor vehicle because the entry into the car and theft are two disparate acts. *State v. Subin*, 222 *N.J. Super.* 227, 236-37 (App. Div.), *certif. denied*, 111 *N.J.* 580 (1988). Neither will burglary and robbery merge, as they involve different conduct. *State v. Martes*, 266 *N.J. Super.* 117, 123 (Law Div. 1993).

Based on this same rationale, the court will also not merge convictions that require the finding of elements of which the other offense is not constituted. In State v. Cook, 330 N.J. Super. 395, 424 (App. Div. 2000), the court rejected the merger of defendant's robbery convictions into murder because the proofs of the armed robbery offenses were not required to sustain the murder conviction. In State v. Davis, 281 N.J. Super. 410, 416 (App. Div. 1995), certif. denied, 45 N.J. 376 (1996), the court held that aggravated assault upon a police officer did not merge with resisting arrest. In State v. Mara, 253 N.J. Super. 204, 213-14 (App. Div. 1992), the court concluded that aggravated assault did not merge with a conviction for driving while intoxicated because intoxication is not an element of the assault conviction. And, in State v. Buonadonna, 122 N.J. 22, 49-50 (1991), the Court held that second-degree aggravated assault need not have merged with first-degree robbery since the State proffered sufficient evidence to sustain each conviction separately and because each conviction addressed separate injuries. See State v. Russo, 243 N.J. Super. 383, 411 (App. Div.) (holding that defendant's conviction for armed robbery should not merge with his conviction for felony murder because his conviction of knowing and purposeful murder rendered the felony murder "surplusage" and thus precluding that the underlying felony must be merged), certif. denied, 126 N.J. 322 (1991); see also State v. Crouch, 225 N.J. Super. 100, 109 (App. Div. 1988); State v. Lewis, 223 N.J. Super. 145 (App. Div.), certif. denied, 111 N.J. 584 (1988).

Likewise, the court will not merge offenses which are severable by legislative intent. In *State v. Matarama*, 306 *N.J. Super.* 6, 23-24 (App. Div. 1997), *certif. denied*, 153 *N.J.* 50 (1998), the court did not merge kidnaping and carjacking because the legislature made clear that these two crimes were to be punished separately. In *State v. Travers*, 229 *N.J. Super.* 144, 151 (App. Div. 1988), the court did not merge death by auto and operating a vehicle while intoxicated since the statutes governing the aforesaid violations protected different interests. Similarly, in *State v. Taccetta*, 301 *N.J. Super.* at 257-58, the court declined to merge defendant's racketeering conspiracy conviction with his two extortion convictions, in part, because the legislative intent behind the RICO statutes, which governed these offenses, was to punish separately and by consecutive sentence a RICO conspiracy and a predicate offense.

Finally, the court will also not merge crimes that are temporally distinct or involve different victims. In State v. Scher, 278 N.J. Super. 249, 274 (App. Div.), certif. denied, 140 N.J. 276 (1994), the court did not merge three assault by auto convictions because they involved different victims. In State v. Ball, 268 N.J. Super. 72, 149 (App. Div. 1993), aff'd 141 N.J. 142 (1994), cert. denied, Mocco v. New Jersey, 516 U.S. 1075 (1996), the court refused to merge defendant's racketeering and bribery convictions because the offenses were committed at different times and places, different proofs were required to sustain each, and the offenses resulted in different and distinct injuries. Likewise, in State v. Jordan, 235 N.J. Super. 517, 519-22 (App. Div.), certif. denied, 118 N.J. 224 (1989), the court held that the simultaneous possession of different types of drugs were severable offenses. And, in State v. Craig, 237 N.J. Super. 407, 416 (App. Div. 1989), certif. denied, 121 N.J. 662 (1990), the court held that a defendant whose firebombing of a building resulted in harm to multiple victims should be exposed to multiple sentences. See also State v. Williams, 229 N.J. Super. 179, 183-84 (App. Div. 1988) (refusing to merge conviction for possession of cocaine with possession with intent to distribute where the two offenses occurred under disparate circumstances and involved the trafficking of drugs to different people); *State* v. Lewis, 223 N.J. Super. at 152 (court did not merge aggravated manslaughter and aggravated assault convictions because they involved different victims).

IX. MERGER OF CHILD SEXUAL ABUSE AND CHILD ENDANGERMENT CONVICTIONS

A seminal case in the area of child sexual abuse, *State v. Miller*, 108 *N.J.* 112, 118-19 (1987), established the now long-standing rule that child endangerment under *N.J.S.A.* 2C:24-4a and child sexual assault under *N.J.S.A.* 2C:14-2a(1) do not merge. The Court reasoned that although such crimes could be encompassed in a single episode, the relevant statutes protect different societal interests. That is, the aggravated sexual assault statute shields children under a certain age from sexual assault, while the endangerment statute protects children from assault by those with a legal duty of care for them. In *Miller*, defendant was the victim's father, which factor thus precluded the merger of his aggravated assault and child endangerment convictions. *Accord State v. Hackett*, 323 *N.J. Super.* 460, 481-82 (reaffirming this

holding). On the other hand, in *State v. Still*, 255 *N.J. Super*. 225, 259-60 (App. Div. 1992), the court merged defendant's conviction for sexual assault with fourth-degree endangering the welfare of a child because he was not the parent and had not undertaken any form of a legal duty of care toward the child. *See also State v. Hackett, supra*, 323 *N.J. Super.* at 482 (merging conviction for lewdness with endangering the welfare of a child).

X. MERGER AND POSSESSION OF CON-TROLLED DANGEROUS SUBSTANCES

Another seminal case in the evolution of the merger doctrine was State v. Dillihay, supra, which resolved the application of the anti-merger provision in N.J.S.A. 2C:35-7 regarding distribution of drugs and distribution of drugs in a school zone. Applying a double jeopardy analysis, the Court examined the punitive objective of the anti-merger provision and concluded that the non-merger statute did not evidence a clear legislative intent to mandate multiple punishments for convictions relating to these offenses and that these offenses were "the same" insofar as the elements of distribution were necessary to establish the elements of distributing within a school zone. State v. Dillihay 127 N.J. at 50-51. Accordingly, the Court permitted the merger of these offenses provided that the sentence of a defendant convicted of a drug offense include the mandatory minimum sentence provided in the school-zone statute. Id. at 56; see also State v. Brana, 127 N.J. 64, 68 (1992); State v. Blow, 123 N.J. 472 (1991); State v. Soto, 241 N.J. Super. 476, 478 (App. Div.), aff'd, 126 N.J. 310 (1991).

XI. MERGER AND FAILURE TO PAY TAXES

In 1987, the Legislature amended subsection N.J.S.A. 2C:1-8a(4) of the merger statute to remove State tax offenses from the restrictions of the rule, which amendment was addressed in State v. Manthey, supra. In that case, the court cited to the relevant subsection, which provides that merger is required where "the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct," but which continues that "no State tax offense . . . shall be construed to preclude a prosecution for any offense defined in this State v. Manthey, 295 N.J. Super. at 32. code." Recognizing that this section of the statute could be regarded as an anti-merger provision, the court nonetheless ruled that defendant's conviction for failure to pay taxes should have merged with his conviction for misapplication of entrusted property since there was only one course of conduct involved in both of these offenses, albeit that the tax offense requires an additional element. *Id.* at 32-33.

MISCONDUCT IN OFFICE

(See also, BRIBERY and CORRUPT INFLUENCES, this Digest)

I. OFFICIAL MISCONDUCT (N.J.S.A. 2C:30-2)

A. Elements

A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:

a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or

b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office. (*N.J.S.A.* 2C:30-2.)

B. Definitions -- Public Servant, Benefit

The terms "public servant" and "benefit" are defined in *N.J.S.A.* 2C:27-1. The Code defines "public servant" as an officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function excluding witnesses. *N.J.S.A.* 2C:27-1g. The term "benefit" is defined as gain or advantage, including a pecuniary benefit or a benefit to any other person or entity in whose welfare he is interested. *N.J.S.A.* 2C:27-1a.

In *State v. Bullock*, 136 *N.J.* 149, 154-55 (1994), the Supreme Court of New Jersey concluded that a state trooper who engaged in misconduct while suspending from active duty nonetheless remained a public servant subject to prosecution for official misconduct. The Court reasoned that suspension is merely a temporary condition and that suspended police officers remain subject to department rules during their period of suspension.

The question may arise whether a person who has been elected to an office, but who has not yet taken his oath of office, is a "public servant" for the purposes of this section. In *State v. Penta*, 127 *N.J. Super.* 201 (Law Div. 1974), *certif. denied*, 68 *N.J.* 166 (1975), the court held that a councilman who has been elected to office, but who has not yet assumed his official position, is not an "officer" within the intention of pre-Code statutes proscribing bribery and misconduct in office; hence, he may not be charged with these offenses. With respect to the Code crime of bribery, *Penta*, however, has been overruled by the third paragraph of the bribery statute, *N.J.S.A.* 2C:27-2, which provides that "[i]t is no defense to prosecution under this section that a person whom the actor sought to influence was not yet qualified to act in the desired way ... because he had not yet assumed office ..."

In *State v. Rockholt*, 186 *N.J. Super*. 539, 547-48 (App. Div. 1982), *aff^{*}d*, 96 *N.J.* 570 (1984), the defendant argued that *Penta* was still good law and that, on its authority, his conviction for official misconduct should be reversed. However, the Appellate Division concluded that *Penta* was inapplicable, since the defendant, who was allegedly unable to function as a "public servant" by reason of drug addiction and alcoholism, nevertheless had been sworn into office prior to his misconduct and remained continuously in office until he resigned after the offenses were committed.

The question also occasionally arises whether a government contractor is a "public servant." In State v. Williams, 189 N.J. Super. 61 (App. Div.), certif. denied, 94 N.J. 543 (1983), the Appellate Division held that the defendant, who was the operative head of an independent social service agency which received government funding for some of the projects in which it was involved, was not a "public officer" within the meaning of the pre-Code common law crime which proscribed misconduct in office by a "public officer." In a footnote the court noted that the contemporary statute, N.J.S.A. 2C:30-2, proscribing misconduct by a "public servant," was of no assistance to their determination, which involved a pre-Code crime. Id. at 66 n.2. Because N.J.S.A. 2C:30-2 adopts the definition of "public servant" set forth in N.J.S.A. 2C:27-1g, it apparently follows that State v. Williams is not relevant to construing this definition.

Note that in *State v. Vickery*, 275 *N.J. Super*. 648, 650-55 (Law Div. 1994), the trial court rejected defendant's assertion that based on his status as a member of the Society for the Prevention of Cruelty to Animals (S.P.C.A.) he was not a "public servant" within the meaning of *N.J.S.A.* 2C:27-1g and thus immune from prosecution for official misconduct. The trial court based its conclusion on various numerous statutory provisions which confer upon S.P.C.A. members authority similar to that exercised by police and law enforcement personnel, and which are not enjoyed by ordinary citizens.

C. Mens Rea

One of the purposes of this section is to clarify and simplify the considerable pre-Code confusion as to the requisite mens rea necessary for a conviction of the pre-Code crime of misconduct in office. See, e.g., State v. Weleck, 10 N.J. 355, 365-366 (1952) (mere unlawful behavior in relation to official duties suffices to establish the crime); State v. Winne, 12 N.J. 152, 175-177 (1953) (State must prove wilfullness or bad faith for nonfeasance and corruption for malfeasance); State v. Williamson, 31 N.J. 16, 22 (Weintraub, C.J., concurring) (1959); State v. Begyn, 34 N.J. 35, 50 (1961) (evil motive or bad faith); State v. Schultz, 71 N.J. 590, 601-602 (1976) (indictment should preferably assert that the public officer acted with evil motive or in bad faith and not honestly); Makwinski v. State, 76 N.J. 87, 92 (1978) ("[c]orrupt motive or intent (mens rea) is not an essential element of the offense"); State v. Tirelli, 208 N.J. Super. 628 (App. Div. 1986).

Under the Code, the State must prove two *mens rea*. First, in all cases, the State must prove that the public servant acted "with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit." *N.J.S.A.* 2C:30-2; *II Final Report of the New Jersey Criminal Law Revision Commission*, "Commentary" (1971) at 291.

The second element of *mens rea* depends upon whether the State is proceeding under subsection (a) or subsection (b). Of course, the question as to which subsection applies hinges upon the substantive facts alleged in the indictment, and not upon the indictment's draftsmanship. State v. Wiliamson, 54 *N.J. Super.* at 182. If subsection (a) applies, then the State must prove that the defendant public officer knew that the act which he committed was unauthorized, or that he was committing the act in an unauthorized manner. Commentary, *supra* at 291.

In *State v. Grimes*, 235 *N.J. Super.* 75 (App. Div. 1989), the Appellate Division recognized that official misconduct is one of the very few crimes where ignorance of the law can be interposed as a viable defense because a public servant may be found guilty of official misconduct under *N.J.S.A.* 2C:30-2a only if he knows his act, relating to his office, is unauthorized or committed in an unauthorized manner.

If subsection (b) applies, then the State must prove that the defendant public servant "knowingly" refrained from performing a duty. "[T]he public servant must know of the existence of such non-discretionary duty to act. Thus, such duty must be either one that is imposed by law, or one that is unmistakably inherent in the nature of the public servant's office, i.e., the duty to act is so clear that the public servant is on notice as to the standards that he must meet." Commentary, *supra* at 291.

D. Duties Imposed By Law The Breach Of Which May Give Rise To Misconduct Charges

1. Duties "Imposed by Law"

State v. Duble, 172 N.J. Super. 72 (App. Div. 1979). A duty "which is imposed by law" must concern duties created by statute or found in the common law. Duties arising from administrative regulations do not suffice for the purpose of the crime. In *Duble*, the defendant police officer was convicted of neglect of official duty for having failed to submit a written report of his investigation as soon as practicable to his commanding officer, as required by departmental regulation. The Appellate Division reversed the conviction, noting that the regulation was purely administrative in character, affecting only the internal operation of the department and the conduct of its members. The court held that department heads and municipal governing bodies cannot create broad classes of indictable offenses chargeable against public officers merely by administrative regulations covering the most commonplace and inoffensive forms of conduct and agency procedure. Compare State v. Falco, 60 N.J. 570 (1972) (sustaining a police officer's misconduct conviction premised upon his total failure to have filed any report); State v. Maiaoranna, 225 N.J. Super. 365 (Law Div. 1988) (distinguishing Duble in denying motion to dismiss and finding that N.J.S.A. 2C:30-2b criminalizes a public servant's refusal to perform a duty which "is clearly inherent in the nature of his office"), aff'd 240 N.J. Super. 352 (App. Div. 1990); certif. denied, 127 N.J. 327 (1992); see also Bayonne Municipal Investigating Committee v. Servello, 200 N.J. Super. 413, 418 (Law Div. 1984) (police officer may be guilty of official misconduct if he fails to inform his superiors of surveillances which he undertakes).

2. Use of Public Property for Private Purposes or for Obtaining an Unauthorized Private Gain

A public servant is obligated to utilize public property only for public purposes, and he may be liable for misconduct in office if he utilizes public property or public facilities in an unauthorized manner to benefit himself or some private cause or individual. *Makwinski v. State*, 76 *N.J.* 87 (1986); *State v. Makwinski*, 133 *N.J.* *Super.* 487 (Law Div. 1975); *State v. Gleitsmann*, 54 *N.J. Super.* 355 (App. Div. 1959), *appeal after remand*, 62 *N.J. Super.* 15 (App. Div. 1960).

An official has the duty to perform the tasks assigned to him uninfluenced by adverse motives engendered by requesting or accepting any gift, gratuity, or promise under an agreement to abstain from performing the functions of his position, or to carry them out in a manner contrary to the public interest. For this reason, an official may be guilty of misconduct if he solicits or accepts such gift, gratuity, or promise, even if he subsequently refuses to carry out the terms of the agreement. *State v. Begyn*, 34 *N.J.* 35, 51 (1961).

In *State v. Peterson*, 189 *N.J. Super.* 261 (App. Div. 1981), *certif. denied*, 89 *N.J.* 413 (1982), defendant, who was the secretary of the Newark Alcoholic Beverage Control Board, informed an applicant for a transfer of his liquor license that the application would be approved if the applicant delivered three cases of vodka. When the applicant agreed, the defendant sent a Board investigator to pick up the vodka. The court held that these facts, if believed by the jury, sufficed to sustain a conviction for official misconduct.

3. Conflicts of Interest

A public official acts corruptly and is guilty of misconduct in office when he has an undisclosed interest in a venture which comes before the body of which he is a member, and he acts in favor of that interest through the office which he holds.

State v. Schenkolweski, 301 *N.J. Super.* 115 (App. Div. 1997); *State v. Furey*, 128 *N.J. Super.* 12, 21 (App. Div. 1974), *certif. denied*, 65 *N.J.* 578 (1974).

An official disqualified to vote on any measure, for any reason, has a duty to observe the substance as well as the form of his abstention. It is insufficient for him to decline to vote while, at the same time, he works to influence what that vote will be. *State v. Schenkolewski*, 301 *N.J. Super*. at 143 (holding that the State had established the elements of official misconduct by demonstrating that the defendant served in an official capacity on the Zoning Board and was a liaison to the Planning Board. While serving in those capacities he could be found to have accepted for himself or another \$500,000 from a partnership seeking government approvals from both bodies); *Darell v. Governing Body of Township of Clark*, 169 *N.J. Super*. 127, 132 (App. Div. 1979), *aff^{*}d o.b.*, 82 *N.J.* 427 (1980).

4. Police Officers

A police officer has the duty to use all reasonable means to enforce laws applicable in his jurisdiction, and to apprehend violators. He also has a duty to abstain from soliciting others to commit crimes. A police officer must not himself violate laws he is sworn to enforce applicable in his jurisdiction. *State v. Cohen*, 32 *N.J.* 1 (1960).

A police officer is not invested with discretion to decide whether the law should be enforced. He is obliged to take such lawful action as in his discretion and in the exercise of good faith and reasonable diligence is necessary to bring criminals to justice. A police officer's discretion is limited to the determination of the steps to be taken to that end. A police officer may not offer immunity to a witness. To do so may constitute misconduct in office. *State v. Secula*, 153 *N.J. Super.* 234 (Law Div. 1978).

In making an arrest, a police officer is permitted to use only such force as may be reasonably necessary to effectuate the arrest. A police officer's use of excessive force in making an arrest will subject him to criminal liability not only for assault, but also for the crime of official misconduct. *State v. Lore*, 197 *N.J. Super.* 277 (App. Div. 1984).

A police officer commits official misconduct if, with purpose to obtain a benefit or to injure another, he conducts unauthorized surveillances, or fails to inform his superiors of his surveillances and fails to turn over to his superiors the photographs, tape recordings and other materials which he compiles from these surveillances. *Bayonne Municipal Investigating Committee v. Servello*, 200 *N.J. Super.* 413, 417-18 (Law Div. 1984).

A police officer is not authorized to conduct a search in a manner proscribed by the Fourth Amendment to the United States Constitution or by Art. I, ¶ 7 of the New Jersey Constitution. In particular, a police officer who, without probable cause, conducts a strip search of a nonmisdemeanor traffic violator acts contrary to this proscription and may therefore be prosecuted for misconduct in office. *State v. Stevens*, 203 *N.J. Super.* 59 (Law Div. 1984), *aff'd*, 222 *N.J. Super.* 602 (App. Div. 1984), *aff'd*, 115 *N.J.* 289 (1989); *see also N.J.S.A.* 2A:161A-1 *et seq.* (regulating the process for conducting strip searches but declaring that only administrative sanctions, and not criminal sanctions, shall be imposed upon persons who violate these statutory provisions).

5. Prosecutors

The duties of a prosecutor require that he investigate each matter with care; that he examine the available evidence, the law and the facts applicable to each other; that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate. His discretion as to whether to prosecute must be exercised in good faith and in accordance with established principles of law, fairly, wisely, and with skill and reason. If the prosecutor wilfully refuses to act, without just cause or excuse, then he is guilty of a breach of his duty rendering him liable to indictment. *State v. Winne*, 12 *N.J.* 152 (1953).

6. Sheriffs, Undersheriffs and Constables

In *State v. Grimes*, 235 *N.J. Super.* 75 (App. Div. 1989), the Appellate Division reversed defendant's official misconduct conviction, finding that the law of constables' duties in tenant removals is so undefined and uncertain that the law does not give a person of ordinary intelligence fair warning what conduct is proscribed.

State v. Silverstein, 76 *N.J. Super.* 536 (App. Div. 1962), *aff'd*, 41 *N.J.* 203 (1963). An undersheriff, like the sheriff, stands in a fiduciary relationship to serve the public with the obligation to exercise his discretion in good faith, with honesty and integrity, and to the best of his ability. The indictment in this case, which charged the undersheriff with misconduct in office, was sufficient because it alleged that the undersheriff failed in this obligation by knowingly accepting false affidavits of justification of bail bond sureties, and by knowingly accepting unsworn affidavits.

7. Councilman -- fixing a traffic ticket

State v. Gora, 148 N.J. Super. 582 (App. Div. 1977), certif. denied, 74 N.J. 275 (1977).

The proofs at trial demonstrated that defendant, a former president and member of a city council, accepted money for the purpose of fixing a traffic ticket. The Appellate Division held that this was sufficient to show that defendant committed an "act or omission in breach of a duty of public concern" and thus rendered defendant liable for conviction for the pre-Code crime of misconduct in office.

8. Members of State Boards

State v. Seaman, 114 N.J. Super. 19 (App. Div. 1971), certif. denied, 58 N.J. 594 (1971), cert. denied, 404 U.S. 1015 (1972). Defendant was the secretary of the State Board of Certified Public Accountants. He had the exclusive jurisdiction and discretion for reviewing and regrading the examination papers of candidates who failed to pass the examination to become a certified public accountant. He accepted money from unsuccessful candidates as an inducement to regrade examination papers. The Appellate Division held that this conduct constituted the crime of misconduct in office.

9. Pension Commissioners

State v. Deegan, 126 N.J. Super. 475 (App. Div. 1974), certif. denied, 65 N.J. 283 (1974). By statute and judicial interpretation, pension commissioners appointed to administer a county's pension laws are duty-bound to (a) determine whether an employee is qualified to receive a pension because of a physical disability; (b) determine whether an alleged disability is work-connected; and (c) prohibit the improper reinstatement of previously withdrawn pension employees. Thus, failure to perform these legal duties may subject the offender to the charge of misconduct in office.

10. Teachers

State v. Parker, 124 N.J. 628 (1991), cert. denied, 503 U.S. 939 (1992), concluded that the defendant, a teacher, could be convicted of official misconduct for exhibiting sexually explicit magazines to her students, and having the students makes collages from photographs cut out of those magazines despite her acquittal on the underlying offenses of sexual assault and child endangerment. In so holding, the Court reaffirmed that charges of official misconduct may be sustained without proof of a criminal act and that sexual gratification is a benefit withing the meaning of the official misconduct statute.

E. Acts "Relating To A Public Servant's Office"

Under subsection (a) of *N.J.S.A.* 2C:30-2, the State must prove that the public servant's act both "related to his office" and also constituted an "unauthorized exercise of his official functions." Thus, the mere fact that the defendant's act falls within the second prong -- *i.e.*, the mere fact that the defendant public servant did something which he was not authorized to do -- obviously does not foreclose the prosecutor from

establishing the first prong -- *i.e.*, from establishing that the defendant's unauthorized act nevertheless "related to his office." *See State v. Schultz*, 71 *N.J.* 590, 602 (1976). "[S]o long as the alleged misconduct is at all related to his official duties, express or inherent," criminal liability will attach. *State v. Begyn*, 34 *N.J.* 35, 43 (1961). For example, "when a public officer undertakes or assumes to perform certain public duties by virtue of his office and as if incident to his office, and he wilfully engages in unlawful behavior which violates the duties undertaken or assumed, he will not be heard to say that such duties were not required by, or incidental to, his office, but were assigned by law to some other public office not held by him." *State v. Silverstein*, 41 *N.J.* 203, 208 (1963).

Conversely, however, the fact that the public servant committed an unauthorized act does not, by itself, establish that that act related to his office. State v. Hinds, 143 N.J. 540, 549 (1996); State v. Schultz, 71 N.J. at 601-602. For example, a police officer has a duty not to commit crime. State v. Cohen, 32 N.J. 1 (1960). Nevertheless, criminal conduct by a police officer does not, by itself, render the officer guilty of official misconduct unless the criminal conduct also relates to his duties as a police officer. State v. Schultz, supra; Kauffman v. Glassboro, 181 N.J. Super. 273, 277-78 (App. Div. 1981), certif. denied, 91 N.J. 523 (1982). In Kauffman, the defendant police officer was indicted both for burglary and for official misconduct premised upon his alleged commission of the burglary. The court held that a police officer's commission of burglary, without more, does not constitute the crime of official misconduct because it does not necessarily relate to his office.

However, in State v. Hinds, 143 N.J. at 547-49, defendant, a private security manager, was convicted of official misconduct as an accomplice after having conspired with an off-duty police officer to engage in shoplifting. He alleged that a police officer who commits a crime unrelated to his office and while off duty does no more than commit the underlying crime. The Supreme Court of New Jersey disagreed, reasoning that because the jury convicted defendant of theft by receiving stolen property, it must have found him to be thief. Thus, the codefendant had a duty to report defendant's crimes. His failure to do so conferred a benefit to defendant and also obtained a benefit for himself, thereby subjecting him to criminal liability for official misconduct. See also State v. Bullock, 136 N.J. 149 (1994) (by identifying himself as member of the "New Jersey Task Force" and showing his State Police identification card during alleged acts of misconduct, defendant's conduct was sufficiently related to his office as state policeman); State v. Johnson, 127 N.J.

458 (1992) (off-duty state trooper could be found to have committed official misconduct when he donned his uniform and feigned an arrest); *State v. Bielecki*, 196 *N.J. Super*. 332 (App. Div. 1984), *certif. denied*, 99 *N.J.* 216 (1984) (defendant's false swearing before the grand jury related to his office as chief of police, because the grand jury was investigating allegations that members of the police department were misappropriating property donated to the municipality); *see also State v. Savoie*, 67 *N.J.* 439, 450 (1975); *State v. Gora*, 148 *N.J. Super*. 582, 594-95 (App. Div. 1977), *certif. denied*, 74 *N.J.* 275 (1977); *Meyerson v. Bayonne*, 185 *N.J. Super*. 437 (App. Div. 1982); *Querques v. Jersey City*, 198 *N.J. Super*. 566, 569 (App. Div. 1985).

F. Relationship With Bribery

Bribery and official misconduct are related offenses in that a public servant, by one act, often commits both crimes. Nevertheless, bribery is not an element of official misconduct, and where bribery and misconduct charges are based on the same factual allegations, the jury's decision to acquit on the former, but to convict on the latter, does not necessarily mean that its verdict is inconsistent. *State v. Peterson*, 181 *N.J. Super.* 261 (App. Div. 1981), *certif. denied*, 89 *N.J.* 413 (1982).

G. Evidential Issues

The evidence of guilt may be circumstantial. In *State v. Witte*, 13 *N.J.* 598 (1953), *cert. denied*, 347 *U.S.* 951 (1954), the defendant, a chief of police, was convicted of misconduct in office premised upon his alleged wilful failure to detect, apprehend, arrest, and strive for the conviction of persons who were violating the gambling laws. The State's case-in-chief included evidence of uninterrupted widespread gambling in the municipality where defendant served as chief of police during the period covered by the indictment. The Court concluded, "[t]hat this condition could have existed so long without the knowledge of the chief of police would seem to be incredible." *Id.* at 615. It sustained the sufficiency of the State's proofs.

Multiple charges of bribery and official misconduct may properly be joined for one trial if there is a common conspiratorial relationship or common evidential strings. In *State v. Coruzzi*, 189 *N.J. Super.* 273, 300-01 (App. Div.), *certif. denied*, 94 *N.J.* 531 (1983), the Appellate Division held that the trial court did not err by failing to sever charges of bribery and official misconduct which arose from three criminal transactions because there was a common conspiratorial relationship, and also because the multiple acts of misconduct were important to the case in terms of explaining the defendant's nonchalance in accepting one of the cash payments.

H. Accomplice Liability

It is now firmly settled that a private person may be an accomplice to official misconduct. *State v. Hinds*, 143 *N.J.* 540, 550 (1996); *State v. Schenkolewski*, 301 *N.J. Super*. 115, 143 (App. Div. 1997); *State v. Bryant*, 257 *N.J. Super*. 63, 66-67 (App. Div. 1992).

- I. ARREST (See also, ARREST, this Digest)
- A. Automobile Stops
 - 1. Generally

State v. Kadelak, 280 *N.J. Super.* 349 (App. Div.), *certif. denied* 141 *N.J.* 98 (1995), ruled that the use of Mobile Inspection Teams (MITs) by the Division of Motor Vehicles to conduct random roadside inspections pursuant to *N.J.S.A.* 39:8-2 is constitutionally permissible.

In *State v. Seymour*, 289 *N.J. Super.* 80 (App. Div. 1996), the Appellate Division held that under the eluding provision of the Code, like the resisting arrest provision, a driver must stop his vehicle even if the trooper's reason for signalling is legal or illegal. Failure to stop provided probable cause for arrest. The court declined to find that operating the vehicle at 40 mph provided grounds for the stop under the community care taking doctrine.

State v. Allan, 283 *N.J. Super.* 622 (Law Div. 1995), determined that while flight alone is not sufficient to create a reasonable suspicion, where there had been a lawful stop for a motor vehicle violation coupled with a suspicion of intoxication, flight by the defendant was not permitted.

2. Community Care Taking

In State v. Martinez, 260 N.J. Super. 75 (App. Div. 1992), the driver was observed driving his vehicle at a "snails pace," although otherwise presenting no occasion for inquiry. The stop of the vehicle, based upon the observations of the officer was not arbitrary, random and wholly without justification in the individual The function exercised by the police circumstance. officer was one of community care taking. But see, State v. Seymour, 289 N.J. Super. 80, 88 (App. Div. 1996), declining to find that slow operation in the right lane was sufficient for stop based on community care taking function; State v. Costa, 327 N.J. Super. 22 (App. Div. 1999), finding police officer's conduct went beyond acceptable community care taking, and was investigative stop, but officer lacked reasonable suspicion to justify the investigative stop of defendant in his parked vehicle.

In *State v. Washington*, 296 *N.J. Super.* 569 (App. Div. 1997), defendant was observed weaving within his lane of travel while driving at a speed of 36 miles per hour in the 45 mile per hour zone and crossing over the travel portion onto the shoulder portion of the roadway about a "tire's width." The stop of the vehicle, based upon the observations of the officer was not arbitrary, random and wholly without justification in the individual circumstance but was reasonable under the community care taking function.

State v. Cryan, 320 N.J. Super. 325 (App. Div. 1999), reversed denial of defendant's suppression motion and his DWI conviction, holding that the police could not justify stopping defendant's vehicle under the community caretaking function simply because he waited a few seconds to proceed after a stop light turned Furthermore, no reasonable and articulable green. suspicion existed to stop defendant. The officer admitted that he stopped defendant's car on orders to pull over every moving vehicle on his shift, and the prosecutor at the suppression motion never argued that reasonable and articulable suspicion justified the stop. Nevertheless, the court affirmed that abnormal operation of a vehicle clearly falls within the community care taking function, as a reasonably objective basis to stop the vehicle.

In *State v. Garbin*, 325 *N.J. Super.* 521 (App. Div. 1999), *certif. denied* 164 *N.J.* 560 (2000), under the community care taking standard, police were justified in entering the defendant's garage in response to a possible fire. The defendant was found in his truck in the garage with the drive wheels spinning and causing the tires to burn.

3. Legality of a Stop

In *State v. Locurto*, 157 *N.J.* 463 (1999), reinstating the conviction, the Supreme Court explained that the Appellate Division had improperly required the trial judge to articulate the basis for findings concerning the credibility of the witnesses engaged in an independent assessment of the evidence as if it were the trial court. The Appellate Division had conducted a *de novo* review of the record using detailed mathematical calculations and concluded that the State did not carry its burden of proving that there was a reasonable basis for the stopping of defendant's vehicle. Municipal court judges are not required to articulate detailed, subjective analyses of factors such as demeanor and appearance to support credibility determinations on each and every witness presented before them. In *State v. Oliveri*, 336 *N.J. Super.* 244, (App. Div. 2001), held that the police officer had reasonable and articulable suspicion to stop defendant's vehicle, after observing the vehicle, a replica of a 1966 Cobra AC, heavily accelerate from a traffic light with smoke emanating from the tires.

In *State v. Chapman*, 332 *N.J. Super.* 452 (App. Div. 2000), a trooper stopped defendant's vehicle after observing it weaving between lanes and fluctuating in speeds. The trooper believed the driver was either intoxicated or fatigued. The ensuing investigation was recorded by a "Video Incident Capture System." The occupants gave inconsistent statements about their trip, and the driver admitted that his license was suspended. Defendant consented to a search. The Appellate Division concluded that the detention was not a defacto arrest, and the consent to search was valid.

4. Mobile Data Terminals

State v. Donis, 157 N.J. 44 (1998), ruled that the use of mobile data terminals (MDTs) by police in patrol cars was a search or a seizure under the State Constitution and the police officer did not have to wait for a motorist to commit a motor vehicle infraction in order to use the MDT to process an inquiry based only on the registration of the vehicle. Random registration checks using the MDT was valid, but the Court requested that the Division of Motor Vehicles (DMV), as the originator of the data obtained using the MDT, reprogram their database to a two-step process in order to balance the interest of the State in highway safety against the motorist's expectations of privacy. In order for a police officer to advance to the second level of inquiry, using the MDT, the officer would have to have ascertained, at the first level, that the status of the registration was questionable, the vehicle was reported as stolen or the license status of the driver may be in question. The court also found that information provided by an MDT that defendant's license was suspended was sufficient to justify the stop.

State v. Parks, 288 *N.J. Super.* 407 (App. Div. 1996), affirmed defendant's motor vehicle convictions, holding that when the police learn from a computer check that a car owner's license is suspended, and the car's driver generally matches the owner's description, they have a reasonable, particularized suspicion supporting an investigatory stop of the vehicle. The Appellate Division rejected the State's claim that once an officer learns from a computer check that the vehicle's owner lacks a valid

license, he or she is authorized to stop the automobile and check any person driving it to verify their identity.

On appeal from a conditional guilty plea to driving with a suspended license, the Appellate Division in *State v. Lewis*, 288 *N.J. Super.* 160 (App. Div. 1996), affirmed defendant's sentence and the denial of his suppression motion. The court held that a random computer check of a motor vehicle's license plate does not violate a driver's Fourth Amendment right to privacy. License plates are exposed to the public, and visual inspection of them and a subsequent computer check intrude upon no legitimate privacy interest since drivers have no such interest in information the DMV possesses concerning registration status and the owner's driving record.

The New Jersey Supreme Court in *State v. Williamson*, 138 *N.J.* 302 (1994), ruled that *N.J.S.A.* 39:4-126 does not require proof that a defendant's failure to signal a lane change actually affected other traffic. A police officer is justified in stopping a motor vehicle pursuant to this statute if he or she has reasonable and articulable suspicion that the failure to signal may have affected other traffic.

II. AUTOMOBILE SEARCHES (See also, SEARCH & SEIZURE, this Digest)

III. COMPULSORY INSURANCE

State v. David, 287 N.J. Super. 434 (App. Div. 1996), reversing the denial of defendant's motion to suppress sobriety test results and for driving an unregistered vehicle, held that production of the insurance certificate which indicates coverage at the time when defendant is alleged to have no coverage is sufficient to prevent the State from proving that defendant knew or should have known that the vehicle she was operating was not covered by insurance. Even though she did not own the vehicle, the appellate court found that this did not preclude conviction, because ownership is not a required element of driving an unregistered motor vehicle. The court found, however, that based upon her production of a formally valid registration at the time of trial, the State failed to sustain its burden on this count as well.

IV. DOUBLE JEOPARDY (See also, DOUBLE JEOPARDY, this Digest)

State v. DeLuca, 108 *N.J.* 98 (1987), *cert. denied* 484 *U.S.* 944, 108 *S.Ct.* 331, 98 *L.Ed.*2d 358 (1987), held that drunk driving and death by auto are not the same

offense for purposes of double jeopardy analysis, and a conviction for one does not necessarily bar a subsequent conviction for the other. However, if in the death by auto prosecution, the State relies solely on intoxication as evidence of recklessness, double jeopardy would bar a subsequent prosecution for driving while intoxicated. Thus, the Supreme Court directed that in cases where drunk driving and death by auto arise out of the same incident, the appropriate procedure is to have both charges proceed simultaneously before the same Superior Court judge. The judge will preside as a Superior Court judge over the trial of the death by auto charge, and as a municipal court juSdge with respect to the drunk driving case.

State v. Snellbaker, 272 N.J. Super. 29 (App. Div. 1994), concluded that the trial court should not render its findings on non-indictable charges when the jury hangs on related indictable charges pending the completion of the "continuing jeopardy." Because of defendant's legitimate concern that the judge may hear additional evidence at the second trial of the indictable which will result in defendant's conviction of the nonindictable on the basis of evidence not presented at the first trial, defendant shall be given the option after the hung jury is "discharged" of (1) having the judge enter a mistrial of the non-indictable complaints with defendant's consent and retry them with the indictables, or (2) reserve decision on the non-indictables until disposition of the indictables (to be tried before another judge if defendant elects) and to render his findings after the jury ultimately renders its verdict or the indictable proceedings are otherwise culminated.

State v. Cuneo, 275 N.J. Super. 12 (App. Div. 1994), held that where a defendant charged with DWI and other motor vehicle offenses submits to a trial in municipal court on the sole issue of operation of the motor vehicle, an adjudication of nonoperation is tantamount to a judgment of acquittal and the State is prevented by the doctrine of double jeopardy from appealing the determination and retrying the defendant. While the State attempted to characterize the municipal proceeding as a probable cause hearing, the Appellate Division stated that it is the substance of the hearing and not the label which controls. Since the purpose of the hearing was to determine if the defendant drove the vehicle, the proceeding concerned an element of the offense which the State failed to establish. Therefore, jeopardy attached and the defendant cannot be retried for any of the offenses charged in which operation of the vehicle is an element.

In *State v. Mara*, 253 *N.J. Super.* 204 (App. Div. 1992), intoxication was the sole basis for the DWI, but not for the charge of aggravated assault. The aggravated assault charge arose from a hit and run accident and did not merge into the DWI charge, but defendant's recklessness could not be considered as an aggravating factor to the aggravated assault charge because it was an element.

V. DRUGS (*See also*, CONTROLLED DANGER-OUS SUBSTANCES, this Digest)

State v. Tamburro, 68 N.J. 414 (1975), held that to support a conviction under N.J.S.A. 39:4-50, for operating a motor vehicle under the influence of narcotic drugs, it is sufficient if, from a person's conduct, physical and mental condition and symptoms displayed, a qualified expert can determine that the person was "under the influence" of a narcotic, including a drug that produces a narcotic effect, without the necessity of that particular drug being identified. Thus, defendant who participated in a methadone maintenance program and admittedly had taken his daily dose, and who exhibited unmistakable symptoms of being under the influence of a narcotic to the extent that it materially affected his physical and mental faculties and made it unsafe for him to operate a motor vehicle on a highway, was guilty of violating N.J.S.A. 39:4-50. Accord, State v. Morris, 262 N.J. Super. 413, 420 (App. Div. 1993).

According to *State v. DiCarlo*, 67 *N.J.* 321 (1975), the controlled dangerous substance statute is not in para materia with the statute providing for the penalties for operating a vehicle while under the influence, and the definition of "narcotic drug" in the controlled dangerous substance statute is not of controlling weight in interpreting the same phrase appearing in Title 39. Testimony presented at trial was ample to establish that methaqualone, found in defendant's urine, is a narcotic drug under the DWI statute.

State v. Anderson, 210 *N.J. Super.* 669 (Law Div. 1986), held that inclusion of marijuana in *N.J.S.A.* 39:4-49, prohibiting operation of a motor vehicle with certain drugs in one's possession or in the motor vehicle, had a rational basis in that it served the regulatory purposes of dissuading the possession and use of drugs while operating motor vehicles.

A. Blood and Urine Tests (*See also,* **SEARCH AND SEIZURE**, this Digest)

State v. Lutz, 309 N.J. Super. 317 (App. Div. 1998), affirmed defendant's driving under the influence conviction and sentence, but reversed his careless driving conviction. The blood test procedure used to detect defendant's blood-alcohol content, an Ekta routine chemistry analyzer using an Ektachem liquid performance verifier, was sufficient to establish the reliability of defendant's test results. Since defendant consented to a blood test, probable cause to arrest was not an issue. Once the officer received those test results, probable cause existed to arrest defendant for driving under the influence. Additionally, defendant had caused a head-on collision when he crossed the center line. The summons charging defendant with "driving under influence" referenced the proper statute involved and adequately informed defendant of the offense charged. Also, defendant was not entitled to a jury trial as a third-time drunk driver, and the State had failed to prove beyond a reasonable doubt that he was guilty of careless driving.

In State v. Ravotto, 333 N.J. Super. 247 (App. Div. 2000), certif. granted 165 N.J. 677 (2000), the Appellate Division granted the State leave to appeal and reversed the Law Division's suppression of blood evidence taken from defendant, a drunk driver. The municipal court denied defendant's suppression motion, but the Law Division reversed. It held that, after defendant's arrest for driving under the influence, the warrantless withdrawal of his blood at the hospital where he had been transported in an ambulance and restrained after wrecking his car was illegal, since he had not consented and no exigent The Appellate Division circumstances had existed. agreed with the State that no search warrant was required. Motor vehicle drivers arrested for driving under the influence have no legal right to refuse blood testing, need not consent to blood withdrawal, and can be restrained if necessary to extract a blood sample. Here, the police could not use a Breathalyzer machine at police headquarters because defendant was being taken to the hospital for possible injuries caused in the wreck, and the hospital would be testing his blood anyway for its own purposes. Defendant did not want to be at the hospital, to be examined, or to have his blood extracted; in short, he was belligerent and uncooperative. Thus, he could be restrained while his blood was drawn. The Supreme Court has granted certification on the issue of the constitutionality of the warrantless forced extraction of the driver's blood by a nurse in the emergency room at police direction.

State v. Weller, 225 N.J. Super. 274 (Law Div. 1986), on remand to consider the matter in light of the holding in State v. Matulewicz, 101 N.J. 27, 31 (1985), to determine whether blood test results by the State Police lab chemist should be accepted as reliable, found that the laboratory reports containing positive readings of ethyl alcohol in the blood of defendants are admissible without accompanying testimony from the qualified forensic scientist who performed the tests. It relied on the expert testimony offered by the State Police Chief Forensic Scientist concerning the standards and procedures used in performing blood-alcohol analysis, and the technical manner in which test results were obtained and recorded. To be admitted, however, the State must supply the defendant, through discovery, with all of the gas chromatography results and data of all testing standards as well as the test on the defendant's blood sample, and the scientist's notes.

In State v. Oliveri, 336 N.J. Super. 244 (App. Div. 2001), defendant contended that the laboratory report cannot qualify as a business record. The Appellate Division held that admissibility is informed by an evidential record that addresses the relevancy and reliability factors discussed in Matulewicz, as codified in N.J.R.E. 808. In this case there was no viable challenge to the methodology used to draw the blood or the chain of custody. The test performed was a "Headspace Gas Chromatography," the same test as in Weller, and as part of pretrial discovery the defense was supplied with the charts, which would readily reveal any deviation outside the specified standard of error. The defense, however, did not attempt to show any such deviations on the charts. The lab certificate contained a notarized certification from the forensic scientist who performed the test, specifying his qualifications, and certifying that the report fairly and accurately documents the type and results of the analysis performed. In addition to vouching for the accuracy and reliability of the test, he also stated that the test was performed on a routine basis within the lab. N.J.R.E. 808 permits admission of such a business or public record when the report concerns an uncomplicated subject matter and the likelihood of accuracy is high. Traditionally, blood-alcohol analysis is viewed as such a simple and accurate procedure warranting admission of a report without additional testimony from the person who performed the test.

State v. Warmbrun, 277 N.J. Super. 51 (App. Div. 1994), certif. denied 140 N.J. 277 (1995), in affirming a

reckless manslaughter conviction, found that under *Schmerber v. State of California*, 384 *U.S.* 757, 86 *S.Ct.* 1826, 16 *L.Ed.*2d 908 (1966); *State v. Dyal*, 97 *N.J.* 229 (1984); and *State v. Macuk*, 57 *N.J.* 1 (1970), acquiescence by a defendant for the taking of a blood sample is not legally significant or necessary, provided the sample is taken in a medically acceptable manner at a medical facility in accordance with accepted medical practices.

State v. Bodtmann, 239 N.J. Super. 33 (App. Div. 1990), held the use of a subpoena *duces tecum* to obtain blood test results from a hospital is not a violation of the physician-patient privilege. The subpoena may issue on less that probable cause. *Bodtmann* was approved in *State v. Schreiber*, 122 N.J. 579, 588 (1991).

State v. Malik, 221 *N.J. Super.* 114 (App. Div. 1987), reversed a trial court's suppression of a test of a urine specimen taken from defendant to test for the presence of CDS. Given the exigent circumstances exception to the warrant requirement and as a search incident to an arrest, there was no constitutional violation of rights. The urine specimen was given voluntarily under supervision and no physical force was used or required; thus there was no imposition of the defendant's personal privacy or bodily integrity.

- B. Breathalyzer (Chemical Breath Testing)
 - 1. Bracketing of Breath Test With Inspections

State v. Sandstrom, 277 N.J. Super. 354 (App. Div. 1994), dealt with the admissibility of breath results when a pre-test inspection certificate as to proper working order was issued more than 30 days before the breath test in question was conducted, and the post-test inspection certificate disclosed a malfunction in the breath test instrument. State v. Samarel, 231 N.J. Super. 134 (App. Div. 1989), did not, and was not intending to establish a 30-day pre-test inspection limitation. Thus, the mere fact that the test was conducted more than 30 days after the last inspection did not invalidate the results. Further, the malfunction found in the postinspection test, could not have been in existence on the day that the test was administered to the defendant since the operator could not have completed the eleven step testing procedure if it was in effect.

State v. Slinger, 281 *N.J. Super.* 538 (App. Div. 1995), held that the State's failure to prove the number of times a simulator solution has been used and the actual readings obtained by the State Police Coordinator when

the Breathalyzer was tested impacts upon the admissibility of the Breathalyzer recordings, but that impact only affects the weight of the State's proofs. Defendant's erratic driving, physical appearance and demeanor, as well as the smell of alcohol on his breath, were sufficient indicia of intoxication for the officer to conclude that the defendant was drunk even without the Breathalyzer reading.

State v. Maure, 240 N.J. Super. 269 (App. Div. 1990), aff'd o.b. 123 N.J. 457 (1991), while noting the conclusions in Dohme II concerning additional random sample testing to increase the probability that all ampoules in the same batch are uniform, continued to adhere to the rule expressed in State v. Ernst, 230 N.J. Super. 238, 243 (App. Div. 1989), certif. denied 117 N.J. 40 (1990) and other prior decisions that foundational requirements are satisfied by admitting the State Police Coordinator's certifications indicating that random sample testing of ampoules from the same batch that was used in the defendants' Breathalyzer tests has been conducted both before and after those examinations. The Inspection Certifications, attesting to the testing of the instruments by the use of randomly selected ampoules would meet the foundational requirement of spot checking, such random sample testing being reasonably reliable and yielding appropriate results. And the court expressed a distinct disinclination to cast the burden on the State of offering further or additional proof of the accuracy and validity of the tests employed by the State Police in spot checking ampoules. Id. at 282-3. Accord, State v. Giordano, 281 N.J. Super. 150 (App. Div. 1995) (alcohol breath test results admissible without pretest certification of test machine if pretest certification made within month before test and there is no evidence machine gave inaccurate results).

In *State v. Samarel,* 231 *N.J. Super.* 134 (App. Div. 1989), the Appellate Division, citing *State v. Hudes,* 128 *N.J. Super.* 589 (Bergen Cty. Ct. 1974) and *State v. Lanahan,* 110 *N.J. Super.* 578 (Burlington Cty. Ct. 1970), determined that even if there is only one inspection certificate for the breath test instrument and there is evidence why there are no problems with the breath test administered to the defendant, and even if the bracketing inspection certificate is missing, the one inspection certificate is admissible to prove the breath test instrument was operating properly at the time of the breath test. The preferred practice is for the State to introduce both the pre-test and post-test inspection certificates. This case and *State v. Sandstrom,* 277 *N.J. Super.* 354 (App. Div. 1994), call into question the

holding in *State v. Hardy*, 211 *N.J. Super.* 630 (App. Div. 1986).

2. Standard Inspection Procedures for Breath Test Instruments

State v. John M. Garthe, 145 *N.J.* 1 (1996), ruled that absent evidence demonstrating that the standard inspection, testing and certification procedures established by the State Police is not scientifically reliable to establish that Breathalyzer instruments are in proper operating order, the State may, subject to *N.J.R.E.* 803(c)(6), 803(c)(8), 807 and 901, offer in evidence at DWI trials a copy of the Breath Test Inspector's Inspection Certificate. It recognized that Breath Test Instrument Inspection Certificates (*N.J.A.C.* 13:51-3.4) are prepared accurately, carefully, competently and have a strong and convincing indices of trustworthiness.

State v. Ernst, 230 N.J. Super. 238, 243-244 (App. Div. 1989), certif. denied 117 N.J. 40 (1990), rejected a defense claim of a failure to produce proof of random sampling of the breath test reagent ampoules. The instrument inspection certificate, signed by the Breath Test Coordinator, indicating that the Trooper had tested random samples of the breath test reagent ampoules from the same batch as those used to test the defendant, was sufficient to satisfy the requirement of "spot checking," as stated in *State v. DeVito*, 125 *N.J. Super.* at 479 and *State v. Dickens*, 130 *N.J. Super.* 73, 79 (App. Div. 1974).

In State v. Maure, supra, the Appellate Division reversed the trial court's ruling, which had been based on the holdings in *Dohme I & II* that the pre-test and posttest instrument inspection certificates were inadmissible because the certificates provided no basis for an inference that the breath test reagent ampoules used in the Breathalyzer had been randomly tested and were homogeneous. 240 N.J. Super. 269. The court also held that the "that spot checking of random ampoules by trained members of the State Police is sufficient prima facie proof that ampoules used in testing the defendants were properly constituted and mixed to proper proportions, effectively overruling the contrary holdings in Dohme I & II. The court found the law was well settled that the spot checking of a random ampoule of the same batch is sufficient *prima facie* proof that the chemicals in the test ampoule were of the proper kind and mixed to proper proportions. It was satisfied that foundational requirements are satisfied by admitting the State Police Coordinator's certification indicting that random sample testing of ampoules from the same batch that was used in the defendant's Breathalyzer tests has been conducted

both before and after those examinations. 240 *N.J. Super.* at 281. The court was unwilling to cast the burden on the State of offering further or additional proof of the accuracy and validity of the tests. *Id.* at 282-3.

In *State v. Dohme (II)*, 229 *N.J. Super.* 49 (App. Div. 1988), following a remand for an evidentiary hearing from *State v. Dohme (I)*, 223 *N.J. Super.* 485 (App. Div. 1988), the Appellate Division incorrectly held that for the instrument inspection certificates to be accepted as foundation proof of the operability and accuracy of the breath test instrument the State had to offer additional evidence of the testing of the breath test reagent ampoules by an approved testing laboratory. This holding has effectively been overruled by *State v. Maure,* 240 *N.J. Super.* 269 (App. Div. 1990), *aff*d o.b.* 123 *N.J.* 457 (1991).

3. Expert testimony (*See also,* EVIDENCE, this Digest)

State v. Benas, 281 N.J. Super. 251 (App. Div.1995), held that expert testimony regarding depletion of the control sample used to certify the machine was too speculative and insufficient to support a viable attack on the accuracy of the Breathalyzer test. See also State v. Slinger, 281 N.J. Super. 538 (App. Div. 1995); State v. Maida, 332 N.J. Super. 564 (Law Div. 2000).

State v. Tischio, 107 N.J. 504 (1987), app. dism., Tischio v. N.J., 484 U.S. 1038, 108 S.Ct. 768, 98 L.Ed.2d 855 (1987), discussed at length that the primary purpose of the DWI legislation was to eliminate the necessity for expert and other testimony relating to the existence and degree of intoxication and concluded, citing State v. Johnson, 42 N.J. 146, 171 (1964), that Breathalyzer test results are admissible upon a simple certification as to the operability and accuracy of the Breathalyzer instrument used to perform the test, that expert testimony attacking the accuracy and reliability of Breathalyzer tests, while 'probably technically still admissible,' had virtually no probative value.

In other cases the Supreme Court has strongly counseled against accepting of expert witnesses in DWI cases, particularly where the evidence does not remotely suggest there is even a reason to suspect the breath tests administered were not correct. *State v. Downie*, 117 *N.J.* 450, 468 (1990), *cert. denied* 498 *U.S.* 819, 111 *S.Ct.* 63, 112 *L.Ed.*2d 38 (1990); *State v. Hammond*, 118 *N.J.* 306, 317 (1990); *State v. Lentini*, 240 *N.J. Super.* 330, 334-336 (App. Div. 1990); *State v. Snyder*, _____ *N.J. Super.* _____, 2001 *W.L.* 83258 (App. Div. 2001).

4. Extrapolation

In *Tischio*, 107 *N.J.* 504, the Supreme Court determined that expert testimony to extrapolate a breath test reading back to the time of operation of the vehicle was inadmissible and that such testimony would not be received. As long as a breath test is administered within a reasonable period of time after the arrest for operating a motor vehicle while intoxicated, then the breath test result is admissible to establish a *per se* violation. The court also specifically disapproved of the holding in *State v. Allan,* 283 *N.J. Super.* 622 (Law Div. 1995). *But see, State v. Oriole,* 243 *N.J. Super.* 688 (Law Div. 1990), holding extrapolation evidence admissible in prosecution for aggravated assault arising from auto accident.

C. Constitutional Rights

Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), held a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunicated in Miranda v. Arizona, 384 U.S. 436 (1966), regardless of the nature or severity of the offense for which he is suspected or for which he is arrested. The roadside questioning of a motorist temporarily detained pursuant to a routine traffic stop does not constitute custodial interrogation for the purposes of the Miranda rule.

State v. Macuk, 57 N.J. 1 (1970), was overruled by State v. Stever, 107 N.J. 543, 559, n.15, cert. denied 484 U.S. 954 (1987), as it applies to the requirement that a defendant in a DWI matter must be read a Miranda warning upon arrest, consistent with the holding in Berkemer.

1. Retroactivity (*See also,* **RETROACTIVITY**, this Digest)

2. Effect

State v. Stever, 107 N.J. 543 (1987), cert. denied 484 U.S. 954, 108 S.Ct. 348 (1987), held analysis of a breath sample is not a "critical stage" at which the motorist has a right to consult with counsel and *Berkemer v. McCarty*, 468 U.S. 420 (1984), is inapplicable. It is not necessary to give warnings prior to asking a suspect to submit to a blood alcohol test because a request of this nature does not constitute "interrogation" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966). See South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983).

State v. Chappee, 211 N.J. Super. 321 (App. Div. 1986) certif. denied 107 N.J. 45 (1986), habeas granted o.g. (DNJ 1988), cert. denied, 493 U.S. 873 (1989), held that police action of confronting individuals stopped for speeding with marijuana roach found on front seat of automobile was not the functional equivalent of express questioning so as to require Miranda warnings.

In State v. DeLorenzo, 210 N.J. Super. 100 (App. Div. 1986), taking of breath sample from a motorist suspected of drunken driving did not constitute interrogation and *Miranda* warnings are not required.

In *State v. Green,* 209 *N.J. Super.* 347 (App. Div. 1986), field sobriety testing did not constitute custodial interrogation and hence did not require *Miranda* warnings prior to conducting the testing. The operator of a motor vehicle arrested for drunken driving did not have a right to contact an attorney before undergoing Breathalyzer testing.

State v. Leavitt, 107 N.J. 534 (1987), held a motorist requested to furnish a breath or blood sample is not guaranteed the Sixth Amendment's assistance of counsel at that stage of the proceeding. Furthermore, no provision of the New Jersey Constitution or statutes furnishes such a guarantee. Consequently, it is appropriate to advise a suspect that he has no right to refuse to give a breath sample on the ground that he has not been afforded counsel. Without resolving the issue of whether a defendant may validly assert a "confusion defense" to justify his refusal to submit to Breathalyzer testing, the Supreme Court decided that any potential assertion of this defense must be premised on a record developed by a defendant to show confusion in fact. Defendant would bear the burden of persuasion if he wishes to establish a confusion claim.

State v. Nece, 206 *N.J. Super.* 118 (Law Div. 1985), held the Sixth Amendment right to counsel was not available to an individual arrested for drunken driving with respect to the compelled exhibition of the arrestee's bodily movements.

State v. Hammond, 118 *N.J.* 306, 307 (1990), held that motor vehicle violations are not offenses under the Code of Criminal Justice, and hence the Code's provisions, including the involuntary intoxication defense, do not apply to a defendant charged with DWI.

State v. Davis, 244 *N.J. Super.* 180 (App. Div. 1990), found that the reporting requirements of *N.J.S.A.* 2C:17-6b, under the Law Division's application of the

principles articulated in *Albertson v. Subversive Activities Control Board*, 382 *U.S.* 70, 86 *S.Ct.* 194, 15 *L.Ed.*2d 165 (1965), was distinguishable in that the statute does not make non-disclosure of incriminating evidence a crime.

3. Speedy Trial (*See also,* **SIXTH AMENDMENT**, this Digest)

State v. Farrell, 320 N.J. Super. 425 (App. Div. 1999), reversed defendant's DWI and motor vehicle convictions because of inexcusable delay in prosecuting the charges. He was charged in January 1995 and asserted his speedy trial right the following month, but thereafter an inordinate number of continuances and lengthy adjournments ensued, many of which the prosecution and municipal court had caused. The Law Division on defendant's *de novo* appeal, while finding the delay exorbitant, saw no bad faith on the State's part, and concluded that defendant's speedy trial right was not violated. The Appellate Division disagreed. None of the excessive delays were fairly chargeable to defendant and most were not reasonably explained and justified; the municipal court itself was to blame for several of them. Defendant also continually asserted his speedy trial right, and was prejudiced to the extent that he incurred additional costs and inconveniences. However, given the excessive delays and the unjustified reasons for them, the court did not have to consider prejudice to find that defendant's speedy trial right had been violated. Vacating the convictions was necessary because the denial of fundamental fairness was so great, and the integrity of the judicial process so crippled.

Supreme Court Directive #1-84 "suggests" a 60-day disposition for DWI cases. While that Directive has never been reduced to a Court Rule, it is generally adhered to by the Municipal Courts as a management tool, but it is not an absolute requirement. *See State v. Fox,* 249 *N.J. Super.* 521, 523, n.1, (Law Div. 1991); *State v. Farrell,* 320 *N.J. Super.* at 446-7.

4. Conditional Guilty Plea - Suppression

State v. Giordano, 281 N.J. Super. 150 (App. Div. 1995) held that the municipal court's ruling on the admission of the defendants' Breathalyzer results was not properly considered under the motion to suppress rule, R. 7:4-2(f) [now R. 7:5-2], and, therefore, could not be appealed to the Law Division following a guilty plea. Because motions to suppress Breathalyzer results do not generally involve constitutional claims involving the improper collection of physical evidence, R. 3:5-7 and R.

7:4-2(f) are not implicated. The Court also concluded that R. 3:9-3(f), which permits defendant to preserve for appeal adverse determinations on pretrial motions with the consent of the prosecutor, is not applicable to municipal court proceedings and that conditional guilty pleas are not permitted in municipal court. R. 7:4-8.

5. Denial of Rights - Fabricated Evidence

In *State v. Gookins*, 135 *N.J.* 42 (1994), the New Jersey Supreme Court reversed the convictions of all defendants' for drunk driving, where the only police officer involved in these arrests had himself been convicted of falsifying Breathalyzer results. The objectivity and value of the Breathalyzer is irreparably undermined when the person operating the machine falsifies the results in order to fabricate evidence of guilt. Because the arresting officer in these cases pleaded guilty to fabricating Breathalyzer results in another drunk-driving case and had been implicated in similar misconduct in other cases, the officer's misconduct compelled the vacation of the guilty pleas and accompanying judgments of conviction in these cases.

D. Jury Trial

State v. Hamm, 121 N.J. 109 (1990), cert. denied 499 U.S. 947, 111 S.Ct. 1413, 113 L.Ed.2d 466 (1991) and State v. Graff, 121 N.J. 131 (1990), held that the statutory penalties for DWI are not so severe as to clearly reflect a legislative determination of a constitutionally serious offense requiring a jury trial. Hamm was facing a third DWI offense which would subject him to a mandatory jail sentence, fines and mandatory participation in an alcohol rehabilitation program. Graff and his co-respondent Ellis were respectively charged with a first and second DWI offense. The analysis by the Court noted that the issue was primarily one of federal constitutional right, because New Jersey has never recognized a right to trial by jury for the motor-vehicle violation of DWI. It is simply not a crime under New Jersey law.

E. Preservation of Breath Samples

State v. Young, 242 N.J. Super. 467 (App. Div. 1990), rejected a request by the defense for production of samples of the breath test reagent ampoules used to test the defendant, relying on the holding in *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), that if the State was not required to save a sample of the defendant's breath as direct evidence of the offense, it could not be required to save and produce for defense inspection and analysis samples of the breath test reagent ampoules used in the administration of the breath tests. *See also State v. Bryan*, 133 *N.J. Super*. 369 (Law Div. 1974), cited with approval in *State v. Teare*, 133 *N.J. Super*. 338, 341 (App. Div. 1975). *State v. Serret*, 198 *N.J. Super*. 21, 26-27 (App. Div. 1984), *certif. denied* 101 *N.J.* 217 (1985) and *State v. Marshall*, 123 *N.J.* 1, 108-109 (1991), *cert. denied*, 507 *U.S.* 929 (1993), gave recognition to the holding in *Trombetta*, as it discounted any requirement that the State is otherwise required to save the breath sample of the defendant.

F. Refusals/Implied Consent

State v. Widmaier, 157 N.J. 475 (1999), adopted another "bright line" rule. Under the "Implied Consent Law," N.J.S.A. 39:4-50.2, anything substantially short of an unconditional, unequivocal assent to an officer's request that the arrested motorist take the Breathalyzer test constitutes a refusal to do so. The test is objective and does not consider whether or not the suspect intended to refuse to take the test. The Court recommends that the Director of DMV (1) revise the standard statement read to DWI suspects to ensure that suspects understand that an ambiguous or conditional answer to a request to submit a Breathalyzer test will be deemed a refusal, and (2) delete the three examples of conduct listed in the supplement to the standard statement and instead simply warn suspects that a summons will issue as a consequence of a refusal to provide breath samples. Adopting the test in Hudson v. United States, 522 U.S. 93 (1997), the Court found that the sanctions imposed following a conviction for refusal under N.J.S.A. 39:4-50.4a are penal for double jeopardy purposes, precluding an appeal by the State from an acquittal on a refusal charge. See also State v. Stever, 107 N.J. 543 (1987), cert. denied 484 U.S. 954, 108 S.Ct. 348 (1987).

State v. Lucci, 310 N.J. Super. 58 (App. Div.), certif. denied, 156 N.J. 386 (1998), reversed defendant's driving while intoxicated conviction but affirmed his refusal to take the Breathalyzer tests conviction. According to his neuropsychologist defendant, who had hydrocephalus, a condition that caused swelling in the brain, functioned in the borderline retarded range, and at times had slurred speech and balance problems. When stopped by the police while driving his car, defendant also had bloodshot eyes and smelled of alcohol. However, the Appellate Division rejected the reasoning of both the municipal court and Superior Court judges that did not accept the testimony of defendant's neuropsychologist, claiming that the factual underpinnings for those judicial decisions were not supported by sufficient credible evidence in the record. The lower courts placed too much emphasis on defendant's ability to hold steady employment. Also, the municipal court judge did not develop a competent record for the Appellate Division to determine if defendant's hydrocephalus had an effect on him, and the smell of alcohol on defendant's breath and his bloodshot eyes when driving could have been caused by factors other than alcohol. The court affirmed defendant's refusal to take the Breathalyzer tests conviction, concluding that he was informed of the consequences of a refusal and that a "confusion" defense to this offense had no viability given his conduct on a videotape of his processing at the police station.

State v. Liberatore, 293 N.J. Super. 580 (Law Div. 1995), aff'd o.b., 293 N.J. Super. 535 (App. Div. 1996), affirmed DWI and refusal convictions based upon the testimony of the arresting officer and the court's review of the in-station video tape. While in the station the defendant exhibited an intoxicated state. Also, after having been read the standard refusal statement, the defendant initially remained silent, then upon being read the additional paragraph, he flatly refused to submit to testing. All of these facts clearly supported a finding of guilty on the refusal as well as the DWI. The refusal need only be established by the preponderance of the evidence standard, which was met in this case. The elements to prove the DWI were more than satisfied from the observations of the officer and the court's review of the videotape.

State v. Bernhardt, 245 N.J. Super. 210 (App. Div. 1991), certif. denied 123 N.J. 323 (1991), held that once a defendant has refused to submit to breath testing, the defendant cannot thereafter "cure" the refusal by agreeing to take the test. Moreover, to the extent that State v. Ginnetti, 232 N.J. Super. 378 (Law Div. 1989), "may be interpreted as permitting a cure, we disapprove." Refusal is judged by a bright line rule, either the defendant submits to the tests or he does not. See State v. Corrado, 184 N.J. Super. 561, 567, 569 (App. Div. 1982). Encompassed within the bright line rule is also silence which the Court determined, under State v. Sherwin, 236 N.J. Super. 510, 515 (App. Div. 1989), as a refusal. Permitting a cure hampers the State in the administration of its public policy of requiring the courts to work in tandem with the Legislature 'to streamline the implementation' of laws designed to rid the highways of drunken drivers. In as much as the implied consent is viewed as a remedial statute, once the violation of refusal in complete it cannot be undone by a cure. The court further reiterated that the elements of the violation of refusal are (1) that the arresting officer has probable cause

to believe that the accused operated a vehicle while under the influence of alcohol, (2) an arrest of the accused for driving while under the influence of alcohol, and (3) the accused's refusal to submit to a chemical breath test.

In State v. Todaro, 242 N.J. Super. 177 (App. Div. 1990), defendant challenged the constitutionality of the implied consent statute, N.J.S.A. 39:4-50.4a, claiming that a conviction supported only by a preponderance of the evidence standard was a constitutional violation. The Appellate Division disagreed, noting that it is well settled in New Jersey that drunk driving is a quasi-criminal offense requiring a beyond a reasonable doubt standard of proof as to each element of the offense. A Breathalyzer refusal hearing has always been treated as a civil matter; the standard of proof in such a proceeding is a preponderance of the evidence. The purpose of the refusal statute is to encourage drivers to submit to breath testing, not to punish them.

State v. Sherwin, 236 *N.J. Super.* 510 (App. Div. 1989), held that a defendant's silence in response to having been read the standard refusal statement, under the implied consent law, was in fact a refusal to submit to chemical breath testing. The court also determined that the defendant failed to prove his claim of confusion upon having been read both a *Miranda* warning and the standard refusal statement.

G. Roadblocks/Sobriety Checkpoints

In Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), the U.S. Supreme Court reviewed a checkpoint operated by the Michigan State Police and reversed the Michigan Supreme Court finding that under a three point balancing test, (1) state interest, (2) effectiveness of checkpoints, and (3) level of intrusion on individuals, the checkpoint could pass constitutional muster. The Court found that checkpoints are a Fourth Amendment seizure and then evaluated the checkpoint under that standard and the balance test. The Court found there was a clear public interest because of the magnitude of the problem of DWI drivers. The measure of the level of intrusion was no different that the brief border search stops based upon well established guidelines. The checkpoint is not a random stop because it is planned and organized. The Court also found that the State Supreme Court's determination of the effectiveness was a violation of the separation of powers in that it intruded on the decision making authority of the executive branch on its allocation and use of resources.

State v. Barcia, 235 N.J. Super. 311 (App. Div. 1989), affirmed the Law Division suppression of drug evidence seized in a checkpoint at the George Washington Bridge entrance to New Jersey on the grounds the checkpoint was a Fourth Amendment violation under the federal and N.J. Constitutions, but found the trial court was in error in applying a constitutional right to travel & commerce clause analysis. The significant factor in this checkpoint was the fact that the checkpoint was an organized and planned event with supervision, but that time, location and operation was such that it was unreasonable and became arbitrarily and oppressive on motorists resulting in traffic backlogs into two other States.

In *State v. DeCamera*, 237 *N.J. Super.* 380 (App. Div. 1989), the Appellate Division found that a checkpoint set up by police without an advance notification in a newspaper did not violate the defendant's Fourth Amendment rights. The Court declined to expand upon the requirements otherwise established under the holding in *State v. Kirk*, 202 *N.J. Super.* 28 (App. Div. 1985).

State v. Hester, 245 *N.J. Super.* 75 (App. Div. 1990), reversed a trial court's suppression order, noting that a motorist is not required to be accorded an opportunity to avoid an otherwise legally established checkpoint. The motorist had observed the checkpoint and made an otherwise lawful U-turn before encountering the checkpoint. The U-turn was the only basis upon which the motorist was stopped, and the Court found there was a sufficient basis for the stop. The court rejected the claim that a motorist has a constitutional right to avoid a checkpoint.

State v. Mazurek, 237 N.J. Super. 231 (App Div. 1989), certif. denied 121 N.J. 623 (1990), affirmed the DWI conviction of defendant as a result of a stop at a checkpoint. Defendant challenged the effectiveness of the use of checkpoints, but the court, relying on U.S. v. Martinez-Fuerte, 428 U.S. 543, 556-8, 96 S.Ct. 3074, 3082-3, 47 L.Ed.2d 1116 (1976), found that success can not be measured solely by numbers of arrests. Because this checkpoint otherwise complied with the requirements set forth in Kirk, it passed constitutional muster under the federal and State Constitutions.

State v. Moskal, 246 *N.J. Super.* 12 (App. Div. 1991), rejected a claim that a review of the statistical results of a checkpoint was sufficient for a court to suppress the stop, citing *Mazurek*. The court further found that the selection of a checkpoint location does not have to be

exact; rather a general location is sufficient, provided the checkpoint is otherwise in compliance with the requirements of *Kirk*, as to a carefully targeted area at a specific time and place based upon data justifying the location selected.

State v. Reynolds, 319 N.J. Super. 426 (App. Div. 1998), reversed the trial court's suppression of evidence in defendant's drunk driving prosecution stemming from his stop at a township's DWI roadblock. The police had established the roadblock at a location where statistics revealed that many DWI arrests had occurred in the past, where several fatal accidents had taken place, and near four bars. Prior warnings were given of the DWI roadblock's presence, and the police operated under specific written guidelines for conducting stops of each car passing through it, including the handing out of DWI information literature. Defendant was pulled over for exuding the odor of alcohol as he stopped at the roadblock. The Appellate Division was entirely satisfied that the township's roadblock was lawfully established pursuant to caselaw. The police could stop every vehicle passing through the roadblock without violating the Fourth Amendment, and could distribute DWI literature to further deterrence. Also, no factual basis supported the trial court's conclusion that the police procedure caused traffic problems, and the odor of alcohol on defendant's breath and his actions constituted sufficient "suspicion," and in fact probable cause, to further detain him.

State v. Flowers, 328 N.J. Super. 205 (App. Div. 2000), reversed the trial court's order suppressing drugs and money seized when defendant attempted to evade a roadblock. As he approached a stolen vehicle checkpoint defendant stopped his vehicle, backed up, drove the wrong way down a one-way street, parked, and discarded cocaine as he walked away from his vehicle; when arrested he possessed a large sum of money. The trial court ruled that while the roadblock to check for stolen vehicles was not per se unconstitutional, the State had failed to prove the checkpoint's reasonableness. The appellate court disagreed, holding that stolen vehicle checkpoints, which serve important public purposes similar to safety and DWI checkpoints, may be the basis for a roadblock. Here, drivers stopped were asked to produce their driving credentials, and were sent on their way if they were in order. Thus any intrusion was minimal, and the police method chosen was both properly conducted and reasonably related to advancing the State's interest in identifying stolen cars in this particular area of Newark. In fact, the Appellate Division determined that the trial court could have taken judicial notice -- which the appellate court did -- of the Newark stolen car problem, which would have made it unnecessary for the State to have empirically justified its roadblock site. Because defendant committed at least one traffic violation in the officers' presence, the court found no need to address the State's contention that avoiding the roadblock itself gave the police probable cause to stop him.

The continued validity of this decision is questionable in light of the holding in *Indianapolis v. Edmond*, ______, 121 *S.Ct.* 447 (2000), which found that checkpoints to interdict drugs were unlawful and unconstitutional under the 4th amendment. The U.S. Supreme Court concluded that while checkpoints for drunken driving as in *Michigan Dept. of State Police v. Sitz*, or to intercept illegal aliens, as in *U.S. v. Martinez-Fuerte*, were acceptable, the court had not indicated approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.

In State v. McLendon, 331 N.J. Super. 104 (App. Div. 2000), the Appellate Division remanded for a hearing on defendant's motion to suppress the checkpoint, notwithstanding that defendant had not raised the issue at the trial court, by pre-trial motion, as required by *R*. 7:5-2. The issue of the validity of the checkpoint was raised, *sua sponte* by the Law Division Judge on the trial de novo on the record below, *R*. 3:23-8. In the absence of a proper pretrial motion to suppress, pursuant to *R*. 7:5-2, the "State had the right to assume that the validity of a roadblock was not in issue," as the validity of a roadblock is not an element of the offense of drunk driving, it is more of a jurisdictional issue of fact.

H. Statutes

State v. Garbin, 325 N.J. Super. 521 (App. Div. 1999), certif. denied 164 N.J. 560 (2000), affirmed a DWI conviction where the defendant was found in the driver's seat of his pickup truck, in the defendant's garage with the tires spinning, creating smoke and the front bumper pushing against the garage wall. Defendant attempted to rely on the holdings in State v. Sweeney, 40 N.J. 139, 360-361 (1963) and State v. Mulcahy, 107 N.J. 467, 477-478 (1987) for the proposition that he had to be operating his vehicle on a public highway, not in his The Appellate Division rejected this claim, garage. distinguishing the cases relied upon by noting that in those cases the issue was the intent of the person to operate within the meaning of the DWI statute, not his intent to operate on a public highway. The court relied upon the holdings in State v. Magner, 151 N.J. Super. 451 (App. Div. 1977) and State v. McColley, 157 N.J. Super.

525 (App. Div. 1978) that a DWI offense is not limited to public roads and highways.

In *State v. Lutz*, 309 *N.J. Super.* 317 (App. Div. 1998), the Appellate Division, citing *State v. Lentini*, 240 *N.J. Super.* 330, 332 (App. Div.1990), stated, "[s]uch a reading established a *per se* offense of driving under the influence even in the absence of any additional evidence of intoxication or impaired ability to drive."

In State v. Sisti, 209 N.J. Super. 148 (App. Div. 1986), trial judges were instructed that where there are proofs of guilt, with and without Breathalyzer readings, the trial court was to make findings of fact and conclusions on both bases. Id. at 151. The court, following the line of reasoning adopted in State v. D'Agostino, 203 N.J. Super. 69 (Law Div. 1984), concerning the duality of the DWI offense under N.J.S.A. 39:4-50, held that municipal court judges, in N.J.S.A. 39:4-50 cases where there are proofs of guilt, with and without Breathalyzer readings, should make findings and conclusions on both bases. Failure to do so is unfair to defendants, the State, the attorneys and the Appellate Courts. However, in State v. Locurto, 157 N.J. 463 (1999), the Supreme Court noted that the holding in Sisti did not require the trial judge to enunciate credibility findings when the record as a whole made the credibility findings clear.

In *State v. Allex*, 257 *N.J. Super.* 16 (App. Div. 1992), the Appellate Division rejected the contention advanced in *State v. Ghegan*, 213 *N.J. Super.* 383 (App. Div. 1986), that subjective medical evidence from a medical expert is admissible to countervail the results of a properly administered breath test.

In State v. Lentini, 240 N.J. Super. 330 (App. Div. 1990), where the breath test results were recorded as 0.10%, the defense offered expert testimony that purported to claim the accuracy of the result was subject to a tolerance of plus or minus 0.01% and therefore the result should be read as 0.09%. The court viewed this argument as a question of legislative intent and noted that a per se violation occurs if a person with a 0.10% blood alcohol concentration operates a motor vehicle, citing State v. D'Agostino, 203 N.J. Super. 69, 73 (Law Div. 1984). Then, citing the holding in *Tischio*, 107 N.J. at 514 discussing the "dominant legislative purpose" of N.J.S.A. 39:4-50, and that a per se violation is deemed as a "bright line" test, the court rejected the defense claim of a tolerance as seeking to "blunt the Legislature's resolve by giving new vigor to the probative value of expert testimony in the interest of eliminating a possible 1/ 100th of a per cent." 240 *N.J. Super.* at 335. Under this holding, a breath test result of 0.10% or more is the reading and the result and satisfies the burden of proof for a *per se* violation of *N.J.S.A.* 39:4-50, provided the State has otherwise satisfied the foundational proofs of proper training of the operator, proper operation of the instrument, and compliance with the check list in operating the instrument. *Id.* at 336.

I. Field Sobriety Testing

In State v. Maida, 332 N.J. Super. 564 (Law Div. 2000), the Law Division, on municipal appeal, determined that horizontal gaze nystagmus (HGN) testing, as administered by the police officer as part of a standardized field sobriety test, was admissible as scientific evidence of intoxication. The Law Division found, following the expert testimony of Dr. Marcelline Burns concerning her validation studies of HGN for NHTSA and Dr. Jack Richman concerning his clinical research on the relationship of alcohol and eye movement, that HGN testing is "generally accepted by the scientific community are a reliable scientific indicator of likely intoxication." Id. at 572. In addition, the Law Division held that a certificate of the Breathalyzer's accuracy was sufficient to prove the defendant was intoxicated based upon the breath test readings. The Court also found that the clue point system (the number of times defendant faltered during a field sobriety test) testimony was admissible because it involved only the officer's observations of defendant's behavior and demeanor, and that failing to videotape defendant at police headquarters did not violate due process.

Maida was rejected in State v. Doriguzzi, 334 N.J. Super. 530 (App. Div. 2000), which held that the results of horizontal gaze nystagmus (HGN) testing, as administered by a police officer as part of a standardized field sobriety test, will not be admissible to prove a defendant was intoxicated in a DWI prosecution, unless and until the State proves that HGN is generally accepted in the scientific community, as required by the *Frye* test. The Appellate Division found "HGN testing to be scientific," and declined to admit HGN testing unless its reliability has been demonstrated by expert testimony, scientific writings, or judicial opinions. See, State v. Harvey, 151 N.J. 117, 166-176 (1997), cert. denied, 528 U.S. 1085 (2000). In the absence of any expert testimony by the State, the Appellate Division undertook an examination of the relevant scientific writings and

judicial opinions. Based upon their examination, the Court expressed its reluctance to endorse HGN testing based only upon a survey of other judicial opinions. Accordingly, the Court ruled that "[w]hile it may very well be that HGN testing can meet the *Frye* test, we believe that the case which decides the issue for all other cases in New Jersey should be grounded in sufficient expert testimony to assure defendants and the State alike that a conviction for driving under the influence, when based in part on HGN testing, is a conviction grounded in reliable scientific data." The court in *Doriguzzi*, did not, however, make a determination concerning the use of HGN testing to establish probable cause to arrest. *Id.*

J. Trial-Evidence & Procedure

1. Pre-Trial Discovery, R. 7:7-7

Under the provisions of R. 3:13-3(c) and R. 7:7-7(b), a request for discovery made directly to a police department or law enforcement agency is inappropriate and does not satisfy the requirement of the Court Rules. The responsibility for providing discovery to the defense belongs exclusively to the prosecutor. State v. Malsbury, 186 N.J. Super. 91, 97-98 (Law Div. 1982), disapproved on other grds., State v. Matulewicz, 198 N.J. Super. 474, 483 (App. Div. 1985), disapproval mod. 101 N.J. 27 (1985); State v. Polasky, 216 N.J. Super. 549, 554-556 (Law Div. 1986); State v. Tull, 234 N.J. Super. 486, 494 (Law Div. 1989) [disapproved on other grounds in *Ford*]; State v. Prickett, 240 N.J. Super. 139, 145-147 (App. Div. 1990). Police and law enforcement agencies can and should make every effort to supply documents in their possession to the prosecutor, but police agencies should not provide these materials directly to defense counsel or defendants.

A discovery demand or Court Order which is interrogatory in scope and content is contrary to court rules (*R.* 3:13-2 & *R.* 7:7-6) and case law, *State v. Tate*, 47 *N.J.* 352 (1966); *State v. Ford*, 240 *N.J. Super.* 44, 51-52 (App. Div. 1990).

In *State v. Prickett*, 240 *N.J. Super.* 139 (App. Div. 1990), the Appellate Division made clear that the legal responsibility for handling pre-trial discovery in the municipal court is that of the municipal prosecutor, and that it is a responsibility which can not be delegated to others, in particular to the records unit of the police department. Where a municipal prosecutor has failed to fulfill a discovery obligation, the remedy for the defense is not to seek a dismissal, but to comply with the controlling Court Rules, *R.* 3:13-3(f) [now *R.* 7:7-7(f) and (g)].

In State v. Ford, 240 N.J. Super. 44 (App. Div. 1990), disapproving & mod. State v, Tull, 234 N.J. Super. 486 (Law Div. 1989), the Appellate Division had the opportunity to address excessive and overly burdensome discovery demands by defendants and defense counsel in DWI cases, in particular the excessive discovery of the type ordered in *Tull*. The court concluded that discovery in a DWI case is limited. In DWI cases, where the defense seeks production of discovery beyond that routinely provided, the defense has the burden of establishing the need for the additional discovery by providing particular facts that give rise to a basis for distinguishing the case from the usual or run of the mill DWI case. Routine discovery in a DWI case will consist of the following items: full identification of the breath test instrument used to test the defendant, the date it was first placed in service by the State, the type of instrument used, including the manufacturer, model number and results of the coordinator's periodic testing of the instrument [N.J.A.C. 13:51-3.4] for approximately one year to include the next testing after defendant's test and the results and all reports and relevant documents signed by defendant pertaining to his condition of sobriety including blood and urine tests. The court also advocated and encouraged the use of the "one time and one time only" principle as a curb against discovery abuse and delay. See also State v. Laurick, 231 N.J. Super. 464, 473-474 (App. Div. 1989), mod. on other grds. 120 N.J. 1 (1990), cert. denied 498 U.S. 967, 111 S.Ct. 429, 112 L.Ed.2d 413 (1990).

In *State v. Holup*, 253 *N.J. Super.* 321, 326 (App. Div. 1992), the Appellate Division reaffirmed the rule requirements pertaining to compliance with pre-trial discovery procedures by the State. Where the defense claims there has been non-compliance with the court rule, it is the responsibility of the defense to present a formal written motion with appropriate and supporting law, and particular facts [which] give rise to a basis for distinguishing the case from the usual or run of the mill DWI case.

State v. Young, 242 *N.J. Super.* 467 (App. Div. 1990), held that a discovery order for pre-trial production of breath test reagent ampoules for independent testing by the defense was inappropriate. Absent some preliminary reasonable showing by the defense that the breath test results are inappropriate or that the ampoules used have not been randomly sampled and spot checked by the Breath Test Coordinator, the court must deny the demand.

State v. Maure, 240 N.J. Super. 269 (App. Div. 1990), aff'd o.b. 123 N.J. 457 (1991), effectively overrules the holdings in State v. Dohme (II), 229 N.J. Super. 49 (App. Div. 1988) on remand from State v. Dohme (I), 223 N.J. Super. 485 (App. Div. 1988). The Appellate Division noted that it had a factual record, which was absent in the Dohme proceedings, and that record was sufficient to support that spot checking of random ampoules by trained members of the State Police is sufficient *prima facie* proof that the ampoules used in testing the defendants were properly constituted and mixed to proper proportions. In general, and absent specific articulable facts, additional requests for discovery beyond that routinely provided should be denied as lacking in relevance or materiality. The additional discovery demands made in this matter are tantamount to a fishing expedition, and there are no apparent facts which support such a wide ranging demand. See also, State v. Tull 234 N.J. Super. at 498 citing State in the Interest of W.C., 85 N.J. 218, 221-222 (1981) and State v. R.W., 104 N.J. 14, 28 (1986).

According to *State v. Gordon*, 261 *N.J. Super.* 462, 465-466 (App. Div. 1993), there does not appear to be any legal obligation on the State, under the provisions of R. 3:13-3(c) and/or R. 7:7-7(b), to create a document or record that does not presently exist or to seek out a document or record not in the possession of the State. *Id.* at 465-466.

State v. Fox, 249 *N.J. Super.* 521 (Law Div. 1991), held that in DWI cases when a trial court is faced with a choice between a dismissal on procedural grounds versus a trial on the merits, the general policy is to adjudicate matters on their merits.

2. Motion to Suppress, R. 7:5-2

State v. Allan, 283 *N.J. Super.* 622 (Law Div. 1995), held that it was inappropriate for the municipal court to simply conduct a pre-trial suppression motion and then move directly to the trial on the merits and then to prevent the defense from cross-examining the complaining officer at trial on testimony offered by the officer in the suppression hearing. The better practice is to completely separate the motion to suppress proceeding from the actual trial by starting the testimony anew with the State's case in chief. However, if both counsel stipulate that the testimony from the motion to suppress will be incorporated into the trial and counsel are given wide latitude in cross-examination in connection with the issues raised during the motion to suppress such a practice may be continued.

State v. Giordano, 281 N.J. Super. 150 (App. Div. 1995), held that the municipal court's ruling on the admission of the defendants' Breathalyzer results was not properly considered under the motion to suppress rule, R. 7:4-2(f) [now R. 7:5-2], and, therefore, could not be appealed to the Law Division following a guilty plea. Because motions to suppress Breathalyzer results do not generally involve constitutional claims involving the improper collection of physical evidence, R. 3:5-7 and R. 7:4-2(f) are not implicated. The Court also concluded that R. 3:9-3(f), which permits defendant to preserve for appeal adverse determinations on pretrial motions with the consent of the prosecutor, is not applicable to municipal court proceedings and that conditional guilty pleas are not permitted in municipal court. R. 7:4-8.

In State v. Liberatore, 293 N.J. Super. 580 (Law Div. 1995), aff'd o.b., 293 N.J. Super. 535 (App. Div. 1996), defendant had been placed under arrest and advised of his Miranda rights. Defendant then attempted to flee onto the porch of his home, thereby making a claim of an unlawful pursuit under State v. Bolte, 115 N.J. 579 (1989), cert. denied 493 U.S. 936 (1989). The court in performing a two step analysis, found the search and seizure to be objectively reasonable as a matter of law and based on the facts, and rejected defendant's claim concerning his motion to suppress by distinguishing this case from the holdings in Bolte and Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

In State v. Colapinto, 309 N.J. Super. 132 (App. Div. 1998) and State v. McLendon, 331 N.J. Super. 104 (App. Div. 2000), the Appellate Division reaffirmed the principle that a defendant's failure to make a pretrial motion seeking to suppress evidence constitutes a waiver of an objection during trial to the admission of the evidence on the grounds the evidence was unlawfully obtained, and this principle would apply to constitutional claims as well. In *Colapinto*, the trial court erred when it permitted a defendant to raise a suppression issue at the trial *de novo*, even though the appellate court was capable of discerning from the record that the issue was without merit. But, in McLendon, the record did not permit that conclusion; thus, the matter was remanded. However, the court also noted that the failure of the State to place in evidence facts relating to the potential suppression issue was inadvertent, since the State had the right to assume that the validity of the roadblock was not

in issue by virtue of defendant's failure to move to suppress.

K. Driving While intoxicated

1. Operating a Vehicle/Vessel While Intoxicated

State v. Bryant, 328 N.J. Super. 379 (App. Div. 2000), affirmed defendant's driving under the influence conviction. Although the trial judge determined that the municipal court had improperly denied defendant's motion to suppress the Breathalyzer evidence, the judge correctly considered defendant's testimony given after the improper denial. Even if suppression had been granted at the municipal court level, the State still could have proceeded on the driving under the influence charge by utilizing evidence other than the breath test results -- his erratic driving, smell of alcohol, difficulty walking, uncoordinated movements, and refusal to perform field sobriety tests. Defendant's decision to testify in municipal court after his suppression motion was denied was similar to most tactical decisions the accused must make with the assistance of their attorneys.

According to *State v. Garbin*, 325 *N.J. Super.* 521 (App. Div. 1999), *certif. denied* 164 *N.J.* 560 (2000), defendant can be convicted for operating while under the influence of alcohol while the vehicle is in the garage of a private residence.

In *State v. Liberatore*, 293 *N.J. Super.* 535 (App. Div. 1996), the Appellate Division found that independent of Breathalyzer results, an alternative finding of intoxication may be based upon observational evidence to find a defendant guilty beyond a reasonable doubt of DWI. *See, State v. Slinger,* 281 *N.J. Super.* 538, 543 (App. Div. 1995), citing *State v. Sisti,* 209 *N.J. Super.* 148, 151 (App. Div. 1986).

In *State v. Morris*, 262 *N.J. Super.* 413 (App. Div. 1993), the evidence was sufficient to show that defendant was under the influence of alcohol. The Appellate Division was satisfied that the State proved that defendant was intoxicated under the principles delineated in *State v. Tamburro*, 68 *N.J.* 414, relying on the language of under the influence used in the statute to mean a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs. Finally, the court noted the observations made of the defendant by the arresting officers that defendant's speech as being slurred when he initially contacted the police over the

phone, that the defendant was loud and abrasive. and the officer observed defendant to be dishevelled, and detected a strong odor of alcohol on his breath, as well as observations that defendant was very agitated, very wobbly and yelling and screaming, as well as having ruffled clothing, red and bloodshot eyes and slurred speech. Defendant's judgment and control, as it related to the operation of a motor vehicle, was materially affected, since his judgment and control over his own actions had all but disappeared.

2. Allowing Another to Operate a Vehicle/Vessel While Intoxicated

State v. Michalek, 207 *N.J. Super.* 340 (Law Div. 1985), held that a defendant could not be convicted of the DWI offense of allowing another to operate a motor vehicle while intoxicated, in the absence of proof that the defendant knew, or reasonably should have known that the operator was intoxicated or had a blood alcohol level of 0.10% or more.

Relying in part on the holding in *Michalek*, the Appellate Division in *State v. Skillman*, 226 *N.J. Super*. 193 (App. Div. 1988) reversed a conviction for allowing another to operate a vehicle while intoxicated, in this case with a blood alcohol level of 0.10% or more. The court reiterated the conclusion that the State must prove that the person charged with this offense knew, or reasonably should have known that the operator of the vehicle was intoxicated or had a blood alcohol level of 0.10% or more. The court recognized that evidence permitted an inference that the defendant knew or reasonably should have known of the operator's intoxication, but held that evidence was insufficient to sustain a conviction.

L. Right to Independent Tests

State v. Jalkiewicz, 303 N.J. Super. 430 (App. Div. 1997), reversed the trial court's suppression of defendant's Breathalyzer results. The trial court had found the police did not have reasonable procedures in effect to "implement" defendant's right under N.J.S.A. 39:4-50.2c to have chemical blood tests conducted by the person or physician of his choice. The appellate court found that only where the absence of procedures interfere with defendant's right to obtain his own testing must relief be granted and here there was no such interference. The Court also questioned the validity of the holding in *State v. Broadley,* 281 N.J. Super. 230 (Law Div. 1995).

Broadley held that because the police department did not have reasonable procedures in place to enable drunk-

driving defendants to exercise their right to an independent blood analysis as required by State v. Ettore, 228 N.J. Super. 28 (App. Div. 1988), certif. denied 114 N.J. 473 (1989) and State v. Hicks, 228 N.J. Super. 541 (App. Div. 1988), certif. denied 127 N.J. 324 (1990), and defendant had unsuccessfully sought to exercise that right, the breath test results indicating a blood alcohol level beyond 0.10% would be suppressed. However, the underlying facts showed that the police did not actively deny the defendant her right to an independent test. Rather, the denial of the test was the result of an independent policy by a hospital not to conduct independent tests without the consent of the police department, a policy which has no supporting legal or statutory requirement. Despite this, the drunk driving conviction was affirmed because the municipal court found evidence independent of the chemical breath test results that supported a finding that the defendant was driving while intoxicated. The continued validity of this decision is questioned in State v. Jalkiewicz, 303 N.J. Super. 430 (App. Div. 1997).

In *Ettore*, 228 *N.J. Super.* 28 the Appellate Division held that the statutory right of a motorist to obtain an independent test was not violated by the police when the police declined to transport the defendant to a hospital and would not release the defendant to the custody of a taxi cab driver. Nor was there a denial of the defendant's right to an independent test as a result of an independent policy by a hospital not to administer blood tests in the absence of a medical reason. This holding overrules *State v. Nicastro,* 218 *N.J. Super.* 231 (Law Div. 1986).

M. Pretextual and Rejected Defenses

State v. Hammond, 118 *N.J.* 306 (1990), rejected involuntary intoxication as a defense to a DWI charge. The court noted "[t]his kind of defense has the potential for being pretextual, and is the kind of tenuous defense the Legislature has sought to discourage by its enactment of a statute based on objective measurements of intoxication." *See, State v. Fogarty*, 128 *N.J.* 59, 67, 68-69 (1992); *State v. Manfredi*, 242 *N.J. Super.* 708, 710-711 (Law Div. 1990).

State v. Lizotte, 272 *N.J. Super*. 568 (Law Div. 1993), held that defendant's alleged consumption of the contents of an open can of beer after he observed that the police were pulling him over, did not vitiate the Breathalyzer test results or preclude his conviction for DWI. It was not a defense, since it disregards the concept of operation, *i.e.* an intention to operate coupled with real

ability to accomplish that goal while under the influence of an intoxicant.

Similarly, in State v. Snyder, ____ N.J. Super. ____, 2001 W.L. 83258 (App. Div. 2001), defendant made the uncorroborated assertion that after causing an accident in a tavern parking lot but before police arrived, he drank whiskey from a bottle he kept in the car. Defendant attempted to distinguish Lizotte on the ground that his drinking and operation of the car was not "so closely intertwined that they constituted one event." The Appellate Division found that defendant was omitting critical facts, that the State showed a prima facie case of a per se offense, the Breathalyzer results were concededly accurate, and extrapolation evidence was not permitted. It reiterated that the court has endeavored to eliminate pretextual defenses, and would not encourage a defense founded upon post-event voluntary ingestion of additional alcohol by defendant, a "glove box" defense.

1. Insanity

State v. Inglis, 304 *N.J. Super.* 207 (Law Div. 1997), concluded that the common law and penal code insanity defense are not available to a defendant charged with drunk driving, since this offense is a strict liability offense requiring no culpable mental state.

2. Depletion of Simulator Solution Testing Standard

State v. Benas, 281 *N.J. Super.* 251 (App. Div.1995), held that expert testimony regarding depletion of the control sample used to certify the machine was too speculative and insufficient to support a viable attack on the accuracy of the Breathalyzer test.

State v. Slinger, 281 *N.J. Super.* 538 (App. Div. 1995), held that the State's failure to prove the number of times a simulator solution has been used and the actual readings obtained by the State Police Coordinator when the Breathalyzer was tested, inspected and found to be operating properly was not critical. The court also rejected the defense expert's testimony that use of the simulator solution up to 50 times, as a testing standard, could lead to an error in the testing results.

3. Involuntary Intoxication

State v. Hammond, 118 *N.J.* 306 (1990), held motor vehicle violations are not offenses under the Code of Criminal Justice, and hence the Code's provisions, including the involuntary intoxication defense, do not

apply to a defendant charged with operating a motor vehicle under the influence of intoxicating liquor in violation of Title 39. Therefore, a defendant can not avail himself of the affirmative defense under the Code of involuntary intoxication. The Legislature has thus made it clear that once drivers become intoxicated and operate a motor vehicle, it does not matter how they became intoxicated or whether they realized they were intoxicated or believed they could overcome the effects of intoxication. The violation is the doing, not the knowing. The critical factor in the offense is objective, not subjective.

4. Entrapment

State v. Fogarty, 128 *N.J.* 59 (1992), rejected defendant's argument of entrapment and quasientrapment, and affirmed his DWI conviction. Relying on *Hammond*, the court found that the defense of entrapment, a Code defense, was not available in a motor vehicle case. Nor was the defendant entitled to assert a defense of quasi-entrapment, on the grounds that but for the instruction of a police officer, the defendant would not have moved his vehicle. The duty rests on the operator not to drink and drive. Moreover, because such a defense relies in part or entirely on the defendant's subjective state of mind, the court deemed such a defense to be pretextual. DWI is an absolute liability offense requiring no culpable mental state.

5. Physician-Patient Privilege

In *State v. Schreiber*, 122 *N.J.* 579 (1991), the Supreme Court disallowed a defense based on the physician-patient privilege (*N.J.S.A.* 2A:84A-22.2) on the grounds that a DWI offense is not a crime or disorderly persons offense and therefore the privilege did not apply. The defendant's hospital blood test results secured through a subpoena *duces tecum* issued by the trial court was enforceable and the blood test results were admissible. The fact that the defendant's physician took it upon himself to voluntarily contact the police to advise them of the defendant's blood test results was not sufficient to warrant a suppression of the blood test results. The police, relying on the unsolicited tip, secured a subpoena *duces tecum* for the blood test results.

6. Expert Testimony to Rebut Breath Test Results

In *State v. Manfredi*, 242 *N.J. Super.* 708 (Law Div. 1990), the trial court disallowed expert testimony from a physician for the purpose of attempting to contradict otherwise reliable breath test results. The defense sought

to use a physician for the purpose of testifying as to the defendant's state of intoxication based upon the physician's observation of the in-station video tape. The trial court held that there is a clear legislative intent and a strong legislative policy to discourage long trials complicated by pretextual defenses, and found that expert testimony regarding observations of defendant's videotaped behavior is inadmissible for the purpose of contradicting the results of an otherwise reliable Breathalyzer test. Defendant's collateral attack on the Breathalyzer constitutes nothing more than the type of pretextual tendentious defense that the legislature sought to discourage by its enactment of a statute based upon objective measurements of intoxication.

N. Sentencing

State v. Rama, 298 *N.J. Super.* 339 (App. Div. 1998), *aff'd* 153 *N.J.* 339 (1997), held that *N.J.S.A.* 2C:20-2.1a mandates the imposition of a monetary penalty and suspension of a defendant's driving privileges upon conviction for automobile theft.

1. Prior Offenses

Nichols v. U.S., 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), appears to have abrogated that portion of State v. Laurick, 120 N.J. 1 (1990), pertaining to sentencing a DWI offender that prior uncounselled DWI convictions do not count in applying the progressively enhanced penalties that second and third DWI offenders receive, since one of the underlying cases relied upon by the N.J. Supreme Court was overturned. But see, State v. Latona, 307 N.J. Super. 387 (App. Div. 1998), certif. denied, 154 N.J. 607 (1990), which reaffirmed the holding in Laurick, that prior uncounselled DWI convictions do not count in applying the progressively enhanced penalties that second and third DWI offenders receive.

State v. Lucci, 310 N.J. Super. 58 (App. Div. 1998), certif. denied 156 N.J. 386 (1998), reversed defendant's driving while intoxicated conviction but affirmed his conviction for refusal to take the Breathalyzer test, concluding that he was informed of the consequences of a refusal and that a "confusion" defense to this offense had no viability given his conduct on a videotape of his processing at the police station. Defendant's two year driver's license suspension for this conviction was illegal because N.J.S.A. 39:4-50.4a mandates a ten year suspension for this five-time DWI offender and the statute's "step down" provision did not apply to him. State v. Fielding, 290 N.J. Super. 191 (App. Div. 1996), reaffirmed that a prior DWI conviction, as well as a prior conviction for refusal to submit to a breath test, triggers the enhanced refusal penalty contained in *N.J.S.A.* 39:4-50.4a for a refusal "in connection to a subsequent offense." Consistent with the penalties for DWI contained in *N.J.S.A.* 39:4-50, and to avoid a benefit to a defendant for a refusal conviction rather than a DWI conviction, the present conviction was treated as a second offense for purposes of enhanced sentencing, despite the fact that defendant's two prior convictions occurred more than 10 years before the present charges.

State v. Nicolai, 287 *N.J. Super.* 528 (App. Div. 1996), on the State's appeal, reversed the Law Division's illegal sentence imposed upon a fourth-time drunk driver. The judiciary must enforce legislatively mandated sentences, and defendants cannot benefit from a prior illegal term even if the State did not appeal it. Reiterating that illegal sentences can be corrected at any time, the court held that defendants have no legitimate expectation of finality in a sentence below the statutory minimum. To the extent that the decision in *State v. Decher*, 196 *N.J. Super.* 157 (Law Div. 1984), differs from this holding, it is disapproved.

State v. Tekel, 281 N.J. Super. 502 (1995), ruled that a prior conviction for operating a motor vehicle while under the influence of intoxicating liquor in violation of N.J.S.A. 39:4-50 satisfies the language of "a subsequent offense under this section" contained in N.J.S.A. 39:4-50.4a, thereby mandating the imposition of the enhanced penalty of a two-year suspension. The Court rejected defendant's claim that only a conviction for a prior refusal to take a breath test in violation of N.J.S.A. 39:4-50.4a satisfies this statutory language.

2. License Suspension

In Re Raphael, 238 B.R. 69 (D.N.J. 1999), reversing 230 B.R. 657 (Bankr. D.N.J. 1999), where the Bankruptcy Court had directed New Jersey Municipal Courts to rescind any driver license suspensions resulting from non-payment of court-imposed fines. The District Court found that the municipal courts were akin to the State for the purposes of 11th Amendment immunity. The District Court further found that even if there was no 11th Amendment immunity, the Bankruptcy Court was barred from issuing such an order to a municipal court under the Anti-Injunction Act. The debtor had failed to comply with an installment order to pay traffic and parking fines and for failure to appear in another municipal court in response to a speeding summons. In re Brown, 244 B.R. 62 (Bankr. D.N.J. 2000), held that the Bankruptcy Code antidiscrimination provisions authorized the Bankruptcy Court to direct a New Jersey Municipal Court to rescind a court ordered license suspension based upon a driver's failure to pay fines through an installment plan. Contrary to In Re Raphael, 238 B.R. 69 (D.N.J. 1999), Judge Wizmur determined that the municipal courts of New Jersey were not an arm of the State for 11th Amendment purposes and, therefore, were not subject to sovereign immunity, and that an Order of the Bankruptcy Court to rescind a court ordered license suspension was not subject to the Anti-Injunction Act.

State v. Ferrier, 294 N.J. Super. 198 (App. Div. 1996), certif. denied 148 N.J. 461 (1997), held that defendant should have challenged any deficiencies regarding the suspension of her driver's license by appealing from that decision rather than trying to attack it collaterally as a defense to a charge of driving while her license was suspended. The court overruled State v. Kindler, 191 N.J. Super. 358 (Law Div. 1983) and State v. Wenof, 102 N.J. Super. 370 (Law Div. 1968).

State v. Tekel, 281 N.J. Super. 502 (App. Div. 1995), affirmed defendant's sentence as a subsequent offender, where he had a prior DWI conviction, followed thereafter by a refusal to submit to breath testing conviction. Unlike the holding in *State v. DiSomma*, 262 N.J. Super. 375 (App. Div. 1993), which analyzed the converse situation, a prior refusal conviction, followed by a DWI conviction, this appellate panel agreed with the holdings in In re Bergwall, 85 N.J. 382 (1981), rev'g on dissent, 173 N.J. Super. 431 (App. Div. 1980); State v. Wilhalme, 206 N.J. Super. 359 (App. Div. 1985), certif. denied, 104 N.J. 398 (1986); State v. Grant, 196 N.J. Super. 470 (App. Div. 1984), that a determination of what is a subsequent offense under N.J.S.A. 39:4-50 includes a conviction for refusal to submit to breath testing, N.J.S.A. 39:4-50.4a. Here, the court read the words, "under this section" to include both convictions for DWI and for refusal to submit to breath testing as within that phrase.

State v. Sandora, 272 N.J. Super. 206 (App. Div. 1994), held that defendant's operation of a vehicle, after a period of suspension but prior to the restoration of his driver's license, constituted a violation of N.J.S.A. 39:3-40, driving while on the suspended list. The court specifically disapproved and overruled State v. Somma, 215 N.J. Super. 142 (Law Div. 1986), which held to the contrary, choosing instead to follow the opinion of another panel of the Appellate Division in State v. Zalta, 217 N.J. Super. 209 (App. Div. 1987).

State v. DiSomma, 262 *N.J. Super.* 375 (App. Div. 1993), held that a conviction for refusal to submit to breath testing could not serve as a basis for imposing second offender status on the same defendant for a subsequent DWI conviction. The court also took the opportunity to criticize earlier holdings *in Wilhalme* and *Grant* pertaining to the converse of this case, that a prior DWI conviction could be a basis upon which to sentence the same defendant as a subsequent offender for a subsequent refusal conviction.

State v. Laurick, 120 N.J. 1 (1990), cert. denied 498 U.S. 967, 111 S.Ct. 429, 112 L.Ed.2d 413 (1990), affirmed, but modified the Appellate Division's decision concerning sentencing of a DWI defendant. The defendant claimed that his prior DWI conviction was an uncounseled conviction, and therefore, he should not be subject to enhanced sentencing for his subsequent DWI conviction. Relying on the holding in *Bladasar v. Illinois*, 446 U.S. 222, 100 S.Ct. 1535, 64 L.Ed.2d 169 (1980) (which was overruled by Nichols v. U.S.), the Court found that it was constitutionally permissible that a prior uncounseled DWI conviction may establish repeat offender status for the purposes of enhanced sentencing, but the defendant may not suffer the consequence of an increased period of incarceration, beyond that which was applicable at the time of the uncounseled DWI conviction. The Supreme Court also required that relief from the effects of a prior uncounseled DWI conviction are to be brought in the Court where the original conviction was entered, not the court in which the defendant is facing an enhanced sentence.

VII. FATALITIES & BODILY INJURIES CAUSED BY VEHICULAR OPERATION -CHARGING OFFENSES

In State v. Radziwil, 235 N.J. Super. 557 (App. Div. 1989), aff'd. o.b., 121 N.J. 527 (1990), defendant was convicted of aggravated manslaughter and death by auto. The State introduced evidence that the defendant regularly became intoxicated every weekend at a particular bar and that fact was admissible as evidence of habit (*Evid. R.* 49 & 50, now *N.J.R.E.* §406(a) & (b)) to prove intoxication at the time of the fatal accident. Aggravated manslaughter was supported by evidence from which the jury could infer that the defendant was highly intoxicated at the time of the fatal accident, was traveling at a high rate of speed, and fled the scene without attempting to render aid to the victims.

State v. Oriole, 243 N.J. Super. 688 (Law Div. 1990), a prosecution for vehicular homicide under N.J.S.A. 2C:11-5, or assault or aggravated assault by auto, N.J.S.A. 2C:12-1, held the State can introduce expert testimony to extrapolate a breath or blood alcohol reading back to the time of operation of the vehicle, since an element of the offense is recklessness, not intoxication. Thus, the level of intoxication at the time of operation of the vehicle becomes probative to the finder of fact, where in a DWI offense, the level of the breath or blood alcohol result only establishes a per se offense. The court also determined that the holding in *Tischio* did not preclude extrapolation in indictable offenses, or for that matter in the proofs of an observational DWI offense - operating while intoxicated as opposed to the per se offense of operating with a blood alcohol level of 0.10% or more.

State v. Mara, 253 *N.J. Super.* 204 (App. Div. 1992) and *State v. Scher*, 278 *N.J. Super.* 249 (App. Div. 1994), *certif. denied* 140 *N.J.* 276 (1994), both approved the holding in *Oriole*, permitting the admission of expert testimony to extrapolate a blood or breath test result to the time of operation of a motor vehicle for purposes other than proving a DWI offense. In *Scher*, defendant was convicted of reckless manslaughter, assault, assault by auto, DWI and other traffic offenses. The Appellate Division ruled that the reckless manslaughter statute was not vague as it applied to vehicular homicides cases.

State v. Pineda, 119 *N.J.* 621 (1990), ruled on the application of the sentencing provisions of *N.J.S.A.* 2C:11-5b, death by auto statute, and held that it was inappropriate for the trial court to impose a split sentence, when the statute required either imprisonment without parole or community service. The Supreme Court also ruled that the trial court could not consider the victim's death as an aggravating factor in imposing sentence for a conviction under the provisions of *N.J.S.A.* 2C:11-5.

State v. Kately, 270 N.J. Super. 356 (App. Div. 1994), relying on the holding in *State v. Radziwil*, 235 N.J. Super. 557 (App. Div. 1989), *aff'd o.b.*, 121 N.J. 527 (1990), concluded that evidence of regular drinking parties

attended by the defendant was properly admitted as evidence of habit under *Evid. R.* 49, now *N.J.R.E.* 401, and further found there was no prejudice by the introduction of this evidence.

State v. Kromphold, 162 *N.J.* 345 (2000), affirmed an Appellate Division opinion modifying the sentence of the defendant on the grounds that the trial court had erred

in allowing the jury to double count the evidence of the level of the defendant's state of intoxication (blood test results = 0.382%) as an aggravating factor in imposing sentence for aggravated assault. The court stated that since the defendant could have been tried and convicted for a DWI offense, based upon the blood test result, the presence of a high blood-alcohol level did not necessarily equate to reckless behavior that manifested an extreme indifference to the value of human life.

VIII. HITCHHIKING

State v. Trotwood, 143 N.J. Super. 518 (Law Div. 1976), aff'd 150 N.J. Super. 115 (App. Div. 1977), app. dism. 75 N.J. 592 (1977), upheld the constitutionality of the statute barring hitchhiking (N.J.S.A. 39:4-59). Defendant's right to travel is not absolute when balanced against the State's duty to promulgate measures directed toward the safe use of its highways. The hitchhiking statute is a proper legislative enactment directed to a matter of public concern, *i.e.*, traffic safety, within the domain of the police power. Furthermore, defendant's right to equal protection was not violated since (1) no class of people was discriminated against, and 2) there was no absolute ban on the right to travel because the statute only prohibited solicitation of rides "in the highway." The Appellate Division also noted that the statute neither vested unlimited discretionary powers in the police regarding the enforcement of its provisions nor prohibited the otherwise legal act of picking up hitchhikers on non-highways.

IX. IDENTIFICATION

According to *State v. Rondinone*, 300 *N.J. Super.* 495 (App. Div. 1997), where defendant presented a third party's drivers license at the scene of accident, the Law Division had duty to amend the complaint to correctly identify defendant with respect to the drunk driving charge and could include other charges of which he was convicted. Defendant's conviction for exhibiting another's drivers license merged with conviction for falsifying or tampering with records. The Appellate Division affirmed, holding that the DWI conviction was not reversible on statute of limitations grounds, even though the summons in defendant's name was not issued until more than 30 days after the infraction.

State v. Valentin, 105 *N.J.* 14 (1987), held that a defendant who gave a false name in response to an inquiry by a law enforcement officer did not "volunteer false information," within the meaning of *N.J.S.A.* 2C:29-3. This decision has effectively been superseded by the

enactment of an amendment to *N.J.S.A.* 2C:29-3a(7) and 2C:29-3b, which changed the language of the statute from "volunteering" false information to police, to "giving" false information to police.

X. JURISDICTION

State v. Ryfa, 315 N.J. Super. 376 (Law Div. 1998), affirmed both the municipal court's amendment of a driving while intoxicated complaint to set forth the correct town where the offense had occurred and its transfer to the proper municipal court. The municipal court was not bound only to dismiss the complaint, but had the broad power pursuant to *R*. 7:10-2, caselaw, and common sense to amend it to reflect the offense's undisputed locale and to transfer it to the correct municipality where that offense had taken place.

State v. Panther Valley Property Owners Assoc., 307 N.J. Super. 319 (App. Div. 1998), affirmed the trial court's grant of summary judgment, which had determined that a private property owners' association that cedes authority to the State to enforce the motor vehicle laws has no power to thereafter impose fines for violations of those laws. While the association originally had the authority to maintain and administer the community's common property, such as roads, by having the surrounding township assume jurisdiction over motor vehicle violations pursuant to N.J.S.A. 39:5A-1, the association gave up the ability to assess fines for such The county prosecutor had standing to violations. challenge the association's practice of fining violators because he was the chief law enforcement officer and had the power to enforce the motor vehicle laws within his jurisdiction.

State v. Garcia, 297 N.J. Super. 108 (Palmyra Mun. Ct. 1996), provides a comprehensive and detailed discussion, including the historical roots of the interstate compact, of the jurisdictional authority concerning bridges over the Delaware River. The case arose as a result of motor vehicle charges against Mr. Garcia for careless driving and leaving the scene of a motor vehicle accident which had occurred on a bridge over the Delaware River. Although the direct impact of the decision is limited to bridges under the control of the Burlington County Bridge Commission, and its precedential value may be limited, the opinion suggests that jurisdictional issues on other Delaware River crossings may be subject to resolution under the same analysis. The court concluded that it could exercise jurisdiction over careless driving and leaving scene of accident offenses which occurred on a bridge owned and operated by county bridge authority

over waters of Delaware River but not for offenses which occur over dry land of another state.

XI. MOPEDS

N.J.S.A. 39:4-14.3q requires any person operating a motorized bicycle to wear a protective helmet of a type approved by the director of DMV. Likewise, the amended statutes regarding the use and operation of bicycles, N.J.S.A. 39:4-10.1 to 39:4-10.4, 39:4-14.4a and 39:4-14.7a, require a person under 14 years of age to wear a properly fitted and fastened bicycle helmet which meets specified standards. The parent or guardian of a person who violates this statute is subject to a warning and fine if it is shown that the parent or guardian failed to exercise reasonable supervision or control over the bicycle operator. Similar requirements are imposed on persons under 14 years of age using a skateboard or roller skates, including in-line skates. N.J.S.A. 39:4-14.5 to 39:4-14.9.

XII. PARKING

A. Handicap Parking

A person who parks a motor vehicle in a zone or space specifically marked with an appropriate sign designating that zone or space for handicapped parking (*N.J.S.A.* 39:4-8.1), is subject to the following penalties: a fine of \$100 for the first offense and for subsequent offenses, a fine of at least \$100 and up to 90 days community service or both. *N.J.S.A.* 39:4-197.

Any eligible handicapped person may request a law enforcement officer to arrange for the removal and storage of a motor vehicle which is parked unlawfully in a parking space or zone which is restricted for use by a handicapped person. *N.J.S.A.* 39:4-207.7. *See, N.J.S.A.* 39:4-204 *et seq.* for definitions of handicapped persons and eligibility.

N.J.S.A. 39:4-197.9 *et seq.*, was adopted to permit municipal governments to establish a "handicapped parking enforcement unit," to specifically enforce the provisions of *N.J.S.A.* 39:4-197.5 which allows for the designation of parking spaces for the exclusive use to park motor vehicles of handicapped persons, whose vehicle display either a handicapped license plate or identification card issued by DMV or an equivalent entity in another jurisdiction.

XIII. SPEEDING

A. Observational Offense

A speeding violation under *N.J.S.A.* 39:4-98 can be proved without the use of radar or other speed measuring instruments. An individual can express an opinion about the speed at which a vehicle is operating. *Baus v. Trenton* & *Mercer Traction Corp.*, 102 *N.J.L.* 1 (Sup. Ct. 1925), *aff'd* 102 *N.J.L.* 712 (E&A 1926). Individuals can express an opinion about the speed of a vehicle based upon its sound without having seen it. *Pierson v. Frederickson*, 102 *N.J. Super.* 156, 162 (App. Div. 1968). Moreover, proof of the exact speed at which a vehicle is operating is not an essential element of the proofs of the offense. *State v. Bookbinder*, 82 *N.J. Super.* 179, 183 (App. Div. 1963), *aff'g* 76 *N.J. Super.* 443 (Cty. Ct. 1962). *See also, State v. Padavano,* 81 *N.J. Super.* 321, 326 (App. Div. 1963).

B. Statutory construction

State v. Green, 327 N.J. Super. 334 (App. Div. 2000), reversed defendant's conviction for speeding in a school zone. While defendant was driving 51 miles per hour in a 25 mile per hour school zone near 1:00 p.m. across from an elementary school, fatal to the State's case was a lack of evidence that school was actually in session and, if so, that it was recess and children were visible from the road, or that children were going to or leaving school during its opening or closing hours. Adopting its holding in State v. Beierle, 325 N.J. Super. 395 (App. Div. 1999), certif. denied 165 N.J. 132 (2000), that N.J.S.A. 39:4-98a establishes a school zone speed limit only under such circumstances, the court concluded that the State in this case had not proven that the 25 mile per hour speed zone applied to defendant. Beierle reversed defendant's conviction for speeding in a school zone "when children are present." Children were playing on fields on school grounds between 7:00 and 8:00 p.m., and were clearly visible from the roadway defendant traveled. However, the lower speed limit defendant was found to have exceeded only had force during school recess when children were visible from the roadway or when they were going to or leaving school in the morning and afternoon. Thus, it was not in force at the time defendant drove his vehicle.

In State v. Van Syoc, 235 N.J. Super. 463 (Law Div. 1989), aff'd 235 N.J. Super. 409 (App. Div. 1989), defendant on appeal claimed the speeding statute, N.J.S.A. 39:4-98, only specifies lawful speeds but does not proscribe exceeding the speed limit as unlawful

conduct. The Appellate Division summarily rejected the argument and relied on the holding of the trial court.

State v. Packin, 107 *N.J. Super.* 93 (App. Div. 1969), held the intent of the driver is not an element of proof of a speeding offense. The offense is a *per se* offense, which requires no intent on the part of the driver.

C. Radar

- 1. Stationary Doppler
- 2. Moving radar

In State v. Van Syoc, 235 N.J. Super. 463 (Law Div. 1989), aff'd 235 N.J. Super. 409 (App. Div. 1989), defendant challenged his moving radar speeding conviction on the grounds that the Trooper had not testified that the radar unit was in the manual position. However, defendant failed to raise this challenge in a timely manner, but waited until the State had rested its case. The court, noting that the holding in State v. Wojtkowiak, 170 N.J. Super. 44 (Law Div. 1979), rev'd. on other grounds 174 N.J. Super. 460 (App. Div. 1980), required the moving radar unit to be operated in the manual mode, concluded that defendant's failure to make a timely objection during the presentation of the State's evidence, particularly since the defendant was an experience trial attorney, was a tactical trial action which did not inure to the detriment of this defendant. The defendant's failure to object in a timely manner constituted a waiver of his right to later raise such an objection.

D. Laser/LIDAR

The Law Division issued two separate opinions, IMO Admissibility Speed Readings LTI Marksman 20-20 Laser Speed Detection System [Laser I], 314 N.J. Super. 211 (Law Div. 1996) and IMO Admissibility Speed Readings LTI Marksman 20-20 Laser Speed Detection System [Laser II], 314 N.J. Super. 233 (Law Div. 1998). In Laser I, the Law Division found that laser was generally accepted in the scientific community and that the training offered by the State Police in the use and operation of the LTI 20-20 Marksman was sufficient. However, in that opinion, the Court was not convinced of the accuracy and reliability of the instrument for law enforcement purposes. Following extensive field testing and a statistical analysis of the field test data, the State applied for a rehearing. On rehearing, the Court determined in Laser II that the LTI 20-20 Marksman Laser Speed Detection System was sufficiently reliable for use by law enforcement to enforce

the speeding laws, subject to limitation on the use of the instrument in inclement weather and at distances under 1,000 feet. For proofs at distances in excess of 1,000 feet the State would be compelled to produce appropriate expert testimony. The holding was affirmed by *State v. Abeskaron, et al.*, 326 *N.J. Super.* 110 (App. Div. 1999), *aff'd & certif. denied* 163 *N.J.* 394 (2000). Defendants entry of conditional guilty pleas, their motion for leave to appeal the trial court's ruling, and submission of particular transcripts as part of the record on appeal resolved any jurisdictional deficiency and procedural irregularities in the appeal.

XIV. TRAFFIC SIGNALS

All "Traffic Control Devices" in use in this State must conform to "the current standards prescribed by the *Manual of Uniform Traffic Control Devices for Streets and Highways*, as adopted by the Commission of Transportation. *N.J.S.A.* 39:4-8, 39:4-8.3, 39:4-120, 39:4-183.6, 39:4-183.27, 39:4-191.1 and 39:4-198. It is unlawful to drive a motor vehicle on public or private property for the purpose of avoiding a traffic control signal or sign. *N.J.S.A.* 39:4-66.2, P.L.1993, c.326, §1.

Motorists are required to obey the instructions of any official traffic control device, *N.J.S.A.* 39:4-81, including official traffic control devices at a public-private intersection. *N.J.S.A.* 39:4-120.9, P.L.1991, c.298, §5.

The placement of unauthorized traffic signs or signs which give the appearance they are official traffic control devices or sign are prohibited. *N.J.S.A.* 39:4-183.3.

In areas on a highway identified as highway construction or repair, through the use of a posted traffic control device or sign, the monetary penalties for violating the following provisions of Title 39 are doubled. *N.J.S.A.* 39:4-52; 4-57; 4-66.1; 4-71; 4-80; 4-81; 4-82; 4-82.1; 4-83; 4-84; 4-85; 4-86; 4-88; 4-89; 4-90; 4-90.1; 4-96; 4-97; 4-98; 4-99; 4-105; 4-1115; 4-119; 4-122; 4-123; 4-124; 4-125; 4-127; 4-129; 4-144; 5C-1 and *N.J.S.A.* 27:12B-18; 23-29; and 25A-21.

In *State v. Casalino*, 262 *N.J. Super.* 166 (App. Div. 1993), the Appellate Division confirmed that failing to observe a traffic signal was subject to the general penalty provisions of Title 39 at *N.J.S.A.* 39:4-203.

Cedar Grove Tp. v. Sheridan, 209 *N.J. Super.* 267 (App. Div. 1986), *certif. denied* 104 *N.J.* 464 (1986), upheld determinations by the Commissioner of Transportation concerning the type, location or operation of traffic control devices on State highways as a

matter of legislative discretion not requiring hearings nor findings of fact, provided the traffic control devices otherwise conform to the *Manual of Uniform Traffic Control Devices for Streets and Highways*.

XV. TRUCKS

In State v. Churchdale Leasing Inc., 115 N.J. 83 (1989), defendants had been charged and convicted of violations of N.J.S.A. 39:3-20b, operating constructor registered vehicles in excess of the maximum allowable registered weight of 70,000 pounds, and of N.J.S.A. 39:3-84b(4) operating a commercial motor vehicle with a gross vehicle weight in excess of 80,000 pounds, or of N.J.S.A. 39:3-84b(2), operating a commercial motor vehicle with an axle weight in excess of 34,000 pounds. The Appellate Division rejected defense claims that N.J.S.A. 39:3-20 was a revenue statute and therefore, defendants could avoid the excess weight violations under N.J.S.A. 39:3-84.3j. The Supreme Court affirmed the convictions for violation of N.J.S.A. 39:3-20, but reversed the convictions for the excess weight violations under N.J.S.A. 39:3-84b on the grounds that the principle against cumulative punishment prohibited penalizing the defendants with both violations based on the same set of facts, even though defendants had violated both statutes. The Supreme Court found that both the registration weight and excess weight provisions of the statute should be read as part of a comprehensive legislative scheme for regulating overweight motor vehicles. The Legislature designed a scheme to protect the State's road system from overweight vehicles regardless of the State in which the vehicle is registered. Even though defendant violated both statutes, in the absence of a clear legislative statement that such punishment was intended, imposition of fines for both would constitute double punishment and could not be permitted.

In State v. Pestana, 303 N.J. Super. 146 (App. Div. 1997), the Appellate Division narrowly construed the provisions of N.J.S.A. 39:3-20b concerning the maximum allowable speed for commercial motor vehicles restricted as "constructor" vehicles. "Constructor" registered vehicles are allowed to register for a gross weight up to 70,000 pounds. In addition, these vehicles are also permitted, under N.J.S.A. 39:3-84.1, to operate with axle weights in excess of that permitted to other commercial motor vehicles. See, N.J.S.A. 39:3-84b(1), -84b(2) and -84b(3). However, a provision within N.J.S.A. 39:3-20b, limits the maximum allowable speed of "constructor" vehicles to 30 mph, when the vehicle is operating with axle weights in excess of that ordinarily permitted. Thus, a "constructor" registered vehicle operating with excess axle weights at a speed in excess of 30 mph is subject to a speeding violation under *N.J.S.A.* 39:4-98. Speeding convictions are affirmed if the requisite proof of speeding is presented. The Court in *Pestana* also reviewed *N.J.S.A.* 39:3-84.3f, the "5% grace allowance," and reversed the trial court's finding that the "5% grace allowance" did not apply to the registration weight limits of *N.J.S.A.* 39:3-20. *See also, State v. Lemar Inc.*, 151 *N.J. Super.* 60 (App. Div. 1977).

In State v. Wallach, 296 N.J. Super. 93 (Law Div. 1996), defendant was charged and convicted of operating overweight vehicles on an intrastate bridge, contrary to N.J.S.A. 39:4-75. The Law Division rejected defendant's claim that the posting of maximum weight limitation signs does not require approval of the Commissioner of Transportation. The court found that the determination to limit weight on county owned bridges was not governed by the provisions of N.J.S.A. 39:4-8 or 39:4-202. Note, however, that an amendment to N.J.S.A. 39:4-75, adopted subsequent to this case, requires the posting of signs for intrastate bridge weight limits.

In State v. Genesis Leasing Corp., 197 N.J. Super. 284 (App. Div. 1987), operators of solid waste vehicles registered in another State sought to claim the benefits of an exemption from axle weight limits for solid waste vehicles registered in New Jersey. N.J.S.A. 39:3-20c and 39:3-84.1a. The Appellate Division rejected the claim, noting that the vehicles could have received dual registration in their home State and in New Jersey, but not dual title, and therefore, would have been eligible to operate under the exemption. Relying on the holdings in State v. E.H. Miller Trans. Co. Inc., 74 N.J. Super. 474 (App. Div. 1962), certif. denied 38 N.J. 306 (1962) and State v. Gratale Bros., 26 N.J. Super. 581, (App. Div. 1953), that the purpose of the weight limitations is to protect the highways from damage from overweight vehicles, the Court concluded that it is inconceivable that the Legislature would draw a classification in favor of foreign over domestic truckers.

In *State v. Stratis Commercial Corp.*, 165 *N.J. Super.* 158 (App. Div. 1979), a challenge to the jursidictional and statutory authority of the Bergen County Police to stop and subject trucks to weight enforcement, the Appellate Division confirmed that County Police officers could, in fact, perform these functions. The defense had claimed that only State Police officers were empowered to stop and weigh trucks. The court disagreed, relying on its earlier holding in *State v. Horn*, 117 *N.J. Super.* 72 (Cty. Ct. 1971), *aff'd. as mod.* 120 *N.J. Super.* 203 (App. Div. 1972), that with reference to the question of the authority of county police to enforce load, *i.e.*, weight, restrictions on county bridges, it would be incongruous to hold that county policemen are without power to compel adherence to load restrictions on public highways in this State. 165 *N.J. Super.* at 181. The court found that the provisions of *N.J.S.A.* 40A:14-107 are to be read in *pari materia* with those at *N.J.S.A.* 39:3-84.3.

State v. Youngstown Cartage Co., 105 N.J. Super. 223 (Law Div. 1969), held that the provisions of N.J.S.A. 39:3-20, regarding registration weight limits for vehicles registered in New Jersey, were inapplicable to a vehicle registered in another jurisdiction. It is not the function of law enforcement officers in New Jersey to enforce the registration weight limitations of a sister jurisdiction.

A. Commercial Driver License Act

The New Jersey Commercial Driver License Act [CDL Act], N.J.S.A. 39:3-10.9 et seq. became effective and operative on November 9, 1990. The essential elements of the CDL Act include: a requirement that all operators of commercial motor vehicles must have a CDL endorsement on their driver's license in order to drive and operate a commercial motor vehicle (N.J.S.A. 39:3-10.18 and -10.19); the term commercial motor vehicle is defined to mean vehicles with a gross vehicle weight rating [GVWR] of 26,001 pounds or more, including a power unit and any trailers, a vehicle transporting passengers for hire, if the vehicle can carry, including the driver, 8 or more persons, any vehicle with a capacity, including the driver, of 16 or more people (N.J.S.A. 39:3-10.11); and every commercial motor vehicle subject to the CDL Act must display the vehicle's GVWR on the vehicle (N.J.S.A. 39:4-46b).

In addition, the CDL Act contains new and specific violations and penalties. No person can operate a commercial motor vehicle subject to the CDL Act with an alcohol concentration of 0.04% or more. N.J.S.A. 39:3-Operators of commercial motor vehicles are 10.13. subject to an implied consent statute requiring submission to chemical breath testing and a refusal to submit to breath testing will subject the operator to penalties. N.J.S.A. 39:3-10.24. In addition to any other penalties which may be provided by law, the CDL endorsement of an operator who was operating a commercial motor vehicle can be suspended, for a first offense for up to 3 years, and for a second or subsequent violation the CDL endorsement can be revoked for life, for a DWI, CDL/DWI, or refusal, leaving the scene of an accident, commission of a crime, operating a commercial motor vehicle while the operator's CDL endorsement is suspended or revoked. N.J.S.A. 39:3-10.20a. If the commercial motor vehicle was transporting hazardous materials, the suspension is mandated to be 3 years. N.J.S.A. 39:3-10.20b. If the commercial motor vehicle was used in the commission of a crime involving the manufacture, distribution or dispensing of CDS or CDS analogs, the CDL endorsement is revoked for life. *N.J.S.A.* 39:3-10.20e. Finally, a CDL endorsement must be suspended for 60 days, for a second offense, and for 120 days for a third or subsequent offense, if the conviction is for a "serious traffic violation" (as defined at N.J.S.A. 39:3-10.11). N.J.S.A. 39:3-10.20f. "Serious traffic violations" include: excessive speeding at 15 mph or more above the speed limit; reckless driving; improper or erratic lane changes; following a vehicle too closely; a violation arising from a fatal motor vehicle accident or traffic control; or other violation relating to traffic control as determined by the Secretary of Transportation at 49 C.F.R. §383.5.

State v. Parkins, 263 N.J. Super. 423 (Law Div. 1993), held that the municipal court, as the trial court, had abused its discretion to amend a traffic summons to charge the driver of a commercial motor vehicle with a CDL learners permit, for operating a commercial motor vehicle in the absence of a valid CDL operator. The Law Division concurred that the operator had been in violation of N.J.S.A. 39:3-10.18, but the original summons only charged him with a violation of N.J.S.A. 39:3-10, being an unlicensed driver. The Law Division concluded, that notwithstanding the provisions of R. 7:10-2 which permits the trial court to amend a traffic summons, the amendment in this case charged a new and completely different offense to that which had been originally charged, and the new offense was not a lesser included offense to the original. Rather the new offense carried a more severe penalty.

XVI. PLEA BARGAINING

The Supreme Court adopted Part VII, a new set of Comprehensive Rules for Courts of Limited Jurisdiction (Municipal Courts) on February 1, 1998. Appendix to Part VII entitled "Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey" contains Guideline 4. Limitations. The Supreme Court has directed that "No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses." Those offenses are: Driving while under the influence of liquor or drugs (*N.J.S.A.* 39:4-50) and refusal to provide a breath sample (*N.J.S.A.* 39:4-50.2); Possession of marijuana or hashish (*N.J.S.A.* 2C:35-10a(4)); being under the influence of a controlled dangerous substance or its analog (*N.J.S.A.* 2C:35-10b); and use, possession or intent to use or possess drug paraphernalia, etc. (*N.J.S.A.* 2C:36-2).

The Comments to the Comprehensive Revision and Guidelines state:

Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter. It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done and truth is revealed in each individual case. The goal should be to achieve individual justice in individual cases.

In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.

State v. Hessen, 145 N.J. 441 (1996), ruled that the prohibition against plea bargaining in municipal court drunk-driving cases includes the offense of allowing or permitting an intoxicated person to drive one's car. The Court rejected the argument that a plea bargaining ban in N.J.S.A. 39:4-50 cases violated the constitutional separation of powers and infringed on the powers of the municipal prosecutor to dispose of cases. Rather, the Court believed the imposition of a ban on plea bargaining in drinking and driving cases is intended to support the policy decisions of the legislature and executive branches in their commitment to eradicate drunk driving.

State v. Marsh, 290 *N.J. Super.* 663 (App. Div. 1996), upheld the trial court's determination to refuse to enforce an "agreement" between defendant and an Ocean Township police detective which called for the dismissal of the DWI summons if defendant cooperated in an unrelated drug investigation. Defendant satisfied his end of the bargain and moved to dismiss the summons. Both the municipal court and the Law Division denied the motion, concluding the agreement was illegal because the detective had no authority to make such a promise and the agreement violated the Supreme Court guidelines on plea bargains in municipal court cases

which state that no plea agreements whatsoever are permitted in drunk driving offenses in municipal court.

OBSCENITY

(See also, ENDANGERING THE WELFARE OF CHILDREN, this Digest)

I. CONSTITUTIONAL BASIS

Obscene materials are not protected by the First Amendment or the New Jersey Constitution. *Roth v. United State*, 354 *U.S.* 476, 77 *S.Ct.* 1304, 1 *L.Ed.*2d 1498 (1957); *State v. Muldoweny*, 60 *N.J.* 594 (1972); *State v. De Piano*, 150 *N.J. Super.* 309 (App. Div. 1977). *See also City of Renton v. Playtime Theaters, Inc.*, 475 *U.S.* 41, 106 *S.Ct.* 925, 89 *L.Ed.*2d 29 (1986) (city zoning ordinance prohibiting adult theaters was not violative of First Amendment).

The definitions of obscene materials under the Code (*see N.J.S.A.* 2C:34-2, 2C:34-3 and 2C:34-6) appear to be neither overbroad nor vague; the definitions track the obscenity guidelines set forth by the United States Supreme Court in *Miller v. California*, 413 *U.S.* 15 93 *S.Ct.* 2607, 37 *L.Ed.*2d 419 (1973); *State v. DeSantis*, 65 *N.J.* 462 (1974); *State v. Blecker*, 155 *N.J. Super.* 93 (App. Div. 1977); *see also J-R Distributors, Inc. v. Eikenberry*, 472 *U.S.* 491, 105 *S.Ct.* 2794, 86 *L.Ed.* 394 (1985).

For a discussion of vagueness, as applied to a determination of whether an ordinance which prohibited obscenity or lewdness was unconstitutionally vague, *see Belmar v. Buckley*, 187 *N.J. Super.* 107 (App. Div. 1982), and *Expo Inc. v. City of Passaic*, 149 *N.J. Super.* 416 (Law Div. 1977). *See also Brockett v. Spokane Arcades. Inc, et al.*, 472 *U.S.* 491, 105 *S.Ct.* 2794, 86 *L.Ed.*2d 394 (1985) (applying normal rule that use of overbroad term in state obscenity statute, *i.e.,* "lust", only required partial, rather than facial, invalidation since the term can be severed and excised from otherwise valid statute).

The third prong of the obscenity test set forth in *Miller v. California*, 413 *U.S.* 15, 93 *S.Ct.* 2607, 37 *L.Ed.*2d 419 (1973), is whether a work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law. For a discussion of this, *see Pope v. Illinois*, 481 U.S. 497, 107 *S.Ct.* 1918, 95 *L.Ed.*2d 439 (1987). *See also State v. Meyer*, 212 *N.J. Super.* 1 (App. Div. 1986).

New York v. P.J. Video, Inc., 475 *U.S.* 868, 106 *S.Ct.* 1610, 89 *L.Ed.*2d 871 (1986) (search warrant for seizure of allegedly obscene books and films presumptively protected by the First Amendment evaluated under

standard of probable cause are used in other areas of Fourth Amendment law).

In re Grand Jury Subpoena: Subpoena Duces Tecum, 829 F.2d 1291 (4th Cir. 1987) (subpoena duces tecum, requiring production of videotapes depicting sexually explicit conduct by minors or adults which were presumptively protected by First Amendment, were "unreasonable and oppressive," since prior to issuing subpoenas government made no attempt to use the less drastic means of buying tapes for viewing by grand jury to examine them for obscenity; compliance with subpoenas would have required two distributors to peruse 2,000 tapes and 141 tapes, respectively).

II. STATUTORY BASIS

The statutory scheme relating to obscenity is set forth in *N.J.S.A.* 2C:34-2 to 2C:34-4 and 2C:34-6 to 2C:34-7. Another relevant statutory section is *N.J.S.A.* 2C:24-4b. (*See also,* ENDANGERING THE WELFARE OF CHILDREN, this Digest).

A. Obscenity for Persons Eighteen Years of Age or Older, *N.J.S.A.* 2C:34-2

This section prohibits the sale of "obscene material," as that term is defined in *N.J.S.A.* 2C:34-2a(1), to a person eighteen years of age or older. A person who merely sells tickets to a pornographic film to an adult is not guilty of selling "obscene material" under *N.J.S.A.* 2C:34-2. *State v. Foglia*, 182 *N.J. Super.* 12 (App. Div. 1981). The court based its decision on the fact that the tickets, in and of themselves, were not "obscene material." Thus, the sale of said tickets was not prohibited by *N.J.S.A.* 2C:34-2.

N.J.S.A. 2C:34-2 also allows a municipality to adopt a zoning ordinance which permits the sale of obscene materials to adults. Such sales shall be deemed legal.

Concerning municipal ordinances preempted by this section, *see State v. Meyer*, 212 *N.J. Super*. 1 (App. Div. 1986); *News Printing Co. v. Borough of Totowa*, 211 *N.J. Super*. 121 (Law Div. 1986). (*See also*, **FIRST AMENDMENT**, this Digest).

B. Obscenity for Persons under Eighteen Years of Age, *N.J.S.A.* 2C:34-3

This section prohibits the sale, distribution, rental or exhibition of "obscene materials," as that term is defined in *N.J.S.A* 2C:34-3a(1), to a person under eighteen years

of age. Additionally, the section prohibits one from admitting a person under eighteen years of age to a theater then exhibiting an "obscene film," as that term is defined in N.J.S.A. 2C:34-3a(2). The definition of "obscene materials" under N.J.S.A. 2C:34-3 is different from the definition of "obscene materials" provided in N.J.S.A. 2C:34-2. N.J.S.A. 2C:34-3, which seeks to protect *minors* from obscene materials, sets forth a definition of "obscene materials" which includes materials which might not be obscene under N.J.S.A. 2C:34-2 (which protects adults from the dissemination of obscene materials). However, a state, because of its strong and abiding interest in its youth, has the authority to limit the access to minors of materials which would be objectionable as to them, but would not be objectionable in its appeal to adults. Thus, as to some materials, sales to adults may be a constitutionally protected activity, while sales of the same materials to minors may be barred and punished. Ginsburg v. New York, 390 U.S. 629 (1968); Cinecom Theaters Midwest St. Inc. v. City of Fort Wayne, 473 F.2d 1297 (9th Cir. 1973); Trombetta v. Atlantic City, 181 N.J. Super, 203 (Law Div. 1981); State v. Seigel, 139 N.J. Super. 373 (Law Div. 1976).

In order to be found guilty of committing one of the above offenses, the defendant must know that the material or film was obscene and that the person was under eighteen years of age. Where the material or film was in fact obscene and the person was under eighteen years of age, *N.J.S.A.* 2C:34-3d presumptively supplies the defendant with the requisite knowledge. Nevertheless, the statutory presumption does not relieve the State of its burden of proving the element of knowledge beyond a reasonable doubt and the jury is not required to follow the statutory presumption. *State v. Blecker*, 155 *N.J. Super.* 93, 101 (App. Div. 1978).

N.J.S.A. 2C:34-3e sets forth the affirmative defenses applicable to prosecutions under this section. It is a defense to promoting obscene material if the person under age eighteen falsely represented in or by writing that he was age eighteen or over, the person's appearance was such that an individual of ordinary prudence would believe him to be age eighteen or over; and the sale, distribution, rental, showing or exhibition to or admission of the person was made in good faith relying upon such written representation and appearance and in the reasonable belief that he was actually age eighteen or over. N.J.S.A. 2C:34-3e. Regarding admitting a person under eighteen to the exhibition of obscene film, it is an affirmative defense to this offense if the defendant is an employee in a motion picture theater who has no financial interest in that motion picture theater other than his wages and has no decision-making authority or responsibility with respect to the selection of the motion picture show which is exhibited. *N.J.S.A.* 2C:34-3e.

In 1988, two new provisions were adopted. *N.J.S.A.* 2C:34-3.1 defines "retailer" as per *N.J.S.A.* 2C:34-3, and *N.J.S.A.* 2C:34-3.2 permits municipalities to enact ordinances requiring covers on obscene material which might be viewed by people under eighteen.

C. Public Communications of Obscenity, *N.J.S.A* 2C:34-4

This section seeks to protect members of the public from being forced to see or hear obscene material which they may not wish to see or hear. *N.J.S.A.* 2C:34-4 does not ban the private display or communications of obscene materials. "Publicly communicate" means to display, post, exhibit, give away or vocalize material in such a way that its character and content may be readily and distinctly perceived by the public by normal unaided vision or hearing when viewing or hearing it in, on or from a public street, road, thoroughfare, recreation or shopping center or area, public transportation facility or vehicle used for public transportation.

The definition of "obscene materials" for the purpose of N.J.S.A. 2C:34-4 is the same definition provided in N.J.S.A. 2C:34-3. As noted above, N.J.S.A. 2C:34-3, which protects minors from the dissemination of obscene materials, sets forth a definition of "obscene materials" which encompasses materials which are not obscene in its appeal to adults. See N.J.S.A. 2C:34-2. The use of the broad definition of "obscene materials" for purposes of N.J.S.A. 2C:34-4 appears to be constitutionally sound because public dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposing juveniles to obscene materials. Miller v. California, 413 U.S. 15, 18-19, 93 S.Ct. 2607, 2612, 37 L.Ed.2d 419 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-59; 93 S.Ct. 2628, 2634-36, 37 L.Ed.2d 446 (1973).

D. Sexually Oriented Business Locations, *N.J.S.A.* 2C:34-7

This section, which was enacted in 1995, provides for restrictions on the placement of sexually oriented businesses, the establishment of buffer zones and limitations on signage outside of such businesses. In *Hamilton Amusement Center v. Portiz*, 156 *N.J.* 254 (1998), the Court applied an intermediate level of scrutiny, and held that the limitation to two exterior signs, each no more than forty square feet, was not unconstitutionally vague. The court cited the government's interest in limiting negative secondary effects such as neighborhood deterioration and concentration of crime. *N.J.S.A.* 2C:34-7c; *Hamilton Amusement Center v. Verniero*, 156 *N.J.* at 268-76. *See also Saddle Brook v. A.B. Family Center*, 307 *N.J. Super.* 17 (App. Div. 1998) (1000 foot buffer around sexually oriented businesses may apply beyond the jurisdictional limits and multi-town zones may be created).

Also in 1995, the legislature enacted N.J.S.A. 2C:33-12.2, which prohibits certain commercial establishments from providing booths or similar enclosures which would facilitate sexual activity by customers. The legislative history indicates that the statute was enacted to stem the spread of sexually transmitted diseases. Chez Sez VIII, Inc. v. Poritz, 297 N.J. Super. 331, 339, certif. denied, 149 N.J. 409 (1997). The State was also concerned with mitigating other secondary negative effects caused by sexually oriented businesses, and intended "to improve traffic safety, to limit harm to minors, and to reduce prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts." Hamilton Amusement Center v. Verniero, 156 N.J. at 273. The provision was deemed not to violate the First Amendment nor be unconstitutionally vague in *Chez Sez* VIII, Inc. v. Poritz, supra.

OBSTRUCTION OF JUSTICE

(See also, ELUDING, ESCAPE, FLIGHT, HINDERING, RESISTING ARREST, CONTEMPT, this Digest)

Chapter 29 of the Code of Criminal Justice codifies the common law crimes relating to the obstruction of governmental operations. However, the wide sweep of the common law crime of obstruction of justice has been significantly narrowed in the Code. *State v. Kent*, 173 *N.J. Super.* 215, 222 (App. Div. 1980). It should be noted that in accordance with *N.J.S.A.* 2C:1-5, all common law crimes have been abolished.

A. Obstruction defined, N.J.S.A. 2C:29-1

A disorderly persons offense is committed when one purposely obstructs the administration of law or prevents or attempts to prevent a public servant from lawfully performing an official function. There must be affirmative interference with governmental functions. A violation of this provision is elevated to a crime of the fourth degree if the actor obstructs the detection or investigation of a crime or the prosecution of a person for a crime. (Source: N.J.S.A. 2A:99-1). Note that the provision was recently amended on April 28, 2000, by adding flight as a means whereby a person can prevent or attempt to prevent a public servant from lawfully performing an official function. Before the amendment, the provision neither criminalized running from the police nor resisting one's own arrest. See State v. Henry, 323 N.J. Super. 157 (App. Div. 1999); State v. Garrison, 230 N.J. Super. 609 (App. Div. 1989).

In *State v. Doss*, 254 *N.J. Super.* 122 (App. Div.), *certif. denied*, 130 *N.J.* 17 (1992), defendant fled when informed that the police were approaching in an unmarked cruiser. The police pursued him into an alley, at which time a foot chase ensued. During the pursuit, defendant ignored an officer's repeated order to stop. Defendant was ultimately apprehended and found to be in possession of drugs. The Appellate Division affirmed the trial court's denial of defendant's motion to suppress based on its conclusion that by refusing to comply with the policemen's order to halt for the purpose of an investigatory detention, defendant had violated *N.J.S.A.* 2C:29-1 in the presence of the officers, thus entitling them to arrest him and conduct a search incident to the arrest.

In *State v. Wanczyk,* 201 *N.J. Super.* 258 (App. Div. 1985), police officers stopped a vehicle in which

defendant was a passenger on the suspicion that the occupants of the vehicle had been involved in an arson incident. Observing a bulge in defendant's pocket, an officer began a pat-down search but defendant became extremely abusive, cursing and moving his arms about in an irate manner. It became virtually impossible to continue the pat-down search as defendant began striking and spitting at the officers. Accordingly, the officers placed him under arrest for obstruction of justice. The Appellate Division held that defendant's actions impaired the officers' efforts to perform their official function, and reversed a trial court ruling that the arrest was pretextual.

In State v. Perlstein, 206 N.J. Super. 246 (App. Div. 1985), a police officer saw defendant driving in a car with a PBA door decal on her windshield just above the inspection sticker. After the officer advised her to remove the sticker, defendant became uncooperative, refused to remove it, refused to produce her license, registration or insurance card and attempted to start the car with the officer in the doorway. She then refused to get out of the car. After arrest she was taken to police headquarters where she initially refused to give any arrest information but finally cooperated. Affirming her conviction for obstruction, the court held that she purposely engaged in independently unlawful acts when she refused to show her driving credentials and when she attempted to move her car contrary to the officer's directions. The court rejected defendant's contention that she fit within exceptions provided in the statute, since a stop for a motor vehicle violation does not necessarily constitute an arrest and she was not arrested until she attempted to leave the scene. She was not engaged in "flight by a person charged with a crime," since the offense was only quasi-criminal in nature. Her failure to show her driving credentials was not a failure "to perform a legal duty" but an independent unlawful act.

In *State v. Carminati*, 170 *N.J. Super.* 1 (App. Div. 1979), *certif. denied*, 82 *N.J.* 274 (1979), a pre-code case, an agreement to inform a sentencing judge of matters relevant to a defendant being sentenced, such as his character, contrition, prior good conduct and the like, was held lawful. Therefore, those who communicate such information, even for the purpose of influencing the judge to be lenient, cannot be regarded as acting to obstruct justice. When, as in this case, the agreement was not to advise the judge of some overlooked facet of a defendant's background, but rather, to secure the intercession of a political figure to persuade and corrupt the judge on matters extraneous to the merits of the

sentencing decision, a jury could properly find a conspiracy to obstruct justice.

In *State v. Kent,* 173 *N.J. Super.* 215 (App. Div. 1980), defendant, an attorney, was accused of placing, offering to place or assisting to place a child for purposes of adoption without proper authority. Among other offenses, he was charged with obstructing the administration of law under *N.J.S.A.* 2C:29-1. The facts alleged were that defendant induced persons involved in the placements to mislead the investigation and withhold "the true and complete facts." The Appellate Division found that these facts would constitute an obstruction of the administration of law "by means of any independently unlawful act" (*see N.J.S.A.* 2C:28-5a), and thus refused to dismiss the charges.

In State v. Berlow, 284 N.J. Super. 356 (Law Div. 1995), defendant, the proprietor of a rooming house, refused to allow the police to enter his residence despite their concern, later proved unfounded, that a shooting victim was located inside. Despite their request to enter the premises, the defendant repeatedly informed the police that he would not allow them inside without a search warrant. He then slammed the door shut and locked it. Based on the exigent circumstances that they believed existed, the police broke through the door. After searching unsuccessfully for the shooting victim, the police arrested defendant and charged him with obstruction. Although finding that defendant's conduct satisfied the elements of N.J.S.A. 2C:29-1a, the trial court concluded that because defendant was validly exercising his Fourth Amendment right to be free from unreasonable searches and seizures by preventing a warrantless entry into his premises, he could not be convicted of obstruction.

B. Compounding Defined, N.J.S.A. 2C:29-4

A person commits the crime of compounding if he accepts or agrees to accept, or confers or agrees to confer, any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense or from seeking prosecution of an offense. It is an affirmative defense to this provision that the pecuniary benefit did not exceed an amount which the actor reasonably believed to be due as restitution or indemnification for harm caused by the offense.

In *State v. Jardim*, 226 *N.J. Super*. 497 (Law Div. 1988), evidence presented to the Grand Jury disclosed that Jardim, using three intermediaries, paid large sums

of money to the mother of a 15-year-old girl whom Jardim had allegedly molested as an inducement to leave the state and not return for any grand jury or court proceedings. The trial court denied the motion of Jardim's associates to dismiss the charges of compounding based on their claim that they had not committed the underlying offense. Specifically, the trial court concluded that because the provision provides that one may compound a crime by conferring a pecuniary benefit upon the victim, the confederates were properly charged with compounding.

PERJURY AND FALSE SWEARING

I. PERJURY

A. Definition

A person who makes a false statement, which the person does not believe to be true, under oath in an official proceeding is guilty of perjury when the statement is material. *N.J.S.A.* 2C:28-1a; *State v. Anderson*, 127 *N.J.* 191, 198 (1992).

B. Materiality

A statement is material if it could have affected the outcome of the proceeding or the disposition of the matter, whether or not the statement is admissible under the rules of evidence. *N.J.S.A.* 2C:28-1b.

The materiality requirement may be satisfied by testimony that tends directly or circumstantially to prove an ultimate matter in issue, and also by testimony relating to a collateral matter which has the capacity to affect the weight of the evidence bearing on the ultimate issue, and thereby influence the tribunal. *State v. Winters*, 140 *N.J. Super.* 110, 118 (Law Div. 1976). False testimony bearing on credibility may be material. *Id.* at 118-19. "[T]he question is whether [the false] statement could have affected the prior jury's verdict." *Anderson*, 127 *N.J.* at 203. Materiality is assessed by considering the testimony at the time it was given. *Winters*, at 119.

1. Materiality, as an element of the offense, must be decided by the jury.

According to the statute, "[w]hether a falsification is material is a matter of law." *N.J.S.A.* 2C:28-1b. The New Jersey Supreme Court held in *State v. Anderson, supra,* that this statutory provision irreconcilably conflicted with the constitutional right of an accused to have a jury determine every element of the crime charged. 127 *N.J.* at 194. Some three years later the United States Supreme Court reached the same conclusion in *United States v. Gaudin,* 515 *U.S.* 506 (1995).

2. The right to a jury finding is not retroactive.

The New Jersey Supreme Court in *State v. Purnell*, 161 *N.J.* 44 (1999), reversed the decision of the Appellate Division, which had overruled the trial court and granted post-conviction relief on the ground that materiality was not found by the jury at defendant's trial. The Court held that the failure to submit the element of materiality to the jury, a "procedural defect ... that was changed after more than a century and a half does not represent the kind of bedrock procedural element that should be retroactively applied." 161 *N.J.* at 64.

C. Irregularities

It is no defense to a perjury prosecution that the oath or affirmation was taken or administered in an irregular manner. A document presented as being made upon oath or affirmation shall be deemed to have been duly sworn or affirmed. *N.J.S.A.* 2C:28-1c.

In a prosecution under 18 *U.S.C.* § 1623 (1970), proscribing knowingly making any false material declaration under oath in any proceedings before or ancillary to any court or Grand Jury in the United States, a defendant was convicted for making inconsistent statements at his guilty plea and in an affidavit for the purpose of withdrawing his plea. *United States v. Stassi*, 443 *F. Supp.* 661, 664 (D.N.J. 1977).

D. Retraction

Retraction of the falsification in the course of the proceeding or matter in which it was made prior to the termination of the proceeding or matter without having caused irreparable harm to any party is an affirmative defense to perjury. *N.J.S.A.* 2C:28-1d.

In *State in the Interest of J.S.*, 273 *N.J. Super.* 450 (Ch. Div. 1994), the defendant attempted to retract false statements implicating others in a burglary after he had pleaded guilty but prior to sentencing. The court concluded that the attempted retraction was made within the same "matter," and the same "proceeding," as it occurred prior to disposition. 273 *N.J. Super.* at 461. Presumably this holding would not apply where the defendant has exercised his right to a jury trial, and retracts the false testimony after the verdict, but, assuming he was convicted, before any sentencing.

E. Corroboration

No person shall be convicted of perjury where the proof of falsity rests solely on the testimony of a single person other than the defendant. *N.J.S.A.* 2C:28-1e.

The requirement, firmly embedded in our law, of corroboration in perjury cases is an exception to the rule of most cases that one witness' testimony suffices, and has been criticized by courts and commentators. *State v.*

Williams, 122 *N.J. Super.* 377, 379 (App. Div. 1973) (citing examples).

The rule requiring corroboration of the testimony of a single witness in perjury prosecutions does not apply to a prosecution for attempted subornation of perjury. *Williams*, 122 *N.J. Super.* at 381.

F. Immunity Withheld from Perjury Prosecution (See also, IMMUNITY, this Digest)

N.J.S.A. 2A:81-17.3, the statute conferring immunity on persons invoking their privilege against self-incrimination, and *N.J.S.A.* 2A:81-17.2a(2), the immunity statute applicable to public employees, do not exempt those who otherwise enjoy use and derivative-use immunity from prosecution for perjury.

G. Guilty Pleas and Perjury Prosecution

N.J.R.E. 410 prohibits the use of statements made in the course of plea proceedings when no guilty plea resulted or when the plea was later withdrawn. One of the two exceptions within the rule is "in a criminal proceeding for perjury, false statement, or other similar offense, if the statement was made by the defendant under oath, on the record, and in the presence of counsel." *N.J.R.E.* 410(2). In *State v. Rodriguez*, 280 *N.J. Super.* 590 (App. Div. 1995), the Appellate Division rejected the defendant's argument that the exception for the use of statements made in connection with a withdrawn guilty plea in perjury prosecutions would impermissibly chill his right to testify at trial. While a defendant has a constitutional right to testify, he does not have a right to commit perjury. *Id.*, at 594 (citing cases).

H. Warning Defense Witnesses About Perjury Prosecution

Although it is in some circumstances appropriate for the trial court to warn a witness of the dangers of perjury, the court errs when it crosses the line from encouraging the witness to testify truthfully to discouraging the witness from testifying at all. In *State v. Vassos*, 237 *N.J. Super.* 585 (App. Div. 1990), the Appellate Division concluded that the trial court's interruption of a defense witness to warn him that his testimony could subject him to perjury prosecution, and striking his testimony when he subsequently refused to continue, violated the defendant's right to a fair trial.

II. FALSE SWEARING

A. Elements

N.J.S.A. 2C:28-2 proscribes two forms of false swearing:

1. the making of a false statement under oath or swearing the truth of a previous statement not believing the statement to be true, *N.J.S.A.* 2C:28-2a; and

2. the making of inconsistent statements under oath where one is false and not believed by the defendant. *N.J.S.A.* 2C:28-2c.

a. Under *N.J.S.A.* 2C:28-2c, it is not necessary for the prosecution to prove which statement was false, but only that one or the other was false and not believed by the defendant to be true.

N.J.S.A. 2C:28-1a and *N.J.S.A.* 2C:28-1c define separate offenses each of which requires jury unanimity. *State v. Bzura,* 261 *N.J. Super.* 602 (App. Div. 1993), *certif. denied,* 133 *N.J.* 443 (1993). Thus the indictment should clearly state which offense is being charged, and if both, each should be set forth in separate counts. *Id.* at 612. In a prosecution under 2C:28-1c, however, which authorizes conviction for false swearing of mutually inconsistent statements, it is not necessary that the jurors agree about which statement is true and which is false. *Id.* at 610.

B. Defenses

As in perjury prosecutions, irregularity in the oath is no defense, and retraction is an affirmative defense. *See* I.C. and I.D., *supra*.

C. Immunized Testimony and Prosecution for False Swearing (*See also,* **IMMUNITY**, this Digest)

N.J.S.A. 2A:81-17.3, the statute conferring immunity on persons invoking their privilege against self-incrimination, and *N.J.S.A.* 2A:81-17.2a2, the immunity statute applicable to public employees, do not exempt those who otherwise enjoy use and derivative-use immunity from prosecution for false swearing.

D. Guilty Pleas and Prosecution for False Swearing

Prosecutions for false swearing are an exception to the prohibition of *N.J.R.E.* 410 against the use of statements made in the course of plea proceedings when no guilty

plea resulted or when the plea was withdrawn. See I.G., supra.

E. False Swearing vs. Perjury; Grading of Each

Unlike perjury, a third-degree offense, false swearing, a fourth-degree offense, does not require that the false statement be made in an official proceeding, nor that the statement be material. *Compare N.J.S.A.* 2C:28-1a with *N.J.S.A.* 2C:28-2a. Moreover, there is no requirement of corroboration in a prosecution for false swearing as there is in a perjury prosecution. *See N.J.S.A.* 2C:28-1e.

POLICE

This topic summarizes New Jersey law concerning the areas of police duty, misconduct, liability and use of force, and the issue of selective enforcement. (*See also*, **MISCONDUCT IN OFFICE**, **DEFENSES**, **FOUR-TEENTH AMENDMENT**, this Digest).

I. DUTY TO ENFORCE THE LAW

A police officer's most basic duty is to enforce the law. *Canico v. Hurtado*, 144 *N.J.* 361, 365 (1996). The police are expected to use "all reasonable means" to enforce the law and catch perpetrators. *Id.; State v. Cohen,* 32 *N.J.* 1, 9 (1960). An off-duty plain clothes policeman, who is working as a security guard, has the duty to enforce the law and apprehend a perpetrator. *State v. Hinds*, 143 *N.J.* 540, 548 (1996).

A police officer has no discretion in enforcing the law. The officer must take whatever action is necessary in good faith and with reasonable diligence to bring criminals to justice. *State v. Secula*, 153 *N.J. Super.* 539 (App. Div. 1977). A police officer's duty to enforce the law also includes the duty to refrain from interfering with the enforcement of the law in another jurisdiction. *State v. Carminati*, 162 *N.J. Super.* 234, 245-46 (Law Div. 1978).

II. WILLFUL VIOLATION OF PRESCRIBED DUTY

Police officers, as public servants, are subject to the criminal code for the offense of official misconduct. N.J.S.A. 2C:30-2, replacing N.J.S.A. 2A:135-1 (neglect of duty) and N.J.S.A. 2A:85-1 (offenses indictable at common law). See State v. Hinds, 143 N.J. at 544-46; State v. Maioranna, 225 N.J. Super. 365, 368-69 (Law Div. 1988), aff'd and remanded, 240 N.J. Super. 352 (App. Div. 1990), certif. denied, 127 N.J. 327 (1991). Official misconduct is a second degree crime. N.J.S.A. 2C:30-2. If an officer is convicted of an offense "involving or touching" his or her employment, the officer is also subject to forfeiture of office. N.J.S.A. 2C:51-2; State v. Lazarchick, 314 N.J. Super. 500 (App. Div.) (police officer convicted of simple assault of a teen during a traffic violation warranted removal), certif. denied 157 (1998): State v. Pitman, 201 N.J. Super. 21 (App. Div. 1985) (correction officers who pled guilty to disorderly persons offenses related to moving an inmate warranted removal and bar of future offices); State v. Lore, 197 N.J. Super.

277, 288 (App. Div. 1984) (conviction for crime not required for forfeiture).

Generally, *N.J.S.A.* 2C:30-2 is designed to encompass wrongful and unlawful acts or failure to act. *State v. Hinds,* 143 *N.J.* at 545-46. The crime of official misconduct regarding a police officer's failure to act is limited to those circumstances in which "an officer refrains from performing a duty to 'obtain a benefit for himself or another or to injure or to deprive another of a benefit'." *Id.* at 549 (*quoting N.J.S.A.* 2C:30-2). Although the specific duties of police officers are not enumerated by statute, their duties are inherent or implicit. *State v. Hinds,* 143 *N.J.* at 546.

It is a basic tenant of law that police officers should not commit crimes, *see State v. Molnar*, 81 *N.J.* 475, 484 (1980); *State v. Peterkin*, 226 *N.J. Super.* 25, 37-38 (App. Div.), *certif. denied*, 114 *N.J.* 295 (1988), nor solicit others to commit crimes, *State v. Cohen*, 32 *N.J.* 1 (1960). Any less scrutiny would undermine public confidence "in the impartiality and fairness of the judicial process." *State v. Molnar*, 81 *N.J.* at 485; *see also State v. Gookins*, 135 *N.J.* 42, 49 (1994).

Police officers can commit official misconduct when off duty. See State v. Hinds, 143 N.J. at 540 (off duty police officer who shoplifted), State v. Bullock, 136 N.J. 149 (1994) (suspended officer who represented himself as a police officer while committing a crime); State v. Johnson, 127 N.J. 458 (1992) (off duty trooper wore uniform and faked drug arrest); Moore v. Youth Correctional Inst., 119 N.J. 256 (1990) (off duty correctional officer who trespassed on supervisor's property to harass); Sparkman v. City of Atlantic City, 237 N.J. Super. 623 (App. Div.), certif. denied, 121 N.J. 660 (1990) (police officer indicted for attending a party where cocaine and marijuana were present and officer failed to act).

Instances of police misconduct falling within a police officer's "color of office" include: police officer sold police identification cards, *State v. Rockholt*, 96 *N.J.* 570 (1984); police chief falsely swore to a State Grand Jury investigator, regarding acts of police corruption, *State v. Bielecki*, 196 *N.J. Super.* 332, 337 (App. Div.), *certif. denied* 99 *N.J.* 216 (1984); police chief offered immunity, without authority, to mayor's son, *State v. Secula*, 153 *N.J. Super.* 539; New York detective convicted in New Jersey of extortion, *State v. Barts*, 132 *N.J.L.* 74 (Sup. Ct. 1944), *aff'd* 132 *N.J.L.* 420 (E. & A. 1945), and police chief took bribe to influence DWI

municipal court proceeding, *State v. Dolton*, 146 *N.J. Super*. 111 (App. Div.), *certif. denied* 74 *N.J.* 252 (1977).

Police misconduct found in connection with investigations may have devastating effects on the underlying convictions. *See, e.g., State v. Gookins,* 135 *N.J.* 42 (police officer who falsified breathalyzer results and stole money from defendants warranted vacation of guilty pleas and convictions); *State v. Michaels,* 136 *N.J.* 299, 323 (1994) (taint hearing required to determine if investigative techniques used to illicit testimony from suspected child abuse victims were reliable); *State v. Wright,* 312 *N.J. Super.* 442, 452 (App. Div.), *certif. denied,* 156 *N.J.* 425 (1998) (failure to identify existence of confidential informant in police reports not warrant dismissal, but practice must cease).

Concerning the effect of lost evidence, see State v. Laganella, 144 N.J. Super. 268, 282-83 (App. Div.) (indictment can be dismissed if egregious carelessness or manifest and harmful prejudice to defendant where evidence is lost), appeal dismissed per motion, 74 N.J. 256 (1976); State v. Lewis, 137 N.J. Super. 167, 172 (Law Div. 1975) (several counts of indictment dismissed where police lost exculpatory evidence). See also State v. Casele, 198 N.J. Super. 462, 470 (App. Div. 1985) (Determining whether mistakenly destroyed evidence prejudiced defendant if "(1) whether the evidence was material to the issues of guilt or punishment, (2) whether defendant was prejudiced by its destruction, and (3) whether the government had acted in bad faith when it destroyed it.") and United States v. Picanello, 568 F.2d 222 (1st Cir. 1978) (setting forth two-prong test to evaluate materiality of lost evidence).

The remedy of dismissal of an indictment should be sparingly used. State v. Montijo, 320 N.J. Super. 483, 490 (Law Div. 1998). In State v. Sugar, 84 N.J. 1 (1980), the Court said that the conduct of officers who intentionally eavesdropped on two conversations between defendant and attorney did not require dismissal of a homicide prosecution. Id. at 22. The Court found that dismissal was not warranted where there was no disclosure of trial strategy and publicity may not have prejudiced witnesses. Id. To preserve fundamental fairness, the New Jersey Supreme Court warned that they would not hesitate to bar future prosecution based on intrusions into the attorney-client relationships. Id. at 26. The correct remedy was not dismissal, but the use of the exclusionary rule for tainted information. Ibid. The State bears the burden to show evidence at trial is free of taint. Id.; State v. Gookins, 135 N.J. at 51. See also State V. Montijo, 320 N.J. Super. at 490-93 (where

photographs and witness statements where lost, trial judge exercised discretion, evaluating totality of circumstances and determining if there was prejudice to defendant, and found no need to dismiss indictment or to suppress witness trial testimony); *State v. Peterkin*, 226 *N.J. Super.* 25 (discovery that officer failed to maintain photo identification arrays resulted in suppression of evidence from pre-trial photo identification and suppression of other tainted evidence).

III. CIVIL LIABILITY

When a police officer engages in misconduct, the officer, supervising officer and the municipality may be subject to civil liability. City of Oklahoma City v. Tuttle, 471 U.S. 808, 85 L.Ed. 2d 791, 105 S.Ct. 2427 (1985) (citing Monell v. Department of Soc. Serv., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978)); Schneider v. Simonini, 163 N.J. 336, 361 (2000), cert. denied, U.S. ____, 69 U.S.L.W. 3399 (2001) (adopting "recklessness or deliberate indifference" standard for supervisor liability); Wildoner v. Borough of Ramsey, 162 *N.J.* 375 (2000). The officer, supervisor and municipality may be subject to claims under 42 U.S.C.A. § 1983 ("Section 1983") and the New Jersey Tort Claims Schneider, 163 N.J. at 353; Act, N.J.S.A. 59:3-3. Wildoner, 162 N.J. at 385-87.

A police officer may be qualifiedly immune from Section 1983 liability if the officer can establish (1) the officer acted with probable cause, or (2) if no probable cause existed, "a reasonable police officer could have believed in its existence." *Kirk v. City of Newark*, 109 *N.J.* 173, 184 (1988), *quoted in, Schneider*, 163 *N.J.* at 355; *Wildoner*, 162 *N.J.* at 389; *Connor v. Powell*, 162 *N.J.* 397, 408-09, *cert. denied*, 120 *S.Ct.* 2220, 147 *L.Ed.*2d 251 (2000). "The same standard of objective reasonableness that applies in Section 1983 actions also governs questions of good faith arising under the Tort Claims Act." *Wildoner*, 162 *N.J.* at 387.

For a discussion on liability arising from a motor vehicle accident, *see Tice v. Cramer*, 133 *N.J.* 347 (1993). Here, the Supreme Court held that absent willful misconduct, a police officer is immune from injuries arising from the pursuit of a fleeing vehicle despite discretionary or ministerial negligence of the officer. This immunity also applies to injuries of third-party motorists when an officer responds to police calls. *See also Canico v. Hurtado*, 144 *N.J.* 361 (officer must establish "good faith" exception to immunity under Tort Claims Act, *N.J.S.A.* 59:3-3); *Fielder v. Stonack*, 141 *N.J.* 101 (1995).

For discussion on liability arising from false arrest, *see Connor v. Powell*, 162 *N.J.* 397. In *Connor*, an officer arrested plaintiff for aggravated assault and possession of a weapon, a plastic fork. Finding no probable cause to arrest defendant, the Supreme Court reversed a dismissal of a § 1983 action for false arrest, false accusation and false imprisonment. *See also Plummer v. Department of Corrections*, 305 *N.J. Super.* 365 (App. Div. 1997) (finding of immunity for detaining person as suspected inmate).

For a discussion on liability for failure to act, see Suarez v. Dosky, 171 N.J. Super. 1 (App. Div. 1979) (police liable for failure to escort stranded occupants at auto accident, where child and adult were struck and killed by passing vehicles), certif. denied, 82 N.J. 300 (1980). For failure to provide medical treatment, see Del Tuto v. Township of Old Bridge, 147 N.J. 90, 101 (1996) (the police have a reasonable duty of care to provide emergent medical assistance). It is plaintiff's burden to establish that the police were indifferent "to serious known medical needs." Id. The court found "common sense dictates that a police officer is not obligated to seek medical treatment for every arrestee involved in an automobile accident." Id. at 101. See also Battista v. Olson, 213 N.J. Super. 137 (App. Div. 1986) (officer's failure to provide prompt medical assistance despite knowing about defendant's perilous condition resulted in liability); Hake v. Manchester Township, 98 N.J. 302 (1985) (matter remanded for jury to consider if police's failure to provide prompt medical assistance to arrestee, who committed suicide, deprived the arrestee of a chance to be revived).

For a discussion concerning liability under Domestic Violence Act, *N.J.S.A.* 2C:25-22, *see Wildones,* 162 *N.J.* at 387-89 (claim of false arrest and imprisonment in a husband-wife domestic violence situation); *cf. Campbell*, *v. Campbell,* 294 *N.J. Super.* 18 (Law Div. 1996) (found liable for failure to make arrest under a domestic violence order).

State law only provides for the State to indemnify police officers and pay for counsel fees in civil suits, not criminal suits. *N.J.S.A.* 59:10-1 *et. seq; Chasin v. Montclair State University,* 159 *N.J.* 418, 463-64 (1999)(*citing Helduser v. Kimmelman,* 191 *N.J. Super.* 493 (App. Div. 1983)(discretion of Attorney General to defend criminal actions)); *Querques v. City of Jersey City,* 198 *N.J. Super.* 566 (App. Div.)(where officer acquitted of criminal charges not arising from or incidental to official duties, officer not entitled to statutory reimbursement by the city for his legal fees and expenses), *certif. denied*, 101 *N.J.* 242 (1985).

IV. THE USE OF FORCE

The United States Supreme Court addressed the topic of police use of deadly force in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed. 2d 1 (1985). Garner states that the use of deadly force to apprehend a suspect is a "seizure" under the Fourth Amendment and therefore requires a balancing test, assessing whether the totality of the circumstances justified the use of deadly force to seize the suspect. Tennessee v. Garner, 471 U.S. at 7-8, 105 S.Ct. at 1699. The use of deadly force to prevent escape of an unarmed criminal suspect is constitutionally unreasonable if the suspect poses no immediate threat to the officer or to others. Before using deadly force, the officer must have probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others and the use of deadly force must be necessary to prevent the escape, and state a warning if possible. 471 U.S. at 11-12, 105 S.Ct. at 1701. The use of deadly force is also permissible to prevent escape if the officer has "probable cause to believe that the suspect has committed a violent crime, involving the infliction or threatened infliction of serious physical harm." Id. Furthermore, deadly force cannot be justified solely to prevent the escape of an unarmed felon who poses no physical danger to himself or others, or solely on the basis that a felony, such as a nighttime burglary of a dwelling, has been committed. Id. at 21, 105 S.Ct. at 1706.

Police use of force in the performance of their duties is governed by *N.J.S.A.* 2C:3-7. Under the Code, deadly force is justified to prevent the escape of a criminal suspect if the officer makes known the purpose of the arrest, if feasible, and if the officer reasonably believes that such force creates "no substantial risk of injury to innocent persons"; the person is suspected of committing, attempting to commit or committed the crime of homicide, kidnaping, sexual assault, criminal sexual contact, aggravated sexual assault, aggravated criminal sexual contact, arson, robbery, burglary of a dwelling; and there is an imminent threat of deadly force to the officer or another. *N.J.S.A.* 2C:3-7.

In 1989, the United States Supreme Court examined the police use of excessive force in the course of arrest. *Graham v. O'Connor,* 490 *U.S.* 386, 109 *S.Ct.* 1865, 104 *L.Ed.* 2d 443 (1989). The use of excessive force is also analyzed under the Fourth Amendment as a "seizure." *Id.* at 393-94, 109 *S.Ct.* at 1870-71 (1989). The test is one of "objective reasonableness" in light of the totality of the circumstances and "without regard to their underlying intent or motivations." *Id.* at 396-97, 109 *S.Ct.* at 1871-72.

The totality of the circumstances includes "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396, 109 *S.Ct.* at 1871-72. *See generally, Abraham v. Raso,* 183 *F.* 3d 279 (3d Cir. 1999); *Groman v. Township of Manalapan,* 47 *F.* 3d 628 (3d Cir. 1995); *Hill v. Algor,* 85 *F. Supp.* 2d 391, 403 (D.N.J. 2000) (arrestee subject to Fourth Amendment protection up to pre-arraignment); *Ridgeway v. City of Woolwich Township Police Dept.,* 924 *F. Supp.* 653 (D.N.J. 1996); *cf. Clark v. Buchko,* 936 *F. Supp.* 212 (D.N.J. 1996) (accidental shooting not seizure under Fourth Amendment).

In June of 2000, the Attorney General issued a revision on the Use of Force policy in Directives to Police Enforcement. The Attorney General's policy directive places greater restrictions on police use of deadly force. The officer cannot use deadly force if the officer reasonably believes that an alternative exists to avert danger. The officer cannot use a firearm solely to disable a moving vehicle. The officer can only fire at a moving vehicle if there is an imminent danger of death or serious bodily injury, and it is the only means to eliminate the danger. The directive also sets up a protocol in an officer's show or unholstering of a firearm. The directive also sets forth a reporting requirement upon the use of deadly force or when an injury results from a discharge of a firearm.

V. SELECTIVE ENFORCEMENT

The evolving area of selective enforcement, also known as "racial profiling", against minorities regarding motor vehicle stops and arrests, was recently explored in *State v. Ballard*, 331*N.J. Super.* 529 (App. Div. 2000). A claim of selective enforcement is not a defense to a crime, but a separate claim that the enforcement is unconstitutional. Id.; *United States v. Armstrong*, 517 *U.S.* 456, 1165 S.Ct. 1480, 134 *L.Ed.* 2d 687 (1996). In order to prove pp. Div. 1991) (defendant showed colorable claim of selective enforcement that warranted pretrial discovery).

A. Special Officers

The appointment and powers of special officers are enumerated at N.J.S.A. 40A:14-146.8 to 146.18. Although an off-duty police officer can have part-time employment as a security guard, a special policeman employed as a security guard for a private security company cannot carry a firearm without a permit, or wear his special policeman's uniform and badge. In re Rawls, 197 N.J. Super. 78 (Law Div. 1984). See also, New Jersey State Police Ass'n v. Attorney General, 201 N.J. Super. 75 (App. Div. 1985) (except for special officers appointed by municipalities in excess of 300,000 in population, offduty special police officer cannot carry a handgun while working for a private employer without a permit). Campus police are not "state police" under N.J.S.A. 2C:39-6a and cannot while on duty carry firearms or night sticks without written permission of the college's governing body. PBA Local 278 N.J. State Campus Police v. Degnan, 175 N.J. Super. 102 (Ch. Div. 1980). See N.J.S.A. 2C:39-6(10) (law amended to allow campus police to carry weapons at all times with approval of college governing body).

B. Procedures in Police Disciplinary Hearings

There was no violation of the Open Public Meetings Act where an officer's disciplinary hearing was held in public and the governing body issued its decision to public, notwithstanding that the governing body deliberated and reached a decision in private. *Della Serra v. Borough of Mountainside*, 196 *N.J. Super.* 6 (App. Div. 1984). Evidence of an officer's past conduct cannot be used in a disciplinary proceeding to prove charges, absent a showing that the conduct was habitual. *In re Phillips*, *117 N.J. 567, 581 (1990).* However, an officer's prior conduct can be considered to determine the appropriate remedy. *In re Phillips, 117 N.J. at 581; In re Morrison*, 216 *N.J. Super.* 143, 160 (App. Div. 1987); *In re Wenderwicz*, 195 *N.J. Super.* 126 (App. Div. 1984).

Information received from a legal wire tap concerning an officer's use of lewd and offensive language cannot be disclosed to a police chief for use in a disciplinary proceeding against the police officer. *In re Spinelli*, 212 *N.J. Super.* 526 (Law Div. 1986). A police officer has a Fifth Amendment privilege to refuse to produce materials which he has compiled in the course of an investigation not authorized by his superiors and where he may be exposed to a criminal charge of official misconduct.

C. Creation of Police Departments

The powers of the chief of police are derived from municipal ordinances and regulations, not from state statutes. Falcone v. De Furia, 103 N.J. 219, 221 (1986). N.J.S.A. 40A:14-118 empowered municipal governing bodies to enact by ordinance "a line of authority for police" to appoint a police chief and others. In Falcone, the court determined that the designation of an officer "detective" fell within the appointment power of the local governing body, and not within the duty of assignments of the police chief. The court also recognized that N.J.S.A. 40A:14-118 was created "to avoid undue interference by a governing body into the operation of the police force." Id. at 222. See Reuter v. Borough Council, 328 N.J. Super. 547 (App. Div. 2000) (municipality which appointed police department positions by resolution contravened N.J.S.A. 40A:14-118 requirement to create by ordinance an "organizational chart" for police force); Policemen's Benev. Ass'n v. Township of North Brunswick, 318 N.J. Super. 544 (App. Div.) (N.J.S.A. 40A:14-118 provides municipality with ability to create by ordinance a police department headed by Police Director, not Police Chief), certif. denied, 161 N.J. 150 (1999).

D. Vehicular Pursuits

In September of 1999, the Attorney General issued a revised policy on Vehicular Pursuit in the Directives to Police Enforcement. The Attorney General's directive advances guidelines on how police departments should decide whether, when and how to pursue criminal offenders who flee in vehicles. The directive also sets forth guidelines on the use of tire deflation devices.

I. DEFINITION

The polygraph is a device that measures and records involuntary body responses to stress. These may include changes in blood pressure, pulse and respiration, as well as skin responses. Their interpretation may lead the examiner to conclude that the subject's answers to the questions posed by the examiner were truthful, untruthful or inconclusive. For the test to be at all acceptable, it must be conducted under carefully controlled circumstances and the examiner must be a person sufficiently trained and skilled in the interpretation of the test results. *State v. Community Distributors, Inc.* 64 *N.J.* 479, 482 (1974).

II. ADMISSIBILITY

Prior to 1972, polygraph evidence was absolutely inadmissible in a criminal case in the State of New Jersey regardless to whether or not the results were favorable to a defendant. See State v. Royster, 57 N.J. 472, 485-86, cert. denied, 404 U.S. 910, 92 S.Ct. 235, 30 L.Ed.2d 182 (1971); State v. Kavanaugh, 52 N.J. 7, 15 n.2, cert. denied, 393 U.S. 924, 89 S.Ct. 254, 21 L.Ed.2d 259 (1968); State v. Peetros, 45 N.J. 540, 546 (1965); State v. Driver, 38 N.J. 255, 261 (1962); State v. Walker, 37 N.J. 208, 216, cert. denied, 371 U.S. 850, 83 S.Ct. 89, 9 L.Ed. 2d 86 (1962); State v. Cole, 131 N.J. Super, 470, 471 (App. Div. 1974), certif. denied, 68 N.J. 135 (1975). Rejection was based on the failure of the procedure to attain scientific acceptance as a reliable and accurate means of ascertaining truth or deception. State v. Driver, 38 N.J. at 261. It was suggested that the results might be different upon a showing of a higher degree of recognition of the reliability of such scientific aids. State v. Walker, 37 *N.J.* at 215.

A necessary corollary to this exclusionary rule prohibits reference to the accused's refusal or offer to submit to a polygraph test. *State v. Clark*, 128 *N.J. Super*. 120, 126 (App. Div. 1974), *aff'd*, 66 *N.J.* 339 (1975); *State v. Driver*, 38 *N.J.* at 261; *State v. Peetros*, 45 *N.J.* at 545-46. *See State v. Marks*, 201 *N.J. Super.* 514 (App. Div. 1985). Similarly, direct or indirect inferences to the results of a polygraph test which implicate the accused are condemned, regardless of whether the test was administered to the defendant, an accomplice or a witness. *State v. Clark*, 126 *N.J. Super.* at 126; *State v. Parsons*, 83 *N.J. Super.* 430 (App. Div. 1964); *State v. Arnwine*, 67 *N.J. Super.* 483, 495 (App. Div. 1961). *See*

also State v. Melvin, 65 N.J. 1 (1974); State v. LaRocca, 81 N.J. Super. 40, 46-47 (App. Div. 1963). Such references are not only inadmissible but may also necessitate a reversal if they occur. State v. Driver, 38 N.J. at 262; State v. Clark, 128 N.J. Super. 120; State v. Arnwine, 67 N.J. Super. at 498-99; State v. Parsons, 83 N.J. Super. at 436. But see State v. Melvin, 65 N.J. 1 (after emphasizing that the Court's conclusion was confined to the peculiar factual context presented therein, in light of the overwhelming evidence of defendant's guilt, the Supreme Court held that defendant was not prejudiced by the inference that the result of the polygraph examination was unfavorable to him). But see, State v. Harvey, 151 N.J. 117, 205-06 (1997) (on specific facts of case, reference to an unindicted suspect's polygraph results did not constitute reversible error, when reference came in response to defendant's attack on the conduct of the police murder investigation, trial court immediately sustained the defendant's objection and instructed the jury to disregard the reference to the polygraph results, and any prejudice to defendant was minimal).

III. STIPULATION

A. General

In 1972, the Supreme Court relaxed the rule of total exclusion and carved out a very narrow exception whereby the results of a polygraph test may be introduced at a criminal trial, if, prior to the test, defendant and the prosecutor have entered into a proper stipulation, *i.e.*, judicial admission, to that effect. The Court reasoned that polygraph testing had been developed to such a point of reliability to warrant admission under these limited circumstances. State v. McDavitt, 62 N.J. 36 (1972); see State v. Reyes, 237 N.J. Super. 250 (App. Div. 1989)(only way to admit results of polygraph examination is for State and defendant to enter into stipulation; stipulation must, however, be clear, unequivocal and complete); State v. Capone, 215 N.J. Super 497 (App. Div. 1987)(without a stipulation, a polygraph examination is not admissible); State v. Christopher, 149 N.J. Super. 269 (App. Div. 1977).

B. Criteria

"It must appear that the stipulation is clear, unequivocal and complete, freely entered into with full knowledge of the right to refuse the test and the consequences involved in taking it." *State v. McDavitt*, 62 *N.J.* at 46. It must also appear that the examiner is qualified and the test administered in accordance with established polygraph techniques, and the trial judge must make an affirmative finding to this effect. *State v. McDavitt, supra; State v. South,* 136 *N.J. Super.* 402 (App. Div. 1975), *certif. denied,* 69 *N.J.* 387 (1976).

"[T]he stipulation not only must demonstrate clearly defendant's certain awareness of all the consequences involved in taking the polygraph test but it must, as well, commit the State to its reciprocal obligation to permit the results to be received in evidence irrespective of the outcome of the test. The surest way to accomplish these ends is to include among its provisions a specific agreement that the results of the testing as expressed in the opinion of experts, whether inculpatory or exculpatory, may be introduced as evidence by either party to the stipulation." *State v. Smith*, 142 *N.J. Super.* 575, 580 (App. Div. 1976), *certif. denied*, 72 *N.J.* 465 (1977).

See also State v. Hollander, 201 N.J. Super. 453, 477 (App. Div. 1985) (where the court refused to interpret the consent form signed by defendant, authorizing the disclosure of the polygraph results and the use of what was said, as a stipulation because it did not specifically mention the use of the results as evidence).

In determining whether defendant fully understands the consequences of submitting to a polygraph test and stipulating that the results of the test will be admitted into evidence, defendant's subjective belief is not relevant. The State only has the burden of showing that defendant "understands" the ramifications of the stipulation and not that he "believes" it. *State v. Powell*, 98 *N.J.* 63 (1984).

In the same way that defendant is completely free to either enter into a stipulation to submit to or to refuse to take the test, the prosecutor is free to refuse to agree to a polygraph examination. *See State v. Cole*, 131 *N.J. Super.* 470 (App. Div. 1974), *certif. denied*, 68 *N.J.* 135 (1975).

See State v. McMahon, 217 N.J. Super. 182 (Law Div. 1986), where following defendant's entry into a valid pretrial stipulation with the State regarding a Stateadministered polygraph examination, under which either party was entitled to submit as evidence the results of the examination and the testimony of the administering State polygraph expert, but which prohibited the opposing party from introducing another polygraph expert or the results of another polygraph examination, defendant was bound by the terms of the stipulation by the principle of fundamental fairness. Thus, he could not bar admission of the Stateadministered polygraph examination results which were unfavorable to him, or submit as evidence the results of a prior unstipulated favorable polygraph examination, or introduce testimony of his own polygraph expert regarding the results of the State's polygraph examination. In this case, defendant had counsel regarding the stipulation, and it was defendant who first requested the State-administered polygraph.

C. Applicability

1. Witnesses

Stipulation as to the results of a polygraph test apply with equal effect to the testing of witnesses as well as defendants and so a valid stipulation entered into between the prosecutor and defendant should be enforced whether it applies to a witness or a defendant. The stipulation implies the belief of each party that the testimony of the witness is important and that the polygraph examination may be beneficial to either party in the search for the truth. The provisions of the stipulation act as a waiver of *Evidence Rule* 20, which normally prohibits the introduction of evidence merely to support the credibility of a witness. *State v. Taylor*, 139 *N.J. Super.* 301, 304-05 (App. Div. 1976).

In the absence of an explicit stipulation, the results of a polygraph test administered to a state witness by the State prior to trial is not admissible at trial, even if the polygraph evidence is exculpatory in nature. The fact that the prosecutor requested the witness to submit to the polygraph test provides no basis from which an inference can be drawn that the State consented to the admission of the test results. *State v. Christopher*, 149 *N.J. Super.* 269, 275 (App. Div.), *certif. denied*, 75 *N.J.* 24 (1977).

2. Juveniles

Polygraph examinations cannot be lawfully administered to juveniles without the consent of both the juvenile and his or her parents. *State in the Interest of J.P.B.*, 143 *N.J. Super.* 96, 104 (App. Div. 1976).

3. Sixth Amendment

In *State v. Sloan*, 226 *N.J. Super.* 605 (App. Div. 1988), defendant was not denied effective assistance of counsel where defense counsel failed to subject him to a lie-detector pre-test before defendant submitted, pursuant to a stipulation, to a lie-detector test. Since defendant did not establish that he told defense counsel he was indeed guilty of the crimes charged, defendant's complaint in essence is that his trial counsel relied on

defendant's own representations. Counsel's reliance on his client's representation to him about an event witnessed only by defendant and the victim does not constitute deficient performance under *Strickland v. Washington*, 466 *U.S.* 668, 104 *S.Ct.* 2052, 80 *L.Ed.*2d 674 (1984), and *State v. Fritz*, 105 *N.J.* 42 (1987).

In State v. Reves, 237 N.J. Super. 250, the court held that defendant's Sixth Amendment right to counsel had not attached at time he entered into a stipulation to make results of polygraph examination admissible at trial, although defendant was in custody based on his arrest for unrelated charge at time he signed stipulation and investigation had focused on him; defendant had not been formally charged when he signed the stipulation, and was not formally charged until he gave inculpatory statement following polygraph examination. State v. Reves, 237 N.J. Super. at 263-65. Furthermore, the Reves court concluded that even though absence of counsel may be factor to consider in determining whether defendant knowingly and intelligently entered into polygraph stipulation, counsel's presence is not a nonwaivable condition. Id.

4. In Conjunction with Interrogation

In the federal case of *United States v. Zhang*, ____ *F. Supp.* 2d ___, 1999 *WL* 61416 (D.N.J. 1999), *aff'd* 216 *F.*3d 1077 (3d Cir. 2000), a five hour polygraph exam was conducted on defendant. The court found that defendant's confession was the product of "police overreaching" under all the circumstances, given the length and intensity of his interrogation coupled with the untrue threat that Secret Service now had powerful polygraph evidence that would convict him at trial.

- D. Permissible Uses
 - 1. Jury Instructions

Where polygraph test results are admitted into evidence, the jurors should be instructed that they are not direct proof of a defendant's guilt or innocence of the crime charged but rather opinion evidence by an expert to be accorded the appropriate weight and effect as determined by the jury. *State v. McDavitt*, 62 *N.J.* 36, 47 (1972).

A defendant's failure on a polygraph test is not *"ipso facto* the equivalent of his guilt;" *State v. Baskerville*, 73 *N.J.* 230, 235 (1977). However, such failure is probative of the issue of guilt or innocence and can be considered, with other evidence in the case, as bearing on that issue.

Id. How it effects the issue of guilt or innocence depends on the questions asked. *Id.* If the polygrapher determines that defendant is being deceptive when, responding to a direct question, he says he did not commit the crime, then the expert's opinion that defendant is lying "may be considered by the jury as proof that defendant did in fact commit that crime. In that circumstance the making of a false statement would be, in itself, evidence of guilt." *Id.*

But see State v. Jones, 224 N.J. Super. 527 (App. Div. 1988), where pursuant to an agreement between defendant and the prosecutor's office, the results of a polygraph test were admitted into evidence at trial. At trial the officer who administered the test testified that defendant was being truthful when he stated during the polygraph test that he was not involved in the armed robbery. The State's case rested almost entirely on the victim's identification of defendant as the perpetrator. The victim identified defendant from an array of photographs shortly after the crime and in person during the trial. Defendant's testimony that he was at home at the time the crime was committed was corroborated by his mother and girlfriend.

At the conclusion of the trial, the trial judge instructed the jury with respect to the polygraph results in conformance with the Model Criminal Jury Charge on Polygraph Evidence, § 4.250 (approved July 11, 1977). The appellate court ruled that in the context of this case, the model charge improperly implied that the jury could find defendant had answered questions deceptively, when the only evidence presented to the jury was that defendant had answered truthfully. Also, the charge that "[t]he [expert's] opinion is not by itself sufficient evidence to support a finding of guilt or innocence" constituted plain error because it erroneously implied that defendant had a burden to present evidence of his innocence and that the burden could not be satisfied by the polygrapher's opinion alone, but had to be supported by other evidence.

In a footnote, the Appellate Division also stated that the model charge in its present form should not be used in cases in which the polygrapher testifies that defendant has been truthful in denying complicity in the crime charged.

2. Expert Testimony

Neither the State nor the defendant is unequivocally bound by the conclusions drawn by the polygraph expert designated in the stipulation when the stipulation does not prohibit either of the parties from introducing extrinsic expert evidence to challenge or refute the stipulated examiner's findings. Since the nature of scientific testimony in general, and polygraphic testimony in particular, requires the fullest possible exploration of the expert's opinion at the trial, and inasmuch as defendant's fundamental right to present witnesses in his favor must be honored, fairness requires the ability by either party to produce extrinsic expert witnesses when it is not barred by the terms of the stipulation. However, while the undesignated expert will be allowed to testify once his personal knowledge and expertise have been established, that testimony will be limited to a refutation of the stipulated examiner's evaluation. State v. Baskerville, 73 N.J. 230, 233-34 (1977).

The holding in *State v. Baskerville, supra*, was predicated upon the fact that the stipulation therein did not contain a clear and unequivocal provision barring extrinsic evidence to combat the stipulated examiner's findings. At that juncture, the Supreme Court expressly refrained from deciding whether an unambiguous waiver of either the right to cross-examine the designated expert or to submit independent proof of a conflicting expert opinion would be enforceable. *Id.* at 234. The Court also left for another day resolution of the question of whether, under a similar stipulation containing no explicit waiver, a defendant might be permitted to introduce evidence of results of a separate test administered by his own examiner.

In State v. Finn, 175 N.J. Super. 13 (Law. Div. 1980), the court addressed the first of the two issues left undecided by the Supreme Court in Baskerville and determined that, whether or not a waiver was knowingly and voluntarily made, that part of the stipulation which precludes defendant from submitting an independent evaluation of the stipulation polygraph results violates principles of fundamental fairness and should not be given effect. The court reasoned that since the process by which the jury assessed the significance of the polygraph was by an evaluation of an expert's interpretation of the results and his or her conclusions as to defendant's truthfulness during the test, and that since that evaluation by the jury would be the determinative factor as to the issue of defendant's innocence or guilt, to enforce a stipulation preventing defendant from introducing rebuttal testimony by his own expert would unfairly deny him the fundamental right to present witnesses and to establish a defense. Furthermore, the court was convinced that, owing to the nature of the evidence, in that polygraph evidence is overvalued and given undue weight by juries, and the polygrapher is viewed by juries as a purveyor of scientific truth, cross-examination alone was insufficient to protect defendant's right to a fair hearing. *Id.* at 17-18. The court, therefore refused to enforce the objectionable, paragraph of the stipulation and permitted defendant's expert witness to testify. Such testimony was, however, limited to an interpretation and evaluation of the state-administered polygraph. *Id.* at 19.

In State in the Interest of B.N., 167 N.J. Super, 370 (J. & D.R. Ct. 1979), the court addressed the second issue left unresolved by the Supreme Court in Baskerville and held that absent a clear and unequivocal provision barring the use of the results of a private polygraph, such results will be admissible to refute the results of the stipulated polygraph, upon a showing that the unstipulated tests were rendered according to established standards by an examiner with established knowledge and expertise in accordance with Evidence Rule 19 (now Evidence Rule 702). State in the Interest of B.N., supra, at 375. The court reasoned that the criminal defendant's right to present witnesses to testify in his favor is guaranteed by the Sixth and the Fourteenth Amendments and should not be defeated in the absence of a clear and unequivocal waiver. Id. at 373 (citing Baskerville). Fundamental fairness requires that the testimony offered to refute the stipulation evaluation may include the results of an independent private polygraph test. Ibid.

3. Relation to Miranda Rights

Subjecting defendant to polygraph tests (with his consent) does not impugn the voluntariness of his confession. *State v. Morton*, 155 *N.J.* 383, 451 (1998) (Immediately before testing defendant, the police reissued Miranda warnings and defendant signed a polygraph waiver form. Because the officers adequately informed defendant of his rights regarding the polygraph tests, the tests did not render his confession involuntary or coerced.) *See, State v. Gerald*, 113 *N.J.* 40 (1988).

4. Appeals

Inmate appealing prison disciplinary decision does not necessarily have the right to a polygraph test. *See, Johnson v. New Jersey Department of Corrections,* 298 *N.J. Super.* 79 (1997)(*citing N.J.A.C.* 10A:3-7.1c). *But cf. Engel v. New Jersey Department of Corrections,* 270 *N.J. Super.* 176 (App. Div. 1994) (in criminal disciplinary proceeding, when only evidence against defendant was an uncorroborated confidential informant's claims, and that informant's successful polygraph test, then defendant entitled to subject himself to polygraph test, as well). In the Department of Corrections context, while the use of polygraphs to investigate disciplinary charges is specifically sanctioned by *N.J.A.C.* 10A:3-7.1, the administration of a polygraph test still falls within the discretion of the Superintendent. *Counterman v. Fauver*, _____*F. Supp.*2d ___, 1989 *WL* 200954,*4-*6 (D.N.J. 1989); *Muhammad v. Beyer*, __*F. Supp.*2d __, 1988 *WL* 59966 (D.N.J. 1988).

In court martial proceedings, a per se rule against admission of polygraph evidence did not violate the Fifth or Sixth Amendment rights of accused. *United States v. Scheffer*, 523 *U.S.* 303, 118 *S.Ct.* 1261, 140 *L.Ed.*2d 413 (1998)(*Military Rule of Evidence* 707 makes polygraph evidence inadmissible in court-martial proceedings).

IV. DISCOVERY

The State has a duty to furnish a defendant with polygraph evidence that is exculpatory in nature under the principles enunciated in such cases as *Brady v. Maryland*, 373 *U.S.* 83, 83 *S.Ct.* 1194, 10 *L.Ed.*2d. 215 (1963), and *State v. Vigliano*, 50 *N.J.* 51 (1967). *United States v. Sourlis*, 953 *F. Supp.* 568 (D.N.J. 1996); *State v. Christopher*, 149 *N.J. Super.* 269, 275 (App. Div.), *certif. denied*, 75 *N.J.* 224 (1977).

V. EMPLOYER REQUIRING LIE DETECTOR TEST-DISORDERLY PERSONS OFFENSE

A. Statute

N.J.S.A. 2C:40A-1 provides in pertinent part that any person who as an employer shall influence, request or require an employee or prospective employee to take or submit to a lie-detector test as a condition of employment or continued employment, commits a disorderly persons offense. Employers and employees legally involved in the manufacture, distribution or dispensing of controlled dangerous substances are exempted from the statute. Any employee or prospective employee who is required to take a lie detector test as a precondition of employment or continued employment shall have the right to be represented by legal counsel. A copy of the report containing the result of the lie detector test shall be in writing and be provided, upon request, to the individual who has taken the test. Information obtained from the test shall not be released to any other employer or person. The employee or prospective employee shall be informed of his right to present to the employer the results of an independently administered second lie detector examination prior to any personnel decision being made in his behalf by the employer.

B. Constitutionality

N.J.S.A. 2A:170-90.1 (repealed; now this section) is constitutional in that it does not deprive defendant of property without due process of law. Nothing in the enactment infringes upon federal due process and since the Legislature could reasonably exercise the State's police power and conclude that on balance, the public welfare would be furthered by prohibiting the employer from using the lie detector test as a condition of employment or continued employment, the enactment satisfies State due process as well. *State v. Community Distributors, Inc.*, 64 *N.J.* 479 (1974).

C. Exemptions

The statute contains the only allowable exclusions or exemptions, and the court had no power to create additional ones, *See Engel v. Township of Woodbridge*, 124 *N.J. Super.* 307 (App. Div. 1973) (employers of police officers not exempted).

D. Preemption

The federal Employee Polygraph Protection Act (EPPA) preempted New Jersey antipolygraph statute to the extent that the antipolygraph statute prohibited the National Security Agency (NSA) from requiring employees of NSA contractors to submit to polygraph examination in order to obtain security clearance. Employee Polygraph Protection Act of 1988, § § 7, 10, 29 *U.S.C.A.* § § 2006, 2009; *Stehney v. Perry,* 101 *F.*3d 925 (3d Cir. 1996).

E. Application and Construction

The New Jersey statute was intended to apply to an established employment relationship as well as to the initial hiring process. *State v. Berky Photo Inc.*, 150 *N.J. Super.* 56, 61 (App. Div. 1977). *See State v. Community Distributors, Inc.*, 64 *N.J.* 479 (1974) (polygraph tests unlawfully used as a screening device in employer's hiring procedures). *See also State v. Berky, Photo Inc., supra*, and *Engel v. Township of Woodbridge*, 124 *N.J. Super*, 307 (App. Div. 1973) (respective employers unlawfully asked certain employees to submit to a lie detector test as an aid in investigating thefts).

There is no statutory requirement that a polygraph test actually be administered before a violation occurs. The essence of the offense is the influence, request or requirement flowing from the employer or its agents. Clearly, the Legislature meant to prevent direct or indirect psychological pressures to submit to testing, not simply to punish administration of polygraph tests actually conducted. The employee does not have to succumb before the statute is violated. *State v. Vornado, Inc.*, 155 *N.J. Super.* 354, 357 (App. Div. 1978).

Except for the exemption incorporated in the statute, in determining whether an employer requested his employees to take the lie detector test, it makes no difference that the police initiated or recommended the procedure. *State v. Berky Photo Inc.*, 150 *N.J. Super*. at 59.

The fact that employees signed consent waivers stating that they were voluntarily taking the lie detector tests was of no relevance in determining whether the statute was violated in view of the psychological compulsion inherent in the employment relationship. *State v. Community Distributors, Inc.; State v. Berky Photo Inc.*

POST-CONVICTION RELIEF

(Seegenerally, R. 3:22-1 et seq.)

I. INTRODUCTION

Post-conviction relief, the state analogue to federal habeas corpus relief, is a collateral proceeding. State v. McQuaid, 147 N.J. 464, 482 (1997). As such, the rules for obtaining such relief are different than those on direct appeal. In addition to the requirement that defendant prove his entitlement to such relief by a preponderance of the credible evidence, State v. Preciose, 129 N.J. 451, 459 (1992), the post-conviction relief rules contain a bar against raising issues that could have been raised in a prior proceeding, R. 3:22-4, and contain a statute of limitations. R. 3:22-12. See Section III, infra. Also, the grounds for post-conviction relief are circumscribed; constitutional claims are limited to those that constitute a "substantial denial" of constitutional rights. R. 3:22-2(a). Post-conviction relief is not a substitute for direct appeal, R. 3:22-3, and it is not an opportunity to relitigate issues previously adjudicated on the merits. R. 3:22-5. The New Jersey Supreme Court has recognized "the good reasons" behind these rules: the finality of judgments and the consolidation of issues on direct appeal. State v. D.D.M., 140 N.J. 83, 101 (1995); State v. Mitchell, 126 N.J. 565, 575-576, 583-584 (1992). See also State v. Lark, 117 N.J. 331, 343 (1989) (interest of finality an "essential element" of criminal justice system).

The post-conviction relief rules clearly embody the principle that collateral review is distinct from direct review. See State v. D.D.M., 140 N.J. at 102 ("the pursuit of justice [on PCR] is bound by the record and constrained by the rules that prescribe the standards governing post-conviction relief"). A presumption of finality and legality attaches to a conviction and sentence once it has been affirmed on direct appeal. See Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 1719 (1993) (discussing habeas corpus relief). Post-conviction relief is secondary and limited, reversed only for those defendants who have been "grievously wronged." See id. Thus, in view of the limited and distinct nature of collateral relief, an error which might warrant reversal on direct appeal may not warrant reversal on collateral attack against the judgment of conviction. See Id., quoting United States v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584 (1982). See also State v. Cerbo, 78 N.J. 595, 605 (1979) (issues cognizable on direct appeal not necessarily cognizable on post-conviction review).

II. GROUNDS FOR RELIEF

R. 3:22-2 contains the grounds for relief that are cognizable on post-conviction relief:

a. Substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey;

b. Lack of jurisdiction of the court to impose the judgment rendered upon defendant's conviction;

c. Imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law;

d. Any ground heretofore available as a basis for collateral attack upon a conviction by *habeas corpus* or any other common-law or statutory remedy.

It is clear that post-conviction relief is not a vehicle to challenge the sufficiency of the evidence used to convict defendant. State v. McQuaid, 147 N.J. at 483; State v. Morales, 120 N.J. Super. 197, 200 (App. Div. 1972), certif. denied, 62 N.J. 77 (1972). Nor is post-conviction relief the means by which to challenge the excessiveness of a sentence. State v. Flores, 228 N.J. Super. 586, 591-592 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989). Under *R*. 3:22-2(c), relief may be granted only when the sentence is "in excess of or otherwise not in accordance with the sentence authorized by law." The rule is narrow and it applies to two types of situations: 1) sentences that exceed the penalties authorized by statute or a specific offense; 2) sentences that are not imposed in accordance with law, such as a sentence that does not include a legislatively mandated parole bar. State v. Murray, 162 N.J. 240, 246-247 (2000). If a sentence is illegal, it may be corrected at any time. R. 3:22-12.

Thus, a challenge to the adequacy of the trial court's findings at sentencing and the sufficiency of its weighing process are not cognizable on post-conviction relief. *State v. Flores,* 228 *N.J. Super.* at 595. The same holds true for a claim that consecutive sentences run afoul of the *State v. Yarbough,* 100 *N.J.* 627 (1985) guidelines. *Id.* at 596. However, a claim regarding a defendant's entitlement to gap-time credits has been held to pertain to the legality of the sentence and, hence, is cognizable on post-conviction relief. *State v. Shabazz,* 263 *N.J. Super.* 246, 251 (App. Div. 1993), *certif. denied,* 133 *N.J.* 444 (1993).

Under "extraordinary circumstances," a guilty plea can be "illegal" within the meaning of the postconviction relief rules, but constitutional issues, such as the voluntary nature of the plea, must be at stake. *State v. Mitchell*, 126 *N.J.* at 577. A claim that the trial court failed to elicit an adequate factual basis for the plea is not, itself, of constitutional dimension. *Id.* A factual basis is constitutionally required only when the defendant claims innocence or does not understand the nature of the law as it applies to the facts of his case. *Id.*

With respect to challenges against jury instructions on post-conviction relief, the New Jersey Supreme Court has ruled that they are cognizable under *R.* 3:22-2(a). *State v. Burgess*, 154 *N.J.* 181, 185 (1998). Correct jury instructions lay at the heart of proper jury function. *State v. Afanador (II)*, 151 *N.J.* 41, 54 (1997). However, a challenge to a jury instruction raised for the first time on PCR is subject to the bar under *R.* 3:22-4, *see Section III, infra*, but it is not usually applied by the courts. *See State v. Burgess, supra, State v. Afanador (II), supra.*

Ineffective assistance of counsel claims are "particularly suited" for post-conviction relief. *State v. Preciose*, 129 *N.J.* at 460. These claims have found a "niche" in PCR procedure because they usually cannot be raised on direct appeal. *State v. Moore*, 273 *N.J. Super.* 118, 125 (App. Div. 1994), *certif. denied*, 137 *N.J.* 311 (1994). *See also State v. Sparano*, 249 *N.J. Super.* 411, 419 (App. Div. 1991) (ineffective assistance of counsel claims raised on direct appeal should be left for PCR).

With the advent of DNA testing, requests for posttrial testing have arisen in the post-conviction relief context. In State v. Velez, 329 N.J. Super. 128 (App. Div. 2000), defendant argued on post-conviction relief, among other things, that he was entitled to subject certain evidence to new DNA testing that was not performed at the time of his trial. The Appellate Division ruled that defendant was entitled to show that new DNA tests might yield definitive findings which would require the trial court to determine if the newly discovered evidence would "probably" change the jury's verdict. Id. at 136. In State v. Halsey, 329 N.J. Super. 553 (App. Div. 2000), certif. denied, 165 N.J. 491 (2000), defendant filed a motion to compel DNA testing several years after his PCR petition was denied. The Appellate Division ruled that defendant's application was not "technically" one that sought post-conviction relief, so the PCR rules under *R.* 3:22-1 *et seq.* did not apply. *Id.* at 555-556.

The distinction between cognizable and noncognizable claims is important because post-conviction relief is not a substitute for direct appeal. R. 3:22-3; State v. Jenkins, 221 N.J. Super. 286, 291 (App. Div. 1987), certif. denied, 113 N.J. 343 (1988). Accord State v. White, 260 N.J. Super. 531, 538 (App. Div. 1992), certif. denied, 133 N.J. 436 (1993); State v. Cacamis, 230 N.J. Super. 1, 5 (App. Div. 1988), certif. denied, 114 N.J. 496 (1989). Thus, in Jenkins, defendant lost the benefit of retroactive application of a United States Supreme Court decision when he failed to raise it on direct appeal. State v. Jenkins, 221 N.J. Super. at 291. But see State v. Guzman, 313 N.J. Super. 363, 375 (App. Div. 1998) (because defendant received ineffective assistance of counsel on direct appeal, appellate court considered PCR issues as if they were being presented on direct appeal), certif. denied, 156 N.J. 424 (1998); State v. Shabazz, 263 N.J. Super. at 251 (defendant did not file a direct appeal, but his challenge to the voluntary nature of his guilty plea warranted relaxation of rule).

III. PROCEDURAL BARS

Generally, the New Jersey Supreme Court has acknowledged and emphasized the importance of procedural bars on post-conviction relief. State v. Afanador (II), 151 N.J. at 50; State v. Mitchell, 126 N.J. at 583. Consistent application of procedural bars prevents abuse of PCR proceedings. State v. Preciose, 129 N.J. at 474. However, the procedural rules "are not ends in themselves, they are a means to achieving a functioning and just system." State v. Mitchell, 126 N.J. at 578. Accord State v. Preciose, 129 N.J. at 474. The rules, thus, are not to be applied rigidly. State v. Mitchell, 126 N.J. And, while the procedural rules should be at 589. invoked in the appropriate case, their application should not be shaped or influenced by the federal standards governing habeas corpus. State v. Preciose, 129 N.J. at 477. In other words, the Supreme Court has admonished our courts not to apply our procedural bar rules artificially to accommodate federal habeas review. Id. As the Court put "... considerations of finality and procedural it. enforcement count for little when a defendant's life or liberty hangs in the balance." Id. at 476

See also State v. Guzman, 313 N.J. Super. at 371 n.1 (no need for State to cross-appeal when it argues the trial court erred by not applying a procedural bar because appeals are from judgments, not opinions).

A. *R.* 3:22-4

The rule provides:

Any ground for relief not raised in a prior proceeding under this rule, or in the proceeding resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

R. 3:22-4 preserves the State's strong interest in finality by requiring defendants to consolidate issues so that judicial and attorney resources are not consumed with piecemeal litigation. *State v. Mitchell*, 126 *N.J.* at 584. The three exceptions to the bar exist to ensure fairness to petitioners. *Id.*

Under exception (a), it is not enough for defendant to assert that he had not thought of the claim in the prior proceeding. *Id.* at 585. The standard under the exception is objective: the claim must be one that a reasonable attorney, aware of the relevant facts and law, could not reasonably have raised. Id. When a defendant raises an issue in his petition for certification on direct appeal, even if not raised in the Appellate Division, exception (a) does not apply because defendant raised the issue "in the proceedings resulting in the conviction." State v. Burgess, 154 N.J. at 185. See also State v. Afanador (II), 151 N.J. at 50-51 (bar not applied because defendant raised issue in petition for certification on direct appeal).

Under exception (b), the term "fundamental injustice" has no precise definition, but it should be invoked only in "exceptional circumstances." *State v. Mitchell*, 126 *N.J.* at 586-587. It is defendant's burden to prove that barring his petition would lead to injustice. *Id.* Defendant must allege specific facts, which, if believed, demonstrate the likelihood of injustice by a preponderance of the evidence. *Id.* at 589. "Fundamental injustice" pertains to the fairness of the proceedings that resulted in conviction. *Id.* at 585. In order to avoid putting form over substance, defendant must also show that the claim being raised for the first time on post-conviction relief played a role in determining guilt. *Id.*

Under exception (c), it is not enough for defendant to couch his claim in constitutional terms. *Id.* at 586. The court must scrutinize the claim to ascertain whether a constitutional right is truly at stake. *Id.* For example, an ineffective assistance of counsel claim will almost always come within exception (c). See State v. Preciose, 129 N.J. at 459-460; State v. Moore, 273 N.J. Super. at 125; State v. Sloan, 226 N.J. Super. 605, 612 (App. Div. 1988), certif. denied, 113 N.J. 647 (1988). In Mitchell, defendant attacked the adequacy of his factual basis, but the Court held it did not fall within the exceptions to R. 3:22-4 because it did not implicate a constitutional right. 126 N.J. at 584-589. Accord, State v. Cacamis, 230 N.J. Super. at 4-5.

With respect to belated challenges to jury instructions on PCR, a "genuinely alleged serious defect" will circumvent *R.* 3:22-4. *State v. Cupe*, 289 *N.J. Super.* 1, 8 (App. Div. 1996), *certif. denied*, 144 *N.J.* 589 (1996). The procedural bar was not applied in *State v. Burgess, supra, State v. Afanador (II), supra, State v. Lawton*, 298 *N.J. Super.* 27, 39 (App. Div. 1997) (State conceded procedural bar did not apply), *certif. denied*, 151 *N.J.* 72 (1997) and in *State v. Cupe, supra.* The bar was applied to jury instruction claims in *State v. Norman*, 151 *N.J.* 5, 38 (1997) and in *State v. Culley*, 250 *N.J. Super.* 558, 563 (App. Div. 1991), *certif. denied*, 126 *N.J.* 387 (1991).

Note that the procedural bar can be overcome if defendant couches the claim under ineffective assistance of trial and appellate counsel. State v. Norman, 151 N.J. The claim of instructional error would be at 36. evaluated in accordance with Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) and State v. Fritz, 105 N.J. 42 (1987). Id. at 37. In order to prevail, defendant must demonstrate the instructional error was prejudicial. Thus, in State v. Reves, 140 N.J. 344 (1995), defendant's claim of ineffective assistance of appellate counsel failed because the alleged error, not raising a challenge to the diminished capacity instruction on direct appeal, would not have resulted in a reversal on direct appeal because defendant was not even entitled to the charge. 140 N.J. at 365.

B. R. 3:22-5

The rule provides that a prior adjudication on the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding. For the bar to apply, the issue previously adjudicated must be "identical" or "substantially equivalent" to the issue being raised on PCR. *State v. McQuaid*, 147 *N.J.* at 484; *State v. Cupe*, 289 *N.J. Super.* at 8. Defendants should not couch the same claim in different verbiage to avoid the bar. *Id.* Although an ineffective assistance of counsel claim

adjudicated on direct appeal will be subject to the bar if raised again on PCR, *State v. McQuaid*, 147 *N.J.* at 484, it will not be barred if the underlying claims of counsel error were not raised in the prior proceeding. *State v. Marshall (III)*, 148 *N.J.* 89, 149 (1997).

See also State v. Afanador (II), 151 N.J. at 51-52 (Court refused to apply R. 3:22-5).

C. R. 3:22-12

This rule contains the statute of limitations for postconviction relief:

A petition to correct an illegal sentence may be filed at any time. No other petition shall be filed pursuant to this rule more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect.

The five year period begins to run from entry of the judgment of conviction. *State v. Cummings*, 321 *N.J. Super.* 154, 165 (App. Div. 1999). The period is not tolled by appellate proceedings, *State v. Dillard*, 208 *N.J. Super.* 722, 727 (App. Div. 1986), *certif. denied*, 105 *N.J.* 527 (1986), or by a resentencing that results with an amended judgment of conviction. *State v. Dugan*, 289 *N.J. Super.* 15, 20 (App. Div. 1996), *certif. denied*, 145 *N.J.* 373 (1996). The rule encourages defendants to bring their claims swiftly, since the passage of time prejudices the State: witnesses die or become unavailable; evidence is lost or becomes unattainable. *State v. Mitchell*, 126 *N.J.* at 575-576.

To avoid dispute on whether a PCR petition was timely filed, defendant should file his petition with the county clerk where the date of receipt is routinely recorded. *State v. Culley*, 250 *N.J. Super.* at 561. An amended PCR petition will relate back to the original filing, so there is no time bar if the amended petition falls outside the five year time period. *State v. Cupe*, 289 *N.J. Super.* at 9.

When a defendant files a PCR petition beyond the five year period, his petition must allege facts demonstrating "excusable neglect." *State v. Mitchell*, 126 *N.J.* at 576. *But see State v. Cummings*, 321 *N.J. Super.* at 165-166 (Court reluctantly allowed defendant to expand appellate record with affidavit on why "excusable neglect" existed).

Ignorance about the time-bar is not "excusable neglect." *State v. Murray,* 162 *N.J.* at 246; *State v. Dillard,* 208 *N.J. Super.* at 728; *State v. Dugan,* 289 *N.J. Super.* at 22. A defendant's difficulty with reading and writing is insufficient, as well. *State v. Cummings,* 321 *N.J. Super.* at 166. A defendant's psychological treatment, alone, is not enough to show "excusable neglect" where defendant adduces no facts to show that the treatment prevented him from pursuing his rights. *State v. D.D.M.,* 140 *N.J.* at 100.

R. 3:22-12 may be relaxed under *R.* 1:1-2 when the interests of justice require a relaxation. *State v. Mitchell,* 126 *N.J.* at 578. *R.* 3:22-12 should be relaxed only in "exceptional circumstances," *id.* at 580, and defendant must establish by a preponderance of credible evidence that he is entitled to the requested relief. *Id.* at 579. Defendant must allege specific facts which, if believed, would provide the court with an adequate basis on which to base its decision. *Id.* Thus, bare allegations will not be enough. *State v. Cummings,* 321 *N.J. Super.* at 168.

IV. RIGHT TO COUNSEL ON POST-CONVICTION RELIEF

Under R. 3:22-6(a), an indigent defendant is entitled to representation from the Public Defender on his first PCR petition. State v. Picciotti, 231 N.J. Super. 111, 113 (App. Div. 1989). Pro forma compliance with this requirement will not suffice. State v. Clark, 260 N.J. Super. 559, 562 (App. Div. 1992). Counsel, once appointed, must faithfully serve the interests of his client, and the rule plainly envisages the effective assistance of PCR counsel. State v. Velez, 329 N.J. Super. at 132. PCR counsel need only give his "best effort" on behalf of defendant. Id. at 133. Accordingly, not appearing at the PCR hearing, not consulting with defendant, not reading the trial record will be deemed ineffective. See State v. Velez, supra; State v. Clark, supra. In Velez, the Court ruled that when PCR counsel has been found to be ineffective, the process should begin anew with a remand and the appointment of new PCR counsel. State v. Velez, 329 N.J. Super. at 135.

Of course, a defendant can proceed *pro se* on his first PCR petition, but he must affirmatively assert his intention. R. 3:22-6(a). If a defendant files a subsequent PCR petition, counsel will be assigned only upon defendant's application and upon a showing of "good cause." R. 3:22-6(b). If the court finds "good cause" and assigns counsel in a subsequent PCR petition, the defendant is entitled to effective and competent

assistance. *State v McIlhenny*, 333 *N.J. Super.* 85, 87 (App. Div. 2000).

Assigned counsel is not permitted to withdraw on the ground of a lack of merit to the petition. R. 3:22-6(d). The rule also states that counsel should advance "any ground" insisted upon by defendant notwithstanding that counsel deems it without merit.

Note: under the federal constitution, a defendant does not have a constitutional right to effective assistance of counsel in collateral proceedings. *Coleman v. Thompson*, 501 *U.S.* 722, 752, 111 *S.Ct.* 2546, 2566 (1991); *Pennsylvania v. Finley*, 481 *U.S.* 551, 107 *S.Ct.* 1990 (1987). *See also* 28 *U.S.C.* § 2254(i).

V. EVIDENTIARY HEARINGS ON POST-CONVICTION RELIEF

Although *R.* 3:22-1 does not require evidentiary hearings, a trial court has discretion to conduct one under *R.* 3:22-10. *State v. Preciose*, 129 *N.J.* at 462. Similarly, a trial court has the discretion to determine a PCR petition on the papers. *State v. Flores*, 228 *N.J. Super.* at 589-590. The trial court must state its findings on the petition and it conclusions of law. *R.* 3:22-11. *See Id.* at 590 (Appellate Court stated its preference for reasons supporting trial court's decision).

When a defendant raises an ineffective assistance of counsel claim, defendant must establish a *prima facie* case of ineffective assistance under *Strickland v. Washington, supra*, and *State v. Fritz, supra*, before he can get an evidentiary hearing. *State v. Preciose*, 129 *N.J.* at 462-463. In other words, the defendant must demonstrate the reasonable likelihood of succeeding under the tenets set forth in *Strickland* and *Fritz. Id.* at 463. Bald assertions of counsel's ineffectiveness will not suffice. *State v. Cummings*, 321 *N.J. Super.* at 170.

In *State v. Moore*, the Appellate Division rejected defendant's proffer of an expert on appellate procedure where defendant claimed ineffective assistance of appellate counsel. 273 *N.J. Super.* at 127-128. The proffered testimony simply was not helpful. *Id.* The preferable tactic would have been to offer appellate counsel whose judgment was being attacked. *Id.* at 127.

An evidentiary hearing also is warranted when there are material issues of disputed facts which cannot be resolved by reference to the existing record. *State v. Russo*, 333 *N.J. Super.* 119, 140-141 (App. Div. 2000). *State v. Pyatt*, 316 *N.J. Super.* 46, 51 (App. Div. 1998), *certif.*

denied, 158 *N.J.* 72 (1998). *Compare State v. Moore*, 273 *N.J. Super*. at 127 (no hearing required when defendant's claim determined by reference to trial record).

Generally, the trial court should ascertain whether the defendant would be entitled to post-conviction relief if the facts are viewed in the light most favorable to defendant. *State v. Marshall (III)*, 148 *N.J.* at 158. However, an evidentiary is *not* to be used to permit defendant to investigate whether the State has failed to deliver discoverable materials to defendant. *Id.* An evidentiary hearing is not to be used as a fishing expedition to search for potential claims. *Id.* at 158, 167.

The PCR rules do not expressly authorize discovery, but the trial court has the inherent authority to order it if justice requires. *Id.* at 269. But, any order for discovery on PCR should be narrow and limited. *Id.* at 270. Thus, a defendant is not entitled to access to the State's entire file. *Id.*

The trial court has the discretion to order defendant's presence at any PCR hearing. *R.* 3:22-10. Defendant is entitled to be present when oral testimony is adduced on a material issue of fact within the defendant's personal knowledge. *Id.*

VI. RETROACTIVITY ON COLLATERAL REVIEW

Post-conviction relief is not a device to give retroactive effect to rules and statutes that have no constitutional underpinning. *State v. Staruch*, 326 *N.J. Super.* 245, 250 (App. Div. 1999). But, decisions that implicate constitutional rights may or may not be retroactively applied on post-conviction review. For a sample of cases that dealt with issues regarding retroactivity on post-conviction review, *see State v. Purnell*, 161 *N.J.* 44 (1999); *State v. Burgess*, 154 *N.J.* at 184-185; *State v. Lark*, 117 *N.J.* 331 (1989); *State v. Cupe*, 289 *N.J. Super.* at 9-14.

I. AUTHORIZATION

Pretrial intervention (hereinafter PTI) is governed by N.J.S.A. 2C:43-12 to 22, R. 3:28 and the Guidelines Under *R.* 3:28 an eligible appertaining thereto. defendant may, with consent of the prosecutor and recommendation of the program director, postpone criminal proceedings and participate in a rehabilitative program for a period not to exceed three years. At the conclusion of this period, or earlier upon motion of the criminal division manager and consent of both the prosecutor and defendant, the judge shall make one of the following recommendations: (1) have the charges dismissed; (2) extend defendant's participation in the program for an additional period of time not to exceed three years; or (3) have the charges proceed against defendant in the ordinary course.

II. PURPOSE OF PTI

R. 3:28, Guideline 1, delineates five specific purposes of PTI. However, in essence, PTI serves a dual purpose: to afford rehabilitative services to appropriate candidates and to relieve the already overburdened criminal justice system by avoiding the prosecution of "victimless" offenses, thereby freeing the courts. State v. Caliguiri, 158 N.J. 28, 50 (1999) (citing State v. Nwobu, 139 N.J. 236, 247 (1995)).

III. TIME FOR APPLICATION

Application for admission to PTI should be expeditiously made and acted upon by all parties concerned so as to relieve defendant from the anxiety of facing prosecution and to enable rehabilitative processes to commence at an early date. State v. Maguire, 168 N.J. Super. 109, 116 (App. Div.), certif. denied, 81 N.J. 408 (1979). An application must, however, be filed not later than 28 days after the indictment is returned. Where the application is filed after an indictment has been returned, the PTI Program should complete its evaluation and make its recommendation within 25 days. The prosecutor should complete a review and advise defendant within 14 days thereafter. An appeal by defendant to the trial court shall be brought within 10 days after the rejection notice, and should be determined either before or at the pretrial conference. R. 3:28, Guideline 6; see State v. Halm, 319 N.J. Super. 569, 578-79, (App. Div.), certif. denied, 162 N.J. 131 (1999).

In general, any defendant accused of any crime is eligible for PTI. R. 3:28. However, there are certain instances in which an offender may not be eligible, or where a presumption against admission exists:

A. Previously Diverted Defendants

IV. ELIGIBILITY FOR PTI

If defendant was previously diverted from regular criminal prosecution under the Controlled Dangerous Substances Act pursuant to N.J.S.A. 2C:36A-1 (formerly N.J.S.A. 24:21-27), or previously diverted under PTI, he or she is no longer eligible for PTI. See R. 3:28, Guideline 3(g); N.J.S.A. 2C:43-12g; State v. Johnson, 282 N.J. Super. 296 (App. Div. 1995); State v. Collins, 180 N.J. Super. 190, 193 (App. Div. 1981), aff'd 90 N.J. 449 (1982). However, while a defendant may be ineligible for diversion pursuant to N.J.S.A. 2C:36A-1 because, for example, he or she is a second offender, that defendant may still be eligible for diversion under PTI. In State v. Collins, 90 N.J. at 452-53, the Supreme Court noted that the two programs were meant to exist contemporaneously, and if a defendant was precluded from diversion under the Act, that did not necessary preclude relief under PTI.

B. Minor Violations

PTI is designed for defendants who have committed criminal or penal offenses; thus, it is generally not available to defendants who have committed minor violations, where the likely disposition would be a suspended sentence without probation, or a fine, or where the offense violates an ordinance, health code or similar provision. R. 3:28, Guideline 3(d).

In State v. Senno, 79 N.J. 216 (1979), the Supreme Court of New Jersey held that PTI programs could properly exclude defendants charged with nonindictable offenses and that the decision to do so is up to each county, subject to the Court's approval. Such exclusion was found to be entirely consistent with the goals of PTI and did not violate equal protection rights. See State v. DiCosmo, 188 N.J. Super. 298 (Law Div. 1982) (holding that defendant was excluded from PTI, notwithstanding his original, indictable charge of assault on a police officer, which was later administratively downgraded to a disorderly persons offense); see also State v. Raupp, 160 N.J. Super. 315 (App. Div. 1978) (holding defendant ineligible for admission into PTI for motor vehicle violation even though some violations carried a mandatory custodial sentence).

C. Graves Act Offenses

In *State v. Hadfield*, 92 *N.J.* 421 (1983), the Court expressly left the question undecided as to whether a person charged under the Graves Act, *N.J.S.A.* 2C:43-6, is *per se* ineligible for PTI.

D. Comprehensive Drug Reform Act

In State v. Caliguiri, the Supreme Court held that an indictment for N.J.S.A. 2C:35-7, third degree possession of marijuana with intent to distribute within 1,000 feet of a school zone, is not a *per se* disqualifier for admission into PTI. The Court invalidated the section of the Attorney General's Supplemental Directive for Prosecuting Cases Under the Comprehensive Drug Reform Act (January 6, 1997), which required prosecutors to object to PTI admission for persons charged under N.J.S.A. 2C:35-7. The Court held that prosecutors may treat a charge of N.J.S.A. 2C:35-7 as equivalent to a second-degree offense and consider PTI presumptively unavailable. 158 N.J. at 44. Nonetheless, a prosecutor must still consider all relevant factors in making the PTI decision. To rebut the presumption, an individual charged with violating N.J.S.A. 2C:35-7 has to show "compelling reasons" for admission into PTI, as explained in State v. Nwobu, 139 *N.J.* at 252-53.

E. Dismissal or Acquittal of Disqualifying Charges

In *State v. Halm*, 319 *N.J. Super.* at 580, the Appellate Division held that when defendant's first and second degree criminal charges precluding his admission into PTI were favorably resolved, defendant's motion for reconsideration of his PTI denial on his pending separate third degree indictment was not time-barred.

V. NECESSITY OF WRITTEN STATEMENT OF REASONS

R. 3:28, *Guideline* 8 requires that PTI decisions must be supported by a written statement of reasons. In *State v. Wallace*, 146 *N.J.* 576, 584 (1996), the Supreme Court reiterated that written decisions facilitate judicial review, promote a sense of fairness and aid in evaluating the overall operation of the program. *See State v. Nwobu*, 139 *N.J.* at 249. The statement of reasons may not simply "parrot" the language of relevant statutes, rules and guidelines. *Id.* at 249, citing *State v. Sutton*, 80 *N.J.* 110, 117 (1979). At a minimum, the prosecutor should note the factors present in defendant's background or the offense purportedly committed which led the prosecutor to conclude that admission should be denied. Additionally, the statement of reasons must not be vague. Rather, the reasons for rejection must be stated with "sufficient specificity so that defendant has a meaningful opportunity to demonstrate that they are unfounded." *State v. Maddocks*, 80 *N.J.* 98, 109 (1979).

VI. SCOPE OF HEARING UPON REJECTION

If a defendant is rejected from PTI, he or she may request a hearing before the judge designated to hear PTI matters. See R. 3:28, Guideline 8. This hearing is not to be a trial-type proceeding, but rather takes the form of an abbreviated and informal proceeding. See State v. Leonardis, 73 N.J. 360, 383 (1977); State v. Leonardis, 71 N.J. 85, 122 (1976). No additional evidence or testimony may be offered, as defendant has already had the opportunity to present any evidence thought compelling to the program director pursuant to Guideline 2. State v. White, 145 N.J. Super. 257 (Law Div. 1976). The hearing is solely to review the actions of the prosecutor or program director, based on the material submitted to the director, to determine whether rejection of the applicant was arbitrary and capricious. State v. Moiseeff, 165 N.J. Super. 40 (App. Div. 1978); State v. Forbes, 153 N.J. Super. 336 (Law Div. 1977). To hear additional material or evidence at this point would constitute a trial *de novo*, and not merely a review of defendant's rejection. Incriminating statements made by defendant at the PTI rejection hearing are inadmissible at a subsequent trial for that offense. State v. Kern, 325 N.J. Super. 435, 442-43 (App. Div. 1999). Furthermore, it is inappropriate for a judge to preside over a PTI rejection appeal and, after affirming that rejection, conduct a bench trial on the criminal charges. Id. at 444.

VII. REVIEW STANDARDS

A. Prosecutor's Review of PTI Applications

In evaluating defendant's application for PTI, the prosecutor may consider many factors in deciding whether or not to deny diversion. Although *N.J.S.A.* 2C:43-12e and *R.* 3:28, *Guideline* 3, delineate the criteria for evaluating admission into PTI, they are not exhaustive. Defendant, notwithstanding any facts which would ordinarily lead to exclusion, shall have the opportunity to present to the program director, and through the director to the prosecutor, any facts or materials demonstrating an amenability to rehabilitation, showing compelling reasons justifying admission, and establishing that a decision against enrollment would be arbitrary and unreasonable. *R.* 3:28, *Guideline*

2; see also State v. Markt, 156 N.J. Super. 486 (App. Div. 1978); State v. Pickett, 186 N.J. Super. 599 (Law Div. 1982).

The primary responsibility for administration rests with the prosecutors and program directors, and judicial review is available to check only the most egregious examples of injustice and unfairness. State v. Wallace, 146 N.J. at 585; State v. Leonardis, 73 N.J. at 381. The need to preserve prosecutorial discretion in deciding whether to divert a particular defendant from the ordinary criminal process is critical because it is the prosecutor's responsibility to decide whom to prosecute, and PTI serves to augment, not diminish, a prosecutor's options. State v. Nwobu, 139 N.J. at 246; State v. Dalglish, 86 N.J. 503, 509 (1981). The prosecutor's decision to reject defendant's admission into PTI is entitled to great deference. Only rarely should a prosecutorial veto be overturned; the prosecutor's statement of reasons should be read liberally and in depth. State v. Wallace, 146 N.J. at 589.

1. Examples

In *State v. Wallace, supra*, the Court held that the Appellate Division had failed to view the prosecutor's decision through the filter of the highly deferential standard of review. The Court found that the prosecutor had weighed the relevant and material factors and had reached a conclusion that defendant was not an appropriate candidate for PTI. The Court also noted that the Appellate Division essentially evaluated the case as if it stood in the shoes of the prosecutor, whereas it should have focused on whether the rejection was arbitrary, irrational or otherwise an abuse of discretion. 146 *N.J.* at 589. Thus, the Court unanimously upheld the prosecutor's application for PTI.

In State v. Nwobu, supra, the Supreme Court reaffirmed the wide discretion given to prosecutors in determining which defendants are admitted to PTI. Significantly, the Court held that when confronted with a second degree charge, defendant must establish "compelling reasons" to overcome the presumption against admission. See Guideline 3(I). The Court adopted the Attorney General's definition of the term "compelling reasons," analogizing the presumption in Guideline 3(I) with the related context of criminal sentencing, and concluding that for first and second degree offenders there must be a showing greater than that the accused is a first-time offender and has admitted or accepted responsibility for the crime. The presumption against admission is not overcome except when defendant "demonstrates something extraordinary, unusual or idiosyncratic in his or her background." 39 *N.J.* at 253.

In State v. Seyler, 323 N.J. Super. 360 (App. Div. 1999), aff'd 163 N.J. 69 (2000), the Appellate Division reversed the trial court's order directing defendant's admission into PTI. Defendant was a former police officer charged with third degree theft and multiple fourth degree unsworn falsifications to authorities stemming from a four year welfare fraud scheme undertaken while he attended dental school. These crimes were, pursuant to Guideline 3(I)(2), part of a continuing criminal enterprise calculated to defraud the State of welfare funds, thereby making defendant presumptively ineligible for PTI admission. No compelling reason, including his possible preclusion from becoming a doctor, justified admission.

In State v. Imbriani, 291 N.J. Super. 171 (App. Div. 1996), the Appellate Division affirmed the trial court's denial of PTI to a former Superior Court judge who pleaded guilty to N.J.S.A. 2C:20-9, third degree theft by failure to make required disposition of property received. The prosecutor indicated that he would not object to defendant's admission into PTI if the program director recommended admission. Notwithstanding defendant's motivation -- to pay for college education of his children -- and that he had "spent a lifetime dedicated to the application of justice," the director declined to admit him into PTI, a decision the prosecutor later endorsed. The court held that the decision was based upon consideration of all of the factors referenced by the director, and should not be disturbed. The court further held that the program director was not precluded from evaluating defendant for PTI merely because the theft occurred from a corporation of which the director was a principal shareholder.

In *State v. Kraft*, 265 *N.J. Super.* 106 (App. Div. 1993), the Appellate Division held that the trial court had erred in failing to defer to the prosecutor's decision and in substituting its own judgment in what amounted to a *de novo* review of defendant's application. The prosecutor's reasons for denying PTI carefully relied upon the criteria set forth in the statute, and included the nature of the offense charged (burglary), the needs and interests of society, whether or not the crime was of such a nature that the value of PTI treatment would be outweighed by the public need for prosecution, and whether or not the harm done to society by abandoning the prosecution would outweigh the benefits to society

from channeling defendant into PTI. Additionally, the court found that the prosecutor properly considered the fact that codefendant was denied PTI, and the diversion of this defendant would adversely affect the prosecution of codefendant.

- B. Standard of Review by Courts
- 1. Patent and Gross Abuse of Discretion

The prosecutor may be overruled by the trial court when defendant meets the heavy burden of clearly and convincingly establishing that the prosecutor acted in an arbitrary and capricious manner, amounting to a "patent and gross abuse of discretion." State v. Wallace, 146 N.J. at 582; State v. Leonardis, 73 N.J. at 375. The Supreme Court of New Jersey defined a "patent and gross abuse of discretion" in State v. Dalglish, 86 N.J. at 509 (citing State v. Bender, 80 N.J. 84, 93 (1979)), explaining that a defendant can establish such an abuse if he or she can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment. For an abuse of discretion to be "patent and gross," it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying PTI. Id.

a. Examples

In *State v. Baynes*, 148 *N.J.* 434, 451 (1997), the Supreme Court held the prosecutor had failed to consider all relevant factors when rejecting defendant's PTI application based on the nature of the offense (possession of controlled dangerous substance within a school zone). Although acknowledging that judicial review of a prosecutor's PTI decision is "strictly limited" and that the State's decision to reject a PTI application is afforded great deference, the Court held that the *per se* denial rule was a patent and gross abuse of discretion, and affirmed the decision admitting defendant into PTI.

In *State v. Fitzsimmons*, 291 *N.J. Super.* 375, 379-80 (App. Div. 1995), *certif. denied*, 146 *N.J.* 568 (1996), the Appellate Division held that the denial of defendant's entry into PTI was a patent and gross abuse of discretion. Defendant's crimes were committed when he was just two months past his 18th birthday; all occurred within a three-week period; no evidence existed that defendant was involved in organized, ongoing money-making enterprise for profit; defendant had no juvenile record; the offenses were motivated by his severe drug addiction which began when he was 12 years old; and where the

State eschewed an opportunity to have defendant examined to determine the *bona fides* of his assertion of drug dependency. *Id; but see State v. Wallace* 146 *N.J.* 589.

In *State v. Davis*, 244 *N.J. Super.* 180, 193 (App. Div. 1990), defendant had a legitimate expectation of admission into PTI after the deputy attorney general in charge of his case consented and gave valid reasons for defendant's admission. In reliance on the State's announced decision to admit defendant into PTI, defendant undertook to fulfill conditions negotiated by the deputy and defense counsel. It was only a change in view of a new deputy assigned to defendant's case that prevented defendant's PTI admission. Thus, defendant's legitimate expectation of admission into the program overcame any subsequent decision to revoke his admission.

In *State v. Hoffman*, 224 *N.J. Super.* 149 (App. Div. 1988), the Appellate Division held that the State's objection to defendant's diversion into PTI constituted a patent and gross abuse of discretion. Defendant was charged with official misconduct and criminal trespass. These charges arose out of his duties as an officer of the Special Civil Part of the Superior Court when he entered a dwelling to recover property under a writ of replevin which defendant believed to be valid but, in fact, was not signed by a judge. The court concluded that, considering the circumstances giving rise to defendant's offenses and the likelihood of his responsiveness to rehabilitation, precluding his admission into PTI would be counterproductive, ineffective or unwarranted, and clearly subversive of the underlying PTI goals. *Id.* at 157.

In *State v. Lopes*, 289 *N.J. Super.* 460, 481 (Law Div. 1995), the trial court held that the PTI director's decision rejecting defendant from admission into PTI, over the consent of the prosecutor to admit defendant, constituted a clear error of judgment and an abuse of discretion. The court held that the director is an agent of the judiciary, and his or her decision was not entitled to the enhanced deference accorded to a prosecutor's decision.

2. Simple Abuse of Discretion

A prosecutor's decision may be classified as a "simple" abuse of discretion if it was not premised upon a consideration of all the relevant or appropriate factors, was premised upon a consideration of irrelevant or inappropriate factors, or constituted a clear error in judgment. *State v. Caliguiri*, 158 *N.J.* at 37 (citing *State*

v. DeMarco, 107 *N.J.* 562, 566-67 (1987)). In reviewing a prosecutor's denial of consent, if the prosecutor's conduct amounted only to a simple abuse of discretion, the court should not enroll defendant in PTI without prosecutorial consent. Rather, it should remand the case to the prosecutor for reconsideration, unless the prosecutor would be unlikely to reconsider its decision. *Id.*

a. Examples

In State v. Caliguiri, supra, the Supreme Court remanded the case for reconsideration of defendant's PTI application where defendant was charged with thirddegree possession of marijuana with intent to distribute within 1,000 feet of school property. The Court held that the prosecutor failed to consider all relevant factors, and the application was rejected solely because defendant had committed a school zone offense. *Id.* at 44.

In *State v. Kern*, 325 *N.J. Super.* at 447, the Appellate Division reversed the trial court's denial of defendant's PTI application and remanded the case for reevaluation by the prosecutor. The court found, *inter alia*, that the interviewer for the PTI program was hostile to defendant and had cast defendant in the worst possible light; although no patent and gross abuse of discretion existed, a remand was necessary because inappropriate factors were considered and all relevant factors were not fairly addressed.

In *State v. Maldonado*, 314 *N.J. Super.* 539 (App. Div. 1998), the Appellate Division reversed the trial court's denial of defendant's PTI application. A grand jury had indicted defendant and others for conspiring to both possess and distribute cocaine, and although the PTI director had approved defendant's application for admission, the State had refused to consent. At least one coindictee, though, was admitted into PTI. The appellate court determined that the State had failed to explain why that coindictee was admitted into PTI while defendant was not. The court therefore reversed the order denying defendant's PTI admission, and remanded for a new hearing at which the prosecutor had to set forth reasons why defendant and a coindictee were treated different.

In *State v. Burger*, 222 *N.J. Super*. 336 (App. Div. 1988), the Appellate Division considered the rejection of defendant from PTI on the basis of her participation in a continuing criminal enterprise -- a six year scheme of welfare fraud through which defendant obtained \$25,000 in excess payments. While acknowledging that

defendant fell within the ambit of R. 3:28, Guideline 3(I)(2) that generally precludes admission of a defendant whose crime constitutes a continuing criminal enterprise, the court held that a remand for reconsideration by the prosecutor was nevertheless This was based on the court's appropriate. determination that factors indicating defendant's amenability to correction and responsiveness to rehabilitation had not been fully explored by the prosecutor in rejecting the program director's determination that defendant was a suitable PTI candidate. Id. at 342; see N.J.S.A. 2C:43-12b. Although the prosecutor's decision did not amount to a patent and gross abuse of discretion, since the statement of rejection made no reference to any individual factors applicable to defendant (e.g., defendant's background and factors relating to the offense), the conclusion that defendant was not amenable to rehabilitation could not be sustained. State v. Burger, 222 N.J. Super. at 342.

VIII. EFFECT OF SUCCESSFUL COMPLETION

In State v. Singleton, 143 N.J. Super. 65 (Law Div. 1976), defendant was admitted to PTI in Essex County and successfully completed the program. An indictment for charges stemming from the same episode was subsequently returned in Passaic County. Based upon the doctrines of compulsory joinder and collateral estoppel, the court dismissed the Passaic County indictment because defendant could reasonably expect that his participation in PTI would terminate prosecution for the entire episode. See also State v. Von Smith, 177 N.J. Super. 203 (App. Div. 1980).

IX. RESTITUTION

In State v. Spann, 160 N.J. Super. 167 (Law Div. 1978), the trial court held that defendant's admission to PTI may be conditioned upon making restitution (see *Guideline* 3(k), which incorporates this holding). However, the court must conduct a hearing to determine the applicant's ability to pay and to settle the restitution amount, if contested. See State v. Jamiolkoski, 272 N.J. Super. 326 (App. Div. 1994), and State v. Castaldo, 271 N.J. Super. 254, 261 (App. Div. 1994) (both holding that defendant is entitled to prosecutorial reconsideration of the restitution condition where there was a bona fide dispute as to the amount owed). Termination is appropriate where defendant fails to make restitution upon which the PTI enrollment was conditioned. Id. at 173; but see State v. Devatt, 173 N.J. Super. 188 (App. Div. 1980) (holding that a decision to terminate for failure to make restitution within statutorily prescribed

time limit, without consideration of circumstances relevant to the participant, was not sufficient in itself to support termination).

X. TERMINATION

A. Examples

As a starting point, persons charged with violating conditions of PTI are afforded certain rights and due process protections. In State v. Lebbing, 158 N.J. Super. 209 (Law Div. 1979), the trial court compared the liberty of a participant in PTI with the liberty interest of a defendant in a parole or probation violation situation, and concluded that similar due process protections should be accorded a PTI divertee before terminating defendant's participation in PTI. Accordingly, the court determined that a hearing must be held at a meaningful time and in a meaningful manner, and that there must be (1) written notice of the claimed violation, (2) disclosure of the evidence relied upon, (3) an opportunity to be heard in person and to present witnesses and documentary evidence, (4) the right to confront and examine adverse witnesses and (5) a statement of reasons for termination by the presiding judge.

In State v. Schroth, 299 N.J. Super. 242 (App. Div. 1997), the Appellate Division held that a defendant who violated his PTI conditions when the prosecution was postponed was properly returned to the criminal justice system even though the order terminating him from PTI was entered after the final date of the original postponement term. Nothing in the Code or court rules barred defendant's PTI termination after the initial PTI term expired. Given defendant's inexcusable failure to comply with the conditions of his PTI admission, the court therefore found no reason to disturb either the termination order or the order denying defendant's motion to dismiss the indictment. The court, however, did agree that defendant's crime preceded the enactment of N.J.S.A. 2C:43-3.2, and thus the trial court could not impose a Safe Neighborhoods Services Fund assessment.

In *State v. Pellegrino*, 254 *N.J. Super.* 117, 121 (App. Div. 1992), the Appellate Division held that evidence that, within six months after being accepted into pretrial intervention program, defendant was arrested for distributing drugs to an undercover police officer and was later convicted warranted defendant's dismissal from program even though defendant was put on probation rather than incarcerated for drug offense.

Distinguishable, however, is State v. Fenton, 221 N.J. Super. 16, 27 (Law Div. 1987), where the trial court held that the mere fact of arrest or indictment cannot provide the sole basis for termination of PTI. This finding was deemed to be in accordance with State v. Devatt, 173 N.J. Super. at 195, whose general standards for termination hearings require "a conscientious judgment" based "in the exercise of sound discretion" that termination is warranted. The court believed that these standards required the inclusion of the "presumption of innocence" in termination proceedings and therefore preclude termination based only on an arrest or indictment. State v. Fenton, 221 N.J. Super. at 24. This holding is contrary to State v. Wilson, 183 N.J. Super. 86 (Law Div. 1981), which held that proof of indictment sufficiently supported the State's motion for termination since the divertee was given an opportunity to explain the surrounding circumstances at the hearing. The Fenton court also held, contrary to Wilson, that due process required representation by counsel at a hearing to terminate PTI. State v. Fenton, 221 N.J. Super. at 22.

XI. POST-CONVICTION RELIEF

In State v. Staruch, 326 N.J. Super. 245, 250 (App. Div. 1999), the Appellate Division held that a defendant who failed to file an appeal of his PTI denial could not seek a remedy by way of a petition for post-conviction relief. In Staruch, defendant's application for enrollment into PTI was denied in June 1996. He then pleaded guilty to a count of the indictment charging him with distribution of marijuana in a school zone, and was sentenced to a four year term with a one year period of parole ineligibility. More than one year after his December 1996 sentencing, defendant sought postconviction relief by virtue of the rejection of his application for PTI. See State v. Caliguiri, 158 N.J. at 44; State v. Baynes, supra, 148 N.J. at 451. In denying postconviction relief, the court concluded that it was not a substitute for appeal by a defendant who declined to appeal a rejection, and defendant had no constitutional basis in seeking such relief. State v. Staruch, 326 N.J. Super. at 250.

PRISONERS AND PAROLE

(See also MEGAN'S LAW, PROBATION, SENTENCING, SEX OFFENDERS, VICTIMS, this Digest)

I. COURT APPEARANCES BY PRISONERS

A trial judge is given wide discretion in determining proper security measures within the courtroom and is obligated to protect the jury, counsel, witnesses and members of public. *State v. Zhu,* 165 *N.J.* 544, 557 (2000); *State v. Cook,* 330 *N.J. Super.* 395, 415 (App. Div. 2000), *certif. denied* 165 *N.J.* 486 (2000).

Security measures that are not inherently prejudicial need not be justified by compelling evidence of imminent threats to the security of the court. *State v. Zhu,* 165 *N.J.* at 557. *See, Holbrook v. Flynn,* 475 *U.S.* 560, 568-69 106 *S.Ct.* 1340, 1345-46, 89 *L.Ed.*2d 525, 534 (1986). However, a trial court cannot allow unsupported or unreasonable assumptions concerning the need for security to dictate implementation of enhanced measures. Rather, trial courts must ensure that the security measures they employ do not brand the accused with the indicia of guilt contrary to constitutional guarantees. *State v. Zhu,* 165 *N.J.* at 558.

Thus, although the County Sheriff is the presumed expert in these matters and has primary responsibility to provide for security, it is the non-delegable duty of the trial court ultimately to approve such measures consistent with constitutional protections to which all defendants are entitled. *State v. Zhu*, 165 *N.J.* 544, 557 (2000).

The power to order a defendant to stand jury trial while handcuffed or shackled calls for a meaningful exercise of judicial discretion. Physical restraints may be used only in exceptional circumstances. The information upon which the judge acts need not necessarily come from evidence formally offered and admitted at the trial. His knowledge may stem from official records or what law enforcement officers have told them. State v. Mance, 300 N.J. Super. 37, 50 (App.Div. 1997); State v. Damon, 286 N.J. Super. 492, 499 (App.Div. 1996); State v. Roberts, 86 N.J. Super. 159, 168 (App. Div. 1965). Such information or knowledge should be placed on the record before trial and out of the presence of the jury, and defendant should be afforded reasonable opportunity to meet that information. Id.

A trial judge should not require an accused to remain handcuffed in the presence of the jury merely because there was a shortage of courtroom security personnel. Security measures should have been established which would have permitted defendant to appear in the presence of the jury without handcuffs. *State v. Damon*, 286 *N.J.Super.* 492, 497 (App. Div. 1996).

When defendant continuously interrupts the trial proceedings or where in the course of the trial there is evident danger of defendant's escape, or restraint is necessary in order to protect others from an attack, the trial judge may have defendant restrained on the spot, without a hearing, because the conduct took place in the presence of the court. *State v. Roberts*, 86 *N.J.Super.* 159, 168 (App. Div. 1965).

The right to be free from handcuffs during trial does not extend to being taken from the jail cell to the courtroom even if inadvertently seen by the jury. *State v. Jones*, 130 *N.J. Super.* 596 (Law Div. 1974).

Defendant, previously convicted of multiple murders in Pennsylvania, defending himself *pro se* with two "co-counsel" assigned attorneys on capital murder, was properly confined to counsel table because of security concerns and was not permitted to leave counsel table to approach a witness, walk around courtroom or approach bench for sidebar conferences. *State v. Cook*, 330 *N.J. Super.* 395 (App. Div.), *certif. denied* 165 *N.J.* 486 (2000).

II. PRISONER'S CLOTHES AND APPEAR-ANCE

Compelling defendant to wear prison clothes in front of jury violates Fourteenth Amendment because it may negatively affect judgment of jurors. *Estelle v. Williams*, 425 *U.S.* 501, 505, 96 *S.Ct.* 1691, 1693, 48 *L.Ed.*2d 126, 131 (1976).

Defendants appearing for a jury trial in prison garb should be personally questioned by the trial judge concerning their desire to relinquish the right to appear in civilian clothes and an explicit in-court waiver should be obtained. *State v. Maisonet*, 166 *N.J.* 9, 18 (2001); *State v. Gertrude*, 309 *N.J. Super.* 354, 357 (App. Div. 1998); *State v. Carrion-Collazo*, 221 *N.J. Super.* 103, 112-13 (App. Div. 1987), *certif. den.* 110 *N.J.* 171 (1988).

Where defendant was deprived by the prison authorities of all necessary amenities, such as food, clean

bedding, soap and running water, and was forced to appear in court in a dirty and disheveled state with no justification by the correctional authorities, he was denied his right to a fair trial and fundamental fairness required a reversal of his conviction. *State v. Maisonet*, 166 *N.J.* at 20-21.

III. PRETRIAL DETAINEES

Where it is alleged that a pretrial detainee has been deprived of liberty without due process, the dispositive inquiry is whether the challenged practices or policy constitutes punishment or is reasonably related to a legitimate governmental objective. *Bell v. Wolfish*, 441 *U.S.* 520, 535, 539, 99 *S.Ct.* 1861, 1872, 1874, 60 *L.Ed.*2d 447 (1979). In considering whether a specific practice or policy is "reasonably related" to security interests, courts should play a very limited role, since such considerations are peculiarly within the province and professional expertise of corrections officials. 441 *U.S.* at 541, n.23, 99 *S.Ct.* at 1875, n.23.

In *Block v. Rutherford*, 468 *U.S.* 576, 598, 104 *S.Ct.* 3227, 3234, 87 *L.Ed.*2d 438 (1984), the Supreme Court held that the Constitution does not require that pretrial detainees be allowed contact visits when responsible, experienced administrators have determined in their sound discretion that such visits will jeopardize the security of the facility.

IV. GENERAL PAROLE PROVISIONS

Parole is not a constitutional right but an act of leniency or grace and a device for the protection of society through the rehabilitation of the offender. N.J. Parole Bd. v. Byrne, 93 N.J. 192, 208 (1983); In re Trantino Parole Application, 89 N.J. 347, 363 n.5 (1982); State v. Davis, 175 N.J. Super. 130, 145 (App. Div.), certif. denied 85 N.J. 136 (1980). Moreover, the Supreme Court has repeatedly said that the due process clause does not give an inmate a constitutionally protected liberty interest simply because the State provides for the possibility of parole. See, e.g., Jago v. Van Curen, 454 U.S. 14, 102 S.Ct. 31 70 L.Ed.2d 13 (1981). The New Jersey Constitution guarantees only that "[a] system for the granting of parole shall be provided by law." N.J. Const. (1947), Art. V., § II, ¶ 2. That provision does not guarantee a liberty interest. N.J. Parole Bd. v. Byrne, 93 *N.J.* at 208.

While there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence, there is by statute a protected expectation of parole in inmates who are eligible for parole. *Trantino v. New Jersey Parole Bd.*, 154 *N.J.* 19, 25 (1998).

In Greenholtz v. Inmates of Nebraska Penal & Cor., 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the United States Supreme Court found that the Nebraska parole procedure, which afforded an inmate the opportunity to be heard and informed him in what respects he fell short of qualifying for parole, if parole was denied, complied with the due process requirements of the Constitution. The Court found that there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. 442 U.S. at 7, 99 S.Ct. at 2104. Merely because a statutory expectation exists cannot mean that in addition to the full panoply of due process required to convict and confine, there must also be repeated, adversary hearings in order to continue the confinement. 442 U.S. at 14, 99 S.Ct. at 2107.

Public outrage over an imminent parole determination has no place in a parole proceeding and is to be given no weight in a parole decision. *In re Trantino Parole Application*, 89 *N.J.* at 376.

In *State v. Alford*, 191 *N.J. Super.* 537 (App. Div. 1983), *app. dism.* 99 *N.J.* 199 (1984), the Appellate Division held that a sentence which directed that one-half of the total fine and VCCB penalty be paid before defendant's release constituted an unwarranted infringement on the authority of the State Parole Board. *Id.* at 540.

In *New Jersey State Parole Bd. v. Gray,* 200 *N.J. Super.* 343 (App. Div. 1985), the Appellate Division held that the Parole Board can correct an error in a prisoner's parole eligibility date any time, and found no due process violation in so recalculating the date without notice to the prisoner or affording him a hearing. 200 *N.J. Super.* at 349.

V. PAROLE STANDARDS

The Parole Act of 1979, *N.J.S.A.* 30:4-123.45 to 123.69 (effective April 21, 1980) substantially changed the parole system in New Jersey. Prior to its adoption, the parole system was governed by *N.J.S.A.* 30:4-123.1 to 123.44 (Parole Act of 1948). The former parole law authorized parole only if the Parole Board determined that "there is a reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society."

N.J.S.A. 30:4-123.14 (repealed); *In re Trantino Parole Application*, 89 *N.J.* at 355.

The standard governing the grant of parole under the 1979 Act is that inmates eligible for parole "shall be released on parole at the time of parole eligibility, unless [it is shown] by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime if released on parole. *N.J.S.A.* 30:4-123-53; *Trantino v. New Jersey State Parole Board*, 166 *N.J.* 113, 126 (2001); *Trantino v. New Jersey State Parole Bd.*, 154 *N.J.* 19, 27, 31 (1998); *In Re Trantino Parole Application*, 89 *N.J.* at 377. The 1979 Act thus posits the likelihood of future criminal conduct as the determinative test for parole eligibility and effectively establishes a presumption in favor of parole. *In re Trantino Parole Application*, 89 *N.J.* at 355-356.

The parole standard was revised in 1997 to require release on parole unless the evidence "indicates by a preponderance of the evidence that the inmate failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole ... if released on parole at that time." *N.J.S.A.* 30:4-123.53a. The 1997 amendment does not apply to inmates sentenced before August 18,1997, the date of enactment. *Trantino v New Jersey State Parole Board*, 331 *N.J.Super.* 577, 605 (App. Div. 2000), *aff'd* 166 *N.J.* 113 (2001); *Williams v. New Jersey State Parole Board*, 336 *N.J.Super.* 1, 7 fn.3 (App. Div. 2000).

In *Thompson v. New Jersey State Parole Board*, 210 *N.J. Super.* 107 (App. Div. 1986), the Appellate Division rejected defendant's *ex post facto* argument and found that the 1979 Parole Act's regulations did apply to pre-Code prisoners. The court found that the continuing obligation of the Parole Board to consider the punitive aspects of a pre-Code sentence did not represent a change in the law, but rather a continuation of pre-Code conditions, without the imposition of more onerous terms. See *Royster v. Fauver*, 775 *F.*2d 527 (3d Cir. 1985).

The *Thompson* Court also held that a prisoner does not have the right to see confidential materials in his parole files. However, in order to protect a prisoner's due process rights with respect to this information, the Court outlined certain procedures for the consideration of this material by the Parole Board:

1. When any document in a parole file is administratively removed from a prisoner's copy of the file, N.J.A.C. 10A:71-2.1(c), it must be identified as

confidential and the reason for nondisclosure must be noted in the Board's file.

2. After making a parole decision adverse to the prisoner, the Board shall state in its decision whether any confidential document played any substantial role in its decision and identify this document in its file.

3. If the Board states that none of the confidential material played a substantial role in producing the adverse decision, that is the end of the matter. Good faith is presumed and the appellate court will not review the documents.

4. In cases where the confidential material played a substantial role in producing the adverse decision and an appeal is taken, the Appellate Division will review the material and determine the propriety of the decision to withhold those items from the prisoner.

If the court finds that nondisclosure was improper, the possible remedies include a remand for reconsideration without the documents in question, reconsideration with disclosure to the prisoner, or an exercise of the appellate court's jurisdiction.

In *Royster v. Fauver*, 775 *F.*2d 527 (3d Cir. 1985), the Third Circuit held that the application of the New Jersey Parole Act of 1979 to a pre-Code prisoner's parole application was not an *ex post facto* violation because the standards of the 1979 and 1948 Parole Acts were identical with respect to inmates convicted before 1979. The court also found that regulations promulgated pursuant to the 1979 Act did not constitute an *ex post facto* violation because they did not prejudice the prisoner in any way.

VI. PAROLE NOTIFICATION TO PROSECU-TORS & VICTIMS

The Parole Board is required by statute to notify the county prosecutor, the Attorney General and any other criminal justice agency whose information and comment may be relevant as to the necessity or desirability of an inmate's parole at least 30 days prior to parole consideration. *N.J.S.A.* 30:4-123.45(b)(5). In this process, the prosecutor is not an adversary, but rather his role "is to inform the Board." *In Re Trantino Parole Application*, 89 *N.J.* at 375, 376. Prosecutors and other interested persons who request to participate in the parole hearing remain subject to the discretion and control of the Board, but should be allowed to submit evidence, give testimony, examine witnesses and present

arguments on all matters directly relevant to the parole of the inmate. *Id.* at 376.

On January 12, 1984, the Parole Act was amended, effective, July 10, 1984, to provide that the prosecutor at the time of sentencing notify any victim injured as a result of a crime of the first or second degree or the nearest relative of a murder victim of the opportunity to present a statement to be considered at the parole hearing or to testify to the Parole Board concerning harm suffered. *N.J.S.A.* 30:4-123.54(b)(2). The Parole Act was further amended (*L.*1999, c.304, § 1), effective December 29, 1999, to permit victims to submit a written or videotaped statement in lieu of testifying. *N.J.S.A.* 30:4-123.54(b)(2).

The State Parole Board is required to notify the prosecutor in writing of an inmate's consideration for parole in cases where notice to victims is required (victims of first and second degree crimes or nearest relative of murder victim). *N.J.S.A.* 30:4-123.55a(1).

The State Parole Board shall notify the prosecutor in writing of any application by an inmate for commutation of sentence. *N.J.S.A.* 30:123.55a(2).

The Supreme Court in the case of In re Hawley, 98 N.J. 108 (1984), aff'g 192 N.J. Super. 85 (App. Div. 1984), held that the prosecutor has the right and the authority to appeal any Parole Board decision granting parole to a state prison inmate. Id. at 113. The Court also found that neither the Constitution nor any statute required the Board to furnish the prosecutor with a statement of reasons for its decision to release a prisoner. Id. Nevertheless, the Court urged the Board to reconsider its policy and, in those few sensitive cases in which the prosecutor participates in a *Trantino* hearing, to furnish, upon the prosecutor's request, a statement of reasons why it granted parole. 98 N.J. at 117. The Court believed that such a statement would alleviate any concern the public may have about the reasonableness of the Board's decision. Id.

In *Tyehimba v. New Jersey Parole Board*, 214 *N.J. Super.* 62 (App. Div. 1986), a prisoner appealed the Parole Board's decision denying him a full-step reduction in his sentence but allowing him a half-step reduction as authorized by *N.J.S.A.* 30:4-123.5(j). In accordance with the Parole Act of 1979 and the procedures set forth in *N.J. Parole Board v. Byrne*, 93 *N.J.* 192 (1983), the county prosecutor filed a written statement of reasons for his objection to a whole-step reduction in defendant's eligibility date. Defendant filed a response to the prosecutor's statement of reasons; nevertheless, the Parole Board allowed only a half-step reduction.

The appellate court found that the procedure followed by the Parole Board was exactly that set forth by the Supreme Court in *N.J. Parole Board v. Byrne, supra,* and thus the Board did not act in an arbitrary and capricious manner. The Court also found that no bases for appeal existed simply because defendant and prosecutor disagreed over the details of the offense and defendant's role therein. Thus, the decision of the Board was affirmed.

VII. RELEASE NOTIFICATION TO PROSECU-TORS & VICTIMS

The Department of Corrections (DOC) is required to provide written notice to the prosecuting authority (County Prosecutor or Attorney General) of the anticipated release from custody or review by Institutional Classification Committee which may result in any residential community release program (half-way house) of any person convicted of murder, manslaughter, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated assault, kidnapping of child, endangering welfare of child through sexual conduct, luring or enticing, or any other offense involving serious bodily injury or attempts to commit the listed offenses. *N.J.S.A.* 30:4-123.53a(b).

Notice should be provided by the DOC to the prosecutor at least 30 days before the inmate's release and the prosecutor, through the Office of Victim-Witness Advocacy, shall use reasonable means to notify the victim of the anticipated release date. *N.J.S.A.* 30:123.53a(d).

In cases involving consideration of residential community release, the Attorney General or County Prosecutor has 10 working days to submit comments to DOC. *N.J.S.A.* 30:4-91.8b(1). The prosecutor, through the Office of Victim-Witness Advocacy, shall use reasonable means to notify the victim of the inmate's consideration for community release. The victim has 10 days to submit written comments to DOC. *N.J.S.A.* 30:4-91b(2).

VIII. RELEASE OF ADULT STATE INMATES

Each adult inmate sentenced to a specific term of years at State Prison or the correctional institution for women shall become primarily eligible for parole after having served any judicial or statutory minimum term, or one-third of sentence imposed, where no mandatory minimum term has been imposed, less commutation and work credits. *N.J.S.A.* 30:4-123.51.

IX. RELEASE OF ADULT COUNTY INMATES

Prisoners in county penal institutions become eligible for parole after serving either 60 days of the aggregate sentence or one-third of the aggregate sentence (less commutation credits), whichever is greater. N.J.S.A. 30:4-123.51(a) and (g). Due to these shorter periods of time, notice of parole eligibility is given to the prosecutor by the court at the time of sentence rather than by the Parole Board. N.J.S.A. 30:4-123.51(g). The prosecutor remains entitled to be heard by the Board on the issues of parole and the imposition of any special parole conditions. *Id.*

X. RELEASE OF SEX OFFENDERS

An offender sentenced to the Adult Diagnostic and Treatment Center (ADTC) at Avenel, is within the custody of the Department of Corrections, which is responsible for providing his treatment. *N.J.S.A.* 2C:47-4. Each adult inmate sentenced to Avenel shall become eligible for parole upon the recommendation of the special classification review board, except that no such inmate shall be eligible prior to the expiration of any parole ineligibility term. *N.J.S.A.* 30:4-123.51(e). Such inmates shall be released on parole when the Parole Board is satisfied that he is "capable of making an acceptable social adjustment in the community." *N.J.S.A.* 2C:47-5.

The parole standard for sex offenders was amended, effective December 1, 1998, to provide that sex offenders whose conduct was not characterized by a pattern of repetitive and compulsive behavior, the standard for sentence to Adult Diagnostic and Treatment Center (ADTC or Avenel) or is not amenable to sex offender treatment shall be primarily eligible for parole after having served any judicial or statutory mandatory minimum term or one third of the sentence imposed where no parole ineligibility term has been imposed. Neither term shall be reduced by commutation or work credits. *N.J.S.A.* 30:4-123.51e(1).

All other sex offenders (Avenel inmates who are amenable to treatment) shall be eligible for parole pursuant to *N.J.S.A.* 2C:47-5, but not prior to the expiration of any parole ineligibility term. *N.J.S.A.* 30:4-123.51e(2).

N.J.S.A. 2C:47-5 provides that inmates serving a sex offender sentence at the ADTC shall be referred by the special classifications review board to the State Parole Board for parole consideration if the offender has achieved a satisfactory level of progress in sex offender treatment. The offender shall be released on parole unless the Parole Board determines that the information in the preparole report indicates by a preponderance of the evidence, that the offender has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the offender will violate conditions of parole if released at that time. *N.J.S.A.* 2C:47-5a.

When a sex offender has not met the standard for parole in N.J.S.A. 2C:47-5a but is scheduled for release (maxed out), not less than 90 days prior to that date, the Chief Executive Officer of the ADTC shall notify the County Prosecutor and the Attorney General of the offender's scheduled release date. N.J.S.A. 2C:47-5d(1). The officer shall also provide his or her opinion and all reports, records and assessments relevant to determining whether the offender may be in need of "involuntary civil commitment", N.J.S.A. 30:4-27.2, or whether the offender may be a "sexually violent predator", N.J.S.A. See N.J.S.A. 2C:47-5d; N.J.S.A. 30:4-30:4-27.26. 27.27b. Upon receipt of the above information, the Attorney General or county prosecutor may initiate court proceedings for the involuntary commitment of the offender under N.J.S.A. 30:4-82.4 (involuntary civil commitment) or N.J.S.A. 30:4-27.28 (sexually violent predator).

Megan's Law amendments to civil commitment statute could be applied retroactively. *Matter of D.C.*, 146 *N.J.* 31 (1996); *In Re Civil Commitment of J.G.*, 322 *N.J. Super.* 309, 316 (App. Div. 1999).

Under Megan's Law amendments and civil commitment statute, involuntary commitment proceedings against sex offender whose release from custody was imminent could be initiated by any county prosecutor, not just the prosecutor from the county that had originally committed the inmate. *Matter of Civil Commitment of G.A.*, 309 *N.J.Super.* 152 (App. Div. 1998).

In *Artway v. Pallone*, 672 *F.*2d 1168, 1180 (3 Cir. 1982), the Third Circuit held that the New Jersey Sex Offender Act and the standards used for determining parole eligibility under the 1979 Act did not violate the due process clause of the Fourteenth Amendment.

In *State v. Howard*, 110 *N.J.* 113 (1988), the Court held that *R.* 3:9-2 requires the trial court to inform the defendant of the parole consequences of a sentence to Avenel. As a result of the trial court's failure to inform defendant, defendant was permitted to withdraw his guilty plea. The court further found that in determining whether defendant is a repetitive sex offender due process does not require proof beyond a reasonable doubt; rather, proof by a preponderance of the evidence is sufficient.

XI. CLASSIFICATION

Determination as to which inmate shall be classified as a minimum security prisoner, and thus eligible for various privileges, is a matter within the discretion of prison officials. *State v. Richardson*, 130 *N.J. Super.* 63 (Law Div. 1974); *State v. Rydzewski*, 112 *N.J. Super.* 517 (App. Div. 1970).

Placement of a prisoner in a particular institution is an administrative decision to be made by the Department of Corrections, and any appeal must be made to the Appellate Division. *State v. Clark*, 54 *N.J.* 25, 26 (1969); *State v. Cook*, 330 *N.J. Super.* at 415; *State v. Rydzewski*, 112 *N.J. Super.* at 520; *R.* 2:2-3(a)(2).

XII. WORK AND COMMUTATION CREDITS

Commutation and work credits cannot reduce a statutorily or judicially-imposed mandatory minimum term of incarceration. *N.J.S.A.* 30:4-123.51a; *Merola v. Department of Corrections*, 285 *N.J. Super.* 501, 509 (App. Div. 1995), *certif. denied* 143 *N.J.* 519 (1996); *State v. Davis*, 175 *N.J. Super.* 130, 142-146 (App. Div. 1980), *certif. denied* 85 *N.J.* 136 (1980).

When an inmate is sentenced to a mandatory minimum term, any commutation and work credits earned will be awarded upon the expiration of the mandatory minimum term for application to the remainder of the sentence. *Merola v. Department of Corrections*, 285 *N.J.Super.* at 510. Murder defendant's 30-year mandatory minimum term of imprisonment was not subject to reduction through application of commutation and work credits. *Id.* at 510-11.

In *Trantino v. Department of Corrections*, 168 *N.J. Super.* 220 (App. Div. 1979), *certif. denied* 81 *N.J.* 338 (1979), the Appellate Division held that the policy of the Department of Corrections which denied prisoners, whose death sentences were commuted to life imprisonment, work credits toward parole eligibility for the time spent on death row did not violate the constitutional guarantees of equal protection or due process. The Court held that the prisoners were not entitled to work credits for work they did not perform. *Id.* at 224-26. *See, e.g., Zink v. Lear,* 28 *N.J. Super.* 515 (App. Div. 1953).

In *Karatz v. Scheidemantel*, 226 *N.J. Super.* 468 (App. Div. 1988), the Court held that: the Law Division lacked jurisdiction over inmate's habeas corpus petition alleging wrongful denial of early release; and inmate sentenced to mandatory minimum term to Avenel as subsequent offender under *N.J.S.A.* 2C:14-6 was not entitled to deduction from sentence of commutation and work credits.

In Savad v. Corrections Dep't, 178 N.J. Super. 386 (App. Div. 1981), certif. denied 87 N.J. 389 (1981), the court held that Title 2A sex offenders who were resentenced under the penal code, N.J.S.A. 2C:1-1d(2), were eligible for work and good behavior credits under N.J.S.A. 30:4-92 and 30:4-140 which should be calculated from the effective date of the code. *Id.* at 392-393.

Title 2A sex offenders who were not resentenced under the Code, still continue to serve their sentences under the Sex Offender Act, *N.J.S.A.* 2A:164-10, and thus were not eligible for work and good time credits. *Savad v. Corrections Dep't*, 178 *N.J. Super.* at 390-391. *See Attorney General, F.O. No.* 11 (1980). *See, e.g., State v. Fernandez*, 209 *N.J. Super.* 37 (App. Div. 1986).

The denial of commutation and/or work credits to sex offenders sentenced under Title 2A does not violate the United States or New Jersey Constitutions. *Prevard v. Fauver*, 47 *F.Supp.*2d 539, 544 (D.N.J. 1999), *aff'd* 202 *F.*3d 254 (3d Cir. 1999); *State v. Fernandez*, 209 *N.J. Super.* at 47-51.

Administrative regulation which prevented partially paralyzed inmate from earning work credits did not violate his rights to due process and equal protection. *Rowe v. Fauver*, 533 *F.Supp.* 1239 (D.N.J. 1982).

XIII. PAROLE REVOCATION

Any parolee who is convicted of a crime while on parole shall have parole revoked and be returned to custody unless the parolee demonstrates, by clear and convincing evidence, that good cause exists why he or she should not be returned to confinement. *N.J.S.A.* 30:4-123.60(e).

Doctrine of fundamental fairness and principles of double jeopardy did not preclude imposition of both parole revocation and criminal prosecution from absconding from parole. *State v. Black*, 153 *N.J.* 438 (1998); *State v. Eisenman*, 153 *N.J.* 462 (1998).

In *N.J. State Parole Bd. v. Mannson*, 220 *N.J. Super.* 566 (App. Div. 1987), *certif. denied* 110 *N.J.* 194 (1988), the Appellate Division held that reconvening a parole revocation hearing before a hearing officer, prior to a final determination on the merits, did not violate a parolee's due process rights. The court further held that the double jeopardy clause does not apply to parole revocation hearings and, therefore, did not preclude admission of additional evidence after the completion of the initial hearing before a hearing officer.

In *Morrissey v. Brewer*, 408 *U.S.* 471, 92 *S.Ct.* 2593, 33 *L.Ed.*2d 484 (1972), the Supreme Court found that Due Process requires the following minimum requirements prior to revocation of parole:

1. written notice of the claimed violations;

2. disclosure to the parolee of the evidence against him;

3. opportunity to be heard and to present witnesses and evidence;

4. the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing the confrontation);

5. a neutral and detached hearing body;

6. a statement by the factfinders of the evidence relied on and reasons for revoking parole.

In *Home News Pub. Co. v. State*, 224 *N.J. Super.* 7 (App. Div. 1988), newspaper brought an action challenging the Parole Board's refusal to give newspaper access to certain Parole Board records. The Appellate Division held that: the court was required to examine document either *in camera* or in preliminary indexing format in evaluating allegations of exemptions from disclosure: and the Parole Board was required to review requested documents on a case-by-case basis, disclosing only such nonconfidential information as it deemed consistent with standards of protection and openness.

XIV. DISCIPLINARY HEARING

In *Wolff v. McDonnell*, 418 *U.S.* 539, 94 *S.Ct.* 2963, 41 *L.Ed.*2d 935 (1974), the Supreme Court found that

due process requires the imposition of several safeguards in prison disciplinary procedures which could result in the loss of credits or imposition of solitary confinement. Prisoners must be:

1. afforded advance written notice of the claimed violation;

2. inmates must be presented a written statement of fact findings;

3. inmates have the right to call witnesses and present documentary evidence where such would not be unduly hazardous to the institutional safety or correctional goals;

4. they must be heard before an impartial review board.

The Court found that prisoners' Sixth Amendment rights of confrontation and cross-examination, as well as the right to counsel, did not attach. The Court also held that mail from attorneys to inmates could be opened by prison officials in the presence of inmates but not read without infringing upon the prisoners' First, Sixth, or 14th Amendment rights.

In *Avant v. Clifford*, 67 *N.J.* 496 (1975), the New Jersey Supreme Court held that procedural due process in a disciplinary hearing requires that the defendant be afforded:

1. Notice - written notice of specific alleged violation.

2. Impartial Tribunal - the Adjustment Committee shall sit at the disciplinary hearing. Such committee shall not consist of more than one person selected from the correctional staff.

3. Discovery - disclosure of the evidence against him.

4. Reasons - statement by the factfinders of the evidence relied on and reasons for their action.

The Court reviewed the applicable standards for disciplinary hearings under the New Jersey law and found that they were in full compliance with the rules set forth by the U.S. Supreme Court in *Wolff v. McDonald, supra.*

The Court also held that a prisoner appearing before the Adjustment Committee must be advised both at the disciplinary hearing and at the investigative interview which precedes it, not only of his right to remain silent but also of his right to make a statement concerning the charge. Consequently, any prisoner must be "informed that any information which they [give] would not be used against them in criminal proceedings."

In *Baxter v. Palmigiano*, 425 *U.S.* 308, 96 *S.Ct.* 1551, 47 *L.Ed.*2d 810 (1976), the Supreme Court noted that ordinarily the right to present evidence at a prison disciplinary hearing is basic to a fair hearing, but the inmates' right to present witnesses is necessarily circumscribed by the penological need to provide swift discipline in individual cases. Thus, the right to call witnesses is subject to the "mutual accommodation between institutional needs and objectives and the provision of the Constitution."

In *Ponte v. Real*, 471 *U.S.* 491, 105 *S.Ct.* 2192, 85 *L.Ed.*2d 393 (1985), the Supreme Court held that due process requires that prison officials state at some point their reasons for refusing to call witnesses requested by an inmate at a disciplinary hearing.

XV. RIGHT TO PRIVACY & FOURTH AMENDMENT

In *Hudson v. Palmer*, 468 *U.S.* 517, 104 *S.Ct.* 3194, 82 *L.Ed.*2d 393 (1984), the Supreme Court held that prisoners have no expectation of privacy in their prison cells, and accordingly, the Fourth Amendment proscription against unreasonable search and seizures does not apply within the confines of a prison cell.

When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to penological interests. *Turner v. Safley*, 482 *U.S.* 78, 107 *S.Ct.* 2254, 96 *L.Ed.*2d 64 (1987).

Policy of Department of Corrections which subjects visitors to correctional facilities to searches for CDS using Ion Scan Machines and passive canine units did not violate Fourth Amendment or Due Process Clause. *Jackson v. Department of Corrections*, 335 *N.J. Super.* 227 (App. Div. 2000).

Statute, *N.J.S.A.* 2C:47-10, which restricted sex offenders access to pornographic materials was reasonably related to legitimate penological interests and thus constitutional. *Waterman v. Farmer*, 183 *F.*3d 208, 218 (3d Cir. 1999).

In *State v. Gillespie*, 225 *N.J. Super.* 435 (Law Div. 1987), the Court determined that the Department of Corrections Administrative Plan Manual was constitu-

tional and upheld the seizure of sexually explicit pictures, which clearly fell within the manual's definition of contraband, finding no violation of the First, Fourth or fourteenth Amendment rights of defendant.

In *State v. Fornino*, 223 *N.J. Super.* 531 (App. Div.), *certif. denied* 111 *N.J.* 570 (1988), *cert. denied* 488 *U.S.* 859 (1988), the Appellate Division held that monitoring of prison inmate's telephone calls, in the ordinary course of correction officers' duties, did not require a warrant. Furthermore, defendant's Fourth Amendment rights were not violated.

A prisoner does not enjoy the same right of privacy as non-incarcerated persons and official surveillance has traditionally been the order of the day. Defendants' motion to suppress a conversation between them, following their arrest, which was overheard by officials using electronic surveillance was therefore properly denied below. *State v. Ryan*, 145 *N.J. Super.* 330 (Law Div. 1976).

XVI. FREEDOM OF RELIGION

In O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), the United States Supreme Court held that prison policy preventing inmates assigned to outside work detail from attending afternoon religious service did not violate prisoner's rights under the Free Exercise Clause of the First Amendment to the Constitution.

Prisoners must be provided "reasonable opportunities" to exercise their religion freedom guaranteed under the First Amendment. *Cruz v. Beto*, 405 *U.S.* 319, 322 fn.2 92 *S.Ct.* 1079, 1081 fn.2, 31 *L.Ed.*2d 263 (1972).

XVII. RELINQUISHMENT OF PRISONER TO OTHER JURISDICTIONS

Governor has discretion to extradite prisoner serving life sentence in New Jersey to another state where he faces the death penalty. *State v. Robbins*, 124 *N.J.* 282 (1991).

The temporary relinquishment of defendant from the state to federal authorities for prosecution is a matter of comity between jurisdictions which did not violate defendant's constitutional or statutory rights nor did it require that service of the state sentence commence on the date of transfer to the federal authorities. For purposes of determining parole eligibility, service of defendant's state prison sentence commenced on the date of his return to the state following completion of his federal obligations. *Russillo v. Fauver*, 225 *N.J. Super.* 308 (App. Div. 1988).

When one owes penalties to two separate sovereigns, the order of punishment is a matter to be decided between the sovereigns - it is a matter of comity between them - and the decision arrived at is one which the convict has no control. *Breeden v. New Jersey Dept. of Corrections*, 132 *N.J.* 457, 463 (1993); *State v. Robbins*, 124 *N.J.* 282, 289 (1991); *State v. Williams*, 92 *N.J.Super.* 560, 563 (App. Div. 1966).

XVIII. PRISON OVERCROWDING

In *Rhodes v. Chapman*, 452 *U.S.* 337, 101 *S.Ct.* 2392, 69 *L.Ed.*2d 59 (1981), the Supreme Court found that the double celling of prisoners was not *per se* unconstitutional and under the facts of this case did not constitute cruel and unusual punishment.

In *Worthington v. Fauver*, 88 *N.J.* 183 (1982), the Supreme court upheld the validity of Executive Order No. 106, issued by the Governor on June 19, 1981, to alleviate the potentially disastrous overcrowding of inmates in state and county correctional institutions. The Court found that the temporary emergency executive orders were authorized by the Disaster Control Act, *N.J.S.A. App.* A:9-30 et seq., and they did not violate the constitutional doctrine of separation of powers, 88 *N.J.* at 210.

In *County of Gloucester v. State*, 132 *N.J.* 141 (1993), the Supreme Court held that the problem of prison overcrowding no longer constituted an emergency within the meaning of the Disaster Control Act and, thus, the executive order authorizing housing of state prisoners in county jails was invalidated.

Subsequent to *Gloucester* decision, the Legislature enacted *L.* 1994, c. 12, which declared prison overcrowding an emergency and authorized the Governor to issue executive orders to address the "crowding problem". *See Executive Order No. 16* (1994). In 1996, the Legislature extended the Governor's executive authority over prison overcrowding for two more years, *L.* 1996, c. 9. *County of Morris v. Fauver*, 153 *N.J.* 80, 90 (1998); *County of Hudson v. Department of Corrections*, 152 *N.J.* 60, 68-69 (1997). *See Executive Order No. 48* (1996).

I. THE PRIVATE DETECTIVE ACT OF 1939

The private detective business is defined to include the business of making for hire or reward any investigation of, for example, crimes against the government, the identity or conduct of any person or organization, the whereabouts of missing persons, the location of lost or stolen property, and the causes of fires, accidents or injuries to persons or corporations. A private detective business also means the furnishing for hire or reward of watchmen, guards or private patrolmen to protect persons or property or for any other purpose. *N.J.S.A.* 45:19-10a.

Strict regulation over the private detective business, including control of those persons who desire to enter that business, is within the public interest because of the inherent potential for abuse. *Schulman v. Kelly*, 54 *N.J.* 364, 371 (1969). Thus, any person or firm which engages in the private detective business without having first obtained a license from the Superintendent of the State Police is guilty of a misdemeanor. *N.J.S.A.* 45:19-10.

Every applicant for a private detective's license must be twenty-five years or older. No license shall be issued to any person or firm unless such person or at least one member of the firm has had at least five years experience as an investigator or as a police officer within an organized police department of any state or a county or municipality thereof, or with an investigative agency of the federal government. *N.J.S.A.* 45:19-12; *Schulman v. Kelly*, 54 *N.J.* at 371; *Artis v. New Jersey State Police*, 93 *N.J.A.R.*2d 1, 2 (1992).

A private detective licensee holds himself or herself out to be a person of good character, competency and integrity. *Devlin v. Greiner*, 147 *N.J. Super.* 446, 466-67 (Law Div. 1977). The ultimate purpose of the statutes relating to the licensing of private detectives is to prevent "disreputable, incompetent persons who would prey upon the public from engaging in such business." *Berardi v. Rutter*, 42 *N.J. Super.* 39, 50-51 (App. Div. 1956), *aff* d 23 *N.J.* 485 (1957). Accordingly, *N.J.S.A.* 45:19-12 permits that the Superintendent of State Police is authorized to revoke a private detective's license for cause; a substantial defect in a detective's good character, competency and integrity is sufficient to render revocable his or her license. *Berardi v. Rutter, supra*, 42 *N.J. Super.* at 49, 50-52. Every individual seeking a private detective license is subject to a background investigation by the State Police. Note, however, that any information obtained as a result of such an investigation is confidential and can only be disclosed through a court order. *See N.J.S.A.* 45:19-12. This rule applies equally to the disclosure of information by the State Police to other law enforcement agencies for law enforcement purposes. *City of Passaic v. New Jersey Division of State Police*, 332 *N.J. Super.* 94, 96, 106 (App. Div. 2000).

Not every individual acting in the capacity of a private detective, however, must be licensed. "[P]olice officers engaged in off-duty security work do not fall under the licensing requirements of the Act unless they are engaged in the "private detective business." Bowman v. Township of Pennsauken, 709 F. Supp. 1329, 1344 (D.N.J. 1989). Also, a person, including a constable, who is an employee of a private detective business does not have to obtain the license required by this Act. N.J.S.A. 45:19-10. Note, however, that a constable who holds the capacity of a security guard at various private business enterprises cannot operate without such a license. Id. Additionally, a license is not required for a single or isolated investigation conducted within the state. State v. Whitaker, 143 N.J. Super. 358, 366-67 (Law Div. 1976).

Regular members of a municipal police department during their off duty hours or any other person may engage in police-related activities for private commercial establishments as employees without being in violation of the Act, as long as those activities do not constitute the business of a private detective security guard or watchman. *Attorney General's Formal Opinion No.* 11 (1978); *See also In re Preis*, 118 *N.J.* 564, 576 (1990) (endorsing the *Attorney General's Formal Opinion No.* 11).

II. REVOCATION OF LICENSE

A private detective license is valid for a five year period but is revocable by the Superintendent after a hearing for cause. *N.J.S.A.* 45:19-2. The basic test applicable in a revocation hearing is whether the facts established show a lack of good character, competency, and integrity or whether the facts and circumstances are such that those requirements have been impaired to such an extent that the holding of the license by the individual "would create the possibility of the very mischief and danger the statute aimed to prevent." *In Re Berardi,* 23 *N.J.* 485, 493 (1957).

III. GUN PERMIT REQUIREMENT

Licensed private detectives are not exempt from the gun permit requirements of *N.J.S.A.* 2C:39-5b. Rather, such individuals must apply for a permit to carry a handgun pursuant to *N.J.S.A.* 2C:58-4. *In Re Rawls*, 197 *N.J. Super.* 78, 83 (Law Div. 1984); *State v. Nicol*, 120 *N.J. Super.* 503, 506 (Law Div. 1972).

The rules in this area are strict. As the Supreme Court of New Jersey stated, "[g]iven the dangers inherent in carrying handguns and the urgent necessity for their regulation," the authorization for the carrying of handguns lies strictly with the judiciary. *In re Preis, supra*, 118 *N.J.* at 576. To that end, each applicant must establish a "justifiable need" to carry a handgun on a "case-by-case" basis. *Id.* Also, the judge must thereafter determine "(1) that the applicant, in the course of performing statutorily-authorized duties, is subject to a substantial threat of serious bodily harm; and (2) that carrying a handgun is necessary to reduce the threat of unjustifiable serious bodily harm to any person." *Id.* at 576-77.

And, the mere fact that employees of a private detective agency were former police officers did not automatically qualify them for a gun permit. Nor does the fact of their former employment presume that such applicants are of "good character or physical fitness" without subjecting them to the two-year-renewal review. *Id.* at 575; *see Matter of Purcell*, 137 *N.J. Super.* 369, 370-71 (App. Div. 1975) (holding that a misdemeanor conviction arising out of defendant's conduct as a private detective without a license was a disqualifying factor for a permit to carry a handgun).

PROBATION

(See also, SENTENCING, PRISONERS AND PAROLE, this Digest)

I. PROBATION AND CONDITIONS

N.J.S.A. 2C:45-2a provides that when the court has sentenced a defendant to be placed on probation, the period of probation shall be fixed by the court at not less than one year nor more than five years.

A defendant convicted of any offense may be placed on probation for a period of up to five years, notwithstanding the fact that the probationary term may exceed the statutory maximum sentence for that offense. *State v. Dove*, 202 *N.J. Super.* 540 (Law Div. 1985).

When the court sentences a defendant to a probationary term, it shall attach such reasonable conditions as it deems necessary to insure that the defendant will lead a law-abiding life or is likely to assist him or her to do so. *N.J.S.A.* 2C:45-1a.

Trial court can order, as a condition of probation, defendant's exclusion from casino hotels, provided that the casino disbarment does not exceed the length of the probationary term. *State v. Krueger*, 241 *N.J. Super.* 244, 255-259 (App. Div. 1990).

Waiver of right to extradition in the event of VOP violation can be condition of probation for probationer permitted to reside out of state. *State v. Maglio*, 189 *N.J.Super.* 257, 259 (Law Div. 1983).

Court can require that defendant serve a county jail sentence not exceeding 364 days, as a condition of probation. *N.J.S.A.* 2C:43-2b(2). The custodial portion of probationary sentence can be served at any time during a probationary period, *State v. Postal*, 204 *N.J. Super.* 94 (Law Div. 1985), and it can be reduced at any time. *State v. Robinson*, 198 *N.J. Super.* 602 (Law Div. 1984).

The presumption of non-incarceration is not violated by imposition of probationary sentence with condition of county jail sentence (split sentence). *State v. Hartye*, 105 *N.J.* 411 (1987); *State v. O'Connor*, 105 *N.J.* 399 (1987) (overruling *State v. Hess*, 198 *N.J. Super.* 322, 327 (App. Div. 1984).

The presumption of incarceration is not satisfied by the imposition of a probationary sentence with the condition of a county jail sentence (split sentence). *State v. O'Connor*, 105 *N.J.* at 408-409. *See, e.g., State v.* Whidby, 204 N.J. Super. 312 (App. Div. 1985); State v. Kreidler, 211 N.J. Super. at 279.

II. REVOCATION HEARING

The penal code provides in *N.J.S.A.* 2C:45-3a(4) that the court may revoke a defendant's probation and resentence him if it is satisfied that the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of probation or if he has been convicted of another offense.

In *State v. Reyes*, 207 *N.J. Super.* 126, 135 (App. Div. 1986), *certif. denied* 103 *N.J.* 499 (1986), the Court held that a violation of probation may not be found unless defendant has been convicted of another offense or the court is satisfied by a preponderance of the evidence that defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of probation. *See, e.g., State v. Jenkins*, 299 *N.J. Super.* 61, 73 (App. Div. 1997).

N.J.S.A. 2C:45-4 provides that prior to any probation revocation or modification of probationary conditions, the defendant shall be given written notice of the grounds on which the action is proposed and a hearing. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense, and to be represented by counsel. *See Gagon v. Scarpelli*, 411 *U.S.* 778, 93 *S.Ct.* 1756, 1760 (1983) (due process requirements set forth in *Morrissey v. Brewer*, 408 *U.S.* 471, 92 *S.Ct.* 2593 (1972), for parole revocation hearings); *State v. Johnson*, 133 *N.J.Super.* 457, 461 (App. Div.1975).

In order for the court to have jurisdiction to revoke probation and punish a probationer for violation of a probationary condition, the probation violation complaint must be filed with the court during the probationary term. *State v. Grabinski*, 245 *N.J. Super.* 402, 405 (App. Div. 1991); *State v. Joseph*, 238 *N.J. Super.* 219, 222 (App. Div. 1990); *State v. DeChristino*, 235 *N.J. Super.* 291, 295, 296 (App. Div. 1989). *State v. Gibson*, 156 *N.J. Super.* 516, 531 (App. Div. 1981), *certif. denied* 78 *N.J.* 411 (1978).

The filing of a petition or complaint by a probation officer constitutes commencement of the probation revocation proceeding and tolls the probationary period. *N.J.S.A.* 2C:45-3c; *State v. Grabinski*, 245 *N.J. Super.* 402 (App. Div. 1991).

The probationary term is not tolled for any period during which defendant absconds or is absent from the State unless a probation violation complaint is filed with the court before the expiration of the probationary term. *State v. DeChristino*, 235 *N.J. Super.* 291, 295 (App. Div. 1989); *State v. Hyman*, 236 *N.J. Super.* 298, 302 (App. Div. 1989).

Failure of a defendant to report to the probation department constitutes grounds for revocation and imprisonment. *State v. Wilson*, 226 *N.J. Super*. 271 (App.Div. 1988); *State v. Smith*, 226 *N.J.Super*. 276 (App. Div. 1988); *State v. McCain*, 150 *N.J. Super*. 497 (App. Div. 1977). Similarly, failure to participate in a required drug rehabilitation program also constitutes sufficient grounds to revoke probation. *State v. Reyes*, 207 *N.J.Super*. 126, 137 (App. Div. 1986), *certif. denied* 103 *N.J.* 499 (1986); *State v. Johnson*, 133 *N.J. Super*. 457, 464 (App. Div. 1975). Testing positive for drug use on urine test is also grounds for revocation. *State v. Smith*, 226 *N.J.Super*. 276 (App. Div. 1988); *State v. Wilson*, 226 *N.J.Super*. 271 (App.Div. 1988).

Commission of a crime while on probation is automatically a violation thereof and every probationer must be held to know that, even where specific conditions of probation may not have been prescribed. *State v. Williams*, 299 *N.J. Super.* 264, 269 (App. Div. 1997); *State v. Zachowski*, 53 *N.J. Super.* 431, 437 (App. Div. 1959). It is equally beyond question that a plea of guilty or *non-vult* to a subsequent offense while on probation is a conclusive admission and proof of violation. *State v. Williams, supra.*

The penal code provides that no revocation of suspension or probation shall be based on failure to pay a fine or make restitution, unless the failure was willful. N.J.S.A. 2C:45-3a(4).

A defendant may not be jailed merely because he cannot pay a fine in full at once. *State v. DeBonis*, 58 *N.J.* 182, 196 (1971). *See also Tate v. Short*, 401 *U.S.* 395, 91 *S.Ct.* 668 (1971); *Williams v. Illinois*, 399 *U.S.* 235, 90 *S.Ct.* 2018 (1970). If a defendant is unable to pay a fine or restitution at once, he shall upon a showing of that inability, be afforded an opportunity to pay the fine or restitution in reasonable installments consistent with the objective of achieving the punishment the fine/ restitution was designed to inflict. *State v. DeBonis*, 58 *N.J.* at 199. If a defendant fails to meet the installments, he shall be recalled for reconsideration of sentence. The court may reduce the fine/restitution, or suspend it, or modify the installment plan, or if none of those

alternatives is warranted, the court may imposed a jail term to achieve the penological objective. *N.J.S.A.* 2C:46-2a; *State v. DeBonis*, 58 *N.J.* at 200.

Where a fine was imposed on defendant as a condition of his three year probationary term, the power to collect the unpaid portion of the fine did not expire with his probation, and the State could institute summary collection proceedings under *N.J.S.A.* 2C:46-2 after the probationary term ended. *State v. Joseph*, 238 *N.J. Super.* 219 (App. Div. 1990).

A violation of probation may be based on hearsay evidence. *State v. Jenkins*, 299 *N.J. Super.* at 74; *State v. Reyes*, 207 *N.J. Super.* at 138-139.

III. STATEMENTS TO PROBATION OFFIC-ERS

State v. Generoso, 156 N.J. Super. 540 (App. Div. 1978), held a probationer was not entitled to be given *Miranda* warnings prior to discussions with his probation officer. The court held that *Miranda* was not applicable to routine probation interviews between a probationer and a probation officer and that the uncorroborated admission of defendant was sufficient for a finding of probation violation. *Id.* at 546-548.

In Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), a defendant made incriminating statements to his probation officer in response to her questions concerning his involvement in a murder. The Supreme Court upheld the admission of the statements and found that statements made by a probationer to his probation officer without prior warnings are admissible in a subsequent criminal proceeding. The court found that defendant was not "in custody" for Miranda purposes and further held that the general obligation of a probationer to appear before his probation officer and answer questions truthfully did not in itself convert a probationer's otherwise voluntary statements into compelled ones. 465 U.S. at 430-434, 104 S.Ct. at 1143-1145; see, In Re A.B., 278 N.J.Super. 380 (Ch. Div. 1994) (juvenile in JISP program was not in custody for *Miranda* purposes when questioned by JISP officer in his own home with parent present).

State v. Johnson, 186 *N.J. Super.* 423 (App. Div. 1982), held that the Fifth Amendment privilege against self-incrimination is unavailable to a probationer at a revocation hearing and that this deprivation did not offend due process. *Id.* at 431. The court also held that

a probationer's silence at such a hearing may be considered by the judge in arriving at his decision.

IV. RESENTENCING FOR PROBATION VIOLATIONS

In *Black v. Romano*, 471 *U.S.* 606, 105 *S.Ct.* 2254 (1985), the Supreme Court held that the Due Process Clause does not require that the sentencing court explicitly state why it has rejected alternatives to incarceration before revoking probation and imposing a custodial sentence.

In *State v. Townsend*, 222 *N.J. Super.* 273 (App. Div. 1988), the Appellate Division held that while the 14th Amendment precludes a State court from automatically revoking probation and imposing a prison term for nonpayment of restitution. The court may revoke probation and sentence defendant within the court's sentencing authority where the court finds a deliberate failure to pay restitution. Where defendant willfully fails to comply with a restitution order while on probation, a trial court is not required to consider whether alternatives other than imprisonment are appropriate.

When the court revokes a suspension or probation, it may impose on the defendant any sentence that might have been imposed originally for the offense of which he was convicted. *N.J.S.A.* 2C:45-3b; *State v. Ryan*, 86 *N.J.* 1, 7 n.4, *cert. denied* 454 *U.S.* 888 (1981). A custodial sentence imposed on probation violation that exceeded the original term imposed as condition of probation (and was already served) did not violate double jeopardy. *State v. Franklin*, 198 *N.J. Super.* 407, 409-410 (App. Div. 1985); *State v. Burke*, 188 *N.J.Super.* 649 (Law Div. 1983).

The sentencing principles of *Roth* and *Hodge* and the aggravating and mitigating factors in *N.J.S.A.* 2C:44-1 apply to resentencing on violations of probation (VOP). *State v. Townsend*, 222 *N.J. Super.* 273, 281 (App. Div. 1988).

In *State v. Baylass*, 114 *N.J.* 169 (1989) and *State v. Molina*, 114 *N.J.* 181 (1989), the Supreme Court held that the sentence imposed after revocation of probation should focus on the original offense, rather than on the violation as a separate offense.

The only aggravating and mitigating factors that the trial court may consider in resentencing a probation violator are those factors that the trial court found at the time of the original sentencing. *State v. Baylass*, 114 *N.J.*

at 176. The court may reweigh the mitigating factors in light of the probation violation and determine that they are no longer applicable. *Id.* at 177.

The terms of the original plea agreement do not survive a violation of probation. *State v. Frank*, 280 *N.J. Super*. 26, 40 (App. Div. 1995), *certif. denied* 141 *N.J.* 96 (1995). Thus, the State's original recommendation for a sentencing downgrade pursuant to *N.J.S.A.* 2C:44-1f(2) does not survive a violation of probation. *Id.*

After revoking a defendant's probation, a trial court is required to impose a sentence based upon the presumptive sentence and the balancing of the aggravating and mitigating factors which survived the violation of probation. *State v. Frank*, 280 *N.J. Super.* 26, 41 (App. Div. 1995), *certif. denied* 141 *N.J.* 96 (1995).

A VOP signifies a failure of noncustodial rehabilitation, and is not a *per se* aggravating factor substantial enough alone to justify the imposition of a parole ineligibility term. *State v. Wilson*, 226 *N.J. Super.* 271, 275 (App. Div. 1988), *certif. den.* 114 *N.J.* 500 (1989); *State v. Smith*, 226 *N.J. Super.* 276, 280 (App. Div. 1988), *certif. denied* 114 *N.J.* 500 (1989).

When the penal code was originally enacted, it provided that multiple periods of suspension or probation would run concurrently. *N.J.S.A.* 2C:44-5f(2). This section of the code was amended, effective January 12, 1984, to provide that "multiple periods of suspension or probation shall run consecutively, unless the court orders these sentences to run concurrently." Now there is a presumption of consecutive sentences whenever a defendant violates probation by committing a new offense. *State v. Sutton*, 132 *N.J.* 471 (1993).

V. CREDIT FOR TIME SERVED ON PROBATION

A defendant cannot demand as a matter of right, credit for time served on probation. *State v. Ryan*, 171 *N.J. Super.* 427, 439-442 (App. Div. 1979), *rev'd on other grounds*, 86 *N.J.* 1, 5-6 (1981), *cert. denied*, 454 *U.S.* 880 (1981); *State v. Smeen*, 147 *N.J. Super.* 229, 233 (App. Div.), *certif. den.* 74 *N.J.* 263 (1977).

The term of imprisonment imposed as a condition of probation pursuant to N.J.S.A. 2C:43-2b(2) is treated as part of the sentence, and in the event of a sentence of imprisonment upon the revocation of probation, the term of imprisonment previously served as a condition of the probationary term shall be credited toward service of

the subsequent sentence. *N.J.S.A.* 2C:45-1e. *See also State In The Interest of S.T.*, 273 *N.J.Super.* 436, 445 (App. Div. 1994); *State v. Carlough*, 183 *N.J. Super.* 234 (App. Div. 1982).

In *State v. Rosado*, 256 *N.J. Super.* 126 (App. Div. 1992), *aff'd* 131 *N.J.* 423 (1993), the Supreme Court affirmed the Appellate Division which held that defendant is entitled to credit for time he or she was on parole following the county jail portion of probationary sentence. A defendant is entitled only to the actual amount of time he spent in jail and on parole.

In *State in the Interest of S.T.*, 273 *N.J.Super.* 436 (App. Div. 1994), on appeal from a custodial disposition for violation of probation, the Appellate Division held that the juvenile was not entitled to credit for time spent in residential program for treatment of sex offenders.

State v. Williams, 81 N.J. 498 (1980), held that under the particular facts of that case the defendant should be given credit for the time period he was on probation. In that case, the custodial sentence of a convicted murderer was erroneously modified by the trial court pursuant to R. 3:21-10(b) to a five year probationary term, conditioned upon successful completion of an in-patient drug rehabilitation program. Id. at 499. The Supreme Court found that since the error of placing defendant on probation was that of the trial court and the State did not seek a stay of the trial court's order pending its appeal, the equities of this particular case mandated that defendant received credit for the time on probation. Id. at 500.

VI. SEARCH AND ARREST OF PROBATION-ERS

In *Griffin v. Wisconsin*, 483 *U.S.* 868, 107 *S.Ct.* 3164, 97 *L.Ed.*2d 709 (1987), the Supreme Court held that the search of the probationer's home satisfied the demands of the Fourth Amendment because it was carried out pursuant to a valid probation regulation that itself satisfied the Fourth Amendment reasonableness requirements.

A probation officer has power to arrest a probationer when there is probable cause to believe that a probation violation has occurred. Illegality of probationer's arrest would not affect the validity of VOP proceedings. *State v. Hyman*, 236 *N.J.Super.* 298 (App. Div. 1989).

PROSECUTORS

I. GENERALLY

"The primary duty of a prosecutor is not to obtain convictions but to see that justice is done." State v. Ramseur, 106 N.J. 123, 320 (1987). See State v. Frost, 158 N.J. 76, 83 (1999); State v. Feaster, 156 N.J. 1, 59 (1998); State v. Farrell, 61 N.J. 99, 104 (1972); State v. Marguez, 277 N.J. Super. 162, 171 (App. Div. 1994). "It is as much his [or her] duty to refrain from improper methods calculated to produce a wrongful convictions as it is to use every legitimate means to bring about a just one." State v. Farrell, 61 N.J. at 105 (quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935)). See State v. Timmendequas, 161 N.J. 515, 587 (1999); State v. Frost, 158 N.J. at 83; State v. Ramseur, 106 N.J. at 320; State v. Torres, 328 N.J. Super. 77, 94 (App. Div. 2000). This duty does not preclude a prosecutor from making a vigorous and forceful presentation of the State's case. State v. Feaster, 156 N.J. at 58-59; State v. Harvey, 151 N.J. 117, 216 (1997); State v. Ramseur, 106 N.J. at 320.

Prosecutorial misconduct is not grounds for reversal of a criminal conviction unless the conduct was so egregious to deprive defendant of a fair trial. *State v. Timmendequas*, 161 *N.J.* at 575; *State v. Frost*, 158 *N.J.* at 83.

The "fair trial" test applies to alleged prosecutorial conduct in both the guilt and penalty phases of a capital trial. *State v. Timmendequas*, 161 *N.J.* at 575; *State v. Pennington*, 199 *N.J.* 547, 565 (1990); *State v. Koedatich*, 112 *N.J.* 225 (1988), *cert. denied*, 488 *U.S.* 1017, 109 *S. Ct.* 813, 102 *L.Ed.*2d 803 (1989); *State v. Zola*, 112 *N.J.* 384 (1988).

In determining whether a prosecutor's misconduct was so egregious as to deprive defendant of a fair trial, an appellate court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred. *State v. Marshall*, 123 *N.J.* 1, 153 (1991); *State v. Scherzer*, 301 *N.J. Super.* 363, 433 (App. Div.), *certif. denied*, 151 *N.J.* 466 (1997).

II. DISCRETION

The decision whether to prosecute and what charges to file or bring before the grand jury generally rests in the prosecutor's discretion, so long as the prosecutor has probable cause to believe the accused committed an offense defined by statute. *State v. Lagares*, 127 *N.J.* 20, 27 (1992); *In the Matter of L.Q.,* 227 *N.J. Super.* 41 (App. Div. 1988). *See also Wayne v. United States*, 470 *U.S.* 598, 105 *S.Ct.* 1524, 84 *L.Ed.*2d 547 (1985).

Enhanced deference is given to prosecutorial decisions to admit or deny a defendant to Pretrial Intervention (PTI). State v. Wallace, 146 N.J. 576, 582 Generally, a defendant must "clearly and (1996).convincingly establish that the prosecutor's refusal to sanction admission into the program was based on a patent and gross abuse of his discretion" before a court can suspend criminal proceedings under R. 3:28 without prosecutorial consent. State v. Leonardis, 73 N.J. 360, 382 (1977). Such abuse of discretion arises upon a showing that the rejection is not premised upon a consideration of all relevant factors, is based upon a consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment. State v. Hoffman, 224 N.J. Super. 149 (App. Div. 1988). See State v. Bender, 80 N.J. 84, 93 (1979).

Where defendant admits her guilt of obtaining financial assistance by false representations, has never been involved in any other crime and has begun restitution, but the prosecutor asserts defendant's failure "to show her amenability to a rehabilitative process," a court can find that the prosecutor has not considered other relevant factors when determining defendant was not a suitable PTI candidate. *State v. Burger*, 222 *N.J. Super*. 336 (App. Div. 1988). *See State v. Mickens*, 236 *N.J. Super*. 272, 279 (App. Div. 1989).

A prosecutor may not exercise peremptory challenges to "remove potential petit jurors who are members of a cognizable group on the basis of their presumed group bias, the State, however, may peremptorily challenge such venirepersons on the grounds of situation-specific bias." *State v. Gilmore*, 103 *N.J.* 508 (1986). *See Georgia v. McCollum*, 505 *U.S.* 42, 112 *S. Ct.* 2348, 120 *L.Ed.*2d 33 (1992); *State v. Martel Johnson*, 325 *N.J. Super.* 78, 84-86 (App. Div. 1999)(black defendants may not make race-based peremptory challenges), *certif. denied*, 163 *N.J.* 12, *order vacated on reconsideration, certif. granted in part*, 163 *N.J.* 393 (2000)(limited to sentencing issue).

The decision of the trial court regarding the prosecutor's reasons must be given due deference on appeal. *State v. Hughes*, 215 *N.J. Super.* 295 (App. Div. 1986). A prosecutor may exercise a peremptory challenge against a black juror whose eyes had been closed for "a very, very long time." *State v. Gilliam*, 224 *N.J. Super.* 759 (App. Div. 1988). Black jurors may also be

excused because of their views toward the death penalty. State v. Thomas, 224 N.J. Super. 221 (App. Div. 1988). The State may excuse all Spanish-speaking jurors where the interpretation and translation of audio taped recordings from Spanish to English constitutes a major issue at trial. State v. Pemberthy, 224 N.J. Super. 280 (App. Div. 1988), certif. denied, 111 N.J. 633 (1988), hab. granted, Pemberthy v. Beyer, 800 F. Supp. 144 (D.N.J. 1992), rev'd, 19 F.3d 857 (3d Cir.), cert. denied, 513 U.S. 969, 115 S. Ct. 439, 130 L.Ed.2d 350 (1994). However, the prosecutor's reasons for challenging minority jurors may be deemed invalid if the same reasons are not applied with equal force to Caucasian jurors. State v. Townes, 220 N.J. Super. 38 (App. Div. 1987).

State v. Hogan, 336 N.J. Super. 319 (App. Div. 2001), provided that only an exculpatory defense, as opposed to a mitigating defense, needs to be charged to a grand jury; the duty to charge as such arises and only when facts known to a prosecutor clearly indicate appropriateness of an instruction; and such duty is met as long as instruction conveys the gist of that defense or justification. The Appellate Division in this case also held that a failure to instruct a grand jury on the law enforcement exception to the duty to retreat is not error; it was not improper for a deputy attorney general to obtain and release an intervening indictment against the same defendants from a different grand jury on charges relating to another issue (alleged racial profiling); and it was not improper for the deputy to summarize evidence in the final statement to the grand jury.

III. DUTY OF DISCLOSURE

A. Generally

As a officer of the court, the prosecutor has an obligation not only to note the existence of possible prejudice or bias on the part of a grand juror but to disclose such circumstances to the court and to afford the court the opportunity to preserve the impartiality of the grand jury proceedings. *State v. Murphy*, 110 *N.J.* 20 (1988). *See State v. Brown*, 289 *N.J. Super.* 285, 288-92 (App. Div. 1996)(applying *State v. Murphy*).

If the State's critical witness lies to the jury and the State, the court did not abuse its discretion in permitting the State to recall the witness; rather than to permitting the defense to subpoena a witness solely to attack the credibility of the State's witness. *State v. D'Amato*, 218 *N.J. Super.* 595, 601 (App. Div. 1987), *certif. denied*, 110 *N.J.* 170 (1988).

A prosecutor must provide discovery material to a defendant charged with careless driving and failure to have a license in his possession since, if convicted, the defendant is subject to imprisonment and license suspension and since the request is not burdensome. *State v. Polansky*, 216 *N.J. Super.* 549 (Law Div. 1986).

B. Exculpatory Evidence (Brady violations)

The rule from *Brady v. Maryland*, 373 *U.S.* 83, 83 *S. Ct.* 1194, 10 *L.Ed.*2d 215 (1963), is that the prosecution must not suppress evidence favorable to an accused where the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 363 *U.S.* at 87. *See State v. Martini*, 160 *N.J.* 248, 268-69 (1999); *State v. Nelson*, 155 *N.J.* 487, 497 (1998), *cert. denied*, 525 *U.S.* 1114, 119 *S. Ct.* 890, 142 *L.Ed.*2d 788 (1999); *State v. Russo*, 333 *N.J. Super.* 119, 134 (App. Div. 2000); *State v. Aguiar*, 322 *N.J. Super.* 175, 185 (App. Div. 1999).

The *Brady* rule applies even when defendant makes no formal request for exculpatory material. *State v. Knight*, 145 *N.J.* 233, 245 (1996); *State v. Nelson*, 155 *N.J.* at 497-98; State *v. Nelson*, 330 *N.J. Super.* 206, 212 (App. Div. 2000). Exculpatory evidence includes not only material that is directly exculpatory of a defendant, but also evidence that may impeach the credibility of a State witness. *State v. Spano*, 69 *N.J.* 231, 235 (1976); *State v. Russo*, 333 *N.J. Super.* at 134; *State v. Jones*, 308 *N.J. Super.* 15, 41-42 (App. Div. 1998).

Awareness of existence of a criminal record, which is peculiarly within the knowledge of law enforcement, is imputable to the trial prosecutor for purposes of a *Brady* claim based on non-disclosure of witness's criminal record, notwithstanding a lack of actual knowledge. *State v. Nelson*, 330 *N.J. Super.* at 213.

Prosecutor's failure to turn over original tapes of capital murder defendant's confession did not constitute a *Brad*y violation -- defendant had copies of the tapes and the information was not exculpatory. *State v. Morton*, 155 *N.J.* 383 (1998).

IV. PROSECUTOR'S COMMENTS AND CONDUCT

A. Failure to Object

Generally, if no objection was made to a prosecutor's allegedly improper remarks, the remarks will not be deemed prejudicial. *State v. Timmendequas*, 161 *N.J.* at

576; *State v. Frost*, 158 *N.J.* at 83; *State v. Ramseur*, 106 *N.J.* at 323.

Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made. *State v. Timmendequas*, 161 *N.J.* at 576; *State v. Irving*, 114 *N.J.* 427, 444 (1989). The failure to object also deprives the trial court of an opportunity to take curative action. *State v. Timmendequas*, 161 *N.J.* at 576; *State v. Frost*, 158 *N.J.* at 84; *State v. Irving*, 114 *N.J.* at 444; *State v. Bauman*, 298 *N.J. Super.* 176, 207 (App. Div.), *certif. denied*, 150 *N.J.* 25 (1997).

B. Prosecutor Summations

Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented. *State v. Timmendequas*, 161 *N.J.* at 587; *State v. Frost*, 158 *N.J.* at 82; *State v. Harvey*, 151 *N.J.* at 216; *State v. Harris*, 141 *N.J.* 525, 559 (1995); *State v. Williams*, 113 *N.J.* 393, 447 (1988); *State v. Bucanis*, 26 *N.J.* 45, 56, *cert. denied*, 357 *U.S.* 910, 78 *S. Ct.* 1157, 2 *L.Ed.*2d 1160 (1958). Although arguments in summation must be limited to the evidence and inferences reasonably drawn therefrom, the prosecutor may forcefully and vigorously present the State's case. *State v. Papasawas*, 163 *N.J.* 565, 615-17 (2000); *State v. Chew*, 150 *N.J.* 30, 84 (1997); *State v. Feaster*, 156 *N.J.* 1, 58-59 (1998); *State v. Harvey*, 151 *N.J.* at 216.

"[A] prosecutor is entitled to sum up the State's case graphically and forcefully. It cannot be expected that criminal trials will be conducted without some show of feeling. Defense counsel traditionally make dramatic appeals to the emotions of the jury. In these circumstances, "a prosecutor cannot be expected to present the State's case in a manner appropriate to lecture hall." *State v. Johnson*, 31 *N.J.* 489, 510-11 (1960). *See State v. Pratt*, 226 *N.J. Super.* 307, 323 (App. Div. 1988). A prosecutor cannot argue facts not in evidence or make baseless accusations, however. *State v. Roach*, 146 *N.J.* 208, 221 (1996).

In evaluating a prosecutor's conduct, an appellate court must consider (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. *State v. Timmendequas*, 61 *N.J.* at 576; *State v. Frost*, 158 *N.J.* at 83; *State v. Marshall*, 123 *N.J.* at 153.

Presentation, at three separate trials of codefendants, of alternative theories as to which defendants actually shot victims and fact that prosecutorial arguments made at defendant's trial were inconsistent with arguments made at co-defendants' trials were not improper; prosecutor properly presented different, plausible interpretations of conflicting evidence that did not conclusively establish who were the shooters. *State v. Roach*, 146 *N.J.* at 221-23.

In summation, when prosecutor invited the jury to use the "product rule" and calculate the likelihood that defendant's shoe size and type, blood type, and hair would match those found at the scene of the crime, the Court held this was permissible. *State v. Harvey*, 151 *N.J.* at 214-15. The Court noted that the "comment was more a rhetorical device than an invitation for the jury to apply a mathematical formula" and was made in response to defendant's allegations. *State v. Harvey*, 151 *N.J.* at 216.

It was error when a prosecutor, during a discussion of mitigating factors in a capital case, implied that defendant was attempting to pass blame onto others, thus excusing his own conduct. *State v. Cooper*, 151 *N.J.* 326, 402-03 (1997). However, the trial court's instruction that the purpose of the mitigating evidence was not to excuse the crimes, but rather to explain and to present extenuating facts about defendant's life, remedied the error. *State v. Cooper*, 151 *N.J.* at 402-03.

It was not error when prosecutor in summation referred to killing during robbery as "execution-style murder," when the comment was supported by strong evidence, such as the fact that defendant's gun was touching or near to the victim's head at the time of the shot. *State v. Loftin*, 146 *N.J.* 295, 387-88 (1996).

A prosecutor may comment in summation on defendant's failure to call an alibi witness. *State v. Driker*, 214 *N.J. Super.* 467 (App. Div. 1987); *State v. Hickman*, 204 *N.J. Super.* 409 (App. Div. 1985). In *State v. McBride*, 211 *N.J. Super.* 699 (App. Div. 1986) the court held that a prosecuting attorney may ask a jury to draw an adverse inference from a defendant's failure to call a witness, but "only if the trial judge first has found, out of the presence of the jury, that the witness is within the defendant's power to produce and that the witness's 'testimony would [be] superior to that already utilized in respect to the fact to be proved.'" *State v. McBride*, 211 *N.J. Super.* at 701 (quoting from *State v. Carter*, 91 *N.J.* 86 (1982)).

Prosecutor's closing statement that defendant had removed his hood and the victim's blindfold before killing him was permissible -- although such facts were not clearly supported in the evidence -- when defense counsel did not object, the jury had been thoroughly instructed that the summations of counsel were not evidence and the jury likely knew that both sides were offering their interpretation of the evidence. *State v. Harris*, 141 *N.J.* 525, 560-61 (1995).

A prosecutor may not vouch for the credibility of a witness. *State v. Marshall*, 123 *N.J.* at 156; *State v. Johnson*, 287 *N.J. Super.* 247, 267 (App. Div. 1996). However, during argument to persuade the jury that the witness is not worthy of belief, a prosecutor may point out discrepancies in a witness' testimony or a witness' interests in presenting a particular version of events. *State v. Purnell*, 126 *N.J.* 518, 538 (1992); *State v. Johnson*, 287 *N.J. Super.* at 267.

A prosecutor cannot personally vouch for credibility of police officers by suggesting charges would be brought against them if they lied. *State v. Frost*, 158 *N.J.* at 84-86. *See State v. Goode*, 278 *N.J. Super.* 85, 90 (App. Div. 1994) (recognizing that it was improper for prosecutor to tell jury that police had no motive to lie); *State v. Staples*, 263 *N.J. Super.* 602, 605-06 (App. Div. 1993) (prosecutor improperly argued that law enforcement officers would not lie, because to do so would jeopardize their careers); *State v. West*, 145 *N.J. Super.* 226 (App. Div. 1976), *certif. denied*, 73 *N.J.* 67 (1977).

A prosecutor can appropriately respond to a defense attack on a police officer's credibility by telling the jury that the police officer had nothing to gain by lying, however. *State v. Rivera*, 253 *N.J. Super.* 598, 605-06 (App. Div.), *certif. denied* 130 *N.J.* 12 (1992).

In capital case, a prosecutor may not comment on the evidence in a manner that serves only to highlight the victim's virtues in order to inflame the jury. *State v. Timmendequas*, 161 *N.J.* at 587-88. Especially in "close and sensitive" cases involving sexual assault, and more so where the victim is a child, improper appeals by prosecutors "calculated to arouse sympathy for the victim and hate and anger against the defendant have a strong potential to cause a miscarriage of justice." *State v. W.L.*, 292 *N.J. Super.* 100, 110-11 (App. Div. 1996)(reversing conviction for sexual assault of child).

So long as there is evidence to support the prosecutor's insinuations regarding the credibility of defense witnesses, the prosecutor may attack the

credibility of defense witnesses. *State v. Crisantos* (Arriagas), 102 *N.J.* 265 (1986). *See also State v. Gilliam*, 224 *N.J. Super.* 759 (App. Div. 1988).

A prosecutor should not note that he or she would "never" make a deal with a witness because the witness was part of a crime, if evidence of such criminal activity was not before the jury. State v. Wilson, 128 N.J. 233, 241-42 (1992). Yet, a prosecutor's summation comments regarding whether certain key witnesses did or did not receive "deals" for their testimony was not improper, where the record clearly supported the prosecutor's statement that one witness received nothing in exchange for his testimony, the prosecutor's comment as to another witness was merely a response to a defense claims, and the prosecutor's statements as to third witness, who testified in exchange for a lesser charge, were forthright. State v. Johnson, 287 N.J. Super. 247, 266 (App. Div. 1996).

C. Appeals to the Jury

A prosecutor should not provide his personal opinion about defendant's guilt. Nor should he or she, during summation of the penalty phase of a capital case, "suggest that the jury's deliberation be influenced by the need to protect society from crime." *State v. Ramseur*, 106 *N.J.* at 321-22. *See State v. Coyle*, 119 *N.J.* 194, 230-31 (1990).

Prosecutor's remark during his opening statement which attempted to instill in the members of the jury a fear for their own safety was improper but did not constitute plain error in the entire context of the trial. *State v. Porambo,* 226 *N.J. Super.* 416 (App. Div. 1988).

Prosecutor's statement, in closing argument in prosecution for drug offenses, that the jury should "send a message" to defendant and the community was inflammatory and deprived defendant of his right to a fair trial. *State v. Hawk*, 327 *N.J. Super.* 276, 281-82 (App. Div. 2000) (such argument in closing deprived defendant of his right to a fair trial). *See State v. Rose*, 112 *N.J.* 454, 519-21 (1988) (Prosecutor's statements during summation in penalty phase of capital murder prosecution, urging jury to sentence defendant to death to deter him from future acts of violence and to send a message to society that conduct such as defendant's would result in death penalty, were improper).

D. Specific Comments Which are Prohibited

Prosecutor cannot comment on defendant's postarrest silence in summation in order to assert that defendant's alibi defense was fabrication. *State v. Deatore*, 70 *N.J.* 100, 115-16 (1976); *State v. Marshall*, 123 *N.J.* 1, 118 (1991); *State v. Lyle*, 73 *N.J.* 403, 410 (1977); *State v. Pierce*, 330 *N.J. Super.* 479, 490-92 (App. Div. 2000). However, there is a distinction between the kind of silence that enjoys constitutional protection and silence that constitutes conduct inconsistent with a defendant's trial testimony. *See State v. Burt*, 59 *N.J.* 156 (1971), *cert. denied*, 404 *U.S.* 1047, 92 *S. Ct.* 728, 30 *L.Ed.*2d 735 (1972). A prosecutor may also not focus on a defendant's post-*Miranda* warning silence in summation. *State v. Schumann*, 111 *N.J.* 470, 477 (1988).

The court in *State v. Jenkins*, 299 *N.J. Super.* 61, 65-69 (App. Div. 1997), held that the prosecutor's summation comments on defendant's post-arrest silence were justified, however, where defendant raised the issue during direct examination and defense counsel declared on summation that defendant was never permitted to explain to the State what occurred on the night in question.

A prosecutor may not misuse hearsay testimony about defendant's prior offenses (*i.e.* what defendant allegedly told the victim, a minor who did not testify). These statements constitute reversible error. *State v. Schumann*, 111 *N.J.* at 477-80.

In *State v. Micheliche*, 220 *N.J. Super.* 532, 541-42 (App. Div.), *certif. denied*, 109 *N.J.* 40 (1987), the defendant testified that his confession was untrue and that he had given it only out of fear that his accomplice would kill him in jail if he denied his own involvement. The prosecutor's question on cross-examination whether defendant or his attorney had ever informed the prosecutor's office as to the true reason for his confession violated defendant's right to remain silent. *State v. Micheliche*, 220 *N.J. Super.* at 541-42.

A prosecutor's comments concerning defendant's failure to tell police about the alleged presence of a friend during the burglary does not invade defendant's constitutional right to remain silent at the time of the apprehension, if defendant raises the issue during his own direct examination and relevant cross-examination. *State v. Powell*, 218 *N.J. Super.* 44 (App. Div. 1987).

The prosecutor's comments on defendant's failure to turn himself in for two weeks when he knew the police were looking for him did not infringe on defendant's right to remain silent as defendant's flight was evidence of consciousness of guilt. *State v. Johnson*, 216 *N.J. Super.* 588 (App. Div. 1987).

It is reversible error to comment on the fact that defendant failed to submit to sodium amytal (truth serum), because it has not been established that sodium amytal test results are scientifically reliable. *State v. Blome*, 209 *N.J. Super.* 227 (App. Div.), *certif. denied*, 104 *N.J.* 458 (1986).

Prosecutor's reference, in penalty-phase summation, to the fact that capital murder defendant never disputed co-perpetrator's statement that defendant had stabbed victim in the genitals, was not an improper comment on defendant's absence from trial and on his decision not to testify, but rather, was based on defendant's adoption by silence of co-perpetrator's statement. *State v. Morton*, 155 *N.J.* 383, 458 (1998).

1. Name calling

When a prosecutor attacks a defense counsel personally or demeans his role at trial, he demeans the profession and the integrity of the trial process. *State v. Thornton*, 38 *N.J.* 380, 397 (1962), *cert. denied*, 374 *U.S.* 816, 83 *S. Ct.* 1710, 10 *L.Ed.*2d 1039 (1963); *State v. Watson*, 224 *N.J. Super.* 354, 362 (App. Div.), *certif. denied*, 111 *N.J.* 620, *cert. denied*, 488 *U.S.* 983, 109 *S. Ct.* 535, 102 *L.Ed.*2d 566 (1988).

In *State v. Acker*, 265 *N.J. Super.* 351 (App. Div.), *certif. denied,* 134 *N.J.* 485 (1993), defendant's convictions were reversed on prosecutorial misconduct grounds in that the prosecutor: called the defense attorney and the defense absolutely preposterous and outrageous; argued it was the jury's function to protect young victims of alleged sexual offenses; commented on facts not in evidence and made inappropriate appeals to the jury.

The Court in *State v. Morton*, 155 *N.J.* 383, 457 (1998), found the prosecutor's statements, which referred to defendant as a "cold-blooded killer," and described defendant's testimony as "nothing more than a self-serving pack of lies," were permissible. The Court found relevant that the prosecutor's remarks responded to defense counsel's summation argument which mentioned defendant's stoic demeanor, and the fact that defendant's trial testimony conflicted with that of the State's witnesses and with his own taped statement. *State v. Morton*, 155 *N.J.* at 457.

Remarks by the prosecutor that the death penalty was the only guarantee against defendant's future acts and that defendant was a vicious animal are improper. *Darden v. Wainwright*, 477 *U.S.* 168, 106 *S.Ct.* 2464, 91 *L.Ed.*2d 144 (1986). It is improper for a prosecutor to refer to a defendant as a "coward," liar," or jackal." *State v. Pennington*, 119 *N.J.* 547, 577 (1990). In *State v. Bruce*, 72 *N.J. Super.* 247, 251-52 (App. Div. 1961), the court held that the prosecutor's summation in which he called defendants "animals" and "brutes" constituted reversible error where such statements were not part of any testimony.

The Supreme Court of New Jersey disapproved of the prosecutor's conduct where, prior to the trial in a capital case, the prosecutor arranged several press briefings at which he stated that defendant committed murders "because he wanted to see someone die;" that defendant shot the victim "for the sheer pleasure of seeing her die;" and that defendant was a "perverted, sick individual." *State v. Biegenwald*, 106 *N.J.* 13 (1987). Similarly, in *State v. Russo*, 243 *N.J. Super.* 383, 408 (App. Div. 1990), the court held that it was improper for the prosecutor to refer to defendant's wife as a "bitch" and the defense psychiatric experts as "whores."

Personal attacks on defense counsel in particular or on defense lawyers in general are also not acceptable. *State v. Thornton*, 38 *N.J.* at 396-98; *State v. Sherman*, 230 *N.J. Super.* 10 (App. Div. 1988).

It is impermissible for a prosecutor to disparage the arguments of defense counsel as "lawyer talk." *State v. Adams*, 320 *N.J. Super.* 360, 369-71 (App. Div. 1999). A prosecutor's accusation that defense counsel is concealing the client's guilt through deception is also impermissible. *State v. Sherman*, 230 *N.J. Super.* at 16. *See State v. Lockett*, 249 *N.J. Super.* 428, 434 (App. Div. 1991); *State v. Pindale*, 249 *N.J. Super.* 266, 286 (App. Div. 1991), *appeal after remand*, 279 *N.J. Super.* 123, *certif. denied*, 142 *N.J.* 449 (1995).

V. DIRECT/CROSS EXAMINATION

It is impermissible for a prosecutor to ask a question which have no factual basis, and from which untrue inferences could be drawn, thus diverting the jury's attention from the relevant facts. *State v. Koedatich*, 112 *N.J.* 225, 320-23 (1988), *cert. denied*, 488 *U.S.* 1017, 109 *S. Ct.* 813, 102 *L.Ed.*2d 803 (1989). *See State v. Pennington*, 119 *N.J.* 547, 578-83 (1990); *State v. Rose*, 112 *N.J.* 454, 515-16 (1988).

Prior convictions are used for the limited purpose of attacking the defendant's credibility and cannot be used to suggest that the individual is prone to violence or is a bad person and thus likely to have committed the offense for which he or she is being tried. *State v. Thomas*, 140 *N.J. Super.* 429, 447 (App. Div. 1976), *rev'd on o.g.*, 76 *N.J.* 344 (1978).

Only adult convictions may be used for general impeachment purposes. *State v. Laws*, 50 *N.J.* 159, 178-79 (1967), *cert. denied*, 393 *U.S.* 971, 89 *S. Ct.* 408, 21 *L.Ed.*2d 384 (1968); *Application of Hart*, 265 *N.J. Super.* 285, 291 (Law Div. 1993). Disorderly persons convictions cannot be used for impeachment purposes. *State v. Tune*, 17 *N.J.* 100, 109-111 (1954); *State v. B.C.*, 235 *N.J. Super.* 157, 160 (Law. Div. 1989).

In narcotics prosecution, error in admission of officer's hearsay testimony as to informer's information that defendant possessed narcotics was not harmless, although evidence was sufficient for conviction. *State v. Bankston*, 63 *N.J.* 263 (1973).

A prosecutor may not comment as to defendant's post-arrest silence to impeach his exculpatory story at trial. Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240,49 L.Ed.2d 91 (1976); State v. Deatore, 70 N.J. 100, 115-16 (1976); State v. Marshall, 123 N.J. 1, 118 (1991); State v. Lyle, 73 N.J. 403, 410 (1977); State v. Pierce, 330 N.J. Super. 479, 490-92 (App. Div. 2000). However, there is a distinction between the kind of silence that enjoys constitutional protection and silence that constitutes conduct inconsistent with a defendant's trial testimony. In State v. Burt, 59 N.J. 156 (1971), cert. denied, 404 U.S. 1047, 92 S. Ct. 728, 30 L.Ed.2d 735 (1972), defendant was charged with shooting a friend and said at trial the shooting had been accidental. The cross-examination at trial established that the defendant had not sought assistance for his injured friend after the incident, had left the locale without knowing whether he was dead or alive and had not reported the occurrence to the police when he was arrested for another offense a few hours later. The court concluded that this was not a true case of silence in police custody as to an exculpatory story, but rather one of conduct, albeit non-action, inconsistent with defendant's story at trial. See also State v. Brown, 118 N.J. 595 (1990)(minimal cross-examination regarding defendant's pre-arrest failure to report to police that he had been driving a car in a fatal collision was permissible for impeachment purposes -- particularly since there was no official, pre-arrest interrogation involved).

A prosecutor cannot cross examine a defendant in any way calculated to have him or her characterize the other witnesses as liars. *State v. Green*, 318 *N.J. Super.* 361, 378 (App. Div. 1999), *aff'd*, 163 *N.J.* 140 (2000).

It is improper for a prosecutor to use a defendant's poverty to establish a criminal motive. *State v. Mathis*, 47 *N.J.* 455, 469-72 (1966); *State v. Stewart*, 162 *N.J. Super.* 96, 100 (App. Div. 1978). Courts have permitted admission of evidence concerning sudden monetary acquisition or improvement in financial condition by an accused in prosecutions for crimes which naturally and ordinarily result in the acquisition of money, provided there is other evidence of the defendant's guilt. *State v. Smollock*, 148 *N.J. Super.* 382, 386 (App. Div.), *certif. denied*, 74 *N.J.* 274 (1977).

VI. MISCELLANEOUS CASES

The court must grant defendant's motion to dismiss the complaint where the prosecutor, for the second time, was not ready to proceed with trial because he had failed to obtain evidence and to subpoena witnesses and because, on both occasions, he failed to notify defendant of need for postponements. *State v. Perkins*, 219 *N.J. Super.* 121 (Law Div. 1987). In *State v. Farrell*, 320 *N.J. Super.* 425, 509 (App. Div. 1999, the court vacated defendant's Municipal Court convictions after multiple postponements, the majority of which were the fault of the prosecution or the court, and after defendant had invoked his right to a speedy trial eight times. *Id.*

It was egregious misconduct for prosecutors to instruct police officers to dispense with *Miranda* warnings, and such misconduct required the exclusion of defendant's statement even for impeachment purposes. *State v. Sosinski*, 331 *N.J. Super.* 11 (App. Div. 2000).

While during the course of preparations for trial the State has the right to attempt to obtain further evidence favorable to the prosecution, it is not entitled to obtain information resulting from the efforts of the defense. Information regarding whether defendant received a pair of sneakers while incarcerated in the county jail, however, was not the subject of any reasonable expectation of privacy and was not privileged; nor did it reveal any trial strategy on the part of the defense. *State v. Weston*, 216 *N.J. Super.* 543 (Law. Div. 1986). Before subpoenaing certain records from a county jail concerning a defendant on trial (*i.e.* "medical records, the names and relationships of visitors, and description of the various items which visitors brought to or from the jail"), the

prosecutor should first apply to the court for a subpoena *duces tecum. State v. Weston*, 216 *N.J. Super.* at 548.

Because of the significant public question involved, a prosecutor has standing to bring a declaratory judgement action to determine the proper allocation of responsibilities between a local governing body and its chief of police. *Falcone v. DeFuria*, 103 *N.J.* 219 (1986).

For purposes of the immunity clause of the New Jersey Tort Claims Act, *N.J.S.A.* 59:3-8, an extradition proceeding is a "judicial proceeding." Thus, a prosecutor and assistant prosecutor are subject to immunity when they instituted extradition proceedings against the wrong persons, and there is no evidence in the case that "their institution of extradition proceedings constitute[s] a crime, actual fraud, actual malice or willful misconduct." *Hayes v. Mercer County*, 217 *N.J. Super.* 614 (App. Div.), *certif. denied*, 108 *N.J.* 643 (1987).

Generally, a prosecutor is prohibited from eliciting admissions from a defendant concerning derogatory statements made about blacks and from referring to defendant's racial attitude during summation. However, when a defendant is being tried for racially motivated crimes against a black family living in a white neighborhood, the prosecutor's conduct is permissible since it proves defendant's specific intent to do harm against another because of race. *State v. Davidson*, 226 *N.J. Super.* 1 (App. Div. 1988).

Defendant's Sixth Amendment right to compulsory process was violated by state's plea agreement not to seek extended 50-year sentence in exchange for codefendant's promise not to testify at defendant's murder trial. *State v. Correa,* 308 *N.J. Super.* 480, 484-87 (App. Div. 1998)(The court ruled that such a plea was harmful "because a court will seldom be able to determine exactly what evidence would have been brought out had the witness been allowed to testify freely." *Id.* quoting from *State v. Asher,* 861 *P.*2d 847 (1993)). *See State v. Fort,* 101 *N.J.* 123 (1985).

However, in *State v. Marshall*, 148 *N.J.* 89, 163-64 (1997), the Court ruled that the State's plea agreement with a murder co-defendant, conditioned upon the co-defendant's truthful cooperation and truthful testimony, in which co-defendant pled guilty to conspiracy to commit murder and escaped charge of capital murder, did not violate defendant's due process rights by providing co-defendant with irresistible reasons to provide perjured testimony against defendant. *See also State v. Long*, 119 N.J. 439, 488-89 (1990)(defendant was not denied due process or fair trial as result of witness

cooperation agreement between State and jailhouse informant, considering disclosure of agreement to jury during direct testimony, cross-examination, and jury instructions); *State v. Morant*, 241 *N.J. Super*. 121, 141 (App. Div. 1990)(". . . nothing unholy flows from the cooperation of a defendant with the prosecutor, even when that cooperation inures to the admissibility of evidence against co-defendants, provided the admission is proper and the State honors any agreement it makes.")

The prosecutor in a drug case had a duty to engage in good faith diligence to ascertain whereabouts of the codefendant, who was a material witness, was living out of state and was cooperating with authorities, so that the codefendant's presence could be compelled. *State v. Farquharson,* 280 *N.J. Super.* 239, 246-47 (App. Div.), *certif. denied,* 142 *N.J.* 517 (1995).

State v. Clark, 162 N.J. 201 (2000), precluded municipal prosecutors from simultaneously serving as defense counsel in superior court in the same county in which the individual serves as municipal prosecutor. The Supreme Court of New Jersey issued an order on May 3, 2000 which relaxed *R*. 1:15-5 to provide that the limitations on municipal prosecutors imposed by *State v. Clark* did not extend to partners, shareholders, associates, employees, or members of a limited liability entity of a municipal prosecutor (pending issuance of the final report of the American Bar Association's Commission on the Evaluation of the Rules of Professional Conduct).

PROSTITUTION AND RELATED OFFENSES

I. STATUTORY BASIS

The statutory scheme relating to prostitution is set forth in *N.J.S.A.* 2C:34-1 and *N.J.S.A.* 2C:34-1.1. The statutes are not to be used to penalize private, consensual sexual activity, but rather are specifically addressed to the business of prostitution. *See State v. Wright*, 235 *N.J.Super.* 97, 100 (App. Div. 1989).

N.J.S.A. 2C:34-1 defines prostitution as sexual activity with another person in exchange for something of economic value, or the offer or acceptance of such an exchange. Sexual activity is broadly defined, beyond just sexual intercourse, to include any other sexual activity, between persons of the same or opposite sex. *See N.J.S.A.* 2C:34-1a(2). This statute was enacted by the Legislature "with the clear intent to include and prohibit any and all forms of sexual activity in exchange for money." *State v. Wright,* 235 *N.J.Super.* at 100.

II. PROSTITUTION OFFENSES

Under *N.J.S.A.* 2C:34-1, there are seven offenses involving or related to prostitution.

A. Prostitution. *N.J.S.A.* 2C:34-1b(1)

Engaging in prostitution is a disorderly persons offense, unless it is a second or succeeding offense, in which case it is a fourth degree offense. If a car is involved in the offense, the individual prosecuted has his or her license suspended for six months. *N.J.S.A.* 2C:24-1c(4).

B. Promoting prostitution. *N.J.S.A.* 2C:24-1b(2)

Promoting prostitution is defined in seven ways, according to *N.J.S.A.* 2C:34-1a(4), and these forms of promoting, along with their punishments, are:

1. Owning, controlling, managing, supervising or otherwise keeping, along or in association with another, a house of prostitution or a prostitution business. A "house of prostitution" is any place where prostitution is regularly carried on by one person under the control, management or supervision of another. *See N.J.S.A.* 2C:34-1a(3). This is a third degree crime. *See N.J.S.A.* 2C:34-1c(3).

2. "Procuring an inmate for a house of prostitution or place in a house of prostitution for one who would be an inmate." This is a third degree crime. *See N.J.S.A.* 2C:34-1c(3).

3. Encouraging, inducing or otherwise purposely causing another to become or remain a prostitute. This is a third degree crime. *See N.J.S.A.* 2C:34-1c(3).

4. Soliciting a person to patronize a prostitute. This is a fourth degree crime. *See N.J.S.A.* 2C:34-1c(3).

5. Procuring a prostitute for a patron. This is a fourth degree crime. *See N.J.S.A.* 2C:34-1c(3).

6. Transporting a person into or within this state with purpose to promote that person's engaging in prostitution, or procuring or paying for transportation with that purpose. This is a fourth degree crime. See N.J.S.A. 2C:34-1c(3).

7. Leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or promotion of prostitution, or failure to make a reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means. This is a fourth degree crime. *N.J.S.A.* 2C:34-1c(3).

C. Knowingly promoting prostitution of a child under eighteen whether or not the actor mistakenly believed that the child was eighteen years of age or older, even if such mistaken belief was reasonable. This is a second degree crime. *N.J.S.A.* 2C:34-1c(1).

D. The actor knowingly promotes prostitution of the actor's child, ward, or any other person for whose care the actor is responsible. This is a second degree crime. *N.J.S.A.* 2C:34-1c(1).

E. The actor compels another to engage in or promote prostitution. This is a third degree crime. *N.J.S.A.* 2C:34-1c(2).

F. The actor promotes prostitution of the actor's spouse. This is a third degree crime. N.J.S.A. 2C:34-1c(2).

G. The actor knowingly engages in prostitution with a person under the age of eighteen, or if the actor enters into or remains in a house of prostitution for the purpose of engaging in sexual activity with a child under the age of eighteen, or if the actor solicits or requests a child under the age of eighteen to engage in sexual activity. It is not

a defense that the actor mistakenly believed that the child was eighteen years of age or older, even if such mistaken belief was reasonable. This is a third degree crime. N.J.S.A.~2C:34-1c(2).

In 1997, an additional related section was added to the code, *N.J.S.A.* 2C:34-1.1 "Loitering for the Purpose of Engaging in Prostitution." (*See also,* LOITERING, this Digest.) This delineates the offense of engaging in conduct in certain public places that demonstrates the purpose to engage in prostitution. The actor must have that purpose, and it must be demonstrated by conduct.

The public locations in which loitering for the purpose of engaging in prostitution are prohibited are described as any place "to which the public has access." *See N.J.S.A.* 2C:34-1.1a. Illustrations of such places are: a public street, sidewalk, bridge, alley, plaza, park, boardwalk, driveway, parking lot or transportation facility, public library, doorways and entrance ways to any building which faces such places, or a motor vehicle in or on any of these places. *See N.J.S.A.* 2C:34-1.1a.

Examples of conduct which might, under the circumstances be considered adequate evidence of a purpose to engage in prostitution or promoting prostitution include: repeatedly beckoning or stopping pedestrians or motorists in a public place, repeatedly attempting to stop or engage passers-by in conversation or repeatedly stopping or attempting to stop motor vehicles. *See N.J.S.A.* 34-1.1c(1) - (3).

An additional, related statute is *N.J.S.A.* 2C:33-12, which covers maintaining a house of prostitution. It is entitled "Maintaining a nuisance," and provides in pertinent part that a person is guilty of maintaining a nuisance when he "knowingly conducts or maintains any premises, place or resort as a house of prostitution..." *N.J.S.A.* 2C:33-12c. A violation of this statute is a fourth degree crime. *N.J.S.A.* 2C:33-12c.

PUBLIC DEFENDER

(See also, COSIS, this Digest)

A. Statutory and Constitutional Basis

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees an accused the right to have the assistance of counsel in order to protect the person's fundamental right to a fair trial. *See*, Gideon v. Wainwright, 372 *U.S.* 335, 83 *S.Ct.* 792, 9 *L.Ed.*2d 799 (1963). In addition, Article 1, ¶ 10 of the New Jersey Constitution guarantees defendants the right to counsel in New Jersey.

In enacting the New Jersey Public Defender Act, *N.J.S.A.* 2A: 158A-1 *et seq.*, our Legislature chose to establish a unitary, centralized system, as distinguished from a system of assigning counsel, as a means of meeting the State's obligation of providing for the defense of litigants under federal constitutional standards.

New Jersey has long held that the right of an accused who is indigent to have counsel assigned without charge is a fundamental right. See, State v. Rush, 46 N.J. 399, 403-04 (1966). In furtherance of this longstanding policy, the Legislature created the Office of the Public Defender in 1967 (N.J.S.A. 2A:158A-1 et seq.; L. 1967, c. 43, § 1). In the Act, the Public Defender is charged with the duty of providing for the legal representation of any indigent defendant who is formally charged with the commission of a crime. N.J.S.A. 2A:158A-5. In the same section of the statute he was also required to provide "all necessary services and facilities of representatives (including investigation and other preparation)..." Under this system, the State assumed all costs for attorneys and for ancillary services. Matter of Cannady, 126 N.J. 486, 490 (1991).

B. Definition of Indigent

An "indigent defendant" is defined by the Public Defender Act to mean "a person who is formally charged with the commission of an indictable offense, and who does not have the present financial ability to secure competent legal representation as determined by the factors in Section 14 of P.L. 1967, c. 43 (*N.J.S.A.* 2A:158A-14), and to provide all other necessary expenses of representation. *N.J.S.A.* 2A:158A-2.

C. Determination as to Who is Indigent, and Entitled to Services

The judiciary has the authority to determine whether a defendant who has been indicted is indigent and eligible for representation by the Office of the Public Defender. N.J.S.A. 2A:158A-14 et seq. Eligibility for the services of the Office of the Public Defender shall be determined on the basis of the need of the defendant. Among the factors to be considered are defendant's employment, liquid assets and income from all sources. It should be noted: "Indigence is not equivalent to total destitution." In re Request of Evelyn Berman Frank for Public Defender Representation, 276 N.J. Super. 269, 281 (App. Div. 1994), quoting from Barry v. Brower, 864 F.2d 294, 299 (3d Cir. 1988). In Frank, the court held that a woman living with her daughter, but without assets and heavily in debt, could still be deemed indigent according to the statute.

N.J.S.A. 2A:158A-15.1 provides that in each county, the Assignment Judge shall designate a judge or court support officer who shall make the determination on each request by defendant for an appointed attorney. A determination to grant or deny the services of the Public Defender shall be subject to final review by the Assignment Judge or his designated judge. The court, in its discretion may ask for the assistance of the Public Defender in conducting the investigation.

D. Individuals Entitled to Public Defender Services

Both juveniles and individuals charged with disorderly persons offenses are to be represented by public defenders. *N.J.S.A.* 2A:158A-24; *N.J.S.A.* 2A:158A-5.2.

E. Appeals (See also, APPEALS, this Digest)

Although there is no constitutional right to an appeal, *Griffin v. Illinois*, 351 *U.S.* 12, 18, 76 S.Ct. 585, 590, 100 *L.Ed.* 891, 898 (1956), once a right to appeal is provided, that right must be protected in a non-discriminatory fashion. Therefore, an indigent defendant has a right to counsel on direct appeal. *Douglas v. California*, 372 *U.S.* 353, 357, 83 *S.Ct.* 814, 816, 9 *L.Ed.*2d 811, 814 (1963). *See, Evitts v. Lucey*, 469 *U.S.* 387, 105 *S.Ct.* 830, 83 *L.Ed.*2d 821 (1985); *State v. Coon*, 314 *N.J. Super.* 426, 438 (App. Div. 1998). *State v. Bianco*, 103 *N.J.* 383, 391 (1986), rejected a claim of denial of equal protection insofar as a subclass of indigent defendants were being denied full review, since the classification of cases included in the Excessive Sentence

Oral Argument program was rationally related to a legitimate state interest in clearing the inordinate delays in appellate review.

The right to counsel for indigents does not extend to discretionary appeals, beyond the first appeal of right, however. *Ross v. Moffitt*, 417 *U.S.* 600, 94 *S.Ct.* 2437, 41 *L.Ed.*2d 341 (1974). *See, Pennsylvania v. Finley*, 481 *U.S.* 551, 108 *S.Ct.* 1990, 95 *L.Ed.*2d 539 (1987) (indigent defendant has no federal constitutional right to appointed counsel when attacking conviction in post-conviction proceedings).

F. Ancillary Services

N.J.S.A. 2A:158A-5 provides in part that "all necessary services and facilities of representation (including investigation and other preparation) shall be provided in every case."

In a trilogy of cases, the Supreme Court of New Jersey has held that the Public Defender has an obligation under the Public Defender Act to pay for necessary ancillary services, such as expert defense witnesses and trial transcripts, for indigent criminal defendants even though they are represented by private attorneys retained by the family or by *pro bono* attorneys. See Matter of Cannady, 126 N.J. 486 (1991); Matter of Kaufman, 126 N.J. 499 (1991); State v. Arenas, 126 N.J. 504 (1991). Therefore, it follows that even if an indigent defendant's family or friends may have provided some of the expenses incident to defending a criminal matter, this would not make the indigent criminal defendant ineligible for Public Defender representation. See also, In re Request of Evelyn Berman Frank for Public Defender Representation, 276 N.J. Super. 269, 282, n.2 (App. Div. 1994); State v. Morgenstein, 147 N.J. Super. 234 (App. Div. 1977), rev'g 141 N.J. Super. 518 (Law Div. 1976)(indigent defendant entitled to transcript of trial prepared for use on appeal).

An interpreter is another example of an additional service. "As with other necessary costs of a criminal defense, a defendant is entitled to have the State pay for an interpreter if he is unable to afford one." *State v. Guzman*, 313 *N.J. Super.* 363, 378 (App. Div. 1998). *See also, State v. Kounelis*, 258 *N.J. Super.* 420, 426 (App. Div. 1992). If a defendant is unable to understand court proceedings without an interpreter, the court must inquire through the court interpreter whether he can afford his own interpreter, and if he cannot, the court must appoint one for him. *State v. Kounelis*, 258 *N.J. Super.* at 426. *See also, State v. Manning*, 234 *N.J. Super.*

147, 158 (App. Div. 1989); *N.J.S.A.* 2A:158A-5 and *N.J.S.A.* 2A:158A-1 *et seq.* To receive such "other services" defendant must be determined to be indigent and the facts of the case must warrant the special services. *State v. Manning,* 234 *N.J. Super.* at 160-62.

An indigent defendant in a capital case is entitled to the service of an expert psychiatrist to contest the issue of his sanity at trial and also as an aid during the sentencing of a capital case. *Ake v. Oklahoma*, 470 *U.S.* 68, 105 *S.Ct.* 1087, 84 *L.Ed.*2d 53 (1985).

The Public Defender Office has the authority to determine the amount of compensation to be made available for ancillary services to a defendant it is not representing. *N.J.S.A.* 2A:158A-5; *Matter of Cannady,* 126 *N.J.* at 493-95 (describes procedure for making application for funding, and criteria used to determine if service will be compensated); *State v. Cantalupo,* 187 *N.J. Super.* 113 (App. Div. 1982), *certif. denied,* 93 *N.J.* 274 (1983).

G. Limitations on Services Provided by the Public Defender

Indigent defendants are not entitled to benefits more favorable than those which a nonindigent could afford. *See, State v. Cantalupo,* 187 *N.J. Super.* 113. In this case, the court held that the Public Defender was not required to produce, at its own cost and expense, out-ofstate alibi witnesses, absent defendant's showing of necessity in connection with these witnesses. Defendant neither provided the names of the alibi witnesses nor made a proffer of their anticipated testimony in order to demonstrate the essential value of it. Without such a proffer, the trial court could not balance the competing interests involved: the expense the public would bear versus the value of the testimony of the witness.

A court may not require the Public Defender to assign new counsel to a defendant who was dissatisfied with the attorney assigned to represent him, absent a showing of "substantial cause." *State v. Lowery*, 49 *N.J.* 476, 489-90 (1967); *see, State v. Smith*, 43 *N.J.* 67, 72 (1964), *cert. denied,* 379 *U.S.* 1005, 85 *S.Ct.* 731, 13 *L.Ed.*2d 706, *reh'g denied,* 380 *U.S.* 938, 85 *S.Ct.* 945, 13 *L.Ed.*2d 826 (1965); *State v. Coon,* 314 *N.J. Super.* 426, 438 (App. Div. 1998); *State v. Wiggins,* 158 *N.J. Super.* 27, 34 (App. Div. 1978); *State v. Reddy,* 137 *N.J. Super.* 32 (App. Div. 1975) (where defendants who had been represented by public defenders for a considerable period of time applied two weeks before trial for a continuance of suppression hearing in order to obtain private counsel, denial of application was a proper exercise of discretion); *State v. Ferguson,* 198 *N.J. Super.* 395 (App. Div. 1985). Disagreement over defense strategy does not rise to the level of good cause or substantial cause. *State v. Crisafi,* 128 *N.J.* 499, 518 (1992). Defendant is not entitled to a "meaningful relationship" with his attorney. *Morris v. Slappy,* 461 *U.S.* 1, 103 *S.Ct.* 1610, 75 *L.Ed.*2d 610 (1983).

Additionally, an indigent criminal defendant is not entitled to compel his appointed counsel to raise and argue on appeal every nonfrivolous issue which defendant wants raised, but which appellate counsel in the exercise of his professional judgment declines to present. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 *L.Ed*.2d. 987 (1983).

Furthermore, an indigent defendant cannot refuse to represent himself and at the same time reject the services of the Public Defender. A defendant must be provided with counsel but has no right to select counsel who will completely satisfy his fancy as to how he is to be represented. *State v. McCombs*, 171 *N.J. Super.* 161 (App. Div. 1978), *aff* d 81 *N.J.* 373 (1979). *See, State v. Kordower*, 229 *N.J. Super.* 566, 576 (App. Div. 1989).

H. Misconduct by Public Defenders

In *Tower v. Glover*, 467 *U.S.* 914, 104 *S.Ct.* 2820, 81 *L.Ed.*2d 758 (1984), the Supreme Court held that public defenders were not immune from liability in actions brought by a criminal defendant against state public defenders who are alleged to have conspired with state officials to deprive the plaintiff of federal constitutional rights. In this case, an Oregon prisoner brought an action for punitive damages under federal law against an Oregon public defender who represented him at one of his trials and against another Oregon public defender who represented him on appeal from that and another conviction. The action alleged that the public defenders conspired with various state officials, including the trial and appellate judges to secure the prisoner's conviction.

Furthermore, federal law does not provide attorneys appointed to represent indigents in federal criminal trials with absolute immunity from malpractice suits filed by their clients in the state courts. *Ferri v. Ackerman*, 444 *U.S.* 193, 100 *S.Ct.* 402, 62 *L.Ed.* 355 (1979). The Supreme Court held in *Ferri v. Ackerman* that state courts are free to determine whether state law provides for such immunity in state causes of action.

An attorney who refuses to represent an indigent defendant assigned to him/her may be found in contempt of court. *In re: Spann Contempt*, 183 *N.J. Super*. 62 (App. Div. 1982) (mistaken belief there was valid reason for refusal to represent not a sufficient defense); *In re Frankel Contempt*, 119 *N.J. Super*. 579, 581 (App. Div.), *certif. den.*, 62 *N.J.* 75, (1972), *cert. den.* 409 *U.S.* 1125, 93 *S.Ct.* 939, 35 *L.Ed.*2d 257 (1973); *(see also,* CONTEMPT, this Digest).

RACKETEERING (RICO)

Racketeering in New Jersey is governed by N.J.S.A. 2C:41-1 et seq., which generally prohibits an individual from conspiring to, or using or investing the income or proceeds from, a pattern of racketeering activity in the acquisition of any interest in, or the establishment or operation of, any enterprise engaged in, or the activities of which affect, trade or commerce, through a pattern of racketeering activity. It also prohibits a person employed by or associated with such an enterprise, to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. N.J.S.A. 2C:41-2. A pattern of racketeering activity is statutorily defined as engaging in two related incidents of racketeering activity within 10 years of each other, excluding any period of imprisonment. *N.J.S.A.* 2C:41-1d. "Racketeering activity" is defined in N.J.S.A. 2C:41-1a.

I. CONSTITUTIONALITY

The New Jersey Supreme Court upheld the constitutionality of the New Jersey racketeering statute in *State v. Ball*, 141 *N.J.* 142 (1995), *cert. denied sub nom., Mocco v. New Jersey*, 516 *U.S.* 1075 (1996). Consistent with the caselaw of every federal circuit court of appeals to have considered the issue with respect to the federal RICO law, the Supreme Court concluded that the State statute, particularly the term "pattern of racketeering activity," was not unconstitutionally vague, since it "makes clear that when certain conduct that the Legislature has already made criminal is committed in a certain way with a certain purpose, it will carry an enhanced penalty." *Id.* at 171.

II. ELEMENTS

A. Enterprise

Under federal RICO law, an "enterprise" encompasses both legitimate and illegitimate enterprises within its scope and is established by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. *Turkette*, 452 *U.S.* 576, 583 (1981). While an enterprise is an entity separate and apart from the pattern of activity in which it engaged, and proof of one would not necessarily establish the other, the proof used to establish the separate elements may "coalesce." Building on federal Id. decisional law and legislative history, the New Jersey Supreme Court in Ball construed the term "enterprise" broadly and found that the evidence used to prove the existence of an enterprise need not be distinct from the evidence used to establish the pattern of racketeering activity. 141 *N.J.* at 162. Furthermore, while the enterprise must be shown to have an "organization," it need not feature any "ascertainable structure" or structure with a particular configuration. *Id.* Rather, "the focus of the evidence must be on the number of people involved and their knowledge of the objectives of their association, how the participants associated with each other, whether the participants each performed discrete roles in carrying out the scheme, the level of planning involved, how decisions were made, the coordination involved in implementing decisions, and how frequently the group engaged in incidents or committed acts of racketeering activity, and the length of time between them." *Id.* at 162-63.

An individual cannot be an enterprise and simultaneously be the person "employed by" or "associated with" the enterprise. *State v. Kuklinski*, 234 *N.J. Super.* 418 (Law Div. 1988).

B. Pattern of Racketeering Activity

N.J.S.A. 2C:41-1a provides a lengthy list of crimes under New Jersey law or equivalent crimes under the laws of another jurisdiction which could constitute "racketeering activity." "Racketeering activity" in New Jersey is also defined to include any conduct defined as "racketeering activity under 18 *U.S.C.* § 1961(1)(A), (B), or (D). A conspiracy to commit a predicate act of racketeering is itself a racketeering predicate under *N.J.S.A.* 2C:41-1a. *State v. Bisaccia*, 319 *N.J. Super.* 1, 20 (App. Div. 1999).

The primary criterion of a "pattern of racketeering activity" is relatedness based upon a broad standard involving the totality of all relevant circumstances, including purposes, results, participants, victims, methods, and other characteristics. *State v. Ball*, 141 *N.J.* at 169. Although "continuity" is not a distinctive subelement of a pattern, as required under federal law, *see H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 *U.S.* 229 (1989), some degree of continuity, or the threat of continuity, is required and is inherent in the element of "relatedness." *State v. Ball*, 141 *N.J.* at 168; *see also State v. Taccetta*, 301 *N.J. Super.* 227 (App. Div.), *certif. denied*, 152 *N.J.* 187 (1997).

In interpreting the statutory phrase "to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs" the New Jersey Supreme Court has rejected federal law, that the defendant must take part in the "operation" or "management" of the enterprise. *See Rever v. Ernst & Young*, 507 *U.S.* 170 (1993). Instead, the Court determined that a defendant may be liable for racketeering if one knowingly engages in activities that seek to further, assist, or help effectuate the goals of the enterprise. *State v. Ball*, 141 *N.J.* at 175. Neither the enterprise nor the predicate racketeering acts are required to have been motivated by an economic purpose for there to be RICO liability. *National Organization for Women, Inc. v. Scheidler*, 510 *U.S.* 249 (1994).

III. CONSPIRACY TO COMMIT RACKETEER-ING

To be liable for the crime of conspiracy to commit racketeering, *N.J.S.A.* 2C:41-2d, one need not agree to personally commit at least two acts of racketeering; one must simply agree that he or one or more of his coconspirators would engage in those acts. *State v. Ball*, 141 *N.J.* at 176-81.

IV. SENTENCING AND MERGER

Racketeering is a second degree crime, unless the pattern of racketeering activity involves a crime of violence, a crime of the first degree, or the use of firearms. *N.J.S.A.* 2C:41-3a. Not only do the predicate racketeering offenses not merge into racketeering or conspiracy to commit racketeering, legislative intent is that the racketeering and predicate offenses be punished separately and consecutively. *State v. Taccetta*, 301 *N.J. Super.* at 257-61; *State v. Ball*, 268 *N.J. Super.* 72, 145-50 (App. Div. 1993), *aff'd o.g.*, 141 *N.J.* 142 (1995), *cert. denied sub. nom., Mocco v. New Jersey*, 516 *U.S.* 1075 (1996).

An extortion committed under a threat of bodily harm is a crime of violence and therefore subjects a defendant to a first degree racketeering sentence if committed as part of a pattern of racketeering activity. *State v. Taccetta*, 301 *N.J. Super.* at 255-57.

Because racketeering is a crime independent of the commission of the underlying offenses, a state prosecution for a predicate act is not barred by *N.J.S.A.* 2C:1-11a(1) by virtue of a federal RICO prosecution involving that same act as one of the predicates. *State v. Cooper*, 211 *N.J. Super.* 1 (App. Div.).

The racketeering statute also provides for criminal forfeiture penalties. *N.J.S.A.* 2C:41-3b. The forfeiture provision is not restricted to the interest in an enterprise, but may include profits and proceeds derived from racketeering. *United States v. Russello*, 464 *U.S.* 16 (1983). The State must prove that "but for" a defendant's racketeering, defendant would not have acquired the asset or property the State seeks to forfeit; thus, a jury can determine that only a portion of the defendant's interest in property resulted from illegal gain. *State v. Sparano*, 249 *N.J. Super.* 411, 426-27 (App. Div. 1991). There need not be a "direct" connection between racketeering profits and the acquired property sought to be forfeited, so long as the State proves that the property was acquired by funds equivalent to the fruits of the criminal activity. *Id.*

VI. INVESTIGATIVE INTERROGATORIES

N.J.S.A. 2C:41-5, which allows the Attorney General to use investigative interrogatories under the racketeering statute, is constitutional. *Matter of Doe*, 294 *N.J. Super.* 108 (Law Div. 1996), *aff'd*, 302 *N.J. Super.* 255 (App. Div.), *certif. denied*, 151 *N.J.* 468 (1997), *cert. denied*, 523 *U.S.* 1096 (1998). The authority of the Attorney General to investigate suspected criminal activity can only be circumscribed by a court if specific demands infringe on the legally protected rights of individuals. *Matter of Doe*, 302 *N.J. Super.* at 261.

VII. SEVERANCE

In State v. Garafola, 226 N.J. Super. 657 (Law Div. 1988), the assignment judge, while acknowledging that all 27 members of a racketeering enterprise may be indicted and tried together, determined that the "inordinate length and complexity" inherent in such a trial warranted severance in the interests of fairness. The court accordingly ordered that seven defendants -- the three public officials and four "core" indictees -- be tried first. In reaching its decision, the court considered: the estimated time needed for presentation of the State's case (at least four months); the need for adjournment should any one of the defendants, their counsel or the jurors become ill; the physical problems attendant to accommodating 27 defendants and their counsel; the near impossibility of obtaining a representative jury for a very lengthy trial, and the "[o]verriding" concern that jurors will be unable to comprehend, remember and evaluate evidence amassed over a long period of time.

REMOVAL

(See also, FORFEITURE and MISCONDUCT FROM OFFICE, this Digest)

I. FORFEITURE OF OFFICE REQUIRED FOR THE COMMISSION OF AN OFFENSE

A. Statutory Provisions

The forfeiture of office statute, *N.J.S.A.* 2C:51-2, was last amended in 1995 and affords courts the authority to remove a person from their public office. *State v. Roth*, 95 *N.J.* 334, 357 (1984).

B. Constitutionality

The statute constitutionally provides for a person's removal from any public office or position even if the state constitution allows alternative methods of removal as to that office, *i.e.*, a state senator. *State v. Pitman*, 201 *N.J.Super.* 21, 25 (App. Div. 1985); *State v. Musto*, 187 *N.J.Super.* 264, 269, 282-06 (Law Div. 1982), *aff'd*, 188 *N.J.Super.* 106, 107-08 (App. Div. 1983).

Removal from office is a civil remedy, or penalty, that is a collateral consequences of conviction; it does not constitute cruel and unusual punishment under the federal and state constitutions. State v. Timoldi, 277 N.J.Super. 297, 298-01 (App. Div. 1994), certif. denied, 142 N.J. 449 (1995); see State v. Lazarchick, 314 N.J.Super. 500, 531 (App. Div.), certif. denied, 157 N.J. 546 (1998); State v. Lee, 258 N.J.Super. 313, 317 (App. Div. 1992); Ayars v. New Jersey Dep't of Corrections, 215 N.J.Super. 223, 228 (App. Div. 1991); Old Bridge Public Workers and Sanitation Union v. Township of Old Bridge, 231 N.J.Super. 205, 209 (App. Div. 1989); State v. Baber, 256 N.J.Super. 240, 245 (Law Div. 1992). Removal also does not violate double jeopardy principles since it does not punish a public office holder, and also is not a bill of attainder. Ayars v. New Jersey Dep't of Corrections, 251 N.J.Super. at 229-30.

- C. Offenses for Which Forfeiture May Be Required
 - 1. Disorderly Person Offenses

The first sentence in *N.J.S.A.* 2C:51-2 make clear that the disabilities therein enumerated can be invoked based upon a conviction for "an offense." Clearly, a conviction for a crime is not required (expert for that portion of subsection a(1) which specifically refers to "crimes"), and disorderly persons offenses can suffice. No conflict exists between this section and *N.J.S.A.* 2C:1-4b, which provides that a conviction for disorderly and petty disorderly persons offenses "shall not give rise to any disability or legal disadvantage based on conviction of a crime." State v. Lore, 197 N.J.Super. 277, 283 (App. Div. 1984); accord State v. Lee, 258 N.J.Super. at 316-17 (relying in part upon the definition of "offense" set forth in N.J.S.A. 2C:1-14k); State v. Pitman, 201 N.J.Super. at 26 (same); State v. Parker, 198 N.J.Super. 272, 282-83 (App. Div. 1984) (also noting that vehicular infractions are not "offenses"), certif, denied, 99 N.J. 239 (1985). N.J.S.A. 2C:52-2e was inserted into the forfeiture of public office statute to ameliorate its harshness in practical applications as to some disorderly or petty disorderly persons convictions. *Flagg v. Essex County Prosecutor,* ____, *N.J.* Super. ___, (App. Div. 2001); State v. Lazarchick, 314 N.J.Super. at 529; see State v. Lee, 258 N.J.Super. at 317. The Appellate Division has indicated that the Attorney General "may" adopt guidelines to enable prosecutors to avoid a patent and gross abuse of discretion in seeking forfeiture of public office. Flagg v. Essex County Prosecutor, ____ N.J. Super. at ___, ___.

2. Offenses Under the Laws of Another Jurisdiction

An offense under the laws of another jurisdiction (*e.g.*, sister states and the United States), which involves dishonesty, is sufficient for the purposes of subsection a(1) regardless of whether, under the laws of this state, the offense would constitute a crime of the third degree or above. *See Old Bridge Public Workers and Sanitation Union v. Family of Old Bridge*, 231 *N.J.Super.* at 210 (Legislature intended that forfeiture follows upon conviction of a specified level of seriousness, whether that conviction arises under the laws of New Jersey, another state, or the United States). Moreover, mail fraud under 18 *U.S.C.* §1341 qualifies as a crime of dishonesty. *State v. Botti,* 189 *N.J.Super.* 127, 134-36 (Law Div. 1983); accord, State v. *Musto,* 187 *N.J.Super.* at 277.

A comparison of foreign offenses with state statutory offenses must proceed beyond an element-by-element breakdown. Paramount importance must be placed upon determining the "essence" or "gist" of the foreign conviction. The mere fact that the elements of the foreign crime do not exactly correspond to the elements of the New Jersey crime does not, by itself, establish that *N.J.S.A.* 2C:51-2 is inapplicable. Particularly with respect to federal crimes, all references to the elements involving interstate commerce or the obstruction thereof should normally be separated from the other elements since they are generally included only for the purpose of providing federal jurisdiction. *State v. Musto,* 187 *N.J.Super.* at 271-74.

3. Pre-Title 2C Offenses

In assessing whether pre-Title 2C convictions result in forfeiture, courts should look to see if such convictions are for equivalent Title 2C crimes. *Old Bridge Public Workers and Sanitation Union v. Township of Old Bridge*, 231 *N.J.Super.* at 209 (defendant's Title 24 drug convictions for high misdemeanors were equivalent to third degree crimes).

4. Offenses Involving or Touching Upon a Public Office, Position, or Employment

The inquiry into whether an offense involves or touches upon public employment involves careful examination of the facts, which consists of assessing the gravity of the offense (its nature, context and the victim's identity) and the qualifications required of that employment. Moore v. Youth Correctional Inst., 119 N.J. 256, 269 (1990); State v. Lee, 258 N.J.Super. at 316, 318. It can so involve and touch the office even if it did not take place during employment hours or on employment grounds; the nexus between the offense and the job is not limited by time and location. Rather, it is the offense's substance that affects the N.J.S.A. 2C:51-2a(2) and d determination. Moore v. Youth Correctional Inst., 119 N.J. at 269-70; State v. Baber, 256 N.J.Super. at 244. Once it is determined that an offense does involve or touch the individual's office, the forfeiture provision is strict and permanent debarment results. State v. Lazarchick, 314 N.J.Super. at 527; see Cedeno v. Montclair State Univ., 310 N.J.Super. 148, 156 (App. Div. 1999) (bribery convictions based on acts committed in course of public office clearly involved or touched defendant's job); State v. Pitman, 201 N.J.Super. at 24-25 (simple assault by corrections officer upon a county jail inmate demands forfeiture); State v. Lore, 197 N.J.Super. at 283 (simple assault by on-duty police officer upon a suspect demands forfeiture); see also State v. Parker, 198 N.J.Super. at 203. The words "office," "position," and "employment" as used in the statute are interchangeable. Pastore v. County of Essex, 237 N.J.Super. 371, 376 (App. Div. 1989), certif. denied, 122 N.J. 129 (1990); see Bevacqua v. Renna, 213 N.J.Super. 554, 557-62 (App. Div. 1986) (electrical subcode official kept inspection fees due the municipality, an offense that touched on his public office and mandated permanent debarment). Even a greens superintendent for county golf courses occupies a public position of trust and profit. Pastore v. County of Essex, 237 N.J.Super. at 372, 380.

5. Offenses Involving Dishonesty

Under pre-Code law, the predecessor removal statute, N.J.S.A. 2A:135-9, provided that the offense must involve "moral turpitude." See, e.g., O'Halloran v. DeCarlo, 156 N.J.Super. 249 (Law Div.), aff'd 162 N.J.Super. 174 (App. Div.), certif. denied, 79 N.J. 469 (1978), cert. denied, 442 U.S. 917 (1979). The change in the penal code from "moral turpitude" to "dishonesty" appears to be a broadening of the language of the statute. Crimes which, under pre-Code law, would be insufficient to warrant removal may, nevertheless, now be sufficient under this section. State v. Musto, 187 N.J.Super. at 275. The statute also makes no distinction as to the quantum of dishonest conduct -- such conduct compels forfeiture of office, regardless of any mitigating circumstances defendant offers. State v. Hamm, 121 N.J. 109, 125 (1990), cert. denied, 499 U.S. 947 (1991); State v. Lee, 258 N.J.Super. at 317, 318.

D. Self-Executing Nature of the Forfeiture Provisions

The provisions of *N.J.S.A.* 2C:51-2 are self-executing. Pursuant to the statute, the forfeiture occurs automatically at the time of sentencing unless the court, for good cause shown, orders a stay of such forfeiture. *State v. Pitman,* 201 *N.J.Super.* at 25; *State v. Musto,* 188 *N.J.Super.* at 108; *State v. Botti,* 189 *N.J.Super.* at 132-33.

E. Good Cause for Ordering a Stay of Forfeiture

A convicted defendant seeking to avoid forfeiture of office may be able to demonstrate "good cause" for the court to order a stay if he or she can show that there is a substantial likelihood of success on appeal, particularly if the offense is totally unrelated to his or her duties as a public official. However, "good cause" is not shown by the allegation that the forfeiture would thwart the will of the voters who elected defendant, that the offense was unrelated to defendant's duties, or that the amounts of money fraudulently taken were not large. Moreover, "good cause" is not generally shown by the fact that if the defendant's conviction is reversed on appeal, the taxpayers will have to pay him or her back salary, even though a replacement also received a salary during the pendency of the appeal. State v. Botti, 189 N.J.Super. at 132-39; see generally Moore v. Youth Correctional Inst., 119 N.J. at 265.

- F. Standing to Initiate Forfeiture Proceedings
 - 1. Authority

The county prosecutor and the Attorney General have standing to institute a suit to compel the forfeiture of office of one who has been convicted of an offense. *O'Halloran v. DeCarlo,* 156 *N.J.Super.* at 256; *see also State v. Musto,* 187 *N.J.Super.* at 269-71.

2. Waiver of Forfeiture

N.J.S.A. 2C:51-2e permits the county prosecutor or Attorney General to seek a judicial waiver of forfeiture if the office holder has committed a disorderly or petty disorderly persons offense and good cause is shown. *Moore v. Youth Correctional Inst.*, 119 *N.J.* at 265, 268; *State v. Lee*, 258 *N.J.Super.* at 317.

3. Pardons

Although a public official is otherwise forever disqualified from holding public office by virtue of *N.J.S.A.* 2C:51-2d, the subsequent executive grant of a full pardon for the underlying conviction will lift the bar to seeking future public employment. *Brezizecki v. Gregorio*, 246 *N.J.Super.* 634, 638, 643-44 (Law Div. 1990).

G. Scope of Subsequent Disqualification

A public officer convicted of an offense involving or touching on his or her public office must be forever disqualified from holding any State office or position of honor, trust or profit. *See Pastore v. County of Essex*, 237 *N.J.Super.* at 378 (Legislature intended to disqualify convicted offenders from all forms of governmental employment); *State v. Pitman*, 201 *N.J.Super.* at 25.

H. Guilty Pleas

In *State v. Heitzman,* 107 *N.J.* 603 (1987), the Supreme Court overruled *State v. Pitman,* to the extent that it held that a trial court must advise a defendant at the time of pleading guilty that the offense to which he or she is pleading guilty will result in the forfeiture of office. The Court emphasized that the rule of *State v. Kovack, 91 N.J.* 476 (1982), pertains only to penal consequences, and not to collateral consequences such as forfeiture of office, the loss of employment, or the possibility of deportation. *See Doe v. Poritz*, 142 *N.J.* 1, 147 (1995) (Stein, J., dissenting); *State v. Garcia,* 320 *N.J.Super.* 332, 336-37 (App. Div. 1999).

II. APPLICABILITY OF CONSCIENTIOUS EMPLOYEE PROTECTION ACT AND LAW AGAINST DISCRIMINATION

A person statutorily barred from obtaining public employment because of a criminal conviction cannot maintain a wrongful discharge action if he or she subsequently regains a public position and is later fired. *Cedeno v. Montclair State Univ.*, 319 *N.J.Super.* at 154, 156.

III. FORFEITURE ARISING FROM IMMU-NIZED TESTIMONY OR REFUSAL TO TES-TIFY

A. Statutory Provisions

The pertinent statutes addresses the public employee's duty to appear and testify as to matters directly related to his or her office, subject to removal if he or she fails or refuses to appear and testify. They also explain the applicability of privileges and the effect of admitting the commission of offenses involving the employee's job. *N.J.S.A.* 2A:81-17.2a1 to 5; *see State v. Korkowski*, 312 *N.J.Super.* 429, 433 (App. Div. 1998); *In re Grand Jury Subpoenas*, 241 *N.J.Super.* 18, 30 (App. Div. 1989).

B. Constitutionality

These statutes violate neither a public employee's Fifth Amendment rights nor equal protection of the laws. *State v. Vinegra*, 73 *N.J.* 484, 489-90 (1977); *State v. Falco*, 60 *N.J. 570, 583-86 (1972); Banca v. Town of Phillipsburg,* 181 *N.J.Super.* 109, 113-14 (App. Div. 1981); *Kugler v. Tiller,* 127 *N.J.Super.* 468, 473-74 (App. Div. 1974); *see also Gardner v. Broderick,* 392 *U.S.* 273 (1968); *Garrity v. New Jersey,* 385 *U.S.* 493 (1967).

C. Procedures

When public officials unqualifiedly declare their intention not to testify before a grand jury on matters relating to their office, no need exists to put specific, relevant questions before them prior to institution of removal proceedings. The refusal to testify, however, does not justify their summary removal from office where factual issues arise to whether they had been informed that the inquiry concerned matters directly related to their office and to whether they were advised of their rights and duties. *Kugler v. Tiller*, 127 *N.J.Super.* at 476-78.

Public officials must be clearly, unambiguously and expressly advised of their use immunity at the outset as a prerequisite to the institution of removal proceedings premised upon their refusal to testify. They must similarly be advised that refusal to testify will result in removal. *Banca v. Phillipsburg*, 181 *N.J.Super.* at 116.

The public employee, though, must claim the privilege against self-incrimination to receive immunity. Because they have a statutory duty to appear and testify about matters directly related to their employment, employees who are not the investigation's target need not be advised of the consequences of failing to appear until they so fail. *State v. Korkowski*, 312 *N.J.Super.* at 434-35. Also, *N.J.S.A.* 2A:81-17.2a2's grant of immunity applies only to public employees who are targets of a grand jury's investigation. *Id.* at 436-37. Immunity, though, extends only to subsequent criminal, not civil, proceedings, and the statutes' removal proceedings are civil in nature. *Shusted v. Traenkner*, 155 *N.J.Super.* 23, 27 (Law Div. 1977), *appeal dismissed*, 163 *N.J.Super.* 445 (App. Div. 1978).

D. Purging Previous Refusal to Testify

N.J.S.A. 2A:81-17.2a1 categorically states that any public employee who fails or refuses to appear and testify shall be subject to removal from office. The statute contains no provisions which permit a recalcitrant witness, having refused to testify, to purge himself or herself by subsequently agreeing to appear and testify before a grand jury. Without deciding whether there would ever arise circumstances under which a pubic employee should be permitted to purge a previous refusal to testify, the Appellate Division has held that those circumstances certainly do not arise after the employee has been given the opportunity to testify three times and refuses to do so, although warned upon each occasion both that removal might ensue and that his testimony would enjoy use and fruits immunity. Hyland v. Smollock, 137 N.J.Super. 456 (App. Div. 1975), certif. denied, 71 N.J. 328 (1976).

E. Definition of Public Employee

For the purpose of these provisions the term "public employee" is broadly defined in *N.J.S.A.* 2A:81-17.2a. In *Hyland v. Ranone,* 141 *N.J.Super.* 48 (App. Div. 1976), *aff"d o.b.* 75 *N.J.* 97 (1977), the court found that defendant, a police officer, was properly removed from office even though at the time he appeared before the grand jury and refused to testify he had not been on active duty for a considerable period of time because of a disability. Courts have rejected the holding in *Shusted v. Coyle,* 139 *N.J.Super.* 314 (Law Div. 1976), that the statements are

unconstitutional as applied to a county sheriff. *In re Burlington County Bd. of Chosen Freeholders*, 99 *N.J.* 90, 100-01 (1985); *State v. Musto*, 187 *N.J.Super.* at 291-92; *accord State v. Pitman*, 201 *N.J.Super.* at 23.

F. Matters Directly Related to the Conduct of Office

The phrase "matters directly related to the conduct of ... office" in N.J.S.A. 2A:81-17.2a(1) should be broadly construed consonant with the statutes purpose. See Hyland v. Ranone, supra. In State v. Bielecki, 196 N.J.Super. 332, 337-38 (App. Div. 1984), certif. denied, 99 N.J. 216 (1984), the court held that defendant admitted the commission of a crime -- namely false swearing, "relating to his employment or touching the administration of his office." The state grand jury before which defendant admitted that he lied was investigating charges that police officers in the police department of which defendant was the chief were improperly misappropriating property. Since defendant's false swearing impeded this investigation, it related to his employment, touched the administration of his office, and compelled his removal from office.

G. Prosecutor's Discretion to Seek Removal

N.J.S.A. 2A:81-17.2a(4) provides that the county prosecutor or the Attorney General may institute removal proceedings by an action in lieu of prerogative writ. In *State v. Bielecki,* 196 *N.J.Super.* at 337, the court held that the prosecutor has discretion as to whether he or she should institute removal proceedings. That discretion is similar to the discretion prosecutors have as to whether they should institute criminal proceedings. In a given case where evidence exists that would support both removal and criminal charges, the prosecutor does not commit an abuse of discretion simply by deciding to seek removal and to forego criminal charges.

H. Conflict With Other Statutory Provisions and Ordinances

In *State v. Bielecki*, 196 *N.J.Super. at 336*, the court, relying in part on *N.J.S.A.* 2A:81-17.2a(5), held that the removal provisions of *N.J.S.A.* 2C:51-2 and thus of *N.J.S.A.* 2A:81-17.2a(1) *et seq.* are not mutually exclusive, and that in an appropriate case the prosecutor may rely upon either or both.

The Legislature has preempted matters relating to the removal of elected officials. Thus, municipalities are denied authority to enact ordinances pertaining to this subject. *Traino v. McCoy*, 187 *N.J.Super.* 638, 646-48 (Law Div. 1982).

I. Application of These Statutes to Administrative Proceedings

The immunity *N.J.S.A.* 2A:81-17.2a(2) affords manifestly applies only to an ongoing proceeding before a court, grand jury, or the State Commission of Investigation. It does not apply to an administrative hearing, such as a State Police disciplinary proceeding. *In re Toth,* 175 *N.J.Super.* 254, 261-62 (App. Div. 1980).

J. Applicability of Criminal Defenses

In State v. Bielecki, 196 N.J.Super. at 334-37, defendant chief of police gave testimony before the state grand jury. Approximately two months later, he returned to the grand jury and admitted that he had committed false swearing during his earlier testimony. He provided new retraction testimony that differed from his earlier testimony. The Attorney General then sought his removal from office under N.J.S.A. 2A:81-17.2a3, and relied upon defendant's admission that he had committed false swearing. The Law Division disagreed and ordered his removal. On appeal the Appellate Division characterized retraction as a "nonexculpatory, public policy defense" and held that, although retraction may be a defense to criminal charges, it has no relevance to N.J.S.A. 2A:81-17.2a(3) removal proceedings. See State in re J.S., 273 N.J.Super. 450, 456 (Ch. Div. 1994).

IV. CIVIL SERVICE

The Civil Service Commission, in appeals *de novo* from decisions of state and local appointing authorities in disciplinary proceedings against employees, is not restricted to an "abuse of discretion" test, even if the authority is a law enforcement agency. Nevertheless, in *Henry v. Rahway State Prison*, 81 *N.J.* 571, 578-80 (1980), the Commission acted arbitrary, capriciously, and unreasonably in reducing a penalty imposed on a corrections officer from removal to a 90 day suspension where the officer falsified a report regarding his discovery of marijuana within a prison.

V. MISCELLANEOUS PROVISIONS

As to the removal from office of municipal officials for failure to comply with various provisions of the Faulkner Act, *see Traino v. McCoy*, and *Stern v. Hall*, 183 *N.J.Super* 536 (Law Div. 1982). As to the removal of county officials who fail to comply with valid residency requirements, including county detectives and assistant prosecutors, see Skolski v. Woodcock, 149 N.J.Super. 340 (App. Div. 1977), and County Prosecutor v. Passaic County Bd. of Chosen Freeholders, 159 N.J.Super. 258 (App. Div.), certif. granted and remanded, 77 N.J. 511 (1978). As to the removal of police officers charged with or convicted of crimes, see N.J.S.A. 40A:14-149.1 et seq., and Connell v. Board of Review, 216 N.J.Super. 403 (App. Div. 1987). As to the removal of judges for misconduct, willful neglect of duty, incompetence or unfitness, see In re Coruzzi, 95 N.J. 557, appeal dismissed, 469 U.S. 802 (1984).

RESISTING ARREST

(See also, FLIGHT, ELUDING, ESCAPE, SELF-DEFENSE, this Digest)

I. GENERALLY

Prior to adoption of the New Jersey Code of Criminal Justice, resisting arrest was a common law misdemeanor likened to obstruction of justice and prosecuted under *N.J.S.A.* 2A:85-1; it was also proscribed by ordinances in most municipalities. *State v. Blanton,* 166 *N.J. Super.* 62 (App. Div. 1979), *certif. denied,* 81 N.J. 265 (1979); II *Final Report of the N.J. Criminal Law Revision Commission* 283 (1971); *see State v. Cassatly,* 93 *N.J. Super.* 111 (App. Div. 1966).

In formulating N.J.S.A. 2C:29-2a the N.J. Criminal Law Revision Commission rejected the Model Penal Code view that mere nonsubmission should not be an offense, believing that an affirmative policy of submission was appropriate as well as a continuation of prior law as exemplified by State v. Mulvihill, 57 N.J. 151 (1970); State v. Washington, 57 N.J. 151 (1970); State v. Koonce, 89 N.J. Super. 169 (App. Div. 1965). II Final Report of the N.J. Criminal Law Revision Commission 282 (1971). The Code, both as proposed and adopted, provides that a person is guilty of resisting arrest if he "purposely prevents a law enforcement officer from effecting a lawful arrest." State v. Blanton, supra. Thus, this statue deals with purposeful conduct. By contrast, the aggravated assault statute, N.J.S.A. 2C:12-1b(5)(a), provides for the alternative culpability elements of purposely, knowingly or recklessly committing a simple assault on a law enforcement officer acting in the performance of his duty while in uniform or exhibiting evidence of his authority. State v. Murphy, 185 N.J. Super. 72 (Law Div. 1982).

The code divides resisting arrest into two categories: (1) a person is guilty of a fourth degree crime if he uses or threatens to use physical force or violence against the officer or another, or uses any other means to create a substantial risk of causing physical injury to the officer or another; (2) a person is guilty of a disorderly persons offense if he purposely seeks to prevent a police officer from effecting an arrest. Thus, the use of actual force or conduct which risks causing injury is not necessary to constitute a disorderly persons offense, and mere flight may be sufficient if it constitutes an overt act of obstruction. *See State v. Blanton, supra.* The code establishes a duty to submit and not resist, consistent with the common law. *Id.*; *see State v. Koonce, supra; State v. Lawrence,* 142 *N.J. Super.* 208 (App. Div.

1976) (acquittal of assault on police officer not inconsistent with conviction for resisting arrest).

Also, resisting one's own arrest is properly prosecuted under this statute. *State v. Garrison,* 230 *N.J. Super.* 609, 614 (App. Div. 1989). Resisting arrest is a single offense notwithstanding the fact that multiple police officers may be involved in the attempted arrest. *State v. Parsons,* 270 *N.J. Super.* 213 (App. Div. 1994). The offenses of assault on a police officer and resisting arrest do not merge. *State v. Battle,* 256 *N.J. Super.* 268, 283 (App. Div.), *certif. denied,* 130 *N.J.* 393 (1992); *State v. Davis,* 281 *N.J. Super.* 410, 416 (App. Div. 1995), *certif. denied,* 145 *N.J.* 376 (1996).

A. Lawful arrests

The defendant must know that he is being arrested to be charged with resisting arrest, but if the arrest is legal, the police do not need to announce it. The facts must simply show that the defendant knew he was being arrested and he nevertheless resisted. *State v. Branch*, 301 *N.J. Super.* 307, 321 (App. Div. 1997), rev'd in part on other grounds 155 *N.J.* 317 (1998).

B. Unlawful arrests

A person may be convicted under subsection a for resisting an unlawful arrest provided that the officer was acting under color of official authority and the officer announces the intention to arrest the defendant before he resists. *State v. Kane*, 303 *N.J. Super.* 167, 182 (App. Div. 1997). In *State v. Kane*, the court found that the defendant resisted several officers who were carrying him out of a meeting, but since there was no authority for an arrest and the arrest was not announced, the conviction was reversed. *See also, State v. Battle*, 256 *N.J. Super.* 268, 274 (App. Div. 1992), *certif. denied*, 130 *N.J.* 393 (1992).

II. DEFENSES

It is not a defense to a prosecution for resisting arrest that a law enforcement officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance. *N.J.S.A.* 2C:29-2a; *State v. Seymour,* 289 *N.J. Super.* 80, 85 (App. Div. 1996).

A person is not justified in using force in selfprotection to resist an arrest which he knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful, unless the peace officer employs unlawful force to effect such an arrest. *N.J.S.A.* 2C:3-4b(1)(a). Similarly, a person may not use force to oppose an unlawful arrest as long as unlawful force is not being employed by the arresting officer. *See N.J.S.A.* 2C:3-4b(1)(a) and Comment thereon, and *State v. Casimono,* 250 *N.J. Super.* 173, 182-185 (App. Div. 1991), *certif. denied,* 127 *N.J.* 558 (1992). This provision codifies the common law proscription that a private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer engaged in the performance of his duties. *State v. Mulvihill,* 57 *N.J.* 151 (1970); *State v. Koonce,* 89 *N.J. Super.* 169 (App. Div. 1965); *State v. Lawrence,* 142 *N.J. Super.* 208 (App. Div. 1976).

A public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest is justified in using force for self-protection even against an occupier or possessor of property using force under a claim of right to protect the property. *N.J.S.A.* 2C:3-4b(2)(b)(ii).

While a person is ordinarily obliged to retreat before utilizing deadly force in self defense, a public officer is not obliged to desist from efforts to perform his duty, effect an arrest or prevent an escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed. *N.J.S.A.* 2C:3-4(2)(b)(ii).

However, deadly force may not be employed to prevent escape of an unarmed fleeing felon unless the suspect committed a crime of violence or presents a danger to the officer or other persons. *Tennessee v. Garner,* 471 *U.S.* 1, 105 *S.Ct.* 1694, 85 *L.Ed.* 2d 1 (1985).

RESTITUTION

Restitution is an appropriate and salutary technique in the criminal process and is a far more preferable remedy than the recovery of damages in a separate civil action. *State v. Harris,* 70 *N.J.* 586, 591-592 (1976). Justice and rehabilitation are achieved through restitution. *Id.*

The adoption of the penal code in 1979 significantly expanded the imposition of restitution as an independent sentencing disposition. Under prior law (Title 2A), restitution was largely limited because it could be imposed only as a condition of probation. *See N.J.S.A.* 2A:168-2 (repealed); *State v. Varlese,* 171 *N.J. Super.* 347, 355 (App. Div. 1979), *certif. denied* 82 *N.J.* 298 (1980); *State v. Wright,* 156 *N.J. Super.* 559, 562 (App. Div. 1978).

Under the penal code, there is a clear preference for restitution where appropriate, as opposed to the imposition of a fine. A fine may only be levied if it does not prevent imposition of necessary restitution. *N.J.S.A.* 2C:44-2a(3). Restitution may be imposed in addition to even a maximum fine. *N.J.S.A.* 2C:43-3h. Restitution can be part of a variety of sentencing dispositions, namely: (1) in combination with both a fine and imprisonment, *N.J.S.A.* 2C:43-2b(4); (2) in combination with only imprisonment, *N.J.S.A.* 2C:43-2b(4); (2) in combination with only imprisonment, *N.J.S.A.* 2C:43-2b(4); and (4) as a condition of probation. *N.J.S.A.* 2C:43-2b(4); *N.J.S.A.* 2C:44-2a; *N.J.S.A.* 2C:45-1b(8). Restitution is applicable to violent as well as property crimes. *See In Re Trantino parole Application,* 89 *N.J.* 347, 358, 361 (1982).

The penal code provides that, the court shall sentence a defendant to pay restitution in addition to sentence of imprisonment or probation, if the victim, or in the case of a homicide, the nearest relative, suffered a loss and the court finds defendant has the ability to pay. *N.J.S.A.* 2C:44-2b. In setting the actual amount of restitution to be made, the court is required to consider the resources of, and burden on, the person ordered to make restitution. *N.J.S.A.* 2C:44-2c(2). Such person must have a fair opportunity to pay the restitution. *N.J.S.A.* 2C:44-2b(2).

A trial court is not required to consider whether alternative methods of punishment to imprisonment were appropriate in case where defendant willfully failed to comply with restitution order while on probation, which was consequently revoked. *State v. Townsend,* 222 *N.J. Super.* 273, 280 (App. Div. 1988).

Sentence that requires defendant to repay victim money obtained through fraud does not constitute cruel

and unusual punishment. *State v. DeAngelis*, 329 *N.J. Super.* 178, 190 (App. Div. 2000).

As a condition precedent to an order of restitution, there must be a showing of the amount due the victim and the offender's ability to repay. State v. Bausch, 83 N.J. 425, 435 (1980). Due process requires a hearing on these issues, that is, a summary proceeding providing notice wherein a person may defend or refute the circumstances of restitution. State in Interest of D.G.W., 70 N.J. 488, 502-503, 506 (1976); State v. Paladeno, 203 N.J. Super. 537 (App. Div. 1985). The focus of the hearing should be a probation department report on a prior investigation about: (1) the nature and extent of the losses; (2) the method used to determine the value of the losses incurred; (3) the amount of money the offender is able to repay and (4) the offender's present and probable future ability to make such repayment. Id. at 505. This factual basis for restitution must, on balance, aver sufficient facts to support restitution that is reasonable and just. State v. Harris, 70 N.J. 586, 599 (1976). The owner of personal property may give his estimate of the value of his property. State v. Rhoda, 206 N.J.Super. 584 (App. Div. 1986), certif. denied 105 N.J. 524 (1986).

Where there is a good faith dispute over the amount of the loss or defendant's ability to pay, the trial court as a matter of defendant's due process entitlement, must hold a hearing on the issue, the character of which should be appropriate to the nature of the question presented. *State v. Jamiolkoski*, 272 *N.J. Super*. 326 (App. Div. 1994) (dispute over restitution amount in PTI form signed by defendant).

Defendant was not entitled to restitution hearing where no dispute existed as to amount of restitution and defendant raised no objection to concession made by his counsel that defendant had funds to pay restitution nor did he dispute his ability to pay. *State v. Orji*, 277 *N.J. Super*. 582 (App. Div. 1994).

Whatever the contents of the probation report, the final decision on the amount and terms of restitution rests with the sentencing judge, and, therefore, may include consideration of other relevant factors. *State in Interest of D.G.W., supra,* 70 *N.J.* at 503-507. The amount of restitution shall not exceed victim's loss. 2C:43-3h. The restitution ultimately imposed must be limited by and directly related to defendant's offenses. *State v. Harris,* 70 *N.J.* at 593; *State v. Insabella,* 190 *N.J. Super.* 544, 552 (App. Div. 1983).

At the time of sentencing, the trial court is required, before imposing a fine or restitution, to determine if the defendant is able, or given a fair opportunity to do so, will be able to pay the fine, make restitution or both. *N.J.S.A.* 2C:44-2b(2); *State v. Newman*, 132 *N.J.* 159, 169 (1993); *State v. McLaughlin*, 310 *N.J. Super.* 242 (App. Div.), *certif. denied* 156 *N.J.* 381 (1998) (a hearing was required in the trial court to determine defendant's ability to pay restitution in an amount of \$271,000); *State v. Smith*, 307 *N.J. Super.* 1 (App. Div. 1997), *certif. denied* 153 *N.J.* 216 (1998), (remanded to trial court for an "ability to pay" hearing as to restitution in amount of \$54,681.96).

In *State v. Scribner*, 298 *N.J. Super*. 366 (App. Div. 1997), *certif. denied* 150 *N.J.* 27 (1997), the Appellate Division held that in imposing restitution jointly and severally between codefendants, the sentencing court must examine each individual's present or future ability to pay. The sentencing judge has considerable discretion in evaluating a defendant's ability to pay and must explain the reasons the decision to order restitution, the amount of restitution, and its payment terms.

The question of restitution in criminal and juvenile proceedings need not hinge exclusively on ability to pay, if the amount of restitution ordered is otherwise appropriate. There is no reason not to order appropriate restitution even when the person ordered to make restitution is presently unable to pay either the entire amount or a lesser amount based on a reasonable payment schedule. *State In the interest of R.V.*, 280 *N.J.Super* 118, 121-122 (App. Div. 1995).

Defendant can be required to pay restitution out of pension funds he receives. *State v. Pulasty*, 136 *N.J. 356 (1994), cert. denied 513 U.S. 1017 (1994).*

In *State v. Burton*, 309 *N.J. Super*. 280 (App. Div.), *certif. denied* 156 *N.J.* 407 (1998) the Appellate Division, remanded the matter of restitution to the trial court in the absence of an explanation for the difference between the amount of restitution ordered at the time of sentencing and the amount reflected in the judgment of conviction.

In *State in the Interest of M.C.*, 292 *N.J. Super*. 214 (Ch. Div. 1995), the court ordered the juvenile offender to make restitution as a condition of probation for the expenses of psychotherapy and after school supervision incurred on behalf of the victim and paid for by the victim's mother.

There must be some relationship between the defendant's ability to pay over course of his incarceration

and parole and \$10,000 VCCB penalty imposed. *State v. Gallagher*, 286 *N.J. Super*. 1, 23 (App. Div. 1995), *certif. denied* 146 *N.J.* 569 (1996)

Orders of restitution imposed as part of defendant's criminal sentence remain intact as part of that sentence regardless of the fact that defendant's period of probation has expired. *State v. Kemprowski*, 265 *N.J. Super*. 471 (App. Div. 1993). *N.J.S.A*. 2C:45-2 (permitting probation to be extended if restitution not paid); *N.J.S.A*. 2C:46-2b,c (permitting collection of restitution by any means available for collection of civil judgment upon default).

In *State v. Paone*, 290 *N.J. Super.* 494 (App. Div. 1996), the defendant was a corporate president convicted of failing to remit unemployment insurance contributions, and he was required to pay restitution regardless of whether he received pecuniary gain himself.

There is no infringement on a defendant's constitutional rights because trial judge and counsel did not discuss possibility of restitution at a plea hearing. *State v. Kruegar*, 241 *N.J.Super* 244, 254 (App. Div 1990); *State v. Rhoda*, 206 *N.J. Super*. 584, 595-596 (App. Div. 1986), certif. denied 105 N.J. 524 (1986).

In *State v. Saperstein*, 202 *N.J. Super.* 478 (App. Div. 1985), the court found that restitution of \$150,000 was beyond defendant's reasonable expectations at time of guilty plea and required remand to trial court for *Kovack* hearing.

However, in *State v. Rhoda*, 206 *N.J. Super*. 584 (App. Div. 1986), *certif. denied* 105 *N.J.* 524 (1986). The court held there was no obligation for sentencing court to advise defendant of the possibility of reasonable restitution which is considered part of rehabilitation and resocialization process, although it is better practice to advise at time of guilty plea.

In *State v. Corpi*, 297 *N.J. Super*. 86 (App. Div.), *certif. denied* 149 *N.J.* 407 (1997) defendant offered to make full restitution before sentencing in exchange for a custodial term, shorter than the one provided for in the plea agreement. When he failed to pay, the original plea bargained sentence was imposed. The Appellate Division held that defendant received fundamental fairness and due process in the plea and sentencing process because the sentence recommendations were partly conditioned on defendant's agreement to pay the victim full restitution, which he did not do. The court must explain and outline the reasons for imposing restitution on the record, pursuant to *R*. 3:21-4(e). *State v. Bausch, supra*, 83 *N.J.* at 436; *State v. Harris, supra*, 70 *N.J.* at 599. The sentencing court, not the probation department, must establish the terms and conditions of restitution. *State v. Blassingdale*, 163 *N.J. Super*. 110, 113 (App. Div. 1978), *certif. dism.* 87 *N.J.* 48 (1979).

The penal code further provides procedures related to the manner of payment, *N.J.S.A.* 2C:46-1; the consequences of nonpayment, *N.J.S.A.* 2C:44-2d and *N.J.S.A.* 2C:46-2; and to the responsibility for collection of restitution payments. *N.J.S.A.* 2C:46-4.

In the context of a plea bargain, an offender may be ordered to make restitution on an offense not pled to, but only if the trial court finds that the offender has voluntarily and knowingly admitted a factual basis for liability on the dismissed charge. State v. Bausch, 83 N.J. 425, 436 (1980). In this regard, in order to impose restitution on dismissed counts of an indictment, a factual basis for the restitution must be established at the time of the plea; defendant must be informed on the record that restitution may be imposed on these counts, and there should be a relationship between the restitution and the goal of rehabilitation with respect to the offense for which defendant is being sentenced. State v. Bausch, 83 N.J. 425 (1980); State v. Kruegar, 241 N.J. Super. 244 (App. Div. 1990). But see Hughey v. United States, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990) (under federal law, restitution cannot be imposed on dismissed counts of indictment).

In *State v. Hill*, 155 *N.J.* 270 (1998), the Supreme Court held that the statute governing restitution, *N.J.S.A.* 2C:43-3e, permits restitution to third parties, such as insurance companies, employers or private or government organizations, who reimbursed a crime victim for losses suffered as a result of criminal conduct. The Court saw no reason "why the fortuity of an injured party being insured or otherwise protected from suffering economic hardship should excuse defendant from an obligation to pay restitution."

In prosecution for tampering with electric, gas or water meters, State may seek restitution not only for cost of repairing or replacing tampered meters, but also for value of services illegally obtained. *State v Kennedy*, 152 *N.J.* 413 (1998).

Drug-buy money is not recoverable as restitution, but it should be taken into account by trial court in connection

with imposition of fine. *State v. Newman*, 132 *N.J.* 159, 177 (1993).

N.J.S.A. 2C:43-3.4 provides that court may order defendant to make restitution for costs of extradition incurred by the State. (Effective 9/12/97). Overruling *State v. Wildman,* 296 *N.J.Super* 565 (App.Div. 1997).

Pursuant to *N.J.S.A.* 2C:43-2.1 a defendant convicted of offense involving theft or unlawful taking of motor vehicle is liable for any reasonable and necessary expense incurred by owner in recovering vehicle and damage to it. The trial court shall order such restitution at sentencing and it has the effect of a civil judgment.

In *State v. Giordano*, 283 *N.J. Super*. 323 (App. Div.1995), the Appellate Division held that bail money posted by a third party cannot be applied to defendant's restitution obligation, but must be returned to the third party or applied in accordance with the assignment given by the third party.

Civil settlement or release does not absolve defendant of obligation to pay criminal restitution. An agreement between a victim and a defendant which abrogates courtordered restitution is not binding on the State or the criminal court. *State v. DeAngelis*, 329 *N.J. Super.* 178, 189 (App. Div. 2000).

In *Kelly v. Robinson, 479 U.S. 36,* 107 *S.Ct. 353, 93 L.Ed.2d 216 (1986),* the United States Supreme Court held that restitution obligations, imposed as conditions of probation in state criminal proceedings, are not dischargeable in proceedings under Chapter 7 of the Bankruptcy Code. Restitution orders entered in criminal proceedings are based upon the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation; thus they operate for the benefit of the State. *But see In the Matter of Towers, 162 F.3d 952 (7th Cir. 1998)* (criminal restitution orders not dischargeable but state/victims must present claim to bankruptcy court), *cert. denied* 527 *U.S.* 1004 (1999); *In Re Rashid,* 210 *F.*3d 201 (3d Cir. 2000).

RETROACTIVITY

I. GENERAL PRINCIPLES

The issue of retroactivity can only arise in cases where there has been a departure from existing law. State v. Young, 87 N.J. 132, 139 (1981); State v. Burstein, 85 N.J. 394, 403 (1981); State v. Staruch, 326 N.J. Super. 245, 251-52 (App. Div. 1999). The Constitution does not mandate that retroactivity be accorded to all court-fashioned rules of criminal procedure, even those based purely on federal constitutional grounds, but instead such determinations are questions of policy, for "the Constitution neither prohibits nor requires retroactive effect." Brown v. Louisiana, 447 U.S. 323, 327, 100 S.Ct. 2214 (1980); Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965); State v. Nash, 64 N.J. 464, 470 (1974). Generally, when the Legislature repeals a statute, the repeal does not apply retroactively to a final judgment. United States v. McGlory, 968 F.2d 309, 350 (3d Cir. 1992), cert. denied, 507 U.S. 962, 113 S.Ct. 1388, 122 L.Ed.2d 763 (1993). In the realm of retroactivity, United States Supreme Court decisions are only binding on state courts insofar as the case involves federal constitutional authority, see Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963) and Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190 (1958), and most recently, New Jersey courts have declined to follow changes in federal precedent in the area of retroactivity.

A. Federal Retroactivity Law

Linkletter v. Walker, 381 *U.S.* 618, 85 *S.Ct.* 1731 (1965) is the seminal case where the United States Supreme Court addressed federal retroactivity law. After recognizing that the United States Constitution neither required nor prohibited retroactivity, the *Linkletter* Court determined that selecting the proper retroactive choice entailed weighing "the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 629, 85 *S.Ct.* at 1738.

In light of *Linkletter*, in order to determine whether retroactivity will be accorded a given case under federal law, the United States Supreme Court devised a tripartite test which remains as the prevailing law in New Jersey. It requires that in cases involving the retroactivity of a new rule of law the court consider: (1) the purpose of the rule and whether it would be furthered by a retroactive application; (2) the degree of reliance placed upon the old rule by those who administered it, and (3) the effect retroactive application would have on the administration of justice. *Solem v. Stumes*, 465 *U.S.* 638, 642-43, 104 *S.Ct.* 1338, 1341 (1984); *Brown v. Louisiana*, 447 *U.S.* at 327-328, 100 *S.Ct.* at 2219; *Stovall v. Denno*, 388 *U.S.* 293, 297, 87 *S.Ct.* 1967, 1970 (1967); *Linkletter v. Walker*, 381 *U.S.* at 629, 85 *S.Ct.* 1738; *State v. Purnell*, 161 *N.J.* 44, 58 (1999); *State v. Nash*, 64 *N.J.* 464, 471 (1974).

Years later, in United States v. Johnson, 457 U.S. 537, 562, 102 S.Ct. 2579, 2595 (1982), the United States Supreme Court revisited the issue of retroactivity and held that the decisions of that Court construing the Fourth Amendment were to be applied retroactively to all convictions that were not yet final at the time the decision was rendered. Under Johnson, for purposes of retroactivity, a conviction is determined to be final where the judgment of conviction was rendered, the availability of appeal exhausted and the time for petition for certiorari has elapsed or the petition is denied. Id. at 542, n.8, 102 S.Ct. at 2583 n.8. See State v. Sarto, 195 N.J. Super. 565, 571-74 (App. Div. 1984). This concept is an important one in the area of retroactivity because courts have distinguished between retroactivity issues that are raised on direct appeal and those raised in a collateral review proceeding. Indeed, the Court in Johnson declined to address the retroactive reach of its opinion in cases that raise Fourth Amendment issues in collateral proceedings. Johnson, 457 U.S. at 562, 102 S.Ct. at 2595. The Court, however, also noted that given the reach of Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976), the circumstances in which Fourth Amendment challenges could be raised as a basis for a collateral attack on the conviction (federal habeas corpus or state post-conviction relief) were extremely limited. *Id.* at 562-63 n.20, 102 S.Ct. at 2595 n.20.

The Supreme Court in *Johnson* therefore held that Fourth Amendment decisions, except those that constituted a "clear break with the past," were to be applied retroactively to all convictions that were not yet final when the decision was handed down. *Id.* at 562, 102 *S.Ct.* at 2595. Nevertheless, the Court expressly declined to express its view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment. *Johnson*, 457 *U.S.* at 562, 102 *S.Ct.* at 2594.

The limited applicability of the *Johnson* opinion became apparent in *Solem, supra*, where the issue before the Court was the retroactivity of *Edwards v. Arizona*, 451 *U.S.* 477, 101 *S.Ct.* 1880 (1984). In that decision, the Court determined that the *Johnson* retroactivity analysis was inapplicable because the matter before it was controlled by prior precedent, arose on collateral review and did not

involve the Fourth Amendment. *Solem*, 465 *U.S.* at 643 n.3, 104 *S.Ct.* at 1341 n.3. The Court then went on to consider the *Linkletter/Stovall* factors and held that *Edwards* would not be applied retroactively to cases involving collateral review of final convictions. *Id. at* 641-51, 104 *S.Ct.* at 1341-1346. In *Solemn*, the Court ultimately ruled that *Edwards* was not retroactive to a conviction that had become final. *See Shea v. Louisiana*, 470 *U.S.* 51, 105 *S.Ct.* 1065 (1985) (*Edwards v. Arizona* was applicable to cases pending on direct appeal at the time *Edwards* was decided). *See also Tate v. Rose*, 466 *U.S.* 1301, 104 *S.Ct.* 2186 (1984)(decision granting stay); *Mack v. Oklahoma*, 459 *U.S.* 900, 103 *S.Ct.* 201 (1982)(memorandum decision).

In Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987), the United States Supreme Court again addressed federal retroactivity law, and it abandoned the Linkletter/ Stovall three-pronged retroactivity approach in cases pending direct review. Id. at 320-22, 107 S.Ct. 711-13. The Griffith Court also departed from the "clear break" retroactivity standard enunciated in Johnson and found that "the fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." Id. at 327-28, 107 S.Ct. at 716. The Griffith Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the rule constitutes a 'clear break' with the past." Id. at 328, 107 S.Ct. at 716.

More recently in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989), the Court revisited retroactivity and distinguished the retroactive application of a new rule of law in a direct appeal from the retroactive application of a new rule of law on collateral attack. The Teague Court concluded that on collateral attack, a new rule of law is to be applied retroactively only where the rule represents a clear break with the past and meets one of two conditions: (1) the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe[;]" or (2) the new rule requires "the observance of 'those procedures that ... are "implicit in the concept of ordered liberty." *Id.* at 311, 109 S.Ct. at 1075-76 (quoting Mackey v. United States, 401 U.S. 667, 692-93, 91 S.Ct. 1160, 1180 (1971)). See Lockhart v. Fretwell, 506 U.S. 364, 372-73, 113 S.Ct. 838, 844 (1993) (Teague retroactivity rule does not apply to claims raised by a federal habeas petitioner). At this point, the federal standard for retroactivity is stricter than the New Jersey standard for relief when a defendant seeks to collaterally attack a prior judgment of conviction. Nonetheless, to the extent that retroactivity arises in the context of criminal-procedure decisions implicating rights guaranteed under the federal constitution, United States Supreme Court precedent controls the scope of retroactivity. *See State v. Purnell*, 161 *N.J.* 44, 59-60 (1999); *State v. Lark*, 117 *N.J.* 331, 335 (1989).

See also Gilmore v. Taylor, 508 *U.S.* 333, 113 *S.Ct.* 2112 (1993); *Sandoval v. Reno*, 166 *F.*3d 225 (3d Cir. 1999); *In re Minarik*, 166 *F.*3d 591 (3d Cir. 1999); *United States v. McGlory*, 968 *F.*2d at 350.

B. State Retroactivity Law

New Jersey's retroactivity analysis is generally consistent with that of the United States Supreme Court, except that New Jersey law is more liberal than that of the federal courts. State v. Afanador, 151 N.J. 41, 57 (1997); State v. Cupe, 289 N.J. Super. 1, 13 (App. Div.), certif. denied, 144 N.J. 589 (1996). Under New Jersey law, the starting point for any retroactivity analysis is "whether the rule at issue is a 'new rule of law' for purposes of retroactivity analysis." Purnell, 161 N.J. at 53; Afanador, 151 N.J. at 57; State v. Knight, 145 N.J. 233, 249 (1996). If there is no new rule of law, the issue of retroactivity never arises and the court's power to limit the retroactive effect of a decision is not implicated. Purnell, 161 N.J. at 53; Afanador, 151 N.J. at 57; Burstein, 85 N.J. at 403. For a decision to be deemed a new rule of law for retroactivity purposes, "there must be a 'sudden and generally unanticipated repudiation of a long-standing practice." Purnell, 161 N.J. at 53; Cupe, 289 N.J. Super. at 11-12.

Once a decision is deemed a new rule of law, our Supreme Court delineated the process the court should undertake to determine retroactive effect. In *Knight*, 145 *N.J.* at 251-53, the New Jersey Supreme Court reinforced New Jersey's continued acceptance of the *Linkletter/Stovall* standard for assessing retroactivity decisions, and to date, that analysis remains the prevailing New Jersey law. As previously stated, once a decision is a new rule of law, the three factors under the *Linkletter/Stovall* test are: (1) the purpose of the rule, (2) the degree of reliance placed upon the old rule, and (3) the effect retroactive effect would have on the administration of justice. *Purnell*, 161 *N.J.* at 58; *Knight*, 145 *N.J.* at 251-53; *State v. Abronski*, 145 *N.J.* 265, 265-67 (1996); *Lark*, 117 *N.J.* at 339-40; *Nash*, 64 *N.J.* at 471.

1. Purpose to be served.

"The purpose of the new rule is often the pivotal consideration." *Knight*, 145 *N.J.* at 251; *Burstein*, 85 *N.J.* at 406. There are different classes of purposes that a new rule may advance. *Purnell*, 161 *N.J.* at 54. A new rule may be decided to deter police misconduct, where its purpose would not be served by retroactive application to past misconduct. *Id.*; *Knight*, 145 *N.J.* at 251; *Burstein*, 85 *N.J.* at 406. In other cases, "if the old rule was altered because it substantially impaired the reliability of the truth-finding process, the interest in obtaining accurate verdicts may suggest that the new rule be given complete retroactive effect." *Knight*, 145 *N.J.* at 251.

2. Extent of reliance upon old rule by law enforcement agencies in performance of their professional responsibilities.

The second factor considers whether law enforcement agents justifiably relied on the old rule in performing their professional responsibilities. *Purnell*, 161 *N.J.* at 55; *State v. Catania*, 85 N.J. 418, 447 (1981). The basic reasoning underlying this inquiry is that state agents should not be penalized for complying in good faith with "prevailing constitutional norms" when carrying out their duties. *State v. Howery*, 80 N.J. 563, 582 (Pashman, J., dissenting), *cert. denied*, 44 *U.S.* 994, 100 *S.Ct.* 527 (1979); *Abronski*, 145 *N.J.* at 268; *Catania*, 85 *N.J.* at 447-48. However, when prior judicial decisions provide state officials with reasons to question the continued validity of the old rule, the significance of the law enforcement officers' reliance correspondingly decreases. *See Nash*, 64 *N.J.* at 473-74.

3. Effect upon the administration of justice.

This factor recognizes that courts must not impose unjustified burdens on our criminal justice system. *Knight*, 145 *N.J.* at 252; *Burstein*, 85 *N.J.* at 410. Generally new rules will not be applied retroactively when such an application would undermine the validity of large numbers of convictions, overwhelm courts with retrials, and present difficulty in re-prosecuting cases where the offense took place years ago. *See State v. Clark*, 162 *N.J.* 201, 207-08 (2000); *Purnell*, 161 *N.J.* at 56; *State v. Brimage*, 153 *N.J.* 1, 26 (1998); *Abronski*, 145 *N.J.* at 268; *Knight*, 145 *N.J.* at 252; *Lark*, 117 *N.J.* at 341; *Burstein*, 85 *N.J.* at 410.

II. DEGREE OF RETROACTIVE EFFECT

Once a new rule of law is involved, courts can undertake a variety of approaches to determine the retroactive effect of decisions in the criminal field which recognize or create new rights of persons investigated, charged with or prosecuted for crime. The approach adopted has depended largely on the court's view of what is just and consonant with public policy of the particular situation presented and application of the *Linkletter/Stovall* criteria. The categories of rules which have evolved are as follows:

1. Hold that the overruling decision operates prospectively only and it does not apply to parties involved in the case that is declaring the new rule of law.

2. Apply the new rule to the parties involved in the case announcing the new rule and to future cases, while applying the old rule to all other pending and past litigation.

3. Grant the new rule limited retroactivity, applying it to the parties of the new case and all other pending cases where the parties have not yet exhausted all avenues of direct review.

4. Give the rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct appeal have been exhausted.

III. SECOND-STAGE RETROACTIVITY

"The second-stage retroactivity issue consists in the circumstances that defendant's present effort to invalidate his 1965 conviction upon the basis of a 1966 decision of the United States Supreme Court arises in the context, not of a North Dakota (or federal habeas) proceeding directly aimed at vacating the conviction, but of an effort to invalidate a 1970 New Jersey conviction because of the use by the State of the 1965 conviction to affect defendant's credibility in that 1970 trial." *State v. Lueder*, 74 *N.J.* 62, 83-84 (1977). *See State v. Koch*, 118 *N.J. Super.* 421 (App. Div. 1972).

IV. SPECIFIC APPLICATION OF RETROAC-TIVITY CRITERIA

A. Search and Seizure

United States v. Johnson, 466 U.S. 537, 102 S. Ct. 2579 (1982) (finding that Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980), which prohibited law enforcement officers from making warrantless and nonconsensual entries into a suspect's home to make a routine felony arrest, was given retroactive effect).

State v. Gervasio, 94 *N.J.* 23 (1983) (ruling in *Delaware v. Prouse*, 440 *U.S.* 648, 99 *S.Ct.* 1391 (1979), which held that random stops of vehicles on public roads violated the Fourth Amendment, is not retroactive); *State v. Carpentieri*, 82 *N.J.* 546 (1980) (same).

State v. Hunt, 91 *N.J.* 338, 348-349 (1982) (holding that toll records of an individual may not be legitimately procured in absence of a judicial sanction or proceeding, was not retroactive);

State v. Young, 87 *N.J.* 132, 139-141 (1981) (rule of *United States v. Chadwick*, 433 *U.S.* 1, 97 *S.Ct.* 2476 (1977), and *Arkansas v. Sanders*, 442 *U.S.* 753, 99 *S.Ct.* 2586 (1979), which stated that absent exigent circumstances police could not, consistent with the Fourth Amendment, conduct a warrantless search of luggage found in an automobile, could only be used retroactively to invalidate searches that occurred after June 21, 1977, the date of the *Chadwick* decision).

State v. Howery, 80 *N.J.* 563, 568-569 (1975) (holding in *Franks v. Delaware*, 438 *U.S.* 154 (1978), setting the parameters in which a criminal defendant is allowed to challenge the validity of a search warrant on the basis of alleged false statements in a supporting affidavit, was only applied prospectively), *cert. denied*, 444 *U.S.* 554, 100 *S.Ct.* 527 (1979).

State v. Skidmore, 253 *N.J. Super.* 227 (App. Div. 1992) (finding that *State v. Hemple*, 120 *N.J.* 182 (1990), which invalidated warrantless garbage searches did not apply retroactively to search that took place before date of opinion).

State v. Sarto, 195 *N.J. Super.* 565, 573 (App. Div. 1984) (holding that rulings in *United States v. Ross*, 456 *U.S.* 798, 102 *S.Ct.* 2157 (1982), and *New York v. Belton*, 453 *U.S.* 454, 101 *S.Ct.* 2860 (1981), applied retroactively).

State v. Catania, 85 *N.J.* 418, 446-448 (1981) (minimization requirements in wiretap cases applied prospectively only).

State v. Burstein, 85 *N.J.* 394, 402-411 (1981) (ruling that decision in *State v. Cerbo*, 78 *N.J.* 595 (1979), that delay in presenting tapes of intercepted conversations for sealing requirements mandates suppression unless a satisfying reason for the delay is shown, was not retroactive).

B. Miranda and the Fifth and Sixth Amendments

In *Solem v. Stumes*, 465 *U.S.* 638, 104 *S.Ct.* 1338 (1984), the United States Court held that *Edwards v. Arizona, supra*, would not be retroactively applied in a collateral review of a final conviction (habeas proceeding). *Id.* at 650, 104 *S.Ct.* at 1345. The Court declined to rule on what effect, if any, *Edwards* would have on cases in which the convictions were not final at the time that decision was rendered. *Id.*, 104 *S.Ct.* at 1346. *See Tate v. Rose*, 466 *U.S.* 1301, 104 *S.Ct.* 2186 (1984) (granting petition for stay).

Likewise, the New Jersey Supreme Court has refused to give retroactive effect to the *Edwards* decision. In *State v. McCloskey*, 90 *N.J.* 18, 28 (1982), the Court held that the *per se* rule of *Edwards* only applied to trials that began after the date the decision was announced on May 18, 1981.

See State v. Abronski, 145 N.J. 265 (1996) (State v. Reed, 133 N.J. 237 (1993), which addressed informing a suspect in custody of an attorney's presence did not apply retroactively).

State v. Knight, 145 *N.J.* 233 (1996) (*State v. Sanchez*, 129 *N.J.* 261 (1992), which held that the mere recitation of *Miranda* warnings did not provide an indicted defendant with sufficient information to give a knowing and voluntary waiver of counsel was given limited retroactive effect to apply in that case and not to defendants who had exhausted all avenues of direct relief at the time *Sanchez* was decided).

State v. Harvey, 121 *N.J.* 4047 (1990) (rule in *State v. Hartley*, 103 *N.J.* 252 (1986), addressing the invocation of the right to silence applied retroactively), *cert. denied*, 499 *U.S.* 931, 111 *S.Ct.* 1336, 113 *L.Ed.*2d 268 (1991).

State v. Stever, 107 N.J. 543, cert. denied, 484 U.S. 954, 108 S. Ct. 348 (1987) (decision in Berkemer v. McCarty, 468 U.S. 420 (1984), requiring Miranda warnings in connection with arrests for minor traffic offenses to be applied retroactively). But see State v. Adams, 200 N.J. Super. 385 (App. Div.) (ruling that Berkemer v. McCarty, holding would not be retroactively applied), certif. denied, 101 N.J. 331 (1985).

C. Other Retroactivity Decisions

Cases involving juries, *Griffith v. Kentucky*, 479 *U.S.* 314, 107 *S.Ct.* 708 (1987) (ruling in *Batson v. Kentucky*, 476 *U.S.* 79, 106 *S.Ct.* 1712 (1986), should be retroactively applied to cases pending on direct state or

federal review or not yet final when *Batson* was decided); *Allen v. Hardy*, 478 *U.S.* 255, 106 *S.Ct.* 2878 (1986) (ruling *Batson* would not be applied retroactively on collateral review of convictions that became final before the *Batson* decision was announced).

Brown v. Louisiana, 447 *U.S.* 323, 100 *S.Ct.* 2214 (1980) (holding retroactive the rule announced in *Burch v. Louisiana*, 441 *U.S.* 130, 99 *S.Ct.* 1623 (1979), that a conviction of a non-petty criminal offense by a non-unanimous six person jury violates the right to trial guaranteed by the Sixth and Fourteenth Amendments was retroactively applied).

State v. Afanador, 151 *N.J.* 41 (1997) (holding in *State v. Alexander*, 136 *N.J.* 563 (1994), requiring the jury instructions to define elements of an offense of the drug kingpin statute applied retroactively); *State v. Burgess*, 298 *N.J. Super.* 254 (App. Div. 1997), *aff'd*, 154 *N.J.* 181, 183-84 (1998) (same).

State v. Czachor, 82 *N.J.* 392, 408-10 (1980) (proscribing *Allen* charges as impermissible jury influences, was granted limited retroactive application to cases pending at time of the decision).

State v. Cupe, 289 *N.J. Super*. 1 (App. Div.) (defendant and other similarly situated who had exhausted all avenues of direct appeal before ruling in *State v. Coyle*, 119 *N.J.* 194 (1990) which prohibits sequential jury charges in murder cases where there is evidence of passion/provocation manslaughter, may not obtain post-conviction relief on ground that sequential jury charges were not given at trial), *certif. denied*, 144 *N.J.* 589 (1996).

State v. Anderson, 173 *N.J. Super.* 75 (App. Div.) (allowed retroactive application of the decision in *State v. Trent,* 79 *N.J.* 251 (1979), which required the trial court to instruct the entire jury to begin deliberations anew when an alternate juror was substituted during jury deliberations), *certif. denied,* 85 *N.J.* 124 (1980).

State v. Long, 204 *N.J. Super*. 469 (Law Div. 1985) (decision that the jury selection process in Atlantic County violated the mandatory provisions of the jury selection statutes calling for "random" selection would be given prospective effect only). In *State v. [Joseph] Long*, 216 *N.J. Super*. 269 (App. Div. 1987) the Appellate Division declined to give retroactive application of the Law Division decision in *State v. [Ronald] Long*, 204 *N.J. Super*. 469 (Law Div. 1985) which held that the jury selection process in Atlantic County did not meet statutory requirement of randomness.

Cases involving guilty pleas: the New Jersey Supreme Court ruling in *State v. Kovack*, 91 *N.J.* 476, 486-87 (1982), which held that a defendant must be informed at the time of his plea that a period of parole ineligibility could be imposed as part of his sentence, was retroactive to September 1, 1979, the effective date of the penal code. *See State v. Lark*, 117 *N.J.* 331, 341 (1989) (applying limited retroactive effect to that case and other cases pending at the time of the decision in *State v. Howard*, 110 *N.J.* 113 (1988) which held that defendant in a plea arrangement must be informed of the effect of his sentence to Avenel and parole eligibility).

Cases involving other areas of the law: in *State v. One* 1990 *Honda Accord*, 154 *N.J.* 373 (1998), the New Jersey Supreme Court held that the owner of property that is not *prima facie* contraband is entitled to a jury trial in an action to forfeit property. In reaching its decision, the Court essentially invalidated the statutory summary procedure enunciated in *N.J.S.A.* 2C:64-3f. The Court later addressed the issue of retroactivity and stated that the *One 1990 Honda* decision was to be applied to all pending cases and those pending on direct appeal.

See Lindh v. Murphy, 521 *U.S.* 320, 117 *S.Ct.* 2059 (1997) (amendments to the habeas corpus statute by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) did not apply to an inmate's pending non-capital case; the new provisions generally applied only to cases filed after its enactment).

State v. Clark, 162 *N.J.* 201, 208 (2000) (amendment to *R.* 1:15-3(b) precluding municipal prosecutors from simultaneously serving as defense counsel in the same county in which he or she serves as a municipal prosecutor shall not apply retroactively).

State v. Harvey, 159 *N.J.* 277, 291 (1999) (amendment to the Death Penalty Statute which limited the universe of cases considered during proportionality review did not apply retroactively to a case that was pending when the statute was enacted), *cert. denied*, _____ U.S. ___, 120 S.Ct. 811, 145 *L.Ed.*2d 683 (2000).

State v. Yothers, 282 *N.J. Super.* 86 (App. Div. 1995) (discussing retroactive effect of state constitutional amendment addressing murder).

Powell v. Nevada, 511 *U.S.* 79, 114 *S.Ct.* 1280 (1994) (rule under *Riverside v. McLaughlin*, 500 *U.S.* 44 (1991) regarding promptness of judicial probable cause determination applied retroactively); *State v. Tucker*, 137 *N.J.* 259, 269 (*McLaughlin* rule applied retroactively to defendant's appeal that was pending before the Appellate Division at the time of the *McLaughlin* decision), *cert. denied*, 513 *U.S.* 1090, 115 *S.Ct.* 751 (1995).

State v. Purnell, 161 *N.J.* 44 (1999) (rule of *State v. Anderson*, 127 *N.J.* 191 (1992) which requires a jury, rather than a judge to decide materiality of a perjury offense did not apply retroactively).

State v. Brimage, 153 *N.J.* 1 (1998) (the holding in this case involving plea agreements pursuant to the Comprehensive Drug Reform Act had limited retroactive effect and only applied to this defendant and to cases pending on appeal at the date the opinion was issued).

State v. Haliski, 140 *N.J.* 1 (1995) (rule that second Graves Act offender may be sentenced to mandatory term of imprisonment while first Graves Act conviction either is pending on appeal or time to appeal that conviction has not yet expired was given limited retroactive effect and applied to cases where sentencing on a second Graves Act conviction has not yet occurred and cases where the offender was sentenced on a second Graves Act conviction, but as of date of this decision, the parties had not exhausted all avenues of direct review on that conviction).

State v. Tarver, 272 *N.J. Super.* 414 (App. Div. 1994) (holding that *State v. Vasquez* 129 *N.J.* 189 (1992) and *State v. Peters,* 129 *N.J.* 210 (1992), which held that the prosecutor must state reasons on the record for waiving or not waiving a parole disqualifier did not apply retroactively to this case).

See generally, Trusdale v. Aiken, 480 U.S. 527, 107 S.Ct. 1394 (1987) (per curiam opinion reversing the decision which refused to apply Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986), retroactively to cases that were final at the time of the decision). The implication thus being that Skipper is retroactive. Robbery is defined in N.J.S.A. 20:15-1.

I. Elements

Title 2C broadens the pre-Code definition of robbery in several respects, but retains the common law touchstone of robbery as a larceny coupled with assaultive behavior. *State v. Farrad*, 164 *N.J.* 247, 262 (2000).

A. Attempted Robbery

In *Farrad*, the Supreme Court held that attempted robbery is a crime under the Code. *Id.* at 258-63. *See also State v. Gonzalez*, 318 *N.J. Super.* 527 (App. Div.), *certif. denied*, 161 *N.J.* 148 (1999) (tacitly recognizing the crime of attempted robbery). The Court also held that a first degree robbery conviction could be "molded" on appeal into a second degree attempted robbery conviction if the elements for the lesser crime were present in the record, *Farrad, supra*, 164 N.J. at 264-69, or the matter could be remanded to the trial court to determine if the elements of attempted robbery are present. *State in re L. W.*, 333 *N.J. Super.* 492, 499 (App. Div. 2000).

- B. Robbery
 - 1. Larceny Element

The asportation, or taking away, of property is no longer an element of robbery. *State v. Mirault*, 92 *N.J.* 492, 496 (1983). The property sought by the thief need not be owned by the victim. *State v. Butler*, 27 *N.J.* 560, 589 (1958). It need only belong to someone other than the thief. *State v. Ford*, 92 *N.J. Super*. 356, 363 (App. Div. 1966); *State v. Bowden*, 62 *N.J. Super*. 339, 345 (App. Div.), *certif. denied sub nom., State v. Duffy*, 33 *N.J.* 385 (1960). The property need not be physically on the person, but only in the person's custody or control. *State v. Reddick*, 76 *N.J. Super*. 316 (App. Div. 1962); *State v. Cottone*, 52 *N.J. Super*. 316 (App. Div. 1958), *certif. denied*, 28 *N.J.* 527 (1959).

A defendant who uses force against two persons in the course of committing a separate theft against each person commits two robberies. *Farrad, supra*; *Mirault, supra*, 92 *N.J.* at 497 n.4; *State v. Lawson*, 217 *N.J. Super.* 47, 51 (App. Div. 1987). Constructive possession of property by two victims may constitute two robberies. *Farrad, supra. See also State v. Carlos*, 187 *N.J. Super.* 406, 417 (App. Div. 1982), *certif. denied*, 93 *N.J.* 297 (1983). However, each

robbery count requires a separate jury charge as to each theft victim and failure to do so will result in reversal of the uncharged counts. *Farrad, supra*, 164 *N.J.* at 262.

Failure to charge attempted theft when warranted will result in reversal, *Carlos, supra,* 187 *N.J. Super.* at 415-18, even if raised for the first time on appeal. *Gonzalez, supra* (reversing felony murder count due to the failure of the underlying robbery); *State v. Smith,* 322 *N.J. Super.* 385 (App. Div.), *certif. denied,* 162 *N.J.* 489 (1999)(affirming felony murder and robbery convictions since attempt instruction was provided elsewhere in the final jury charge).

2. Assault Element

The plain language of the statute and legislative history indicate that minimal force upon another, such as a purse-snatching or blind-side mugging, suffices for a robbery conviction. *N.J.S.A.* 2C:15-1a; *Mirault, supra,* 92 *N.J.* at 496. However, force against the theft victim must exceed a sudden taking without injury or without the opportunity of the victim to physically resist, *i.e.*, a wresting from the victim. *State v. Sein,* 124 *N.J.* 209, 212-18 (1991).

A purposeful threat of immediate bodily injury or purposeful or knowing injury to someone other than the possessor of the property will justify a conviction for robbery. N.J.S.A. 2C:15-1a; Farrad, supra. Similarly, flight from the completed or attempted theft which purposely or knowingly causes injury to others will constitute robbery. Farrad, supra; State v. Sewell, 127 N.J. 133, 138 (1992); State v. McClary, 252 N.J. Super. 222 (App. Div. 1991), certif. denied, 130 N.J. 6 (1992). Moreover, a purposeful terroristic threat directed at a witness while fleeing from a theft constitutes a robbery. Farrad, supra; State v. Smalls, 310 N.J. Super. 285, 292 (App. Div. 1998); State v. Planes, 274 N.J. Super. 190 (Law Div. 1994). The threat is determined under the totality of circumstances, and does not require any special words or conduct by the accused. Farrad, supra; Smalls, supra.

C. Flight from Attempted or Completed Robbery

Flight turns on several considerations of causation including: rate of asportation, time, distance, whether there is pursuit, whether the defendant reached a point of temporary safety and whether the defendant still possesses the fruits of the crime. *Mirault, supra, N.J.* at 500-501; *State v. Pantusco,* 330 *N.J. Super.* 424, 441-44 (App. Div. 2000). Where a robbery may be construed as completed, *i.e.,* it can reasonably be determined that the perpetrator reached a point of temporary safety, the judge must instruct

the jury on separate offenses that occur after flight, *e.g.*, assault, resisting arrest, *etc.*, if applicable. *State v. Jordan*, 240 *N.J. Super*. 115 (App. Div.), *certif. denied*, 122 *N.J.* 328 (1990); *State v. Crouch*, 225 *N.J. Super*. 100, 109 (App. Div. 1988); *Carlos, supra*, 187 *N.J. Super*. at 418.

D. Deadly Weapon

Prior to January 4, 1982, "deadly weapon" was defined as a "firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of causing death or serious bodily injury." As a result, in *State v. Butler*, 89 *N.J.* 220 (1982), the Supreme Court ruled that a first degree robbery conviction could not stand where the defendant did not possess a real firearm when he committed the robbery but either possessed a toy or fake gun simulating the use of a firearm. *Id.* at 231. *See also State v. Ortiz*, 187 *N.J. Super.* 44,47 (App. Div. 1982) (affirming a first degree robbery conviction where a defendant carrying a "fake gun" used it to strike the victim in an attempt to inflict serious bodily injury).

The definition of deadly weapon was amended, effective January 4, 1982, to include the phrase "or which in the manner it is fashioned would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury," thereby alleviating the *Butler* problem. The statutory definition of "deadly weapon," *N.J.S.A.* 2C:11-1c, which will elevate a robbery to a first degree crime, is satisfied if there is some device used by the defendant which is fashioned to create in the victim the reasonable sensory impression that the object is capable of causing serious bodily harm or death. *State v. Hutson*, 107 *N.J.* 222, 229 (1987). The statute does not require the presence of a tangible object fashioned to look like a weapon or held in a manner to suggest that it concealed a weapon.

In *State v. LaFrance*, 117 *N.J.* 583 (1990), the Supreme Court further held that defendant's use of his hand to simulate a gun, along with the victims' reasonable sensory impression that what purported to be a gun was being used, supported a first degree robbery conviction. *Id.* at 594. In *State v. Huff,* 292 *N.J. Super.* 185 (App. Div. 1996), the Appellate Division held that defendant's patting his pocket over loose-fitting clothing and placing his hand into a pocket indicating possession of a firearm was sufficient to sustain a first degree robbery conviction.

A defendant armed with a kitchen knife which was not used or intended to be used, and which was not observed by the victim, is not guilty of a first degree robbery because the weapon is not a deadly weapon under *N.J.S.A.* 2C:11-1. *State v. Brown*, 325 *N.J. Super.* 447, 453 (App. Div. 1999), *certif. denied*, 163 *N.J.* 76 (2000); *State v. Riley*, 306 *N.J. Super.* 141, 149 (App. Div. 1997)(pocket knife). The defendant must be provided notice regarding a charge of a deadly weapon in an armed robbery charge, but the particular kind of deadly weapon is not an element of armed robbery. *State v. Lopez*, 276 *N.J. Super.* 296, 305 (App. Div. 1994), *certif. denied*, 139 *N.J.* 289 (1995).

Under the No Early Release Act, whether a defendant used or threatened the victim with a deadly weapon, as defined in that Act, is an element of the crime, which the jury must find beyond a reasonable doubt. *N.J.S.A.* 2C:43-7.2d; *State v. Johnson*, 166 *N.J.* 523, 766 (2001); *State v. Austin*, 335 *N.J. Super.* 486, 490-93 (App. Div. 2000), *certif. pending.* This ruling, based upon statutory interpretation, was made prospective by the Court, *i.e.*, after February 28, 2001.

E. Grading

Ordinarily, robbery is a second degree crime. However, if in the course of committing the theft the defendant attempts to kill anyone, purposely inflicts or attempts to inflict serious bodily injury or is armed with, uses or threatens the immediate use of a deadly weapon, it is a first degree crime. *N.J.S.A.* 2C:15-1b. Defendant need not personally possess the firearm to be convicted of armed robbery. If defendant's accomplice is armed with a firearm during the robbery and defendant knew or had reason to know that his accomplice was armed, then defendant is guilty of armed robbery. *State v. White*, 98 *N.J.* 122, 130 (1984); *State v. Gantt*, 195 *N.J. Super*, 114, 118 (App. Div. 1984), *aff'd*, 101 *N.J.* 573 (1986).

In *State v. Baker*, 303 *N.J. Super.* 411 (App. Div.), *certif. denied*, 151 *N.J.* 470 (1997), the Appellate Division ruled that the court's charge to the jury authorizing conviction of the defendant for armed robbery, even if the jury accepted his claim that he did not know about the gun or the robbery until codefendants returned to his vehicle after shooting the victim, correctly stated the law. Defendant, who was the getaway driver, drove his codefendants from the scene of the robbery with knowledge that the victim was shot and the codefendant was culpable for armed robbery.

The degree of robbery charged is an element of the offense and must be set forth in the indictment. *State v. Catlow*, 206 *N.J. Super.* 186, 194-95 (App. Div. 1985), *certif. denied*, 103 *N.J.* 465-66 (1986); *but see Bibby v.*

Tard, 741 *F*.2d 26 (3d Cir. 1984)(stating that under the New Jersey penal code, degree of robbery is not part of the substantive offense but rather, is merely a grading provision). Failure to include the first degree robbery language in the indictment will result in at most a second degree conviction. *State v. Rodriguez*, 234 *N.J. Super*. 298, 304 (App. Div.), *certif. denied*, 117 *N.J.* 656 (1989).

In State v. Bohannan, 206 N.J. Super. 646 (App. Div. 1986), the court reversed a first degree robbery conviction because the trial court failed to submit the lesser included offense of second degree robbery where there was a rational basis to find that defendant was guilty as an accomplice to a simple robbery while the principals were guilty of armed robbery. Id. at 650-51. When considering the guilt of an accomplice to armed robbery, the judge must instruct the jury to determine whether the defendant shared a purpose to commit an armed robbery or whether the defendant possessed the mental state for second degree robbery. State v. Weeks, 107 N.J. 396 (1987); State v. Bielkiewicz, 267 N.J. Super. 520 (App. Div. 1993). A general accomplice instruction that is not tailored to the facts and competing presentations is unsatisfactory and will result in a reversal. State v. Tucker, 280 N.J. Super. 149, 151-53 (App. Div. 1995).

II. MERGER

Due to the consolidation of the theft offenses, robbery "embraces" all thefts as lesser included offenses even though the particular theft may not technically fit as a lesser included offense. (See also, THEFT, this Digest.) State v. Talley, 94 N.J. 385, 393-94 (1983); see also State v. Sein, 232 N.J. Super. 300 (App. Div. 1989), aff'd, 124 N.J. 209 (1991); State v. Freeman, 324 N.J. Super. 463 (App. Div. 1999); State v. Smalls, 310 N.J. Super. 285 (App. Div. 1998); State v. Jordan, 240 N.J. Super. 115 (App. Div.), certif. denied, 122 N.J. 328 (1990); but see State v. Smith, 136 N.J. 245 (1994) (holding that where the State's case revealed a knifepoint robbery of a cabdriver, while the defendant presented mere fare evasion, the trial court should instruct the jury that if it accepted the defense presentation, it should acquit, since the State's harm to be protected against, the security of the cabdriver's money on his person, was not the subject of the defense presentation).

When the evidence demonstrates that a first degree robbery was committed by means of an aggravated assault upon the victim in the course of a theft, the indictment should not fractionalize the incident by separately charging aggravated assault and second degree robbery, unless the event took place after flight *i.e.*, a point of temporary safety. Rather, defendant should be charged with first degree robbery, and the jury then instructed on all lesser offenses. *State v. Battle*, 209 *N.J. Super.* 255 (App. Div.), *certif. denied*, 105 *N.J.* 560-61 (1986). In *State v. Crouch*, 225 *N.J. Super.* 100 (App. Div. 1988), however, the Appellate Division distinguished *Battle* and refused to merge defendant's convictions for aggravated assault and robbery, committed against the same victim, because aggravated assault required the State to prove that defendant committed serious bodily injury while second degree robbery required only bodily injury.

Possession of a firearm for an unlawful purpose will merge into the robbery, unless the State can prove a larger purpose and submits the matter to the jury through a special verdict form. State v. Lado, 275 N.J. Super. 140, 158 (App. Div.), certif. denied, 138 N.J. 271 (1994); State v. Bull, 268 N.J. Super. 504 (App. Div. 1993), certif. denied, 135 N.J. 304 (1994) (holding that possession of a firearm for an unlawful purpose merges into armed robbery); but see Hakeem v. Beyer, 990 F.2d 750 (3d Cir. 1993)(holding that a charge of possession of a weapon for an unlawful purpose does not necessarily merge into a charge of armed robbery). A finding of not guilty on a count of possession of a weapon for an unlawful purpose will not preclude a conviction of first degree robbery. State v. Mieles, 199 N.J. Super. 29, 40-41 (App. Div.), certif. denied, 101 N.J. 265 (1985).

Hindering apprehension is not a lesser included offense for an accomplice who assists in the flight from the robbery. *State v. Williams*, 232 *N.J. Super*. 432, 435-37 (App. Div.), *certif. denied*, 118 *N.J.* 208 (1989); *but see State v. Childs*, 204 *N.J. Super*. 639, 651 (App. Div. 1985), *certif. denied*, 104 *N.J.* 430 (1986). Flight which results in death, will subject the perpetrator to a felony murder charge with robbery as a lesser included offense. *Harris v. Oklahoma*, 433 *U.S.* 682, 97 *S.Ct.* 2912, 53 *L.Ed.*2d 1054 (1977); *State v. Pantusco*, 330 *N.J. Super*. 424 (App. Div. 2000).

III. DEFENSES

There is no claim-of-right defense in a robbery prosecution. *State v. Harris*, 141 *N.J.* 525, 557-59 (1995); *State v. Mejia*, 141 *N.J.* 475, 490-500 (1995), *overruling State v. D'Agostino*, 176 *N.J. Super.* 49 (App. Div. 1980), *certif. denied*, 85 *N.J.* 494 (1981); *State v. Bull*, 259 *N.J. Super.* 120 (Law Div. 1992); *State v. Mayberry*, 52 *N.J.* 413, 431 (1968)(pre-Code). However, in a capital trial, a defendant may raise claim of right at the sentencing phase. *Mejia, supra*, 141 *N.J.* at 500.

IV. SENTENCING

Armed robbery may subject the defendant to the Three Strikes Law. N.J.S.A. 2C:43-7.1; State v. Oliver, 162 N.J. 580 (2000). Armed robbery where the defendant uses or threatens the victim with the immediate use of a deadly weapon, as defined in the No Early Release Act, even as an accomplice, may subject the defendant to the No Early Release Act. N.J.S.A. 2C:43-7.2d; State v. Johnson, 166 N.J. 523, 766 (2001); State v. Rumblin, 166 N.J. 550, 766 (2001); State v. Reardon, 337 N.J. Super. 324, 766 (App. Div. 2001); State v. Austin, 335 N.J. Super. 486, 490-93 (App. Div. 2000), certif. pending; State v. Williams, 333 N.J. Super. 356, 360 (App. Div. 2000). Robbery that results in serious bodily injury also subjects a defendant to the No Early Release Act. N.J.S.A. 2C:43-7.2; State v. Staten, 327 N.J. Super. 349 (App. Div.), certif. denied, 164 N.J. 561 (2000).

Robbery while armed with a firearm, as defined in *N.J.S.A.* 2C:39-1f, mandates a minimum parole ineligibility period under the Graves Act. *N.J.S.A.* 2C:43-6c; *State v. Austin*, 335 *N.J. Super.* 486, 494 (App. Div. 2001), *certif. pending.* In *State v. Hawks*, 114 *N.J.* 359 (1989), the Supreme Court determined that a defendant convicted for the second time of armed robbery must receive an extended term pursuant to *N.J.S.A.* 2C:43-6 and *N.J.S.A.* 2C:43-7c, notwithstanding the fact that the offense which formed the basis of a defendant's second conviction occurred prior to defendant's first conviction. *Id.* at 365-66; *State v. Gillespie*, 203 *N.J. Super.* 417, 421 (Law Div. 1985).

SEARCH AND SEIZURE

I. GENERAL PRINCIPLES

The Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protects the right of the people to be secure from unreasonable searches and seizures. A search compromises the individual's interest in privacy while a seizure deprives an individual of dominion over property. *Horton v. California*, 496 *U.S.* 128, 133, 110 *S.Ct.* 2301, 2306, 110 *L.Ed.*2d 112 (1990).

The Fourth Amendment does not apply to searches and seizures conducted outside the United States. United States v. Verdugo-Urquidez, 494 U.S. 259, 274, 110 S.Ct. 1056, 1066, 108 L.Ed.2d 222 (1990). Evidence seized in foreign countries may be suppressed (1) where foreign law enforcement officials acted as agents or virtual agents of American law enforcement officials or (2) where the cooperation between American and foreign law enforcement agencies was designed to evade constitutional requirements applicable to American officials. United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992), cert. denied sub nom. Pontillo v. United States, 508 U.S. 980 (1993).

The search and seizure clause does not protect citizens from unreasonable searches by private parties. *Hennessey v. Coastal Eagle Point Oil Co.*, 129 *N.J.* 81, 95 (1992); *State v. Navarro*, 310 *N.J. Super.* 104, 107 (App. Div. 1998), *certif. denied*, 156 *N.J.* 382 (1998) (search of defendant's room by landlady did not raise constitutional issue). Where a private citizen acts as an agent of law enforcement, the Fourth Amendment is applicable. *Cf. State v. Stelzner*, 257 *N.J. Super.* 219, 230-32 (App. Div. 1992).

In reviewing the actions of the police, the court must not concern itself with the subjective intent of the officer; rather, the court must determine whether the officer's actions were objectively reasonable. *Whren v. United States,* 517 *U.S.* 806, 813, 116 *S.Ct.* 1769, 1774, 135 *L.Ed.*2d 89 (1996); *State v. Bruzzese,* 94 *N.J.* 210 (1983), *cert. denied,* 465 *U.S.* 1030 (1984).

To invoke constitutional protection against an unlawful search and seizure, a defendant must establish that a reasonable or legitimate expectation of privacy was invaded by government action. *Smith v. Maryland*, 442 *U.S.* 735, 740, 99 *S.Ct.* 2577, 2580, 61 *L.Ed.*2d 220 (1979); *State v. Marshall I*, 123 *N.J.* 1, 66 (1991), *cert. denied*, 507 *U.S.* 929 (1993). Expectations of privacy are

established by general social norms. *State v. Hempele*, 120 *N.J.* 182, 200 (1990). A court must decide whether defendant exhibited an actual expectation of privacy (the subjective element) and whether the expectation of privacy is one society is prepared to recognize as reasonable (the objective element). *State v. Marshall I*, 123 *N.J.* at 66-67. What a person exposes to the public, even in a home or office, is not protected by the constitution. *State v. Gibson*, 318 *N.J. Super*: 1, 10 (App. Div. 1999); *State v. Marshall I*, 123 *N.J.* at 67 (no actual or subjective expectation of privacy in envelope which had written on it "to be opened in the event of my death.").

A convicted sex offender has no reasonable expectation of privacy in his/her fingerprints, photograph or matters of public record. Doe v. Poritz, 142 N.J. 1, 28 n.8 (1995). There is no legitimate expectation of privacy shielding a portion of the interior of an automobile which may be viewed by passersby, whether civilians or police officers. State v. Foley, 218 N.J. Super. 210, 215-16 (App. Div. 1987). A person cannot have an expectation of privacy in a room used by other workers. State v. Brown, 282 N.J. Super. 538, 547 (App. Div. 1995), certif. denied, 143 N.J. 322 (1995). The defendant had no expectation of privacy in a rest room which was unlocked and in which defendant was engaged in illegal drug activity when he took no steps (like locking the door or blocking it) that would demonstrate his desire to keep others out. State v. Boynton, 297 N.J. Super. 382, 391-93 (App. Div. 1997), certif. denied, 149 N.J. 410 (1997). Defendant did not have a reasonable expectation of privacy in his rear yard marijuana crop; the use of binoculars to see what already could be seen did not violate the constitution. State v. Citta, 208 N.J. Super. 208, 215 (Law Div. 1990), aff'd. sub nom. State v. Fuhs, 265 N.J. Super. 188, 190 (App. Div. 1993), certif. denied, 134 N.J. 486 (1993). See also State v. Gibson, 318 N.J. Super. at 11 (use of flashlight).

There is no reasonable expectation of privacy in the contents of a stolen car. *State v. Bohuk*, 269 *N.J. Super*. 581, 595 (App. Div. 1994), *certif. denied*, 136 *N.J.* 29 (1994), *cert. denied*, 513 *U.S.* 865 (1994). A defendant who breaks into a home does not have an expectation of privacy in the effects left behind. *State v. Arias*, 283 *N.J. Super*. 269, 281 (Law Div. 1992). A coconspirator lacked a privacy interest in his cohort's apartment and could not challenge the legality of the search of the apartment. *State v. Harris*, 298 *N.J. Super*. 478, 484 (App. Div. 1997), *certif. denied*, 151 *N.J.* 74 (1997). A defendant had no constitutionally protected privacy interest in a mound of dirt where he had been standing; it was a public area which the police could search at any time. *State v. Sharpless*, 314 *N.J. Super*. 440, 454 (App. Div. 1998). Officers posing as

prospective buyers who entered defendant's home and saw marijuana in plain view did not violate defendant's reasonable expectation of privacy. *State v. Ferrari*, 323 *N.J. Super*: 54, 58-59 (App. Div. 1999).

While a defendant had a reasonable expectation of privacy in a pager's memory, the circumstances of the case, including a codefendant who had fled the scene and was still at large after helping defendant commit a violent robbery, and information revealing that a call had been received justified the warrantless search of the pager. *State v. DeLuca*, 325 *N.J. Super.* 376, 390-91 (App. Div. 1999), *certif. granted*, 163 *N.J.* 79 (2000).

No search occurs when the police examine what is "thrust into the public eye" such as the exterior of a car. A vehicle identification number (VIN), located on the inside of a car, is more akin to the exterior of a car than a glove compartment or trunk because by law, the number is required to be visible. Therefore, moving papers which were placed over a VIN to obscure it is not a "search." New York v. Class, 475 U.S. 106, 114, 106 S. Ct. 960, 966-67, 89 L.Ed.2d 81 (1986). Similarly, moving a blanket which covered the engine area of a pick-up truck is not a "search." State v. Ball, 219 N.J. Super. 501, 508 (App. Div. 1987). Use of a narcotics sniffing dog to detect narcotics in luggage at public airports is not a search. United States v. Place, 462 U.S. 696, 706-07, 103 S.Ct. 2367, 2644-45, 77 L.Ed.2d 110 (1983); State v. Cancel, 256 N.J. Super. 430, 436-37 (App. Div. 1992), certif. denied, 134 N.J. 484 (1993).

There is a divergence of opinion regarding whether use of a forward looking infrared device (FLIR), an instrument which detects heat sources and differences in temperatures, is a search. The courts which have ruled that use of FLIR is not a search have done so based upon the fact that there is no expectation of privacy in heat "waste" that is vented into the atmosphere. Compare United States v. Kyllo, 190 F.3d 1041, 1046 (9th Cir. 1999), cert. granted, 121 S.Ct. 29 (2000) (no constitutional violation); United States v. Robinson, 62 F.3d 1325 (11th Cir. 1995), cert. denied, 517 U.S. 1220 (1996) (same); United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995) (same); United States v. Myers, 46 F.3d 668 (7th Cir. 1995), cert. denied, 516 U.S. 879 (1995) (same); United States v. Ford, 34 F.3d 992 (11th Cir. 1994) (same); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994), cert. denied, 513 U.S. 1057 (1994) (same) with People v. Deutsch, 52 Cal. Rptr.2d 366 (Ct. App. 1996) (Fourth Amendment applies); Commonwealth v. Gindelsperger, 743 A.2d 898 (Pa. 1999) (same); State v. Young, 867 P.2d 593 (Wash. 1994) (same).

A seizure requires some detention of the individual against his or her will. A seizure does not occur merely because police approach an individual and ask a few questions. *Florida v. Bostick*, 501 *U.S.* 429, 433, 111 *S.Ct.* 2382, 2386, 115 *L.Ed.*2d 389 (1991); *State v. Davis*, 104 *N.J.* 490, 497 (1986). Only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of an individual has a seizure occurred. *Terry v. Ohio*, 392 *U.S.* 1, 19 n.16, 88 *S.Ct.* 1868, 1879 n. 16, 20 *L.Ed.*2d 889 (1968); *State v. Foley*, 218 *N.J. Super.* at 214.

With regard to a show of authority by an officer, no seizure occurs under the federal constitution when the suspect flees and does not yield. To constitute a seizure, there must be actual physical restraint or compliance with an order to stop. *California v. Hodari D.*, 499 *U.S.* 621, 626, 111 *S.Ct.* 1547, 1550-51, 113 *L.Ed.*2d 690 (1991). In New Jersey, however, a seizure occurs when, under all the circumstances, "a reasonable person would feel that he was not free to leave." *State v. Tucker*, 136 *N.J.* 158 (1994)(rejecting *Hodari D.* on state constitutional grounds); *State ex rel. J.G.*, 320 *N.J. Super.* 21, 28 (App. Div. 1999).

An individual's presence in a high crime area is insufficient to provide reasonable, particularized suspicion that the individual is committing a crime. *Texas v. Brown*, 443 *U.S.* 47, 99 *S.Ct.* 2637, 61 *L.Ed.*2d 357 (1979). Under the federal constitution, unprovoked flight at the sight of police officers provides police with reasonable suspicion that the individual is engaged in criminal activity and justifies an investigatory stop. *Illinois v. Wardlow*, 528 *U.S.* 119, 124, 120 *S.Ct.* 673, 676, 145 *L.Ed.*2d 570 (2000).

In New Jersey, unprovoked flight at the sight of police officers does not satisfy the reasonable particularized suspicion test and cannot justify a stop. State v. Tucker, 136 N.J. at 168-70. However, flight may be a factor to consider with all other surrounding circumstances, including a high crime location, the time of the encounter and the officers' knowledge of the defendant, to determine whether officers have a reasonable and articulable suspicion that a defendant was engaged in criminal activity. State v. Citarella, 154 N.J. 272, 281 (1998); State v. Morrison, 322 N.J. Super. 147, 154-55 (App. Div. 1999); State v. Ruiz, 286 N.J. Super. 155, 163 (App. Div. 1995), certif. denied, 143 N.J. 519 (1996) (stop valid when defendant, a known drug offender, fled from officer he recognized in a location that was known drug trafficking area); State v. Butler, 278 N.J. Super. 93 (App. Div. 1994) (stop valid because of lateness of hour, high crime area); State v. Ramos, 282 N.J. Super. at

19 (App. Div. 1995) (police observed drug transaction and then defendant fled; stop not based solely on flight); *State in the Interest of J.B.*, 284 *N.J. Super*. 513, 518-29 (App. Div. 1995) (juvenile's flight upon officer's approach during planned sweep in high drug trafficking area).

When the police seize an object which looks intrinsically innocent, its configuration and design do not "proclaim" its contents and its contents are not visible, to find probable cause to believe that the contents are criminal, the police officer must explain why, in light of his or her training and expertise, he or she believed the container contained contraband and that explanation must persuade an average, reasonably prudent person. *State v. Demeter*, 124 *N.J.* 374, 383 (1991);

II. WARRANT SEARCHES

The preferred method for conducting a search is with a search warrant. *State v. Hempele*, 120 *N.J.* 182, 217, 221 (1990) (police may *seize* trash bags left for collection for any reason but to *search* the trash the police must obtain a search warrant). A search warrant is presumed valid. It must be supported by probable cause which has been defined as a flexible, nontechnical concept which exists where the facts and circumstances within the affiant's knowledge and of which he/she has reasonably trustworthy information are sufficient to lead a person of "reasonable caution" to conclude that an offense is being or has been committed. *Brinegar v. United States*, 338 *U.S.* 160, 175-76, 69 *S.Ct.* 1302, 1311, 93 *L.Ed.* 1879 (1949); *State v. Novembrino*, 105 *N.J.* 95, 120 (1987).

A totality of the circumstances approach is used in evaluating whether probable cause exists and that finding depends upon factual contexts "not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527 (1983); State v. Jones, 308 N.J. Super. 15, 29 (App. Div. 1998). Hearsay can be relied upon to provide probable cause and the facts set forth in the affidavit should be reviewed in a common sense manner to determine whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. at 238, 103 S.Ct. at 2332, 76 L.Ed.2d 527; United States v. Ventresca, 380 U.S. 102, 109, 89 S.Ct. 741, 745-46, 13 L.Ed.2d 684 (1965). A reviewing court must give due deference to the fact that a fellow judicial officer has issued a warrant and must regard as "binding" the decision of the issuing judge that probable cause was demonstrated unless "there was clearly no justification for that conclusion." State v. Kasabucki, 52 N.J. 110, 117 (1968). Where the allegations of an informant alone are insufficient to support probable cause, the independent observations of the affiant may supplement the allegations enough to provide the necessary probable cause. *State v. Novembrino*, 105 *N.J.* at 125-26.

Officers searching a person's car, home or belongings under the authority of a search warrant are authorized to use only those investigatory methods and to search only those places appropriate in light of the scope of the warrant. *State v. Reldan*, 100 *N.J.* 187, 195 (1985); *State v. Johnston*, 257 *N.J. Super*. 178, 189-90 (App. Div. 1992). The description of the items in the search warrant must be sufficiently definite to prevent searches conducted "at the whim of an officer." *State v. Reldan*, 100 *N.J.* at 196 n.2. However, the description of items to be seized need be only as specific as reasonable under the circumstances and in the context of the items specified and the crime allegedly committed. The lowered expectation of privacy in an automobile is a factor bearing upon the reasonableness of a warrant authorizing a search of the car. *Id.* at 198.

"Scrupulous exactitude" regarding the items to be seized is required only in the First Amendment context where the intent of the warrant is to suppress rather than seize the documents. *Heller v. New York*, 413 *U.S.* 483, 492, 93 *S.Ct.* 2789, 2794-95, 37 *L.Ed.* 745 (1973); *Stanford v. Texas*, 379 *U.S.* 476, 485, 85 *S.Ct.* 506, 511, 13 *L.Ed.*2d 431 (1965); *State v. Jones*, 308 *N.J. Super.* at 34 (warrant sought to seize defendant's writings that had tendency to establish motive, identity and relationship between defendant and victim).

Generally, the validity of a warrant is judged solely on the information contained in the four corners of the affidavit. State v. Novembrino, 105 N.J. at 128. However, a defendant must be permitted to challenge the validity of a search warrant on the ground that false statements were made in the supporting affidavit. A defendant must make a "substantial" preliminary showing that false statements were made deliberately or in reckless disregard for the truth and must support the allegations by an offer of proof including reliable statements of witnesses. Franks v. Delaware, 438 U.S. 154, 164-70, 98 S.Ct. 2674, 2680-85, 57 L.Ed.2d 667 (1978); State v. Marshall III, 148 N.J. 89, 193 (1997), cert. denied, 522 U.S. 850 (1997); State v. Howery, 80 N.J. 563, 568 (1979), cert. denied, 444 U.S. 994 (1979); State v. Chaney, 318 N.J. Super. 217, 222 (App. Div. 1999).

Even this showing does not automatically guarantee a hearing. To obtain a hearing, the defendant must show that the allegedly false statements were essential to support a probable cause determination. If there was enough probable cause for a warrant without this purportedly false information, then there is no need for a hearing. *State v. Howery*, 80 *N.J.* at 568; *State v. Chaney*, 318 *N.J. Super*. 222. If a reviewing court determines that there was insufficient probable cause to support the issuance of a warrant, the search cannot be saved by demonstrating the good faith reliance of the police on the warrant because New Jersey has rejected the good faith exception to the exclusionary rule. *United States v. Leon*, 468 *U.S.* 897, 913, 104 *S.Ct.* 3405, 3415, 82 *L.Ed.*2d 677 (1984); *State v. Novembrino*, 105 *N.J.* at 159.

When the requested search intrudes on the attorney client relationship, that special expectation of privacy leads to a heightened Fourth Amendment scrutiny but premises are not immune to a search warrant merely because they contain lawyer's offices. *State v. Marshall III*, 148 *N.J.* at 193.

The "knock and announce" rule, a common law principle which requires the police to announce their presence when executing a warrant, forms a part of the reasonableness inquiry under the Fourth Amendment. *Wilson v. Arkansas*, 514 *U.S.* 927, 929, 115 *S.Ct.* 1914, 1915, 131 *L.Ed.*2d 976 (1995); *State v. Bilancio*, 318 *N.J. Super.* 408, 410 (App. Div. 1999), *certif. denied*, 160 *N.J.* 478 (1999).

A *per se* rule dispensing with the knock and announce requirement for certain crimes is unconstitutional. Richards v. Wisconsin, 520 U.S. 385, 394, 117 S.Ct. 1416, 1421, 137 L.Ed.2d 615 (1997). Rather, to use the "no knock" option, the State must show that there is a reasonable suspicion that knocking and announcing would be dangerous, futile or would inhibit investigation of crime by allowing the destruction of evidence. *Id.* The Fourth Amendment does not hold officers to a higher standard than that required in the no knock situation when the no knock entry results in destruction of evidence. United States v. Ramirez, 523 U.S. 65, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998). When a no knock provision is erroneously authorized, suppression is unjustified if the residence searched was unoccupied. State v. Bilancio, 318 N.J. Super. at 418-19. See also State v. Nunez, 333 N.J. Super. 42, 49-51 (App. Div. 2000) (police did not have to knock on unlocked back door before proceeding further into multifamily dwelling).

Anticipatory search warrants are valid so long as they are executed after probable cause arises and so long as the affidavit in support of the anticipatory warrant specifically relates the facts upon which the affiant relies in asserting that the items to be seized will be at the specified place at a specified later time. *State v. Ulrich*, 265 *N.J. Super*. 569, 575 (App. Div. 1993), *certif. denied*, 135 *N.J.* 304 (1994).

A judge may issue a search warrant upon the sworn oral testimony of an applicant who is not physically present. The judge must contemporaneously record the applicant's sworn testimony if possible or take "adequate" longhand notes summarizing the testimony of the applicant. A search warrant may be issued if the applicant demonstrates that probable cause exists and exigent circumstances preclude obtaining a written warrant. *N.J. Ct. R.* 3:5-3(b); *State v. Valencia*, 93 *N.J.* 126 (1983).

III. WARRANTLESS SEARCHES

The federal and state constitutions both require the prior approval of an impartial judicial officer before most searches can be undertaken. *State v. Hill*, 115 *N.J.* 169, 173 (1989). As such, any warrantless search is *prima facie* invalid unless the State can demonstrate that it falls within one of the specific exceptions to the warrant requirement created by the United States Supreme Court. *Id.* at 174.

A. Abandonment

Because the constitution provides protection only against unlawful searches and seizures, a defendant must establish that a reasonable or legitimate expectation of privacy was invaded by government action. State v. Marshall I, 123 N.J. 1, 66 (1991), cert. denied, 507 U.S. 929 (1993). A person who abandons property no longer has any expectation of privacy in it and therefore, a warrantless search of abandoned property cannot violate the constitution. Abel v. United States, 362 U.S. 217, 240-41, 80 S.Ct. 683, 698, 41 L.Ed.2d 668 (1960); State v. Hempele, 120 N.J. 182, 213 (1990); State v. List, 270 N.J. Super. 252 (Law Div. 1990), aff'd, 270 N.J. Super. 169, 174 (App. Div. 1993); State v. Allen, 254 N.J.Super. 62, 67 (App. Div. 1992); State v. Lee, 245 N.J. Super. 441, 450 (App. Div. 1991); State v. Farinich, 179 N.J. Super. 1 (App. Div. 1981), aff'd o.b., 89 N.J. 378 (1982).

The search and seizure of abandoned property is presumptively reasonable because the owner no longer has an expectation of privacy in the property abandoned. The test for determining abandonment is primarily one of intent and therefore, is an objective one. An intent to abandon a privacy interest in property may be inferred from the words spoken, the acts done and other objective facts. *United States v. Wider*, 951 *F.*2d 1283, 1285 (D.C. Cir. 1991); *United States v. Torres*, 949 *F.*2d 606, 608 (2d Cir. 1991). Abandonment is an ultimate fact or conclusion generally based upon a combination of action and intent. People v. Rasmussen, 478 N.W.2d 752, 755 (Mich. App. 1991).

In determining whether there has been an abandonment of privacy interests in the property, the critical inquiry is whether the person prejudiced by the search voluntarily discarded, left behind or otherwise relinquished interest in the property so that no reasonable expectation of privacy was retained in the property at the time of the search. United States v. Lehder-Rivas, 955 F.2d 1510, 1521-22 (11th Cir. 1992), cert. denied sub nom. Reed v. United States, 506 U.S. 924 (1992); United States v. Winchester, 916 F.2d 601, 603 (11th Cir. 1990). The facts and circumstances relevant to the court's abandonment inquiry are not limited to those known to the officers at the time of the search. Rather, subsequently discovered events may support an inference that the defendant chose and manifested an intent not to return to the property. Id. at 604; State v. List, 270 N.J. Super. at 259-60. Discarding property after an unreasonable seizure does not constitute abandonment. State v. Tucker, 136 N.J. 158, 171-72 (1994).

B. Automobile Cases

1. Stops

The Fourth Amendment applies to seizures of the person, including brief investigatory stops of vehicles. United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 694-95, 66 L.Ed.2d 621 (1981). In order to stop an automobile, a police officer need only have reasonable suspicion that a crime or traffic offense is being or has been committed. Id. at 417, 101 S.Ct. at 695, 66 L.Ed.2d 621; United States v. Olafson, 203 F.3d 560, 563 (9th Cir. 2000); State v. Caldwell, 158 N.J. 452, 463 (1999); State v. Locurto, 157 N.J. 463, 470 (1999). The totality of the circumstances must be evaluated in determining whether the police have a particularized and objective basis for the stop. United States v. Cortez, 449 U.S. at 418, 101 S.Ct. at 695, 66 L.Ed.2d 621. It is unnecessary to prove that a motor vehicle violation occurred to justify a stop for failure to signal. The police need only have a reasonable and articulable suspicion that failure to signal is likely to affect traffic. State v. Williamson, 138 N.J. 302, 304 (1994); State v. Jones, 326 N.J. Super. 234, 244 (App. Div. 1999) (traffic conditions justified stop but police had no valid reason to search interior of car).

Reasonable suspicion exists when an officer is aware of specific, articulable facts which, when combined with reasonable inferences, form the basis for suspecting that the particular person to be detained has committed or is about to commit an offense. United States v. Olafson, 203 F.3d at 563. The facts are to be interpreted in light of a trained officer's experience. United States v. Sokolow, 490 U.S. 1, 8, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). While reasonable suspicion is a less demanding standard than probable cause "and requires a showing considerably less than preponderance of the evidence," Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673, 675-76, 145 L.Ed.2d 570 (2000), the constitution requires at least a minimal level of objective justification for making the stop. Id. at 124, 120 S.Ct. at 676, 145 L.Ed.2d 570. The officer must be able to articulate more than a "hunch" that criminal activity is afoot. Id.

Reasonable suspicion for a stop need not be based solely on the officer's personal observations. The police may rely upon a flyer or bulletin issued by fellow law enforcement personnel to justify a stop to check identification, pose questions or briefly detain a suspect while attempting to obtain further information. The critical question is whether the issuing jurisdiction had reasonable suspicion to believe that the wanted person had committed an offense. *United States v. Hensley*, 469 *U.S.* 221, 232, 105 *S.Ct.* 675, 682, 83 *L.Ed.*2d 604 (1985). *See also State v. Hickman*, 335 *N.J. Super.* 623,634 (App. Div. 2000) (stop of defendant justified by information received from another police officer that car in which defendant was passenger was being driven by driver with a revoked license).

Once the car is properly stopped, the federal constitution permits an officer to request, without any particularized showing, that a car's driver, *Pennsylvania v. Mimms*, 434 *U.S.* 106, 111, 98 *S.Ct.* 330, 333, 54 *L.Ed.*2d 331 (1977), and passenger, *Maryland v. Wilson*, 519 *U.S.* 408, 117 *S.Ct.* 882, 37 *L.Ed.*2d 41 (1997), exit the vehicle for safety reasons. New Jersey follows *Mimms* with regard to ordering the driver out of the car.

However, when the police ask the passenger to exit, they must have reasons to do so because "the passenger has not engaged in the culpable conduct that resulted in the vehicle's stop." *State v. Smith*, 134 *N.J.* 599, 615 (1994). In order to support an order to a passenger to exit, the police need not point to specific facts that the occupants are armed and dangerous. Rather, the officer need point only to some fact or facts in the totality of the circumstances that would create in an officer a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger out of the car. *Id.* at 618. This cannot be based on a hunch; instead, the officer must be able to articulate why the passenger's gestures or other

circumstances caused him/her to expect more danger from this traffic stop than from other routine traffic stops. *Id.* at 619-20.

The police may conduct a weapons search of the interior of a car when they have a reasonable belief that the motorist is potentially dangerous. That belief must be based upon specific and articulable facts which, taken together with rational inferences from the facts, reasonably warrant the officer in believing that the suspect is dangerous and may gain immediate control of weapons. Michigan v. Long, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201 (1983); State v. Lund, 119 N.J. 35, 40 (1990). Even if there is an insufficient basis for a protective search at the initial encounter between the officer and suspect, events occurring after the stop might give the police reasons to conduct a protective search for weapons. Id. at 46. Furtive gestures and nervousness may, in conjunction with other facts, be enough to justify a protective search for weapons. Id. at 47; State v. Daniels, 264 N.J. Super. 161, 166 (App. Div. 1993) (court gives due deference to the officer's belief that defendant's actions were suspicions and his belief that, given lack of documentation and false plates on car, the vehicle was probably stolen).

2. Automobile Exception

The "automobile exception" to the warrant requirement permits the police to search a car when they have probable cause to believe it contains contraband or evidence of criminal activity. State v. Colvin, 123 N.J. 428, 431 (1991). Historically, the exception was based on the inherent mobility of automobiles, which create exigent circumstances, and the lessened expectation of privacy in automobiles. Id. However, in Pennsylvania v. Labron, 518 U.S. 938, 940, 116 S.Ct. 2485, 2487, 135 L.Ed.2d 1031 (1996), the United States Supreme Court determined that if a car is readily mobile and probable cause exists to believe that the vehicle contains contraband, the Fourth Amendment permits the police to conduct a search; a showing of exigent circumstances is not required. The New Jersey Supreme Court has rejected Labron on state constitutional grounds and continued to require exigent circumstances before the police can conduct a search pursuant to the automobile exception. See State v. Cooke, 163 N.J. 657, 667-670 (2000).

Exigent circumstances include the unforseeability and spontaneity of the circumstances giving rise to probable cause and the inherent mobility of the automobile as well as any element of surprise that has been lost, the fact that confederates, who are not in custody are waiting to move the evidence and the fact that police would need a special detail to guard an immobilized vehicle. *Id.* at 18-19.

The police cannot orchestrate the circumstances so that an item is delivered to an automobile and then rely upon the automobile exception to search the vehicle. *State v. Santiago*, 319 *N.J. Super*. 632, 639-40 (App. Div. 1999). The automobile exception applies whether the car is parked or mobile. *State v. Cooke*, 163 *N.J.* at 657; *State v. Esteves*, 93 *N.J.* 498 (1983). The police can transport the vehicle to another location and conduct a search without first obtaining a search warrant. *State v. Colvin*, 123 *N.J.* at 433.

A search of the automobile under this exception is limited to those areas where the police have probable cause to believe evidence of criminal activity can be found. Probable cause to believe that a container in the car holds contraband or evidence allows a warrantless search of that item under the automobile exception even if probable cause does not extend to the entire car. *California v. Acevado*, 500 *U.S.* 565, 574, 111 *S.Ct.* 1982, 1988, 114 *L.Ed.*2d 619 (1991); *State v. Lugo*, 249 *N.J. Super.* 565, 568 (App. Div. 1991).

3. Search incident to arrest

If the police properly stop a vehicle and arrest the occupant, the police have the authority to search the passenger compartment and any containers in the area irrespective of whether probable cause exists to believe contraband is contained there. *New York v. Belton*, 453 *U.S.* 454, 460, 101 *S.Ct.* 2860, 2864, 69 *L.Ed.*2d 768 (1987). The Supreme Court has determined that *Belton* does not apply to warrantless arrests for motor vehicle offenses. *State v. Pierce*, 136 *N.J.* 184, 210-15 (1994). *See also Knowles v. Iowa*, 525 *U.S.* 113, 117-18, 119 *S.Ct.* 484, 488, 142 *L.Ed.*2d 492 (1998) (constitution does not permit police to conduct a full search of a vehicle after giving driver citation for speeding).

However, the police may search areas within the immediate control of the arrestee, *Chimel v. California*, 395 *U.S.* 752, 762-63, 89 *S.Ct.* 2034, 2040, 23 *L.Ed.*2d 685 (1969), may search the person of the arrestee, *State v. Pierce*, 136 *N.J.* at 213-14, and may conduct a weapons search of the interior if they possess a reasonable belief that the vehicle's driver or passenger(s) pose a threat to their safety, *State v. Lund*, 119 *N.J.* 35, 40 (1990).

C. Consent

The "touchstone" of the Fourth Amendment is reasonableness. *Katz v. United States*, 389 *U.S.* 347, 360, 88 *S.Ct.* 507, 516, 19 *L.Ed.*2d 576 (1967). As such, courts have approved of consensual searches because "it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v. Jimeno*, 500 *U.S.* 248, 251, 111 *S.Ct.* 1801, 1804, 114 *L.Ed.*2d 297 (1991).

A consent to search must be voluntary under the totality of the circumstances. However, there is no constitutional requirement that the police have reasonable suspicion that contraband is present or that criminal activity is afoot before they seek consent to search. *State v. Abreu*, 257 *N.J. Super*. 549, 555 (App. Div. 1992); *State v. Allen*, 254 *N.J. Super*. 62 (App. Div. 1992). *But see State v. Carty*, 332 *N.J. Super*. 200, 207 (App. Div. 2000), *cert, granted*, 165 *N.J.* 605 (2000) (state constitution requires that police have reasonable suspicion to believe that evidence of crime will be uncovered as prerequisite to seeking consent to search after a valid traffic stop). *See also State v. Rodriguez*, 336 *N.J. Super*. 550 (App. Div. 2001) (refusing to apply *Carty* to stop on street).

Under the Fourth Amendment, knowledge of the right to refuse consent is one factor which may be considered by the court in determining the validity of the consent. Schneckloth v. Bustamente, 412 U.S. 218, 219, 227, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). Under the New Jersey constitution, however, the validity to search, even in a non-custodial situation, is measured in terms of waiver, *i.e.*, the State has to show that the person involved was aware of the right to refuse to consent, State v. Johnson, 68 *N.J.* 349, 354 (1975), and was given the opportunity to be present during the search. State v. Hampton, 333 N.J. Super. 19 (App. Div. 2000); State v. Santana, 215 N.J. Super: 63, 72-73 (App. Div. 1987). In a situation where a defendant initiates contact with the police and adopts a cooperative posture in the mistaken belief that he can divert police attention, consent to search may be implied. *State v.* Koedatich, 112 N.J. 225, 262-64 (1988), cert. denied, 489 U.S. 1017 (1989); State v. Boud, 240 N.J. Super. 171, 178 (App. Div. 1990). Similarly, where the individual having authority to consent fully cooperates with the police and there is no indication that he would not have consented to the search had he known of the right to refuse, consent is implied. State v. Brown, 282 N.J. Super. 538, 547-48 (App. Div. 1995).

Consent may be obtained from a third person who possesses common authority over the property or from a

third person who the police reasonably believe has authority to consent. *Illinois v. Rodriguez*, 497 *U.S.* 177, 188-89, 110 *S.Ct.* 2793, 2801, 111 *L.Ed.*2d 148 (1990); *State v. Maristany*, 133 *N.J.* 299, 305 (1993). A police officer's belief that a third person has authority to consent does not have to be correct. Rather, the officer only has to have a reasonable belief that the person consenting has sufficient control over the property to consent to its being searched. *State v. Crumb*, 307 *N.J. Super.* 204, 243-44 (App. Div. 1997), *certif. denied*, 153 *N.J.* 215 (1998).

In a vehicle situation, unless there is evidence to the contrary, a driver has authority to consent to a complete search of the car, including the trunk and glove compartment. State v. Maristany, 133 N.J. at 306. The driver's apparent authority to consent to a search of the automobile does not include authority to permit police to search personal belongings of the passenger(s) unless there is evidence of joint access or joint control over the belongings. State v. Suazo, 133 N.J. 315, 321 (1993); State v. Kelly, 271 N.J. Super. 44, 48-49 (App. Div. 1994), certif. denied sub nom, State v. Ellis, 137 N.J. 72 (1995) (reasonable reliance on codefendant's consent to search four bags where no identification tags on bags, the information received by police indicated that both men involved in transportation of narcotics and drug dog reacted to all four bags). When the police are on notice that the driver does not have authority to consent to the search of the property, they cannot rely on apparent authority. State v. Suazo, 133 N.J. at 322. Where there is multiple party control over property, any party in possession has the right to consent to the search. State v. Santana, 215 N.J. Super. at 69.

A landlord generally does not have authority to consent to the search of the tenant's premises. *State v. Coyle*, 119 *N.J.* 194, 215 (1990). Having the right to enter the premises for limited purposes does not give the landlord authority to consent to a search of the tenant's belongings which are not in plain view. *Id.* at 217.

A parent has the right to consent to the search of a child's room or belongings, even an adult child, unless there is evidence that the child has exclusive control over the room or property in the parent's home. *State v. Crumb*, 307 *N.J. Super*. at 243-44. A family member or co-tenant cannot consent to a search of premises or possessions in which another has or is reasonably believed to have exclusive control. *State v. Younger*, 305 *N.J. Super*. 250, 257 (App. Div. 1997).

A search generally is limited by the scope, implied or expressed, of the consent given and by the object of the search. *Florida v. Jimeno*, 500 *U.S.* at 251, 111 *S.Ct.* at 1803, 114 *L.Ed.*2d 297; *State v. Leslie*, _____ *N.J. Super.* _____ (App. Div. 2001); *State v. Younger*, 305 *N.J. Super.* at 256-57. A suspect may delimit "as he chooses" the scope of the search but if the consent reasonably would be understood to be unlimited, the constitution does not require a more explicit authorization. *Florida v. Jimeno*, 500 *U.S.* at 252, 111 *S.Ct.* 1801, 114 *L.Ed.*2d 297. A consent to search attributable to police misconduct cannot justify the search. *State v. Smith*, 155 *N.J.* 83, 101 (1998), *cert. denied*, 525 *U.S.* 1033(1998).

Conspicuous signs at the airport warning of the inspection of persons entering the area puts individuals on notice that by proceeding through the area, they are impliedly consenting to a search. *United States v. Hezbrun,* 723 F.2d 773, 775-76 (11th Cir. 1984); *State v. Ascensio,* 257 *N.J. Super.* 144, 150-51 (Law Div. 1992), *aff'd,* 277 *N.J. Super.* 334 (App. Div. 1994), *certif. denied,* 140 *N.J.* 270 (1995).

The extraction of blood over a defendant's objection and without a warrant is reasonable if there are exigent circumstances making it unreasonable to obtain a warrant, the officers acted reasonably under the circumstances and the sample was taken in a medically acceptable manner. *Schmerber v. California*, 384 *U.S.* 757, 768-71, 86 *S.Ct.* 1826, 1826-28, 16 *L.Ed.*2d 908 (1966); *State v. Ravotto*, 333 *N.J. Super.* 247, 252-55 (App. Div. 2000), *certif. granted*, 165 *N.J.* 677 (2000), (blood can be extracted from defendant suspected of drunk driving without his/her consent and the defendant may be restrained in order to extract a blood sample).

D. Home Searches

Warrantless searches of homes must be subjected to particular scrutiny and are presumptively unreasonable unless probable cause and exigent circumstances exist. Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); State v. Hutchins, 116 N.J. 457, 463 (1989). Hot pursuit, Warden v. Hayden, 387 U.S. 294, 298, 87 S.Ct. 1642, 1545-46, 18 L.Ed.2d 782 (1976), can justify entry. See State v. Jones, 143 N.J. 4, 19 (1995) (police officers acting pursuant to valid arrest warrant have a right to pursue fleeing suspects into a private residence); State v. Josey, 290 N.J. Super. 17, 24-25 (App. Div. 1996), certif. denied, 146 N.J. 497 (1996) (police officers who observed defendant selling drugs properly pursued him into apartment to effect arrest). See also State v. Liberatore, 293 N.J. Super. 580, 587 (Law Div. 1996), aff'd., 293 N.J. Super. 535 (App. Div. 1996) (police officer properly pursued defendant onto porch of house to arrest defendant for resisting arrest).

However, it is unreasonable for police officers in hot pursuit of an individual suspected of numerous motor vehicle and disorderly persons offenses to make a warrantless entry into the suspect's home to effectuate an arrest. *State v. Bolte*, 115 *N.J.* 579, 580-81 (1989), *cert. denied*, 493 *U.S.* 936 (1989); *State v. Holland*, 328 *N.J. Super.* 1, 9-10 (App. Div. 2000) (burning odor of marijuana emanating from residence did not justify warrantless entry into home because it demonstrated at most that disorderly persons offenses were being committed).

Where the police reasonably believe that the premises recently have been or are being burglarized, they can enter the premises without a warrant. *State v. Faretra*, 330 *N.J. Super.* 527, 531-34 (App. Div. 2000).

The threatened removal of evidence from a home can constitute exigent circumstances justifying a warrantless home entry. The issue becomes whether the physical character of the premises is conducive to surveillance as an alternative to a warrantless entry. *State v. Lewis*, 116 *N.J.* 477, 485 (1989). Even when a warrantless search is justified by exigent circumstances, it must be strictly limited by the exigency that justified it. *State v. Stupi*, 231 *N.J. Super.* 284, 288-89 (App. Div. 1989).

Exigent circumstances permitting home entries in drug cases depend upon the degree of urgency involved and the amount of time necessary to obtain a warrant, reasonable belief that the contraband is to be removed, possibility of danger to the police guarding the site while a search warrant is sought, information indicating the defendants are unaware police are on their trail and the ready destructibility of contraband. *State v. Hutchins*, 116 *N.J.* at 469-71. Where police enter a residence for legitimate reasons, not to arrest or search a defendant, anything they see and seize in plain view is not tainted by the absence of a warrant. *State v. Perry*, 124 *N.J.* 128, 148-50 (1991).

If the police enter a home with consent and return 30 minutes later to effectuate an arrest, the separate entries are components of a single, continuous, integrated police action which does not require a warrant for entry. *State v. Henry*, 133 *N.J.* 104, 116 (1993), *cert. denied*, 510 *U.S.* 984 (1993). Once properly in the home, the police may fan out to conduct a protective sweep of the area if a reason exists to believe they are in danger from others who may be in the residence. This "fan out" cannot be a pretext to search for

evidence. *Maryland v. Buie*, 494 *U.S.* 325, 337, 110 *S.Ct.* 1093, 1099-1100, 108 *L.Ed.*2d 276 (1996); *State v. Henry*, 133 *N.J.* at 118.

Where a home has been turned into a commercial drug outlet to which outsiders have been invited, it has lost its nature as a home for purposes of the constitution. *Lewis v. United States*, 385 *U.S.* 206, 211, 87 *S.Ct.* 424, 427, 17 *L.Ed.*2d 312, 316 (1966); *State v. Henry*, 133 *N.J.* at 116-17.

If an emergency situation exists, no warrant for entry into a home is required under general fourth amendment principles. United States v. Karo, 468 U.S. 705, 717-18, 104 S.Ct. 3296, 3304-05, 82 L.Ed.2d 530 (1984). The emergency exception applies when the purpose of the police entry is not to gather evidence of criminal activity but rather to respond immediately to a need for assistance for the protection of life or property. State v. Pante, 325 N.J. Super. 336, 352 (App. Div. 1999), certif. denied, 163 N.J. 76 (1999) (when police saw blasting and demolition materials in hallway, they had right to search defendant's bedroom because of public safety exigency); State v. Garland, 270 N.J. Super. 31, 44-46 (App. Div. 1994), certif. denied, 136 N.J. 296 (1994) (police properly entered hotel room, where saw and seized drugs, because believed children there alone).

There is no precise formula to determine whether an emergency situation exists but the existence of the emergency is determined as of the moment of warrantless entry onto the premises. The courts should consider the appearance of the scene of the search as it would appear to a reasonably prudent person in the police officer's shoes. *United States v. Reed*, 935 *F*.2d 641, 642 (4th Cir. 1991), *cert. denied*, 502 *U.S.* 960 (1991). The police may make a warrantless entry onto the premises where they reasonably believe a person is in need of immediate aid. *Thompson v. Louisiana*, 469 *U.S.* 17, 21, 105 *S.Ct.* 409, 411, 83 *L.Ed.*2d 409 (1984); *State v. Castro*, 238 *N.J. Super.* 482, 488 (App. Div. 1990).

A warrantless search of a hospital room for drugs was justified by exigent circumstances because patients and others had access to the room and could have retrieve the contraband. *State v. Stott*, 335 *N.J. Super*.611 (App. Div. 2000), *certif. granted*, ____ *N.J.* ___ (2001).

There is no "murder scene" exception to the Fourth Amendment's requirement of a warrant for a home entry. *Mincey v. Arizona*, 437 *U.S.* 384, 385, 98 *S. Ct.* 2408, 2415, 57 *L.Ed.*2d 290 (1978); *State v. Damplias*, 282 *N.J. Super.* 471, 481 (App. Div. 1995).

E. Community Caretaking Function

In addition to investigating crimes, the police also engage in a community caretaking function which is "totally divorced" from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute. Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973); State v. Garbin, 325 N.J. Super. 521, 526-27 (App. Div. 1999); State v. Navarro, 310 N.J. Super. 104, 109-10 (App. Div. 1998), certif. denied, 156 N.J. 382 (1998). The need to protect or preserve life or avoid serious injury is justification for what otherwise would be illegal action, State v. Garbin, 325 N.J. Super. at 525-26 (quotation omitted), such as warrantless entry into a home. Id. at 525. The community caretaking function cannot be overbearing or harassing in nature. State v. Drummond, 305 N.J. Super. 84, 88-89 (App. Div. 1997).

Where an officer was on the premises to investigate a report of a possible fire and observed smoke billowing from the garage, he was justified in entering the garage without a warrant. State v. Garbin, 325 N.J. Super. at 526-27. Similarly, police who accompanied defendant's landlady into his apartment where she believed a gun was secreted were performing a community caretaking function, since the presence of the gun in the apartment might lead to violence. State v. Navarro, 310 N.J. Super. at 108-09. A police officer who stopped a driver proceeding at a snail's pace because he considered the conduct abnormal was acting properly under his community caretaking function. State v. Martinez, 260 N.J. Super. 75 (App. Div. 1992). However, stopping a defendant who was sitting with a friend in a parked car in a tavern parking lot while the tavern was open was not an appropriate community caretaking function. State v. Costa, 327 N.J. Super. 22, 29 (App. Div. 1999). Similarly, stopping a defendant because he failed to proceed for five seconds after a red light turned green could not be justified under a community caretaking analysis. State v. Cryan, 320 N.J. Super. 325, 331 (App. Div. 1999).

F. Independent Source

The independent source doctrine permits the State to utilize evidence which was derived from a lawful source independent of the illegal conduct. *Silverthorne Lumber Co. v. United States*, 251 *U.S.* 385, 392, 40 *S.Ct.* 182, 183, 64 *L.Ed.* 319 (1920); *State v. Curry*, 109 *N.J.* 1, 13-14 (1987); *State v. Sugar II*, 100 *N.J.* 214, 241-42 (1985); *State v. Hinton*, 333 *N.J. Super.* 35, 440-42 (App. Div. 2000) (while entry into car to search for credentials improper, drugs obtained from source independent of illegality). The key question under the independent source doctrine "is whether the State *learned of* the evidence from an untainted source, not whether it gained possession of the evidence from one." *State v. Curry*, 109 *N.J.* at 14 (emphasis in original).

The independent source doctrine has two applica-The general application identifies all evidence tions. acquired in a fashion untainted by the illegal evidencegathering activity. This occurs when police gain access to evidence wholly independent from the illegal activity, as, for example when a third party reveals damaging information. The more specific application of the rule applies when evidence acquired through an independent source is identical to the evidence unlawfully acquired. So long as the police obtained that evidence from untainted sources, it is considered cleanly obtained. Murray v. United States, 487 U.S. 533, 537, 108 S.Ct. 2529, 2533, 101 L.Ed.2d 422 (1988). The Supreme Court has made clear that reseizure of tangible evidence does not require a different analysis. Because the police should not be placed in a worse position due to their illegal activity, so long as the later, lawful seizure is genuinely independent of the earlier, illegal search, the independent source doctrine applies. To decide whether a search warrant was based on a genuinely independent source of the information, the court must determine whether what the police originally illegally obtained was presented in support of the probable cause that prompted the trial judge to issue the warrant. See also State v. Nichols, 253 N.J. Super. 273 (App. Div. 1992).

G. Inevitable Discovery

One of the exceptions to the exclusionary rule is the inevitable discovery doctrine which posits that the exclusion of evidence should not occur if the police would have obtained the same evidence even if no misconduct occurred. State v. Johnson, 120 N.J. 263, 289 (1990); State v. Sugar III, 108 N.J. 151 (1987); State v. Sugar II, 100 N.J. 214 (1986). That is because the exclusionary rule is meant to place the police in no worse condition than if the unlawful conduct had not occurred. United States v. Hernandez-Cano, 808 F.2d 779, 783 (11th Cir.), cert. denied, 482 U.S. 918 (1987); State v. Nichols, 253 N.J. Super: 273, 277 (App. Div. 1992). In order for inevitable discovery to apply, the State must show by clear and convincing evidence that 1) proper, normal and specific investigative procedures would have been pursued in order to complete the investigation of the case, 2) under all of the surrounding relevant circumstances the pursuit of these procedures inevitably would have resulted in the discovery of the evidence and 3) the discovery of the evidence through use of the procedures would have occurred wholly independently of the discovery of such evidence by unlawful means. *State v. Sugar II*, 100 *N.J.* at 235.

The State need not demonstrate the exact circumstances of the evidence's discovery or establish the exclusive path leading to the discovery. It needs only to show that the evidence ultimately would have been discovered. The facts and elements underlying the inevitable discovery may be proven only by a preponderance of the evidence so long as the ultimate combination of facts and elements clearly and convincingly establish that the evidence inevitably would be discovered. State v. Sugar III, 108 N.J. at 159. The doctrine applies where the disputed evidence inevitably would have been discovered by a private party rather than the police. United States v. Hernandez-Cano, 808 F.2d at 784; State v. Sugar III, 108 N.J. at 157; State v. Urcinoli, 321 N.J. Super. 519, 538-39 (App. Div. 1999) (evidence in motel room inevitably would have been discovered by motel employees).

H. Plain View, Plain Smell, Plain Touch

1. Plain View

Where the police are lawfully in the area and inadvertently see items suggesting criminal activity, they may seize the items in plain view. *State v. Bruzzese*, 94 *N.J.* 210, 236 (1983), *cert. denied*, 465 *U.S.* 1030 (1984). The inadvertence requirement of plain view is to prevent the police from engaging in planned warrantless searches when they know in advance the location of certain evidence. Inadvertence is not defeated if the police had no intention of seizing the evidence when they lawfully go to the place where the evidence is located. *State v. Damplias*, 282 *N.J. Super.* 471, 478-79 (App. Div. 1995).

The federal plain view doctrine does not require that police inadvertently view the object. *Minnesota v. Dickerson*, 508 *U.S.* 366, 375, 113 *S.Ct.* 2130, 2137, 124 *L.Ed.*2d 334 (1993); *Arizona v. Hicks*, 480 *U.S.* 321, 107 *S.Ct.* 1149, 94 *L.Ed.*2d 347 (1987); *Horton v. California*, 496 *U.S.* 128, 136, 110 *S.Ct.* 2301, 2310, 110 *L.Ed.*2d 112 (1990). The New Jersey courts have not determined whether the inadvertence requirement remains a part of the plain view search criteria. *State v. Damplias, supra.*

If the item in plain view is not readily recognizable as contraband, the police may not take any action, such as lifting the object, which would reveal whether it was stolen or not. *Arizona v. Hicks, supra*. In those circumstances, the police must seek a warrant for further inspection. *Id*. A bulge in an unusual area, such as the crotch or ankles, may bolster a claim that the item seized was immediately recognizable as contraband. *State v. Toth*, 321 *N.J. Super*. 609, 613 (App. Div. 1999).

2. Plain Smell

The smell of unburnt or burnt marijuana by a trained police officer while lawfully in the area provided police with probable cause to search the car of the defendant. *State v. Judge*, 275 *N.J. Super.* 194, 201 (App. Div. 1994); *State v. Kahlon*, 172 *N.J. Super.* 331, 338 (App. Div. 1980), *cert. denied*, 454 *U.S.* 818 (1981). However, the smell of burning marijuana emanating from a residence did not justify warrantless entry into home because it demonstrated at most that disorderly persons offenses were being committed. *State v. Holland*, 328 *N.J. Super.* 1, 9-10 (App. Div. 2000).

3. Plain touch

When an officer discovers contraband through the sense of touch during an otherwise lawful search, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. As such, its warrantless seizure would be justified so long as the incriminating nature of the object is immediately apparent. *Minnesota v. Dickerson,* 508 *U.S.* at 375-76, 113 *S.Ct.* at 2137, 124 *L.Ed.*2d 334; *State v. Jackson,* 276 *N.J. Super.* 626, 630-31 (App. Div. 1994). If the officer determines that the item is contraband only after conducting a further search, unauthorized by any exception to the warrant requirements, then the item seized must be suppressed. *Minnesota v. Dickerson,* 508 *U.S.* at 378-79, 113 *S.Ct.* at 2138-39, 124 *L.Ed.*2d 334.

Where the police physically manipulate a piece of luggage in an "exploratory manner," that violates the fourth amendment. *Bond v. United States*, 529 *U.S.* 334, 336-38,120 *S.Ct.* 1462, 1464-65, 146 *L.Ed.* 2d 365 (2000).

- I. Police Encounters
 - 1. Field Inquiry

The police do not violate the constitution by merely approaching a person on the street or any other public place and asking the person if he/she is willing to answer some questions or by putting some questions to the person if he/ she is willing to listen. *Florida v. Royer*, 460 *U.S.* 491, 497, 103 *S.Ct.* 1319, 1324, 75 *L.Ed.*2d 229 (1983); *State v. Davis*, 104 *N.J.* 490, 497 (1986); *State ex rel. J.G.*, 320 *N.J. Super.* 21, 28 (App. Div. 1999). As such, a field inquiry does not constitute a seizure so long as the police officer allows the person to move if he/she wishes. *State v. Sheffield*, 62 *N.J.* 441, 447 (1973).

2. Investigative Detention

In order to conduct an investigative detention, the police must have a particularized and objective basis for the stop. United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 694-95, 66 L.Ed.2d 621 (1981). Reasonable suspicion exists when an officer is aware of specific, articulable facts which, when combined with reasonable inferences, form the basis for suspecting that the particular person to be detained has committed or is about to commit an offense. State v. Davis, 104 N.J. at 504. The totality of the circumstances, interpreted in light of a trained officer's experience, must be evaluated in determining whether reasonable suspicion exists. United States v. Sokolow, 490 U.S. 1, 8, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). The fact that purely innocent connotations may be ascribed to a person's actions does not mean that a police officer cannot base reasonable suspicion on those actions; the State must show that a person would find the actions consistent with guilt. State v. Citarella, 154 N.J. 272, 279-80 (1998).

While reasonable suspicion is a less demanding standard than probable cause "and requires a showing considerably less than preponderance of the evidence," *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675-76, 145 L.Ed.2d 570 (2000), the constitution requires at least a minimal level of objective justification for making the stop. Id. at 124, 120 S. Ct. at 676. The officer must be able to articulate more than a "hunch" that criminal activity is afoot. Id.; State v. Contreras, 326 N.J. Super. 528, 541 (App. Div. 1999). The police cannot use improper considerations, like race, to justify a stop. State v. Patterson, 270 N.J. Super. 562 (App. Div. 1994) (drug courier profile); State v. Letts, 254 N.J. Super. 390 (App. Div. 1992) (same).

Even if the initial stop is valid, it can thereafter become unconstitutional if the officer does not use the least intrusive investigative techniques reasonably available to quickly verify orc dispel any suspicions. *United States v. Sharpe*, 470 *U.S.* 675, 685, 105 *S.Ct.* 1568, 1575, 84 *L.Ed.*2d 605 (1985); *State v. Davis*, 104 *N.J.* at 504. The length of a detention may turn a stop into an arrest for which probable cause is necessary. *State v. Dickey*, 152 *N.J.* 468, 482 (1998). If a vehicle is properly stopped, the driver does not have a valid driver's license and under questioning continuously provides the police with false information about his/her identity, the police may take the driver into custody but cannot search the vehicle unless exceptions to the warrant requirement provide independent justification for the search. *State v. Lark*, 163 *N.J.* 294 (2000).

When a police officer observes unusual conduct which leads to a reasonable conclusion that criminal activity is "afoot" and that the person observed is armed and dangerous, the police officer may approach the individual, identity himself and if still concerned about his or others' safety, the officer can conduct a pat down search for weapons. *Terry. v. Ohio*, 392 *U.S.* 1, 27, 88 *S.Ct.* 1868, 1883, 20 *L.Ed.*2d 889 (1968). Less than probable cause can justify this limited intrusion but objective reasonableness is required. *State v. Thomas*, 110 *N.J.* 673, 679-80 (1988). In determining the propriety of a pat down search, there is greater concern for an officer's safety when the individual searched has been stopped for a suspected crime and the criminal activity actually was observed. *State v. Dale*, 271 *N.J. Super.* 334, 338 (App. Div. 1994).

A generalized search for weapons cannot be validated under Terry, rather, the officer must point to particular facts from which he or she can reasonably infer that the individualis dangerous. Ybarra v. Illinois, 444 U.S. 85, 93-94, 100 S.Ct. 338, 343, 62 L.Ed.2d 238 (1979); State v. Thomas, 110 N.J. at 679; State v. Green, 313 N.J. Super. 385, 394 (App. Div. 1998) (group of person not suspected of criminal activity could not be dispersed). Events can occur in the course of the encounter between police and suspect which will justify a protective search. State v. *Thomas,* 110 *N.J.* at 681. The mere fact that drug dealers often carry weapons will not be enough to support a *Terry* frisk. Id. at 682-83. While knowledge of a defendant's criminal history is not enough to justify an investigative stop, that knowledge can play a part in the decision to conduct a pat down search. State v. Valentine, 134 N.J. 536 (1993).

The police, who have probable cause to believe that evidence of a crime is in a residence, may temporarily detain and individual and prevent him from entering the residence unaccompanied by police to ensure that evidence is not destroyed while the police diligently obtain a search warrant. *Illinois v. McArthur,* 121 *S.Ct.* 946 (2001) (police officers acted properly in preventing defendant from entering his home while they obtained a warrant to search premises).

Prior to the filing of a criminal complaint, the Attorney General or County Prosecutor may move for an order authorizing the temporary detention of a person and compelling that person to submit to "non-testimonial identification procedures." *R.* 3:5A. "Evidence of physical characteristics" includes fingerprints, palm prints, footprints, handwriting exemplars, blood and urine samples and appearance in a lineup. R. 3:5A-9. In order to obtain such an order, the State must demonstrate to the court that a crime has been committed and is under active investigation, that there is a reasonable and well-grounded basis to believe that the person may have committed the crime, that the results of the physical characteristics obtained will significantly advance the investigation and determine whether the person committed the crime and physical characteristics sought cannot otherwise practicably be obtained. R. 3:5A-4.

3. Arrest

To effectuate an arrest, the police must have probable cause to believe that the defendant had or was in the process of committing a crime. *State v. Contursi*, 44 *N.J.* 424, 428-29 (1965). The "formal language of arrest" need not be used; if the individual's liberty of movement is restrained, then an arrest has occurred. *Id.* at 433.

While a search to produce grounds for an arrest is invalid, *id.*, if the arrest is independently valid, evidence uncovered during the search will not be suppressed merely because the arrest did not precede the search. *Id.*; *State v. Doyle*, 42 *N.J.* 334, 343 (1964).

The police may search the personal effects of a person under lawful arrest as part of a routine administrative procedure at a police station incident to booking and jailing the suspect. *Illinois v. Lafayette*, 462 *U.S.* 640, 643, 103 *S.C*t. 2605, 2606, 77 *L.Ed.*2d 65 (1983); *State v. Jackson*, 268 *N.J. Super.* 194, 205 n.5 (Law Div. 1993).

J. Police Action Based On Citizen's Tips, Informant's Tips or Anonymous Tips

1. Citizen's Tips

When the source of a tip is an ordinary citizen, the assumption is that the person is trustworthy and motivated by factors consistent with law enforcement goals. As such, information provided by a citizen to a police officer concerning a criminal event ordinarily would not require further exploration or verification of the citizen's personal credibility or reliability before the police take action based upon the tip. *State v. Davis*, 104 *N.J.* 490, 506 (1986). This assumption is further heightened when the tipster gives a sworn statement which subjects the tipster to civil or criminal liability. *Sanducci v. City of Hoboken*, 315 *N.J. Super.* 475, 482 (App. Div. 1998).

2. Informant's Tips

An informant's tip may constitute a basis for police action so long as a substantial basis exists to credit the hearsay based on the totality of the circumstances. State v. Smith, 155 N.J. 83, 92 (1998), cert. denied, 525 U.S. 1033 (1998).A few past instances of reliability cannot conclusively establish an informant's reliability. Id. at 94. Important factors in assessing the reliability of the informant's tip include that the information gives the police sufficient detail, recounts information that could not be attributed to rumors, or predicts future events which would be difficult to know. Id. at 94-95. Corroboration of the details in the tip constitutes an essential element of probable cause because it ratifies the informant's veracity, validates the truthfulness of the tip and may add to the evidentiary weight of the factors as well as the overall circumstances. Id. at 98.

3. Anonymous tips

A tip from an anonymous source does not by itself demonstrate the informant's basis of knowledge or veracity. Alabama v. White, 496 U.S. 325, 329, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990); State v. Goree, 327 N.J. Super. 227, 236 (App. Div. 2000); State v. Sharpless, 314 N.J. Super. 440, 448 (App. Div. 1998). As such, it would not provide sufficient basis for the police to act. An anonymous tip, suitability corroborated, may exhibit "sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop." Alabama v. White, 496 U.S. at 327, 110 S.Ct. at 2414, 110 L.Ed.2d 301. Among the factors that may endow the tip with reliability is police surveillance or the anonymous tip's predictive information. Florida v. J.L., 529 U.S. 266, 271, 120 S.Ct. 1375, 1379 (2000). There is no lesser standard applied when the tip alleges that a person is in possession of a firearm. Id. at 271-72, 120 S.Ct. at 1379-80; State v. Goree, 327 N.J. Super. at 245.

K. Border and airport searches

Border searches, based upon the "long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country," *United States v. Ramsey*, 431 *U.S.* 606, 616, 97 *S.Ct.* 1972, 1978, 52 *L.Ed.*2d 617 (1977), are reasonable "simply by virtue of the fact that they occur at the border." *Id.* Therefore, no warrant is necessary to conduct such a search. However, this rule applies only to stops performed at the border or its "functional equivalent." *Almeida-Sanchez v. United States*, 413 *U.S.* 266, 93 *S.Ct.* 2535, 37 *L.Ed.*2d 596 (1973). Airport security searches, which are broadcast by way of a sign or other notice, are considered implied consent searches. *United States v. Doe*, 61 *F*.3d 107, 109-10 (1st Cir. 1995). To be upheld as warrantless searches, they must be narrowly limited to their objective of searching for weapons or explosives. *United States v. De Los Santos Ferrer*, 999 *F*.2d 7, 9 (1st Cir. 1993), *cert. denied*, 510 *U.S.* 997 (1993).

L. Roadblocks

Stopping a car at a roadblock is a seizure under the Fourth Amendment. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 450, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). However, the police do not need reasonable suspicion of unlawful activity to stop cars at a roadblock so long as 1) the roadblock was established by supervisory police officials, 2) the time, location and operation of the roadblock is reasonable and 3) adequate warnings to the public near the site of the roadblock. State v. Flowers, 328 N.J. Super. 205, 211 (App. Div. 2000); State v. Reynolds, 319 N.J. Super. 426, 431 (App. Div. 1998); State v. Kirk, 202 N.J. Super. 28, 40-41 (App. Div. 1985). The State must establish that governmental interests of sufficient importance "warrant the intrusion upon the traveling public's federal and state constitutional rights to be free of warrantless seizures." State v. Kadalak, 258 N.J. Super. 599, 613 (App. Div. 1992). Courts have upheld roadblocks for driving while intoxicated, State v. Kirk, supra; for stolen cars, State v. Flowers, supra; for vehicle safety checks, State v. Kadalak, supra; for illegal aliens, United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) and for drug interdiction, Merrett v. Moore, 58 F.3d 1547 (11th Cir. 1995). But see Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999), aff'd., sub nom. City of Indianapolis v. Edmond, 121 S.Ct. 447 (2000) (drug interdiction roadblocks unconstitutional).

M. Inventory searches

A police inventory of property is valid when it is part of routine police practice and is not conducted as a pretext for an indiscriminate purpose. These procedures protect the inventoried property while in police custody, protect police and others from false property claims and safeguard the police from potential danger. *South Dakota v. Opperman* 428 *U.S.* 364, 375-76, 96 *S.Ct.* 3092, 3100, 49 *L.Ed.*2d 1000 (1976). When the driver is arrested for a motor vehicle violation, impounding the vehicle and inventorying its contents in accordance with police procedures is improper unless the driver consents or is given a reasonable opportunity to make other arrangements for the custody of the vehicle. *State v. Slockbower*, 79 *N.J.* 1, 11-12 (1979); *State v. Ercolano*, 79 *N.J.* 25, 33-34 (1979) (impoundment of car parked legally on street after defendant's arrest and over his objection improper). Even if the car is properly impounded, the police inventory of the vehicle in conformance with routine police procedures will be deemed "flawed" unless the police discuss the disposition of the vehicle's contents with the owner or temporary custodian and allow the owner/custodian to make other arrangements for the disposition of the property. *State v. Mangold*, 82 *N.J.* 575, 585-87 (1980); *State v. Padilla*, 321 *N.J. Super.* 96, 110-12 (App. Div. 1999), *aff'd. o.b.*, 163 *N.J.* 3 (2000).

N. Open Fields

Observations of potentially criminal activity made from open fields do not violate the fourth amendment. *United States v. Dunn*, 480 *U.S.* 294, 107 *S.Ct.* 1134, 94 *L.Ed.* 326 (1987); *State v. Citta*, 208 *N.J. Supe*r. 208, 215 (Law Div. 1990), *aff'd sub nom. State v. Fuhs*, 265 *N.J. Super.* 188, 190 (App. Div. 1993), *certif. denied*, 134 *N.J.* 486 (1993); *Health Dept. v. Rehsler*, 235 *N.J. Super.* 262, 266-67 (Law Div. 1989).

O. "Special Needs" searches

In limited circumstances, where the privacy interests implicated by a search are minimal and where an important governmental interest furthered by the intrusion would be placed in jeopardy by the requirement of individualized suspicion, a search may be conducted in the absence of a warrant and individual suspicion.

Using this theory, the courts have upheld drug testing of school athletes, Vernonia School District 475 v. Acton, 515 U.S. 646, 653, 115 S. Ct. 2386, 2391, 132 L. Ed. 2d 564 (1995); drug testing of railway employees, Skinner v. Railway Labor Executives Assn, 489 U.S. 602, 624, 109 S.Ct. 1402, 1417, 103 L.Ed.2d 685 (1989); the search of a probationer's home based on less than probable cause, Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987); the search of an employee's office on less than probable cause when the reason for the search is for work-related, non-investigatory purpose or to conduct an investigation regarding work-related misconduct O'Connor v. Ortega, 480 U.S. 709, 723-25, 107 S.Ct. 1492, 1500-01, 94 L.Ed.2d 714 (1987); a search in a school context if reasonable under all the circumstances, New Jersey v. T.L.O., 469 U.S. 325, 340-41, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1985); Desilets v. Clearview Regional Bd. of Educ., 265 N.J. Super. 370 (App. Div. 1993) (upholding public school policy which subjected to a search for alcohol and drugs all hand luggage carried by students prior to a field trip); HIV and AIDS testing of accused and convicted sex offenders, *State in the Interest of J.G.*, 151 *N.J.* 565, 577 (1997) and drug testing of police officers, *New Jersey Transit PBA Local 304 v. New Jersey Transit Corp.*, 151 *N.J.* 531, 558-65 (1997). *But see Ferguson v. City of Charleston*, _____ *U.S.* ____ (2001) (no special need demonstrated for testing of urine of pregnant women for cocaine in view of policy's law enforcement purpose); *Chandler v. Miller*, 520 *U.S.* 305, 313-14, 117 *S.Ct.* 1295, 137 *L.Ed.*2d 513 (1997) (no special need demonstrated which would authorize drug test of candidates).

The testing of an accused or convicted juvenile or adult sex offender for the HIV virus or AIDS, pursuant to *N.J.S.A.* 2A:4A-43.1 and *N.J.S.A.* 2C:43-2.2, is permissible under the special needs test if the State demonstrates probable cause to believe there has been possible transfer of bodily fluids. *State in the Interest of J.G.*, 151 *N.J.* at 590. However, the test results may not be admitted into evidence at a criminal trial. *Id.* at 579.

P. Searches involving regulated industries

In closely regulated industries where privacy interests are weakened and the governmental interest in regulating the business is heightened, a warrantless inspection of the premises is constitutional where there is a substantial governmental interest informing the regulatory scheme, the warrantless inspection is necessary to further the regulatory scheme and the inspection scheme, in terms of regulation and certainly of application, provides a substitute for a warrant by advising the owner that the search is being made pursuant to statute and by limiting the discretion of the officers conducting the inspection. *New York v. Burger*, 482 *U.S.* 691, 702-03, 107 *S.Ct.* 2636, 2644, 96 *L.Ed.*2d 601 (1987).

Q. Corrections context

The Fourth Amendment proscription against unreasonable searches does not apply to searches of a cell by prison guards. Privacy rights for convicted prisoners "cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Hudson v. Palmer*, 468 *U.S.* 517, 526, 104 *S.Ct.* 3194, 82 *L.Ed.*2d 393 (1984). The Court based its decision upon the fact that weapons, drugs and other contraband present a danger to order in the prison environment and therefore, the prisoner's expectation of privacy would yield to the paramount interest of prison security. *Id.* at 528, 104 *S.Ct.* at 3201, 82 *L.Ed.*2d 393.

A pretrial detainee has Fourth Amendment protection against unlawful searches conducted to uncover incriminating evidence and not for institutional security concerns. *State v. Jackson*, 321 *N.J. Super*. 365, 379-80 (Law Div. 1999).

N.J.S.A. 2A:161-1b, which permits a strip search when the police have probable cause and an exception to the warrant requirement exists, is not satisfied merely by an arrest. The police must point to an exception to the warrant requirement which comes into play after the arrest. *State v. Hayes*, 327 *N.J. Super*. 373, 378 (App. Div. 2000).

R. Consequences of illegal search or seizure

When there has been an illegal search or seizure, the remedy is to suppress at the trial any evidence which may have been seized as a consequence. The illegal action does not thereby taint the entire prosecution. United States v. Crews, 445 U.S. 463, 477, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537 (1980) (illegal arrest did not taint in court identification of defendant by witness); United States v. Calandra, 414 U.S. 338, 351, 94 S.Ct. 613, 621, 38 L.Ed.2d 561 (1974) (exclusionary rule inapplicable to grand jury proceedings); State v. Mulcahy, 107 N.J. 467, 482 (1987); State v. Egles, 308 N.J. Super. 124, 131 (App. Div. 1998); State v. Battle, 256 N.J. Super. 268, 276-78 (App. Div. 1992), cert. denied, 130 N.J. 393 (1992) (testimony about the reason for a defendant's stop may be introduced into evidence even if the tangible evidence suppressed because of an illegal search); State v. Casimono, 250 N.J. Super. 173, 183-85 (App. Div. 1991), certif. denied, 127 N.J. 558 (1992), cert. denied, 504 U.S. 924 (1992) (illegal search or detention does not bar a conviction for assault, escape or other unlawful act committed by the illegally detained person); State v. Hyman, 236 N.J. Super. 298, 301 (App. Div. 1989) (illegal arrest does not thereby invalidate defendant's conviction for violation of probation).

S. Civil liability for improper conduct

A cause of action may be brought by persons who have been deprived of their federal or constitutional rights by persons acting under color of state law. *Gomez v. Toledo*, 446 *U.S.* 635, 640, 100 *S.Ct.* 1920, 1923, 64 *L.Ed.*2d 572 (1980). As such, police may be sued for violations of civil rights if they act improperly. *McKinney v. East Orange*, 284 *N.J. Super* 639 (App. Div. 1995), *certif. denied*, 143 *N.J.* 519 (1996). Nonetheless, if the police reasonably believed that probable cause existed at the time of their actions, they are entitled to the defense of qualified immunity which precludes liability under both 42 *U.S.C.* § 1983 and the

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Tort Claims Act, N.J.S.A. 59:3-3. Wildoner v. Borough of Ramsey, 162 N.J. 375, 386-87 (2000).

IV. PROCEDURES REGARDING USE OF THE EVIDENCE

A. The Motion to Suppress

An individual aggrieved by a search or seizure and having reasonable grounds to believe that the evidence obtained may be used against him or her in a criminal setting must move before the trial court to suppress the physical evidence seized. *N.J. Ct. R.* 3:5-7(a). When the search is by warrant, the defendant must file a brief stating the facts and arguments in support of the motion to suppress. The State must file a responsive brief within 10 days. When the search was conducted without a warrant, the State must file a brief within 15 days of defendant's motion including a statement of the facts "as it alleges them to be." *N.J. Ct. R.* 3:5-7(b).

If there are codefendants who have filed motions to suppress, the trial court must hold a single hearing to determine the validity of the search unless there is good cause for separate hearings. N.J. Ct. R. 3:5-7(c). An evidentiary hearing may be held if material facts are in dispute. State v. Kadonsky, 288 N.J. Super. 41 (App. Div. 1996), certif. denied, 144 N.J. 589 (1996). A defendant has the constitutional right to be present at a hearing on the motion to suppress. While a defendant may waive his or her right to be present, the waiver must be a knowing and voluntary one, evidenced either by defendant's express written or oral waiver placed on the record or by defendant's failure to appear after having received actual notice in court of the date of the hearing. State v. Robertson, 333 N.J. Super. 499, 509-10 (App. Div. 2000). The notice can be given at the arraignment/status conference where dates for hearings on motions are set. Id. at 510 n.2; R. 3:9-1(c).

B. Standing

An "aggrieved person" who may file a motion to suppress evidence is one who has a possessory, proprietary or participatory interest in the seized evidence. *State v. Alston,* 88 *N.J.* 211 (1981). A participatory interest in seized property refers to the relationship of the evidence to the underlying criminal activity and the defendant's role in the generation and use of the evidence. *State v. Mollica,* 114 *N.J.* 329, 339 (1989). While a defendant may have standing to file the motion to suppress, he or she also must demonstrate that his or her constitutional rights were personally violated. *State v. Bohuk,* 269 *N.J. Super.* 581, 595 (App. Div. 1994), certif. denied, 136 N.J. 29 (1994), cert. denied, 513 U.S. 865 (1994) (defendant had no constitutional right to privacy in the contents of a stolen car); State v. Arias, 282 N.J. Super. 269, 281 (Law Div. 1992) (no Fourth Amendment rights of defendant violated when police seized items he left in house which he burglarized). But see, State v. De La Paz, _____ N.J. Super. _____ (App. Div. 2001) (New Jersey's automatic standing rule provides defendant substantive privacy rights under state constitution regardless of defendant's actual privacy interest in dwelling where search occurred).

C. Choice of Law

When incriminating evidence is seized by federal agents acting lawfully and then turned over to state officials, the evidence may be admitted in New Jersey courts even if the search does not meet the requirements of New Jersey caselaw. That is because to suppress the evidence would not deter police misconduct or imperil the judicial integrity of New Jersey courts. State v. Mollica, 114 N.J. at 354-55; State v. Curry, 109 N.J. 1, 14 (1987) (evidence that may have been illegally seized by Illinois police still may be admitted into evidence in New Jersey trial where State learned of evidence from untainted source). However, where the relationship between the federal government and state officials is such to implication concerns which prompted the State's more restrictive laws, such as wiretap laws, then evidence seized by the federal government and turned over to the State may be suppressed. State v. Minter, 116 N.J. 269, 283 (1989).

D. Technical Violations

No search or seizure made with a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it or in its execution. *N.J. Ct. R.* 3:5-7(g). Execution of a warrant 30 minutes before it was authorized was a technical violation that did not violate defendant's rights and did not require suppression of the evidence. *State v. Bickham*, 285 *N.J. Super.* 365, 367 (App. Div. 1995). A police officer who conducted an investigation outside the territorial boundary of his or her jurisdiction may have been in technical violation of statute (*N.J.S.A.* 40A:14-152) but that would not justify suppression of evidence seized from the defendant because no constitutional right of defendant was violated. *State v. Whit*e, 305 *N.J. Super.* 322, 327, 332 (App. Div. 1997).

I. GENERALLY

Chapter Three of the Penal Code addresses the general principles of justification, including self-defense. Self-defense encompasses the use of force in self-protection, *N.J.S.A.* 2C:3-4; use of force for the protection of other persons, *N.J.S.A.* 2C:3-5; and use of force for the protection in defense of premises of personal property, *N.J.S.A.* 2C:3-6.

II. BURDEN OF PROOF

A claim of justification is an affirmative defense. *N.J.S.A.* 2C:3-1. Defendant has the burden of producing evidence to raise the issue of self-defense. Once such evidence is presented, even if it is in the State's case, the State must disprove the defense beyond a reasonable doubt. Acquittal is required if there remains a reasonable doubt whether defendant acted in self-defense. *See, e.g., State v. Kelly*, 97 *N.J.* 178 (1984); *State v. Gardner*, 51 *N.J.* 444 (1968); *State v. Fair*, 45 *N.J.* 77 (1965); *State v. Abbott*, 36 *N.J.* 63 (1961); *State v. Branch*, 301 *N.J. Super.* 307 (App. Div. 1997), *rev'd in part on other grounds*, 155 *N.J.* 317 (1998); *State v. Burks*, 208 *N.J. Super.* 480 (App. Div. 1986); *State v. Brown*, 131 *N.J. Super.* 228 (App. Div. 1974), *aff'd o.b.*, 66 *N.J.* 146 (1974).

III. USE OF FORCE IN SELF-PROTECTION

A. Generally

The use of non-deadly force upon or towards another person is justifiable when defendant reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. *N.J.S.A.* 2C:3-4a.

The use of deadly force is only justifiable when defendant reasonably believes that such force is necessary to protect himself against death or serious bodily harm. *N.J.S.A.* 2C:3-4b(2). Deadly force is defined as force used with the purpose of causing or creating a substantial risk of death or serious bodily harm. Discharging a firearm will constitute deadly force, but pointing a firearm will not. *N.J.S.A.* 2C:3-11b; *see State v. Moore*, 158 *N.J.* 292 (1999); *State v. Harmon*, 203 *N.J. Super.* 216 (App. Div. 1985), *rev'd on other grounds*, 104 *N.J.* 189 (1986).

B. Honest and Reasonable Belief

Defendant's belief in the necessity of force must not only be held honestly, but also be reasonable. State v. Moore, 158 N.J. 292 (1999); State v. Gartland, 149 N.J. 456 (1997); State v. Bowens, 108 N.J. 622 (1987); State v. Kelly, 97 N.J. 178 (1984); State v. Aguiar, 322 N.J. Super. 175 (App. Div. 1999); State v. Hines, 303 N.J. Super. 311 (App. Div. 1997); State v. Bryant, 288 N.J. Super. 27 (App. Div.), certif. denied, 144 N.J. 589 (1996); State v. Rivers, 252 N.J. Super. 142 (App. Div. 1991); State v. Burks, 208 N.J. Super. 595 (App. Div. 1986). What is a reasonable belief is measured by an objective standard, not what defendant believed reasonable. Moore, supra; Kelly, supra; State v. Bess, 53 N.J. 10 (1968); Bryant, supra; State v. Johnston, 257 N.J. Super. 178 (App. Div. 1992). The jury must judge the reasonableness of the belief in light of all of the circumstances known to defendant at the time of the action. Bess, supra; Aguiar, supra; Bryant, supra.

Actual shooting is not required to establish defendant's honest and reasonable belief in the need for use of deadly force. A party brandishing a firearm and otherwise threatening defendant could establish such reasonable belief. *Burks, supra.* However, an armed defendant could not have such belief if another unarmed person attempts to seize the gun but does not gain control of it. *Moore, supra.* And, a defendant who brandishes his gun first could not have such belief if the victim then responds by putting his hand in his pocket to feign possession of a gun. *Rivers, supra.* Additionally, defendant's alleged skill with deadly weapons is not admissible because of its irrelevance to a belief in the need for force. *State v. Coyle,* 119 *N.J.* 194 (1990).

The victim's character trait of aggressiveness is admissible as to the reasonableness of defendant's belief only if defendant had prior knowledge of it. Gartland, supra. However, even without such prior knowledge, this trait may be admissible to corroborate the circumstances that defendant's claims called for self-defense. Aguiar, supra; see State v. Convers, 58 N.J. 123 (1971); see also, N.J.R.E. 404(a)(2) (permitting admission of evidence of a pertinent character trait of victim). Additionally, a defendant charged with murder and asserting a claim of self-defense is entitled to discovery from the State of a criminal case history of the victim relating to charges involving violence, aggressiveness, or offenses against persons. State v. Carter, 278 N.J. Super. 629 (Law Div. 1994).

Expert testimony regarding psychological disabilities or lack of intelligence is not admissible as to the reasonableness of defendant's belief. *Bess, supra, State v. Sikora,* 44 *N.J.* 453 (1965). However, expert testimony about "battered-woman's syndrome" and post-traumatic stress disorder is admissible on the issues of honesty and reasonableness of defendant's belief. *Kelly, supra, Hines, supra.*

C. Imminence

Defendant must believe that the use of force is immediately necessary on the present occasion. Even a defendant who has armed himself in advance of a confrontation with another may be justified in the use of force if, in the actual confrontation, that use becomes immediately necessary. *State v. Harmon*, 104 *N.J.* 189 (1986); *State v. Lopez*, 213 *N.J. Super.* 324 (App. Div. 1985). However, most conspiracy cases to commit murder or attempted murder will generally involve planning and other actions which can not be considered an immediate response to an immediate threat. *State v. Buonadonna*, 122 *N.J.* 22 (1991).

D. Actual Necessity

It is not imperative that actual necessity exist in order to act in self-defense. Defendant's belief may be mistaken. *State v. Kelly*, 97 *N.J.* 178 (1984); *State v. Aguiar*, 322 *N.J. Super.* 175 (App. Div. 1999); *State v. Bryant*, 288 *N.J. Super.* 27 (App. Div.), *certif. denied*, 144 *N.J.* 589 (1996); *State v. Johnston*, 257 *N.J. Super.* 178 (App. Div. 1992); *State v. Rivers*, 252 *N.J. Super.* 142 (App. Div. 1991); *State v. Burks*, 208 *N.J. Super.* 595 (App. Div. 1986).

E. Unlawfulness of Force by Aggressor

Unlawful force is defined as force which is employed without the consent of the person to whom it is directed and constitutes an offense or actionable tort. *N.J.S.A.* 2C:3-11a.

F. Use of Force by Defendant

A person may not use more force than that which he reasonably believes is necessary to repel the attack. It need not be proportionate to the force used against defendant. *State v. Kelly*, 97 *N.J.* 178 (1984); *State v. Fair*, 45 *N.J.* 77 (1965); *State v. Bryant*, 288 *N.J. Super.* 27 (App. Div.), *certif. denied*, 144 *N.J.* 589 (1996).

The use of force or deadly force against an intruder, who is unlawfully in a dwelling, is only justifiable where a homeowner or his guest reasonably believes it is immediately necessary to protect himself or others against the use of unlawful or deadly force by the intruder. *N.J.S.A.* 2C:3-4c(1).

A reasonable belief in this particular circumstance is statutorily defined as existing where: the person was lawfully in the dwelling; the encounter with the intruder was sudden and unexpected, requiring immediate action; and (1) the person reasonably believed that the intruder would inflict injury upon himself or others, or (2) demanded that the intruder disarm, surrender, or withdraw and the intruder refused to do so. *N.J.S.A.* 2C:3-4c(2). Also, the person is not required to retreat or withdraw. *N.J.S.A.* 2C:3-4c(3).

"Dwelling" is statutorily defined as any building or structure which is the actor's home or place of lodging (unless applied to the separate provision for defense of premises under *N.J.S.A.* 2C:3-7, in which case it does not to be the home or place of lodging). *N.J.S.A.* 2C:3-11. This includes not only the house itself, but also the doorway, threshold, and a porch or similar appurtenance. *State v. Bilek*, 308 *N.J. Super.* 1 (App. Div. 1998); *State v. Martinez*, 229 *N.J. Super.* 604 (App. Div. 1989).

H. Statutory Exceptions to Justification of Self-Defense (Resisting Arrest and Resisting Occupier or Possessor of Property)

The use of force is not justifiable to resist arrest, even where such arrest is unlawful. *N.J.S.A.* 2C:3-4b(1)(a); *see State v. Mulvihill*, 57 *N.J.* 151 (1970); *State v. Doss*, 310 *N.J. Super.* 450 (App. Div.), *certif. denied*, 155 *N.J.* 589 (1998); *State v. Battle*, 256 *N.J. Super.* 268 (App. Div. 1992), *certif. denied*, 130 *N.J.* 393 (1992); *State v. Casimono*, 250 *N.J. Super.* 173 (App. Div. 1991), *certif. denied*, 127 *N.J.* 558 (1992). However, a person may resist excessive force used by the arresting officer. *Mulvihill*, *supra*, *Doss, supra*.

Also, the use of force is not justifiable to resist force used by the occupier or possessor of property acting under a claim of right to protect that property. *N.J.S.A.* 2C:3-4b(1). Exceptions to this rule are when a public officer or his assistant are making a lawful arrest, where defendant is reentering property of which he has been dispossessed, or where necessary to protect against death or serious bodily harm. *N.J.S.A.* 2C:3-4b(1)(b). I. Statutory Exceptions to Use of Deadly Force (Provocation and Retreat)

The use of deadly force is not justifiable if defendant, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter. *N.J.S.A.* 2C:3-4b(2)(a); *State v. Moore*, 158 *N.J.* 292 (1999); *State v. Bryant*, 288 *N.J. Super.* 27 (App. Div.), *certif. denied*, 144 *N.J.* 589 (1996); *State v. Rivers*, 252 *N.J. Super.* 142 (App. Div. 1991); *State v. Provoid*, 110 *N.J. Super.* 547 (App. Div. 1970).

Also, the use of deadly force is not justifiable if defendant knows he can avoid using deadly force with complete safety by retreating, surrendering possession of a thing to a person asserting a claim right thereto, or by complying with a demand that he abstain from any action which he has no duty to take. N.J.S.A. 2C:3-4b(2)(b); Moore, supra, Bryant, supra. This duty to retreat only applies to use of deadly force; moderate force may always be used without retreating. N.J.S.A. 2C:3-4b(3); State v. Abbott, 36 N.J. 63 (1961). As a result, defendant does not have a duty to retreat where he only brandishes or points a firearm because this does not constitute use of deadly force. Moore, supra, State v. Harmon, 203 N.J. Super. 216 (App. Div. 1985), rev'd on other grounds, 104 N.J. 189 (1986); see *N.J.S.A.* 2C:3-11b. If defendant ultimately discharges the firearm, the situation changes because deadly force has been used and the duty to retreat becomes retroactively operative. Moore, supra. Also, there is no duty to retreat unless one "knows" that he can do so safely. State v. Gartland, 149 N.J. 456 (1997); Abbott, supra.

There are exceptions to this duty to retreat. First, defendant is not required to retreat from his dwelling, unless he was the initial aggressor. *N.J.S.A.* 2C:3-4b(2)(b)(i). A person may stand at the threshold of his home and prevent an assailant from entering by any means. *State v. Martinez*, 229 *N.J. Super.* 593 (App. Div. 1989). Importantly, this portion of the statute was legislatively amended in 1999 to remove the exception requiring retreat from a cohabitant assailant.

Second, a police officer or his assistant is not required to retreat when using deadly force in the performance of his duties, making an arrest, or preventing an escape. *N.J.S.A.* 2C:3-4b(2)(b)(ii); *see N.J.S.A.* 2C:3-7 (governing justifiable use of force in law enforcement).

J. Imperfect Self-Defense

The common law doctrine of imperfect self-defense arises when a defendant used deadly force under an honest

but unreasonable belief that the force was necessary to defend himself, reducing the charge of murder to manslaughter. State v. Powell, 84 N.J. 305 (1980) (precode). Although the criminal code does not provide an independent category of justification of imperfect selfdefense automatically reducing the charge to manslaughter, evidence which would sustain this defense at common law will frequently be relevant to the presence or absence of the essential elements of code offenses. State v. Coyle, 119 N.J. 194 (1990); State v. Bowens, 108 N.J. 622 (1987). Accordingly, the facts constituting imperfect self-defense may be relevant to whether defendant had a specific intent of purpose or knowledge required as an element of the offense. State v. Pridgen, 245 N.J. Super. 239 (App. Div.), certif. denied, 126 N.J. 327 (1991). However, such facts will not be relevant to whether defendant was reckless. State v. Colon, 298 N.J. Super. 569 (App. Div.), certif. denied, 150 N.J. 27 (1997) (will not reduce manslaughter charge); Pridgen, supra (will not reduce reckless assault).

IV. USE OF FORCE FOR THE PROTECTION OF OTHERS

A. Generally

The use of force upon or towards another person to protect a third person is justifiable if the intervenor would be justified in defending himself against the injury threatened to the third person, the third person would be justified in defending himself under the circumstances as the intervenor reasonably believes them to be, and the intervenor reasonably believes that intervention is necessary. *N.J.S.A.* 2C:3-5.

B. Reasonable Belief

The intervenor is judged only on his own reasonable belief, not by facts that may be known by others, including the third person whom he is assisting. State v. Fair, 45 N.J. 77 (1965); State v. Holmes, 208 N.J. Super. 480 (App. Div. 1986); State v. Moore, 178 N.J. Super. 417 (App. Div.), certif. denied, 87 N.J. 406 (1981). Accordingly, defendant may be justified in using force to defend a third person whom defendant reasonably believes to be a victim of an attack, even if that person turns out to be the aggressor. State v. Bryant, 288 N.J. Super. 27 (App. Div.), certif. denied, 144 N.J. 589 (1996). The facts must justify a reasonable belief that the person defended is actually in danger. State v. Martinez, 229 N.J. Super. 593 (App. Div. 1989) (defendant's belief not reasonable where the person allegedly defended was inside the house and appeared to be unconnected to the fight taking place outside); State v. Wishnatsky, 258 N.J. Super. 67 (Law Div. 1990)

(defendant's belief not reasonable where attempting to prevent abortions from being performed in clinic).

C. Retreat

The retreat rule applies if the intervenor can thereby secure the complete safety of the third person, and the intervenor is obliged to try and cause the third party to retreat except in his own dwelling. *N.J.S.A.* 2C:3-5b; *Holmes, supra.*

V. USE OF FORCE IN DEFENSE OF PREMISES OR PERSONAL PROPERTY

The use of force upon or toward another person is justifiable when the actor is in possession or control of the premises or is licenses or privileged to be thereon and he reasonably believes such force to be necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of a criminal trespass by such other person in or upon the premises. *N.J.S.A.* 2C:3-6a.

Use of force upon or toward another person is justifiable when the actor reasonably believes it necessary to prevent what he reasonably believes to be an attempt to commit theft, criminal mischief, or other criminal interference with personal property in his possession or in the possession of another for whose protection he acts. *N.J.S.A.* 2C:3-6c.

Use of deadly force is only for defense of premises, not property. *N.J.S.A.* 2C:3-6b(3); 2C:3-6d(2). Deadly force may be used against any person attempting to commit or committing any kind of criminal theft or property destruction where defendant reasonably believes that the use of force less than deadly force would expose him to "bodily harm." *N.J.S.A.* 2C:3-6b(3); *see N.J.S.A.* 2C:3-11e (defining "bodily harm" as physical pain, temporary disfigurement, or impairment of physical condition). Importantly, there is a rebuttable presumption that a person within the dwelling had a reasonable belief in the existence of such danger, obviating the need to come forward with any evidence on this issue and requiring the State to overcome the presumption with proof beyond a reasonable doubt. *N.J.S.A.* 2C:3-6b(3)(c).

A. Requirement to Provide Notice

A defendant must serve written notice on the prosecutor if he intends to rely on justification of self-defense. Specifically, defendant must serve a notice of intention to claim this justification no later than seven days before the arraignment/status conference. If defendant has requested or received discovery, he must provide discovery pertaining to such claim with the notice. The prosecutor must provide discovery pertaining to such claim within fourteen days of receipt of the notice. *R.* 3:12-1.

B. Failure to Provide Notice

If either defendant or the prosecutor fails to comply with the notice requirements, the court may preclude witnesses, grant an adjournment or continuance of trial, or take such action as the interest of justice requires. *R.* 3:12-1.

VII. JURY INSTRUCTIONS

A. Generally

Self-defense should be charged to the jury if there is sufficient evidence to support it in either the defense's or the State's cases. *State v. Moore*, 158 *N.J.* 292 (1999); *State v. Blanks*, 313 *N.J. Super.* 55 (App. Div. 1998); *State v. Bryant*, 288 *N.J. Super.* 27 (App. Div.), *certif. denied*, 144 *N.J.* 589 (1996); *State v. Rivers*, 252 *N.J. Super.* 142 (App. Div. 1991). It is not dependent on defendant's claims and may even be required to be charged over defendant's objection. *State v. Johnston*, 257 *N.J. Super.* 178 (App. Div. 1992), *certif. denied*, 130 *N.J.* 596 (1992); *see State v. Vasquez*, 265 *N.J. Super.* 528 (App. Div.), *certif. denied*, 134 *N.J.* 480 (1993).

B. Specific Jury Instructions

A general self-defense charge may be confusing when *N.J.S.A.* 2C:4-3c (use of force against intruders) is applicable to the particular facts. This section permits a lesser threat to justify the use of force and does not require proportionality of force to the threat. As a result, a specific jury instruction should be given for this section. Such instruction should also include an explanation regarding the scope of a "dwelling" and a definition of "personal injury" consistent with the related concept of "bodily harm." *State v. Bilek*, 308 *N.J. Super.* 1 (App. Div. 1998); *see N.J.S.A.* 2C:3-11e (defining "bodily harm" as physical

pain, temporary disfigurement, or impairment of physical condition).

VIII. RELATIONSHIP TO OTHER DEFENSES

Accident and self-defense are not necessarily inconsistent defenses. *State v. Moore*, 158 *N.J.* 292 (1999); *State v. Giberson*, 153 *N.J. Super.* 241 (App. Div. 1977). Insanity/ diminished capacity are similarly not necessarily inconsistent defenses. *State v. Johnston*, 257 *N.J. Super.* 178 (App. Div. 1992), *certif. denied*, 130 *N.J.* 596 (1992).

IX. RELATIONSHIP TO WEAPONS OF-FENSES

Where a defendant arms himself in advance of a confrontation, a claim of self-defense is not applicable to the various possessory weapons offenses, such as *N.J.S.A.* 2C:39-3 and 2C:39-5. Such a claim is only available against such weapons offense in the rare and momentary circumstances where defendant arms himself spontaneously to meet an immediate danger. *State v. Kelly*, 118 *N.J.* 370 (1990); *State v. Harmon*, 104 *N.J.* 189 (1986).

SELF-INCRIMINATION

(See also, COURTS, SIXTH AMENDMENT, JUVENILES, IMMUNITY, AND EVIDENCE, this Digest)

I. CONSTITUTIONAL LIMITATIONS ON INTERROGATIONS

The Due Process Clause of the Fourteenth Amendment and the Fifth and Sixth Amendments of the United States Constitution have been construed to impose strictures on the manner in which law enforcement officials conduct the interview of suspects during the investigatory phase of the criminal process. However, it is the Fifth Amendment, which guarantees that "no person shall be compelled in any criminal case to be witness against himself ..." and its New Jersey counterpart, which remains the touchstone for constitutional analysis of interrogations.

A. Miranda Generally

Prior to the watershed *Miranda* decision, the admissibility of a confession was determined exclusively under the fact-sensitive "totality of circumstances" test to ascertain whether the challenged police conduct deprived the defendant of his "power of resistence" in violation of due process under the Fourteen Amendment. *See Brown v. Mississippi,* 297 *U.S.* 276 (1936). To be certain, the voluntariness of a confession remains a necessary precondition to the admissibility of statements obtained through custodial questioning by law enforcement officers.

However, in Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court supplanted the foregoing test as the principal constitutional basis governing the admissibility of confessions. Specifically, in Miranda the Court extended the right against compelled selfincrimination to encompass all custodial police interrogations, a practice it perceived as presumptively coercive. To dispel the inherently coercive atmosphere of a custodial interrogation and thereby protect the suspect's Fifth Amendment rights, the Court enunciated specific procedural safeguards which must be scrupulously adhered to at all stages of a custodial interrogation. Of greatest significance, a defendant must be warned prior to any questioning of the following: 1) that he has the right to remain silent; 2) that anything he says can be used against him in a court of law; 3) that he has the right to the presence of an attorney; and 4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

The failure to inform a criminal suspect of these warnings gives rise to an irrebutable presumption that the subsequent confession was involuntary, rendering it inadmissible as substantive evidence of guilt. Conversely, a statement will be deemed admissible only after the prosecution has demonstrated a knowing, voluntary, and intelligent waiver of these rights.

The opinion explains further that if, at any stage of the interrogation, the suspect indicates that he wishes to speak with a lawyer, all questioning must cease. Even if the suspect has answered some questions or volunteered a statement, he may refuse to answer further questions until he sees an attorney and therefore consents to be questioned.

In *Dickerson v. United States*, 530 *U.S.* 428, 120 *S.Ct.* 2326, 147 *L.Ed.*2d 405 (2000), the United States Supreme Court reaffirmed the constitutional vitality of its decision in *Miranda*. Specifically, the Court held that *Miranda*, being a constitutional decision, could not be effectively overruled by an Act of Congress. It further held that the principle of *stare decisis* militated heavily against overruling *Miranda*, which, the Court observed, "has become embedded in routine police practice to the point where the warnings have become part of our natural culture."

Although the *Miranda* opinion refers to custodial interrogations conducted exclusively by "law enforcement officers," that term has since been broadly interpreted to include caseworkers with the New Jersey Division of Youth and Family Services, *State v. P.Z.*, 152 *N.J.* 86 (1997); *State v. Helewa*, 223 *N.J. Super.* 40 (App, Div. 1988), Internal Revenue Service agents, *Mathis v. United States*, 391 *U.S.* 1 (1968), and court-appointed psychiatrists, *Estelle v. Smith*, 451 U.S. 454 (1981). However, in *State v. Biancamano*, 284 *N.J. Super.* 654 (App. Div. 1995), *certif. denied*, 143 *N.J.* 516 (1996). the Appellate Division rejected the assertion that a high school vice-principal was acting in the capacity of a law enforcement officer when questioning a student about drugs allegedly sold by him.

Lastly, the United States Supreme Court in *Berkemer v. McCarty*, 468 *U.S.* 420 (1984), decisively rejected the existence of a "minor crimes" exception to the *Miranda* requirement. The holding was premised on the Court's view that to grant an exemption from *Miranda* for minor crimes would substantially undermine the clarity of the *Miranda* rule.

B. When Is a Defendant in Custody?

The requirements of *Miranda* are only triggered when the suspect is subject to custodial questioning, defined by the United States Supreme Court in that opinion as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *See also State v. Timmendequas*, 161 *N.J.* 515 (1999); *State v. P.Z.*, 152 *N.J.* 86 (1997) ("The predicate requirements of *Miranda* are that the defendant must be in custody and the interrogation must be carried out by law enforcement").

Whether a suspect is or is not in custody at a particular moment is to be determined by an objective "reasonable suspect" test," *i.e.*, whether a reasonable person in the suspect's position would believe he was (or was not) in custody at that moment. Consequently, "[a]n officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody . . . [A]n officer's view's concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." Stansbury v. California, 511 U.S. 318 (1994); accord California v. Beheler, 463 U.S. 1121 (1983) (holding that under federal law, the "ultimate test for determining custody is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest").

Similarly, our Supreme Court has determined the "critical determinant of custody" is whether there has been a significant deprivation of the suspect's freedom of actions based on objective circumstances. Those circumstances include: the time and place of the interrogation, the status of the interrogator, the status of the suspect, and other such facts. *State v. P.Z.; see also State v. Timmendequas.*

Clearly, a suspect must be afforded his or her *Miranda* warnings prior to questioning if he has been arrested. However, mere presence at a police station is not conclusive in determining whether a suspect is in custody for purposes of Miranda. A suspect who voluntarily comes to the police station in response to a police request is normally not in custody and is therefore not entitled to *Miranda* warnings prior to questioning. *See California v. Beheler*, 462 *U.S.* 1121 (1983); *Oregon v. Mathiason*, 429

U.S. 492 (1977); see also State v. Marshall (III), 148 N.J. 89 (1997), cert. denied, 522 U.S. 850 (1997); State v. McLaughlin, 310 N.J. Super. 242 (App. Div.), certif. denied, 156 N.J. 381 (1998); State v. Lacaillade, 266 N.J. Super 522 (App. Div. 1993); State v. Coburn, 221 N.J. Super. 566 (App. Div. 1987), certif. denied, 110 N.J. 300 (1988); State v. Prudden, 212 N.J. Super. 608 (App. Div. 1986); State v. Lutz, 165 N.J. Super. 278 (App. Div. 1979); but see State v. Pearson, 318 N.J. Super. 123 (App. Div. 1999) (Miranda violation found where homicide suspect was taken to prosecutor's office for lengthy questioning, was not told she was free to leave, and was placed under arrest immediately following interview); State v. Micheliche, 220 N.J. Super. 532 (App. Div.), certif. denied, 109 N.J. 40 (1987); State v. Godfrey, 131 N.J. Super. 168 (App. Div. 1974), aff'd o.b. 67 N.J. 267 (1975).

When a suspect is questioned outside the coercive atmosphere of a police station, it is, of course, less likely that he or she will be found to have been in custody, thereby triggering the necessity of Miranda warnings. See e.g., Beckwith v. United States, 425 U.S. 341 (1976); State v. Timmendequas, 161 N.J. 515 (1999); State v. Graves, 60 N.J. 441 (1972); State v. Keating, 277 N.J. Super. 141 (App. Nonetheless, based on the particular Div. 1994). circumstances of a police encounter, a person may indeed be in custody when questioned at his or her residence or at a location other than a police station. See Orozco v. Texas, 394 U.S. 324 (1969) (holding that suspect was in custody when four officers entered his bedroom at 4:00 a.m. and questioned him at gunpoint); see also State v. O'Loughlin, 270 N.J. Super. 472 (App. Div. 1994); State v. Hall, 253 N.J. Super. 84 (Law Div. 1990), aff'd o.b. 253 N.J. Super. 32 (App. Div. 1991).

Similarly, a motorist is not in custody if he or she is subjected to roadside questioning during a routine traffic stop. Traffic stops are brief, occur in public, and usually involve only one or two officers. Consequently, the motorist does not feel "completely at the mercy of the police." Berkemer v. McCarty, 468 U.S. 420 (1984). The holding of *Berkemer* has been interpreted by New Jersey courts to mean that the police may conduct general on-thescene questioning of a suspect, as permitted by Terry v. Ohio, without providing Miranda warnings. State v. Hickman, 335 N.J. Super. 623 (App. Div. 2000); State v. Toro, 229 N.J. Super. 215 (App. Div. 1988), certif. denied, 118 N.J. 216 (1989); see also State v. Nemesh, 228 N.J. Super. 597 (App. Div. 1988), certif. denied, 114 N.J. 473 (1989); State v. Pierson, 223 N.J. Super. 62 (App. Div. 1988) (holding that Miranda is not implicated when the detention and questioning are part of an investigatory procedure rather than a custodial interrogation).

If an incarcerated defendant converses with an undercover agent or government informant without knowing he or she is speaking to a law enforcement agent, no custodial interrogation has occurred. Under these circumstances, the coercive "police-dominated atmosphere" underlying the necessity of Miranda warnings is simply absent. Illinois v. Perkins, 496 U.S. 292 (1990). Indeed, if an incarcerated defendant is directly questioned by law enforcement officers in a setting or atmosphere far removed from the coercive environment of a station house, Miranda warnings need not be given. See e.g., State v. Williams, N.J. 493 (1971) (holding that a incarcerated witness testifying in open and public courtroom in the presence a judicial officer was not in custody for Miranda purposes); see also State v. Malik-Ismail, 292 N.J. Super. 590 (App. Div. 1996) (holding that an incarcerated defendant who agreed to plead guilty and to cooperate against a codefendant was not in custody during post-plea interviews conducted by investigators).

C. What Constitutes Interrogation?

As emphasized by the United States Supreme Court in *Miranda*, volunteered statements are admissible even if the defendant was in custody when the statement was made and no warnings were given. *See State v. Bohuk*, 269 *N.J. Super*. 581 (App. Div.), *certif. denied*, 136 *N.J.* 29, *cert. denied*, 513 *U.S.* 865 (1994); *State v. Mujahid*, 252 *N.J. Super*. 100 (App. Div.), *certif. denied*, 127 *N.J.* 561 (1991); *State v. Marks*, 201 *N.J. Super*. 514 (App. Div. 1985), *certif. denied*, 102 *N.J.* 393 (1986); *State v. Elysee*, 159 *N.J. Super*. 380 (App. Div. 1978).

In *Rhode Island v. Innis*, 446 *U.S.* 291 (1980), the United States Supreme Court defined "interrogation" for purposes of *Miranda* as encompassing both express questioning and its "functional equivalent." The "functional equivalent" of express questioning is "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"

Elaborating on the "functional equivalent" form of "interrogation", the Court in *Innis* held that it "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." In other words, the officer's subjective intent to elicit an incriminating response by his words or actions is not dispositive. Rather, the *Innis*test is primarily objective: should the officer have realized that his acts or words were reasonably likely to result in an incriminating response. Nonetheless, the Court cautioned that "any knowledge the police may have had concerning

the susceptibility of a suspect to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response."

In *Arizona v. Mauro*, 481 *U.S.* 520 (1987), the United States Supreme Court concluded that a defendant who asserted his right to counsel was not subjected to interrogation or its "functional equivolent" when police allowed defendant's wife to speak to him in the presence of another officer who tape recorded their conversation. The police officer asked no questions about the crime, and there was no indication that the police sent defendant's wife in to see him for the purpose of eliciting incriminating statements.

Applying the test enunciated in *Innis*, the Appellate Division concluded that inquiry about a suspect's comfort is not "reasonably likely" to evoke an incriminating response. *State v. Lozado*, 257 *N.J. Super*. 260 (App. Div.), *certif. denied*, 130 *N.J.* 595 (1992). It likewise rejected an assertion that an inquiry made by an arresting officer regarding the whereabouts of a suspect's glasses while effectuating his arrest was intended to elicit incriminating evidence. *State v. Ramos*, *217 N.J. Super*. 530 (App. Div. 1987); *see also State v. M.L.* 253 *N.J. Super*. 13 (App. Div. 1991), *certif. denied*, 127 *N.J.* 560 (1992); *State v. Sanchez*, 224 *N.J. Super*. 231 (App. Div. 1988); *State v. Coburn*, 221 *N.J. Super*. 586 (App. Div. 1987), *certif. denied*, 110 *N.J.* 300 (1988).

Routine ministerial questions asked during the booking of a suspect have not usually been held to require Miranda warnings. Pennsylvania v. Muniz, 496 U.S. 582 (1990) (holding that questions to defendant regarding his name, address, height, weight, etc. did not require Miranda warnings even though video tape of the questions and defendant's answers was introduced at trial to demonstrate defendant's intoxication); State v. Bohuk; State v. Cunningham, 153 N.J. Super. 350 (App. Div. 1977). Although informing a suspect of charges against him during a booking procedure does not amount to interrogation for Miranda purposes, see State v. Mallozzi, 246 N.J. Super. 509 (App. Div.), certif. denied, 126 N.J. 331 (1991), confronting a suspect with incriminating evidence during questioning has been found to constitute the functional equivalent of interrogation. State v. Brown, 282 N.J. Super. 538 (App. Div.), certif. denied, 143 N.J. 322 (1995); see also State v. Hall, 253 N.J. Super. 84 (Law. Div. 1990), aff'd, 253 N.J. Super. 32 (App. Div. 1991); State v. Ward, 240 N.J. Super. 412 (App. Div. 1990).

D. The Public Safety Exception

Recognizing that "public safety must be paramount to adherence to the literal langauge of *Miranda*" the United States Supreme Court in *New York v. Quarles*, 467 *U.S.* 649 (1984), announced a limited "public safety" exception to the requirement that a suspect be advised of his rights prior to custodial interrogation. In *Quarles*, officers arrested a man matching the description of a rapist who was reportedly armed with a handgun. The arresting officer frisked the suspect and discovered that he was wearing a shoulder holster. After handcuffing the suspect, the officer asked him where the gun was. The suspect responded by saying, "The gun is over there." After retrieving the gun, the officer advised the suspect of *Miranda* rights and asked several additional questions regarding the handgun.

Notwithstanding the officer's failure to advise the suspect of his rights before asking where the gun was located, the Court deemed the suspect's answer admissible at his trial, concluding that under the particular circumstances, "overriding considerations of public safety justified the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon." Moreover, the test for determining whether the officer's conduct complies with the exception is objective: where his or her inquiry can reasonably be said to have been prompted by a concern for public safety, then the exception is applicable and the unwarned statement may be subsequently admitted at trial.

The Appellate Division, in *State in the Interest of A.S.*, 227 *N.J. Super.* 541 (App. Div. 1988), addressed the public safety exception and concluded that, based upon facts similar to those addressed in *Quarles*, sufficient exigencies existed to justify the officer's failure to advise the suspect of his *Miranda* warnings before asking where a gun could be found.

E. Adequacy of Miranda Warnings

An officer's failure to adhere to the precise language of the warnings enumerated in the *Miranda* decision does not invariably render a suspect's statement inadmissible. Rather, the warnings given must, viewed in their totality, satisfactorily express the substantive meaning of the *Miranda* rights. *California v. Prystock*, 453 U.S. 355 (1981). In *Duckworth v. Egan*, 492 U.S. 195 (1989), the United States Supreme Court concluded that warnings, which suggested that the suspect was entitled to an attorney only at trial, were nonetheless sufficient when viewed in their totality. Although it is unlikely that the patently flawed warnings under scrutiny in *Duckworth* would pass muster under this State's constitution, the Supreme Court of New Jersey has on one occasion concluded that a deviation from the language of the warning announced in *Miranda* did not warrant suppression of the defendant's statement. *State v. Melvin,* 65 *N.J.* 1 (1974). Although disapproving of the officer's warning to the defendant that anything he said could be used for or against him at trial, the Court declined to find constitutional error based upon its observation that "in resolving the adequacy of the language of a *Miranda* warning a court should given precedence to substance over form." *State v. Melvin,* 65 *N.J.* at 13; *see also State v. Dixon,* 125 *N.J.* 223 (1991).

It is now clear that officers are not constitutionally obligated to inform a suspect of anything beyond the warnings delineated in the Miranda decision. State v. Adams, 127 N.J. 438 (1992) ("The responsibility of lawenforcement authorities to inform defendants of their rights ends with the proper administration of Miranda warnings"). Thus, if a defendant's statement is tape recorded, officers are not required to inform him about the recording. State v. Vandever, 314 N.J. Super. 124 (App. Div. 1998). Nor is it necessary for officers to seeking to question a suspect to inform him of all possible subjects of the proposed interrogation, the fact that he or she is the target of the investigation, or the penalties for the crimes being investigated. See Colorado v. Spring, 479 U.S. 564 (1987); State v. Adams, 127 N.J. 438 (1992) ("A police officer has no duty to probe for a defendant's unstated misconceptions about the effect of the waiver of Fifth Amendment rights); State v. McKnight, 52 N.J. 35 (1968); State v. Hollander, 201 N.J. Super. 453 (App. Div.), certif. denied, 101 N.J. 335 (1985).

F. Waiver

A valid waiver of both the right to remain silent and the right to counsel are unconditional prerequisites to the admissibility of any statement derived from a custodial interrogation. Moreover, it is firmly embedded in the jurisprudence of New Jersey that the prosecution must establish beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary in light of all the circumstances. *State v. Presha*, 163 *N.J.* 304 (2000); *State v. Burris*, 145 *N.J.* 509 (1996); *State v. Kelly*, 61 *N.J.* 283 (1972).

As stated unequivocally by the United States Supreme Court in *Miranda*, "a valid waiver will not presumed from the silence of the accused after warnings are given or simply from the facts that a confession was in fact eventually obtained." Nonetheless, in *North Carolina v. Butler*, 441 *U.S.* 369 (1979), the United States Supreme Court held that "an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case." The Court emphasized that although the burden of proof is on the prosecution to prove that the suspect validly waived his *Miranda* rights, "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."

The courts of this State are in accord with *Butler*. In *State v. Kremens*, 52 *N.J.* 303 (1968), for example, the Supreme Court of Jersey held that any unambiguous manifestation of a desire to waive based on a consideration of all of the relevant surrounding facts and circumstances is adequate to establish a waiver of *Miranda; accord State v. Adams*, 127 *N.J.* 438 (1992) (rejecting as unfounded defendant's assertion that his unwillingness to make a written statement unequivocally invoked the right to silence for all purposes where he was clearly willing to make an oral statement); *State v. Graham*, 59 *N.J.* 366 (1971) (holding that "[a]ny clear manifestation of a desire to waive is sufficient"); *State v. Freeman*, 223 *N.J. Super.* 92 (App. Div. 1988), *certif. denied*, 114 *N.J.* 525 (1989).

As noted previously, a waiver must be voluntary, *i.e.*, the product of a free, deliberate, and unfettered choice. In ascertaining voluntariness, the United States Supreme Court correctly recognized that there is no discernable reason to require more in the way of a voluntariness inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context. *Colorado v. Connelly*, 479 *U.S.* 157 (1986).

In short, the two inquiries are coextensive, and have been consistently treated as such by both federal and New Jersey courts. As with rights located in the Due Process Clause, a waiver of *Miranda* rights is not involuntary if the "moral and psychological pressures to confess emanat[e] from sources other than official coercion." *Colorado v. Connelly.* Thus, a mentally ill suspect's waiver of his rights was deemed voluntary by the United States Supreme Court notwithstanding evidence that the suspect believed at the time he was following the "voice of God." *Colorado v. Connelly, see also State v. Smith,* 307 *N.J. Super.* 1 (1997) (holding that defendant's will was not overborne and his confession was neither the product of police coercion nor the result of mental illness), *certif. denied,* 153 *N.J.* 216 (1998).

Cases addressing the voluntariness of a particular statement are innumerable. It is sufficient to note that the

factors relied upon by courts to traditionally assess voluntariness have remained largely unchanged: they include the suspect's age, education and intelligence, advise as to constitutional rights, the length of detention, whether the questioning was repeated and prolonged in nature, whether physical punishment or mental exhaustion was involved, and the suspect's previous encounters with the law. *State v. Presha*, 163 *N.J.*304 (2000); *State v. Timmendequas*, 161 *N.J.*515 (1999); *State v. Chew (I)*, 150 *N.J.* 30 (1997), *cert. denied*, 528 *U.S.*1052 (1999); *State v. Galloway*, 133 *N.J.* 631 (1993); *State v. Miller*, 76 *N.J.* 392 (1978).

Moreover, because the questioning of a suspect almost necessarily entails, at some level, the use of psychological influences, cases holding that police conduct had overborne the will of the defendant have typically required a showing of "very substantial psychological pressure" directed against the accused by his or her interrogators. See State v. Galloway; State v. Miller. Similarly, given the natural reticence of a suspect to divulge his or her guilt, interrogating officers are afforded a degree of leeway in their efforts to dispel that reluctance and persuade them to talk. See State v. Miller; State v. Smith, 32 N.J. 501 (1960), cert. denied, 364 U.S. 936 (1961); State v. Johnson, 309 N.J. Super. 237 (App. Div.), certif. denied, 156 N.J. 387 (1998). In this regard police deception does not automatically vitiate an otherwise valid waiver; rather, such conduct is one of but many relevant factors considered in evaluating the totality of circumstances. Frazier v. Cupp, 393 U.S. 731 (1961); State v. Cooper (I), 151 N.J. 326 (1997), cert. denied. 528 U.S. 1084 (2000); State v. Chew (I); State v. Roach, 146 N.J. 208 (1996), cert. denied, 519 U.S. 1021 (1996); State v. DiFrisco (I), 118 N.J. 253 (1990).

In addition to the requirement of voluntariness, a waiver must be knowing and intelligent. In *State v. Reed*, 133 *N.J.* 237 (1993), the Supreme Court of New Jersey

refused to follow *Moran v. Burbine*, 475 *U.S.* 412 (1986), which held that the failure to inform an in-custody suspect that an attorney had been retained for him did not deprive the suspect of the "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Basing its contrary holding on state constitutional grounds, the Supreme Court of New Jersey stated in *Reed* that where, to the knowledge of officers, an attorney has been retained on behalf of a person in custody and is present or readily available, that information must be imparted to the suspect in order to establish a knowing waiver of *Miranda* rights. The Supreme Court of New Jersey subsequently determined that its holding in *Reed* would not be applied retroactively. *State v. Abronski*, 145 *N.J.* 265 (1996).

A knowing and intelligent waiver presupposes that the suspect comprehends the nature of the rights being relinquished. Thus, a suspect who lacks the mental acuity to comprehend the rudimentary protections afforded by *Miranda* is logically incapable of waiving his or her rights. See State v. Flowers, 224 N.J. Super. 208 (Law Div. 1987), aff'd, 224 N.J. Super. 90 (App. Div. 1988); but see State v. Carpenter, 268 N.J. Super. 378 (App. Div. 1993) (holding that although the defendant possessed an I.Q. of 71, the waiver was valid under the totality of circumstances), certif. denied, 135 N.J. 467 (1994). As noted previously, however, a waiver cannot be invalidated simply because the defendant failed to appreciate the full range of consequences arising from his election to waive his rights, or was not aware of the possible topics of the interrogation. Colorado v. Spring, 475 U.S. 412 (1986); Oregon v. Elstad, 470 U.S. 298 (1985); State v. Adams, 127 N.J. 438 (1992).

G. Invocations And Their Consequences

The *Miranda* decision states that once warnings are administered, if the suspect indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, the interrogation must immediately stop. *See also Michigan v. Mosely,* 423 *U.S.* 101 (1975); *State v. Bey (I),* 112 *N.J.* 45 (1988).

So too with invocations of the right to counsel. In *Edwards v. Arizona,* 451 *U.S.* 477 (1981), the United States Supreme Court held that when a suspect invokes his right under *Miranda* to consult with an attorney prior to interrogation, the suspect is not subject to further interrogation by authorities under any circumstance until counsel has been made available. The only exception to the aforementioned and strictly enforced "bright-line" rule is if the accused initiates further communications with the police.

The United States Supreme Court subsequently held that the *Edwards* rule also prohibits police-initiated interrogation, even regarding offenses unrelated to the subject of the original interrogation. Stated differently, the *Edwards* rule is not offense-specific. *Arizona v. Roberson*, 486 *U.S.* 675 (1988). Furthermore, the *Edwards* rule has been strictly construed to mandate the attorney's presence at all subsequent questioning once counsel has been requested. Thus, questioning outside of an attorney's presence following defendant's consultation with that attorney will be deemed a violation of *Edwards. Minnick v. Mississippi*, 498 *U.S.* 146 (1990). Lastly, an accused's postrequest response to further interrogation may not be used to cast doubt upon the clarity of his or her initial request for counsel. *Smith v. Illinois*, 469 *U.S.* 91 (1984).

Ambiguous invocations have been the subject of much case law in this State, not all of it consistent. Initially, it is firmly settled that when a suspect makes a statement that arguably amounts to an assertion of Miranda rights, all questioning must immediately cease. The interrogating officer must then inquire of the suspect about the correct interpretation of the statement before questioning may continue. Absent such a clarification, it must be presumed that the defendant invoked his rights. State v. Chew (I), 150 N.J. 30 (1997), cert. denied, 528 U.S. 1052 (1999); State v. Wright, 97 N.J. 113 (1984). In this context it cannot be too strongly emphasized that New Jersey has expressly declined to follow the holding in Davis v. United States, 512 U.S. 452 (1994), which limited the application of the *Edwards* "bright-line" rule to unambiguous assertions of the right to have counsel present during a custodial interrogation. See State v. Chew (I).

Note that defendant's request for permission to lay down and to think about what happened during an interrogation was analogized to a request for something to eat or drink, and was not, therefore, found to constitute an equivocal invocation of his right to silence. State v. Bey (II), 112 N.J. 123 (1988). Yet in State v. Harvey (I), 121 N.J. 407 (1990), cert. denied, 499 U.S. 931 (1991), the Supreme Court of New Jersey concluded that defendant's statement to investigators that he would talk to them about the murder after first speaking with his father, was found to be an ambiguous manifestation of desire to terminate the interview. Three years later, defendant's agreement to speak with investigators after first conferring with his confederate was not perceived by the Supreme Court as an invocation of the right to silence. State v. Martini (I), 131 N.J. 176 (1993), cert. denied, 516 U.S. 875 (1995). In State v. Brooks, 309 N.J. Super. 43 (App. Div.), certif. denied, 156 N.J. 386 (1998), the Appellate Division recently endeavored to harmonize the evidently divergent

rulings of *Bey (II), Harvey (I)* and *Martini (I)* and held that defendant did not invoke his right to silence when he told police officers that he would submit to an interview after he telephoned his mother.

Other examples abound of equivocal invocations of the right to silence or counsel which gave rise to an affirmative duty on the part of officers to clarify the ambiguous comments made by the accused. See State v. Chew (I) (defendant asked his mother to call his attorney when arrested); State v. Johnson, 120 N.J. 263 (1990) (defendant stated to police "I just can't talk about it"); State v. Hartley, 103 N.J. 252 (1986) (defendant stated "I don't believe I want to make a statement at this time"); State v. *Wright* (defendant stated "I won't sign any more [waivers] without a lawyer present" prior to taking a polygraph examination); State v. Jackson, 272 N.J. Super. 543 (App. Div. 1994) (defendant stated during interview that "he wasn't going to tell anything that happened because of personal reasons"), certif. denied, 142 N.J. 450 (1995); see also State v. Elmore, 205 N.J. Super. 373 (App. Div. 1985); State v. Dickens, 192 N.J. Super. 290 (App. Div. 1983), certif. denied, 97 N.J. 694 (1984); State v. Fussell, 174 N.J. Super. 14 (App. Div. 1980); but see State v. Dixon, 125 N.J. 223 (1991) (rejecting capital defendant's claim that his change in demeanor during an interview necessitated clarification by officers); State v. Cardona, 268 N.J. Super. 38 (App. Div. 1993), certif. denied, 135 N.J. 30O (1994).

Departing from out-of-state authority, our Supreme Court in *State v. Chew (I)*, rejected the assertion that the rendition of *Miranda* warnings was sufficient to clarify an ambiguous request for counsel made by the defendant during his arrest and well before the custodial interrogation. It further rebuffed the argument that defendant was incapable of anticipatorily invoking his rights prior to the interview.

Finally, a suspect may, if he or she elects, limit the scope of the invocation. Thus, where a suspect declines to make a written statement but is clearly willing to make an oral statement, he is foreclosed from subsequently asserting that the right to silence was invoked for all forms of communication. *Connecticut v. Barrett*, 479 *U.S.* 523 (1987); *State v. Adams*, 127 *N.J.* 438 (1992); *State v. Gerald*, 113 *N.J.* 40 (1988) (holding that investigators were not prohibited from securing an oral statement where the defendant agreed to be interviewed but refused to have the interview tape recorded); *State v. Freeman*, 223 *N.J. Super.* 92 (App. Div. 1988), *certif. denied*, 114 *N.J.* 525 (1989).

H. Multiple Confessions

The circumstances of the initial custodial interrogation will often be relevant in ascertaining the constitutional validity of any subsequently obtained statement derived from an ensuing custodial interrogation. If, for example, the suspect waives all of his or her *Miranda* rights during the initial interview and does not thereafter invoke them, the warnings need not be readministered at the commencement of the second interview. *State v. Melvin,* 65 *N.J.* 1 (1974); *State v. Magee,* 52 *N.J.* 352 (1968), *cert. denied,* 393 *U.S.* 1097 (1969); *State v. Helewa,* 223 *N.J. Super.* 40 (App. Div. 1988).

Of course, different strictures obtain when a suspect has invoked his rights during the preceding interview. When a suspect has invoked his or her right to silence or counsel it is absolutely imperative that all questioning promptly cease to ensure that his rights are scrupulously honored. However, where the right to silence has been invoked -- as opposed to a request for an attorney -- the police are entitled to reinitiate questioning conditioned upon strict adherence to the "bright-line" rule announced in State v. Hartley, 103 N.J. 252 (1986), mandating the rendition of fresh Miranda warnings prior to renewed questioning. See also Michigan v. Mosely, 423 U.S. 96 (1975); State v. Harvey (I), 121 N.J. 407 (1990), cert. denied. 499 U.S. 931 (1991); State v. Mallon, 288 N.J. Super. 139 (App. Div.), certif. denied, 146 N.J. 497 (1996). If, on the other hand, a suspect invokes the right to counsel, under *Edwards* and its state and federal progeny there can be absolutely no resumption of questioning unless either the suspect initiates communications with the police or counsel is present. Edwards v. Arizona, 451 U.S. 477 (1981); State v. Chew (I), 150 N.J. 30 (1997), cert. denied, 528 U.S. 1052 (1999).

The parameters of initiation were fully addressed by the Supreme Court of New Jersey recently in State v. Chew (1). There, a capital defendant was questioned following his arrest in contravention of the Edwards rule. At the conclusion of the interview, he was subsequently transported that day from Ocean County to Middlesex County where he was processed and charged with the murder of his girlfriend. That same evening, defendant requested to speak with an investigator. When the investigator entered the room, defendant asked "[w]hat am After the investigator outlined the possible I facing." punishments for murder and lesser included offenses, defendant, without solicitation, began to talk about his involvement in the murder. The investigator stopped defendant, readministered Miranda warnings and obtained a waiver thereof before commencing the second interview.

Based on the aforementioned circumstances, the Supreme Court of New Jersey concluded that the criteria for initiation established by the United States Supreme Court in *Oregon v. Bradshaw*, 462 *U.S.* 1039 (1983), was satisfied. Specifically, defendant's inquiry evinced a willingness and a desire for discussion about the investigation. Stated differently, it was clear that defendant was inviting discussion of the crimes for which he was being held, thereby entitling the officers to question him. *See also State v. Fuller*, 118 *N.J.* 75 (1990). Had defendant's inquiry been merely incidental to the custodial relationship, such as a request to use the bathroom, further questioning would have been prohibited.

Once proper initiation has been established, the State is obligated to demonstrate beyond a reasonable doubt that the accused made a knowing, intelligent, and voluntary waiver beyond a reasonable doubt. *State v. Chew (I)*. Although it is prudent for the police to readminister fresh *Miranda* warnings following a valid initiation and before the resumption of questioning, such warnings are not constitutionally required. *State v. Chew (I); State v. Fuller*.

I. Miranda Violations and Taint

The particular analysis undertaken to assess whether one illegally obtained statement has tainted a subsequent statement turns on the nature of the initial violation. In New Jersey, our Supreme Court has drawn a clear distinction between the ancillary rights of *Miranda*, and violations of the constitutional rights those measure protect. *State v. Burris*, 145 *N.J.* 509 (1996). Under this formulation, failure to administer *Miranda* warnings does not give rise to a constitutional violation, whereas the elicitation of a statement following the invocation of a *Miranda* right -- be it the right to remain silent or the right to counsel -- is a violation of constitutional dimension. *State v. Chew (I)*, 150 *N.J.* 30 (1997), *cert. denied*, 528 *U.S.* 1052 (1999); *State v. Burris, State v. Hartley*, 103 *N.J.* 252 (1986).

Likewise, in *Oregon v. Elstad*, 470 *U.S.* 298 (1985), the United States Supreme Court, observing "that [the] *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself," noted that the failure of police officers to administer *Miranda* warnings to a suspect was not a violation of constitutional dimension but rather only a violation of *Miranda's* prophylactic, procedural requirements. The Court in *Elstad* further pointed out that the *Miranda* presumption of compulsion, although irrebuttable for purposes of the prosecution's case-in-chief, did not require that the statements and their fruits be discarded as inherently tainted. From the foregoing observations, the *Elstad* Court concluded that where a defendant makes a statement after providing an unwarned though voluntary statement, the second statement is nonetheless admissible if preceded by a knowing and intelligent waiver of *Miranda* warnings. *Accord State v. Brown*, 282 *N.J. Super.* 538 (App. Div.), *certif. denied*, 143 *N.J.* 322 (1995); *see also Michigan v. Tucker*, 417 *U.S.* 433 (1974); *but see Massachusetts v. White*, 439 U.S. 280 (1978).

Conversely, questioning undertaken in disregard of an asserted right results in a direct constitutional violation. Thus, any subsequent statements or, for that matter, tangible evidence apparently derived from the initial statement will be scrutinized in accordance with the more demanding "fruit of the poisonous tree" doctrine to determine whether it was the product of the initial violation or sufficiently attenuated from any taint. See State v. Chew (I); State v. Harvey (I), State v. Hartley; State v. Johnson, 118 N.J. 639 (1990); State v. Pante, 325 N.J. Super. 336 (App. Div. 1999), certif. denied, 163 N.J. 76 (2000). Three factors are considered in making this determination: 1) the flagrancy and purpose of the police misconduct, 2) the presence of intervening circumstances, and 3) the temporal proximity between the illegal conduct and the challenged evidence. Brown v. Illinois, 422 U.S. 590 (1975); State v. Chippero, 164 N.J. 342 (2000); State v. Chew (I); State v. Hartley; State v. Pante. Note that in circumstances where one statement follows closely "on the heals" of a compelled statement, the two statements are sufficiently intertwined such that the second statement will be considered the product of the first and thus clearly tainted by the preceding constitutional violation. See State v. Johnson, 120 N.J. 263 (1990); State v. Bey (I), 112 N.J. 45 (1988); State v. Hartley.

J. Suppressed Statements Used for Impeachment Purposes

Adhering to settled federal jurisprudence, the Supreme Court of New Jersey in *State v. Burris*, 145 *N.J.* 509 (1996), explicitly sanctioned the use of a voluntarily though improperly obtained statement to impeach the credibility of a defendant. Where the prosecution seeks to use the statement for impeachment purposes a pretrial hearing must be convened outside the presence of the jury at which time the voluntariness of the statement must be established beyond a reasonable doubt. Even if the voluntariness of the statement has been established, it nevertheless may be excluded for impeachment purposes because it is prejudicial, cumulative, or misleading. Furthermore, where the trial court allows the statement to be used to impeach the defendant's credibility, it must instruct the jury that it may, although it need not, consider the statement only for the limited purpose of affecting the defendant's credibility as a witness and that it cannot be used as evidence of guilt.

The Appellate Division recently disallowed the prosecution from using an improperly obtained statement solely for impeachment purposes based on evidence that an assistant prosecutor had directed a detective to withhold *Miranda* warnings prior to questioning defendant. The Court ruled that the holding of *Burris* did not extend to instances of "prosecutorial overzealousness which deprived a defendant of his *Miranda* rights." *State v. Sosinski*, 331 *N.J. Super.* 11 (App. Div. 2000).

K. Juveniles And Miranda

The Supreme Court of New Jersey recently clarified and refined the law governing juvenile confessions in *State* Presha, 163 N.J. 304 (2000). In upholding the V. admissibility of defendant's confession, the Court reaffirmed that courts should consider the totality of the circumstances when determining the voluntariness, and thus the admissibility, of confessions by juveniles in custody. It also emphasized that the absence of a parent or legal guardian from the interrogation is a highly significant fact when determining whether the State has demonstrated that the juvenile's waiver of rights was knowing, intelligent, and voluntary. It will be exceptionally difficult for the State to successfully meet its burden in situations in which the police deliberately exclude a parent or legal guardian from the interrogation and the confession almost invariably will be suppressed.

The Court also announced a bright-line rule regarding the questioning of a juvenile under the age of fourteen. In that situation, the absence of an adult will render the young offender's statement inadmissible as a matter of law, unless the parent or legal guardian is unwilling to be present or is genuinely unavailable. Regardless of the juvenile's age, law enforcement officers must use their best efforts to locate the adult before beginning any questioning, and must account for those efforts to the trial court's satisfaction.

In *State in the Interest of J.D.H.*, _____*N.J. Super.* ____, (App. Div. 2001), the Appellate Division extended the guidelines enunciated in *Presha* to circumstances where it is the victim, rather than the police, who questions the defendant by telephone at the direction of law enforcement. Notably, the Court did not discuss the United States Supreme Court's decision in *Illinois v.*

Perkings, 496 *U.S.* 292 (1990), which arguably compels a contrary result.

In *State in the Matter of O.F.*, 327 *N.J. Super.* 102 (App. Div. 1999), the Appellate Division engaged in a comprehensive survey of juvenile confession law, and concluded that the confession of a 13-year-old juvenile required suppression based in large measure on the exclusion of the juvenile's mother during custodial questioning. That determination was subsequently validated by the decision rendered in *Presha; see also State in the Interest of S.H.*, 61 *N.J.* 108 (1972) (holding that custodial questioning of juveniles must be conducted "with the utmost fundamental fairness and in accordance with the highest standards of due process and fundamental fairness").

Note also that in *State in the Interest of J.P.B.*, 143 *N.J. Super.* 96 (App. Div. 1976), the Appellate Division concluded that a juvenile resident at a youth probationary institution was entitled to *Miranda* warnings when participating in a group discussion intended to encourage admission of anti-social behavior. The Court reasoned that the warnings were necessary because the session was sufficiently analogous to a custodial interrogation and because the supervisor was acting as an agent of the State. *But see State in the Interest of A.B., 278* N.J. Super. 380 (Ch. Div. 1994) (holding that a juvenile was not subjected to a custodial interrogation when questioned by an office with the Juvenile Intensive Supervision Program in the living room of his home regarding drugs found by his mother).

L. Investigative Detentions and Miranda

Based on the current state of the law, police are flatly prohibited from questioning a suspect -- irrespective of the issuance of *Miranda* warnings -- when he is detained pursuant to an investigative detention order issued in accordance with *R.* 3:5A-1. In *State v, Rolle,* 265 *N.J. Super,* 482 (App. Div.), *certif. denied,* 134 *N.J.* 562 (1993), defendant was detained for a period not to exceed five hours for photographs and fingerprinting. During that time he was questioned after waiving his *Miranda* rights and provided a taped confession. The Appellate Division subsequently reversed defendant's murder conviction, holding that the State had misconceived the function and scope of *R.* 3:5A-1 when it questioned defendant during his detention. That error, according to the Appellate Division, necessitated suppression of defendant's confession.

Where, however, an investigative detention order is constructively dissolved by the filing of formal charges based on the accumulation of additional evidence, the holding of *Rolle* is inapplicable, and the police will be entitled to commence questioning the detainee. *State v. Johnson*, 309 *N.J. Super*, 237 (App. Div.), *certif. denied*, 156 *N.J.* 387 (1998).

M. Miranda and the Death Penalty

In one very limited circumstance, a court-ordered psychiatric examination to ascertain a capital defendant's competency may trigger the necessity of Miranda warnings if, and only if, the results of that examination will be introduced at a penalty phase to justify the imposition of the death penalty. In *Estelle v. Smith*, 451 U.S. 454 (1981), the trial court in a capital prosecution ordered that defendant undergo a psychiatric examination to determine his competence to stand trial. Defendant had made no request for the examination, and although counsel had been appointed for him, counsel was not advised that the examination would occur. At the penalty phase of defendant's trial, the court-appointed psychiatrist testified that defendant was a continually dangerous person, who had no remorse for what he had done.

The United States Supreme Court ruled that the prosecution was not entitled to introduce the psychiatrist's testimony in the penalty phase because defendant possessed the right to remain silent during the examination and that anything he said could be used against him. It did acknowledge that defendant would not have been entitled to the warnings (at least with respect to Fifth, rather than Sixth Amendment rights) had the results of examination been used only on the competency issue.

N. Procedural Issues Relating to Confessions

R. 3:5-7(d), which automatically preserves for appellate review challenges to the denial of a suppression motion notwithstanding the entry of guilty plea, does not encompass attacks upon the admissibility of a confession. Therefore, the entry of an unconditional plea of guilty will constitute a waiver of any claim that a defendant's statement was obtained in violation of *Miranda. State v. Smith*, 307 *N.J. Super.* 1 (App. Div. 1997), *certif. denied*, 153 *N.J.* 216 (1998); *State v. Robinson*, 224 *N.J. Super.* 495 (App. Div. 1988); *State v. Morales*, 182 *N.J. Super.* 502 (App. Div.), *certif. denied*, 89 *N.J.* 421 (1982). Pursuant to *R.* 3:9-1(d), hearings convened to determine the admissibility of a statement by criminal defendants are to be conducted prior to trial unless otherwise ordered by the court.

Whenever a defendant's oral or written statement, admission, or confession is introduced at trial, the jury

must be instructed, whether requested or not, in accordance with the holding of *State v. Hampton*, 61 *N.J.* 250 (1972), directing the jury to determine the credibility of the statement without any knowledge that the court has already determined the issue of voluntariness. Similarly, a cautionary charge pursuant to *State v. Kociolek*, 23 *N.J.* 400 (1957), is required whenever defendant's oral statement is introduced. The failure to submit either instruction, however, is not *per se* reversible error. *State v. Jordan*, 147 *N.J.* 409 (1997); *see also N.J.R.E.* 104(c).

A *Hampton* charge is unnecessary when the statement sought to be introduced was made to a non-police witness without being subjected to any form of physical or psychological pressure. *State v. Baldwin*, 296 *N.J. Super.* 391 (App. Div. 1997), *certif. denied*, 149 *N.J.* 143 (1999). Nor is it appropriate for the jury to be charged that the State must prove defendant's statement credible beyond a reasonable doubt. *State v. Chew (I)*, 150 *N.J.* 30 (1997), *cert. denied*, 528 *U.S.* 1052 (1999).

II. THE PRIVILEGE AGAINST SELF-INCRIMI-NATION

A. General Principles

The definition of incrimination is codified in *N.J.R.E.* 502 and expressly provides that a matter is incriminating if it directly or inferentially provides a clue to the discovery of matter that will establish an element of the offense for a crime against New Jersey, any other state, or the United States, unless the witness has no reasonable cause to believe that he or she is subject to criminal prosecution. *See State v. McGraw*, 129 *N.J.* 68 (1992); *In Re Ippolito*, 75 *N.J.* 435 (1978).

The common-law privilege against self-incrimination is codified by *N.J.R.E.* 503. By its express terms, the privilege against self-incrimination is a personal privilege and may not, therefore, be asserted by or on behalf of a corporation, by or on behalf of other groups or organizations, or by a defendant on behalf of a witness. *Matter of Grand Jury Proceedings of Guarino*, 104 *N.J.* 218 (1986); *see also State v. Curry*, 109 *N.J.* 1 (1987). Thus, while it does not protect corporate records, an individual's personal financial records, such as personal checking account statement and lists of personal assets, are entirely protected by the privilege. *In Re Addonizio*, 53 *N.J.* 107 (1968).

Furthermore, a witness seeking to avail himself of the privilege must do so in good faith and set forth some basis for the claim. *Hirsch v. N.J. State Bd. of Med. Exam.*, 252 *N.J. Super.* 596 (App. Div. 1991), aff'd o.b., 128 *N.J.* 160

(1992). The privilege, of course, applies whether the potentially incriminating answer refers to past, present, or prospective acts, provided the hazards of incrimination are not "trifling and imaginary." Marchetti v. United States, 390 U.S. 39 (1968). In this regard, a trial court is not bound to accept the witness's unsupported statement that an answer will tend to incriminate him. In Re Ippolito, In Re Pillo, 11 N.J. 8 (1952); State v. Johnson, 223 N.J. Super. 122 (App. Div. 1988), certif. denied, 115 N.J. 75 (1989). Rather, the determination as to the reasonableness of the basis for apprehension of criminal prosecution rests exclusively with the trial court. Hoffman v. United States, 341 U.S. 479 (1951); In Re Ippolito, In Re Pillo. Accordingly, a witness must appear before the tribunal where he has been subpeoneaed to testify and assert the privilege at that proceeding. In Re Addonizio, In Re Boiardo, 34 *N.J.* 599 (1961).

Obviously, the privilege against self-incrimination ceases after the danger of incriminating oneself has been obviated by conviction or acquittal. In *Namet v. United States*, 373 *U.S.* 179 (1963), the United States Supreme Court reviewed the substantial authority for the proposition that a plea of guilty terminates the testimonial privilege. Similarly, no privilege exists following the expiration of period of limitations. *Hale v. Henkel*, 201 *U.S.* 43 (1906), and following an official statutory grant of immunity, *Reina v. United States*, 364 *U.S.* 507 (1960).

Furthermore, the privilege is not self-executing and must be invoked by the person seeking its protection. *Maness v. Meyers*, 419 *U.S.* 449 (1975); State v. P.Z., 152 *N.J.* 86 (1997); *State v. Korkowski*, 312 *N.J. Super.* 429 (App. Div. 1998). The privilege will be deemed to be irrevocably waived based upon the failure to claim it at the appropriate time. *State v. Fary*, 19 *N.J.* 432 (1955); *State v. Toscano*, 13 *N.J.* 418 (1953); *State v. Soney*, 177 *N.J. Super.* 47 (App. Div. 1980); *certif. denied*, 87 *N.J.* 313 (1981). Lastly, the privilege may be asserted in civil proceedings as well as criminal. *State v. Kobrin Securities, Inc.*, 111 *N.J.* 307 (1988).

B. The Testimonial Limitation Of The Privilege

The privilege against self-incrimination applies only to "testimonial" evidence. In *Schmerber v. California*, 384 *U.S.* 757 (1966), the United States Supreme Court observed that the "privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Accord State v. Green*, 209 *N.J. Super.* 347 (App. Div. 1996). This tenet has particular salience with respect to the investigative

phase of criminal proceedings. Thus, orders requiring the production of physical evidence, such as blood or hair samples, voice and handwriting exemplars, breath tests, lineups, saliva samples, fingerprints, etc., do not implicate the privilege against self-incrimination. See Schmerber v. California; United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); State v. Stever, 107 N.J. 543, cert. denied, 484 U.S. 954 (1987); State v. Dyal, 97 N.J. 229 (1984); State v. Andretta, 61 N.J. 544 (1972); State v. Bernhardt, 245 N.J. Super. 210 (App. Div.), certif. denied, 126 N.J. 323 (1991). In addition to the foregoing, facial expressions, State v. Marshall (I), 123 N.J. 1 (1991), cert. denied, 507 U.S. 929 (1993), the odor of one's breath, State v. Phillips, 213 N.J. Super. 534 (App. Div. 1986), and a DWI suspect's conduct at field sobriety checkpoint, State v. Green, have likewise been found to fall beyond the scope of the privilege. However, in United States v. Doe, 465 U.S. 605 (1984), the United States Supreme Court recognized that in some circumstances the act of producing evidence pursuant to subpoena may be incriminating and therefore held that the privilege may be invoked when the act of production involves testimonial self-incrimination.

C. Use Of Post-Arrest Silence

Use by any trial tactic of defendant's post-arrest silence for impeachment purposes is flatly proscribed. In *Doyle v.* Ohio, 426 U.S. 610 (1976), the United States Supreme Court held that not only is every post-arrest silence "insolubly ambiguous" because it may be nothing more than the arrestee's exercise of [his] Miranda rights," but use of the silence to impeach "would be fundamentally unfair" given the fact that the warnings carry the implicit "assurance that silence will carry no penalty." New Jersey's prohibition against the use of post-arrest silence applies regardless of whether defendant received Miranda warnings, thus conferring broader protection than the federal rule, which applies only if Miranda warnings were given. State v. Lyle, 73 N.J. 403 (1977); State v. Deatore, 70 N.J. 100 (1976); State v. Pierce, 330 N.J. Super. 479 (App. Div. 2000); State v. Jenkins, 299 N.J. Super. 61 (App. Div. 1997); State v. Aceta, 223 N.J. Super. 21 (App. Div. 1988); see also Fletchter v. Weir, 455 U.S. 603 (1982) (finding permissible impeachment with post-arrest silence when defendant had not been given a Miranda warning).

Relying on *Doyle*, the United States Supreme Court subsequently concluded that the prosecution's use of defendant's post-arrest silence to rebut his insanity defense also violates due process. *Wainright v. Greenfield*, 474 *U.S.* 284 (1986). Similarly, in *State v. Oglesby*, 122 *N.J.* 522 (1991), the Supreme Court of New Jersey concluded that the prosecutor's attempt to disparage defendant's insanity defense by referring to the invocation of his right to silence and to an attorney transgressed the holding of *Greenfield*. A similar violation was addressed more recently by the Appellate Division in *State v. Hyde*, 292 *N.J. Super.* 150 (App. Div. 1996). In the narrow circumstance where the defense engages in a calculated and deliberate effort to "open the door" to the protected area of post-arrest silence, a prosecutor may be justified in commenting on defendant's post-arrest silence. *State v. Jenkins.*

The issues arising from the admission of evidence related to a defendant's pre-arrest silence in a criminal proceeding can be divided into two categories: 1) the use of a pre-arrest silence to impeach a defendant's credibility once he takes the witness stand, and 2) the use of that silence as substantive evidence of guilt, whether or not a defendant testifies. When addressing the use of pre-arrest silence to impeach a defendant who testifies at trial in Jenkins v. Anderson, 447 U.S. 231 (1980), the United States Supreme Court ruled that the use of pre-arrest silence to impeach his credibility once he testified at trial does not violate either the Fifth Amendment prohibition against self-incrimination or the Fourteenth Amendment guarantee of due process. Likewise, the Supreme Court of New Jersey has explicitly permitted the use of pre-arrest silence for impeachment purposes when no government compulsion is involved. State v. Brown, 118 N.J. 595 (1990).

To date neither the Supreme Court of Jersey nor the United States Supreme Court has determined whether the State may use a defendant's pre-arrest silence as substantive evidence of guilt when a defendant chooses not to testify. *See Jenkins v. Anderson* (the *Jenkins* Court expressly noted that it did not consider whether or under what circumstances defendant's pre-arrest silence may be protected by the Fifth Amendment). There presently exists a conspicuous split in the Appellate Division regarding the use of pre-arrest silence as substantive evidence of guilt. *See State v. Dreher (II)*, 302 *N.J. Super.* 408 (App. Div.) (allowing the use of pre-arrest silence), *certif. denied*, 152 *N.J.* 10 (1997); *State v. Marshall*, 260 *N.J. Super.* 591 (App. Div. 1992) (disallowing the use of pre-arrest silence).

D. Self-Incrimination And Trial Witnesses

The privilege against self-incrimination "protects a mere witness as fully as does one who is also a party defendant." *McCarthy v. Arndstein*, 266 *U.S.* 34 (1924). Where defendant subpoenas a witness with a Fifth Amendment privilege, however, two constitutional rights come into conflict. The accused, of course, has the

constitutional right to present a defense and to compel witnesses to testify on his behalf. Washington v. Texas, 388 U.S. 14 (1967). The witnesses have the constitutional right not to incriminate themselves. In these circumstances, the trial court has a duty to protect both the defendant's Sixth Amendment right to compulsory process and the prospective witness' privilege against self-incrimination. Thus, where a witness suspected of criminal conduct appears involuntarily, it is generally within the trial court's discretion to advise him of his privilege. State v. Vinegra, 73 N.J. 484 (1977); State v. Jamison, 64 N.J. 363 (1974); State In the Interest of B.G., 289 N.J. Super. 361 (App. Div.), certif. denied, 145 N.J. 374 (1996); State v. Johnson, 223 N.J. Super. 122 (App. Div. 1988), certif. denied, 115 N.J. 75 (1989). When, however, the trial witness appears voluntarily, thereby signaling his intention to testify freely, and the hazard of incrimination is remote, "sound public policy considerations, if not the defendant's Sixth Amendment right to compulsory process, *militate against*" advising the witness of his right to remain silent. State v. Johnson; see also State v. Vassos, 237 N.J. Super. 585 (App. Div. 1990). Note as well that a prosecutor lacks standing to object to a witness's testimony on the basis of that person's privilege against self-incrimination. State v. Marchese, 14 N.J. 16 (1953); State v. Johnson. Moreover, warnings should never be given where the trial court believes that the witness's purpose is to testify falsely and perjury is the only crime for which he can be prosecuted. State v. Williams, 59 U.S. 493 (1971); State v. Vassos.

E. Self-Incrimination And Defenses

In Williams v. Florida, 399 U.S. 78 (1970), the United States Supreme Court scrutinized Florida's alibi notice provision, which imposed an obligation on defendants who intended at trial to pursue an alibi defense to give pretrial notice of: 1) their intention to claim such alibi; 2) specific information as to the place at which the defendant claims to have been, and 3) the names and addresses of witnesses by whom they propose to establish such an alibi. Although the Court construed the provision as clearly requiring testimonial communication by the accused, it nonetheless rejected the assertion that such information was in any sense compelled. It specifically reasoned that the alibi-notice provision imposed no greater compulsion than would be present at trial when the accused was required to decide whether or not to raise the alibi defense. The notice requirement, it concluded, did no more than "accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which . . . [he] planned to divulge at trial."

Our courts are in accord with the holding and rationale of *Williams*, and thus have upheld from constitutional attack *R*. 3:12-2, which requires a criminal defendant who intends to rely on an alibi defense to furnish the prosecution with a notice setting forth his whereabouts at the time of the alleged offense and the names and addresses of the witnesses whom he intends to call at trial in support of the defense. *State v. Irving*, 114 *N.J.* 427 (1989); *State v. Lumumba*, 253 *N.J. Super.* 375 (App. Div. 1992). In addition, a prosecutor is entitled to cross examine the accused as to why his first bill of particulars omitted the name of the person he testified at trial was with him at the time of the crime.

State v. Irving.

As cogently observed by the Appellate Division, that the accused faces a dilemma "demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against selfincrimination." State v. Burris, 298 N.J. Super. 505 (App. Div. 505 (App. Div.), certif. denied, 152 N.J. Super. 187 (1997). Nonetheless, when the accused interposes a psychiatric defense involving expert testimony which encompasses his hearsay statements, a trial court cannot condition the admission of that testimony on defendant's waiver of his right not to testify. State v. Burris. To do otherwise results in an unconstitutional and "powerful State v. Burris. Rather, the form of compulsion." appropriate course is to charge the jury in accordance with State v. Maik, 60 N.J. 203 (1972), and State v. Lucas, 30 N.J. 37 (1959), that such testimony should not be considered as substantive evidence relating to the question of guilt or innocense of the accused, but only as evidence tending to support the ultimate expert conclusion of the psychiatrist.

F. The Griffin Prohibition Against Adverse Inferences

It is by now axiomatic that neither courts nor prosecutors are entitled to comment regarding the accused's failure to take the stand. In *Griffin v. California*, 380 *U.S.* 609 (1965), the United States Supreme Court concluded that such comment on defendant's silence constitute a "penalty imposed . . . for exercising a constitutional privilege" in that it "cuts down on the privilege by makings it assertion costly." In so holding, the Court rebuffed the state's assertion that "inference of guilt for failure to testify as to the facts peculiarly within the accused's knowledge is in any event natural and irresistible," noting that this is not invariably true, as where

the accused declines to testify to avoid impeachment through the admission of prior convictions. Reversal is mandatory where the prosecutor has "unambiguously" called attention to defendant's failure to testify. *State v. Williams*, 113 *N.J.* 393 (1988).

The holding of *Griffin* is no less applicable in circumstances where the prosecutor has made a thinlyveiled or indirect comment on silence, although not every impropriety will constitute reversible error. See e.g., State v. Johnson, 120 N.J. 263 (1990); State v. Gosser, 50 N.J. 438 (1967), cert. denied, 390 U.S. 1035 (1968); State v. Pickles, 46 N.J. 542 (1966); State v. Ortisi, 308 N.J. Super. 573 (App. Div.), certif. denied, 156 N.J. 383 (1998); State v. Engel, 259 N.J. Super. 336 (App. Div. 1991), certif. denied, 130 N.J. 393 (1992). Where the accused elects not to testify, remarks alluding to his failure to call witnesses listed in his alibi notice are likewise inappropriate because such argument implies the contents of the alibi notice are not credible and thus inferentially affects his right not to testify. State v. Lumumba, 253 N.J. Super. 375 (App. Div. 1992); see also State v. Collins, 262 N.J. Super. 230 (App. Div. 1993).

Note, however, that in *United States v. Robinson*, 485 *U.S.* 25 (1988), the United States Supreme Court upheld the government's right to comment upon the accused's silence at trial in its rebuttal argument. There, the Court found the government's comments appropriate only to rebut defense counsel' statement during closing argument that the government had not allowed the defendant to explain his side of the story to the jury. *Accord State v. Williams, State v. Schultz,* 46 *N.J.* 254 (1966), *cert. denied,* 384 *U.S.* 918 (1967).

Finally, the accused is constitutionally entitled to have the trial court instruct the jury that it may not consider his refusal to testify during its deliberations. *Carter v. Kentucky*, 450 *U.S.* 288 (1981); *State v. Oliver*, 133 *N.J.* 141 (1993); *State v. Haley*, 295 *N.J. Super*. 471 (App. Div. 1996). The Appellate Division has concluded that the failure to give the cautionary charge when requested is per se reversible error. *State v. Haley*. Although the instructions should only be given at the request of counsel, it is not constitutional error to submit the charge over defendant's objection. *Lakeside v. Oregon*, 435 *U.S.* 333 (1978); *State v. Lynch*, 177 *N.J. Super.* 107 (App. Div.), *certif. denied*, 87 *N.J.* 347 (1981).

SENTENCING

(See also GUILTY PLEAS & PLEA BARGAINING, INTENSIVE SUPERVISION PROGRAM, MERGER, PRISONERS & PAROLE, PROBATION, RESTITUTION, SEXUAL OFFENSES, this Digest)

I. FACTORS TO BE CONSIDERED AT SENTENCING

A. Aggravating and Mitigating Factors - *N.J.S.A.* 2C:44-1a,b

1. Generally

The trial courts must make their findings of sentencing factors explicit, identifying the aggravating and mitigating factors and describing the balance of those factors, so that the appellate courts can determine in Code cases whether deviations from the presumptive terms were warranted for particular offenders and in CDS cases whether sentencing discretion was soundly exercised. *State v. Sainz*, 107 *N.J.* 283 (1987); *State v. Kruse*, 105 *N.J.* 354, 360 (1987).

Sentences imposed upon defendants, who plead guilty as part of a plea agreement, must still be within the sentencing guidelines, and the aggravating and mitigating factors must still have support in the record. *State v. Sainz*, 107 *N.J.* at 292.

When a trial court imposes a sentence based on defendant's guilty plea, the defendant's admissions or factual version need not be the sole source of information for the Court's sentencing decision. *State v. Sainz*, 107 *N.J.* at 293. The court may look to other evidence in the record when making such determinations, and should consider "the whole person," and all the circumstances surrounding the commission of the crime. *Id.*

A reviewing court is prohibited from considering rejected plea offers for purposes of ascertaining the propriety of a sentence imposed following trial. *State v. Pennington*, 154 *N.J.* 344, 363 (1998).

The aggravating and mitigating factors found by the trial court cannot be generalized factors but must be based upon individual circumstances that distinguish this particular offense from other crimes of the same nature. *State v. Yarbough*, 100 *N.J.* 627 (1985), *cert. denied* 475 *U.S.* 1014 (1986); *State v. Reed*, 211 *N.J. Super.* 177, 188-189 (App. Div. 1986), *certif. denied* 110 *N.J.* 508 (1988); *State v. Pavin*, 202 *N.J. Super.* 255 (App. Div. 1985); *State*

v. Martelli, 201 *N.J. Super.* 378, 386 (App. Div. 1985); *State v. Link*, 197 *N.J. Super.* 615, 620 (App. Div. 1984), *certif. denied* 101 *N.J.* 234 (1985).

Trial judge, who stated there were no mitigating circumstances but who recited aggravating circumstances and presented detailed analysis of crime, defendant and reason for sentencing, substantially complied with sentencing statute. *N.J.S.A.* 2C:43-6(b); *State v. Porter*, 210 *N.J. Super.* 383, 396-397 (App. Div. 1986), *certif. denied* 105 *N.J.* 556 (1986).

Aggravating and mitigating factors are not to be offset one to one, but each factor must be given appropriate weight. *State v. C.H.*, 264 *N.J. Super.* 112, 141 (App. Div. 1993), *certif. denied* 134 *N.J.* 479 (1993).

Trial court could consider restrictions placed on defendant's liberty during lengthy period preceding her plea in determining what is fair sentence under all the circumstances. *State v. Mirakaj*, 268 *N.J. Super.* 48, 53 (App. Div. 1993) (defendant stayed in convent as condition of bail); *State v. Christensen*, 270 *N.J. Super.* 650 (App. Div. 1994) (defendant mistakenly ordered to commence serving probationary sentence, which had been stayed pending State's successful appeal of sentence).

The Code does not limit a sentencing judge to the 13 specific factors in *N.J.S.A.* 2C:44-1a. *Id. See, e.g., State v. Maquire*, 84 *N.J.* 508, 532 (1980).

The sentencing principles of *Roth* and the aggravating and mitigating factors in *N.J.S.A.* 2C:44-1 apply to resentencings on violations of probation. *State v. Townsend*, 222 *N.J. Super.* 273, 281 (App. Div. 1988).

In *State v. LeSane*, 227 *N.J. Super.* 276 (Law Div. 1987), it was held that municipal court judges must state reasons for the imposition of sentence and must apply the presumption of non-incarceration to individuals not previously convicted of an offense. *R.* 7:4-6(c); *R.* 3:21-4(c). *Cf. State v. Walsh*, 236 *N.J. Super.* 151, 156 (Law Div.) (motor vehicle offenses are not crimes so aggravating - mitigating analysis is not required by court imposing sentence).

2. Double Counting of Factors

The trial court cannot rely upon an element of the offense as either an aggravating or mitigating factor in order to justify the sentence imposed. *State v. Kromphold*, 162 *N.J.* 345, 353-356 (2000); *State v. Miller*, 108 *N.J.* 112, 122 (1987); *State v. Yarbough*, 100 *N.J.* 627 (1985);

State v. Reed, 211 *N.J. Super.* at 188-189; *State v. Pavin*, 202 *N.J. Super.* 225; *State v. Martelli*, 201 *N.J. Super.* at 386; *State v. Link*, 197 *N.J. Super.* at 620.

Fact which requires the imposition of a legislatively mandated parole ineligibility term (in this case Graves Act), can be considered as a basis for increase of the specific term sentence and period of ineligibility based therein. *State v. Reed*, 215 *N.J. Super.* at 108.

Victim's death may not be considered as an aggravating factor for a murder sentence; however, it may be considered in sentencing defendant on other counts of the indictment in which it is not an element. *State v. Boyer*, 221 *N.J. Super.* 387, 405-406 (App. Div. 1987), *certif. denied* 110 *N.J.* 299 (1988).

Seriousness of bodily injury was element of second degree aggravated assault and cannot be counted as an aggravating factor. *State v. Rivers*, 252 *N.J. Super.* 142 (App. Div. 1991). Nevertheless, in *State v. Mara*, 253 *N.J. Super.* 204 (App. Div. 1992), trial court was permitted to consider victim's injuries in aggravated assault case because serious injuries were far in excess of statutory minimum.

Trial court's error in considering element of offense as aggravating factor provided no basis for disturbing sentence where judge did not impose sentence in excess of presumptive term. *State v. C.H.*, 264 *N.J. Super.* at 140.

3. Nature and Circumstances of Offense - *N.J.S.A.* 2C:44-1a(1)

Where intent is an element of the offense it may not be considered an aggravating factor; nevertheless defendant's intention to cause pain aggravates the offense and warrants more severe punishment. *State v. O'Donnell*, 117 *N.J.* 210, 217-218 (1989).

It is improper to consider recklessness and conduct manifesting indifference to human life as aggravating factor because they are elements of aggravated assault. *State v. Kromphold*, 162 *N.J.* 345, 354 (2000); *State v. Mara*, 253 *N.J. Super.* at 215.

Sentencing court could not use defendant's level of intoxication as aggravating factor where trial court had instructed jury to consider the extent of defendant's intoxication on the issue of defendant's recklessness. *State v. Kromphold*, 162 *N.J.* at 355-56.

Evidence supported trial court's finding that aggravated assault was committed in cruel, heinous or

depraved manner where defendant pointed gun at one victim and shot two other victims. *State v. Rivers*, 252 *N.J. Super.* 142 (App. Div. 1991).

Factor deemed applicable where defendant used excessive force to commit crime and inflicted gratuitous bodily injuries on victim. *State v. McBride*, 211 *N.J. Super.* 699, 704 (App. Div. 1986).

Factor found to be applicable where shoot-out and chase occurred in highway traffic and had potential to endanger many lives. *State v. King*, 215 *N.J. Super.* 504, 522 (App. Div. 1987).

4. Harm To Victim - *N.J.S.A.* 2C:44-1a(2)

If court finds that this factor is applicable and does not impose a custodial sentence, then the court must place on the record the mitigating factors which justify the imposition of a noncustodial term. *N.J.S.A.* 2C:44-1g.

Definition of serious bodily injury contained in aggravated assault statute is not equivalent to seriousness of harm aggravating factor, and thus sentencing court may find this aggravating factor even if assault conviction was based on serious bodily injury. *State v. Kromphold*, 162 *N.J.* at 356-358.

When a sentencing court considers the harm a defendant caused to a victim for purposes of determining whether the aggravating factor is implicated, it should engage in a pragmatic assessment of the totality of the harm inflicted by the offender on the victim, to the end that defendants who purposely or recklessly inflict substantial harm receive more severe sentences than other defendants. *State v. Kromphold*, 162 *N.J.* at 358.

Evidence of victim's loss of eye supported gravity and seriousness of harm aggravating factor. *State v. Colella*, 298 *N.J. Super.* 668, 676 (App. Div.), *certif. denied* 151 *N.J.* 73 (1997).

Psychological harm, which may be a material factor in sentencing for violent crimes, is relevant under the seriousness of harm aggravating factor. *State v. Kromphold*, 162 *N.J.* at 357; *State v. Logan*, 262 *N.J. Super.* 128, 132 (App. Div.), *certif. denied* 133 *N.J.* 446 (1993).

Gravity and seriousness of harm was aggravating factor because defendant threatened victims with baseball bat. *State v. Kelly*, 266 *N.J. Super.* 392, 395-96 (App. Div. 1993). Factor was appropriately considered where defendant beat victim "nearly senseless and broke one of his teeth." *State v. McBride*, 211 *N.J. Super.* 699, 704 (App. Div. 1986).

In *State v. Taylor*, 226 *N.J. Super.* 441 (App. Div. 1988), the Appellate Division found that in certain circumstances the age of the victim and the seriousness of the harm may be considered as aggravating factors, despite the fact that the victim's age is an element of the offense.

Trial court erred in finding age of victim was aggravating factor since it was an element of the offense. Nevertheless, sentence could be sustained because court did not impose sentence greater than presumptive. *State v. C.H.*, 264 *N.J. Super.* 112, 140 (App. Div.), *certif. denied* 134 *N.J.* 479 (1993).

Aggravating factor *N.J.S.A.* 2C:44-1a(2) which refers to the vulnerability of the victim is not limited to the intrinsic condition of the victim, <u>i.e.</u>, age or physical disability, but includes any other reason that renders the victim substantially incapable of exercising normal physical or mental power of resistance. *State v. O'Donnell*, 117 *N.J.* 210, 218-19 (1989).

When a victim is so restrained as to make physical resistance virtually impossible, he or she has been rendered vulnerable with the meaning of *N.J.S.A.* 2C:44-1a(2). *O'Donnell,* 117 *N.J.* at 218-219.

In *State v. Mara*, 253 *N.J. Super.* 204 (App. Div. 1992), the court found that it was not double counting to consider the injuries inflicted as aggravating factor in aggravated assault/death by auto prosecution, notwith-standing that the victim's injury was element of offense, because there were several life threatening injuries.

The recklessness of defendant's actions and the victim's death, could not be considered as aggravating factors because they were elements of the offense of reckless manslaughter. *State v. Reed*, 211 *N.J. Super.* at 188. *See, e.g., State v, Link*, 197 *N.J. Super.* at 620; *State v. Bogus*, 223 *N.J. Super.* 409, 433-434 (App. Div. 1988), *certif. denied* 111 *N.J.* 567 (1988).

Emotional trauma to the victim's family caused by his death is not an aggravating factor. Wording of the statute indicates that Legislature intended this aggravating factor to relate to harm to the victim of the offense, not to the victim's relatives. *State v. Radziwil*, 235 *N.J. Super.* 557, 575 (App. Div. 1989), *aff'd o.b.* 121 *N.J.* 527 (1990).

In death by auto case, trial court properly considered the number of deaths that had occurred as an aggravating factor. *State v. Travers*, 229 *N.J. Super.* 144, 154 (App. Div. 1988)

5. Risk of Another Offense - N.J.S.A. 2C:44-1a(3)

Finding of trial court that there was a risk of another offense was justified because alcohol was the cause of the death by auto/aggravated assault offenses and defendant did not acknowledge that he had an alcohol problem. *State v. Mara*, 253 *N.J. Super.* 204 (App. Div. 1992); *State v. Travers*, 229 *N.J. Super.* at 154.

Finding of trial court that defendant, a former police officer, was likely to commit another offense was supported by evidence that defendant lacked remorse and also took pride in the beating and verbal abuse he inflicted on arrestee. *State v. O'Donnell*, 117 *N.J.* at 216. The fact that defendant was no longer on the police force, did not preclude the trial court from finding that he might commit another assault. *Id.* at 216-17.

A substantial risk of future recidivism is evidenced by defendant's lengthy history of criminal activity. *State v. Gallagher*, 286 *N.J.Super.* 1, 21 (App. Div. 1995).

While defendant's six prior DWI convictions do not constitute prior offenses, they can be considered in determining whether there is a risk that defendant will commit another offense. *State v. Radziwil*, 235 *N.J. Super.* at 575,n.3.

While defendant had no prior adult convictions, his arrest for another crime while on bail, plus juvenile adjudications, supported finding that there was risk of another offense. *State v. McBride*, 211 *N.J. Super.* at 704-705.

6. Involvement in Organized Criminal Activity - N.J.S.A. 2C:44-1a(5)

In *State v. Merlino*, 208 *N.J. Super.* 247 (Law Div. 1984), the State was permitted to introduce evidence at sentencing that there was a substantial likelihood that defendant was involved in organized criminal activity, notwithstanding that the offenses for which he was convicted were not related to such activity. State's presentation not restricted by rules of evidence. *See State v. Rosenberger*, 207 *N.J. Super.* 350 (Law Div. 1985) (discussion of sentencing factors with respect to white collar crime).

Involvement in organized criminal activity is not an element of the offense of conspiracy to promote gambling, and thus it can be considered an aggravating factor at sentencing. *N.J.S.A.* 2C:44-1a(5). *State v. Pych*, 213 *N.J. Super.* 446, 460-461 (App. Div. 1986), *certif. denied* 107 *N.J.* 90 (1987).

Supreme Court directive of November 5, 1965 requiring as a matter of administrative policy to have all sentencings in gambling cases handled by a single judge in each county was found to be valid and compatible with the purposes of the penal code. *State v. Pych*, 213 *N.J. Super.* at 462.

7. Prior Record - *N.J.S.A.* 2C:44-1a(6)

The trial court may consider a defendant's extensive juvenile record and municipal court convictions as an aggravating factor. *State v. Taylor*, 226 *N.J. Super.* 441 (App. Div. 1988).

A court can consider a defendant's prior conviction which has been set aside under the Federal Youth Corrections Act, just as the court can consider a defendant's arrest record and record of dismissed charges. *State v. Walters,* 279 *N.J. Super.* 626, 633 (App. Div.), *certif. denied* 141 *N.J.* 96 (1995); *State v. Stackhouse,* 194 *N.J. Super.* 371, 375 (App. Div. 1984). *See State v. Marzolf,* 79 *N.J.* 167, 176-177 (1979).

A Court can consider defendant's prior arrest which resulted in supervisory treatment under the drug laws. *State v. Walters*, 279 *N.J. Super.* at 633; *State v. Marzolf*, 79 *N.J.* 167, 176-177 (1979).

A Court can consider defendant's adult arrests which did not result in convictions. *State v. Walters*, 279 *N.J. Super.* at 633; *State v. Green*, 62 *N.J.* 547, 571 (1973).

Defendant's prior convictions for DWI could not be considered as aggravating factor under 2C:44-1a(6), although they could be considered as part of defendant's overall personal history in the same fashion as convictions in municipal court or a juvenile record. *State v. Radziwil*, 235 *N.J. Super.* at 576. *See State v. Marzolf*, 79 *N.J.* at 177.

A trial court may consider a defendant's juvenile record at sentencing; however, if the record is lengthy because of charges and arrests that did not result in convictions, the judge should state the reasons why these arrests/charges are relevant to the present sentence. *State v. Torres*, 313 *N.J. Super.* 129, 162 (App. Div.), *certif. denied* 156 *N.J.* 425 (1998); *State v. Walters*, 279 *N.J. Super.* 616,

633 (App. Div.), certif. denied 141 N.J. 96 (1995); State v. Tanksley, 245 N.J.Super. 390, 396-397 (App. Div. 1991).

8. Need To Deter - *N.J.S.A.* 2C:44-1a(9)

Deterrence was correctly considered as an aggravating factor in *State v. Davidson*, 225 *N.J. Super.* 1 (App. Div. 1988), *certif. denied* 111 *N.J.* 594 (1988), wherein the defendant committed racially motivated acts of mischief, damage to property and threats of violence against a black family. In upholding defendant's custodial sentence the Court noted that a case involving racial or ethnic violence involves a particular need for general deterrence. See *N.J.S.A.* 2C:44-1a(9).

When defendant is eligible for extended term as persistent offender, the need for deterrence is enhanced. *State v. Pennington*, 154 *N.J.* 344, 354 (1998).

The need to deter defendant was evident by the fact that defendant murdered four people on four separate occasions. *State v. Cook*, 330 *N.J. Super.* 395, 423 (App. Div. 2000).

Deterrence is clearly a permissible aggravating factor to consider in imposing sentence on inmate for aggravated assault on corrections officer. *State v. Doss*, 310 *N.J.Super.* 450, 461 (App. Div. 1998); *State v. Martin*, 235 *N.J.Super.* 47, 59-60 (App. Div.), *certif. denied* 117 *N.J.* 669 (1989).

The need to deter the defendant and others from drunk driving may be an aggravating factor in appropriate cases. *State v. Mara*, 253 *N.J. Super.* 204 (App. Div. 1992).

Defendant's six prior DWIs could be considered in determining the applicability of this factor. *State v. Radziwil*, 235 *N.J. Super.* at 576 n.3.

Trial court properly found the need to deter as an aggravating factor where the defendant, who was convicted of aggravated assault, consistently denied his involvement and lacked remorse. *State v. Rivers*, 252 *N.J. Super.* 142 (App. Div. 1991).

9. Cost of Doing Business - *N.J.S.A.* 2C:44-1a(11)

The sentencing judge properly considered as aggravating factors the need for deterrence and the concern that without a substantial prison term in a drug case, the defendant and others would consider his punishment as merely part of the cost of doing business. *State v. Ascencio*,

277 *N.J. Super.* 334, 336-37 (App. Div. 1994), *certif. denied* 140 *N.J.* 278 (1995); *State v. Tarver*, 272 *N.J. Super.* 414, 434 (App. Div. 1994).

B. Mitigating Factors

1. Conduct Did Not Cause Harm - *N.J.S.A.* 2C:44-1b(1)(2)

Distribution of cocaine can be readily perceived to constitute conduct which causes and/or threatens serious harm, therefore mitigating factors 1 and 2 (defendant did not cause or contemplate that conduct would cause serious harm) not applicable. *State v. Tarver*, 272 *N.J. Super.* 414, 434-435 (App. Div. 1994).

2. Youth - N.J.S.A. 2C:44-1b

Youth may be considered as a mitigating factor if the defendant was substantially influenced by another person more mature than defendant. *State v. Torres*, 313 *N.J. Super.* 129, 162 (App. Div. 1998) (def. not entitled to factor).

Trial court should have considered as mitigating factor that defendant, who was quite young, of limited intellect and easily swayed, was under the virtual domination of someone who was not only older than him, but also his aunt. *State v. Henry*, 323 *N.J. Super.* 157, 166 (App. Div. 1999).

3. Justification/Excuse - N.J.S.A. 2C:44-1b(4)

A defendant's drug or alcohol dependency is not a mitigating factor. *State v. Ghertler*, 114 *N.J.* 383, 390 (1989); *State v. Towey*, 244 *N.J. Super.* 582 (App. Div. 1990), *certif. denied* 122 *N.J.* 159 (1990). Crimes committed under the influence of alcohol or drugs do not detract from the seriousness of the offense. *State v. DeLuca*, 325 *N.J. Super.* 376, 392 (App. Div. 1999), *certif. granted* 163 *N.J.* 79 (2000); *State v. Towey*, 244 *N.J. Super.* at 595.

Mental retardation may be considered as a mitigating circumstance under this factor. *State v. Jarbath*, 114 *N.J.* 394, 403, 414 (1989).

Trial court could consider mitigating factor where facts indicated that assault conviction resulted from defendant coming to the aid of another person whom he believed was being attacked. *State v. Christensen*, 270 *N.J. Super*. 650 (App. Div. 1994).

4. Provocation - N.J.S.A. 2C:44-1b(3)

Factor not applicable in passion/provocation manslaughter conviction because it is element of offense and would constitute double counting. *State v. Teat*, 233 *N.J. Super.* 368, 372 (App. Div. 1989).

5. Circumstances Unlikely to Recur - *N.J.S.A.* 2C:44-1b(8)

There is nothing unique about being under the influence of alcohol while owing money to justify defendant's claim that armed robbery offense was the result of circumstances unlikely to recur. *State v. Kelly*, 266 *N.J. Super.* 392, 396 (App. Div. 1993).

6. Response to Probationary Treatment - *N.J.S.A.* 2C:44-1b(10)

Mitigating factor that defendant is likely to respond to probationary treatment is irrelevant where there is presumption of imprisonment. *State v. Kelly*, 266 *N.J. Super.* at 396.

7. Excessive Hardship - *N.J.S.A.* 2C:44-1b(11)

Incarceration of mentally retarded defendant, who was severely abused daily by other inmates, beaten and who had attempted suicide, constituted excessive hardship. *State v. Jarbath*, 114 *N.J.* at 398, 409.

Hardship to defendant's children may be a mitigating factor in appropriate circumstances. *State v. Mirakaj*, 268 *N.J. Super.* at 51; *State v. Christensen*, 270 *N.J. Super.* 650 (App. Div. 1994).

8. Cooperation - *N.J.S.A.* 2C:44-1b(12)

Mitigating factor of cooperation does not apply when defendant was willing to cooperate with law enforcement because he thought he would get a reward. *State v. Grey*, 281 *N.J. Super.* 2, 13 (App. Div. 1995), *rev'd o.g.* 147 *N.J.* 4 (1996).

Where defendant cooperated with police and testified against one codefendant, court erred in imposing greater sentence than it otherwise would have imposed, with stated intention to reduce sentence later, in order to ensure defendant's continuing cooperation in the event the remaining fugitive codefendant was apprehended. *State v. Henry*, 323 *N.J. Super.* 157, 166-167 (App. Div. 1999).

9. Codefendant's Sentences (Disparity)

A sentence of one defendant not otherwise excessive is not erroneous merely because a codefendant's sentence is lighter; nevertheless, there is an obvious sense of unfairness in having disparate punishment for equally culpable perpetrators. The question is whether the disparity is justifiable or unjustifiable. *State v. Roach*, 146 *N.J.* 208, 232-234 (1996); *State v. Hicks*, 54 *N.J.* 390, 392 (1969); *State v. Lee*, 235 *N.J. Super.* 410, 416 (App. Div. 1989).

Disparate sentences imposed on defendant and codefendants were justified by codefendants' cooperation with law enforcement authorities. *State v. Gonzalez*, 223 *N.J. Super.* 377, 393 (App. Div. 1988), *certif. denied* 111 *N.J.* 589 (1988).

The fact that one defendant may have received a lenient sentence unappealable by the State does not mean that a codefendant's appropriate sentence becomes assailable or subject to modification on appeal. *State v. Baker*, 270 *N.J. Super.* 55, 78-79 (App. Div. 1994), *aff'd o.b.* 138 *N.J.* 89 (1994); *State v. Lee*, 235 *N.J. Super.* 410, 415-416 (App. Div. 1989).

The fact that the codefendant's sentence was shorter, and did not include mandatory term which had been imposed on defendant, did not violate equal protection, nor did the codefendant's testimony against the defendant under a plea agreement which included an illegal sentence deny defendant due process of law. *State v. Baker*, 270 *N.J. Super*. 55 (App. Div.), *aff'd o.b.* 138 *N.J.* 89 (1994).

Disparity must be evaluated in terms of "real time," and defendant who received no parole ineligibility term while codefendant received a two year parole disqualifier may actually serve less "real time" then codefendant. *State v. Salentre*, 275 *N.J. Super.* 410, 425 (App. Div. 1994), *certif. denied* 138 *N.J.* 269 (1994).

In *State v. Bessix*, 309 *N.J. Super.* 126 (App. Div. 1998) the Appellate Division remanded matter for resentencing where juvenile defendant's sentence of 20 years, 10 without parole, appeared to be significantly disproportionate to the sentences imposed on three adult codefendants who pleaded guilty and did not receive parole disqualifiers for their first degree robbery and aggravated assault convictions.

II. PRESUMPTION OF IMPRISONMENT - *N.J.S.A.* 2C:44-1d

Applicable only to first and second degree crimes committed after September 24, 1981. *See State v. Hodge*, 95 *N.J.* 369, 374 (1984); *State v. Roth*, 95 *N.J.* 334 (1984); *N.J.S.A.* 2C:44-1d.

It is only in the exceptional case, when the sentencing court finds a "serious injustice" exists, that the presumption of imprisonment may be overcome. *State v. Kelly*, 97 *N.J.* 178, 220 (1984); *State v. Roth*, 95 *N.J.* at 368.

The presumption of incarceration is not overcome merely because the defendant is a first offender or because the mitigating factors preponderate over the aggravating factors. *State v. Jabbour*, 118 *N.J.* 1 (1990); *State v. Kelly*, 97 *N.J.* at 219-20; *State v. Gonzalez*, 223 *N.J. Super*. 377, 393 (App. Div.), *certif. denied* 111 *N.J.* 589 (1988).

Nor is the presumption overcome when the sentencing judge elects to sentence the defendant one degree lower pursuant to *N.J.S.A.* 2C:44-1f(2). *State v. Frank*, 280 *N.J. Super.* 26, 42 (App. Div.), *certif. denied* 141 *N.J.* 96 (1995). In that situation the judge may reduce a prison term, but he still must imprison defendant. *State v. Jabbour*, 118 *N.J.* 1 (1990); *State v. Salentre*, 275 *N.J. Super.* 410, 415 (App. Div.), *certif. denied* 138 *N.J.* 269 (1994); *State v. Gerstofer*, 191 *N.J. Super.* 542, 546 (App. Div. 1983), *certif. denied* 96 *N.J.* 310 (1984).

The presumption of imprisonment was not overcome by the trial judge's conclusion that defendant would have a difficult time in prison because of his youth, physical appearance and psychiatric condition. These personal characteristics of the defendant did not distinguish him from other sex offenders nor did they demonstrate that imprisonment would be a serious injustice that overrode the need to deter such conduct by others. *State v. Jabbour*, 118 *N.J.* 1 (1990).

In *State v. Johnson*, 118 *N.J.* 10 (1990), the Supreme Court held that it would not be a serious injustice to imprison a deaf drug addict who sodomized his step-daughter, and thus the presumption of imprisonment was not overcome.

The commission of a first or second degree crime while under the influence of alcohol or drugs is not an extraordinary or unusual circumstance sufficient to overcome the presumption of imprisonment. *State v. Rivera*, 124 *N.J.* 122 (1991); *State v. Ghertler*, 114 *N.J.* 383, 390 (1989); *State v. Roth*, 95 *N.J.* at 368. The availability, or even the successful completion of a drug or alcohol rehabilitation program is an insufficient basis by itself upon which to conclude that imprisonment of a first or second degree offender would be a "serious injustice." *State v. Kent*, 212 *N.J. Super.* 635, 643 (App. Div. 1986), *certif. denied* 107 *N.J.* 65 (1986).

When the aggravating and mitigating factors are in equipoise, and defendant is convicted of a first or second degree crime with a presumption of imprisonment, the presumptive term should be imposed. *State v. Frank*, 280 *N.J. Super.* at 42 (App. Div. 1995).

Defendant's conviction for second-degree drug offense required a custodial sentence and presumption of incarceration was not overcome by anecdotal evidence of rehabilitation. *State v. Soricelli*, 156 *N.J.* 525 (1999).

Presumption of incarceration in *N.J.S.A.* 2C:44-1d is not satisfied by imposition of probationary sentence with the condition of a county jail term (split sentence). *State v. O'Connor*, 105 *N.J.* 399, 407-410 (1987); *see, e.g., State v. Kreidler*, 211 *N.J. Super.* 276, 279 (App. Div. 1986), *certif. denied* 107 *N.J.* 126 (1987); *State v. Whidby*, 204 *N.J. Super.* 312, 314 (App. Div. 1985).

Split sentence can only be imposed on first and second degree offenses in exceptional cases in which the trial court finds that the presumption of imprisonment has been overcome. *State v. O'Connor*, 105 *N.J.* at 410; *State v. Kreidler*, 211 *N.J. Super.* at 277-279.

Second or subsequent offender charged with third degree crime or less serious offense is not subject to presumption of imprisonment. *State v. Powell*, 218 N.J. Super. 444, 450-451 (App. Div. 1987).

III. PRESUMPTION OF NON-INCARCERA-TION-*N.J.S.A.* 2C:44-1e

Presumption not applicable if offender previously convicted of disorderly or non-indictable offense. *See N.J.S.A.* 2C:1-14k; *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 (Law Div. 1982); *State v. Garcia*, 186 *N.J. Super.* 386 (Law Div. 1982).

Presumption still applies to a defendant previously convicted of a crime when that conviction is the subject of a pending direct appeal. *State v. Rodriguez*, 202 *N.J. Super.* 543 (Law Div. 1985).

Presumption does not apply in cases in which judge reduces second degree offense to third degree for purposes of sentencing. (Defendant still convicted of second degree offense). *N.J.S.A.* 2C:44-1f(2); *State v. Partusch*, 214 *N.J. Super.* 473, 476 (App. Div. 1987); *State v. Hartye*, 208 *N.J. Super.* 319, 325-327 (App. Div. 1986), *aff'd*105 *N.J.* 411, 418-421 (1987); *State v. Rodriguez*, 179 *N.J. Super.* 129 (App. Div. 1981); *N.J.S.A.* 2C:44-1e. *State v. O'Connor*, 105 *N.J.* at 405.

Presumption of non-incarceration is not violated by imposition of probationary sentence with condition of county jail sentence (split sentence). *State v. Hartye*, 105 *N.J.* at 418-421; *State v. O'Connor*, 105 *N.J.* 399 (1987).

If the trial court finds that the presumption against incarceration is overcome, it is bound to impose a custodial term within the ordinary statutory range for that offense. *State v. Hartye*, 105 *N.J.* at 417.

Presumption of non-incarceration is applicable to municipal court offenses. *State v. LeSane*, 227 *N.J. Super.* 276 (Law Div. 1987).

IV. PRESUMPTIVE TERMS - N.J.S.A. 2C:44-1f

When the trial court finds the aggravating and mitigating factors are in equipoise, it shall impose the presumptive sentence. When, however, either the mitigating or the aggravating factors preponderate, it may adjust the sentence within the guidelines set by *N.J.S.A.* 2C:44-1f. *State v. Kruse*, 105 *N.J.* 354, 358 (1987).

A court may impose a period of parole ineligibility in conjunction with a presumptive term. Nevertheless, it should be imposed only in rare cases where the trial judge clearly states his reasons for such a sentence. *State v. Kruse*, 105 *N.J.* at 361-362.

V. DOWNGRADE OF SENTENCE - N.J.S.A. 2C:44-1f(2)

The reasons justifying the downgrade of an offense pursuant to *N.J.S.A.* 2C:44-1f(2) must be "compelling" and something in addition to, and separate from, the finding that the mitigating factors substantially outweigh the aggravating factors. *State v. Megargel*, 143 *N.J.* 484 (1996).

The Legislature's creation of enhanced sentences for certain crimes such as kidnaping and aggravated manslaughter mandates that the trial court exercise special caution before downgrading such serious offenses. *State v.*

Megargel, 143 N.J. 484 (1996); State v. Mirakaj, 268 N.J. Super. at 50-51.

Sentencing court can impose sentence greater than the presumptive term when it sentences one degree lower pursuant to *N.J.S.A.* 2C:44-1f(2). *State v. Balfour*, 135 *N.J.* 30, 38 (1994); *State v. Kelly*, 266 *N.J. Super.* 392 (App. Div. 1993).

The provisions of a plea agreement can appropriately be considered and weighed in the decision to downgrade. *State v. Balfour*, 135 *N.J.* 30, 38 (1994).

The presumption of imprisonment still applies on a downgrade from second to third degree for sentencing purposes because defendant remains convicted of a second degree offense despite the fact he was sentenced as third degree offender. *State v. O'Connor*, 105 *N.J.* 399, 405 (1987); *State v. Frank*, 280 *N.J.Super.* 26, 42 (App. Div.), *certif. denied* 141 *N.J.* 96 (1995); *State v. Partusch*, 214 *N.J. Super.* at 476; *State v. Rodriguez*, 179 *N.J. Super.* 129 (App. Div. 1981).

Mandatory parole disqualifiers are still required even if court sentences one degree lower under *N.J.S.A.* 2C:44-1f(2). *State v. Barber*, 262 *N.J. Super.* 157 (App. Div.), *certif. denied* 133 *N.J.* 441 (1993).

Court required to impose Drug Enforcement and Demand Reduction Penalty (DEDR) for second degree crime notwithstanding downgrade to third degree for purposes of sentencing. *State v. Williams*, 225 *N.J. Super.* 462, 464-65 (Law Div. 1988).

VI. INDETERMINATE SENTENCES FOR YOUTHFUL OFFENDERS

Any offender, who at the time of sentencing is less than 26 years old and has not been previously sentenced to state prison, may be sentenced to an indeterminate term at the Youth Correctional Institution Complex. *N.J.S.A.* 2C:43-5; *N.J.S.A.* 30:4-146.

A maximum term for an indeterminate sentence is ordinarily 5 years, unless the statutory maximum for the offense is less than 5 years, or if the trial judge specifically waives the 5 year term and for good cause imposes a greater term (within statutory limits). *State v. White*, 186 *N.J. Super*. 15 (Law Div. 1982); *N.J.S.A.* 30:4-148.

Trial court may use the aggravating and mitigating factors delineated in *N.J.S.A.* 2C:44-1 as a basis to explain the "good cause" which requires a term in excess of the mandated presumptive five year term. *State v. Scherzer*,

301 *N.J. Super.* 363, 498 (App. Div.), *certif. denied* 151 *N.J.* 466 (1997); *State v. Ferguson*, 273 *N.J. Super.* 486, 495 (App. Div.), *certif. denied* 138 *N.J.* 265 (1994).

A defendant who has previously been sentenced to state or federal prison cannot receive indeterminate term on subsequent conviction. *State v. Murray*, 162 *N.J.* 240, 247 (2000); *State v. Levine*, 253 *N.J. Super.* 149 (App. Div. 1992); *State v. Benedetto*, 221 *N.J. Super.* 573, 577 (App. Div. 1987), *certif. denied* 111 *N.J.* 559 (1988); *N.J.S.A.* 30:4-147.

Cannot give indeterminate sentences for Graves Act offense, but sentence can be served at Yardville. Cannot get parole ineligibility term in conjunction with indeterminate term. *State v. DesMarets*, 92 *N.J.* 62, 76, 83-84 (1983); *State v. Groce*, 183 *N.J. Super.* 168 (App. Div. 1982). *N.J.S.A.* 2C:43-5.

Cannot give indeterminate sentence for CDRA drug offense which carries a mandatory parole ineligibility term. *State v. Luna,* 278 *N.J. Super.* 433 (App. Div. 1995).

In *State v. Styker*, 262 *N.J. Super.* 7 (App. Div. 1993), *aff'd o.b.* 134 *N.J.* 254 (1993), the Appellate Division held that *McBride* mandated preference for youthful offender sentence did not survive enactment of code. It is merely an sentencing option for the trial court.

Where the trial judge lawfully sentenced the defendant as a youthful offender to an indeterminate term but set the indeterminate term below the required five years, that sentence could be corrected; however, once service of the sentence commenced, the lawful discretionary elements of the sentence, could not be made more burdensome. *State v. Eigenmann*, 280 *N.J. Super.* 331 (App. Div. 1995).

VII. PAROLE INELIGIBILITY TERMS

Standard for imposition is whether court is "clearly convinced" that "aggravating factors substantially out-weighed the mitigating" --- *N.J.S.A.* 2C:43-6b.

Failure of trial court to make specific finding that he was clearly convinced that aggravating factors substantially outweigh the mitigating factors" did not require vacation of parole ineligibility terms where such finding was implicit in court's reasons for sentence. *State v. Porter*, 210 *N.J. Super.* 383, 396-397 (App. Div. 1986), *certif. denied* 105 *N.J.* 556 (1986). Where there is a sufficient showing in the sentencing court's reasons for sentence to show substantial compliance with provisions of *N.J.S.A.* 2C:43-

6b, failure to recite the statutory formula will not defeat sentence imposed. *Id.*

Parole ineligibility term must be on a specific sentence or specific count of indictment; it cannot be imposed on aggregate sentence. *State v. Orlando*, 269 *N.J. Super.* 116, 141 (App. Div. 1993), *certif. denied* 136 *N.J.* 30 (1994); *State v. Subin*, 222 *N.J. Super.* 227, 241 (App. Div.), *certif. denied* 111 *N.J.* 580 (1988); *State v. Alevas*, 213 *N.J. Super.* 331, 342 (App. Div. 1986); *State v. Jones*, 213 *N.J. Super.* 562, 571 (App. Div. 1986).

Commutation and work credits are not deducted from parole ineligibility terms but are awarded after the prisoner has served the mandatory minimum sentence. *Merola v. Department of Corrections*, 285 *N.J. Super.* 501, 512 (App. Div. 1995), *certif. denied* 143 *N.J.* 519 (1996); *Karatz v. Scheidemantel*, 226 *N.J. Super.* 468 (App. Div. 1988); *N.J.S.A.* 30:4-123.51(a).

Gap-time credits do not reduce parole ineligibility terms. *Booker v. New Jersey State Parole Bd.*, 136 *N.J.* 257, 263 (1994); *Mitnaul v. New Jersey Parole Board*, 280 *N.J. Super.* 164 (App. Div. 1995).

Mandatory minimum 30 year parole ineligibility term for murder is not reduced by commutation and work credits. *Merola v. Department of Corrections*, 285 *N.J. Super.* 501 (App. Div. 1995), *certif. denied* 143 *N.J.* 519 (1996).

There is no constitutional impediment barring imposition of the mandatory 30 year sentence on juveniles whose cases have been waived to the adult court and who have been found guilty of murder. *State v. Pratt*, 226 *N.J. Super*. 307 (App. Div.), *certif. denied* 114 *N.J.* 314 (1988).

Parole ineligibility terms may be imposed on any crime, including CDS offenses. *State v. Reevey*, 213 *N.J. Super.* 37 (App. Div. 1986); *State v. Flippin*, 208 *N.J. Super.* 573, 576 (App. Div. 1986).

In *State v. Towey*, 114 *N.J.* 69 (1989), the Supreme Court held that there should be a high degree of correlation between the length of the base term and the length of the parole ineligibility term. *State v. Towey*, 114 *N.J.* at 81. It is logical to expect that the longest parole ineligibility term would be imposed only on base terms at or near the top of the range for the degree of crime involved. *Id.*

Increasing presumptive term is not prerequisite for imposition of parole ineligibility, and sentencing court should not increase presumptive term merely to justify period of parole ineligibility. *State v. Kruse*, 105 *N.J.* at 362.

When parties have entered plea agreement limiting maximum sentence to presumptive term, court may sentence defendant to such term subject to period of parole ineligibility. *State v. Kruse*, 105 *N.J.* at 361-362. Nevertheless, it will be a rare case in which the sentencing court imposes a period of parole ineligibility on top of a presumptive sentence. *Id.* at 362.

In *State v. Bowens*, 108 *N.J.* 622 (1987), the Supreme Court upheld the imposition of a five year parole ineligibility period on a presumptive 15 year sentence for first degree aggravated manslaughter. The Court found that the sentence imposed was appropriate under *Kruse* because the trial court explained the reasons that harmonize a presumed ordinary term with a period of parole ineligibility.

Generally, a sentencing court cannot impose sentence at bottom range for third degree offense with a parole ineligibility term because imposition of less than presumptive term required fact-finding inconsistent with that necessary for imposition of period of parole ineligibility term. *State v. Alevas*, 213 *N.J. Super.* at 342. *Compare, N.J.S.A.* 2C:44-1f with *N.J.S.A.* 2C:43-6b. *See, e.g., State v. Nemeth*, 214 *N.J. Super.* 324 (App. Div. 1986).

However, a parole ineligibility term may be legally imposed on sentence lesser than the presumptive term where the defendant acknowledged at the time of the plea proceedings that a parole ineligibility term could be imposed notwithstanding imposition of a sentence at the bottom of the sentencing range, and the trial court stated that it was clearly convinced that the aggravating factors substantially outweighed the mitigating ones and the sentence imposed comported fully with the plea agreement. *State v. Cullars*, 224 *N.J. Super.* 32, 43 (App. Div.), *certif. denied* 111 *N.J.* 605 (1988). *See also State v. Guzman*, 199 *N.J. Super.* 346 (Law Div. 1985).

A 25 year parole disqualifier can be imposed on a life sentence for a Title 24 drug offense. *State v. Cacamis*, 230 *N.J. Super.* 1 (App. Div. 1988), *certif. denied* 114 *N.J.* 496 (1989).

VIII. CONCURRENT AND CONSECUTIVE TERMS

A. Generally

N.J.S.A. 2C:44-5 creates a presumption of consecutive terms whenever a defendant violates probation by committing another offense while released on probation, parole, or bail. *State v. Sutton*, 132 *N.J.* 471 (1993).

The application of amendment to *N.J.S.A.* 2C:44-5c which reversed previous presumption of concurrent sentences and provided that unless otherwise ordered by trial court parole violation terms ran consecutively to criminal sentences, to offender who was sentenced on original offense before effective date of that enactment but violated parole after effective date, did not violate ex post facto clause. *Loftwich v. Fauver*, 284 *N.J. Super.* 530 (App. Div. 1995).

N.J.S.A. 2C:44-5h was amended to create a presumption that a sentence for a crime committed while awaiting trial on other charges be served consecutively with any other term of imprisonment imposed. This presumption applies only to <u>offenses</u> committed after June 29, 1993.

Consecutive sentence provisions of the Code, *N.J.S.A.* 2C:44-5, do not apply to sentences imposed in foreign jurisdictions. *Breeden v. N.J. Dept. of Corrections*, 132 *N.J.* 457, 466 (1993). Nevertheless Court can make New Jersey sentence consecutive to federal sentence. *State v. Mercadante*, 299 *N.J.Super.* 522, 532 (App. Div.), *certif. denied* 150 *N.J.* 26 (1997); *State v. Walters*, 279 *N.J. Super.* 626, 634 (App. Div. 1995).

Plea agreements can be considered and weighed in decision to impose consecutive sentences. *State v. S. C.*, 289 *N.J. Super.* (App. Div.), *certif. denied* 145 *N.J.* 373 (1996).

Court cannot make sentence concurrent to a previously expired sentence. *State v. Mercadante*, 299 *N.J. Super.* at 532.

Court cannot impose partially concurrent and partially consecutive sentences. *State v. Rogers*, 124 *N.J.* 113 (1991).

Juveniles who have committed two or more acts of delinquency may be sentenced to consecutive terms. *State in the Interest of J.L.A.*, 136 *N.J.* 370 (1994); *State in the Interest of G.C.*, 136 *N.J.* 383 (1994).

Trial court must impose concurrent rather than consecutive suspensions of driving privileges on offenders who are sentenced on the same day for multiple drug offenses. *State in the Interest of T.B.*, 134 *N.J.* 382 (1993).

When consecutive sentences are imposed the sentence most restrictive of the defendant's liberty shall be served first. *State v. Lane*, 279 *N.J. Super.* 209, 223 (App. Div.), *certif. denied* 141 *N.J.* 94 (1995).

Court must clearly state reasons for consecutive sentences. *State v. Mosch*, 214 *N.J. Super.* 457 (App. Div. 1986), *certif. denied* 107 *N.J.* 131 (1987).

The factors relied on to sentence defendant to the maximum term for each offense should not be used again to justify imposing those sentences consecutively. *State v. Miller*, 108 *N.J.* 112 (1987); *State v. Ghertler*, 114 *N.J.* 383, 392 (1989). Where the offenses are closely related, it would ordinarily be inappropriate to sentence a defendant to the maximum term for each offense and also require that those sentences be served consecutively, especially where the second offense did not pose an additional risk to the victim. *Id.*

B. Yarbough Guidelines

Guidelines for imposition of concurrent or consecutive sentences are set forth in *State v. Yarbough*, 100 *N.J.* 627 (1985), *cert. denied* 475 *U.S.* 1014 (1986).

Yarbough "no free crimes" criteria does not require consecutive sentences on every additional crime. Rather, in imposing sentence for each crime in a series, the court should take into account the aggravating and mitigating factors and then consider the *Yarbough* criteria. *State v. Rogers*, 124 *N.J.* 113 (1991).

C. One Incident

Consecutive sentences can be imposed on multiple convictions arising from one incident involving one victim but which is comprised of distinct and dissimilar offenses. *State v. Mosch,* 214 *N.J. Super.* 457, 462-466 (App. Div. 1986), *certif. denied* 107 *N.J.* 131 (1987).

Where separate crimes grow out of the same series of events or from same factual nexus, consecutive sentences should not be imposed. *State v. Lester*, 271 *N.J. Super.* 289, 293 (App. Div. 1994), *certif. denied* 142 *N.J.* 453 (1995).

Imposition of five consecutive life sentences for the murders of defendant's wife, mother and children was permitted exception to *Yarbough* rule. The killings, although related in defendant's mind, were predominantly independent of each other. Each was committed at a different time on successive victims in separate circumstances. *State v. List*, 270 *N.J. Super.* 169 (App. Div. 1993).

Consecutive sentences were warranted for attempted escape and aggravated assault on a corrections officer because the public interest in deterring violent assaults upon correctional officers is sufficiently important and separate from the public interest in preventing prison escapes. *State v. Espino*, 264 *N.J. Super.* 62, 75 (App. Div. 1993).

Consecutive sentences for armed robbery and kidnapping did not offend *Yarbough* in that crimes were independent of each other as they involved separate elements. *State v. Orlando*, 269 *N.J. Super.* 116, 140 (App. Div.), *certif. denied* 136 *N.J.* 30 (1994).

Imposition of consecutive sentences was not an abuse of discretion where sexual offenses committed by defendant took place at different times and involved multiple victims. *State v. J.G.*, 261 *N.J. Super.* 409, 426-427 (App. Div.), *certif. denied* 133 *N.J.* 436 (1993).

Consecutive sentences for two counts of murder do not violate *Yarbough* guideline 5. *State v. Rogers*, 124 *N.J.* at 119 (1991).

Consecutive sentences for felony murder and possession of a weapon for an unlawful purpose were justified by the fact that weapons conviction resulted from defendant's threats and gestures to witness after victim was shot. *State v. Boyer*, 221 *N.J. Super.* 387, 406 (App. Div. 1987), *certif. denied* 110 *N.J.* 299 (1988).

D. Yarbough Cap

In *Yarbough*, the Supreme Court established a "cap" for multiple offenses. This "cap" imposed an overall outer limit on consecutive sentences for multiple offenses - not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses. *Id.*

On August 5, 1993, the Legislature amended *N.J.S.A.* 2C:44-5a to provide that "there shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." *P.L.* 1993, c. 223. This amendment appears to eliminate the *Yarbough* cap. This amendment applies only to offenses committed after August 5, 1993.

Yarbough "cap" on maximum sentence may be overcome in exceptional circumstances. *State v. Moore*, 113 *N.J.* 239, 309-310 (1988); *State v. Lewis*, 223 *N.J. Super.* 145, 153-154 (App. Div.), *certif. denied* 111 *N.J.* 584 (1988); *State v. Cooper*, 211 *N.J. Super.* 1 (App. Div. 1986); *State v. Bryant*, 217 *N.J. Super.* 72, 85 (App. Div. 1987), *certif. denied* 108 *N.J.* 202 (1987), *cert. denied* 484 *U.S.* 978 (1987); *State v. Day*, 216 *N.J. Super.* 33 (App. Div.), *certif. denied* 107 *N.J.* 640 (1987).

For example, in *State v. Lewis*, 223 *N.J. Super.* at 153-154, the Appellate Division found that the consecutive sentences imposed on defendant, which were greater than the sum of longest terms allowable for two most serious offenses, did not violate *Yarbough*, in light of the fact that seven victims were injured by defendant, including one who died, and defendant received concurrent sentences on five of the nine convictions.

Similarly, in *State v. Cooper*, 211 *N.J. Super.* at 25, defendant's sentence of life with 25 years of parole ineligibility plus 86 years did not violate *Yarbough* since it was the same as the sum of the longest terms (including an extended term) which could have been imposed for defendant's two most serious offense, murder and armed robbery.

Likewise, in *State v. Day*, 216 *N.J. Super.* 33 (App. Div.), *certif. denied* 107 *N.J.* 640 (1987), the Appellate Division upheld the imposition of consecutive terms which slightly exceeded the maximum sentence for the two offenses because: 1) no parole ineligibility terms were imposed; thus the 49 year sentence resulted in less "real time" than the *Yarbough* maximum of 40 years, with a possibility of 20 years without parole; 2) the myriad of additional convictions were concurrent, and 3) the weeks of suffering endured by the victim (who was repeatedly tortured by defendant), warranted the greater punishment.

IX. MANDATORY SENTENCES

A. Carjacking

Carjacking is a first degree offense with a sentencing range between 10 and 30 years, with a mandatory minimum sentence of 5 years parole ineligibility. *State v. Zadoyan*, 290 *N.J. Super.* 280, 289-290 (App. Div. 1996); *State v. Henry*, 323 *N.J. Super.* 157, 163 (App. Div. 1999).

While the other first degree offenses with longer ordinary terms, aggravated manslaughter and kidnaping, have been given presumptive terms of 20 years by the Legislature, *N.J.S.A.* 2C:44-1f(1)(a), the offense of

carjacking has no presumptive term. *State v. Zadoyan*, 290 *N.J. Super.* at 290.

Because there is no presumptive term for carjacking, the Appellate Division, in *State v. Zadoyan*, 290 *N.J. Super.* at 291, set out a sentencing procedure to guide judges, which focuses on the four elevating factors in the carjacking statute. The longer sentences should be reserved for the cases involving the most serious additional fact: the infliction of bodily injury or the use of force [Element a(1)].

Sentences in the lower range should be considered in cases involving the least serious element, operation of the vehicle with the lawful occupant remaining in it [Element a (4)], unless of course the remaining occupant is an infant or child or if the perpetrator further victimizes the occupant by committing a third or fourth degree offense. *State v. Zadoyan*, 290 *N.J. Super.* at 291 and fn 2.

Where there is the threat of bodily injury or the commission or threat to commit a first or second degree crime [Elements a(2) and a(3)], generally a sentence within the mid-range of sentence would be appropriate. *State v. Zadoyan*, 290 *N.J. Super.* at 291; *State v. Henry*, 323 *N.J. Super.* at 163-164.

The high end of the sentencing range for carjacking should be reserved for those cases involving the most serious accompanying elements. *State v. Zadoyan*, 290 *N.J. Super.* at 292.

Where defendant did not injure victim but carjacking involved use of gun, a risk of serious injury and commission or threat of other crimes including robbery and kidnaping, defendant should be sentenced on high side of intermediate range for carjacking. *State v. Henry*, 323 *N.J. Super.* 157, 164 (App. Div. 1999).

Mandatory sentence for carjacking did not constitute cruel and unusual punishment. *State v. Zadoyan*, 290 *N.J. Super.* 280 (App. Div. 1996).

B. Graves Act

Mandatory minimum terms of parole ineligibility for offenses committed with firearms; plea bargaining to less than mandatory minimum prohibited. *State v. Des Marets*, 92 *N.J.* 62 (1983); *N.J.S.A.* 2C:43-6c and d.

Graves Act "escape valve statute", *N.J.S.A.* 2C:43-6.2 which required consent of prosecutor for reduction of

sentence, did not violate separation of powers doctrine. *State v. Alvarez*, 246 *N.J. Super.* 137 (App. Div. 1991).

The prosecutor's refusal to apply, pursuant to *N.J.S.A.* 2C:43-6.2, for an "escape valve" reduction of defendant's mandatory Graves Act parole disqualifier was not arbitrary but was consistent with the legislative goal of deterrence and there was no denial of equal protection of the law. In this case, defendant pointed a loaded handgun at two people, threatened them and then accidently shot himself in the foot. *State v. Miller*, 321 *N.J. Super.* 550 (Law Div. 1999).

The length of a Graves Act parole disqualifier is determined in the same manner as non-Graves Act parole ineligibility. *State v. Towey*, 114 *N.J.* 69, 81-82 (1989).

However, since a parole ineligibility term is mandated by the Graves Act even if the court determines that the mitigating factors outweigh the aggravating ones and imposes a base term lower than the presumptive term, it is understandable that there may be less correlation between the length of a base term and the severity of the Graves Act parole disqualifier than that imposed in non-Graves cases. *State v. Towey*, 114 *N.J.* at 81-82.

The Court should also consider, in determining the length of a Graves Act parole ineligibility term, the extent to which injury was threatened or inflicted by defendant's possession or use of the firearm, regardless of the fact that this particular consideration may also be an element of the offense. *State v. Towey*, 114 *N.J.* at 83.

The trial court must inform a defendant of the mandatory parole ineligibility term required by *N.J.S.A.* 2C:43-6c before accepting a guilty plea to a Graves Act offense. *State v. Bailey*, 226 *N.J. Super.* 559 (App. Div. 1988).

Accomplice is subject to Graves Act penalties if he knew or had reason to know that codefendant would use or be in possession of a firearm. *State v. White*, 98 *N.J.* 122 (1984).

Graves Act applies to defendant even if his involvement with weapon was limited to hiring someone to commit murder. *State v. Mancine*, 124 *N.J.* 232 (1991).

Constructive possession of weapon is sufficient in certain cases for Graves Act sentence. *State v. Stewart*, 96 *N.J.* 596 (1984).

In Graves Act cases, jury should not be instructed that a guilty verdict would result in a mandatory minimum term of imprisonment. *State v. Reed*, 211 *N.J. Super.* 177, 186-187 (App. Div. 1986), *certif. denied* 110 *N.J.* 508 (1988).

The Graves Act requires an independent determination of defendant's use or possession of a firearm based upon a consideration of all relevant material, not merely that adduced at trial or considered by a jury. *State v. Palmer*, 211 *N.J. Super.* 349, 354 (App. Div. 1986).

Firearm need not be operable, *State v. Gantt*, 101 *N.J.* 573 (1986), or loaded or even recovered for Graves Act sentence. *State v. Des Marets*, 92 *N.J.* at 66, 70 n.8; *State v. Hickman*, 204 *N.J. Super.* 409 (App. Div. 1985).

An air-powered pistol is considered to be a handgun within the meaning of *N.J.S.A.* 2C:39-5b and for Graves Act purposes. *State v. Harmon*, 203 *N.J. Super.* 216, 229 (App. Div. 1985), *rev'd o.g.* 104 *N.J.* 189 (1986); *State v. Mieles*, 199 *N.J. Super.* 29 (App. Div.), *certif. denied* 101 *N.J.* 265 (1985).

Inoperable BB gun used during course of robbery required Graves Act sentence. *State v. Austin*, 335 *N.J. Super.* 468, 494 (App. Div. 2000).

Allegedly inoperable shotgun used during the course of robbery/kidnapping fell within definition of firearm and required imposition of Graves Act sentence. *State v. Orlando*, 269 *N.J. Super*. 116, 141 (App. Div. 1993), *certif. denied* 136 *N.J.* 30 (1994).

A starter's pistol is not a firearm for purposes of the Graves Act. *State v. Williams*, 232 *N.J. Super.* 414 (App. Div.), *certif. denied* 117 *N.J.* 633 (1989).

It is the role of the sentencing court, not the jury, to decide whether a defendant intended to use a firearm against a person, as opposed to the property, of another for purposes of Graves Act sentencing under *N.J.S.A.* 2C:43-6c. *State v. Camacho*, 153 *N.J.* 54 (1998), *cert. denied* 535 *U.S.* 864 (1998). *But see Apprendi v. New Jersey*, 530 *U.S.* 466, 120 *S.Ct.* 2348, 147 *L.Ed.*2d 435 (2000); *State v. Johnson*, 166 *N.J.* 523, 766 (2001).

In *McMillan v. Pennsylvania*, 477 *U.S.* 79, 106 *S.Ct.* 2411, 91 *L.Ed.*2d 67 (1986), the United States Supreme Court upheld the constitutionality of Pennsylvania's version of the Graves Act. The Court concluded that States may treat "visible possession of a firearm" as a sentencing consideration rather than an element of a particular offense. The Court further held that due process was

satisfied by the standard that proof of possession be established by a preponderance of the evidence.

C. Graves Act Extended Term - *N.J.S.A.* 2C:43-6c; 2C:44-3

N.J.S.A. 2C:44-5a(2) does not preclude imposition of multiple Graves Act sentences on second Graves Act offender. That provision limits the judge's authority to impose discretionary extended prison terms, not Graves Act mandatory extended prison terms. *State v. Singleton*, 326 *N.J. Super.* 351, 355 (App. Div. 1999); *State v. Connell*, 208 *N.J. Super.* 688, 691 (App. Div. 1986). Thus, the sentence for each Graves Act crime imposed on a second Graves Act offender must be within the extended prison sentence range.

Defendant is entitled to written notice and a hearing for a mandatory Graves Act extended term. *State v. Martin*, 110 *N.J.* 10 (1988); *R.* 3:21-4d. The notice must state the prior conviction that will be relied upon and the substance of the proof that will be addressed in support of the claim that it is a prior Graves Act conviction. *Id.* at 20. Proof of the conviction may be established by a certified copy of a conviction, transcripts of testimony indicating that a firearm was possessed or used, or other information, in addition to the presentence report. *State v. Martin*, 110 *N.J.* at 18.

When a sentence of life imprisonment is imposed upon a subsequent Graves Act offender the judge must impose a parole ineligibility term of 25 years. *N.J.S.A.* 2C:43-7c; *State v. Swint*, 328 *N.J. Super.* 236, 262 (App. Div.), *certif. denied* 165 *N.J.* 492 (2000).

The trial court rationally determined that defendant had used a real gun to commit his crimes and properly imposed an extended Graves Act sentence. In reaching this conclusion, the trial court was allowed to consider, pursuant to *N.J.R.E.* 101(a)(2)(c) and *N.J.R.E.* 410, defendant's sworn statements at his subsequently withdrawn guilty plea, that the gun used in the offense was real, in addition to his unsworn statement to the police that the gun he used was a toy. *State v. Hawkins*, 316 *N.J. Super.* 74 (App. Div. 1998), *certif. denied* 162 *N.J.* 489 (1999).

In *State v. Jefimowicz*, 119 *N.J.* 152 (1990), the Supreme Court held that when the record is clear regarding defendant's prior Graves Act conviction, a hearing is <u>not</u> required under <u>Martin</u> in order to clarify or elucidate the nature of the conviction.

A second Graves Act offender may be sentenced to a mandatory extended term of imprisonment while the first Graves Act conviction is pending on appeal or the time to appeal that conviction has not yet expired. *State v. Haliski*, 140 *N.J.* 1 (1995).

For purposes of the mandatory extended terms of the Graves Act, the chronology of the events and offenses were irrelevant so long as judgments were entered prior to the sentencing of the matter before the court. *State v. Hawks*, 114 *N.J.* 359 (1989) *See, e.g., State v. Bey*, 96 *N.J.* 625, 629 (1984); *State v. Biegenwald*, 96 *N.J.* 630, 635-636 (1984); *State v. Windsor*, 205 *N.J. Super.* 450 (Law Div. 1985).

In imposing a mandatory extended term for a second Graves Act offense, the trial court should weigh the aggravating and mitigating factors to determine the "base term" and to fix the period of parole ineligibility as outlined in *State v. Dunbar*, 108 *N.J.* 80 (1987). *State v. Jefimowicz*, 119 *N.J.* 152 (1990).

Proof of the conviction may be established by a certified copy of a conviction, transcripts of testimony indicating that a firearm was possessed or used, or other information, in addition to the presentence report. *State v. Martin*, 110 *N.J.* 10, 18 (1988).

As originally drafted the mandatory extended term provisions for a second Graves Act offense, *N.J.S.A.* 2C:44-3d, could not be based on foreign convictions. *State v. Copeman*, 197 *N.J. Super.* 261, 264-265 (App. Div. 1984). *N.J.S.A.* 2C:44-3d was amended, effective June 20, 1997, to provide that a conviction in another jurisdiction would constitute a prior conviction for a Graves Act extended term.

D. NERA - No Early Release Act - *N.J.S.A.* 2C:43-7.2 (eff. 6/9/97)

NERA requires that a parole ineligibility term of 85% of the base term be imposed when defendant commits a violent crime of the first or second degree. *N.J.S.A.* 2C:43-7.2a. In addition a period of parole supervision, 5 years for first degree crimes and 3 years for second degree crimes, must be imposed. *N.J.S.A.* 2C:43-7.2c.

Imposition of an extended term for first or second degree violent crime must include NERA sentence at least equal to the maximum ordinary term for the degree of the crime involved. *State v. Allen*, 337 *N.J. Super.* 259, 766 (App. Div. 2001).

1. Constitutionality

The No Early Release Act is constitutional and does not impose cruel and unusual punishment. *State v. Johnson*, 166 *N.J.* 523, 766 (2001); *State v. Newman*, 325 *N.J. Super.* 556 (App. Div. 1999), *certif. denied* 163 *N.J.* 396 (2000).

The factual predicate for a NERA sentence must be found beyond a reasonable doubt by a jury in cases that proceed to trial or by judge in cases involving guilty pleas (right to jury trial waived). *State v. Johnson*, 166 *N.J.* 523, 766 (2001), S.O. at 29-30; *State v. Shoats*, _____ *N.J. Super.* ____, S.O. at 15-16, 2001 *WL* 267054 (App. Div. 2001).

Supreme Court declined to address whether indictment requirement of state constitution attaches to NERA. *State v. Johnson*, 166 *N.J.* at 523, 766 (2001) n. 2, S.O. at 29 n. 2. The Court did find in *Johnson*, that indictment in that case gave defendant sufficient notice of the NERA violent crime predicate. *Id.* The Supreme Court asked the Criminal Practice Committee to make recommendations for appropriate NERA procedures and whether *R.* 3:21-4(f) should be amended to require notice by the prosecutor of intent to impose a NERA sentence earlier than 14 days after jury verdict or guilty plea. (In case involving plea agreements prosecutor must file and serve notice prior to plea). *State v. Johnson*, 166 *N.J.* 523,766 (2001) (S.O. at 30).

Supreme Court decision in *Johnson* is based on theory of statutory construction and not on principles of constitutional law, and will not be retroactively applied. *State v. Johnson*, 166 *N.J.*523, 766 (2001) (S.O. at 33-35). Accordingly, the *Johnson* decision will apply only to all cases on direct appeal on the date of the opinion (February 28, 2001) where the appellant is challenging the failure of the NERA offense to be proven to a jury beyond a reasonable doubt, and to trial cases, in which NERA is implicated, that commence after the filing date of the opinion. *State v. Johnson*, 166 *N.J.* 523, 766 (2001), S.O. at 35; *State v. Shoats*, _____, *N.J. Super.* ___, S.O. at 16, 2001 *WL* 267054 (App. Div. 2001).

2. Violent Crime

"Violent crime" is defined in the statute as any crime in which the actor causes death or serious bodily injury; or uses or threatens the immediate use of a deadly weapon; or any aggravated sexual assault or sexual assault in which the actor uses, or threatens the immediate use of, physical force. *N.J.S.A.* 2C:43-7.2d.

NERA does not apply to knowing and purposeful murder. *State v. Manzie*, 335 *N.J. Super.* 267 (App. Div. 2000), *certif. granted* _____ *N.J.* ____ (2001) (argued March 13, 2001). The Appellate Division, in the interest of sentencing uniformity, declined to reconsider whether murder is a NERA offense and potentially create a conflict of law because issue is before Supreme Court in *Manzie*. *State v. Allen*, 337 *N.J. Super.* 259, 766 (App. Div. 2001).

If NERA applies to murder, the parole ineligibility term for sentence of life imprisonment would be 63 3/4 years, that is 85% of 75 years - 75 years being the basis of a life sentence in light of parole act, *N.J.S.A.* 30:4-123.51(a) and (b). *State v. Allen*, 337 *N.J. Super.* 259, 766 (App. Div. 2001).

NERA applies to reckless-intent crimes like reckless manslaughter, and not just to purposeful or knowing offenses. NERA's plain language proves that reckless manslaughter is a violent crime, within the meaning of the statute. *State v. Newman*, 325 *N.J. Super.* 556 (App. Div. 1999), *certif. denied* 163 *N.J.* 396 (2000). *See State v. Burford*, 163 *N.J.* 16, 20-21 (2000).

NERA applies to vehicular homicide convictions. State v. Ferencsik, 326 N.J. Super. 228 (App. Div. 1999); State v. Burford, 163 N.J. at 20-21.

A conviction for drug-induced death, *N.J.S.A.* 2C:35-9, qualifies as a violent crime under the provisions of NERA; therefore, the 85% parole disqualifier was properly applied to defendant's sentence. *State v. Cullum*, ____ *N.J. Super.* ____ (App. Div. March 29, 2001).

Sentencing judge properly considered facts beyond those limited to proof of the elements of the predicate crime in determining that offense was violent crime under NERA. *State v. Williams*, 333 *N.J.Super.* 356, 361 (App. Div. 2000), *sentence vacated* _____ *N.J.* ___ (March 14, 2001)

(NERA factual predicate not found beyond a reasonable doubt by jury).

In *State v. Thomas*, ______N.J. ____, 2001 *WL* 194653 (2001), the Supreme Court found that NERA covers three types of first degree aggravated sexual assault and second degree sexual assaults: (1) those in which the actor causes serious bodily injury; (2) those in which the actor uses or threatens the immediate use of a deadly weapon, and (3) those in which the actor uses or threatens the immediate use of physical force. (S.O. at 14).

Where the elements of the sexual offense charged against a defendant do not contain as an element of proof any one or more of the NERA factors, there must be proof of an independent act of force or violence or a separate threat of immediate physical force to satisfy the NERA factor. *State v. Thomas*, S.O. at 18. This independent act of force or violence or separate threat of immediate physical force must be found beyond a reasonable doubt by a jury where the case proceeds to trial. *State v. Thomas*, S.O. at 18; *State v. Johnson*, 166 *N.J.*523, 766 (2001), S.O. at 29-30.

Guilty plea to armed robbery in which defendant stated that he used baseball bat to strike the victim on his neck satisfied definition of violent crime under NERA. *State v. Hernandez,* ____ *N.J. Super.* __, S.O. at 5, 2001 *WL* 262636 (App. Div. 2001).

A broken nose is not serious bodily injury as required for sentencing under NERA. *State v. Kane*, 335 *N.J.Super.* 391, 398-399 (App. Div. 2000).

3. Deadly Weapon

"Deadly weapon" is defined as any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or intended to be used, is known to be capable of producing death or serious bodily injury. *N.J.S.A.* 2C:43-7.2d.

Whether defendant used or threatened the immediate use of a deadly weapon must be found beyond a reasonable doubt by a jury at a trial, or a judge in cases involving guilty pleas, if the use or threatened use of a deadly weapon is not an element of the offense. *State v. Johnson*, 166 *N.J.* 523, 766 (2001), S.O. at 29-30; *State v. Shoats*, ____ *N.J. Super.* ___, S.O. at 14-16, 2001 *WL* 267054.

The use of a hypodermic needle purportedly containing the AIDS virus to commit first degree armed

robbery is a violent crime under NERA. *State v. Ainis*, 317 *N.J. Super.* 127 (Law Div. 1998)

If a first or second degree crime involves the use or threat of immediate use of a firearm, NERA applies. *State v. Meyer*, 327 *N.J. Super.* 50, 56 (App. Div.), *certif. denied* 164 *N.J.* 191 (2000).

A pellet gun or BB gun is a firearm and a deadly weapon for purposes of NERA. *State v. Cheung*, 328 *N.J. Super.* 368 (App. Div. 2000); *State v. Meyer*, 327 *N.J. Super.* 50, 56 (App. Div.), *certif. denied* 164 *N.J.* 191 (2000).

An operable firearm encompassed within the definition of *N.J.S.A.* 2C:39-4 does meet NERA standards. *State v. Austin*, 335 *N.J. Super.* 486, 493 (App. Div. 2000) (inoperable BB gun not deadly weapon under NERA).

Robbery committed with inoperable BB gun was not NERA offense, but Graves Act applied and required imposition of mandatory parole ineligibility term. *State v. Austin*, 335 *N.J. Super.* 465, 494 (App. Div. 2000).

NERA does not apply to a "purely possessory" crime of possession of a firearm with intent to unlawfully use it against another where there was no contemporaneous use of the weapon during a violent crime or a threat to use the weapon. *State v. Johnson*, 325 *N.J. Super.* 78 (App. Div. 1999), *aff'd o.g.* 166 *N.J.* 523, 766 (2001). However, possession of a weapon for an unlawful purpose is not excluded from imposition of NERA sentence under all circumstances. *State v. Williams*, 333 *N.J. Super.* 356, 361 (App. Div. 2000), *remanded N.J.* (March 14, 2001). Court may evaluate factual circumstances to determine if defendant's actions constitute a violent crime under NERA. *Id.*

Defendants' use of a closed knife during a robbery, concealed to look like a gun, did not constitute a "deadly weapon" for purposes of NERA. *State v. Pierre*, 330 *N.J. Super*. 7 (App. Div. 2000), *aff'g* 329 *N.J. Super*. 588 (Law Div. 1999).

NERA sentence not required where defendant used a hammer merely to break the front of a jewelry store's display case, and did not use or threaten the immediate use of a deadly weapon as *N.J.S.A.* 2C:43-7.2d requires. Rather than using the hammer "as a menacing, deadly weapon," defendant employed it "as a burglar's tool." *State v. Grawe*, 327 *N.J. Super.* 579 (App. Div. 2000), *certif. denied* 164 *N.J.* 560 (2000).

Defendant's second-degree eluding conviction did not qualify as a "violent crime" under NERA, *N.J.S.A.* 2C:43-7.2, because he did not intend to use the stolen automobile he was driving as a deadly weapon. *State v. Burford*, 163 *N.J.* 16 (2000).

However, where defendant intentionally used his car as a battering ram against a police vehicle, it constituted a deadly weapon under NERA. *State v. Griffith*, 336 *N.J. Super.* 514 (App. Div. 2001).

4. NERA Hearing and Sentence

In accordance with *N.J.S.A.* 2C:43-7.2e, the State must provide written notice to defendant of the ground it will urge to support the imposition of a NERA sentence. *State v. Staten*, 327 *N.J. Super.* 349, 357 (App. Div.), *certif. denied* 164 *N.J.* 561 (2000).

R.3:21-4(f) requires notice to defendant of enhanced sentencing under NERA.

5. Burden of Proof

Where the NERA factor is not an element of the offense, the State must prove beyond a reasonable doubt the factual predicate which triggers the NERA sentence. *State v. Johnson*, 166 *N.J.* 523, 766 (2001); *State v. Ainis*, 317 *N.J. Super.* 127 (Law Div. 1998).

If a first degree offense is downgraded to a second degree for purposes of sentencing, see *N.J.S.A.* 2C:44-1(f)(2), defendant still receives the five year period of parole supervision because he or she remains convicted of the first degree offense. *State v. Cheung*, 328 *N.J. Super.* 368 (App. Div. 2000).

The judgment of conviction should reflect whether the Graves Act also applied to the offense, because even though the NERA 85% parole ineligibility term satisfies the Graves mandatary minimum requirements, the record must be clear in the event defendant commits a second Graves offense, in which case a mandatory extended term is required. *State v. Cheung*, 328 *N.J. Super.* 368 (App. Div. 2000).

6. NERA Guilty Plea

Defendant can waive right to jury determination of the NERA fact and submit issue to trial court for a NERA determination which the State must prove beyond a reasonable doubt. Such waiver must be acknowledged on the record and found by the judge to have been knowingly and voluntarily entered. *State v. Shoats*, ____*N.J. Super.*___, S.O. at 16-17, 2001 *WL* 267054 (App. Div. 2001).

Where both prosecutor and defendant assumed that NERA applied to defendant's account of the offense, and Appellate Division found otherwise, remedy was remand to trial court. *State v. Shoats*, _____, *N.J. Super.* ____, S.O. at 16, 2001 *WL* 267054. The following options are available on remand:

(1) State and defendant may agree to jury determination on the NERA issue;

(2) Defendant can waive right to jury determination of the NERA fact and, with agreement of the prosecutor, submit the issue to the judge for a NERA determination with the State's burden being beyond a reasonable doubt;

(3) If jury determination on NERA is not agreed to by both the prosecutor and defendant, and defendant does not expressly waive right to jury trial on NERA issue, then defendant is not entitled to the benefit of the remainder of the plea bargain.

In such cases, the prosecutor can:

- (a) reinstate all the original charges, or
- (b) renegotiate another plea bargain, or

(c) accept defendant's factual version and seek resentencing without the NERA parole ineligibility term but also without the agreed-to limit on the base term. *State v. Shoats*, ____ *N.J. Super.* at __, S.O. at 16, 2001 *WL* 267054.

Where defendant acknowledges NERA's application and the basis therefor at the time of the guilty plea, a NERA hearing may not be necessary at sentencing. *State v. Meyer*, 327 *N.J. Super.* 50 (App. Div.), *certif. denied* 164 *N.J.* 191 (2000); *State v. Staten*, 327 *N.J. Super.* 349, 358 n. 2 (App. Div.), *certif. denied* 164 *N.J.* 561 (2000).

Guilty plea includes a waiver of jury trial as to guilt of offense. There is no constitutional impediment to waiver of defendant's right to a jury determination as to NERA sentencing enhancement fact. But there must be an express waiver which is knowingly and voluntarily entered. *State v. Shoats*, _____, *N.J. Super.* ___, S.O. at 15-16, 2001 *WL* 267054 (App. Div. 2001).

When a defendant is indicted for a NERA eligible offense and facts underlying guilty plea acknowledged existence of NERA predicate facts, the fact that plea agreement is to lesser offense does not preclude a NERA sentence. *State v. Reardon*, 337 *N.J.Super.* 324, 766 (App. Div. 2001). Where defendant, who was indicted for first degree robbery, admitted in his factual basis his use of knife in committing the crime, plea agreement to second degree robbery did not preclude NERA sentence. *State v. Reardon, supra.*

Defendant cannot obtain the benefit of a negotiated downgraded sentence premised on the application of NERA and then repudiate the NERA sentence. *State v. Hernandez,* ______. *N.J. Super.* at _____, S.O. at 5-6, 2001 *WL* 262636. Where application of NERA has been acknowledged at the time of a negotiated plea, the defendant must first make an application in the trial court to vacate the plea. In this way, the record will be clear that he understands that a successful attack on the sentence means that all charges may be resurrected. *State v. Hernandez,* ______. *N.J. Super.* at _____, S.O. at 7, 2001 *WL* 262636.

Defendant who acknowledged the application of NERA at the time of plea is not precluded from arguing that the factual basis for his plea is insufficient to permit a NERA sentence. *State v. Shoats*, _____, *N.J. Super.* ____, S.O. at 14, 2001 *WL* 267054 (App. Div. 2001); *State v. Hernandez*, _____, *N.J. Super.* at ____, S.O. at 7, 2001 *WL* 262636.

Defendant cannot, on appeal, concede the validity of the guilty plea which was necessarily predicated upon the conclusion that the victim suffered serious bodily injury, yet, at the same time argue that for purposes of NERA the victim did not sustain serious bodily injury. *State v. Staten*, 327 *N.J. Super.* 349, 359 (App. Div.), *certif. denied* 164 *N.J.* 561 (2000). Defendant's remedy is to move to withdraw his guilty plea, and if granted, dismissed charges will be reinstated. *State v. Shoats*, ____*N.J. Super.* ___, S.O. at 16, 2001 *WL* 267054 (App. Div. 2001); *State v. Hernandez*, ____*N.J.Super.* ___, S.O. at 7, 2001 *WL* 262636; *State v. Staten*, 327 *N.J. Super.* at 359-360.

7. NERA Accomplices and Attempts

An accomplice of a person committing a qualifying NERA offense is also subject to a NERA sentence. *State v. Rumblin*, 166 *N.J.* 550, 766 (2001); *State v. Cheung*, 328 *N.J. Super.* 368 (App. Div. 2000).

An attempt to cause death or serious bodily injury, without causing either, and without the use or threatened use of a deadly weapon, is not a NERA crime because it does not meet the statutory definition of a violent crime. *State v. Staten*, 327 *N.J. Super.* at 354. A mere attempt to cause serious bodily injury, without more, does not subject a first or second degree offender to NERA. *State v. Kane*, 335 *N.J. Super.* at 355; *but see State v. Thomas*, _____ *N.J.* _____, S.O. at 16, 2001 *WL* 194653 (2001) (offenses that do not contain NERA factor as constituent element can be brought within scope of NERA only upon proof of a NERA factor. "Invariably, the criminal attempt statute, *N.J.S.A.* 2C:5-1 will be used to accomplish that purpose.")

E. Three Strikes - N.J.S.A. 2C:43-7.1

The Supreme Court of New Jersey held that the Three Strikes Law, *N.J.S.A.* 2C:43-7.1a, is constitutional and does not violate double jeopardy, separation of powers, ex post facto doctrine, equal protection, due process and is not cruel and unusual punishment, and defendant's 1979 precode robbery conviction was substantially equivalent to first degree robbery under *N.J.S.A.* 2C:15-1b and constituted a prior offense under the law. *State v. Oliver*, 162 *N.J.* 580 (2000).

Prior out-of-state robbery conviction was not substantially equivalent to first degree robbery in this state and thus defendant was not eligible for life term under Three Strikes statute. *State v. Rhodes*, 329 *N.J. Super.* 536 (App. Div.), *certif. denied* 165 *N.J.* 487 (2000).

Defendant must be given notice that he or she is subject to the provisions of the Three Strikes law and a hearing must be held to establish the eligibility for the enhanced sentence by a preponderance of the evidence. *State v. Oliver*, 162 *N.J.* 580, 590-591 (2000).

X. DISCRETIONARY EXTENDED TERMS - *N.J.S.A.* 2C:44-3

A. Persistent Offender

The general rule is that only one sentence for extended term may be imposed at the same proceeding. *N.J.S.A.*

2C:44-5a(3); State v. Pennington, 154 N.J. 344, 361 (1998); State v. Cook, 330 N.J. Super. 395, 423 (App. Div.), certif. denied 165 N.J. 486 (2000); 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).

An exception to this rule is Graves Act extended terms for which multiple terms must be imposed when required the statutory requirements are met. *State v. Connell*, 208 *N.J. Super.* 688 (App. Div. 1986). *See also State v. Serrone*, 95 *N.J.* 23 (1983) (murder is exception).

Nor does this restriction apply to situations where extended terms have been imposed on different offenses at a separate time in a separate proceeding by different courts. *State v. Williams*, 299 *N.J. Super.* 264, 273 (App. Div. 1997).

Parole ineligibility term may be imposed on presumptive base term in extended term sentence. *State v. Pennington*, 154 *N.J.* at 357.

Life imprisonment is the presumptive term for extended term for first degree kidnapping. *State v. Pennington*, 154 *N.J.* at 356.

If a sentencing court elects to impose a parole bar on an extended term of life imprisonment, that bar must be twenty-five years. *State v. Pennington*, 154 *N.J.* 344 (1998).

1. Grounds for Imposition and Notice

The Supreme Court articulated the following standards for imposition of an extended term of imprisonment on a persistent offender:

(a) the sentencing court must determine whether the minimum statutory requirements for subjecting the defendant to an extended term have been met.

(b) the court must determine whether to impose an extended term.

(c) the court must weigh the aggravating and mitigating circumstances to determine the base term of the extended sentence.

(d) the court must determine whether to impose a period of parole ineligibility. *State v. Pennington*, 154 *N.J.* 344, 354 (1998); *State v. Dunbar*, 108 *N.J.* 80 (1987).

The standard for determining whether to impose an extended term on an eligible defendant is whether it is necessary for the protection of the public from future offenses by defendant through deterrence. *State v. Pennington*, 154 *N.J.* at 354; *State v. Dunbar*, 108 *N.J.* at 90-91. Aspects of the defendant's record, such as a juvenile record, parole and probation records, and overall response to prior attempts at rehabilitation, will be relevant factors in adjusting the base extended term. *State v. Dunbar*, 108 *N.J.* at 92.

In determining parole ineligibility it would be necessary to take into account the defendant's entire prior record as part of the weighing process. *State v. Dunbar*, 108 *N.J.* at 93; *State v. Williams*, 310 *N.J. Super.* 92, 98 (App. Div.), *certif. denied* 156 *N.J.* 426 (1998).

2. Proof of Prior Conviction

The rationale of *State v. Haliski*, 140 *N.J.* 1 (1995), is also applicable to discretionary extended terms. Thus a sentencing court may consider convictions entered after defendant committed the present crimes even if an appeal is pending or the right to direct appeal exists. If defendant is successful in that appeal, the extended term can be amended. *State v. Cook*, 330 *N.J. Super*. 395, 421-422 (App. Div.), *certif. denied* 165 *N.J.* 486 (2000). *But see, State v. Hawks*, 114 *N.J.* 359 (1989); *State v. Mangrella*, 214 *N.J. Super*. 437, 445 (App. Div. 1986), *certif. denied* 107 *N.J.* 127 (1987).

The chronology of the events and offenses is irrelevant in determining the applicability of the persistent offender statute, so long as the judgments were entered prior to the sentencing before the court. *State v. Hawks*, 114 *N.J.* 359 (1989): *State v. Mangrella*, 214 *N.J. Super.* at 445.

An extended term cannot be imposed unless the defendant is specifically apprised at the time of the plea of the potential number of years to which he is exposed. *State v. Cartier*, 210 *N.J. Super.* 379, 381-383 (App. Div. 1986). Thus, where the prosecutor reserves the right to move for an extended term, it is incumbent upon the trial judge at the time of the plea to make certain that defendant is made aware of the possible sentencing consequences under *N.J.S.A.* 2C:43-7. *Id.*

An uncounseled conviction without waiver of the right to counsel is invalid for the purpose of increasing a defendant's loss of liberty. *State v. Laurick*, 120 *N.J.* 1, 16 (1990), *cert. denied* 498 *U.S.* 967 (1970). In the context of repeat DWI offenses, *Laurick* means that the enhanced administrative penalties and fines may constitutionally be imposed but in that in the case of repeat DWI convictions based on uncounseled prior convictions, the actual period of incarceration may not exceed that for any counseled DWI convictions. *State v. Laurick*, 120 *N.J.* at 16.

It is constitutionally permissible that an prior uncounseled DWI conviction may establish repeatoffender status for purposes of enhanced penalty provisions of the DWI laws, but defendant may not suffer increased period of incarceration as a result of uncounseled DWI conviction. *Id.*

Defendant's prior conviction for driving while intoxicated could not be used to enhance his punishment upon third conviction if he was not represented by counsel at first conviction and he did not waive his right to counsel. *State v. Latona*, 307 *N.J. Super.* 387 (App. Div.), *certif. denied* 154 *N.J.* 607 (1998). Defendant bears the burden of proving the absence of counsel or lack of waiver. *State v. Laurick*, 120 *N.J.* at 11 (1990).

Under federal constitutional principles, an uncounseled misdemeanor conviction valid under *Scott v. Illinois*, 440 *U.S.* 367 (1979), because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction, even though that sentence entails imprisonment. *Nichols v. U.S.*, 511 *U.S.* 738, 746-748, 114 *S.Ct.* 1921, 1927-1928 (1994). *But see, State v. Latona*, 307 *N.J. Super.* 387 (App. Div.), *certif. denied* 154 *N.J.* 607 (1998). (Appellate Court followed *Laurick* and not *Nichols*).

Use of prior convictions to support imposition of extended term does not violate ex post facto clause because enhanced punishment is for a new offense, not the earlier one. *In Re Caruso*, 10 *N.J.* 184, 189-190 (1952); *State v. Williams*, 309 *N.J. Super.* 117, 125 (App. Div.), *certif. denied* 156 *N.J.* 383 (1998). *See Gryger v. Burke*, 334 *U.S.* 728, 732, 68 *S.Ct.* 1256, 1258 (1948).

Conviction in another jurisdiction can support imposition of discretionary extended term as persistent offender. *State v. Garcia*, 204 *N.J. Super.* 202 (App. Div. 1985), *certif. denied* 103 *N.J.* 449 (1986); *State v. Williams*, 309 *N.J. Super.* 117, 123-124 (App. Div.), *certif. denied* 156 *N.J.* 383 (1998).

Absent a showing of fundamental injustice surrounding the prior conviction from another country, its use is presumed to be appropriate where the conviction occurs in a jurisdiction that has a judicial system that affords protections similar to our own. *State v. Williams*, 309 *N.J. Super.* 117, 123-124 (App. Div.), *certif. denied* 156 *N.J.* 383 (1998) (Canadian conviction could be used to support extended term).

XI. PROBATION - N.J.S.A. 2C:45-3 and 2C:45-4

A defendant convicted of any offense may be placed on probation for a period of up to five years, notwithstanding the fact that the probationary term may exceed the statutory maximum sentence for that offense. *State v. Dove*, 202 *N.J. Super.* 540 (Law Div. 1985). *But see*, *N.J.S.A.* 2C:45-2a.

The filing of a petition or complaint by a probation officer constitutes commencement of the probation revocation proceeding and tolls the probationary period. *State v. Grabinski*, 245 *N.J. Super.* 402 (App. Div. 1991).

Trial court can order, as a condition of probation, defendant's exclusion from casino hotels, provided that the casino disbarment does not exceed the length of the probationary term. *State v. Krueger*, 241 *N.J. Super.* 244, 255-259 (App. Div. 1990).

Where a fine was imposed on defendant as a condition of his three year probationary term, the power to collect the unpaid portion of the fine did not expire with his probation and the State could institute summary collection proceedings under *N.J.S.A.* 2C:46-2 after the probationary term ended. *State v. Joseph*, 238 *N.J. Super.* 219 (App. Div. 1990).

Power to collect restitution did not expire with termination of probationary term. The restitution order has a separate existence of its own as part of a criminal sentence. *State v. Kemprowski*, 265 *N.J. Super.* 471, 473-474 (App. Div. 1993).

A. County Jail Term as Condition of Probation

Custodial portion of probationary sentence can be served at any time during probationary period. *State v. Postal*, 204 *N.J. Super.* 94 (Law Div. 1985), and it can be reduced at any time. *State v. Robinson*, 198 *N.J. Super.* 602 (Law Div. 1984).

Presumption of non-incarceration is not violated by imposition of probationary sentence with condition of county jail sentence (split sentence). *State v. Hartye*, 105 *N.J.* 411 (1987); *State v. O'Connor*, 105 *N.J.* 399 (1987). Presumption of incarceration is not satisfied by the imposition of a probationary sentence with the condition of a county jail sentence (split sentence). *State v. O'Connor*, 105 *N.J.* 399 (1987). *See, e.g., State v. Whidby*, 204 *N.J. Super.* 312 (App. Div. 1985); *State v. Kreidler*, 211 *N.J. Super.* 276 (App. Div. 1986), *certif. denied* 107 *N.J.* 126 (1987).

A defendant is entitled to credit for time he or she was on parole following the county jail portion of probationary sentence. A defendant is entitled only to the actual amount of time he spent in jail and on parole. *State v. Rosado*, 131 *N.J.* 423 (1993), *aff'g* 256 *N.J. Super.* 126 (App. Div. 1992). The credit for time on parole is to be applied against the aggregate term and does not reduce a statutorily mandated parole ineligibility term. *State v. Mercadante*, 299 *N.J. Super.* 522 (App. Div. 1997), *certif. denied* 150 *N.J.* 26 (1997).

XII. SENTENCING ON PROBATION VIOLA-TIONS

If a probationer has been convicted of a crime, the violation is conclusively presumed. *State v. Williams*, 299 *N.J.Super.* 264, 267 (App. Div. 1997).

Violation of probation can be based upon conviction which is on appeal. If the conviction is subsequently reversed, defendant can move for relief in the trial court on the ground that basis for the VOP no longer exists. *State v. Williams*, 299 *N.J. Super.* 264, 274 (App. Div. 1997).

When a defendant violates probation several options are open to the sentencing judge. The judge may continue probation, require service of any suspended term, or impose any sentence that could have been meted out originally on conviction for the underlying sentence. *State v. Wilson*, 226 *N.J. Super.* 271, 275 (App. Div. 1988); *State v. Smith*, 226 *N.J. Super.* 276, 280 (App. Div. 1988). The sentence imposed after revocation should be viewed as focusing on the original offense rather than on the violation of probation as a separate offense. *Id.*

When the court revokes a suspension or probation, it may impose on the defendant any sentences that might have been imposed originally for the offense of which he was convicted. *N.J.S.A.* 2C:45-3b; *State v. Ryan*, 86 *N.J.* 1, 7 n. 4 (1981), *cert. denied* 454 *U.S.* 888 (1981); *State v. Williams*, 299 *N.J. Super.* at 269-270; *State v. Vervin*, 241 *N.J. Super.* 458, 469 (App. Div. 1989), *certif. denied* 121 *N.J.* 634 (1990).

In *State v. Baylass*, 114 *N.J.* 169 (1989) and *State v. Molina*, 114 *N.J.* 181 (1989), the Supreme Court held that the sentence imposed after revocation of probation should focus on the original offense, rather than on the violation as a separate offense.

The only aggravating and mitigating factors that the trial court may consider in resentencing a probation violator are those factors that the trial court found at the time of the original sentencing. *State v. Baylass*, 114 *N.J.* at 176. The court may reweigh the mitigating factors in light of the probation violation and determine that they are no longer applicable. *Id.* at 177.

The terms of the original plea agreement do not survive a violation of probation. *State v. Frank*, 280 *N.J. Super.* 26, 40 (App. Div.), *certif. denied*141 *N.J.* 96 (1995). Thus, the State's original recommendation for a sentencing downgrade pursuant to *N.J.S.A.* 2C:44-1f(2) does not survive a violation of probation because the sentence must depend on a balancing of aggravating and mitigating factors at that time. *State v. Frank, supra, State v. Vasquez,* 129 *N.J.* 189, 206 (1992).

After revoking a defendant's probation, a trial court is required to impose a sentence based upon the presumptive sentence and the balancing of the aggravating and mitigating factors which survived the violation of probation. *State v. Frank*, 280 *N.J. Super.* at 41.

There is a presumption of consecutive sentences whenever a defendant violates probation by committing a new offense. *State v. Sutton*, 132 *N.J.* 471, 484 (1993).

Custodial sentence imposed on probation violation that exceeded original term imposed as condition of probation (and was already served) did not violate double jeopardy. *State v. Franklin*, 198 *N.J. Super.* 407, 409-410 (App. Div. 1985).

When defendant was originally sentenced to extended term and subsequently placed on probation after a successful motion for transfer to drug treatment program, *R.* 3:21-10b1, trial court could reinstate original extended term sentence when defendant violated probation by committing new offenses. *State v. Williams*, 299 *N.J. Super.* 264, 270 (App. Div. 1997).

XIII. RESTITUTION, FINES, AND VCCB PENALTIES

For general law on restitution see: *State v. Harris*, 70 *N.J.* 586 (1976); *State v. DeBonis*, 58 *N.J.* 182 (1971). In

State v. Saperstein, 202 *N.J. Super.* 478 (App. Div. 1985), the court ruled *Kovack* applied to restitution imposition). *But see, State v. Rhoda*, 206 *N.J. Super.* 584 (App. Div.), *certif. denied* 105 *N.J.* 524 (1986) (*Kovack* not applicable to restitution).

The application of increased mandatory penalty provisions to an offense that occurred prior to amendment is constitutionally barred by the prohibition of ex post facto legislation found in both the federal and state constitutions. *State v. Dela Rosa*, 327 *N.J. Super.* 295, 303 (App. Div.), *certif. denied* 164 *N.J.* 191 (2000).

Trial court must have hearing on the amount of restitution and defendant's ability to pay. *N.J.S.A.* 2C:44-2c; *State v. Newman*, 132 *N.J.* 159 (1993).

Where there is a good faith dispute over the amount of the loss or defendant's ability to pay, the trial court must hold a hearing on the issue. *State v. Jamiolkoski*, 272 *N.J. Super.* 326 (App. Div. 1994) (dispute over restitution amount in PTI form signed by defendant).

Defendant was not entitled to restitution hearing where no dispute existed as to amount of restitution and defendant raised no objection to concession made by his counsel that defendant had funds to pay restitution nor did he dispute his ability to pay. *State v. Orji, 277 N.J. Super.* 582 (App. Div. 1994).

Orders of restitution imposed as part of defendant's criminal sentence remain intact as part of that sentence regardless of the fact that defendant's period of probation has expired. *State v. Kemprowski*, 265 *N.J. Super.* 471 (App. Div. 1993).

A trial court is not required to consider whether alternative methods of punishment to imprisonment were appropriate in case where defendant willfully failed to comply with restitution order while on probation, which was consequently revoked. *State v. Townsend*, 222 *N.J. Super.* 273, 280 (App. Div. 1988).

In order to impose restitution on dismissed counts of an indictment: 1) a factual basis for the restitution must be established at the time of the plea; 2) defendant must be informed that restitution may be imposed on these counts, and 3) there should be a relationship between the restitution and the goal of rehabilitation with respect to the offense for which defendant is being sentenced. *State v. Bausch*, 83 *N.J.* 425 (1980); *State v. Kruegar*, 241 *N.J. Super.* 244 (App. Div. 1990). *But see, Hughey v. United States*, 495 *U.S.* 411, 110 *S. Ct.* 1979, 109 *L.Ed.*2d 408 (1990) (under federal law, restitution cannot be imposed on dismissed counts of indictment).

Drug-by money is not recoverable as restitution, but it should be taken into account by trial court in connection with imposition of fine. *State v. Newman*, 132 *N.J.* 159, 177 (1993).

A. Fines

A defendant is entitled to monetary credit of \$20 per day against his outstanding fine, for time spent in custody awaiting hearing for summary collection of fine. *N.J.S.A.* 2C:46-2a; *State v. Joseph*, 238 *N.J. Super.* 219 (App. Div. 1990).

B. Penalties

VCCB penalties can be imposed only for crimes committed after the effective date of the code (September 1, 1979). *N.J.S.A.* 2C:43-3.1; *State v. Dela Rosa*, 327 *N.J. Super.* 295, 303 (App. Div.), *certif. denied* 154 *N.J.* 191 (2000); *State v. Chapman*, 187 *N.J. Super.* 474, 477 (App. Div. 1986).

Safe Neighborhoods Services Fund (SNSF) Assessments do not apply to offenses committed before effective date of statute (August 2, 1993). *N.J.S.A.* 2C:43-3.2; *State v. Smith*, 307 *N.J. Super.* 1 (App. Div. 1997), *certif. denied* 153 *N.J.* 216 (1998).

VCCB penalties and SNSF assessments do not apply to convictions for refusal to take Breathalyzer test. *State v. Tekel*, 281 *N.J. Super.* 502, 510 (App. Div. 1995).

XIV. STATE'S RIGHT TO APPEAL-*N.J.S.A.* 2C:44-1f(2) (*see also* APPEALS, this Digest)

The State must file its notice of appeal within 10 days or right to appeal is lost. *See State v. Farr*, 183 *N.J. Super.* 463 (App. Div. 1982); *State v. Watson*, 183 *N.J. Super.* 481 (App. Div. 1982).

In *State v. Saunders*, 107 *N.J.* 609 (1987), the Supreme Court held that the right of appeal provided by *N.J.S.A.* 2C:44-1f(2) does not violate the fifth amendment's double jeopardy clause despite the fact that a defendant may remain incarcerated for up to ten days while the State perfects its appeal. The clear and unambiguous terms of the statute remove any expectation of finality that a defendant may vest in his sentence; its stay provisions insure that he will not begin serving that sentence until the State's notice of appeal is filed. Bail must be established by the trial court in accordance with R. 2:9-3(d) within a reasonable period after the State's appeal is taken.

A defendant must be advised at sentencing of the applicability of the election and waiver provisions of R. 2:9-3(d). However, in view of the Supreme Court's conclusion that R. 2:9-3(d) is inapplicable until the State perfects its appeal, it is self-evident that this advice to a defendant is not required until the bail hearing is held. *State v. Saunders*, 107 *N.J.* at 617 n.7; *State v. Christensen*, 270 *N.J. Super.* 650 (App. Div. 1994).

The State cannot appeal sentence as lenient in cases in which it: 1) recommended the sentence imposed or a lesser sentence; or 2) waived its right to take a position at sentencing, or 3) waived its right to appeal. *State v. Partusch*, 214 *N.J. Super.* 473, 476 (App. Div. 1987). *See also, State v. Ferrara*, 197 *N.J. Super.* 1 (App. Div. 1984); *State v. Paterna*, 195 *N.J. Super.* 124, 126 (App. Div. 1984). However, State can appeal when a probationary or non-custodial term is imposed where the plea bargain involved a downgrade from second to third degree for purposes of sentencing. *State v. Partusch*, 214 *N.J. Super.* at 476.

State's appeal of improper merger is not barred by double jeopardy. *State v. Gross*, 216 *N.J. Super.* 92, 97 (App. Div. 1987), *certif. denied* 108 *N.J.* 194 (1987).

State had no right to appeal discretionary sentence because of mistakes it made in calculating sentence recommendation pursuant to *State v. Brimage* 153 *N.J.* 1 (1998), and the Attorney General's Guidelines. The Appellate Division did hold however, that trial judges may permit the prosecution to withdraw its plea offer if it has made an honest mistake and acts before defendant is sentenced. *State v. Veney* 327 *N.J. Super.* 458 (App. Div. 2000).

In *State v. Christensen*, 270 *N.J. Super.* 650 (App. Div. 1994), the Appellate Division rejected defendant's claim he acquired a legitimate expectation in the finality of probationary sentence when the probation department mistakenly directed him to report, and he had commenced serving a probationary sentence which had been stayed pending the State's appeal.

State could not challenge as illegal a sentence imposed after remand where it did not raise the alleged illegality until four months after it discovered defendant had been resentenced. *State v. Tavares*, 286 *N.J. Super.* 610 (App. Div.), *certif. denied* 144 *N.J.* 376 (1996).

XV. RIGHT OF ALLOCUTION – R. 3:21-4(b)

Defendant must be given the right to speak before sentence is imposed. Failure to do so may constitute reversible error. *State v. Cerce*, 46 *N.J.* 387 (1966) (technical when raised in PCR but requires remand when raised on direct appeal).

The right of allocution is a personal right that defendants themselves decide whether to execute. Accordingly, the trial court should address the defendant, rather than counsel, concerning the right of allocution. *State v. Bey*, 161 *N.J.* 233, 277 (1999), *cert. denied* 120 *S.Ct.* 2693 (2000).

A challenge to the trial court's failure to afford defendant an opportunity to make a statement of allocution must be raised on direct appeal. *State v. Bey*, 161 *N.J.* at 276; *State v. Cerce*, 46 *N.J.* at 396. Otherwise, the claim is barred from post-conviction review under *R.* 3:22-4, because the issue could have been raised on direct appeal; the denial of allocution does not result in fundamental injustice, and allocution is not required by the federal or state constitutions. *State v. Bey*, 161 *N.J.* at 276.

XVI. CONFLICT BETWEEN ORAL SENTENCE AND JUDGMENT OF CONVICTION

Oral sentence usually takes precedence over written judgment of conviction. *State v. Warmbrun*, 277 *N.J. Super*. 51, 58 n. 2 (App. Div. 1994), *certif. denied* 140 *N.J.* 277 (1995); *State v. Pohlabel*, 40 *N.J. Super*. 416, 423 (App. Div. 1956) (oral controls); *State v. Womack*, 206 *N.J. Super*. 564 (App. Div. 1985), *certif. denied* 103 *N.J.* 482 (1986).

The sentencing transcript is the true source of the sentence. *State v. Walker*, 322 *N.J. Super.* 535, 556 (App. Div.), *certif. denied* 162 *N.J.* 487 (1999).

XVII. ILLEGAL SENTENCES

Nothing in the State or federal constitutions preclude a court from correcting an illegal sentence by imposing a mandatory minimum term and therefore increasing the sentence imposed. *State v. Baker*, 138 *N.J.* 89 (1994), *aff g* 270 *N.J. Super.* 55 (App. Div. 1994), *aff d on habeas, Baker v. Barbo,* 117 *F.*3d 149 (3d Cir.), *cert. denied* 528 *U.S.* 911 (1999).

An illegal sentence is one which is inconsistent with the requirements of the controlling sentencing statutes or

constitutional principles. *State v. Veney*, 327 *N.J. Super.* 458, 462 (App. Div. 2000).

A sentence is not in accord with the law if it fails to include a legislatively mandated term of parole ineligibility. *State v. Murray*, 162 *N.J.* 240, 247 (2000).

If original sentence imposed on defendant is illegal, sentence may be corrected at any time, even if increase in term of imprisonment is required. *State v. Baker*, 270 *N.J. Super.* 55 (App. Div. 1994), *aff d o.b.* 138 *N.J.* 89 (1994); *State v. Horton*, 331 *N.J. Super.* 92, 98 (App. Div. 2000); *State v. Veney*, 327 *N.J. Super.* 458, 462 (App. Div. 2000); *State v. Mercadante*, 299 *N.J.Super.* 522, 529 (App. Div.), *certif. denied* 150 *N.J.* 26 (1997).

An illegal sentence can be corrected even if it means increasing the term of the custodial sentence that defendant has begun to serve. *State v. Eigenmann*, 280 *N.J.Super.* 331, 337 (App. Div. 1995); *State v. Mercadante*, 299 *N.J.Super.* at 529.

Where the legislature has mandated a particular sentence or collateral consequence of the sentence, the trial court has a continuing authority and responsibility to implement that statutory directive if it inadvertently fails to do so at the time of conviction. *State v. Ercolano*, 335 *N.J. Super.* 236, 243 (App. Div. 2000). (forfeiture of public employment was mandatory, notwithstanding fact that forfeiture was not raised at time of conviction).

If the sentence imposed on defendant is illegal, the State may appeal and, in the event of resentencing, double jeopardy will not prevent the court from imposing a more onerous sentence. *State v. Luna*, 278 *N.J. Super.* 433, 436 n.1 (App. Div. 1995).

Defendant's extended life term with a 20 year parole disqualifier was illegal because imposition of such a life term mandated service of a 25 year period of parole ineligibility. *State v. Swint*, 328 *N.J.Super.* 236, 262 (App. Div.), *certif. denied* 165 *N.J.* 492 (2000).

Probationary sentence imposed in violation of section 12 (*N.J.S.A.* 2C:35-12) plea agreement in drug case was illegal and State had authority, if not duty, to appeal it. *State v. Leslie*, 269 *N.J. Super.* 78, 86 (App. Div. 1993), *certif. denied* 136 *N.J.* 29 (1994).

Sentence which did not include statutorily mandated community supervision for life under Megan's Law, *N.J.S.A.* 2C:43-6.4, was illegal. *State v. Horton*, 332 *N.J. Super.* 92, 97-102 (App. Div. 2000).

Defendant could not avoid the statutorily required minimum sentence for third conviction for driving while intoxicated, *N.J.S.A.* 39:4-50, merely because the municipal court imposed an illegal penalty on an earlier conviction and the prosecutor failed to challenge that error by filing an appeal. *State v. Nicolai*, 287 *N.J. Super.* 528, 531 (App. Div. 1996).

No defendant can claim a legitimate expectation of finality in a sentence below the statutorily mandated minimum. *State v. Nicolai*, 287 *N.J. Super.* at 532; *State v. Eigenmann*, 280 *N.J. Super.* at 337.

State's authority to appeal illegal sentence had not expired even though defendant had served custodial portion of probationary sentence. *State v. Leslie*, 269 *N.J. Super.* 78, 86 (App. Div. 1993), *certif. denied* 136 *N.J.* 29 (1994).

State's appeal of improper merger not barred by double jeopardy. *State v. Gross*, 216 *N.J. Super.* 92, 97 (App. Div. 1987), *certif. denied* 108 *N.J.* 194 (1987).

XVIII. CREDIT FOR TIME SERVED

Credit awarded for presentence time served under *R.* 3:21-8 is referred to as "jail credits." Sentence credits awarded pursuant to *N.J.S.A.* 2C:44-5b(2) are "gap-time credits," since it applies to the gap between the imposition of different sentences. *Richardson v. Nickolopoulos*, 110 *N.J.* 241, 242 (1988).

A. Jail Credit

R. 3:21-8 states that 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 rule applies only to confinement directly attributable to the specific offense for which sentence is being imposed. *State v. Mercadante*, 299 *N.J.Super.* 522, 529 (App. Div.), *certif. denied* 150 *N.J.* 26 (1997).

Defendant entitled to receive credit for any time he served between his arrest and imposition of sentence. *R.* 3:21-8. Not entitled to credit for time spent in drug program. *State v. Ryan*, 171 *N.J. Super.* 427 (App. Div. 1979), *rev'd o.g.* 86 *N.J.* 1 (1981), *cert. denied* 454 *U.S.* 880 (1981); *State v. Reyes*, 207 *N.J. Super.* 126 (App. Div.), *certif. denied* 103 *N.J.* 499 (1986).

Defendant who is sentenced to a probationary term with the condition that he serve a term in county jail is entitled to credit for time served between arrest and sentencing. *State v. Carlough*, 183 *N.J. Super.* 478, 484 n.1 (App. Div. 1985). He is also entitled to credit for time spent on parole after he is released from county jail. *State v. Rosado*, 256 *N.J. Super.* 126 (App. Div. 1992), *aff'd* 131 *N.J.* 423 (1993).

Defendant not entitled to jail credit for time spent in custody pending sentence on new charge committed while on parole after a parole warrant/detainer was lodged. *State v. Black*, 153 *N.J.* 438, 461 (1998); *State v. Harvey*, 273 *N.J. Super.* 572 (App. Div. 1994).

When a parolee is taken into custody on a parole warrant, the jail credit is attributable to the original offense on which parole was granted and not to any new offense committed while on parole. *State v. Black*, 153 *N.J.* 438, 461 (1998). If the parole warrant is withdrawn or parole is not revoked and defendant is convicted and sentenced on the new charges based on the same conduct that led to the parole warrant, jail credit should be given against the new sentence. *Id.*

If parole is revoked, jail credit for time served from parole warrant and sentence for new offense should be credited to any period of reimprisonment ordered by the Parole Board. *State v. Black*, 153 *N.J.* at 461.

Defendant is not entitled to credit for time he willfully and voluntarily absented himself without authorization. Breeden v. N.J. Dept. of Corrections, 132 N.J. 457, 464 (1993).

Defendant was not entitled to jail time credit pursuant to *R.* 3:21-8 for the time he participated in an electronic monitoring wristlet program as a condition of pretrial release because it was not the equivalent of time served in custody in jail or in a state hospital. *State v. Mastapeter*, 290 *N.J. Super.* 56 (App. Div.), *certif. denied* 146 *N.J.* 569 (1996).

Defendant who resided in convent as condition of bail was not entitled to credit for time served there. *State v. Mirakaj*, 268 *N.J. Super.* 48, 53 (App. Div. 1993). However, trial court could consider restrictions placed on defendant's liberty during time she resided in convent in determining appropriate sentences under all the circumstances. *Id.*

Defendant who voluntarily entered psychiatric hospital as condition of bail was not entitled to credit for time served there. *State v. Towey*, 114 *N.J.* 69, 86 (1989).

Juvenile not entitled to credit for time spent in a residential program for treatment of juvenile sex offenders because the program was not custodial. *State in the Interest of S. T.*, 273 *N.J. Super.* 436 (App.Div. 1994).

Generally, credit for time spent serving sentence in one jurisdiction will not be given against sentence in another jurisdiction. *Breeden v. N.J. Dept. of Corrections*, 132 *N.J.* 457, 464 (1993). *Accord, State v. Hugley*, 198 *N.J.Super.* 152 (App. Div. 1985). *But see, State v. Dela Rosa*, 327 *N.J. Super.* 295 (App. Div.), *certif. denied* 164 *N.J.* 191 (2000).

Defendant, who was transferred to New Jersey pursuant to the Interstate Agreement on Detainers Act, but the time spent here was attributable to his current New York sentence, was not due jail credits under *R.* 3:21-8, but was entitled to gap time credits. *State v. Dela Rosa, supra. But see, State v. Hugley,* 198 *N.J. Super.* 152 (App. Div. 1985).

The existence of a detainer filed by Camden County Prosecutor did not entitle defendant to credit for time spent awaiting disposition of unrelated Cumberland County charges, which were subsequently dismissed, especially where the detainer had no effect upon period of time for which he was incarcerated on the Cumberland indictment. *State v. Hill*, 208 *N.J. Super.* 492, 495 (App. Div. 1986), *certif. denied* 104 *N.J.* 412 (1986); *State v. Marnin*, 108 *N.J. Super.* 442, 445 (App. Div.), *certif. denied* 55 *N.J.* 598 (1970), *cert. denied* 400 *U.S.* 835 (1971); *State v. Council*, 137 *N.J.Super.* 306, 308 (App. Div. 1975).

Defendant was entitled to jail credit for time he was detained by New York correctional authorities after his release date because of New Jersey detainer since such confinement was due solely to action taken by New Jersey. *State v. Beatty*, 128 *N.J.Super.* 488, 490 (App. Div. 1974).

Defendant was entitled to credit for the time he spent in state prison after his federal sentence expired and until he was paroled on state convictions against both his state sentence and parole disqualifier. He was also entitled to credit against his aggregate sentence -- but not against the parole ineligibility term -- for the time spent on state parole until his resentencing and subsequent imprisonment. *State v. Mercadante*, 299 *N.J. Super.* 522, 533-534 (App. Div.), *certif. denied* 150 *N.J.* 26 (1997).

In *State v. Grate*, 311 *N.J. Super.* 456 (App. Div. 1998), *certif. denied* 156 *N.J.* 411 (1998), the Appellate Division upheld the award of jail credits to defendant, for time served while awaiting disposition of his indictment.

Defendant had initially made bail on these charges, but could not pay the combined bail imposed when arrested on new charge. When he was acquitted on the additional charge, he was released on the original bail posted. The Court found that defendant was entitled to jail credit against sentence imposed on original offense and such credits could be applied to parole ineligibility term.

B. Gap-Time Credits - *N.J.S.A.* 2C:44-5b(2)

Gap time credits must be awarded under *N.J.S.A.* 2C:44-5b(2) when: 1) a defendant has already been sentenced to a term of imprisonment; 2) defendant is subsequently sentenced to another term of imprisonment, and 3) the subsequent sentence is for an offense that occurred prior to the imposition of the first sentence.

In *Richardson v. Nickolopoulos*, 110 *N.J.* 241 (1988), the Supreme Court held that "gap-time credit" to which defendant was entitled under *N.J.S.A.* 2C:44-5b(2) at time of second sentence, for an offense committed prior to imposition of first sentence, applied only to base term of aggravated sentences, and did not reduce defendant's parole ineligibility term on second sentence.

N.J.S.A. 2C:44-5b(2) does not require that concurrent sentences imposed at different times be served coterminously. *State v. Benedetto*, 221 *N.J. Super.* 573, 578 (App. Div. 1987), *certif. denied* 111 *N.J.* 559 (1988). When concurrent sentences are imposed, the shorter term merges into and is satisfied by discharge of the longer term.

Gap-time credits do not reduce parole ineligibility terms. *Booker v. New Jersey State Parole Bd.*, 136 *N.J.* 257, 263 (1994); *Mitnaul v. New Jersey Parole Board*, 280 *N.J. Super.* 164 (App. Div. 1995).

Where a defendant is sentenced to a period of parole ineligibility, gap-time credit only reduces the aggregate term to be served after the defendant serves the mandatory period of incarceration. *Booker v. New Jersey State Parole Bd.*, 136 *N.J.* 257, 267 (1994).

Where a defendant receives no mandatory period of incarceration, gap-time credit reduces the aggregate term and the Parole Board must compute defendant's parole eligibility date on the basis of the reduced aggregate sentence. *Booker v. New Jersey State Parole Bd.*, 136 *N.J.* at 267.

Defendant not entitled to gap-time credit for time period before sentence but after his parole for prior offenses

was revoked. *State v. Hart*, 272 *N.J. Super.* 182 (App. Div.), *certif. denied* 137 *N.J.* 307 (1994).

Defendant was awarded gap-time credits where he was sentenced on a VOP for an offense which occurred prior to the imposition of sentence on another VOP. *State v. Guaman*, 271 *N.J. Super.* 130 (App. Div. 1994).

Gap-time credit under *N.J.S.A.* 2C:44-5b(2), which relates to time spent in imprisonment as result of sentence previously imposed, has no application unless defendant, while incarcerated, is sentenced for an offense occurring before the prior sentence.

State v. Garland, 226 N.J. Super. 356 (App. Div.), certif. denied 114 N.J. 288 (1988).

In State v. Lawlow, 222 N.J. Super. 241 (App. Div. 1988), the Appellate Division held that N.J.S.A. 2C:44-5b(2) and N.J.S.A. 2C:44-5e require a judge sentencing a defendant to imprisonment to do the following: (1) determine whether the defendant had previously been sentenced to imprisonment for any other offenses; if $s_{0,2}$ determine whether the defendant had committed any offense for which he is being sentenced, prior to imposition of the previously custodial sentence or sentences; if so, (3) state whether the term of imprisonment being imposed for that offense is to run concurrently with or consecutively to the previous term; and in either case, (4) aggregate the present term with the previous term; (5) credit defendant with post-sentence time served under the previous term, and (6) Credit the defendant with any pre-sentence time served that is solely attributable to the offense for which he is being sentenced as required by *R*. 3:21-8.

The judge imposing the current sentence determines whether time served under the previous sentence will be credited against time to be served under the current sentence. If the sentence is concurrent, time served under the previous sentence will be credited against the current term; if the sentence is consecutive, the time served under the previous term will not be credited. *State v. Lawlor*, 222 *N.J. Super.* 241, 245 (App. Div. 1988).

Defendant should receive gap time credit for time spent in this state awaiting sentence while serving another state's sentence. *State v. Dela Rosa*, 327 *N.J. Super.* 295 (App. Div.), *certif. denied* 164 *N.J.* 191 (2000). A contrary result was reached in *State v. Hugley*, 198 *N.J.Super.* 152 (App. Div. 1985), which held that defendant was not entitled to gap time credits. *See also Breeden v. N.J. Dept. of Corrections*, 132 *N.J.* 457, 464 (1993) (Generally, credit for time spent serving sentence in one jurisdiction will not be given against sentence in another jurisdiction). This issue is now pending before the New Jersey Supreme Court in *State v. Weinberger* (petition granted 2/14/01).

XIX. MODIFICATION OR REDUCTION OF SENTENCE

A. Release Because of Illness or Infirmity

Defendant's motion for reconsideration of sentence under *R.* 3:21-10b, which was based upon her alleged inability to physically endure a prison sentence because of her medical condition and age, was properly denied since defendant's medical needs could be adequately monitored and addressed in the correctional setting. *State v. Frank*, 281 *N.J. Super.* 299 (App. Div.), *certif. denied* 142 *N.J.* 457 (1995).

R. 3:21-10b only permits the release of defendant from custody and not reduction of sentence. *State v. Priester*, 99 *N.J.* 123, 141 (1985); *State v. Wright*, 221 *N.J. Super.* 123, 127 (App. Div. 1987).

Under appropriate circumstances a custodial sentence may be amended to permit the release of a defendant because of mental infirmity. *State v. Verducci*, 199 *N.J. Super.* 329, 334 (App. Div.), *certif. denied* 101 *N.J.* 256 (1985).

An essential predicate to the review of a custodial sentence pursuant to *R*. 3:21-10(b)(2) [release for illness] is that a change of circumstances amounting to a severe depreciation of the inmate's health must have occurred since sentencing. *State v. Priester*, 99 *N.J.* at 136; *State v. Wright*, 221 *N.J. Super*. 123, 127-128. Changed circumstances must also exist for relief under *R*. 3:21-10(b)(1) (release to drug or alcohol program). *State v. Kent*, 212 *N.J. Super*. 635 (App. Div. 1986).

1. Aids

Fact that inmate has AIDS does not in and of itself justify reduction of sentence or release from prison. Prisoner must still satisfy *Priester* standard for modification of sentence pursuant to *R.* 3:21-10. *State v. Wright,* 221 *N.J. Super.* 123 (App. Div. 1987); *State v. E.R.,* 273 *N.J. Super.* 262, 274 (App. Div. 1994).

Court found that uncontradicted prognosis of immediate death within six months due to AIDS justified resentencing defendant, convicted of second degree offense, to probation with condition that he not leave home without permission of Court except to receive medical treatment. *State v. E.R.*, 273 *N.J. Super.* at 272-273. Change of sentence essentially transferred defendant from confines of bed in prison hospital to confines of bed at home and as such did not violate presumption of imprisonment. *Id.* at 273-274. Dissenting opinion by Judge Brochin believed that tragic circumstances warranted clemency and not resentencing. *Id.* at 275.

2. Release to Drug or Alcohol Treatment Program

In State v. Kent, 212 N.J. Super. 635 (App. Div. 1986), certif. denied 107 N.J. 65 (1986), the Appellate Division held that "changed circumstances" are a prerequisite for a R. 3:21-10(b)(1) motion for a transfer to a drug or alcohol program. See, e.g., State v. Priester, 99 N.J. 123 (1985) (court, in construing R. 3:21-10(b)(2) which permits resentencing based upon the illness or infirmity of the defendant, held that an essential predicate to review is that a change of circumstances must have occurred since sentencing).

Thus, where a defendant's need for a drug or alcohol abuse program and the availability of that program are essentially the same when a motion for a change of sentence is filed as at the time of original sentencing, the policy of finality of sentences should mandate denial of the motion. *State v. Kent*, 212 *N.J. Super.* at 641.

The granting of defendant's motion for transfer to drug program resulted only in suspension of extended term custodial sentence pending successful completion of the drug rehabilitation program and probationary term. Thus when defendant violated his probation he was subject to reincarceration on his original sentence. *State v. Williams*, 299 *N.J.Super.* 264, 270 (App. Div. 1997).

A defendant who is serving a Graves Act sentence may not make an application for change or reduction of sentence under *R.* 3:21-10(b). *State v. Mendel,* 212 *N.J. Super.* 110, 113 (App. Div. 1986). Where a parole ineligibility term is required or mandated by statute, an application may not be granted under *R.* 3:21-10(b) so as to change or reduce that sentence prior to the expiration of the statutorily mandated parole ineligibility term. *State v. Diggs,* 333 *N.J. Super.* 7, 8 (App. Div.), *certif. denied* 165 *N.J.* 678 (2000) (mandatory drug sentence); *State v. Mendel,* 212 *N.J. Super.* 110 (Graves Act).

However, where a defendant is serving a parole ineligibility term above that required to be served as a minimum mandatory period of parole ineligibility, the application can be considered under R. 3:21-10(b) consistent with case law and based on circumstances

appearing after completion of the parole ineligibility term required by statute. *State v. Mendel*, 212 *N.J. Super.* at 113-114.

XX. INCREASE OF SENTENCE ON RESEN-TENCING (See also DOUBLE JEOPARDY, this Digest)

Imposition of harsher sentence following successful appeal and reconviction violates due process unless special findings of justification overcome presumption of vindictiveness. Court must give reasons for increase of sentence after defendant's successful appeal. *North Carolina v. Pearce*, 395 *U.S.* 711, 723-25, 89 *S.Ct.* 2072, 2080, 23 *L.Ed.*2d 656, 668-70 (1969). Those reasons must be based upon objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceeding. *Id., 395 U.S. at 723-726; State v. Pindale*, 279 *N.J. Super.* 123, 129 (App. Div.), *certif. denied* 142 *N.J.* 449 (1995); *State v. Bauman*, 298 *N.J. Super.* 176, 201-202 (App. Div.), *certif. denied* 150 *N.J.* 25 (1997).

Presumption of vindictiveness does not apply when sentence imposed after trial is greater than that previously imposed after guilty plea. *Alabama v. Smith*, 490 *U.S.* 794, 801, 109 *S.Ct.* 2201, 2205-2206, 104 *L.Ed.*2d 865 (1989).

Imposition of greater sentence following retrial after successful appeal resulted in remand by appellate court because trial court gave no reasons for imposing a greater sentence than the one originally imposed after the first trial. *State v. Pindale*, 279 *N.J. Super.* 123, 128-130 (App. Div. 1995), *certif. denied* 142 *N.J.* 449 (1995).

Where defendant's appeal resulted in merger of two offenses, double jeopardy did not bar resentencing on remaining counts, provided defendant's aggregate sentence is not increased. *State v. Rodriguez*, 97 *N.J.* 263 (1984).

In *State v. Roddy*, 210 *N.J. Super.* 62 (App. Div. 1986), the Court held that merger of two counts of indictment on appeal would have defeated State's reasonable expectations under plea agreement if its original terms were enforced; thus the parties were returned to status quo ante and defendant would have option to withdraw plea or waive objection to enhanced sentence.

A defendant whose sentence has been vacated on appeal may be resentenced to a longer term on one of a related group of convictions without violating principles of double jeopardy provided there is no increase in his aggregate sentence. *State v. Espino*, 264 *N.J. Super.* 62 (App. Div. 1993).

Double jeopardy did not bar defendant's resentencing following the State's successful appeal of sentence, notwithstanding that probation department mistakenly directed defendant to commence serving stayed probationary sentence. *State v. Christensen,* 270 *N.J. Super.* 650 (App. Div. 1994).

Double jeopardy may not bar increase of sentence on resentencing if original sentence was illegal and defendant had no expectation of finality. *State v. Luna*, 278 *N.J. Super*. 433, 436 n. 1 (App. Div. 1995); *State v. Paldino*, 203 *N.J. Super*. 537 (App. Div. 1985); *State v. Kirk*, 243 *N.J. Super*. 636 (App. Div. 1990); *but see, State v. Towey*, 244 *N.J. Super*. 582 (App. Div. 1990), *certif. denied* 122 *N.J.* 159 (1990).

Double jeopardy did not preclude restructuring of the sentence of a defendant who was originally sentenced to indeterminate term pursuant to the repealed 2A Sex Offender Act but later resentenced pursuant to the Code of Criminal Justice so long as the aggregate term of imprisonment was not increased. *State v. Bowen*, 224 *N.J. Super.* 263, 276-277 (App. Div.), *certif. denied* 113 *N.J.* 323 (1988). *See State v. Rodriquez*, 97 *N.J.* 263 (1984).

XXI. INTENSIVE SUPERVISION PROGRAM (ISP) - R. 3:21-10(e); N.J.S.A. 2C:43-11

There is generally a 60 day waiting period before an inmate is eligible for ISP.

A defendant serving a mandatory minimum sentence cannot be admitted into the Intensive Supervision Program (ISP). *State v. McPhall*, 270 *N.J. Super.* 454 (App. Div.), *certif. denied* 137 *N.J.* 306 (1994).

ISP motions are addressed entirely to the sound discretion of the three judge panel assigned to hear them. There were no provisions made for any appellate review of the panel's substantive decision. R. 3:21-10(e).

N.J.S.A. 2C:44-1h was adopted on May 28, 1993 to provide that the presumption of imprisonment does not preclude the admission of an inmate into ISP. *P.L.* 1993, c. 123.

N.J.S.A. 2C:43-11 was enacted, effective May 28, 1993, and provides that an inmate is not eligible for ISP if he or she: 1) is convicted of a first degree offense; 2) is

convicted of an offense where the sentencing court found that there was a substantial likelihood that defendant was involved in organized criminal activity, *N.J.S.A.* 2C:44-1a(5); 3) is serving a parole ineligibility term; 4) has previously completed an ISP program; 5) was previously convicted of a first degree offense in this state or the equivalent in another jurisdiction and committed the instant offense within five years of his or her release from prison on that prior offense.

Any inmate convicted of a second degree offense is not eligible for ISP if the prosecutor objects in writing within 20 days of inmate's ISP application, **unless** the inmate is within nine months of parole ineligibility and has served at least six months of his sentence. *N.J.S.A.* 2C:43-11b.

If an inmate's application for change of custodial sentence to ISP is granted over the objection of the prosecutor or Attorney General, the order shall not be final for 20 days or until the State's motion for reconsideration is decided by the ISP resentencing panel. *N.J.S.A.* 2C:43-11c.

A victim of an offense shall have the right to make a written statement or appearance at an ISP hearing. N.J.S.A. 2C:43-11d.

A defendant can be charged with escape when he leaves or absconds from the ISP program. *N.J.S.A.* 2C:29-5b. (effective February 25, 1991). *State v. KYC*, 261 *N.J. Super.* 104, 109-110 (App. Div.), *certif. denied* 133 *N.J.* 436 (1993) (preparole participant in home confinement program (HCP) was in official detention within meaning of escape statute).

Court cannot admit defendant to Court administered probation program (ISP) before defendant had served full term of mandatory period of imprisonment for drug offense as specified in section 12 plea agreement *N.J.S.A.* 2C:35-12 of CDRA. *State v. Stewart*, 136 *N.J.* 174 (1994) (Essex County ECLIPSE program modeled on ISP); *State v. McPhall*, 270 *N.J. Super.* 454 (App. Div. 1994), *certif. denied* 137 *N.J.* 309 (1994). *See also State v. Bridges*, 131 *N.J.* 402, 414 (1993), *aff'g* 252 *N.J. Super.* 286, 293-294 (App. Div. 1991).

XXII. SEX OFFENDER SENTENCING

In *State v. Howard*, 110 *N.J.* 113, 125 (1988), the Supreme Court held that the trial judge must inform a defendant at the time of his guilty plea to a sex offense of the possibility of an Avenel sentence and the effect such a sentence will have on the defendant's parole ineligibility, in

addition to stating the minimum and maximum sentence for the offense.

The retroactivity of the Howard decision was decided in *State v. Lark*, 117 *N.J.* 331 (1989), where the Supreme Court held that Howard's holding applied only to the defendant in that case and to cases pending when it was decided, in which the defendant "has not yet exhausted all avenues of direct review."

If defendant objects to finding of ADTC that he falls under the Sex Offender Act, he is entitled to hearing before trial court. Court need only find by a preponderance of the evidence that defendant's conduct was characterized by a pattern of repetitive, compulsive behavior in order to impose Avenel sentence. *State v. Howard*, 110 *N.J.* 113, 131 (1988). *See State v. Horne*, 56 *N.J.* 372, 375 (1970).

Trial court does not have the power to direct a defendant's immediate transfer to Avenel or to order his admission to the facility, out of sequence from his position on the "waiting list." *State v. Falcone*, 211 *N.J. Super.* 685 (App. Div. 1986).

The temporary imprisonment of a convicted sex offender in a county jail or other correctional facility while awaiting transfer to the ADTC does not violate a defendant's constitutional rights. *State v. Howard*, 110 *N.J.* 113, 132 (1988). Moreover, the delay in the service of an Avenel sentence is not grounds for resentencing a defendant, found to fall under the Sex Offenders Act, to an ordinary prison term. *Id.* at 133.

Trial court may impose parole ineligibility term on sex offender Sentence to ADTC. *State v. Chapman*, 95 *N.J.* 582 (1984). Defendant's original sentence which did not include community supervision for life pursuant to *N.J.S.A.* 2C:43-6.4, for endangering the welfare of a child by touching a child's breasts, was illegal and the imposition of the mandatory supervision did not violate double jeopardy or fundamental fairness. A remand was needed, however, to determine if defendant was advised during plea proceedings that he was subject to lifetime supervision and, if not, whether he would have pleaded guilty even if properly advised. *State v. Horton*, 331 *N.J. Super*. 92 (App. Div. 2000).

In *State v. Anderson*, 186 *N.J. Super.* 174 (App. Div. 1982), *aff'd o.b.* 93 *N.J.* 14 (1983), the court held that the enhanced penalty provision of *N.J.S.A.* 2C:14-6 does not apply to simultaneous convictions of separate sex offenses. In order to impose the mandatory extended term, the second or subsequent offense must follow the first offense

chronologically and the subsequent offense must occur after there has been a conviction on the prior offense. *State v. Haliski*, 140 *N.J.* 1, 10 (1995); *State v. Anderson*, 186 *N.J. Super.* at 175.

SEXUAL OFFENSES AND OFFENDERS

(See also, PROSTITUTION, OBSCENITY, thisDigest)

I. INTRODUCTION

A. Sex Offenses In General

N.J.S.A. 2C:14-1 *et seq.* supercedes Title 2A statutes on rape (*N.J.S.A.* 2A:138-1), sodomy (*N.J.S.A.* 2A:143-1 and 2) and incest (*N.J.S.A.* 2A:114-1), and combines these offenses under the general terms of "sexual assault" and "sexual contact." The Legislature's reformed concept of sexual offenses is analogous to the law of assault and battery. Sexual offenses are now viewed as a crime against the bodily integrity of the victim, and bring this area of law in line with the expectation of privacy and bodily control long embodied in most of our private and public law.

Generally, the crimes of sexual assault and sexual contact require a non-consensual act either of sexual penetration or of sexual contact. By establishing definitions for "sexual contact" and "sexual penetration," the law permits prosecution for the entire spectrum of intentional and non-consensual touching of the intimate parts of the body. The Code does not require the victim to demonstrate his or her non-consent, and it eliminates the spousal exception based on implied consent. N.J.S.A. 2C:14-5b. The victim's state of mind, attitude, or whether or not she/he resisted the sexual assault and, if so, to what degree, is a non-issue. N.J.S.A. 2C:14-5a. The issue for the fact-finder is whether defendant reasonably believed that the victim freely gave affirmative permission to the act of penetration or contact. See State v. Oliver, 133 N.J. 141, 155-56 (1993) (defendant who claims he penetrated with permission puts his own state of mind in issue, and State can introduce evidence to disprove that defendant had that state of mind).

For a thorough discussion on the history and evolution of Chapter 14, and the current state of the law, *see State in Interest of M.T.S.*, 129 *N.J.* 422 (1992).

B. Definitions

The following terms are defined in *N.J.S.A.* 2C:14-1: "actor," "victim," "sexual penetration," "sexual contact," "intimate parts," "severe personal injury," "physically helpless," "mentally defective," and "mentally incapacitated." "Coercion" is found in *N.J.S.A.* 2C:14-1j, but is not specifically defined therein. Instead, Chapter 14 adopts the definition of "criminal coercion" as defined in *N.J.S.A.* 2C:13-5(1), (2), (3), (4), (6) and (7). See State v. Queen, 221 *N.J. Super*. 601, 606 (App. Div. 1988) ("coercion" includes a threat to inflict bodily harm, while "physical force" is force applied to the victim's body). The terms "actor" and "victim" are gender neutral demonstrating the intent that either males or females can be an actor or a victim. See State v. Yarbough, 195 *N.J.Super*. 135 (App. Div.), remanded for re-sentencing 100 *N.J.* 627 (1985), cert. denied 475 U.S. 1014 (1986) (woman convicted of aggravated sexual assault).

"Sexual penetration" means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons, or insertion of the hand, finger or object into the anus or vagina by the actor or upon the actor's instruction. The depth of insertion is irrelevant. *N.J.S.A.* 2C:14-1c. Nonetheless, penetration, however slight, is required. *See State v. Gallagher*, 286 *N.J. Super.* 1, 15 (App. Div. 1995), *certif. denied* 146 *N.J.* 569 (1996) (insertion of defendant's penis between left and right buttocks sufficient to support finding of sexual contact, but not sexual penetration); *State v. J.A.*, _____ *N.J. Super.* ____ (App. Div. 2001) (held that penile penetration of the space between the labia majora or outer lips of the vulva constitutes "vaginal intercourse" within the meaning of *N.J.S.A.* 2C:14-2a(1)).

For penetration with inanimate objects, *see State v. Scherzer*, 301 *N.J.Super.* 363, 403-07 (App. Div.), *certif. denied* 151 *N.J.* 466 (1997) (broom handle and baseball bat into vagina).

For legal definition of fellatio, *see State in Interest of S.M.*, 284 *N.J.* Super. 611, 616-19 (App. Div. 1995). *See also State v. C.H.*, 264 *N.J. Super.* 112, 129 (App. Div. 1993) (finding attempted fellatio as basis for conviction of attempted sexual assault).

For legal definition of cunnilingus, see *State v. Fraction*, 206 *N.J. Super.* 532, 535-36 (App. Div. 1985). *See also State v. Zola*, 112 *N.J.* 384, 408 (1988) (State sought to prove sexual assault through circumstantial evidence including presence of saliva in vagina).

"Sexual contact" means intentional touching by defendant or the victim of either the victim's or defendant's intimate parts. Contact may be direct to the body part or through clothing. The contact or touching must be for the purpose of degrading or humiliating the victim, or sexually arousing or sexually gratifying defendant. Where defendant has sexual contact with himself or herself, this touching must be in view of the victim and defendant must be aware of the victim's presence. *See State v. Zeidell*, 154 *N.J.* 417 (1998) (defendant who masturbated himself under boardwalk 75 feet away from young victims, but within their view, guilty of sexual contact even though he did not direct his act toward any particular victim); *State v. Ridgeway*, 256 *N.J. Super.* 202 (App. Div.), *certif. denied* 130 *N.J.* 18(1992) (defendant who called 11 year old victim over to his car, then masturbated himself in her presence, guilty of sexual contact).

The definition of "intimate parts" is clearly set forth in *N.J.S.A.* 2C:14-1e and needs no case law explanation. *See State v. J.S.*, 222 *N.J. Super.* 247, 257-58 (App. Div.), *certif. denied* 111 *N.J.* 588 (1988)(finding that specification of the particular "intimate parts" was not an essential element of the offense, and trial court's amendment of the indictment from "breast and inner thigh" to "the vagina" in conformance with the evidence was proper); *State v. Gray*, 206 *N.J. Super.* 517, 521-22 (App. Div. 1985), *certif. denied* 103 *N.J.* 463 (1986)(even though indictment specified intimate parts as "vagina and genital area," defendant could be convicted of sexual contact with other intimate parts, such as the "inner thigh" because it is in the "same zone of privacy" as the genital area).

"Severe personal injury" includes "incapacitating mental anguish" which has been defined as "severe emotional distress or suffering which results in a temporary or permanent inability of the victim to function in some significant area of her life, such as employment, ability to care for herself, or in her capacity as spouse, homemaker or mother. State v. Walker, 216 N.J. Super. 39,43 (App. Div.), certif. denied 108 N.J. 179 (1987). "Temporary incapacity" means more than a fleeting, short-lived or brief incapacity. Id. In State v. Mosch, 214 N.J. Super. 457, 467 (App. Div. 1986), certif. denied 107 N.J. 131 (1987), the court concluded that emotional trauma suffered by victim of sexual assault can cause greater damage than physical injury since "psychological scars may never heal." See generally, Collins v. Union County Jail, 150 N.J. 407 (1997), a civil case in which the Court held that the psychological harm suffered by the victim as the direct result of sexual assault by a corrections officer was a "permanent loss of a bodily function" which will afflict the victim for "the rest of his life." Id. at 420-21.

"Physically helpless" means totally unconscious or when a person is physically unable to flee or physically unable to communicate an unwillingness to act. A person who is asleep is "physically helpless" within the meaning of the statute. *State v. Rush*, 278 *N.J. Super*. 44, 48 (App. Div. 1994).

"Mentally defective" within the context of Chapter 14 means a victim, who at the time of the sexual activity, is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in such conduct with another. See State v. Olivio, 123 N.J. 550, 564 (1991), for thorough discussion on "mentally defective" within the context of the statute. See also State v. Scherzer, 301 N.J. Super. at 398-99, where psychiatric evidence was introduced to establish victim's incapacity to understand her right to refuse to engage in sexual activity. In both Olivio and Scherzer, defendants were found to have known or should have known of the respective victim's mental incapacity. State v. Olivio, 123 N.J. at 568; State v. Scherzer, 301 N.J. Super. at 404. See also State v. Cuni, 303 N.J. Super. 584, 600-02 (App. Div. 1997), aff'd 159 N.J. 584 (1999) discussing whether defendant knew or should have known that victim was mentally defective.

There appears to be no case law defining the term "mentally incapacitated" under *N.J.S.A.* 2C:14-1i. However, it is suggested that the definition is limited to "non-consensual incapacitation" of the victim's mind by means of the administration of intoxicants, including drugs. *See Cannel, Criminal Code Annotated,* Comment 9 to *N.J.S.A.* 2C:14-1. *Cannel* also suggests that the statutory phrase "other act committed upon" the victim may include hypnosis.

"Date rape" or "acquaintance rape" means forced sexual activity between persons who know one another, most often by male relatives, current or former husbands, boyfriends or lovers. Generally, guns or knives are not used in these types of sexual assaults, and victims do not suffer external bruises or cuts. *See generally, State in Interest of M.T.S.*, 129 *N.J.* at 446-47; *State v. Lyles*, 291 *N.J. Super.* 517 (App. Div. 1996), *certif. denied* 148 *N.J.* 607 (1997).

II. TYPES OF SEXUAL OFFENSES

A. In General

Any act of sexual penetration engaged in by defendant without the "affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault." *State in Interest of M.T.S.*, 129 *N.J.* 422, 444 (1992). "Physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful." *Id.* "Physical force" under *N.J.S.A.* 2C:14-2c(1) is satisfied if defendant uses "any amount of force" in the absence of what a "reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration." *Ibid.* "Permission" can be inferred either from acts or statements, which demonstrate that "a reasonable person would have believed the victim had affirmatively and freely given authorization to act." *Id.* at 445.

B. Aggravated Sexual Assault

N.J.S.A. 2C:14-2 sets forth seven categories of first degree aggravated sexual assault. These offenses, both in the actual commission and in an attempt to commit, recognize an increased risk of physical or psychological harm to the victim over and above the act of sexual violence. All seven of these offenses require penetration. See *State v. Cole*, 120 *N.J.* 321, 330-31 (1990).

An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

N.J.S.A. 2C:14-2a(1) - the victim is less than 13 years old;

N.J.S.A. 2C:14-2a(2) - the victim is at least 13 but less than 16 years old; and

a. The actor is related to the victim by blood or affinity to the third degree, or

b. The actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or

c. The actor is a foster parent, a guardian, or stands in loco parentis within the household.

Where age of the victim is an element of the offense, consent is not an issue. Nor is it a defense that defendant believed the victim to be above that age. *N.J.S.A.* 2C:14-5c. The age of the victim and/or defendant must be specified in the indictment so that defendant is on notice of the offense against which he must defend. *State v. Burden*, 203 *N.J. Super.* 149 (Law Div 1985).

Sexual offenses committed by family members and non-family members are separate offenses and treated differently. *See State v. Miller*, 108 *N.J.* 112 (1987) and *State v. D.R.*, 109 *N.J.* 348 (1988) (endangering conviction did not merge with aggravated sexual assault where defendant was victim's father); *State v. Still*, 257 *N.J.Super.* 255 (App. Div. 1992) (defendant was grandson of victim's babysitter and had no particular duty to victim, thus endangering conviction merged with sexual assault conviction). Defendant and victim, who are stepbrother and stepsister, are related by "affinity" in the context of subparagraph (a) above. This familial relationship extends to aunts and uncles by blood or marriage. *State v. Brown*, 311 *N.J. Super.* 273 (Law Div. 1997); *see also Cannel*, Comment 2 to *N.J.S.A.* 2C:14-2.

The Appellate Division has recently determined that the pre-Code crime of "carnal abuse," under *N.J.S.A.* 2A:138-1, which has been repealed, is eligible for expungement. *State v. N.W.*, 329 *N.J. Super.* 326 (App. Div. 2000).

N.J.S.A. 2C:14-2a(3) - the act of sexual penetration occurs during the course of other specified criminal activity, such as kidnaping, robbery, homicide, aggravated assault, burglary, arson or criminal escape. See State v. Spencer, 319 N.J. Super. 284, 305-6 (App. Div. 1999) (fact that the victim might have been dead by the time penetration occurred does not detract from defendant's culpability provided the sexual assault is part of a continuous transaction); State v. Jones, 308 N.J. Super. 174 (App. Div.), certif. denied 156 N.J. 380 (1998) (that victim was dead at the time of the sexual penetration did not prevent conviction for aggravated sexual assault where victim was alive when the assault began); for a discussion on fact that murder victim was, after death occurred, also victim of sexual assault see, 76 A.L.R.4th 1147, 3 (1990); State v. Cuni, 303 N.J. Super. 584, 597-98 (App. Div.), certif. denied 152 N.J. 12 (1997) (conviction under this statute could not stand unless jury found defendant unlawfully entered victim's home with intent to commit non-consensual sexual penetration); State v. Lyles, 291 N.J. Super. 517 (App. Div. 1996) (kidnaping conviction could not stand because confinement was incident only to the sexual assault); State v. Arp, 274 N.J. Super. 379 (Law. Div. 1994) (confinement began lawfully, but later turned unlawful in the course of aggravated sexual assault); State v. Trochin, 223 N.J. Super. 530 (App. Div. 1988) (discussing kidnaping and aggravated sexual assault)

N.J.S.A. 2C:14-2a(4) - defendant has or uses a weapon or any object fashioned in such a way that victim reasonably believes it is a weapon and threatens by word or gesture to use the weapon or object. *See State v. Martinez*, 97 *N.J.* 567 (1984) (this statute section satisfied when defendant pointed gun at the victim and then placed gun under a table close to where sexual assault occurred).

N.J.S.A. 2C:14-2a(5) - defendant is aided or abetted by one or more other persons, and defendant uses physical force or coercion. *See State v. Scherzer*, 301 *N.J. Super*. 363 (App. Div.), *certif. denied* 151 *N.J.* 466 (1997) (persuasion is not coercion or physical force; State must demonstrate some form of intimidation). For discussion on force and coercion in group setting, *see State v. B.G.*, 247 *N.J. Super*. 403, 409-17 (App. Div. 1991). For general discussion of force and coercion *see State v. M.T.S.*, 129 *N.J.* 422, 444 (1992) and *State v. Oliver*, 133 *N.J.* 141, 155-56 (1993).

N.J.S.A. 2C:14-2a(6) - defendant uses physical force or coercion and the victim sustains severe bodily injury. *See State v. Jones*, 308 *N.J.Super*. 15, 39 (App. Div. 1998), where defendant used bat, pitchfork and saw in the course of murder and aggravated sexual assault.

N.J.S.A. 2C:14-2a(7) - the victim is someone defendant knew or should have known was physically helpless, mentally defective or mentally incapacitated. *See State v. Rush,* 278 *N.J. Super.* 44 (App. Div. 1994) (a sleeping person is "physically helpless"). *See also State v. Cuni,* 159 *N.J.* 584, 600-02 (1999) and *State v. Olivio,* 123 *N.J.* 550 (1991), for discussion on type of evidence that establishes incapacity, and fact that defendant must know or be in a position to know of the victim's incapacity.

C. Sexual Assault

A sexual assault under *N.J.S.A.* 2C:14-2b is a second degree offense and is known as a "tender years" sexual assault. There are three key elements to this offense:

1. a victim who is less than 13 years old;

2. a defendant who is at least four years older than the victim; and

3. a sexual contact with the under 13-year old victim. The sexual contact for this offense is the intentional or purposeful touching of an intimate part of the victim.

There are three types of intentional sexual touching: the defendant touches himself or herself; the defendant touches the victim, or the victim touches the defendant.

This intentional sexual touching must have at least one of the following four purposes: to degrade the victim; to humiliate the victim; to sexually arouse defendant, or to sexually gratify defendant.

If the sexual touching by defendant is to himself or herself, the touching must be in view of the victim whom defendant knows to be present.

For a thorough discussion on "tender years" sexual assault, *see State v. Zeidell*, 154 *N.J.* 417 (1998). *See also State v. Budis*, 125 *N.J.* 519, 537 (1991) (victim under the

age of 13 cannot consent to sexual conduct); State v. Thomas, 322 N.J. Super, 512, 515 (App. Div.), certif. denied 162 N.J. 489 (1999) (consent is a non-issue in sexual assault of a victim under 13 years of age); State v. Burden, 203 N.J. Super. 149, 153-55 (Law Div. 1985)(victim 16 or under cannot incapable of giving consent to sexual conduct); State v. A.N., 267 N.J. Super. 158 (Ch. Div. 1993) (physical appearance alone may be sufficient to prove the age element if any reasonable trier of fact would be able to find physical appearance alone sufficient to prove age beyond reasonable doubt); State v. Gray, 206 N.J. Super. 517 (App. Div. 1985), certif. denied 103 N.J. 463 (1986) (when indictment charges offense under this statute with specificity and gives the victim's age, it is not necessary to set forth defendant's age or the difference in age between victim and defendant); State in Interest of K.A.W., 104 N.J. 112 (1986) (when under 13-year-old victim cannot remember exact dates of assault, dates not necessary as long as defendant has sufficient notice to prepare a defense).

N.J.S.A. 2C:14-2c sets forth seven categories of second degree sexual assault, all of which require penetration and either physical force or coercion.

An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

N.J.S.A. 2C:14-2c(1) - defendant uses physical force or coercion, but the victim does not sustain severe personal injury. *See State v. M.T.S.*, 129 *N.J.* 422 (1992) (sleeping victim awoke to find defendant engaged in penetration; defendant ceased conduct when told to do so). *See also State v. Blacknall*, 288 *N.J. Super.* 466 (App. Div. 1995), *aff'd* 143 *N.J.* 419 (1996) (kidnaping and second degree sexual assault, although main issue is double jeopardy); *State v. Lightner*, 99 *N.J.* 313 (1985) (force or coercion essential elements of this offense).

N.J.S.A. 2C:14-2c(2) - the victim is on probation or parole, is detained in a hospital, prison or other institution where defendant has supervisory or disciplinary power over the victim by virtue of his legal, professional or occupational status. *See State v. Spann*, 236 *N.J. Super*. 13 (App. Div), *aff'd* 130 *N.J.* 484 (1993) (prison guard sexually assaulted female inmate who became pregnant as a result); *State v. Martin*, 235 *N.J. Super*. 47 (App. Div.), *certif. denied* 117 *N.J.* 669 (1989) (supervisor in juvenile shelter engaged in sexual conduct with juvenile resident; "consent" was not a defense). *N.J.S.A.* 2C:14-2c(3) - the victim is at least 16 but less than 18 years old; and

a. defendant is related to the victim by blood or affinity to the third degree; or

b. defendant has supervisory or disciplinary power over the victim; or

c. defendant is a foster parent, a guardian or stands in loco parentis within the household.

N.J.S.A. 2C:14-2c(4) - the victim is at least 13 but less than 16 years old and defendant is at least four years older than the victim. *See State v. Smith,* 279 *N.J. Super.* 131, 148 (App. Div. 1995) (although indictment did not charge physical force or coercion, charges of aggravated assault and attempted murder put defendant on notice that State might try to prove physical force or coercion against the victim during the sexual assault); *State v. Rodriguez,* 179 *N.J. Super.* 129, 133 (App. Div. 1981) (defendant's guilty plea to second degree sexual assault was proper even though he claimed 13-year-old victim consented and he thought she was 16 years old).

D. Aggravated Criminal Sexual Contact

N.J.S.A. 2C:14-3a - a person is guilty of this offense if he or she commits an act of sexual contact (as defined in *N.J.S.A.* 2C:14-1d) with the victim under any of the circumstances set forth in *N.J.S.A.* 2C:14-2a (2) through (7). This is a crime of the third degree. See State v. Dixon, 125 *N.J.* 223, 257-58 (1991) (discovery gave defendant fair notice of State's theory that charge was based either on defendant's possession of a weapon or in the course of a robbery); State v. Mosch, 214 *N.J. Super.* 457 (App. Div. 1986), certif. denied 107 *N.J.* 131 (1987) (defendant convicted of third degree sexual contact committed in the course of a burglary); State v. Ramos, 217 *N.J. Super.* 530 (App. Div. 1987) (defendant convicted of third degree aggravated sexual contact and burglary).

E. Criminal Sexual Contact

N.J.S.A. 2C:14-3b - a person is guilty of this offense if he or she commits an act of sexual contact (as defined in *N.J.S.A.* 2C:14-1d) with the victim under any of the circumstances set forth in *N.J.S.A.* 2C:14-2c (1) through (4). This is a crime of the fourth degree. *See State v. Rush*, 278 *N.J. Super.* 44 (App. Div. 1994) (defendant convicted of fourth degree sexual contact after he snuck into victim's home and touched the skin of her buttocks and vagina while she was asleep). F. Lewdness

N.J.S.A. 2C:14-4a - is a disorderly persons offense if defendant commits "any flagrantly lewd and offensive act" which he or she knows or reasonably expects a non-consenting person to observe and to be "affronted or alarmed" by the conduct.

N.J.S.A. 2C:14-4b(1) - is a fourth degree offense if defendant exposes his or her intimate parts for the purpose of arousing or gratifying his or her sexual desire or the sexual desire of any other person if defendant knows or reasonably should know that the conduct is likely to be observed by a child less than 13 years old; defendant must be at least four years older than the child victim.

N.J.S.A. 2C:14-4b(2) - is a fourth degree offense if defendant exposes his or her intimate parts for the purpose of arousing or gratifying his or her sexual desire or the sexual desire of any other person if defendant knows or reasonably should know that the conduct is likely to be observed by a person who, because of mental disease or defect, is unable to understand the sexual nature of defendant's conduct.

N.J.S.A. 2C:14-4c - defines "lewd acts" as exposing of defendant's genitals for the purpose of arousing or gratifying the sexual desire of defendant or another person.

Generally speaking, lewdness involves more than nudity. The critical element of this offense is that defendant's nudity must be motivated by his or her sexual desire, and defendant's sexually motivated nudity must be observed by another person. *See State v. Hackett*, 323 *N.J. Super*. 460, 474 (App. Div. 1999), *N.J. app. pending* (defendant stood nude in his front window in full view of children waiting for school bus for the purpose of arousing his sexual desire).

For a thorough discussion on the difference between "sexual contact" and "lewdness," *see State v. Zeidell*, 154 *N.J.* 417 (1998). Essentially, an actor's touching himself, knowing children could actually see the act, even though no specific victim was targeted, was enough to constitute assaultive behavior, and thus sexual contact, because the act itself is "shocking and threatening to observe." On the other hand, merely exposing oneself without touching or forcing a victim to touch is lewdness. *Id.* at 432-35; *N.J.S.A.* 2C:14-4a. *See also State v. Ridgeway*, 256 *N.J. Super.* 202 (App. Div.) *certif. denied* 130 *N.J.* 18 (1992) (defendant who called eleven year old girl over to his car and masturbated in her presence guilty of sexual contact).

See also Tri-State Met. Naturists v. Lower Twp., 219 N.J. Super. 103, 115-15 (Law Div. 1987) (township could not ban nude sunbathing on regulated, state-owned property; moreover, lewdness statute addresses more than nudity or public indecency, it is aimed at a form of "sexual aggression").

III. RELATED OFFENSES (*See also*, ENDAN-GERING THE WELFARE OF CHILDREN, this Digest)

A defendant who engages in conduct proscribed under Chapter 14 of the New Jersey Criminal Code with a child under the age of 16, is also guilty of endangering the welfare of a child. *See N.J.S.A.* 2C:24-4. A person who has a legal duty for the care of a child or who has "assumed responsibility" for the care of a child and who is found to have endangered the welfare of that child is guilty of a crime of the third degree. Any other person found to have endangered the welfare of a child is guilty of a fourth degree crime. *See State v. Galloway*, 133 *N.J.* 631 (1993).

The endangering statute also prohibits child pornography. *See N.J.S.A.* 2C:24-4b. *State v. Brady*, 332 *N.J. Super.* 445 (App. Div. 2000).

IV. DEFENSES (See also, DEFENSES, this Digest)

A. No Age, Impotency, or Marriage Defense

"No actor shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim." *N.J.S.A.* 2C:14-5b. *See State v. Smith*, 85 *N.J.* 193, 196 (1981); *State v. Morrison*, 85 *N.J.* 212, 216 (1981).

But see State in the Interest of C.P. and R.D., 212 N.J. Super. 222 (Ch. Div. 1986): Two juveniles, age six and nine years, respectively, were charged with aggravated sexual assault after they physically restrained a six-year-old victim and inserted their fingers in her vagina. Although the Chancery Court acknowledged that no actor is to be presumed to be incapable of committing a crime because of his or her age, the court dismissed the indictment based upon psychiatric testimony that the juveniles could not have formed the mental intent, the "knowing awareness," required by the statute.

B. No Mistake as to Age Defense

"It shall be no defense ... that the actor believed the victim to be above the age stated for the offense, even if such

a mistaken belief was unreasonable." *N.J.S.A.* 2C:14-5c. *See State v. Rodriguez*, 179 *N.J. Super.* 129, 133 (App. Div. 1981), where the trial court accepted a guilty plea to 2C:14-2c(5), despite defendant's assertion that the victim appeared at least 16 years old. *See also State v. Moore*, 105 *N.J. Super.* 567, 570 (App. Div.), *certif. denied*, 54 *N.J.* 502 (1969).

C. Consent

Consent is no defense to the "statutory rape" provisions embodied in 2C:14-2a(1); 2C:14-2b, 2C:14-2c(4), and 2C;14-2c(5). *See State v. Rodriguez*, 179 *N.J. Super.* 129, 133 (App. Div. 1981), where the trial court accepted a guilty plea to 2C:14-2c(5), despite defendant's assertion that child-victim consented. *See also State v. Thomas*, 322 *N.J. Super.* 512, 515 (App. Div.), *certif. denied*, 162 *N.J.* 489 (1999) (consent irrelevant to sexual assault against a child under 13); *State v. Burden*, 203 *N.J. Super.* 149, 153-155 (Law Div. 1985).

Consent is a defense where use of force is an element of the offense, such as in 2C:14-2a(6) and 2C:14-2c(1). Consent may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. *State in Interest of M.T.S.*, 129 *N.J.* 422, 444 (1992). It is often "indicated through physical actions rather than words." *Id.* at 445. Consent is demonstrated "when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act." *Id.* at 445.

"In a case ... in which the State does not allege violence or force extrinsic to the act of penetration, the fact finder must decide whether the defendant's act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration. Such permission can be indicated either through words or through actions that, when viewed in light of all the surrounding circumstances, would demonstrate to a reasonable person affirmative and freelygiven for the specific act of sexual penetration." *Id.* at 447-448.

Burden of Proof: the State must prove beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freelygiven permission of the alleged victim. Such proof can be based on evidence of conduct or words in light of surrounding circumstances and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely-given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, the State must demonstrate either that defendant did not actually believe that affirmative permission had been freely-given or that such a belief was unreasonable under all of the circumstances. Thus, the State bears the burden of proof throughout the case. *State in Interest of M.T.S.*, 129 *N.J.* at 448-449.

V. EVIDENCE

A. Resistence

The State is not required to offer proof that the victim resisted, resisted to the utmost, or reasonably resisted against any conduct proscribed by Chapter 14. *N.J.S.A.* 2C:14-5a.

B. Admissibility of Evidence (*See also* EVIDENCE, this Digest)

In prosecution for aggravated sexual assault, sexual assault, aggravated sexual contact and sexual contact, endangering the welfare of a child and lewdness, evidence of the victim's previous sexual conduct is not admissible, nor is reference to it allowed in front of the jury, unless defendant obtains a court order allowing the evidence. *N.J.S.A.* 2C:14-7a. Evidence of a victim's sexual conduct which took place more than one year before the offense occurred is presumed to be inadmissible, unless there is "clear and convincing proof" that such evidence should be admitted. *N.J.S.A.* 2C:14-7b.

Evidence of sexual conduct with someone other than defendant is not considered relevant unless it is material to proving the source of semen, pregnancy or disease. *N.J.S.A.* 2C:14-7c.

Evidence of the victim's previous sexual conduct with defendant is relevant only if it is probative of the determination whether a reasonable person, knowing what defendant knew at the time the alleged offense occurred, would have believed that the victim "freely and affirmatively permitted" the sexual behavior complained of. *N.J.S.A.* 2C:14-7d.

Evidence of how the victim was dressed at the time the alleged offense occurred is not admissible unless the trial court first determines that such evidence is relevant and admissible "in the interests of justice." *N.J.S.A.* 2C:14-7e. Before making such a determination, the proponent of such evidence must make an offer of proof outside the

jury's presence, or at a hearing on the subject if the trial court deems such necessary. The trial court must make a record of its findings of fact essential to its determination. *Id.*

"Sexual conduct" as utilized in *N.J.S.A.* 2C:14-7, means any sexual conduct or behavior by the victim, including but not limited to, previous or subsequent sexual penetration or sexual contact, use of contraceptives, notations in the victim's gynecological records concerning the victim's sexual activity, or living arrangement and life style of the victim. *N.J.S.A.* 2C:14-7f.

For a thorough discussion on this statute, commonly known as the "Rape Shield Law," *see State v. Budis*, 125 *N.J.* 519 (1991). In *State v. Cuni*, 159 *N.J.* 584, 598 (1999), the procedural requirements of this statute were found constitutional. To qualify for an evidentiary hearing on admissibility of victim's prior sexual activity, defendant must submit a signed, detailed written proffer to the trial court. *State v. Rowe*, 316 *N.J. Super.* 425, 436 (App. Div. 1998), *certif. denied* 160 *N.J.* 89 (1999).

One purpose of the Rape Shield Law is to protect the victim against surprise, harassment and unnecessary invasion of privacy. *State v. Cuni*, 159 *N.J.* 584, 598 (1999); *State v. Rowe*, 316 *N.J. Super*. at 434. Another purpose is to encourage victims to report sexual assaults and to avoid prejudicing juries against victims. *State v. Cuni*, 159 *N.J.* at 596-97. *See also State v. Clowney*, 299 *N.J. Super*. 1, 14 (App. Div.), *certif. denied* 151 *N.J.* 77 (1997)(Rape Shield Law applies even to victim who is dead); *State v. Ogburne*, 235 *N.J. Super*. 113 (App. Div. 1989) (forbidding defendant from asking if victim was a virgin); *State v. G.S.*, 278 *N.J. Super*. 151, 171 (App. Div. 1994), *rev'd o.g*.145 *N.J.* 460 (1996) (evidence of victim's sexual activity between her and her boyfriend not admissible).

For discussion on Rape Trauma Syndrome, *see State v. Scherzer*, 301 *N.J. Super.* 363, 399 (App. Div.), *certif. denied* 160 *N.J.* 89 (1999) (court found it was error to admit expert testimony that victim exhibited signs of Rape Trauma Syndrome).

For discussion on Child Sexual Abuse Accommodation Syndrome (CSAAS) *see State v. J.Q.*, 130 *N.J.* 554 (1993), finding that such evidence is inadmissible to establish guilt or innocence, but is admissible to establish that victims' symptoms are consistent with sexual abuse and to explain delay in reporting abuse or in recanting allegations; *see also State v. W.L.*, 278 *N.J. Super*. 295 (App. Div. 1995) (finding reversible error in trial court's failure to give limiting instruction on use of CSAAS testimony); *State v. Michaels*, 264 *N.J. Super*. 579 (App. Div. 1993), *aff'd* 136 *N.J.* 299 (1994)(psychologist's testimony that conduct of children was consistent with child sexual abuse was inadmissible); *see generally, State v. Hines*, 303 *N.J. Super*. 311 (App. Div. 1997) (finding reversible error in trial's court's refusal to allow defendant to offer evidence to post-traumatic stress disorder; Rape Trauma Syndrome discussed).

In aggravated sexual assault case, defendant's right to confrontation was not violated by 8-year-old victim's closed circuit television testimony caused by victim's fear of the courtroom and defendant; also held that victim's videotaped statement was admissible under the "tender years" exception of hearsay rule. *State v. Smith*, 158 *N.J.* 376 (1999). In *State v. Crandall*, 120 *N.J.* 649 (1990), it was held that child's closed circuit television testimony caused by victim's fear of defendant does not violate Confrontation Clause. *See also Idaho v. Wright*, 497 *U.S.* 805 (1990); *Maryland v. Craig*, 497 *U.S.* 836 (1990).

Special education student who was victim of sexual assault classes was competent to testify because he understood that to tell the truth was the "right" thing to do, and that he could be punished if he did not tell the truth. *State v. Walker*, 325 *N.J. Super*. 35 (App. Div. 1999), *certif. denied* 163 *N.J.* 74 (2000).

For cases on fresh complaint evidence, *see State v. Bethune*, 121 *N.J. 137 (1990); State v. Hill*, 121 *N.J.* 162 (1990); *State v. Lyles*, 291 *N.J. Super.* 517, 529 (App. Div.1996), *certif. denied* 148 *N.J.* 460 (1997).

Expert testimony not necessary for jury to conclude that victim's testimony of incapacitating mental anguish is credible. *State v. Walker*, 216 *N.J. Super.* 39 (App. Div.), *certif. denied* 108 *N.J.* 179 (1987).

Physical appearance alone may be sufficient to prove age beyond a reasonable doubt. State *in Interest of A.N.*, 267 *N.J. Super*. 158 (App. Div. 1993)

Court may order physical examination of child sex abuse victim only when satisfied that defendant has made sufficient showing that such examination can produce competent evidence with substantial probative worth. *State v. D.R.H.*, 127 *N.J.* 249 (1992).

N.J.S.A. 2C:43-2.2 does not violate due process and provides for testing of juvenile or adult sex offenders for AIDS and HIV, which are among the limited circumstances in which suspicionless searches are

warranted. The results of these tests are generally required to be kept confidential and may not be used at trial. The tests will be ordered at the discretion of the trial court if the State shows the existence of probable cause to believe there was a transmission of bodily fluids during commission of the offense. *State in Interest of J. G., N.S. and J. T.*, 151 *N.J.* 565 (1997).

VI. SENTENCING (See also, SENTENCING, this Digest)

A. Presentence Evaluation

Whenever a person is convicted of aggravated sexual assault (N.J.S.A. 2C:14-2a), sexual assault (N.J.S.A. 2C:14-2b), aggravated criminal sexual contact (N.J.S.A. 2C:14-3a), kidnapping (*N.J.S.A.* 2C:13-1c(2)), endangering the welfare of a child (N.J.S.A. 2C:24-4a or b(4)), or any attempt to commit such crimes, the trial court must order the Department of Corrections to complete a psychological examination of the offender, unless the offender is sentenced to a term of life imprisonment without parole. The examination is required to determine three issues: (1) whether the offender's conduct is characterized by a pattern of repetitive compulsive behavior; (2) whether he is amenable to sex offender treatment; and (3) whether he is willing to participate in that treatment. N.J.S.A. 2C:47-1. The examination must be conducted within 30 days after receipt of the Presentence Report, and a written report of the results sent to the court. N.J.S.A. 2C: 47-2.

If the examination reveals that the offender is repetitive and compulsive, is amenable to sex offender treatment, and is willing to participate in that treatment, the court must reexamine the report and make its own findings. N.J.S.A. 2C:47-3a. If the court agrees with the report's findings, it must sentence the offender to a term of incarceration to be served in the custody of the Adult Diagnostic and Treatment Center (ADTC) for sex offender treatment or probation conditioned upon outpatient psychological or psychiatric treatment. N.J.S.A. 2C:47-3b (removing discretion to sentence to ADTC previously accorded to court under State v. Chapman, 95 N.J. 582 (1984); State v. Hamm, 207 N.J. Super. 40 (App. Div. 1986)). An offender sentenced to seven years or less must be confined at ADTC as soon as practicable. N.J.S.A. 2C:47-3h(1); see State v. Falcone, 211 N.J. Super. 685 (App. Div. 1986) (if ADTC is filled to capacity and there is a waiting list for admission, the offender may by incarcerated in county jails pending availability of space at ADTC); see also, State v. Howard, 110 N.J. 113 (1988) (waiting period at county jail not unconstitutional). An offender sentenced to more than seven years does not immediately go to ADTC, but instead

must first be confined in a facility designated by the Commissioner. At least 30 days prior to the date before the offender has five years to the expiration of either his sentence or, if imposed, of any mandatory minimum term, the Department of Corrections must complete another psychological examination to determine whether the offender is amenable and willing to participate in sex offender treatment. If the report reveals that the offender is amenable and willing to participate, he will be transferred to ADTC as soon as practicable. If the report reveals that the offender is either not amenable or not willing to participate in sex offender treatment, the offender can not be transferred to ADTC. N.J.S.A. 2C:47-3h(2, 3). In such a case, the offender is precluded from receiving good or work time credits. N.J.S.A. 2C:47-3i. In addition, the offender is only entitled to treatment while incarcerated in ADTC. N.J.S.A. 2C:47-3k; see State v. Howard, supra (offender not entitled to treatment while in county jail). An offender sentenced to a term of life imprisonment without parole shall not be confined in ADTC, but in a facility designated by the Commissioner. N.J.S.A. 2C:43-7j.

If the examination reveals that the offender is repetitive and compulsive, is amenable to sex offender treatment, but is unwilling to participate in such treatment, the offender is sentenced as if he is a sex offender but not sent to ADTC. *N.J.S.A.* 2C:47-3f. The offender is precluded from receiving good or work time credits. *N.J.S.A.* 2C:47-3g. The offender is also eligible for parole only when the requirements of *N.J.S.A.* 2C:45-7 are met, an impossibility for anyone who refuses treatment. *N.J.S.A.* 2C:47-3f; see **PRISONERS AND PAROLE**, this digest.

If the examination reveals that the offender is either not repetitive and compulsive or not amenable to sex offender treatment, the offender may be given an ordinary sentence. However, the sentence may not be reduced by good or work time credits. *N.J.S.A.* 2C:47-3d.

The provisions of this Chapter apply to female sexual offenders the same as they do to a male offender. *N.J.S.A.* 2C:47-4.2.

B. Sentence and Punishment

1. In General

Before accepting a guilty plea to sexual offenses, the trial court should satisfy itself that defendant understands the possibility of an ADTC sentence and the impact such sentence might have on parol opportunities. *State v. Howard*, 110 *N.J.* 113 (1988), *rev'g* 213 *N.J. Super.* 587

(App. Div. 1986); see **PRISONERS AND PAROLE**, this digest. However, this rule is retroactive only as to cases pending at the time of the *Howard* decision where the defendant had not exhausted all avenues of direct review. *State v. D.D.M.*, 140 *N.J.* 83 (1995); *State v. Lark*, 117 *N.J.* 331 (1989).

Where the State agrees not to speak at sentencing as part of a plea bargain to second degree sexual assault, the State is not permitted to appeal the sentence imposed as being too lenient. *State v. Paterna*, 195 *N.J. Super*. 124 (App. Div. 1984).

When sentenced as a sex-offender under *N.J.S.A.* 2C:47-3b or f, the length of the sentence must be set in accordance with the Code-mandated procedure of weighing aggravating and mitigating factors. *N.J.S.A.* 2C:47-3c; see *Gerald v. Commissioner, N.J. Dept. of Corr.,* 102 *N.J.* 435 (1986). Periods of parole ineligibility, extended terms, and consecutive sentences may also be imposed in accordance with the Code. *State v. Chapman,* 95 *N.J.* 582 (1984); *State v. Holmes,* 192 *N.J. Super.* 458 (App. Div.), *certif. denied* 99 *N.J.* 144 (1984). For conviction of first and second degree crimes, the presumption of imprisonment remains. *State v. Hamm,* 207 *N.J. Super.* 40 (App. Div. 1986).

A defendant convicted of a second or subsequent offense under N.J.S.A. 2C:14-2 or N.J.S.A. 2C:14-3a, shall be sentenced to a fixed minimum sentence of not less than five years, unless he or she is sentenced pursuant to N.J.S.A. 2C:43-7. See N.J.S.A. 2C:14-6. The sentencing court has no discretion to suspend a sentence or impose a noncustodial sentence of a second or subsequent offender under this section. Id. For the purpose of this section, a second or subsequent offense means that defendant has been previously convicted of a similar offense. Id. An offense is not a second or subsequent offense unless it occurred after the conviction of the first offense. State v. Anderson, 186 N.J. Super. 174 (App. Div. 1982); aff'd 93 N.J. 14 (1983). If defendant is convicted simultaneously of two offenses which occurred on separate occasions, the enhanced penalty provisions of this section does not apply. State v. Bowser, 272 N.J. Super. 582, 588 (Law Div. 1993). "Subsequent" means after the second offense, in other words, third, fourth, fifth, etc. State v. Hawk, 214 N.J. Super. 430, 434 (App. Div. 1986), aff'd 114 N.J. 359 (1989).

Aggravated sexual assault conviction merges into kidnaping conviction. *State v. Cooper*, 151 *N.J.* 326 (1997). Endangering the welfare of a child conviction merges into sexual assault conviction where there is no basis

for endangering beyond the sexual assault. *State v. Still*, 257 *N.J. Super*. 255, 259 (App. Div.1992); *State v. Clark*, 324 *N.J. Super*. 178 (App. Div. 1999), *rev'd o.g.* 162 *N.J.* 201 (2000). In contrast, second degree burglary conviction does not merge into second degree attempted aggravated sexual assault, and fourth degree criminal sexual contact conviction does not merge into second-degree attempted aggravated sexual assault. *State v. Adams*, 227 *N.J. Super.*, 51 (App. Div.), *certif. denied* 113 *N.J.* 642 (1988); *State v. Mosch*, 214 *N.J. Super.* 457 (App. Div.), *certif. denied* 107 *N.J.* 131 (1987) (third degree burglary did not merge with third degree sexual contact).

The "No Early Release Act" (NERA), *N.J.S.A.* 2C:43-7.2, which requires a defendant to serve 85% of sentence for violent crime, will not to apply to second degree sexual assault when there is only the possibility that the actor used physical force. *State v. Thomas*, __*N.J.* __ (2001).

VII. MEGAN'S LAW

A. Generally

N.J.S.A. 2C:7-1 et. seq., the Registration and Community Notification Laws, commonly known as Megan's Law, provides that offenders who have been convicted of one of the enumerated sexual offenses listed in the statute must register by completing a Registration Form and providing a primary residential address prior to release from a correctional facility to parole, probation, work release, furlough or a "similar program", or release into the community with no supervision. Following registration, the County Prosecutor's Office has the obligation to determine the risk of reoffense posed by the offender. That risk, delineated by "tier", (as in low: Tier One; moderate: Tier Two; and high: Tier Three), forms the basis for a determination, based upon geographic proximity to the home address of the offender, as to what members of the community will be notified of the offenders location, so that the public can be protected. N.J.S.A. 2C:7-1a. Additionally, the registration assists law enforcement in resolving crimes involving sexual abuse and missing persons. N.J.S.A. 2C:7-1b.

B. Constitutionality

In *Doe v. Poritz*, 142 *N.J.* 1 (1995), the New Jersey Supreme Court upheld the general constitutionality of *N.J.S.A.* 2C:7-1. The Court mandated that a trial court must hold a hearing to determine if the prosecutor properly classified the registrant when he challenges the tier classification and manner of notification. The Court struck down the provision of *N.J.S.A.* 2C:7-1 et. seq. which provides for public disclosure of the sex offender's home address and other information. In *Paul P. v. Verniero*, 170 *F.*3d 396 (3d Cir. 1999), the Third Circuit similarly upheld the general constitutionality of this statutory scheme, remanding only for consideration of whether the procedures for notification of protected information were adequate. See *Paul P. v. Farmer*, 80 *F.Supp.* 320 (D.N.J.) (ruling that the guidelines for these procedures did not reasonably limit disclosure to those entitled to receive it), *judgment vacated*, 92 *F.Supp.*2d 320, 325 (D.N.J.) (upholding redrafted guidelines), *aff'd Paul P. Farmer*, 227 *F.*3d 98 (3d Cir. 2000).

In *In re C.A.*, 146 *N.J.* 71 (1996), the New Jersey Supreme Court upheld the Attorney General's sex offender classification guidelines, know as the Registrant Risk Assessment Scale (RRAS). The Court noted that the RRAS is entitled to deference but is not immune to challenges. The Court characterized the RRAS as a "useful guide" in determining the amount of notification that a community should receive.

C. Caselaw

In In re G.B., 147 N.J. 62 (1996), the New Jersey Supreme Court held that the RRAS score given to a registrant by the prosecutor is presumptively reliable. However, a registrant can enter a challenge to his tier classification under the following circumstances: (1) when the registrant is challenging the calculation utilized on the basis that there was a factual error, or because he disputes the prior offense, because there was variable factors that were not considered by the prosecutor, or for "similar reasons"; (2) when the registrant wants to introduce evidence that the RRAS "calculations do not properly encapsulate his specific case" and he should be placed in a different tier than the one given him by the prosecutor; and (3) when the registrant wants to introduce expert testimony to demonstrate that there are "unique aspects" of his case which necessitate him receiving a lower classification than he received from the prosecutor. Expert testimony may be used by a registrant during the hearing to demonstrate the "unique aspects" of the case. However, expert testimony is to be utilized on a limited basis. See Matter of A.B., 285 N.J. Super. 399 (App. Div. 1995) (registrant not strictly held to deadline to challenge tier classification if fairness requires some latitude).

In *Matter of J.M.*, _____ *N.J.* ____ (2001), the New Jersey Supreme Court held that in determining a sex offender's classification under the RRAS, all prior sexual offenses are appropriate for consideration and weighting under the

factors relating to criminal history, even if such offenses would not themselves require registration.

In In re E.I., 300 N.J. 519 (App. Div., 1997), the Appellate Division found that in "unusual cases" the facts presented during the hearing will necessitate the trial court classifying the registrant one tier lower than the RRAS requires The Court found that this case presented one of those "unusual cases". In this case facts were presented to the trial court that showed that this registrant was not the type of offender that was contemplated by the community notification provisions of Megan's Law. These facts were: (1) there was no evidence that the registrant was a sexual predator; (2) there was no evidence that the registrant used violence to accomplish the sexual assault; (3) there was no evidence that the registrant was likely to reoffend; and (4) the community notification would have a negative affect on the registrant's rehabilitation, which was part of the registrant's sentence. See Matter of A.I., 303 N.J. Super. 105 (App. Div. 1997) (also upholding the classification of such a registrant)

In *In re R.F.*, 317 *N.J. Super.* 379 (App. Div., 1998), *certif. granted and summarily remanded* 162 *N.J.* 123 (1999), the Appellate Division found that the prosecutor has the burden to present "clear and convincing evidence" to support the scope of notification which the prosecutor feels is necessary to protect the members of the community who will come into contact with the registrant.

In *In re E.A.*, 285 *N.J. Super*. 554 (App. Div., 1995), the Appellate Division clarified the scope of notification. The Court found that notification made within a one mile and one-half radius of the registrant's address in a suburban or rural area is appropriate. Furthermore, the Court directed the prosecutor to prepare a "grid, color-coded, large scale map of the county to identify the low-, moderate, and high population density areas on a municipality-by-municipality basis." These maps are to be utilized in determining the scope of notification.

In *Matter of E.D.*, 288 *N.J. Super.* 166 (App. Div. 1996), the Appellate Division held that although the statute uses place of residence as the basis for the registration requirement, a person living out of the state but working in state can be required to register.

In *State in Interest of B.G.*, 289 *N.J. Super.* 361 (App. Div.), *certif. denied* 145 *N.J.* 374 (1996), the Appellate Division held that the registration requirements clearly apply to juveniles, and they do not terminate when a juvenile turns eighteen. But see, *State in Interest of J.G.*, 165 *N.J.* 602 (2000) (issue of applicability to juveniles currently

pending in New Jersey Supreme Court); see also, *State in Interest of K.B.*, 304 *N.J. Super.* 628 (App. Div. 1997) (court did not rule on how registration requirements would be affected by a juvenile asserting exemption from the statutory disclosure requirements of *N.J.S.A.* 2A:4A-60f because the juvenile had failed to satisfy the non-disclosure requirements).

SIXTH AMENDMENT

I. RIGHT TO COUNSEL

A. Origin

In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his or her defense. *N.J. Const. 1947*, Art. I, ¶ 10; *U.S. Const.* Amend. VI.

Powell v. Alabama, 287 U.S. 46 (1932), held "The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skills and knowledge to adequately prepare his defenses, even though he may have a perfect one. He requires the guiding hand of counsel in every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence...." Id. at 68-69.

Gideon v. Wainwright, 372 *U.S.* 335 (1963), held that the Sixth Amendment is obligatory on the states, and therefore the right to counsel was extended to indigent defendants in state courts.

See Pointer v. Texas, 380 U.S. 400 (1965); Rodriguez v. Rosenblatt, 58 N.J. 281, 285 (1971); State v. Slattery, 239 N.J. Super. 534, 543-44 (App. Div. 1990); State v. Melvins, 155 N.J. Super. 316 (App. Div. 1978), certif. denied 87 N.J. 320 (1981).

The right to counsel attaches only at or after the initiation of adversary judicial proceedings against a defendant. It is at this point the criminal prosecution is commenced. *Kirby v. Illinois*, 406 *U.S.* 682 (1972). *See Michigan v. Jackson*, 475 *U.S.* 625 (1986)(defendant's request for appointment of counsel at arraignment is sufficient to invoke Sixth Amendment right to counsel to extend to all subsequent formal and informal proceedings). *See also State v. P.Z.*, 152 *N.J.I*86, 110 (1996)(during pre-indictment period of criminal investigation, a law enforcement officer can question defendant without implicating his Sixth Amendment right; interview with

social worker does not trigger the right during this time period either). *See also State v. Tucker*, 137 *N.J.* 259, 288-291 (1994).

There is no right to an attorney before taking, or before refusing to take, a breathalyzer test. *State v. Macuk*, 57 *N.J.* 1, 15 (1970); *State v. Leavitt*, 107 *N.J.* 454 (1987); *State v. DeLorenzo*, 210 *N.J.Super*. 100, 104 (App. Div.), *certif. denied* 105 *N.J.* 507 (1986).

The Court must honor a defendant's request for counsel at a bail hearing. *State v. Fann*, 239 *N.J. Super.* 507 (Law Div. 1990).

Defendant's right to counsel was not violated when he made incriminating statements to police, after being given *Miranda* rights several times but never requested an attorney, even though in his interview with Criminal Case Management Office, he was deemed eligible and recommended for acceptance for Public Defender assistance. *State v. Perez, 334 N.J. Super. 296 (App. Div. 2000).*

There is no right to counsel where an out-of-court identification precedes both custody and arrest. *State v. Royster*, 57 *N.J.* 472, 482 (1971) and *State v. Farrow*, 61 *N.J.* 434 (1972), *cert. denied* 410 *U.S.* 937 (1972).

Suspect must be given the opportunity to have counsel present at pre-arrest and pre-charge investigative detentions such as line-up identification procedure. *State v. Hall*, 93 *N.J.* 552 (1983).

Defendant is entitled to counsel at post-indictment identification line-up, which is a "critical stage" of the prosecution. *United States v. Wade*, 388 *U.S.* 218 (1967); *Gilbert v. California*, 388 *U.S.* 263 (1967).

Counsel should be appointed for defendant with history of psychiatric problems and current disorder creates reasonable basis to question defendant's competency to stand trial or proceed pro se, even if defendant is not facing consequence of magnitude. *State v. Ehrenberg*, 284 *N.J. Super*. 309 (Law Div. 1994).

When defendant's testimony is interrupted by overnight recess, defendant has constitutional right to discuss his testimony with counsel. To prohibit such consultation deprives defendant of his right to assistance of counsel; prejudice is presumed and reversal automatic. *State v. Fusco*, 93 *N.J.* 578 (1983).

Defense counsel's voluntary absence from the courtroom during the first 18 minutes of the court's jury charge did not entitle defendant to relief from conviction. *State v. Holmes*, 157 *N.J. Super.* 37 (App. Div. 1978).

In a case where defendant discharged his lawyer and then left the courtroom and trial proceeded in defendant's absence without any representation, reversible error was found. *State v. Wiggins*, 158 *N.J. Super.* 27 (App. Div. 1978).

Defendant has a constitutional right to summation and can knowingly and voluntarily waive the right. *State v. Viglante*, 194 *N.J. Super*. 560 (Law Div. 1983). Defendant can also waive opening statement. *State v. Williams*, 232 *N.J. Super*. 414 ,418 (App. Div.), *certif. denied* 117 *N.J.* 633 (1989).

Defendant has constitutional right to counsel at motion for new trial after conviction; before determining that defendant has waived that right, trial court must conduct "searching inquiry". *State v. Wiggins*, 291 *N.J. Super*. 441 (App. Div. 1996). Defendant has constitutional right to counsel at sentencing and resentencing. *State v. Giorgianni*, 189 *N.J. Super*. 220 (App. Div. 1983), *certif. denied* 94 *N.J.* 569 (1983). *See also Tully v. Scheu*, 607 *F*.2d 31, 35-36 (3d Cir. 1979). This longstanding rule is equally applicable to a motion for modification of a sex offender's parole ineligibility term. *State v. G.S.*, 255 *N.J. Super*. 340 (App. Div. 1992).

There is no right to counsel at parole revocation hearing. *State v. Morales*, 120 *N.J. Super*. 197 (App. Div.), *certif. denied* 62 *N.J.* 77 (1972).

An indigent defendant has a right to counsel on direct appeal, even though there is no constitutional right to an appeal. *State v. Coon*, 314 *N.J. Super*. 426, 434 (App. Div. 1998). *See Douglas v. California*, 372 *U.S.* 353, 357 (1963); *Griffin v. Illinois*, 351 *U.S.* 12, 18 (1956).

Defendant has no constitutional right to counsel at post-conviction relief proceedings. *Coleman v. Thompson*, 501 *U.S.* 722 (1991). See also *Pennsylvania v. Finley*, 481 *U.S.* 551 (1987); *Wise v. Williams*, 982 *F.*2d 142 (4th Cir.), *cert. denied* 508 *U.S.* 964 (1992).

New Jersey has not followed federal law. Our courts have held that, even though post-conviction relief proceedings are solely a creation of the court rules, see *R*. 3:22-1 *et seq.*, defendant is entitled to an attorney on a first petition for post-conviction relief. *State v. Clark*, 260 *N.J. Super*. 559 (App. Div. 1992); *State v. King*, 117 *N.J. Super*.

109 (App. Div. 1971). In addition, the Appellate Division has recently found ineffective assistance of post-conviction relief counsel and remanded for a new proceeding because post-conviction relief counsel's representation of defendant "amount[ed] to no representation at all." *State v. Velez*, 329 *N.J. Super*. 128, 134 (App. Div. 2000). *See also State v. Russo*, 333 *N. J. Super*. 119 (App. Div. 2000).

Defendant and co-defendants were physically restrained in arm and leg chains throughout trial were not denied a fair trial. The Appellate Division found that because the trial court was confronted with seven defendants whose records for violence was remarkable, not using restraints would have required so many sheriff's officers that the message purportedly conveyed by the restraints, that defendants were dangerous, would have been the same or worse. No jury charge was requested or given concerning the restraints, and plain error not found. *State v. Mance*, 300 *N.J. Super.* 37 (App. Div. 1997).

B. Choice of Counsel

An essential element of the right to assistance of counsel is defendant's right to retain counsel of his or her own choice. *Chandler v. Fretag*, 348 *U.S.* 3 (1954); *Powell v. Alabama*, 287 *U.S.* 45 (1932).

The right to counsel of one's own choosing, however, is not absolute, and cannot be insisted upon in a manner that will obstruct an orderly disposition of cases on the court's docket nor deprive the court of its inherent power to control its docket. *State v. McLaughlin,* 310 *N.J. Super.* 242, 258 (App. Div.), *certif. denied* 156 *N.J.* 381 (1998); *State v. Ferguson,* 198 *N.J. Super.* 395, 401 (App. Div.), *certif. denied* 101 *N.J.* 266 (1985).

A defendant who wants to exercise the right to proceed with counsel he or she chooses must do so with reasonable diligence. *State v. McCombs*, 171 *N.J. Super.* 161, 165 (App. Div. 1978), *certif. denied* 81 *N.J.* 373 (1979). If defendant fails to act expeditiously, the trial court has the power "to do what is reasonably necessary to meet the situation." *State v. Reddy*, 137 *N.J. Super.* 32, 35-36 (App. Div. 1985); *State v. Yormark*, 117 *N.J. Super.* 315, 340 (App. Div. 1971), *mod. in part on o.g. State v. Mulvaney*, 61 *N.J.* 202, *certif. denied* 409 *U.S.* 862 (1972).

Defendant's right to counsel does not extend to the appointment of counsel of choice, or to a special rapport, confidence, or even a meaningful relationship with appointed counsel. *Morris v. Slappy*, 461 *U.S.* 1, 103 S.Ct. 1610, 1617-18 (1983).

A court may not require the Public Defender to assign new counsel to a defendant who is dissatisfied with the attorney assigned to represent him or her, absent a showing of "substantial cause." *State v. Lowery*, 49 *N.J.* 476, 489-90 (1967); *State v. Coon*, 318 *N.J. Super.* 426, 438 (App. Div. 1998). Disagreement over trial strategy does not rise to the level of good cause or substantial cause. *State v. Crisafi*, 128 *N.J.* 499, 518 (1992); *State v. Coon, supra.*

It is within the trial court's discretion to determine whether defendant's request for an adjournment to permit retention of counsel of choice should be granted or denied, and absent an abuse of discretion which caused defendant a "manifest wrong or injury," the decision will not be disturbed on appeal. *State v.* McLaughlin, 310 *N.J. Super* at 259; *State v. Ferguson*, 198 *N.J. Super*: at 402. *See Wheat v. United States*, 486 *U.S.* 153 (1988) (presumption in favor of defendant's counsel of choice must be recognized, but presumption may be overcome by demonstration of serious potential for conflict).

Defendant's right to counsel of his own choosing was not infringed upon where counsel was under indictment at the time he was representing defendant but failed to inform defendant of that fact. An attorney does not have an affirmative duty to inform defendant of a pending indictment which is completely unrelated to defendant's matter. *State v. Pych*, 213 *N.J. Super*. 446 (App. Div. 1986).

Trial court's denial of defendant's request for admission of counsel pro hac vice did not violate Sixth Amendment right to counsel. A defendant does not have a constitutional right to choose out-of-state counsel where in-state counsel is able to provide effective assistance. State v. Chappee, 211 N.J. Super. 321 (App. Div. 1986), certif. denied 107 N.J. 45 (1987). But see Fuller v. Diesslin, 868 F.2d 604 (3d Cir.), cert. denied, Perretti v. Fuller, 493 U.S. 873 (1989), a companion case of Chappee, in which the Third Circuit held that, in co-defendant's case, the state trial court's "wooden approach and its failure to make record-supported findings balancing right to counsel with demands of administration of justice resulted in arbitrary denial of defendant's motion for counsel pro hac vice, and such arbitrary denial constituted per se constitutional error justifying issuance of writ of habeas corpus." See also United States v. Voight, 89 F.3d 1050, 1074 (3d Cir.), cert. denied 519 U.S. 1047 (1996) (Fuller v. Diesslin, supra, reveals that "counsel of choice" cases can be divided into two types: arbitrary denial of the right, and non-arbitrary but erroneous).

C. Effectiveness and Competence of Counsel

The standard for ineffective assistance of counsel claims is set forth in *Strickland v. Washington*, 466 *U.S.* 668 (1984), which was essentially adopted by New Jersey in *State v. Fritz*, 105 *N.J.* 42 (1987). *See also State v. Matamara*, 306 *N.J. Super.* 6, 17 (App. Div. 1997), *certif. denied* 153 *N.J.* 50 (1998); *State v. Ellis*, 299 *N.J. Super.* 440, 452 (App. Div.), *certif. denied* 151 *N.J.* 74 (1997).

To prevail on an ineffective assistance of counsel claim, defendant must show that counsel's performance was both deficient and prejudicial to defendant. In other words, defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 *N.J.* at 688.

"The benchmark for judging ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 687. *See Lockart v. Fretwell*, 506 *U.S.* 364 (1993); *Darden v. Wainwright*, 477 *U.S.* 168 (1986); *State v. Fisher*, 156 *N.J. 494*, 499 (1998); *State v. Buonadonna*, 122 *N.J.* 22, 41-42 (1992).

Counsel's performance is reviewed with "extreme deference," and there is "a strong presumption" that counsel acted within the "wide range of reasonable professional assistance," and made all decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 *U.S.* at 689-907; *State v. Fritz*, 105 *N.J.* at 52. *See State v. Perry*, 124 *N.J.* 128, 153-54 (1991); *State v. Marshall I*, 123 *N.J.* 154 (1991). Reviewing courts are required to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689.

Whether the result of the proceeding would have been different but for counsel's unprofessional errors, which forms the basis for ineffective assistance, is a mixed question of law and fact. *State v. Russo,* 333 *N.J. Super.* 119, 140 (App. Div. 2000). Where *prima facie* showing of ineffective assistance has been made, the judge, on post-conviction relief, even if it is the same just who presided at trial, may not assume the proffered evidence does not create a reasonable probability that the result of the proceeding

would have been different; that determination can be made only after the requisite evidentiary hearing. *Ibid.*

The burden of proving that counsel's alleged incompetence had a prejudicial effect upon the outcome of the proceeding is "squarely on defendant." *State v. Paige*, 256 *N.J. Super*. 362, 377 (App. Div.), *certif. denied* 130 *N.J.* 17 (1992). *See State v. Timmendequas*, 161 *N.J.* 515, 598 (1999).

A *per se* assessment of prejudice is reserved for those cases in which counsel's performance is so likely to prejudice the accused that it is tantamount to a complete denial of counsel. When counsel's errors are so grave it is unnecessary for defendant to demonstrate prejudice. *United States v. Cronic*, 466 *U.S.* 648 (1984). *See State v. Harrington*, 310 *N.J. Super.* 272, 283 (App. Div. 1998) (counsel was ineffective for admitting during closing argument that defendant participated in robbery). *But see State v. Sheika*, __*N.J. Super.* __ 2001 *WL* 111021 (App. Div. 2001).

The *Strickland* test is also utilized for ineffective assistance of appellate counsel claims. *State v. Morrison*, 215 *N.J. Super*. 540 (App. Div.), *certif. denied* 107 *N.J.* 642 (1987).

The *Strickland* test also applies to ineffective assistance of counsel claims in the guilt-phase of a death penalty case. *State v. Davis*, 116 *N.J.* 341, 355 (1989). However, for ineffective assistance of counsel claims during the penaltyphase portion of a trial, the second-prong of the *Strickland* test was reformulated: in those cases, prejudice is established if "there is a reasonable probability that, but for counsel's unprofessional errors, the jury's penalty-phase deliberations would have been affected substantially." *State v. Martini V*, 160 *N.J.* 248, 264 (1999); *State v. Marshall III*, 148 *N.J.* 89, 250, *cert. denied* 522 *U.S.* 850 (1997).

The *Strickland* test also applies to guilty plea challenges based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 *U.S.* 52 (1985); *State v. Garcia*, 320 *N.J. Super*. 332, 340 (App. Div. 1999); *State v. Chung*, 210 *N.J. Super*. 427, 433 (App. Div. 1986). *See State v. Vieria*, 334 *N.J. Super* 681 (App. Div. 2000)(counsel renders ineffective assistance in not telling defendant, a resident alien who has difficult reading and writing English and who is contemplating a guilty plea, that he risks deportation with conviction).

Decisions of counsel concerning trial strategy, made after a thorough investigation of the law and facts pertinent

to a particular case, are almost always unassailable and cannot be a basis for ineffective assistance of counsel claims, even when that strategy fails. See State v. Marshall I, 123 N.J. 1, 165 (1991); State v. Perry, 124 N.J. 128, 153 (1991); State v. Buondonna, 122 N.J. 22, 44 (1991); State v. Hightower, 120 N.J. 378, 402 (1990); State v. Sheika, _ N.J. Super. ____ (App. Div. 2001); State v. Cordero, 291 N.J. Super. 441 (App. Div. 1996); State v. Paige, 256 N.J. Super. (App. Div.), certif. denied 130 N.J. 17 (1992). See State v. Savage, 120 N.J. 594 (1990), for an example of when counsel's investigation of case was found to be so deficient as to require reversal for new trial. And see State v. Holmes, 290 N.J. Super. 302 (App. Div. 1996), for an example of ineffective assistance due to counsel's failure to use witnesses's pending charges, their prior records and their potential for loss of parole and probationary statute to impeach their credibility, and for counsel failure to object to the prosecutor's use of defendant's pre-arrest silence).

Defense counsel's failure to present witnesses at penalty phase of capital murder trial did not amount to ineffective assistance of counsel because it was a strategic decision. *State v. Morton*, 155 *N.J.* 383, 431 (1998).

Defense counsel's failure to discover and put forward evidence containing both mitigating and damaging elements does not constitute ineffective assistance of counsel. *State v. Martini*, 160 *N.J.* 248 (1999).

In juvenile waiver hearing, if defense counsel failed to present any evidence of the juveniles potential for rehabilitation, there may be a valid claim of ineffective assistance of counsel. In making that determination, it must be established that (1) the decision not to present evidence was reasonable, and (2) that there is a reasonable likelihood that presentation of that evidence would have made a difference at the waiver proceeding. Both questions must be answered affirmatively to make out a claim for ineffective assistance of counsel. *State v. Jack*, 144 *N.J.* 240 (1996).

Counsel's failure to move for dismissal of indictment on double jeopardy grounds after first trial judge erroneously granted State's motion for a mistrial was not ineffective assistance. *State v. Allah* 334 *N.J. Super.* 516 (App. Div. 2000)

The right to assistance of counsel was not violated by attorney who refused to cooperate in presenting perjured testimony. *Nix v. Whiteside*, 475 *U.S.* 157 (1986).

Reasonably effective representation cannot and does not include a requirement to make arguments based on

predictions of how the law may develop. *See Elledge v. Dugger*, 823 *F.*2d 1439, 1443 (11th Cir.), *modified o. g.* 833 *F.*2d 250 (11th Cir. 1987), *cert. denied* 485 *U.S.* 1014 (1988).

Failure to file a suppression motion does not constitute per se ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 *U.S.* 365 (1986). *But see State v. Fisher*, 156 *N.J.* 494 (1998) (counsel's failure to refile a motion to suppress would constitute deficient performance, as required for ineffective assistance of counsel claim, if it was based on improper conclusion that defendant waived his right to refile the motion when he became a fugitive, rather than a tactical decision).

The Constitution does not guarantee that counsel appointed for a defendant shall measure up to his notions of ability or competency. *State v. Bentley*, 46 *N.J.Super*. 193, 203 (App. Div. 1957), Assigned counsel is not required to dance to defendant's tune. *State v. Rinaldi*, 58 *N.J. Super. 209. 214* (App. Div. 1959), *cert. denied* 366 *U.S.* 914 (1961). Defendant has no right to counsel who will "blindly follow his instructions." *State v. Ortisi*, 308 *N.J. Super.* 573, 588-89 (App. Div.), *certif. denied* 156 *N.J.* 383 (1998).

Counsel is not required to raise issues or advance arguments that are obviously frivolous or specious. *State v. Hughes*, 128 *N.J. Super*. 363 (App. Div.), *certif. denied* 66 *N.J.* 307 (1974).

Where appellate counsel decides not to raise an issue on appeal which was raised during trial, and decision is based upon a reasonable, tactical decision, defendant cannot meet his burden of showing cause for the procedural default or ineffective assistance of counsel. *Smith v. Murray*, 477 U.S. 527 (1986).

A defendant who elects to represent himself at trial cannot claim ineffective assistance of counsel on appeal. *State v. Ortisi,* 308 *N.J. Super.* 573, 592 (App. Div.), *cert. denied* 156 *N.J.* 383 (1998).

D. Conflicts of Interest

It is axiomatic that both the Federal and New Jersey Constitutions afford a defendant the right to have the untrammeled and unimpaired assistance of counsel. See *Glasser v. United States*, 315 *U.S.* 60, 70 (1942); *State v. Bellucci*, 81 *N.J.* 531, 538 (1980); *State v. Murray*, 315 *N.J. Super.* 535, 543 (App. Div. 1998) , *aff'd as mod.* 162 *N.J.* 240 (2000); *State v. Oliver*, 320 *N.J. Super.*405, 423 (App. Div.), *certif. denied* 161 *N.J.* 332 (1999). These constitutional prescriptions mandate that a defendant should have nothing less than the undivided loyalty of his or her attorney. *Glasser v. United States*, 315 *U.S.* at 70; *State v. Bellucci*, 81 *N.J.* at 538; *State v. Land*, 73 *N.J.* 24, 29-30 (1977).

In an unbroken line of decisions, both federal and state courts have said that the attorney's position as an advocate for his or her client should not be compromised before, during or after trial. *See Von Moltke v. Gillies*, 332 *U.S.* 708, 720-21 (1947); *Williams v. Kaiser*, 323 *U.S.* 471, 475 (1945); *State v. Bellucci*, 81 *N.J.* at 538; *State v. Land*, 73 *N.J. at 31.*

If a private attorney, or any lawyer associated with that attorney is involved in simultaneous dual representations of co-defendants, a *per se* conflict arises and prejudice will be presumed absent a valid waiver. *State v. Norman*, 151 *N.J.* 5, 24-25 (1997).

If multiple representation in same criminal action is by a public defender's office, prejudice is not presumed. However, if circumstances demonstrate a potential conflict of interest and a significant likelihood of prejudice arising from representation of multiple defendants by a public defender's office, presumption of both an actual conflict of interest and actual prejudice will arise, without necessity of proving such prejudice. *State v. Bell*, 90 *N.J.* 163, 171 (1982).

In a case where the law firm of defendant's trial attorney has previously represented a prosecution witness, the court rejected the argument highly speculative. State v. Purnell, 126 N.J. 518, 535-36 (1992), see also State v. Galati, 64 N.J. 572 (1974); State v. Morelli, 152 N.J. Super. 67, 70 (App. Div. 1977); State v. Needham, 298 N.J. Super. 100, 103 (Law Div. 1996); State v. Catanoso, 222 N.J. Super: 641, 644 (Law Div. 1987). See also State v. Loyal, 164 N.J. 418 (2000) (trial court did not abuse its discretion in granting a mistrial after discovering that defense counsel previously, and recently, represented a significant State witness, which in the circumstances of that case, created an appearance of impropriety that could not be ignored. The Court further held that in the absence of prejudice to defendant or bad faith by the prosecution, there was no double jeopardy violation and defendant could be retried).

For a case where the State moved to have defendant's law firm disqualified because that firm had represented the State's lead detective in a civil rights and worker's compensation case, *see State v. Bruno*, 323 *N.J. Super*. 322 (App. Div. 1999). After finding that the law firm did not represent the investigating detective at time it was engaged

by defendant, the Court held that the law firm's representation of defendant after representing investigating detective did not create the appearance of impropriety. *Id.* at 336.

See also State v. Copling, 326 N.J. Super. 417 (App. Div. 1999), certif. denied 164 N.J. 189 (2000) (public defender's friendship with the chief investigator for the case did not require the trial court to disqualify counsel); State v. Shieka, N.J. Super. 2001 WL111021 (App. Div. 2001) (where defendant's attorney had a daughter who was an assistant prosecutor in the same county and at the time as defendant's trial, evidentiary hearing to determine likelihood of prejudice emanating from that relationship was warranted; defense attorney faced with possible conflict of interest should notify court as the earliest possible time).

For a federal case where an actual conflict of interest was found: *United States v. Moscony*, 927 *F*.2d 742, 747 (3d Cir. 1991). For federal cases where no conflict was found: *Burger v. Kemp*, 483 *U.S.* 776 (1987); *United States v. Kole*, 164 *F*.3d 164, 175-76 (3d Cir. 1998), *cert. denied* 119 *S.Ct.* 1484 (1999).

E. Intrusion of Third Persons On The Right To Counsel

Not every intrusion into the attorney-client relationship results in a denial of the right to effective assistance of counsel. Defendants must demonstrate either a disclosure of defense strategy or an inhibition of free exchange between attorney and client before a Sixth Amendment violation is implicated. *Weatherford v. Bursey*, 429 *U.S.* 545, 558 (1977). Illegal eaves-dropping by police of two conversations between defendant and his attorneys was "outrageous" conduct that would not be tolerated. However, because the overheard conversations did not reveal trial strategy, dismissal of prosecution based on violation of right to counsel was not warranted, but tainted witnesses and evidence resulting from the illegal eavesdropping would be excluded from grand jury and trial. *State v. Sugar*, 84 *N.J.* 1, 24-26 (1980).

When the State intentionally plants an informer in the defense camp; or when confidential defense strategy information is disclosed to the prosecution by a government informer; or even when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant, then the Sixth Amendment has been compromised. *United States v. Costanzo*, 740 *F*.2d 251, 254 (3d Cir. 1984).

It is a violation of defendant's Sixth Amendment rights for the State to deliberately elicit statements from defendant, in the absence of counsel, after he or she has been indicted; such statements cannot be used as evidence by the prosecution. *Massiah v. United States*, 377 *U.S.* 201, 206 (1964).

For a case in which statements were not found to be deliberately elicited, *see Matteo v. Superintendent, SCI Albion*, 171 *F.*3d 877, 894 (3d Cir 1999), *cert. denied* 120 *U.S.* 73 (1999)(in the context of habeas corpus review under the AEDPA, the Court found that petitioner's right to counsel had attached at time of taped telephone conversations between petitioner and informant, but that state court's determination that informant was not a government agent and did not deliberately elicit incriminating statements, was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, and even if it was, the error was harmless.

For a case where defendant's statements were found to be deliberately elicited, *see United States v. Henry*, 477 *U.S.* 264, 270 (1980)(defendant's incriminating statements to paid informant who, while confined in same cellblock as defendant, was told by government agents to be alert to any statements made by federal prisoners but not to initiate conversations with or question defendant regarding the charges against him were inadmissible as being "deliberately elicited" from defendant in violation of his Sixth Amendment right to counsel).

Confession defendant made to fellow inmate during time of trial did not violate Sixth Amendment, even though inmate had previously been employed by State as informant. Informant's involvement with the State ended two weeks prior to confession, and no request was made by government authorities to obtain information from, or regarding defendant. *State v. Scales*, 217 *N.J. Super*. 258 (Law Div. 1986), *aff'd* 231 *N.J. Super*. 336 (App. Div.), *certif. denied* 117 *N.J.* 123 (1989).

Inadvertent recording, on court's sound recording system, of confidential and privileged communications between defendant and defense counsel did not violate defendant's right counsel. *State v. Baker*, 267 *N.J. Super.* 463 (Law Div. 1993).

Defendant's execution of an application for a public defender while incarcerated at the county jail and at the request of a jail guard is not an assertion of defendant's Sixth Amendment right to counsel. *State v. Larry*, 211 *N.J. Super*. 221 (App. Div. 1986).

To safeguard counsel's ability to provide effective assistance, he or she must be permitted full investigative latitude, without risking a "potentially crippling revelation" to the State of information which defense counsel uncovers but chooses not to utilize at trial. *State v. Mingo*, 77 *N.J.* 576 (1978).

When the defense hires two experts, but only offers one as a witness, hearsay evidence relevant to the nontestifying expert which was not relied upon by the testifying expert to reach his opinion may not be employed on cross-examination. Although the crossexaminer may inquire as to whether the expert relied upon certain hearsay evidence, if the answer is "no," the details of that hearsay evidence may not be used as the basis for further cross-examination. To do so, would permit the jury to hear testimony it otherwise would not be permitted to hear. *State v. Spencer*, 319 *N.J. Super*. 284, 299 (App. Div. 1999) (prosecutor's crossexamination alerted jury to the fact that non-testifying defense expert's conclusion was consistent with the State's expert).

After prosecutor observed charts in jury room illustrating jury's deliberations in guilt-phase of capital trial, jury had to be discharged and death penalty phase of trial precluded, because defendant would have been substantially and irremediably prejudiced by proceeding on penalty phase with new jury. *State v. Baker*, 310 *N.J. Super*. 128 (App. Div. 1998).

F. Indigents (See also, COSTS, INDIGENTS, this Digest)

See generally, R. 3:4-2; Ross v. Moffit, 471 U.S. 600 (1974); Ake v. Oklahoma, 470 U.S. 68 (1985); State v. R.D.G., 108 N.J. 1, 18 (1987); State v. Cantalupo, 187 N.J. Super. 113 (App. Div.), certif. denied 93 N.J. 274 (1983); State v. Cannady, 126 N.J. 486 (1991).

G. Waiver of Right to Counsel And Participation with Counsel

Just as defendant has the right to be represented by counsel, he or she also has the right to dispense with counsel and to proceed *pro se. Faretta v. California*, 422 *U.S.* 806 (1975); *State v. Ortisi*, 309 *N.J. Super.* 573, 587 (App. Div.), *cert. denied* 156 *N.J.* 383 (1998). A defendant can excise the right to self-representation only by first knowingly and intelligently waiving his right to counsel. *McKasle v. Wiggins*, 465 *U.S.* 168, 173 (1984); *State v. Crisafi*, 128 *N.J.* 499, 509 (1992). However, there is a presumption against waiver. *State v. Ortisi*,

supra; *State v. Gallagher*, 274 *N.J. Super*. 285, 295 (App. Div. 1994).

Before allowing defendant to waive his right to counsel, a trial court must make a "searching inquiry" to ensure that the waiver is made knowingly and voluntarily, and that defendant understands the consequences of the waiver. There is no specific litany of questions required in every case, but defendant should be advised of the following:

1. the dangers and disadvantages of self-representation;

2. the nature of the charges, the statutory defenses to those charges and the possible range of punishment;

3. the technical problems he may encounter in acting as his own counsel and the risks he takes if the defense is unsuccessful;

4. the necessity that he conduct his defense in accordance with the relevant rules of criminal procedure and evidence, that a lack of knowledge of those rules may impair his ability to defend himself, and that his dual role as attorney and defendant might hamper the effectiveness of his defense; and

5. difficulties of acting as his own counsel, and the court should specifically advise defendant that it would be "unwise not to accept the assistance of counsel." *State v. Crisafi*, 128 *N.J.* at 510-12.

The validly of a wavier of counsel must be determined on a case-by-case basis, considering the particular facts and circumstances involved, including defendant's background, experience and conduct. *Id.*; *State v. Kordower*, 229 *N.J. Super.* at 578; *State v. Cole*, 204 *N.J. Super.* 618, 624 (App. Div. 1985).

See also State v. Wiggins, 291 N.J. Super. 441, 449 (App. Div.), certif. denied 146 N.J. 568 (1996); State v. Buhl, 269 N.J. Super. 344, 362 (App. Div.), certif. denied 135 N.J. 468 (1994); State v. Slattery, 239 N.J. Super. 534 (App. Div. 1990); State v. Kordower, 229 N.J. Super. 566 (App. Div. 1989).

This same thorough inquiry must be made of defendant before he or she is permitted to waive the right to appellate counsel. *State v. Coon*, 314 *N.J. Super.* 426, 439 (App. Div.), *certif. denied* 158 *N.J.* 543 (1998).

When defendant's options are representation by the Public Defender, or choosing to proceed *pro se*, choosing the latter constitutes a voluntary waiver of counsel. *State* v. *Crisafi, supra*; *State v. Ortisi, supra*. The choice between proceeding with an attorney whom defendant disagrees on trial strategy or proceeding *pro se* can produce a valid waiver of counsel. *State v. Crisafi 128 N.J.* at 518; *State* v. *Coon*, 314 *N.J. Super.* at 438; *State v. McCombs*, 81 *N.J.* 373, 378 (1979); *State v. Buhl*, 269 *N.J. Super.* at 361-62. *See United States v. Grosshans*, 821 *F.*2d 1247, 1251 (6th Cir), *cert. denied* 484 *U.S.* 987 (1987).

A *pro se* defendant's right to self-representation encompasses the right "to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." At the core of the defendant's "*Faretta* right" to conduct his own defense is the entitlement "to preserve actual control over the case he chooses to present to the jury." *State v. Cook*, 330 *N.J. Super.* 395, 414-15 (App. Div. 2000), quoting *McKaskle v. Wiggins*, 465 *U.S.* 174, 178.

Defendant's request of self-representation must be made clearly and unequivocally, and his request to do so on day jury selection was beginning was not untimely, where defendant had already filed timely written motion seeking right to proceed <u>pro se</u>. Buhl v. Cooke, 233 F.3d at 795.

Defendant is not constitutionally entitled to "hybrid representation." The opportunity for defendant to act as co-counsel with his attorney may be foreclosed and should normally be avoided. *State v. Roth*, 289 *N.J.Super*. 152, 165 (App.Div.), *certif. denied* 146 *N.J.* 68 (1996); *accord, State v. Long*, 216 *N.J. Super*. 269, 275 (App. Div. 1987); *State v. McCleary*, 149 *N.J. Super*. 77, 78-80 (App. Div.), *certif. denied* 75 *N.J.* 26 (1977).

When a defendant validly elects to proceed through trial *pro se*, the "prudent course" for the trial court to take is to appoint "stand by counsel" for defendant. *United States v. Welty*, 674 *F.*2d 185, 188 (3d Cir. 1982). Standby counsel has two purposes: to "act as a safety net to insure defendant received a fair hearing of his claims and to allow the trial to proceed without undue delay likely to arise when a layperson present his [or her] own defense." These two purposes include, but are not limited to, at least four functions:

1. to be available if and when the accused requests help;

2. to be ready to step in if defendant wishes to terminate his own representation;

3. to explain and enforce the basic rules of courtroom protocol to defendant;

4. to overcome routine obstacles that may hinder effective *pro se* representation. *See United States v. Bertoli*, 994 F.2d 1002, 1018-19 (3d Cir. 1993), and cases cited therein; *State v. Ortisi*, 308 *N.J. Super.* at 591. *See also United States v. Salemo*,80 F.3d 1453, 1456 n.2 (9th Cir.), *cert. denied* 519 *U.S.* 982 (1996).

Defendant may not use his or her right to counsel to play "cat-and-mouse" games with the court, "or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel." *Kates v. Nelson*, 435 *F*.2d 1085, 1088-89 (9th Cir. 1970); *State v. Crisafi*, 128 *N.J.* at 518.

In a case where defendant was deliberately and obviously doing everything in his power to "make the orderly proceeding of ... trial next to impossible," *State. Ortisi, supra,* the Appellate Division reaffirmed what it had said two decades earlier:

In every trial there is more at stake than just the interests of the accused; the integrity of the process warrants a trial judge's exercising his [or her] discretion to have counsel participate in the defense even when rejected. A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself.

Id., 308 *N.J. Super.* at 593, quoting *State v. Wiggins*, 158 *N.J. Super.* 27, 32 (App. Div. 1978).

II. RIGHT TO SPEEDY TRIAL

A. Constitutional Provisions

"[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial...." This provision is binding on the states through the Fourteenth Amendment. *N.J. Const. 1947*, Article I, ¶ 10; *U.S. Const.*, Amend VI. B. The Four Factor Test for Determining Whether the Right to a Speedy Trial Has Been Violated

The United States Supreme Court employs a flexible balancing test to adjudicate alleged violations of the Sixth Amendment Speedy Trial Clause. *See Barker v. Wingo*, 407 *U.S.* 514 (1972). The test is applied on an *ad hoc* basis, and requires the consideration and weighing of the following four factors: (1) the length of the delay, (2) the reasons for the delay; (3) whether and how defendant asserted his speedy trial right; and (4) the amount of prejudice to defendant by the delay. *Id.* at 530.

The New Jersey Supreme Court adopted the *Barker v. Wingo* test in *State v. Szima*, 70 *N.J.* 196 (1976), *certif. denied*, 429 *U.S.* 896 (1976). *See State v. Long*, 119 *N.J.* 439 (1990).

The list of *Barker* factors is not intended to be exhaustive, but only illustrative of the type of considerations that are relevant to the merits of a speedy trial claim. As the United States Supreme Court explained in *Barker*, "We regard none of the four factors ... as either a necessary or sufficient condition of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.* at 533.

C. First Factor: Length of the Delay

The length of delay is, to some extent, a triggering mechanism. Unless there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. *Barker v. Wingo*, 407 *U.S.* at 530.

As the United States Supreme Court announced in *Doggett v. United States*, 505 *U.S.* 647 (1992): "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay, since, by definition, he cannot complain that the government has denied him a 'speedy' trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. This latter inquiry is significant to the speedy trial analysis because ... the presumption that pretrial delay

has prejudiced the accused intensifies over time." *Id.* at 651.

"Presumptive prejudice," when used in this threshold context, simply "marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Doggett v. United States*, 505 *U.S.* at 652, n.1. Such "presumptive prejudice" cannot alone create a Sixth Amendment violation but "it is part of the mix of relevant facts, and its importance increases with the length of delay." *Id.* at 655.

Thus, the length of the delay first figures into the speedy trial equation for purposes of determining whether it is long enough to trigger inquiry into the other *Barker* factors. *Hakeem v. Beyer*, 990 *F*.2d 750, 760 (3d Cir. 1993). If the delay is long enough to trigger inquiry, then it must be considered and weighed in conjunction with the other factors. *Id.*

The length of the delay that is necessary to trigger an inquiry into the other factors is dependent upon the peculiar circumstances of the case. For example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge. *Barker v. Wingo*, 407 *U.S.* at 530-531.

See State v. Farrell, 320 N.J. Super. 425 (App. Div. 1999) (delay of 633 days from issuance of summons for DWI offenses, which included 13 noncontiguous, widely-spaced court sessions, was inexcusable and violated defendant's right to speedy trial).

D. Second Factor: Reasons for Delay

Closely related to the length of the delay is the reason the State assigns to justify the delay. *Barker v. Wingo*, 407 *U.S.* at 531.

A deliberate attempt by the State to delay the trial in order to hamper the defense should be weighed heavily against the State in determining whether defendant has been denied a speedy trial. *Id.*

However, a more neutral reason for delay, such as negligence, should be weighted less heavily against the State, absent "any showing of bad faith or dilatory purpose." *Id.; Gov. of Virgin Islands v. Pemberton*, 813 *F.*2d 626, 628 (3d Cir. 1987).

Furthermore, a valid reason "should serve to justify appropriate delay." *Id.* And a delay that is attributable to the dilatory actions of a defendant "cut[s] against a

finding of a Sixth Amendment violation." *Hakeem v. Beyer*, 990 F.2d at 766; *Wells v. Petsock*, 941 F.2d 253, 258 (3d Cir. 1991); *United States v. Wangrow*, 924 F.2d 1434, 1436-1437 (8th Cir. 1991).

The New Jersey Supreme Court has held that "[a]ny delay that defendant caused or requested [sh]ould not weigh in favor of finding a speedy trial violation." State v. Long, 119 N.J. 439, 470 (1990), quoting State v. Gallegan, 117 N.J. 345, 355 (1989); see also United States v. Jones, 524 F.2d 834, 850 (D.C. Cir. 1975) ("a defendant should not be able to take advantage of a delay substantially attributable to his own trial motions when the court acts upon them within a reasonable period of time"); State v. Marcus, 294 N.J. Super. 267, 293 (App. Div. 1996), certif. denied 157 N.J. 543 (1998) (delay for the resolution of complex issues relating to the admissibility of DNA evidence and defendant's protracted efforts to obtain his own DNA experts, were "legitimate and substantial reasons," which did not violate speedy trial right).

E. Third Factor: Whether and How Defendant Asserted the Right to a Speedy Trial

Although a defendant's delay in asserting his or her constitutional right to a speedy trial will not constitute a waiver of the right, *Barker v. Wingo*, 407 *U.S.* at 528, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532. *See State v. Marcus*, 294 *N.J. Super.* at 293.

Repeated assertions of the right do not balance this factor in favor of a defendant when other circumstances indicate he is apparently unwilling or unready to proceed to trial. United States v. Loud Hawk, 474 U.S. 302, 313-14 (1986); Hakeem v. Beyer, 990 F.2d at 764. Where, through contrary actions, a defendant evidences an unwillingness to commence with the trial requested, the request should carry minimal weight. United States v. Kalady, 941 F.2d 1090, 1095 (10th Cir. 1991), quoting United States v. Tranakos, 911 F.2d 1422, 1429 (10th Cir. 1990); Hakeem v. Beyer, 990 F.2d at 765. A defendant must show that she "'vigorously pursued a speedy trial' if the factor of its assertion is to be weighed in his favor." Hakeem v. Beyer, 990 F.2d at 764, quoting United States v. Koller, 956 F.2d 1408, 1414 (7th Cir. 1992).

Furthermore, when a defendant who is represented by counsel makes an informal complaint to the court regarding pre-trial delay, that protest should not be weighted heavily, absent a motion to dismiss on speedy trial grounds or, at the very least, some evidence that defendant instructed his attorney to assert the right to a speedy trial. *Hakeem v. Beyer*, 990 *F.*2d at 766; *Gov. of Virgin Islands v. Pemberton*, 813 *F.*2d at 629. As the Third Circuit announced in *Hakeem*, "[W]e believe, if a defendant is to tip the *Barker* scales significantly in his favor on the factor of assertion of the right that, at least in cases where the accused is represented by counsel, some formal motion should be made to the trial court or some notice given to the prosecution. *Hakeem v. Beyer*, 990 *F.*2d at 765.

Whenever a defendant fails to assert his right to a speedy trial in some way, such failure will "weigh very heavily" against the defendant if he subsequently claims he was denied a speedy trial. *See also State v. Holmes*, 214 *N.J. Super.* 195, 210 (App. Div. 1986); *State v. McNamara*, 212 *N.J. Super.* 102, 105-106 (App. Div. 1986); *State v. Smith*, 131 *N.J. Super.* 354, 368-369 (App. Div. 1974).

Cases in which courts considered the fact that defendant failed to assert his right to a speedy trial by moving to dismiss the pending complaint: *State v. Szima*, 70 *N.J.* at 202; *State v. Raymond*, 113 *N.J. Super.* 222, 227 (App. Div. 1971); *State v. Gilliam*, 224 *N.J. Super.* 759, 765 (App. Div. 1988).

Case in which court considered the fact that defendant failed to assert his right to a speedy trial by moving to dismiss the indictment: *State v. Gilliam*, 224 *N.J. Super.* at 765.

F. Fourth Factor: Prejudice to the Defense

Prejudice to defendant has often been characterized as the most important factor. *Hakeem v. Beyer*, 990 *F.*2d at 760; *Wells v. Petsock*, 941 *F.*2d at 258. However, prejudice to a defendant must be assessed in the light of the interests that the speedy trial right was designed to protect. *Barker v. Wingo*, 407 *U.S.* at 532. The United States Supreme Court has identified three such interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize the accused's anxiety and concern over the outcome of the litigation; and (3) to limit the possibility that the defense will be impaired. *Id.* at 532. Of these, the most serious is the last, because the "inability of a defendant to adequately prepare his case skews the fairness of the entire system." *Id.*

It is well-established that "[v]ague allegations of anxiety are insufficient to state a cognizable claim." *Hakeem v. Beyer*, 933 *F.*2d at 762. Rather, a defendant must show that his anxiety extended beyond that which "is inevitable in a criminal case." United States v. Dreyer, 533 F.2d 112, 116 (3d Cir. 1976). In order to reach that level, defendant must produce evidence of "psychic injury." Id. at 115-116. See also United States v. Loud Hawk, 474 U.S. at 312 ("The Speedy Trial Clause's core concern is impairment of liberty; it does not shield a suspect or a defendant from every expense or inconvenience associated with criminal defense"); State v. Porter, 210 N.J. Super. 383, 395 (App. Div. 1986) (same).

General allegations that witnesses' memories have faded are insufficient to create prejudice, at least absent extreme delay such as eight and one-half years [as was present in *Doggett v. United States, supra*]." *Hakeem v. Beyer*, 990 *F.*2d at 763.

Cases in which courts considered the absence of lengthy pretrial incarceration in finding insufficient prejudice: *see State v. Szima*, 70 *N.J.* at 202; *State v. Gilliam*, 224 *N.J. Super.* at 765; *Gov. of Virgin Islands v. Pemberton*, 813 *F.*2d at 629-630; *Gov. of Virgin Islands v. Burmingham*, 788 *F.*2d 933, 937 (3d Cir. 1986).

With respect to all its various types, the burden of showing prejudice lies with the defendant. *Hakeem v. Beyer*, 990 *F.*2d at 760. Moreover, the mere "possibility of prejudice is not sufficient to support [the] position that speedy trial rights [are being] violated." *Ibid.*, citing *United States v. Loud Hawk*, 474 *U.S.* at 315.

G. Miscellaneous Examples

An unexplained lapse of 22 months between the time of defendant's arrest and his subsequent indictment did not constitute a denial of his right to a speedy trial. Defendant was not subjected to lengthy pretrial incarceration, he made no effort to assert his right to a speedy trial by moving to dismiss the pending complaint, and he claimed no impairment of his inability to defend. *State v. Szima*, 70 *N.J.* 196 (1976).

The 971-day delay from the date of arrest to the date of trial did not constitute a denial of defendant's right to a speedy trial. Defendant filed numerous pretrial motions, which accounted for most of the delay, and there was no indication that the prosecution intentionally delayed the proceedings to gain an unfair, tactical advantage. *State v. Long*, 119 *N.J.* 439, 467-469 (1990).

A five-and-one-half year period separated defendant's arrest for contributing to the delinquency of a juvenile and his indictment for her murder. There was nothing to indicate that defendant's defense was unduly impaired by delay. Nor did defendant show that prior to the indictment, his employment was interrupted, his finances drained, his associations curtailed, his reputation impaired. There was no evidence that defendant or his family and friends were subjected to anxiety by reason of the threat of prosecution for murder. Not only that, but the State offered a reasonable explanation for the delay. Because the victim's body was never found, the State had to prove her death by circumstantial evidence. In order to do this convincingly, it was necessary to allow time to pass so that a jury could reasonably infer that she had not merely run away. Moreover, it was not unreasonable for the State to hope that more positive evidence would be found before trying defendant for this ultimate crime. State v. Zarinsky, 143 N.J. Super. 35 (App. Div. 1976), aff'd, 75 N.J. 101 (1977).

Delay of defendant's sentencing for three and onehalf years did not violate Sixth Amendment where the charge was dismissed post-conviction, the State appealed, and the appeal was held up for a lengthy period as a result of significant delays on defendant's part. As the Court explained, there was no suggestion of purposeful stalling by the State; the appellate issues raised by the State were substantial and resulted in the reinstatement of defendant's conviction; defendant never asserted a speedy trial right; there was no impairment of defendant's defense; and there was no cognizable prejudice to defendant. *State v. LeFurge*, 222 *N.J. Super.* 92 (App. Div. 1988).

Twenty month delay between defendant's initial arrest and final conviction held reasonable, where State was still gathering evidence of defendant's criminal involvements, and where defendant filed motion demanding speedy trial five months after indictment and State was ready to proceed to trial 18 days thereafter. *State v. Bryant,* 217 *N.J. Super.* 72 (App. Div.), *certif. denied,* 108 *N.J.* 202, *cert. denied* 484 *U.S.* 978 (1987).

Five year delay between time of defendant's indictment and date of final conviction held reasonable where defendant failed to assert his right to speedy trial until four years after indictment, and where defendant's own actions were primarily responsible for the delay. *State v. Holmes*, 214 *N.J. Super.* 195 (App. Div. 1986).

Three year delay between defendant's indictment and final conviction held reasonable where defendant had been released on bail for offense in question and was subsequently arrested and incarcerated in different jurisdiction in state on unrelated charges. Defendant failed to move for trial on speedy trial basis until end of three year period and failed to demonstrate prejudice from delay. *State v. McNamara*, 212 *N.J. Super.* 102 (App. Div. 1986), *certif. denied* 108 *N.J.* 210 (1987).

Although the Court refused to apply *Barker* retrospectively, it was convinced that the defendant was not deprived of his right to a speedy trial. The length of time from filing of the indictment to the time of trial was approximately two years; the State offered a valid reason for the delay; defendant did not demand a specified trial date; and defendant did not suffer prejudice. *State v. Cappadona*, 127 *N.J. Super.* 555, 557-558 (App. Div. 1974).

Defendant's right to a speedy trial was not compromised by the 18-1/2 month delay between arrest and indictment, or by the nearly two-year delay between indictment and trial. Defendant was free on bail for the most part, he never asserted his right to a speedy trial, and he suffered no prejudice as a result of the delay. *State v. Gilliam*, 224 *N.J. Super.* 759, 765 (App. Div. 1988).

H. Compare: Protections of the Due Process Clause

The Due Process Clause imposes a limit on the extent to which prosecuting authorities may delay initiating a criminal prosecution after discovering an offense has been committed. *State v. Aguirre*, 287 *N.J. Super.* 128, 131-132 (App. Div.), *certif. denied*, 144 *N.J.* 585 (1996). *See also United States v. Lovasco*, 431 *U.S.* 783, 789 (1977); *United States v. Marion*, 404 *U.S.* 307, 324 (1971). In particular, "the due process inquiry focuses on whether the delay 'violates those 'fundamental conceptions of justice which lie at the base of our sense of fair play and decency.'" *State v. Aguirre*, 287 *N.J. Super.* at 132, quoting *United States v. Lovasco*, 431 *U.S.* at 790.

Unlike analysis under the Sixth Amendment's Speedy Trial Clause, which involves a four-factor balancing test, claims under the Due Process Clause arising from pre-indictment or pre-arrest delay are measured by "a far more rigorous standard." *State v. Aguirre*, 287 *N.J. Super.* at 132. In order to prevail, a defendant must demonstrate "both that (1) there was no legitimate reason for the delay, and (2) he was prejudiced thereby." *Ibid.*, quoting *State v. Rodriguez*, 112 *N.J. Super.* 513, 515 (App. Div. 1970); *see also State v. Little*,

296 *N.J. Super.* 573, 580 (App. Div.), *certif. denied* 150 *N.J.* 25 (1997); *State v. Cichetto*, 144 *N.J. Super.* 236, 238 (App. Div. 1976); *State v. Roundtree*, 118 *N.J. Super.* 22, 28-29 (App. Div. 1971). The ultimate burden of persuasion on both issues rests with defendant. *State v. Cichetto*, 144 *N.J. Super.* at 239. Moreover, the State is only obligated to show there was a legitimate reason for the delay if and when defendant shows he suffered prejudice. *Ibid.; State v. Roundtree*, 118 *N.J. Super.* at 29.

Furthermore, the law is well-settled that actual prejudice, not possible or presumed prejudice, is required. *State v. Aguirre*, 287 *N.J. Super.* at 133. *See State v. Alexander*, 310 *N.J. Super.* 348, 353 (App. Div.), *certif. denied*, 156 *N.J.* 408 (1998). Specifically, defendant must show "the delay caused 'actual and substantial prejudice,' endangering his right to a fair trial and 'must present concrete evidence showing material harm.'" *Id.* at 134, quoting *United States v. Anagnostou*, 974 *F.*2d 939, 941-942 (7th Cir. 1992), *cert. denied* 507 *U.S.* 1050 (1993). "'Vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient....'" *Ibid.*, quoting *United States v. Jenkins*, 701 *F.*2d 850, 855 (10th Cir. 1983).

A majority of federal circuit courts of appeal have held that "for pre-indictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused or for some other impermissible, bad faith purpose. *See United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir.1996)(en banc), *cert. denied* 519 U.S. 1076 (1997) and cases cited therein, including *United States v. Ismaili*, 828 F.2d 153, 157 (3d Cir.1987), *cert. denied* 485 U.S. 935 (1988).

III. RIGHT TO CONFRONTATION (See also, WIINESSES, this Digest)

A. Origin

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *N.J. Const.* Art. 1, ¶ 10; *U. S. Const.* Amend. VI *Mattox v. United States*, 156 *U.S.* 237 (1895).

"The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 U.S. at 242-43.

The combined effect of the elements of confrontation — physical presence, oath, cross-examination, and observation of demeanor by the trier of fact — serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to rigorous adversarial testing. *Maryland v. Craig,* 497 *U.S.* 836 (1990). *See also Ohio v. Roberts,* 380 *U.S.* 415, 418 (1980); *California v. Green,* 399 *U.S.* 149, 158 (1970).

The face-to-face component of the Confrontation Clause is not absolute. "Although face-to-face confrontation forms the core of the values furthered by the confrontation clause ... it is not the *sine qua non* of the confrontation right." *Maryland v. Craig*, 497 *U.S.* at 847. If this component was indispensable, it would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Id.* at 837.

For cases discussing child sexual abuse victims testifying via closed circuit television, as provided for by N.J.S.A. 2A:84-32.4, see State v. Delgado, 327 N.J. Super. 137 (App. Div. 2000) (reactions of child victim to testifying in court warranted presentation of her testimony via closed circuit television); State v. Smith, 158 N.J. 376 (1999) (Confrontation Clause not violated where child victim of aggravated sexual assault feared testifying in defendant's presence and in the courtroom); State v. Crandall, 120 N.J. 649, 654 (1990) (statute permitting child victim of sexual assault to testify via closed circuit television in certain circumstances is constitutional on its face and as applied); State v. McCutcheon 234 N.J. Super. 434 (Law Div. 1988) (finding constitutionality of statute and that evidence established that child would suffer severe emotional or mental distress if she was forced to testify in open court); State v. Sheppard, 197 N.J. Super. 411 (Law Div. 1984) (use of videotape testimony of child victim would be permitted because defendant waived his right to confrontation by threatening to kill the victim if he testified, thus causing him to be unwilling to testify in court out of fear). See also State v. Nutter, 258 N.J. Super. 41, 54 (App. Div. 1992) (finding reversible error in allowing the victim's children to testify via closed circuit television).

The party seeking to have minor witness testify outside defendant's presence carries the burden of satisfying statutory criteria by clear and convincing evidence. *State in Interest of B.F.*, 230 *N.J. Super*. 153 (App. Div. 1989).

Trial courts should conduct a thorough face-to-face interview with the child and make detailed findings concerning the child's objective manifestations of fear, but there is no constitutional requirement that the court personally observe the prospective witness at a pretrial hearing before allowing the child to testify via closed circuit television. *State v. Michaels*, 264 *N.J. Super.* 579 (App. Div. 1993), *aff'd* 136 *N.J. 299 (1994).* Expert testimony is not required to show that a child will suffer severe emotional or mental distress from testifying in open court. If a court is unable to make a determination on its own, it may then appoint an expert to evaluate the child. *Id.* at 613-14.

For federal cases on the subject of minor sexual assault victims testifying via closed circuit television, see Craig v. Maryland, 497 U.S. at 857 (where child witness fears defendant, closed circuit television testimony does not violate Confrontation Clause); Idaho v. Wright, 497 U.S. 805 (1990) (admitting hearsay statements into evidence does not violate Confrontation Clause when statements have sufficient indicia of reliability); Coy v. Iowa, 487 U.S. 1012 (1988) (any exception to Confrontation Clause must further important public policy; placement of screen between defendant and child victim during testimony violated defendant's right to confrontation); Pennsylvania v. Ritchie, 480 *U.S.* 39 (1987)(Confrontation Clause does not compel pre-trial discovery).

For discussion of the Confrontation Clause in other factual contexts, *see United States v. Mitchell*, 145 *F*.3d 572, 578-79 (3d Cir. 1998) (anonymous note linking defendant to robbery getaway vehicle was not admissible under any hearsay exceptions and violated defendant's right to confrontation; error was not harmless); *Gov. of Virgin Islands v. Joseph*, 964 *F*.2d 1380 (3d Cir. 1992) (a statement admitted as a hearsay exception must have adequate indicia of trustworthiness to satisfy the confrontation clause).

Defendant's voluntary failure to appear in court has been held to waive his right of confrontation. *United States v. Tortora*, 464 *F.*2d 1202 (2 Cir. 1972), *cert. denied* 409 *U.S.* 1063 (1972). In New Jersey, however, defendant's absence must be knowing, voluntary, and unjustified before or after trial has commenced in order for trial to proceed in absentia. See State v. Hudson, 119 N.J. 165, 181 (1990) (defendant's failure to appear for trial after receiving notice of the trial date constitutes a waiver of the right to be present); State v. Finklea, 147 N.J. 211 (1996), cert. denied, 522 U.S. 837 (1997) (once defendant has been given actual notice of a scheduled trial date, non-appearance on the scheduled or adjourned trial date is deemed a waiver of the right to be present absent a showing of justification by the defendant); State v. Sellars, 331 N.J. Super. 110 (App. Div. 2000)(finding defendant did not waive his right to be present at trial); State v. Ellis, 299 N.J. Super. 440, 449 (App. Div.), 151 N.J. 74 (1991) (to sustain a waiver of the right to be present, it must be shown the trial date was actually communicated to defendant and that he unjustifiably failed to appear). Note: this issue is currently pending before the Supreme Court in State v. Whaley, certif. granted 164 N.J. 189 (2000).

Under the confrontation clause, defendant has a constitutional right to be present at a suppression hearing. *State v. Robertson*, 333 *N.J. Super*. 499 (App. Div. 2000).

B. Cross-examination

The Sixth Amendment Confrontation Clause encompasses the fundamental right of cross-examination. *See Smith v. Illinois*, 390 *U.S.* 129, 131 (1968). *See Davis v. Alaska*, 415 *U.S.* 308, 315-16 (1974). Revealing a witness's bias or motivation in testifying is among the proper and important functions protected by the right to cross-examination. *Id.* at 316-17.

The Confrontation Clause only "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense may wish." *Delaware v. Fensterer*, 474 *U.S.* 15, 20 (1985).

Cross-examination is generally limited to the scope of direct examination. *N.J.R.E.* 611(b).

Cross-examination and re-cross examination of material brought out on direct and redirect are the principal means to test the trustworthiness of the witness. *Davis v. Alaska*, 415 *U.S.* 308, 316 (1974). *See State v. Zenquis*, 251 *N.J.Super.* 358, 367 (App. Div.1991), *aff'd* 131 *N.J.* 84 (1993) (limitation on defendant's right to cross-examine police officer as to vantage point from which he observed alleged narcotics sale deprived defendant of right to confront witnesses against him); *State v. Wormley*, 305 *N.J. Super* 57, 66 (App. Div. 1997)

(defense was entitled to present impeachment evidence regarding longstanding drug addiction of state's witness).

Re-cross is to redirect as cross-examination is to direct. A party is entitled to re-cross examination only where "new information is brought out on re-direct examination. *United States v. Riggi*, 951 *F.*2d 1368, 1376 (3d Cir. 1991); *see also State v. Martini*, 160 *N.J.* 248, 161 (1999) (If defense counsel had put on certain evidence in mitigation at penalty-phase of capital trial, it would have opened the door to damaging rebuttal evidence by the State; the State is entitled to impeach mitigation testimony with relevant evidence of a defendant's past conduct, subject to an instruction that the evidence is admissible only for the limited purpose of rebutting mitigating factors and cannot be used to add to the weight assigned by the jury to the aggravating factors.

The Sixth Amendment is offended where a witness' testimony "add[s] critical weight to the prosecution's case in a form not subject to cross-examination." *Todaro v. Fulcomer*, 944 *F*.2d 1079, 1084-85 (3d Cir. 1991).

Defendant's confrontation rights require disclosure of police personnel records if some factual predicate is advanced making it reasonably likely the information in the records could affect the credibility of the officer, who was also the State's key witness. *State v. Harris*, 316 *N.J. Super*. 384 (App. Div. 1998).

Trial judges retain wide latitude under the Confrontation Clause in limiting cross-examination to avoid harassment, prejudice, confusion of the issues or interrogation that is repetitive or only marginally relevant. *Delaware v. Van Arsdall*, 475 *U.S.* 673, 679 (1986); *see State v. McDougald*, 120 *N.J.* 523, 577-78 (1990); *State v. Wishnatsky*, 255 *N.J. Super.* 67 (Law Div. 1990) (cross-examination of clinic executive director as to her opinion concerning abortion as taking of human life was properly precluded as exceeding scope of direct examination, in prosecution of abortion protestor for blocking public passage at clinic).

Defendant's right to confrontation was violated when the trial judge prevented defense counsel from cross-examining a police officer as to testimony elicited at a suppression hearing two months before, and merely incorporated testimony adduced at the suppression hearing into the record. *State v. Allan, 283 N.J. Super.* 622 (Law Div. 1995). The right of confrontation and cross-examination does not apply to sentencing pursuant to a criminal conviction. *U.S. ex rel. Gerchman v. Maroney*, 355 F.2d 302, 308 (3d Cir. 1966)

C. Use of co-defendant's statements

In a joint trial, admission of non-testifying codefendant's confession which implicated defendant violated right to confrontation even though the trial court gave a clear, concise and understandable instruction that the confession could only be used against co-defendant and must be disregarded with respect to defendant. *Bruton v. United States*, 391 *U.S.* 123 (1968). A "limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination," is unacceptable. The effect is the same as if there had been no instruction at all. *Id.* at 137.

When the confession of any co-defendant involving any other co-defendant cannot be effectively excised, the trial court should order separate trials. *State v. Young*, 46 *N.J.* 152 (1965); *R.* 3:15-2(a). *See State v. Lyons*, 211 *N.J. Super.* 403, 406 (App. Div. 1986) (trial court's denial of severance motion by joint defendants was error, but harmless under the circumstances).

When a defendant has confessed and his confession interlocks with that of his co-defendant, admission of the interlocking confessions in a joint trial with proper limiting instructions does not violate Sixth Amendment. *Richardson v. Marsh*, 481 *U.S.* 200, 211 (1987); *Parker v. Randolph*, 442 *U.S.* 62, 75 (1979). *See State v. Guzman*, 313 *N.J. Super.* 363, 382 (App. Div.), *certif. denied* 156 *N.J.* 424 (1998) (trial court's admission of codefendant's statements without limiting instruction was not reversible error since the statements only incriminated defendant when they were linked with other evidence presented by the prosecution, which was overwhelming without those co-defendant's statements).

Bruton error occurred during trial when detective, in response to question by co-defendant's defense counsel, testified about non-testifying co-defendant's out-ofcourt confession which inculpated defendant. Holland v. Attorney General of NJ, 777 F.2d 150 (3d Cir. 1985); State v. LaBoy, 270 N.J. Super. 296 (App. Div. 1994) (admission of testimony relating to non-testifying codefendant's confession directly incriminating defendant violated defendant's right of confrontation). See State v. Bowser, 297 N.J. Super. 588 (App. Div. 1997). Absent co-defendant's flight was not an incriminating statement under Confrontation Clause; in any event the trial court's limiting instructions cured any impairment of defendant's rights. *State v. Melendez*, 129 *N.J.* 48 (1992).

Co-conspirator's brief appearance on stand and his invocation of Fifth Amendment privilege against selfincrimination did not deprive defendant of his right to adequate opportunity for cross-examination, absent any showing that co-conspirator's brief appearance added critical weight to prosecution's case in form not subject to cross-examination. *Todaro v. Fulcomer*, 944 *F.*2d 1079 (3d Cir. 1991), *cert. denied* 503 *U.S.* 909 (1992)

D. Co-conspirator's statements

Co-conspirator hearsay exception does not violate Confrontation Clause. *Bourjaily v. United States*, 483 *U.S.* 171 (1987); *United States v. Inadi*, 475 *U.S.* 387 (1986).

However, "co-conspirator exception" to hearsay rule requires that statement be made in furtherance of the conspiracy. *State v. Phelps*, 96 *N.J.* 500 (1984) (setting forth standards for determining admissibility of coconspirator's hearsay statement); *State v. D'Arco*, 153 *N.J. Super* 258 (App. Div. 1977) (hearsay statements made by co-conspirators is admissible as long as there is independent proof of the conspiracy and defendant's participation in it). *See also Lambert v. Avonio*, 1995 *WL* 526538 (D.N.J.) (finding co-conspirator hearsay statement did not violate federal constitutional rights and that there was ample evidence to support a finding that a conspiracy existed and that defendant participated in it).

The right of confrontation is not violated when a police officer explains the reasons he apprehended a suspect or went to the scene of a crime by stating that he did so "upon information received," because such testimony shows the officer was not acting arbitrarily. State v. Bankston, 63 N.J. 263, 268 (1973). However, when the testimony becomes more specific by repeating what some other person told him concerning a crime by the accused, both the hearsay rule and the right of confrontation are violated. Id, see State v. Alston, 312 N.J. Super. 102 (App. Div. 1998) (repeated, express references to anonymous information directly pointing to defendants as suspects, which was included in the State's opening, summation and testimony, constituted hearsay that violated their confrontation rights as explained in State v. Bankston, supra); State v. Maristany,

133 *N.J.* 299, 308 (1993) (officer's testimony as to driver's statement that bag found in automobile trunk belonged to defendant violated right to confrontation); *State v. Farthing*, 331 *N.J. Super.* 58 (App. Div. 2000) (investigator's testimony that co-defendants gave sworn statements implicating the defendant violated the confrontation clause; co-defendant's statements were inadmissible under the co-conspirator exception to the hearsay rule).

State v. Bunyan, 154 *N.J.* 261 (1998) (exclusion of deceased witness' exculpatory hearsay statement did not violate Confrontation Clause).

E. Use of Hearsay and Expert Testimony

The right to confrontation is not violated when the State's expert witness could not specifically remember how he came to a particular conclusion, since there is no constitutional guarantee that every prosecution witness be free of forgetfulness, confusion and evasion. *Delaware v. Fensterer*, 474 *U.S.* 15, 21 (1985).

An expert's testimony may be based on the work done or even hearsay evidence of another expert, particularly when the latter's work is supervised by the former. *State v. Stevens*, 136 *N.J. Super.* 262, 264 (App. Div. 1975).

Law enforcement agencies do not have to preserve breath samples of suspected drunk drivers in order for results of breath-analysis tests to be admissible at trial, so long as defendant has the opportunity to question the test results. *California v. Trombetta*, 467 *U.S.* 479, 490 (1984). *See State v. Casele*, 198 *N.J.Super.* 462, 471 (App. Div. 1985) ("where the State in good faith, uses up, consumes or even disposes of the balance of a blood specimen in good faith, this does not preclude the admission of competent evidence of the test and the results at trial"); *State v. Montijo*, 320 *N.J. Super.* 483 (Law Div. 1998) (loss of statements by victim and eyewitness as well as police photographs of the crime scene, while regrettable, did not warrant dismissal of indictment).

IV. RIGHT TO COMPULSORY PROCESS

A. Origin

In all criminal prosecutions the accused shall have the right ... to have compulsory process for obtaining witnesses in his favor... "*N.J. Const.* Art. I, ¶ 10; *U.S. Const.* Amend. VI. A defendant has the right to call

witnesses to testify in his or her defense. *State v. Fort*, 101 *N.J.* 123, 128-29 (1985); *State v. Vassos*, 237 *N.J.Super.* 585, 590-92 (App. Div. 1990).

The constitutional right to compulsory process does not grant to a defendant "the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process' for obtaining witnesses in his favor." *United States v. Valenzuela-Bernal*, 458 *U.S.* 858, 867 (1982). A requirement that codefendants agree not to testify favorably for defendant as part of their plea agreement violated defendant's right to compulsory process. *State v. Fort*, 101 *N.J.* 123 (1985).

Where the State agreed not to seek an extended term sentence if co-defendant agreed not to testify against defendant, defendant's right to compulsory process was violated. *State v. Correa*, 308 *N.J. Super.* 480, 484 (App. Div. 1998). *See also State v. Scherzer*, 301 *N.J. Super.* 363, 429 (App. Div.), *certif. denied* 151 *N.J.* 466 (1997).

A witness who has violated a sequestration order may, in extraordinary circumstances, be barred from giving testimony at trial. *State v. Tillman*, 122 *N.J.Super*. 137, 143-44 (App. Div.), *certif. denied* 62 *N.J.* 428 (1973).

Unless violation of the sequestration order is due to the consent, connivance, procurement or knowledge of the defendant or his counsel, a trial judge should not deprive a criminal defendant of his right to present testimony. Where there was no intention to call the witness at the time he or she was in the courtroom as an observer, the witness should not be precluded from testifying. *State v. Dayton*, 292 *N.J. Super*. 76, 90 (App. Div. 1996).

A potential defense witness who is in the Federal Witness Protection program poses substantial jurisdictional problems for the enforcement of a defendant's constitutional right to compulsory process. See State v. Farquharson 280 N.J. Super. 239, 246 (App. Div. 1995). In Farguharson, an out-of-state witness was not in any witness protection program, and thus, it was determined that the prosecution failed to act with good faith diligence to ascertain the whereabouts of an absconding co-defendant, who was a material witness, justifying dismissal of the indictment. Id. at 251. See also State v. Roman, 248 N.J. Super. 144, 149 (App. Div. 1991) (where the Uniform Witness Act has been adopted by another state, it is not beyond the power of the trial court to compel appearance of a witness through the procedures of that Act). Accord, Barber v. Page, 390 U.S. 719, 723 (1968) (while the fact that a witness was

outside a court's jurisdiction may at one time have excused the prosecutor from producing the witness, "developments like the Uniform Act" have "increased cooperation between the states themselves and between the states and the federal government" requiring prosecutors to engage in diligent efforts to produce witnesses that may be beyond the court's jurisdiction).

V. RIGHT TO FAIR TRIAL

The trial court is responsible for assuring that the presumption of innocence is not lost any stage of the proceedings because of extraneous factors. In *State v. Maisonet*, 166 *N.J.* 9 (2001), defendant's convictions were reversed under the doctrine of fundamental fairness. Defendant was denied basic necessities while in custody with no justification by the State. As a direct result, he appeared at trial dirty and disheveled and his physical condition was palpable to any reasonable observer. Furthermore, defendant's credibility was at issue because he testified at trial, and his co-defendant, who was on bail and neatly groomed, testified against defendant. Co-defendant was acquitted of the most serious charges while defendant was convicted. *Id.* at 22-23.

In *State v. Zhu*, 165 *N.J.* 544 (2000), heightened courtroom security measures did not deprive five codefendants a fair trial in gang-related multiple homicide. Although he Sheriff is the presumed expert in security issues, trial court has non-delegable duty to ultimately approve such measures consistent with constitutional protections to which all defendants are entitled. *Id.* at 557.

STALKING

Modeled after the 1990 California statute, the stalking statute, N.J.S.A. 2C:12-10, addresses conduct that "has been characterized as behavior exceeding harassment but not yet advanced to assault or other more serious crimes that involve overt threats or physical contact." State v. Saunders, 302 N.J. Super. 509 (App. Div.), certif. denied, 151 N.J. 470 (1997). The statute is constituted of two elements. First, defendant must maintain "visual or physical proximity" to the victim on two or more occasions. Second, defendant's conduct must be of a threatening nature that would cause a reasonable person to fear bodily injury or death of himself or herself and his or her family. Stalking was denominated as a fourth degree crime punishable by a term of imprisonment of up to eighteen months or a fine of up to \$7,500, or both. First enacted in 1992, the statute was redrafted in 1996 and thereafter amended in 1998 to exclude conduct which occurs during organized group picketing.

In State v. Saunders, 302 N.J. Super. at 576, defendant attacked the constitutionality of the pre-1996 statute, arguing that it was overbroad and vague. He contended that the statute was overbroad because it infringed upon his First Amendment rights to "expressive activities." The court, however, rejected this argument, reasoning that it was not overbroad when applied to the facts before it, which involved defendant's repetitive watching of the victim from a number of different locations. Id. at 520. The court also disagreed with defendant's argument that the statute was impermissibly vague, concluding that the scienter requirement mitigated the statute's vagueness. Id. at 522-23. And, although not an issue, the court noted that the 1996 amended version of the statute was clearer regarding the conduct prohibited. Id. at 523.

The constitutionality of the amended version of the stalking statute was similarly challenged in *State v. Cardell*, 318 *N.J. Super.* 175, 181 (App. Div.), *certif. denied*, 158 *N.J.* 687 (1999), also as being overbroad and vague. As in the former case, the court declined to accept defendant's overbreadth claims, noting that although the newer version of the statute had a broader reach, it was linguistically clearer than the last and had the important effect of adding protections for the victim. *Id.* at 184. The court also found discreditable defendant's secondary claim of vagueness, reiterating its words in *Saunders, supra*, that the statute clearly articulated the nature of the conduct proscribed. *Id.* at 185.

STATE CONSTITUTION

I. THE ADEQUATE STATE GROUND DOCTRINE

The authority of state courts to construe their state constitutions independently is well-recognized. State constitutions historically have been viewed as documents with some independent force. The federal Bill of Rights was modeled primarily on the early revolutionary state constitutions. The amendments adopted represented a simplified list of states' rights and were not intended to provide a greater or lesser degree of protection. While New Jersey's 1776 Constitution did not contain a Bill of Rights, it did establish certain fundamental criminal protections, including a right to a jury trial and the privilege of counsel.

Under the independent and adequate state ground doctrine, the United States Supreme Court generally declines to review a state decision based on either a state ground alone, constitutional or otherwise, or on both state and federal grounds if resolution of the state law issue conclusively renders consideration of the federal question unnecessary.

The United States Supreme Court has recognized the continuing validity of the adequate state ground doctrine, noting that a state is free as a matter of its own law to impose greater restrictions on police activity than the Supreme Court finds necessary under the Fourth Amendment. However, pointing to the potential erosion of principles of federalism, the Court has carefully reviewed decisions in which state tribunals expand criminal protections under the guise of state constitutions while relying on federal law interpretations.

In *Michigan v. Long*, 463 *U.S.* 1032, 103 *S.Ct.* 3469 (1983), the United States Supreme Court reversed a Michigan Supreme Court decision, invalidating a protective search, which seemed to be based on both the Michigan Constitution and the Fourth Amendment. The Michigan court's opinion twice referred to the state constitution's search and seizure clause but otherwise relied exclusively on federal law. After holding that mere references to the state constitution were insufficient to foreclose federal review under the independent and adequate state ground doctrine, the Supreme Court also set forth criteria as to the sufficiency of asserted state grounds to support a state court decision.

When a state opinion relies heavily upon federal grounds and where the asserted state ground is not apparent from the face of the opinion, then the Court will presume that federal law dictated the result. Thus, it will not assume that the opinion rested on an independent state ground. But if a state court relies on federal precedent merely for direction, the opinion must include a "plain statement" that the federal cases are being used only for the purpose of guidance and do not themselves compel the result the court has reached. In short, state decisions that evaluate the legality of police conduct under federal standards, and then conclude without further analysis that the state privilege was violated, will not escape federal review. Michigan v. Long, supra. See also Harris v. Reed, 489 U.S. 255, 261-62, 109 S.Ct. 1038, 1042-43 (1989).

II. RELIANCE UPON STATE CONSTITU-TIONS AS AN INDEPENDENT SOURCE OF RIGHTS

As the use of state constitutions as a distinct source of individual rights has grown, two fundamental schools of analysis have emerged to define the relationship between state and federal constitutions: the primacy, or selfreliant method, and the supplemental, or interstitial, approach. At the heart of these two concepts lies core philosophical differences concerning the weight of independence to be accorded state constitutions in the country's system of federalism and the deference to be given United States Supreme Court decisions.

The self-reliant approach advocates a staunchly independent interpretation of state constitutions. Under this scheme, if a criminal defendant alleges that police conduct violates both the state and federal constitutions, the state court should first examine the meaning of the relevant state guarantee and how it applies in the particular case. A finding that state law protects the claimed right obviates the need for federal constitutional analysis. Only if the state law is less protective, should the court proceed to determine the claim under the federal constitution.

Although, for example, the Oregon Supreme Court has wholeheartedly embraced the self-reliant approach, New Jersey and other states have adopted the less radical supplemental or interstitial model. *See State v. Hunt*, 91 *N.J.* 338, 345-346 (1982); Pollock, "State Constitutions as Separate Sources of Fundamental Rights," 35 *Rutgers L. Rev.* 707, 717-718 (1983). This approach acknowledges the dominant role of Supreme Court interpretations of the federal constitution in framing state constitutional rights. Since the Supreme Court serves as the final arbiter of federal constitutional rights, reliance on its reasoning helps to justify state court decisions built on a federal base. However, when a state court diverges from a Supreme Court interpretation of the scope of the Fourth Amendment rights, it should provide a reasoned explanation for the departure. State constitutions under this technique play a gap-filling role, supplementing the level of protections conferred by the federal constitution.

Thus, for example, in *State v. Lewis*, 227 *N.J. Super*. 593 (1988), *aff'd*, 116 *N.J.* 477 (1989), the Appellate Division, in ruling invalid a warrantless search of an apartment gained from an informant that a drug operation was located therein, "ma[d]e it clear that our decision is rendered on state constitutional grounds," and in a lengthy footnote, relying upon *Michigan v. Long, supra*, emphasized that "[w]e intend that our decision rest on bona fide separate and independent state grounds, not subject to federal review." *Id.* at 594-95 n.1. However, in affirming the decision the Supreme Court specifically stated that the decision was based on federal and not state grounds. *State v. Lewis*, 116 *N.J.* at 489. *See State v. Kirk*, 202 *N.J. Super.* 28, 34 (App. Div. 1985).

III. SEARCH AND SEIZURE LAW

The New Jersey Supreme Court has relied upon the state constitution as a source of criminal procedural rights which the United States Supreme Court has not adequately protected under the federal constitution.

The search and seizure clause of the state constitution, Art. I, \P 7, is nearly identical to the Fourth Amendment, and nothing in the constitutional history of the state article suggests that it was intended to be construed independently of the Fourth Amendment. Heckel, "The Bill of Rights," *II Constitutional of* 1947 (1951).

Both constitutional provisions are designed to cover the same protectible interests: they acknowledge the right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures. *State v. Hunt*, 91 *N.J.* 338, 343 (1982).

A. Use of the State Constitution in Search and Seizure Cases

In a number of search and seizure cases decided by the Supreme Court of New Jersey since 1975, the Court has imposed more stringent restrictions on police activity under the state constitution than required by the Fourth Amendment. Thus in State v. Johnson, 68 N.J. 349 (1975), a case involving the proper standard for noncustodial warrantless consent searches, the court rejected the holding in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973), that knowledge of a right to withhold consent, while a factor to be considered, is not a prerequisite to establishing voluntary consent to validate a warrantless search under the Fourth Amendment. Rather, voluntariness is determined from the totality of the circumstances and the burden is on the State to show that the consent was voluntary, *i.e.*, that the individual in question knew that he or she had the right to refuse consent, pointing out that "we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning." 68 N.J. at 353 n.2.

In *State v. Alston*, 88 *N.J.* 211 (1981), the Supreme Court further displayed its independence under the state constitution by retaining the rule of defendants' automatic standing in the Fourth Amendment area, rejecting the United States Supreme Court holding in *Rakas v. Illinois*, 439 *U.S.* 128, 99 *S.Ct.* 421 (1978), and *United States v. Salvucci*, 448 *U.S.* 83, 100 *S.Ct.* 2547 (1980).

Asserting its authority to extend fundamental rights beyond the Fourth Amendment, the New Jersey Supreme Court in *Alston* retained the automatic standing rule as a matter of state constitutional law. The court in *Alston* relied upon four basic reasons for not following federal precedents: (1) the United States Supreme Court decisions did not afford sufficient protection against unreasonable searches and seizures, (2) the vagueness of the federal standard which could result in an infringement of the right to privacy, (3) state and federal precedents supporting its interpretation of the constitution, and (4) the court's obligation to make rules affecting the administration of criminal justice.

In 1982, the Supreme Court continued to provide greater protection under the state constitution than even under the Fourth Amendment. In *Hunt, supra*, the court held a subscriber's telephone toll billing records to be protected from unreasonable searches and seizures, rejecting the United States Supreme Court's decision in *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577 (1979), that the Fourth Amendment did not apply to information obtained through the warrantless installation of a pen register – a device which identifies all of a customer's local long distance telephone numbers dialed. In *Hunt, supra,* and *Right to Choose v. Byrne,* 91 *N.J.* 287 (1982), the Supreme Court of New Jersey attempted for the first time to develop a comprehensive framework of New Jersey constitutional interpretation. At least three guidelines emerge from the various opinions in the two cases. The court identified uniformity of state and federal law as the overriding element to be considered before it relied on the state constitution to avoid more restrictive federal decisions on individual rights. Particularly in criminal procedure, *Hunt* stated that while notions of federalism may seen to justify differences, enforcement of criminal laws in federal and state courts, sometimes involving the identical episodes, encouraged applying uniform search and seizure rules.

A second guiding principle dealt with the appropriate weight to be accorded United States Supreme Court decisions. The two majority opinions suggest that federal Supreme Court precedents must be given considerable weight, so that the state Supreme Court must proceed cautiously before providing extra protection under nearly identical provisions of the state constitution.

Finally, to offset the first two criteria, the court implicitly required some objectively verifiable difference between the state and federal constitutional provisions to warrant an interpretational divergence. *Right to Choose* seemed to establish a bright line test for divergence, based on a showing of either of two conditions: "[w]here provisions of the federal and state constitutions differ. . .or where a previously established body of state law leads to a different result, then we must determine whether a more expansive grant or right is mandated by the state constitution."

In *State v. Johnson*, 68 *N.J.* 349 (1975), the Court held on state constitutional grounds that the validity of a consent to search depends on the knowledge of the right to refuse consent.

In *State v. Novembrino*, 105 *N.J.* 95 (1987), the Court relied upon the state constitution to reject the good faith exception to the federal exclusionary rule. *See United States v. Leon*, 468 *U.S.* 897, 104 *S.Ct.* 3405 (1984).

In *State v. Mollica*, 114 *N.J.* 329 (1989), the Court used the state constitution to hold that the defendant had a sufficient participatory interest in the gambling activities in question to give him standing to challenge the police seizure of toll records of his codefendant's telephone calls made from a different room of the hotel.

In *State v. Hempele*, 120 *N.J.* 182 (1990), the Court continued to apply the greater protection of the state constitution to hold that the police must "secure a warrant based on probable cause for garbage searches conducted in criminal investigations." *Id.* at 221. *Contra, California v. Greenwood*, 486 *U.S.* 35, 108 *S.Ct.* 1625 (1988) (Fourth Amendment does not prohibit warrantless search of garbage bag left at curb).

In *State v. Tucker*, 136 *N.J.* 158 (1994), the court ruled that under the state constitution, a seizure occurs when a reasonable person would not feel free to leave. *Contra, California v. Hodari D.*, 499 *U.S.* 621, 111 *S.Ct.* 1547 (1991) (To constitute seizure, must be actual physical restraint).

However, in *State v. Jones*, 143 *N.J.* 4 (1998), the court, relying upon both the Fourth Amendment and the state constitution, held that police officers acting pursuant to a valid arrest warrant have the right to follow a fleeing suspect into a private residence, regardless of whether they know the underlying offense for which the warrant was issued, and regardless of whether the underlying offense is a major or minor one.

In *State v. Pierce*, 136 *N.J.* 184 (1994), the court, once again relying upon the state constitution, declined to apply the rule set forth in *New York v. Belton*, 453 *U.S.* 454, 101 *S.Ct.* 2860 (1981), which permits a policeman who has lawfully arrested the occupant of an automobile to search the passenger compartment of that automobile at the time of the arrest, holding that such a search based solely on an arrest for a motor vehicle offense was impermissible. Thus the court suppressed the evidence of cocaine found in the jacket of one of the vehicles occupants.

More recently, in *State v. Alfred Cooke*, 163 *N.J.* 657 (2000), the court relied upon the state constitution to hold that the automobile exception to the requirement of a search warrant must be supported both by probable cause and exigent circumstances, rejecting the ruling of the United States Supreme Court that probable cause is in itself sufficient to justify a search of the automobile. *See Pennsylvania v. Labron*, 518 *U.S.* 938, 116 *S.Ct.* 2485 (1996).

The Appellate Division also has been active in the search and seizure area. It ruled that arbitrary, random investigatory stops of motor vehicles were unconstitutional under the state constitution. *State v. Kirk*, 202 *N.J. Super*. 28 (App. Div. 1985). To justify the use of a roadblock, the State must show that it was reasonable and

valid under the circumstances and that the police exercised proper discretion as to the time, place and duration of the procedure. In basing its decision exclusively on state constitutional grounds, the *Kirk* court referred to the United States Supreme Court's invitation to the states to develop acceptable alternatives to the constitutionally infirm random stops condemned in *Delaware v. Prouse*, 440 *U.S.* 648, 99 *S.Ct.* 1391 (1979). *See State v. Reynolds*, 319 *N.J. Super.* 426 (App. Div.1998).

Thus in State v. Woodson, 236 N.J. Super. 537 (App. Div. 1989), the Court suppressed evidence of marijuana and other unspecified controlled dangerous substances, as well as evidence of an open beer can, a motor vehicle violation, because the evidence was discovered by means of opening the passenger-side door of defendant's car without permission. The Court rejected the State's argument that the controlling case was Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977), in which the Court held that it was permissible for the police to order drivers out of their vehicles after being stopped for a traffic violation. The Woodson Court also determined that the plain view exception to the search warrant requirement, Coolidge v. New Hampshire, 403 U.S. 443, 92 S.Ct. 26 (1971), was inapplicable in the circumstances, since opening the door of defendant's vehicle was an "exploratory investigation which constituted a search" (quoting State v. Griffin, 84 N.J. Super. 508 (App. Div. 1964)).

On the other hand, a state trooper's detection of burnt marijuana emanating from the passenger compartment of a vehicle lawfully stopped for speeding, which led to the discovery of marijuana residue in the clothing of both of the occupants of the vehicle, as well as in the vehicle itself, and to the arrest of the two occupants, was upheld in *State v. Judge*, 275 *N.J. Super.* 194 (App. Div. 1994), since there was probable cause to support a search, and, in any case, the search of the vehicle was justified under the automobile exception. *See State v. Alston*, 88 *N.J.* 211 (1981).

IV. OTHER CRIMINAL PROCEDURAL RIGHTS

Periodically, New Jersey courts have used an independent state constitutional ground to expand criminal defendants' other rights beyond those guaranteed by the federal constitution, although this course has been the exception rather than the rule. In *State v. Bellucci*, 81 *N.J.* 531 (1980), the court found that an attorney's representation of a defendant at a trial in

which his law partner represented a codefendant violated the defendant's right to effective assistance of counsel under Art. I, \P 10 of the state constitution.

Although defendants may waive a right to independent counsel, after being fully advised of the potential risks involved, a strong presumption exists against waiver of fundamental constitutional rights.

The Supreme Court also has held that an order prohibiting a defendant during an overnight recess from discussing his own testimony with his attorney violated defendant's right to assistance of counsel under the state and federal constitutions. *State v. Fusco*, 93 *N.J.* 578 (1983).

In *State v. Gilmore*, 103 *N.J.* 508 (1985), the Court held that exclusion of jurors based on group association, *e.g.*, race, rather than particular individual biases, violated a defendant's right to a jury trial by a fair and impartial jury, drawn from a representative cross-section of the community, by discriminating against potential jurors based on race, national origin, or other improper determination.

The state constitutional mandate, independent of the Sixth Amendment, cannot be undermined by the right to peremptory challenges in criminal cases, authorized by *N.J.S.A.* 2B:23-13b, c, and *R.*1:8-3d, because the latter right does not spring from constitutional origins. While the State has wide discretion to exercise peremptory challenges, it cannot systematically or intentionally exclude prospective petit jurors on the basis of race, so as to destroy the representative cross-section of a jury.

The state constitution, unlike the Fifth Amendment and other state constitutions, does not expressly establish a privilege against self-incrimination. However, the privilege has historically been an integral part of the state's common law and is embodied in *N.J.R.E.* 501, 502 and 503.

The state Supreme Court has barred impeachment of a defendant's exculpatory statement at trial by reference to the defendant's refusal to answer when questioned by police. *State v. Deatore*, 70 *N.J.* 100 (1976). The court held that the common law privilege against selfincrimination included an accused's right to remain silent when in police custody or under interrogation. *Id.*

STATUTE OF LIMITATION

N.J.S.A. 2C:1-6 sets time limitations for prosecution of criminal offenses. These provisions are not to be applied to offenses committed prior to 1979, the effective date of the Code. *State v. Freck Funeral Home*, 185 *N.J. Super.* 385, 391 (Law Div. 1982).

The Code establishes six provisions which determine the time period in which a criminal prosecution must commence. First, a prosecution for murder, manslaughter, or sexual assault may be commenced at any time. *N.J.S.A.* 2C:1-6a. The common law "year and a day rule," which barred a murder prosecution unless the victim died within a year and a day of the assault, has been abolished. *State v. Young*, 148 *N.J. Super.* 405, 412-413 (App. Div. 1977), *rev'd o.g.* 77 *N.J.* 245 (1977).

Second, prosecution of certain offenses related to the environment must be commenced within ten years of discovery of the offense. These offenses include causing or risking widespread injury or damage contrary to *N.J.S.A.* 2C:17-2a(2); and violations of waste rules and regulations under *N.J.S.A.* 13:1E-9 and *N.J.S.A.* 13:1E-48.20; of clean-air provisions in *N.J.S.A.* 26:2C-19; hazardous substances provisions in *N.J.S.A.* 34:5A-41; and water-pollution-control provisions in *N.J.S.A.* 58:10A-10. *N.J.S.A.* 2C:1-6(5).

Third, prosecution of certain enumerated offenses involving the conduct of public officials and employees must be commenced within seven years after their commission, N.J.S.A. 2C:1-6b(3). They include bribery in official and political matters, N.J.S.A. 2C:27-2; compensation for past official behavior, N.J.S.A. 2C:27-4; gifts to public officials, N.J.S.A. 2C:27-6; compensation of a public servant for assisting private interests in relation to matters before him, N.J.S.A. 2C:27-7; compounding an offense, N.J.S.A. 2C:29-4; official misconduct, N.J.S.A. 2C:30-2; and speculating or wagering on official action or information, N.J.S.A. This seven-year statute of limitation also 2C:30-3. applies to any attempts or conspiracies to commit these specified offenses. N.J.S.A. 2C:1-6b(3).

Fourth, prosecution of criminal sexual contact, N.J.S.A. 2C:14-3, and endangering the welfare of a child, N.J.S.A. 2C:24-4, where the victim is under the age of eighteen years, must be commenced within two years of the victim's reaching the age of eighteen or within five years of discovery of the offense by the victim, whichever is later. N.J.S.A. 2C:1-6b(4).

Fifth, prosecution of all other crimes must be commenced within five years after the commission of the offense. *N.J.S.A.* 2C:1-6b(1); *State v. Stern*, 197 *N.J. Super.* 49 (App. Div. 1984). And finally, a prosecution for a disorderly persons offense or petty disorderly persons offence must be commenced within one year after it is committed, *N.J.S.A.* 2C:1-6b(2).

The Code provides that the period of limitation begins to run on the day after the offense is committed. *N.J.S.A.* 2C:1-6c. An offense is committed when every element occurs, *State v. Weleck*, 10 *N.J.* 355, 374 (1952), or in the case of a continuing offense, when the course of conduct or defendant's complicity in the offense terminates. *N.J.S.A.* 2C:1-6c; *State v. Tyson*, 200 *N.J. Super.* 137 (Law Div. 1984). The effect of the Code, however, is to establish a presumption against finding that an offense is a continuing one. *State v. Tyson, supra.*

The Code requires that a prosecution be commenced within the period specified. *N.J.S.A.* 2C:1-6d. For crimes, commencement occurs when an indictment is voted by the Grand Jury and properly returned to court. *State v. Rhodes,* 11 *N.J.* 515, 520 (1953); *see Grill v. City of Newark,* 311 *N.J. Super.* 435 (App. Div. 1997). For a disorderly persons offense or petty disorderly persons offense, a prosecution is commenced when a warrant or other process is issued, provided that each is executed without unreasonable delay. *Id.* It is the attempt to serve the warrant or process and not the actual service which satisfies the statutory provision. *N.J.S.A.* 2C:1-6d.

Once a prosecution has been properly filed within the statute of limitation for indictable offenses, it can be downgraded to a nonindictable offense at any time. *Ibid*, *see also, State v. Stillwell*, 175 *N.J. Super.* 244 (App. Div. 1980) (holding, pre-Code, that the defendant could not be found guilty on the lesser included offense of manslaughter in a murder trial commenced more than five years after the crime occurred, as manslaughter was governed by a five-year statute of limitations).

There are two tolling provisions in the Code. Time during which a prosecution for the same conduct is pending against the accused in this State does not count against the period of limitation. *N.J.S.A.* 2C:1-6e. The statute will also be tolled while a suspect is fleeing from justice. *N.J.S.A.* 2C:1-6f. *See State v. Greenberg,* 16 *N.J.* 568, 578 (1954) (State must show either flight from or concealment within the jurisdiction plus an intent to avoid detection or prosecution). *Accord, State v. Estrada,* 35 *N.J. Super.* 459, 461 (Cty. Ct. 1955).

Although *N.J.S.A.* 2C:1-6f tolls the limitation for prosecution of crimes, it neither sets a limit for commencement of a probation violation proceeding nor provides for tolling of any such limitation. *State v. DeChristino*, 235 *N.J. Super.* 291, 296 (App. Div. 1989) (violation proceedings commenced too late, flight did not toll limitation).

Factors to be considered in determining whether welfare fraud is a continuing offense and thus unshielded by *N.J.S.A.* 2C:1-6 limitation provisions include time gaps separating the periods of improper welfare payments. *State v. Kern*, 325 *N.J. Super.* 435, 445 (App. Div. 1999). The crime of "bail jumping," *N.J.S.A.* 2C:29-7, is not a continuing offense, but the "flight from justice" tolling provision of *N.J.S.A.* 2C:1-6f may apply, depending on the facts of the case. *State v. Meltzer*, 239 *N.J. Super.* 110 (Law Div. 1989).

Unless otherwise provided in the Code, no civil action shall be brought pursuant to the Code more than five years after the cause of action accrues. *N.J.S.A.* 2C:1-6g. The Code creates civil causes of action for theft violations, *N.J.S.A.* 2C:20-20 and -21, racketeering violations, *N.J.S.A.* 2C:41-4, money laundering, *N.J.S.A.* 2C:21-28, and forfeiture, *N.J.S.A.* 2C:64-1 *et seq.*, provided, however, that a forfeiture action must be commenced within ninety days of seizure if seized property is sought in a forfeiture action. *N.J.S.A.* 2C:64-3a.

One New Jersey court, noting that it did *not* decide the applicability of *N.J.S.A.* 2C:1-6g, has held, by analogy to federal limitations analysis, that a *four*-year limitation period applies to civil racketeering actions brought pursuant to *N.J.S.A.* 2C:41-1 *et seq. Matter of Integrity Ins. Co.*, 245 *N.J. Super.* 133 (Law Div. 1990). The Appellate Division saw no need to decide whether a four- or five-year limitation applied in *Fraser v. Bovino*, 317 *N.J. Super.* 23, 34 (App. Div. 1998), because the civil racketeering complaint was filed outside both periods of limitation.

The defense of the statute of limitations should not be raised as a pretrial matter. Rather, it should be raised as a question of law by motion for judgment of acquittal at the end of the State's case if the State has failed to produce evidence that defendant was a fugitive. If the State produces evidence of flight, however, the determination of the fugitive status becomes a question of fact for the jury. *State v. Ochmanski*, 216 *N.J. Super.* 240 (Law Div. 1987). Defendant Ochmanski was charged with murder in a 1980 indictment, and subsequently was charged with two counts of murder, conspiracy, and kidnaping in a 1986 superseding indictment. There were no limitations on the murder charges, *N.J.S.A.* 2C:1-6a, and the limitation for the conspiracy charge was tolled because it subjected defendant to prosecution for the "same conduct," *N.J.S.A.* 2C:1-6e, that was the subject of charges against defendant in the original indictment for murder. *N.J.S.A.* 2C:1-8a(2)d. The five-year statute of limitations for kidnaping, however, which did not involve the same conduct as murder, would run, unless the State could prove that defendant was a fugitive. *State v. Ochamski, supra.*

The statute of limitations creates rights that generally are not waived with respect to lesser included offenses. *State v. Short*, 131 *N.J.* 47, 54-57 (1993). For example, in a murder prosecution where a lesser included manslaughter offense was subject to a then five-year limitation which barred a manslaughter conviction, the jury should have been instructed on manslaughter but not told that defendant would go free if found guilty of manslaughter. *Id.*

STATUTES AND ORDINANCES

I. GENERAL RULES OF STATUTORY CON-STRUCTION

A. Legislative Intent

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), the United States Supreme Court declared the New Jersey hate crime sentence enhancers, N.J.S.A. 2C:43-6a(1), N.J.S.A. 2C:43-7a(3) and N.J.S.A. 2C:44-3e, unconstitutional because they authorized the trial court to impose an extended sentence without requiring the jury to find an essential element of the offense -- that defendant acted with a biased purpose -- beyond a reasonable doubt. The Court noted that the Legislature's merely placing the hate crime enhancers in the sentencing provisions of the penal code did not change the fact that the finding of biased purpose which was needed to enhance a sentence was an element of the offense which had to be decided by a jury beyond a reasonable doubt.

In *Rodriguez v. United States*, 480 U.S. 522, 107 *S.Ct.* 1391, 94 *L.Ed.*2d 533 (1987), the United States Supreme Court concluded that a provision of the Comprehensive Crime Control Act of 1984, which required the imposition of a two year sentence upon anyone committing a felony while on release pending judicial proceedings, did not supersede the authority of federal judges to suspend execution of certain sentences and impose probation. The totality of the legislative history demonstrated that there was no intent to repeal the earlier provision which granted the authority to suspend certain sentences. There is no need for a court to examine policy considerations when construing a statute where the language of the provision is clear and not at odds with the legislative history.

State v. Farrad, 164 *N.J.* 274 (2000) held that attempted robbery is a crime under the penal code. The drafters of the penal code, upon which robbery statute is modeled, contemplated an attempted robbery charge where the facts support it.

In *State v. Wallace*, 158 *N.J.* 552 (1999), relying upon statutory construction, the Court ruled that the term "injury" must be defined for the jury in a case of second-degree eluding a police officer, *N.J.S.A.* 2C:29-2b. Noting that there was no definition of injury, the Court relied upon the legislative history of the eluding statute to determine that the Legislature intended both second-degree eluding and second-degree aggravated assault caused while eluding a law enforcement officer under *N.J.S.A.* 2C:12-2b(6) to require "bodily injury" or "risk of bodily injury" as defined in *N.J.S.A.* 2C:11-1a.

State v. Zeidell, 154 *N.J.* 417 (1998), relied upon the language and structure of the New Jersey Code of Criminal Justice to differentiate second degree tenderyears sexual assault, defined in *N.J.S.A.* 2C:14-2b as "an act of sexual contact with a victim who is less than 13 years old and the other is at least four years older than the victim," from fourth degree lewdness, which "consists of an actor intentionally 'exposing' or displaying himself or herself for sexual arousal or gratification under circumstances in which the actor 'knows or reasonably expects' that he or she is likely to be observed by a child less than thirteen years old," and is "limited to exposing or displaying an actor's intimate parts rather than touching them."

State v. Eisenman, 153 *N.J.* 462 (1998). The Legislature intended to impose harsh penalties for car theft and particularly on career car thieves. As such, the Court construed *N.J.S.A.* 2C:20-2.1 to authorize the sentencing court to impose consecutive license suspensions for each incident of auto theft.

State v. Chew I, 150 *N.J.* 30 (1997). The aggravating factor of pecuniary gain, *N.J.S.A.* 2C:11-3c(4)(d), which was based on statutes from other states, was intended to apply to all situations where the murder was for pecuniary gain and not just to contract killings.

State v. Mortimer, 135 N.J. 517 (1994), upheld the New Jersey harassment statute, N.J.S.A. 2C:33-4, against a claim that it violated a defendant's right to freedom of speech. Relying upon R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992), the Court noted that the New Jersey statute is a victim-selection or penalty-enhancement provision. The Mortimer Court rejected defendant's argument that subsection N.J.S.A. 2C:33-4a which prohibited making communications under certain circumstances, violated the New Jersey Constitution, since "activity first must be expressive before the provisions. . . of that constitution can prohibit it. Finally, the Court conducted "judicial surgery" to uphold N.J.S.A. 2C:33-4d, which stated that it was a fourth degree offense if, in committing an offense under this statute, a defendant acted "at least in part" with ill will, hatred, or bias. The Court eliminated the "at least in part" provision.

State v. Stewart, 136 *N.J.* 174 (1994). Nonlegislative, court-administered probation programs may not be operated in a manner that conflicts with explicit legislative intent. The Court determined that the trial court improperly admitted a defendant into an Intensive Supervision Program, because *N.J.S.A.* 2C:35-12 expressly prohibits a court from imposing a lesser punishment than agreed to in the plea bargain. As such, defendant was ordered to return to jail to complete the imprisonment imposed as part of a probationary term.

State v. Bigham, 119 *N.J.* 146 (1990). The Insurance Reform Act, *N.J.S.A.* 17:29A-35b(3), authorized the Director of the Department of Motor Vehicles to impose a surcharge on a motorist convicted of motor vehicle violations for offenses which pose a direct threat to safety even if points are not assessed for these offenses.

State v. Churchdale Leasing, Inc., 115 *N.J.* 83 (1989), held that the State violated the double jeopardy clause of the federal constitution by imposing punishments on operators of commercial vehicles for both vehicle registration violations and excess weight violations arising from the operation of commercial vehicles in excess of maximum registered weight. Since there was an absence of any clear expression of legislative intent, the State was limited to recovery of penalties for one violation or the other, but not both.

State v. Wright, 107 N.J. 488 (1987). Conviction for refusal to take a Breathalyzer examination in violation of N.J.S.A. 39:4-50.4 is not conditioned upon actual operation of a motor vehicle. The Supreme Court reached this conclusion after examining not only the particular statute involved, but the entire legislative scheme. The Court noted that a broad interpretation should be given to the drunk driving laws where a narrow interpretation would frustrate legislative intent. According to the Supreme Court, the legislative history of the consent and refusal statutes, N.J.S.A. 39:4-50.2 and 50.4, clearly indicated that they were enacted to facilitate drunk driving investigations and that a requirement of actual operation was inconsistent with that purpose.

State v. Tate, 102 *N.J.* 64 (1986). The legislative intent to preclude a defendant charged with possession of marijuana who alleges need of the drug for relief from spasticity associated with his quadriplegia from using the statutory defense of justification, *N.J.S.A.* 2C:3-2a, was clear from the statutory language permitting possession of marijuana pursuant to a valid prescription.

In *State v. McGague*, 314 *N.J. Super.* 254, 263 (App. Div. 1998), *certif. denied*, 157 *N.J.* 542 (1998), defendants' convictions for possession or distribution of hypodermic needles, *N.J.S.A.* 26:36-6, were affirmed as the Appellate Division rejected defendants' claim that their actions were justified by the medical necessity to prevent the spread of AIDS.

Fisher v. State Parole Board, 303 *N.J. Super.* 229 (App. Div. 1997), *aff'd o.b.*, 154 *N.J.* 85 (1998). Statute which requires prisoners to pay a portion of appellate filing fee, *N.J.S.A.* 30:4-16.2, was intended to prevent frivolous lawsuits and is inapplicable to inmate appeals from agency decisions in parole and disciplinary matters.

State v. Nutter, 258 *N.J. Super.* 41 (App. Div. 1992). Statute allowing child to testify via closed circuit television in sexual assault prosecutions, *N.J.S.A.* 2A:84A-32.4, cannot be employed in murder prosecutions.

State v. Wrotny, 221 N.J. Super. 226 (App. Div. 1987). The language of a statute should be construed in such a manner as to preclude an absurd result. Since the primary purpose of N.J.S.A. 39:3-40e was to deter people whose driver's licenses had been suspended or revoked from driving, the provisions of N.J.S.A. 39:3-40 could not be construed in such a manner that one previously convicted of a drunk driving offense would be treated more leniently than one not previously convicted. (See also, MOTOR VEHICLES, this Digest).

Matter of Scioscia, 216 *N.J. Super.* 644 (App. Div. 1987).

Since legislation which is susceptible to differing interpretations should be interpreted in accordance with its underlying objective, the court examined the underlying purposes of the Solid Waste Utility Control Act, *N.J.S.A.* 48:13A-10a, and the regulations adopted in conjunction with the Act in determining whether its antimonopoly provisions prohibited various activities not expressly mentioned in the Act. The court concluded from its review that on the basis of either the underlying purpose of the Act or the adopted regulations it was clear that these activities were prohibited.

State v. Walker, 216 *N.J. Super.* 39 (App. Div. 1987). In light of the legislative purposes and consistent with the plain meaning of the language used, the court defined "incapacitating mental anguish" as used in *N.J.S.A.* 2C:14-2c(1) to mean severe emotional distress resulting in a temporary incapacity which is more than a "mere

fleeting" incapacity. The Appellate Division reasoned that to interpret the statute otherwise would transform almost all sexual assaults where physical force or coercion was used to commit an act of sexual penetration into first degree crimes, a result clearly not intended by the statute.

State v. Pescatore, 213 N.J. Super. 22 (App. Div. 1986), aff'd, 105 N.J. 441 (1987). The intent of the Legislature not to preclude prosecutors from proceeding against violators of the Sale Tax Act, N.J.S.A. 54:32B-1 et seq., under other applicable laws was made clear by inclusion of the language "in addition to any other penalties herein or elsewhere prescribed," when addressing penalties to be imposed under the statute. N.J.S.A. 54:32B-26(b).

State v. Hugley, 198 N.J. Super. 152 (App. Div. N.J.S.A. 2C:44-5b(2) does not entitle an 1985). offender to receive credit for time served in another state, to offset a New Jersey term of imprisonment for a crime committed before the out-of-state sentence was imposed. Although criminal statutes should be strictly construed, the legislature's intention should not be disregarded. Reading N.J.S.A. 2C:44-5 in its entirety signifies the legislature's intention to give credit only for prior New Jersey convictions, rather than convictions in other jurisdictions. Moreover, when the legislature intended to cover out-of-state convictions in the code, it specifically did so. See, e.g., N.J.S.A. 2C:44-4c. But see State v. DelaRosa, 327 N.J. Super. 295, 301-02 (App. Div. 2000) (applying gap-time credits to prisoner serving sentence in another state.

State v. Carlos, 187 *N.J. Super.* 406 (App. Div. 1982). Under *N.J.S.A.* 2C:15-1, a defendant cannot be convicted of robbery unless the State proves theft or attempted theft from the victim by force or intimidation. While acknowledging that *N.J.S.A.* 2C:15-1 signified a legislative intent to adopt a more expansive concept of robbery, the court found that the Legislature did not intend to change the common law larceny (theft) requirement as an element of robbery.

State v. McGague, 314 *N.J. Super*. at 263. The *de minimis* provision of the code, *N.J.S.A.* 2C:2-11, which allows the assignment judge to dismiss a criminal complaint or indictment, does not apply where the violation of the law is clear and the violation contravenes state policy.

B. Meaning of Statutory Language

State v. Schad, 160 *N.J.* 156 (1999). Ordinance that defined term "display" was unambiguous and clearly applied to transparency displays in defendant's adult entertainment stores.

State v. Szemple, 135 *N.J.* 406 (1994). Because the language of the priest-penitent privilege, *Evid. R.* 29 (repealed) was ambiguous, the Court reviewed reports of several Commissions to determine that the privilege applied only to the cleric. In 1994, the Legislature enacted *N.J.R.E.* 511, which makes the privilege available to both cleric and penitent.

State in Interest of M.T.S., 129 *N.J.* 422 (1992). The Court, strictly construing *N.J.S.A.* 2C:14-1, the sexual offense statute, concluded that any act of sexual penetration engaged in by the defendant without the "affirmative and freely-given permission of the victim" to the specific act of penetration constitutes the offense of sexual assault. Any physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful.

State v. Wright, 107 *N.J.* 488 (1987), reviewed the language of *N.J.S.A.* 39:4-50.4 (the Breathalyzer refusal statute) and found it was subject to contradictory interpretations as to whether actual operation of a motor vehicle was a necessary element for conviction. Therefore, the Court went on to examine not only the particular statute involved, but the entire legislative scheme in determining legislative intent and ruled that conviction for refusal did not require the State to prove actual operation of the vehicle.

State v. Rockholt, 96 N.J. 570 (1984). The plain language of the criminal code changed the prior law regarding the entrapment defense so as to require both that the police conduct created a substantial risk that the crime would be committed by people who were not predisposed to commit it and that it caused the particular defendant to commit the crime. N.J.S.A. 2C:2-12a. Moreover, the commentary to the code suggested that the entrapment provision was intended to convert an otherwise objective entrapment defense into an amalgam of objective and subjective elements of entrapment.

State v. Talley, 94 *N.J.* 385 (1983). Examining the language of the code and legislative intent, the Court determined that a defendant indicted for first degree robbery could be convicted of theft by deception. *N.J.S.A.* 2C:20-4. The court emphasized that the code changed the existing law by consolidating all theft

offenses under the *N.J.S.A.* 2C:20-2a, so that a conviction of theft can be supported by any violation of the substantive theft sections. *N.J.S.A.* 2C:20-1 *et seq.*

State v. Butler, 89 N.J. 220 (1982). The use of a simulated weapon, as opposed to possession or use of an actual weapon, was insufficient proof of a deadly weapon under a pre-1982 definition of deadly weapon to support a first degree robbery conviction under *N.J.S.A.* 2C:15-1b. Looking beyond the plain language of the robbery statute, the Court highlighted the intention of the code's drafters to distinguish the use of a simulated weapon for purposes of second degree robbery and the actual use or threat to use a dangerous weapon as a requisite element of first degree robbery. The definition of deadly weapon, *N.J.S.A.* 2C:11-1c, was amended in 1982 to include any instrument or device which "in the manner it is fashioned" would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury.

State v. Hurtado, 219 N.J. 12 (App. Div. 1987), rev'd on dissent, 113 N.J. 1 (1988). Defendant challenged the authority of a police officer to arrest an individual for violating a municipal ordinance. The Appellate Division noted that the first step in determining the issue was the statutory provision setting forth a police officer's authority. The court also examined the common law of arrest and the plain meaning of the statutory language and concluded that there was no limitation on such arrests. The dissent found no authority for the warrantless arrest. An officer may arrest for a municipal ordinance violation without a warrant only for violations involving a breach of peace. The Supreme Court adopted the dissenting opinion.

State v. Mieles, 199 N.J. Super. 29 (App. Div. 1985), certif. denied, 101 N.J. 265 (1985). The Appellate Division held that a spring action BB pistol is a firearm and a handgun under the penal code and therefore, sustained convictions for possession of a handgun without a permit, N.J.S.A. 2C:39-5b, and aggravated assault by knowingly pointing a firearm, N.J.S.A. 2C:12-1b(4).

State v. Monturi, 195 *N.J. Super*. 317 (Law Div. 1984). Mandatory language should be given its ordinary meaning absent specific intent to the contrary. Applying the principle of statutory construction, the court found that, after a defendant has been convicted of knowing or purposeful murder, *N.J.S.A.* 2C:11-3c, the State's proofs at the penalty stage are limited to evidence related to the specific aggravating factors the State raised. *N.J.S.A.* 2C:11-3c(2); *N.J.S.A.* 2C:11-3c(4). Since evidence not

directly related to the aggravating factors might nonetheless become relevant at the penalty state (*i.e.* to help assess the credibility of witnesses testifying at both the guilt and penalty phases), the court declined to grant a pretrial motion to try the guilt and penalty phases before different juries.

State v. Garcia, 193 *N.J. Super.* 334 (App. Div. 1984). An offender is not automatically entitled to bail on a charge of violation of probation. The plain language of *N.J.S.A.* 2C:45-3a(3) gives trial courts the discretion to hold violators of probation without bail pending disposition of the charges. Since defendant in this case committed another offense while still serving a probationary term, the court properly held him without bail for violating probation.

State v. Roseman, 183 *N.J. Super.* 137 (App. Div. 1982). The plain language of *N.J.S.A.* 30:4-123.59g and h, mandates that fines imposed on state prison inmates be collected by the Bureau of Parole and distributed to the State Treasury. Unless a statute is ambiguous or uncertain, the plain words control. Since the statutory language clearly sets forth the procedures for collecting and distributing funds to be paid by inmates in state correctional facilities, the court rejected the claim that Monmouth County should receive the proceeds.

State v. Kiejdan, 181 N.J. Super. 254 (App. Div. 1981). Although strict liability generally should not apply to criminal statutes, the legislature has the discretion to impose penal consequences, absent a criminal state of mind, to implement regulatory schemes dealing with serious social problems. N.J.S.A. 2C:2-2c(3) (the "gap-filler" provision) does not prohibit penal strict liability legislation, so long as the legislative body clearly states its intention to impose strict liability. Under these standards, the court affirmed defendant landlord's conviction for failing to comply with a township ordinance requiring apartment owners to furnish heat to tenants at prescribed times.

C. Reading Statutes As A Whole, and Intrinsic Aids to Construction

State v. Cooper I, 151 *N.J.* 326 (1997). Legislature did not intend to create unified crime of murder. Rather, felony murder is not the moral equivalent of purposeful/knowing murder.

State v. Alexander, 136 *N.J.* 563 (1994). Where statute does not completely convey legislative

understanding in creating crime, Court should explain and more fully define statutory language. The Court applied this concept to the "drug kingpin" statute, *N.J.S.A.* 2C:35-3, and reversed defendant's conviction because the jury charge was faulty.

State v. Purnell, 126 *N.J.* 518 (1992). Even if offense does not meet penal code's definition of lesser-included offense under *N.J.S.A.* 2C:1-8d, a lesser offense supported by the evidence should be submitted to the jury. Using that criteria, the Court held that it was reversible error in this death penalty case not to charge the jury on felony murder as a lesser offense of purposeful murder.

State v. Sloane, 111 *N.J.* 293 (1988). Statutory categories of lesser-included offense are not "water-tight" compartments. Therefore, where the relative culpability of an offender can be mitigated by the presence of other evidentiary factors and defendant is on fair notice, the trial judge should submit lesser offenses to the jury to resolve the issue of defendant's culpability.

State v. Miller, 108 *N.J.* 112 (1987). The grading of sexual crimes that occur within the family differently from those occurring in other contexts demonstrates the Legislature's intent to distinguish sexual assault on children committed by strangers from those committed by persons with a legal duty to care for a child. The Supreme Court concluded that defendant-father's convictions for aggravated sexual assault and endangering the welfare of a child did not merge even though both were based upon the same conduct because the latter offenses also entailed a breach of parental duty. (*See also,* **MERGER**, this Digest).

State v. Harmon, 104 N.J. 189 (1986). The structure of Chapter 39 evinces the Legislature's intent that the offense of possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a, requires a more culpable state of mind than that required for conviction under the regulatory sections of Chapter 39. The fact that N.J.S.A. 2C:39-4a is grouped with the regulatory weapons offenses does not negate the fact that a defendant's state of mind is critical in determining guilt or innocence and convictions may ensue only when it has been determined that the defendant has armed himself with the actual purpose of using the weapon in a criminal manner against another. The Court found this view to be consistent with the plain meaning of the applicable Code provisions and the framework of Chapter 39. State v. A.N.J., 98 N.J. 421 (1985). The plain language and legislative history of N.J.S.A. 2C:52-3 permits expungement of more than one disorderly persons offense. When the plain language of the code presents apparent inconsistencies, the court should seek interpretations that most appropriately reflect the Legislature's intent. Despite general language limiting expungement to "one-time offenders," N.J.S.A. 2C:52-32, the court emphasized that N.J.S.A. 2C:52-32, the court emphasized that N.J.S.A. 2C:52-32 expressly set forth procedures to expunge a disorderly persons offense, five years after the date of the conviction, if the defendant has committed no more than three disorderly persons offenses. In contrast, the statute allowed expungement of only one criminal conviction.

State v. 1979 Pontiac Trans Am, Color Grey, 98 N.J. 474 (1985). The Supreme Court construed parts of the code's forfeiture statute, N.J.S.A. 2C:64-1 to N.J.S.A. 2C:64-5, to allow innocent owners of unlawfully used property to claim as a defense that they did all that could be reasonably expected to prevent the unlawful use of the property. Forfeiture statutes are to be construed strictly and in a manner favorable to the individual whose property is seized. Permitting innocent property owners to assert the defense shelters the statute from a constitutional attack on the ground that it represents an unlawful taking of property without just compensation in violation of the Fifth Amendment's due process clause. Moreover, the statute, read in its entirety, reflects the legislature's intention to weigh absence of knowledge of the property's unlawful use before declaring forfeiture of the property. N.J.S.A. 2C:64-5; N.J.S.A. 2C:64-8. Accord, State v. One 1979 Pontiac Sunbird, 191 N.J. Super. 578 (App. Div. 1983); see also State v. One 1990 Honda Accord, 154 N.J. 373, 378-79 (1998) (forfeiture is a disfavored remedy, depends on statute for existence and remains subject to common law principles, including right to jury trial).

State v N.W., 329 *N.J. Super.* 326 (App. Div. 2000). The expungement statute, *N.J.S.A.* 2C:52-2b, which specifically bars expungement of the pre-code offense of rape, does not bar expungement of pre-code offense of carnal abuse.

State v. Battle, 256 *N.J. Super.* 268 (App. Div. 1992), *certif. denied*, 130 *N.J.* 393 (1992). Although resisting arrest is not lesser included offense of escape, defendant's conviction for resisting arrest was affirmed because there was evidence in the record to support it and defendant requested that the trial court charge it.

State v. Merlino, 216 *N.J. Super.* 579 (App. Div. 1987). The legislative scheme of the Casino Control Act demonstrated the intent that the Commission not be restricted in the same manner as other administrative agencies. Thus, the "residuum rule," requiring that hearsay evidence be supported by competent evidence, which is applicable to other administrative agencies, is not applicable to the Commission, and hearsay evidence was properly admitted at hearings to determine the propriety of the Commission's determination to place "career offenders" on the exclusion list from licensed gambling casinos.

State v. Johnson, 203 N.J. Super. 436 (Law Div. 1985). A defendant cannot be convicted of operating a motor vehicle while under the influence of intoxicating liquor (*N.J.S.A.* 39:4-50) for operating a nonmotorized pedal bicycle while intoxicated. The unambiguous definition of motor vehicle set forth in *N.J.S.A.* 39:1-1 plus the court's review of other statutory definitions pertaining to motor vehicle laws clearly indicate that muscular powered bicycles were not to be included in the definition of a motor vehicle. But see State v. Tehan, 190 *N.J. Super.* 348 (Law Div. 1982).

State v. Stern, 197 *N.J. Super*. 49 (Law Div. 1984). Under *N.J.S.A.* 2C:1-6, the State may charge an indictable offense and then downgrade to a disorderly persons offense, so long as the original criminal complaint was filed within the five-year statute of limitations.

D. Extrinsic Aids To Construction

State v. Kittrell, 145 *N.J.* 112 (1996). A commentary to a statute cannot overcome clear legislative language.

State v. Szemple, 135 *N.J.* 406 (1994). Relying upon reports of several Commissions, the Court determined that the priest-penitent privlege in *Evid. R.* 29 applied only to the cleric. The Legislature repealed *Evid. R.* 29 in 1994 and enacted *N.J.R.E.* 511, which makes the privilege applicable to both cleric and penitent.

State v. Sutton, 132 *N.J.* 471 (1993). Comment from Executive Branch is helpful in determining legislative intent. Governor, in invoking conditional veto, made clear that statute would remove presumption of concurrent sentences when a person commits a crime while on bail, probation or parole. Thus, *N.J.S.A.* 2C:44-5 does not mandate consecutive sentences.

State v. Valentin, 105 N.J. 14 (1987). After examining the statutory language and legislative history of the hindering apprehension statute, N.J.S.A. 2C:29-3, the Supreme Court concluded that the term "volunteer" as used in the statute regarding hindering one's own apprehension, N.J.S.A. 2C:29-3b(4), "is sufficiently ambiguous to preclude its application" to a defendant who provided a false name to a police officer when asked his name by the officer. The Court noted that penal statutes are to be strictly construed and are not to be extended by implication. The term "volunteer" as used in the statute was susceptible of more than one interpretation. The Court, therefore, expanded its inquiry beyond the plain language of the statute to determine legislative intent, and determined that the term "volunteer" did not include information conveyed in response to police inquiry regarding hindering another's apprehension pursuant to N.J.S.A. 2C:29-Because the Legislature employed the same 3a(7). language in N.J.S.A. 2C:29-3b(4) as that in N.J.S.A. 2C:29-3a(7) with no clear indication that a different meaning was intended, the general rule that the same meaning was intended throughout the statute was employed by the Court in Valentin.

State v. White, 98 N.J. 122 (1984). The Graves Act, N.J.S.A. 2C:43-6c, applies to an accomplice convicted of first degree robbery when one of the perpetrators uses or When the code language is possesses a firearm. susceptible of different constructions, it shall be interpreted to further . . . the special purposes of the particular provision involved. N.J.S.A. 2C:1-2c. Given the aim of the Graves Act to deter violent crimes, its language, the general purposes of the code's sentencing procedures and the pre-code treatment of accomplices, the court determining that the legislature intended to apply the Graves Act to accomplices convicted of crimes involving firearms. (See also, SENTENCING, this Digest).

State v. Serrone, 95 N.J. 23 (1983). A life sentence for a murder conviction is an ordinary sentence under N.J.S.A. 2C:11-3, not an extended sentence under N.J.S.A. 2C:44-3 and N.J.S.A. 2C:44-5c. Thus, a defendant who committed two murders could be sentenced to two consecutive life sentences. The legislature's intent to give specialized treatment to murder was manifested, in part, by a 1982 amendment restoring capital punishment and by eliminating any reference to N.J.S.A. 2C:11-3 to an extended sentence for murder. (See also, SENTENCING, this Digest). *State v. Tekel*, 281 *N.J. Super.* 502 (App. Div. 1995). Under statute mandating an enhanced sentence for refusal to take a breath test, *N.J.S.A.* 39:4-50.4a, "subsequent offenses" are not limited to refusals but include operating a car while under the influence.

State v. Fornino, 223 *N.J. Super*. 531 (App. Div. 1988), found the report of the Criminal Law Revision Commission, which described the intent of the attempt provisions of the Code of Criminal Justice, instructive in determining whether there was sufficient evidence from which the jury could conclude an attempt had been committed. The court concluded that form the expanded scope of attempt liability, as revealed by the report, there was sufficient evidence for the jury to find an attempt had been committed. (*See also*, **ATTEMPT**, this Digest).

Fasching v. Kallinger, 211 N.J. Super. 26 (App. Div. 1986).

Monies earned by the author or publisher of a biography of a convicted murderer were not subject to the forfeiture provisions of *N.J.S.A.* 52:4B-26 *et seq.*, as they were not "agents" within the meaning of the statute which was designed to prevent perpetrators of sensational crimes from benefitting from their acts. The Court reached this conclusion after examining the plain language of the statute, its structure, function, title, legislative history and interpretations accorded the statute by the Attorney General and Violent Crimes Compensation Board.

State v. Bill, 194 N.J. Super. (App. Div. 1984). A conviction of fourth degree aggravated assault for knowingly pointing a firearm at another, N.J.S.A. 2C:12-1b(4), does not require proof that a gun must actually be loaded. Examining the plain language of N.J.S.A. 2C:39-1f, the court found that the definition of a firearm did not include a requirement that the weapon, *i.e.*, a gun, be loaded. The court also reviewed the code's legislative history to determine the meaning of the following language in N.J.S.A. 2C:12-1b(4): "whether the actor believes it (the gun) to be loaded." It held that this language did not refer to the condition of the firearm, but negated a defense that because the defendant believed the gun to be unloaded, he lacked the requisite criminal state of mind. Finally, as shown by enactment of the Graves Act, the legislature intended that crimes committed with firearms warranted harsher sentences than those without. Accordingly, the trial court improperly downgraded two fourth degree aggravated assault counts to simple assault. *Bill* overruled the interpretation of *N.J.S.A.* 2C:12-1b(4)

set forth in *State v. Diaz*, 190 *N.J. Super.* 639 (Law Div. 1983).

State v. Grant, 196 *N.J. Super.* 470 (App. Div. 1984). Imposition of an enhanced penalty under *N.J.S.A.* 39:4-50.4a does not require a second conviction of driving while intoxicated. Although penal statutes should be strictly construed, the court here determined that nothing in the legislative history suggested that a second conviction of driving while intoxicated was a prerequisite to treating the defendant in this case as a subsequent offender. *N.J.S.A.* 39:4-50.4a.

State v. Duva, 192 N.J. Super. 418 (Law Div. 1983). A second conviction under N.J.S.A. 39:3-40 (driving after a license has been revoked) mandates imposing a fine and a term of imprisonment. The plain language of a statute best reflects the legislature's intent. N.J.S.A. 39:3-40b expressly provides that a second offender "shall" be subject to a fine and a term of imprisonment. Nothing in the statute or the legislative history suggests that the sentencing court had discretion whether or not to impose a period of imprisonment.

E. Presumption to Aid Construction

State v. Hamm, 121 *N.J.* 109 (1990). Third offense of driving while intoxicated which imposed penalties of \$1,000 fine, 10 years license suspension, up to 90 days community service and 180 days detainment or incarceration in County Jail was not so packed with onerous penalties as to reflect legislative determination of constitutionally serious offense requiring jury trial.

State v. O'Connor, 105 *N.J.* 399 (1987). A split sentence (a sentence of imprisonment to County Jail imposed as a condition of probation) is not long enough to fall within the presumptive sentence range for a second or third degree sentence. As such, a split sentence cannot be imposed for a second or third degree offense.

State v. Michalek, 207 *N.J. Super.* 340 (Law Div. 1985). Although there may be occasions when strict criminal liability is called for, the presumption is to the contrary. *N.J.S.A.* 2C:2-2c(3).

F. Implied Repeals of Statutes

Rodriguez v. United States, 480 U.S. 522, 107 *S.Ct.* 1391, 94 *L.Ed.* 2d 533 (1987). Repeals of statutes by implication are not favored. Unless an intent to repeal is "clear and manifest," a repeal by implication will not be found. The United States Supreme Court, in

determining whether federal judges could suspend execution of sentence in lights of a provision in the Comprehensive Crime Control Act of 1984 which provided for imposition of a mandatory two year sentence, found no such clear and manifest intent to repeal in either the language or legislative history of the applicable statutes. Where the language of two statutory provisions does not suggest irreconcilable conflict, an intent to repeal will not be inferred.

State v. Des Marets, 92 N.J. 62 (1983). All Graves Act offenders, even those under 26 years of age, must receive the mandatory minimum terms prescribed by the Act. N.J.S.A. 2C:43-6(c). The court acknowledged that the decision repealed N.J.S.A. 2C:43-5 and N.J.S.A. 30:4-148 to the extent that these conflicted with the Graves Act, and that implied repealers were not favored. Nevertheless, the presumption against implied repealers was overcome by a showing of irreconcilable inconsistency. In such situations, the general rule is that the later expression of the Legislature's intent is intended so supersede prior law. Given the clear legislative intent underlying the Graves Act, the court determined that it applied to sentences of youthful offenders. (See also, SENTENCING, this Digest).

State v. Lester, 271 N.J. Super. 289 (App. Div. 1994), certif. denied, 142 N.J. 453 (1993). Statute which proscribed maintaining a dwelling as a narcotics nuisance, N.J.S.A. 24:21a(6), not impliedly repealed by enactment of the Comprehensive Drug Reform Act (CDRA), N.J.S.A. 2C:35-1 et seq., since no similar statutory provision was enacted in the CDRA.

State v. Wrotny, 221 *N.J. Super.* 226 (App. Div. 1987). Unless the terms of the statutory provisions are inconsistent or repugnant the presumption will be against an implied repealer. The court concluded that in this case they were not. Therefore, the provisions of N.J.S.A. 39:3-40 could not be interpreted in a manner to imply a repealer of the penalties of these provisions when the violator had a previous conviction for drunken driving. (*See also,* **DRUNK DRIVING**, this Digest).

Division of Motor Vehicles v. Kleinert, 198 N.J. Super. 363 (App. Div. 1985). Implied repealers of statutes are disfavored, and only when a later expression of legislative will is clearly in conflict with an earlier statute on the same subject should court find a legislative intent to supersede earlier law. Applying this principle of statutory construction, the court rejected the claim that N.J.S.A. 39:5-30.1 impliedly repealed the authority of the Director of Motor Vehicles to suspend a New Jersey driver's license for an out-of-state drunk driving violation. *N.J.S.A.* 39:5-30a. The legislative history of *N.J.S.A.* 39:5-30.1 indicates that the section was intended to establish machinery for interstate enforcement of motor vehicle violations between New Jersey and other signatory states to the Interstate Driver License Compact *N.J.S.A.* 39:5D-1 *et seq.* However, this section was not intended to revoke the Director's authority, *N.J.S.A.* 39:5-30a, as to motor vehicle violations committed by New Jersey drivers in non-signatory jurisdictions.

G. The Preemption Doctrine and Statutory Construction

State v. Crawley, 90 *N.J.* 241 (1982). In view of legislative history and absence of loitering proscription from the penal code, the penal code's "preemption by exclusion," *N.J.S.A.* 2C:1-5d, prohibited enforcement of Newark anti-loitering ordinance.

State v. Marain, 322 *N.J. Super.* 444 (App. Div. 1999), *certif. denied*, 163 *N.J.* 10 (1999). A municipality's ability to regulate parking, *N.J.S.A.* 39:4-8c, does not conflict with *N.J.S.A.* 39:3-42 which confers exclusive authority on the State to license or permit use or operation of a motor vehicle.

State v. Burten, 219 N.J. Super. 339 (Law Div, 1987), aff'd 219 N.J. Super. 156 (App. Div. 1987), certif. denied, 107 N.J. 144 (1987). Criminal prosecution under N.J.S.A. 2A:170-90.2 for failure of an employer to make contributions to an employee pension plan was precluded by the Federal Employee Retirement Security Act, (ERISA), 29 U.S.C. § § 1001-1381, which preempted the field. The legislative history of the federal statute clearly demonstrated the intent of Congress to preempt the field for federal regulation, and the state statute was not saved from preemption pursuit to the exemption of "any general applicable criminal law of the state." 29 U.S.C. § 1144b(4). The court below concluded that N.J.S.A. 2A:170-90.2 was "specifically promulgated to deal with employee benefit plans" and as such did not constitute a "general applicable criminal law." Thus, the lower court dismissed the complaints and the Appellate Division affirmed for substantially the reasons set forth below.

Tri-State Metro Naturists v. Township of Lower, 219 *N.J. Super.* 103 (Law Div. 1986). The court found that a municipal ordinance banning nudity on a State beach was not invalid because of the State preemption doctrine, but was unenforceable because the site, which was State

owned and regulated, was immune from legal control on state sovereignty grounds. According to the court, control of dress could be regulated through municipal ordinances since it was not the purpose of the penal code to address indecent behavior. Addressing the issue of State sovereignty, the court stated that while the superior power of the State and its right to exercise that power on its own property was not without limits, such limits "speak to the reasonableness of the state action" and do not preclude recognition of a legitimate local interest. The court concluded, however, that absent wavier or consent, a municipality may not lawfully exercise its police power to regulate conduct on State-owned lands (See also, FOURTEENTH within its boundaries. AMENDMENT, this Digest).

State v. Meyer, 212 *N.J. Super.* 1 (Law Div. 1986). The subject of obscenity is largely preempted by the *Code of Criminal Justice, N.J.S.A.* 2C:1-5d; *N.J.S.A.* 2C:34-2, although a specific grant of authority was given to the municipalities which would allow control of the location of the sale of obscene material through the use of zoning ordinances. The court concluded that the challenged municipal ordinance, which purported to control the display of magazines containing nudity, was not part of the zoning ordinance and did not control the location of sale, but rather the manner of the sale and according, was preempted by State legislation.

H. Constitutional Analysis and Statutory Construction (*See also*, FOURTEENTH AMENDMENT, this Digest)

Town Tobacconist v. Kimmelman, 94 N.J. 85 (1983). When a statute's constitutionality is doubtful because of vagueness, the court has the authority to restore its validity through appropriate statutory construction that conforms with the intent of the legislature and that advances the purposes of the legislation. Applying this principle, the Court modified the definition of drug paraphernalia in the state's Drug Paraphernalia Act, N.J.S.A. 24:21-46. The deleted language would have required a factfinder to examine the defendant's intent to ascertain whether an item constituted drug paraphernalia. Reviewing the legislative history of the Model Drug Paraphernalia Act, after which the New Jersey statute was patterned, the Court determined that the factfinder should focus on a defendant's intent with respect to a violation of the appropriate operative section of the act, rather than a definitional term. See State v. Sharkey, 204 *N.J. Super.* 192, (App. Div. 1985) (upholds

constitutionality of the "look alike drug" statute, *N.J.S.A.* 24:21-19.1 *et seq.*, as a justifiable regulatory law reasonably related to a proper legislative purpose).

State v. Harris, 218 *N.J. Super.* 251 (Law Div. 1987). In determining whether stun guns were included within the definition of weapons under *N.J.S.A.* 2C:39-1, the trial court concluded that the statute did not give fair notice that the guns were illegal. It dismissed the indictment against defendants. Shortly after the arrest, the Legislature amended *N.J.S.A.* 2C:39-1 to include stun guns.

Allen v. Bordentown City, 216 N.J. Super. 557 (Law Div. 1987). A local curfew ordinance, which permitted a police officer to determine whether a person was loitering in the exercise of the officer's "reasonable judgement," failed not only to provide no ascertainable standards to measure the decision but provided no notice of the acts forbidden. Thus, the statute was unconstitutionally vague. In addition, the ordinance was unconstitutionally overbroad. The ordinance contained restrictions of fundamental personal liberties including freedom of speech, assembly and religion and the right to travel, which were unnecessary as the purpose of the ordinance could have been achieved through more narrowly drawn provisions.

Abramowitz v. Kimmelman, 200 N.J. Super. 303 (Law Div. 1984), aff'd 203 N.J. Super. 118 (App. Div. 1985). There was a rational basis for an amendment to the state's Sunday closing law, N.J.S.A. 2A:171-5.8, allowing only certain large cities to decide whether to permit Sunday sales in counties with blue laws. In view of the pressing economic problems facing the State's larger cities, the court held that it was reasonable for the legislature to allow these communities to hold referenda to decide whether to permit Sunday sales within their borders.

I. Court Rules and Statutory Construction

State v. Vigilante, 194 N.J. Super. 560 (Law Div. 1983). A defendant may waive the right to summation. R. 1:7-1(b) provides that following the close of evidence, the parties may make closing statements in the reverse order of the opening statements. The court construed the plain language of the court rule to mean that summations were permissive, not mandatory. The particular facts showed that defendant knowingly and voluntarily relinquished his right to a summation.

STIPULATIONS

(See also, POLYGRAPHS, this Digest)

I. TRIAL LEVEL

A. Generally

A stipulation is an admission which cannot be disregarded or set aside at will. Waldorf v. Borough of Kenilworth, 878 F. Supp. 686, 690 (D.N.J. 1995), aff'd, 142 F.2d 601 (3d Cir. 1998). The State and the defendant may stipulate to the entire factual picture. State v. Leach, 143 N.J. Super. 289, 291 (Law Div. 1976). See also U.S. v. Kikumura, 947 F.2d 72, 75-76 (3d Cir. 1991) (defendant's stipulation that he transported explosives with knowledge and intent that they be used to damage or destroy property, which prosecution made clear would not prevent Government from seeking to prove intent to cause death, injury or intimidation at sentencing, waived any objection to Government's introduction of evidence of his intent to kill at sentencing); State v. Thomas, 132 N.J. 247, 257 (1993) (stipulation ordinarily obviates the need for authenticating a document).

However, to be given effect, the terms of a stipulation must be "definite and certain" and "assented to by the parties or those representing them." *Kurak v. A.P. Green Refractories Co.*, 298 *N.J. Super.* 304, 325 (App. Div. 1997), *certif. denied*, 152 *N.J.* 10 (1997). As such, stipulations should be construed with reference to their subject matter and in light of the surrounding circumstances. *Id; see also Washington Hosp. v. White*, 889 *F.*2d 1294, 1302-03 (3d Cir. 1989); *Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co.*, 71 *F. Supp.*2d 394, 400-02 (D.N.J. 1999).

A trial of a criminal case based upon stipulated facts to which parties can agree may be a useful mechanism in appropriate cases to narrow the areas of conflict to be resolved by court. *State in the Interest of T.M.*, _____ *N.J.* _____ (2001). However, such a process must be reconciled with *Rule* 3:9-2 and procedural due process considerations. *Id.* Thus, trials on stipulated facts are limited to situations where there is an initial demonstration on the record that the defendant is engaging in the stipulatedfacts trial voluntarily and knowingly. *Id.*

Nonetheless, the State may reject a defendant's offer to stipulate to essentially all of the facts. The prosecution is entitled to prove its case by evidence of its own choice and a criminal defendant may not stipulate his or her way out of the full evidentiary force of a case. Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997); State v. Alvarez, 318 N.J. Super. 137, 152-53 (App. Div. 1999). For instance, in State v. Laws, 50 N.J. 159, 183-184 (1967), the defendant was prepared to stipulate to the facts of the robbery and the killing, except for the assailants' identity. The State correctly refused to so stipulate because "the State should have the right to make a full showing before the jury whenever it considers such course necessary for the proper presentation of its case." Id. Thus, even if a defendant stipulates to certain facts, the State may still introduce evidence to prove every element of the offense. State v. Peltack, 172 N.J. Super. 287, 293 (App. Div.), certif. denied, 84 N.J. 474 (1980).

As to stipulations to the number of jurors on a jury, see R. 1:8-2; State v. Morales, 116 N.J. Super. at 543; E.E.O.C. v. State of Del. Dept. of Health and Social Serv., 865 F.2d 1408, 1420 (3d Cir. 1989).

II. APPELLATE REVIEW

A. Generally

Litigants will generally be held to their stipulations and the consequences thereof both during trial and upon appellate review. *Matter of Robinovitz*, 102 *N.J.* 57, 61 (1986); *Negrotti v. Negrotti*, 98 *N.J.* 428, 432 (1985); *Hartford Fire Ins. Co. v. Riefolo Constr. Co.*, 81 *N.J.* 514, 523 (1980); *Ambassador Insur. Co. v. Montes*, 76 *N.J.* 477, 481-42 (1978); *State v. Andrial*, 203 *N.J. Super.* 1, 5-7 (App. Div. 1985); *State v. Morales*, 116 *N.J. Super.* at 542-43. Valid stipulations entered into freely and fairly and approved by the court should not be lightly set aside. *Waldorf v. Shuta*, 142 *F.*3d 601, 616 (3d Cir. 1998). A court's decision to bind a party to a stipulation is reviewed under an abuse of discretion standard. *Id.*

Despite the limitations placed upon withdrawing stipulations, they are not absolute and courts may grant parties relief from them to prevent a manifest injustice. *Id.* at 617-18. Neither the parties nor the court is bound by stipulation as to a matter of law which is contrary to the controlling law on the subject. *State v. Bodtmann*, 239 *N.J. Super.* 33, 46-47 (App. Div. 1990); *State v. Elysee*, 159 *N.J. Super.* 380, 384 (App. Div. 1978). An appellate court is not bound by an erroneous stipulation or concession concerning the application of a statute. *Schere v. Freehold Tp.*, 150 *N.J. Super.* 404, 408 (App. Div. 1977).

B. Rejection of Stipulation on Appeal

SUBPOENAS

An appellate court may reject the parties' stipulation. *Negrotti v. Negrotti*, 98 *N.J.* at 432-33. The *Negrotti* Court stated, however:

Our decision should in no way be taken as an invitation to litigants or trial courts to sidestep the binding nature of factual stipulations. Quite to the contrary, it is important for attorneys to have confidence in stipulations as a tool to avoid the expense, trouble, and delay of coming forward with proofs when certain otherwisecontestable facts are admitted. The basic thought is that generally litigants should be held to their stipulations and the consequences thereof. [*Id.* at 432 (citation omitted)]

Nonetheless, should a reviewing court refuse to adhere to a stipulation entered on the record, the party losing the benefit of the stipulation must be given an opportunity to present his proofs as if there were no stipulation below. *Id.* at 432-33.

As to whether a stipulation entered into prior to trial remains binding during subsequent proceedings between the parties, *see State v. Powell*, 176 *N.J. Super.* 190, 192-95 (App. Div. 1980), *certif. denied*, 87 *N.J.* 333 (1981); *Waldorf v. Shuta*, 142 *F.*3d at 616-17.

I. INTRODUCTION

A subpoena is a medium for compelling the attendance of witnesses in court or before a public body or agency. A subpoena *duces tecum* is the process by which a court or public body requires the production before it of documents, papers, or tangible things. Generally, the issuance, form, service, and enforcement of subpoenas and subpoenas *duces tecum* are governed by *N.J.S.A.* 2A:81-15 *et seq.* and *R.* 1:9-1 *et seq.*

"A subpoena is simply 'a command to appear at a certain time and place to give testimony upon a certain matter." *Silverman v. Berkson*, 141 *N.J.* 412, 422, *cert. denied*, 516 *U.S.* 975 (1995) (quoting *Black's Law Dictionary* 1279 (5th ed. 1979)). The party subpoenaed has an opportunity before compliance to move to quash or modify the subpoena. *Greer v. New Jersey Bureau of Sec.*, 288 *N.J. Super.* 69, 81 (App. Div. 1996).

II. THE POWER TO SUBPOENA

Subpoenas may not be issued except upon constitutional and legislative authority. *Reiman v. Breslin*, 175 *N.J. Super.* 353, 356 (App. Div.), *certif. denied*, 85 *N.J.* 147 (1980). However, this authority may be implied and need not be expressly stated within the statute. *In re Shain*, 92 *N.J.* 524, 532 (1983).

A subpoena to appear in court may be issued by the clerk of the issuing court or by an attorney or a party, in the name of the clerk. *R.* 1:9-1. In municipal court cases involving non-indictable offenses, law enforcement officers may issue and serve subpoenas. *R.* 7:7-8. In criminal prosecutions, both the Sixth Amendment of the United States Constitution and article I, paragraph 10, of the New Jersey Constitution guarantee a defendant the right to subpoena witnesses and compel production of materials for the defense. *In re Farber*, 78 *N.J.* 259, 273-74, *cert. denied*, 439 *U.S.* 997 (1978).

In *State v. Hilltop Private Nursing Home, Inc.* 177 *N.J. Super.* 377 (App. Div. 1981), the Appellate Division upheld the right of a prosecutor to issue a subpoena to testify or a subpoena *duces tecum* for investigative purposes without express grand jury authorization and without formal proof of the existence of a grand jury investigation so long as the subpoena is made returnable to a grand jury on a date on which it is sitting. *In re Nackson, 221 N.J. Super.* 187, 205 (App. Div. 1987), *aff'd,* 114 *N.J.* 527 (1989), confirmed that "our Rules give the prosecutor no pretrial subpoena power independent of the grand jury." See *State v. Johnson*, 287 *N.J. Super.* 247, 258 (App. Div.), *certif. denied*, 144 *N.J.* 587 (1996); *State v. Misik*, 238 *N.J. Super.* 367, 376 (Law Div. 1989).

In Reiman v. Breslin, 175 N.J. Super. at 364, a prosecutor's practice of using three-week, on-call subpoenas for police witnesses was upheld as a reasonable way of insuring the appearance of the police officers at trial when their testimony was required. The Appellate Division upheld the validity of the on-call subpoena, finding that it was not an unreasonable burden or restriction on the officers' movement, nor was it an unconstitutional infringement on the right to travel. Id. at 363. The court stated that "[a] person is subject to a subpoena even if his appearance is required beyond the date set forth on the face of the subpoena." Id. at 358. The Appellate Division further stated in *Reiman* "that a subpoena issued in New Jersey creates a continuing obligation which cannot be satisfied until the person is released from it." Id. at 359. "[A] subpoena in its traditional form does not have a specified termination date -- it is valid until the person is dismissed by the court or by the person who had subpoenaed him." Id.

In the case of a public body or agency, the right of each to issue subpoenas is provided by statute. Most state agencies, boards, and other bodies have the power to issue subpoenas as part of their investigatory or enforcement functions. In *Hayes v. Gulli*, 175 *N.J. Super.* 294, 302 (Ch. Div. 1980), the Chancery Division held that because of the absence of a specific statutory grant, it could not conclude that the Office of Administrative Law and its administrative law judges have their own inherent power to issue subpoenas. However, the Court ruled that where an administrative law judge is hearing a contested case for an agency which has its own statutorily granted subpoena power, the Office of Administrative Law assumes substantively the same power of subpoena as is held by the agency. *Id.*

As for municipalities, a city council under the mayorcouncil form of government was held to have implicit power to issue subpoenas by virtue of its legislative function under the Faulkner Act, *N.J.S.A.* 40:69A-1 *et seq. In re Shain*, 92 *N.J.* at 532. In *Shain*, the Supreme Court reasoned that a concomitant part of the council's legislative power is the power to investigate, which includes the power to compel testimony. *Id.* at 531-32. The Court also stated that no specific statutory grant was necessary to vest a legislative body with subpoena power. *Id.* at 532. *N.J.S.A.* 40:48-25 specifically confers subpoena power on a municipal investigating committee composed of a municipality's governing body. A municipal investigating committee not composed of members of the governing body does not have authority to issue subpoenas. *Traino v. McCoy*, 187 *N.J. Super.* 638, 649-50 (Law Div. 1982).

III. WHO CAN BE SUBPOENAED (See also, WITNESSES, this Digest)

A. General Principles

Ordinarily, all persons within the jurisdiction of the court may be compelled to appear as witnesses before it by means of duly issued subpoenas. The Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings, N.J.S.A. 2A:81-18, et seq. (see also, TOPIC, this Digest), allows a court in this state to subpoena an out-of-state resident to testify in a criminal prosecution or grand jury proceeding in this state. It also permits a court in any state which has a similar provision to subpoena a New Jersey resident to testify in out-ofstate criminal prosecutions and grand jury investigations. In both situations the following must be shown: (1) a criminal prosecution is pending or a grand jury investigation has commenced or is about to commence; (2) the required witness is material and necessary to the proceeding; and (3) it will not cause undue hardship to the witness to be compelled to testify in the proceeding. N.J.S.A. 2A:81-19. N.J.S.A. 2A:81-21 protects a witness coming into the state in response to a subpoena to testify in a criminal proceeding from arrest or the service of process, civil or criminal, in connection with matters arising before his or her entrance into this state under the subpoena.

Our Supreme Court held that the New Jersey Bureau of Securities may subpoena a non-resident who has engaged in purposeful conduct expressly aimed at the New Jersey's securities market. *Silverman v. Berkson*, 141 *N.J.* at 432.

In *Marxe v. Marxe*, 233 *N.J. Super.* 247, 250-52 (Ch. Div. 1989), a North Carolina resident required to be a witness in a New Jersey matrimonial action was not immune from service by virtue of his non-resident, non-party status.

A witness who refuses to obey a subpoena on valid grounds of self-incrimination may be granted use immunity as to his or her testimony or evidence produced under *N.J.S.A.* 2A:81-17.3. If the witness refuses to testify after being granted immunity, he or she may be held in contempt and incarcerated until agreeing to testify. *See In re Zicarelli*, 55 *N.J.* 249, 271-72 (1970), *aff'd*, 406 *U.S.* 472 (1972). (See also, **IMMUNITY** and **SELF-INCRIMINATION**, this Digest). In *In re Grand Jury Proceeding of Guarino*, 104 *N.J.* 218, 232 (1986), the Court held that the business records of a sole proprietor were not privileged against compelled self-incrimination because they lacked elements of personal privacy.

Generally, public employees may be subpoenaed, and under *N.J.S.A.* 2A:81-17.2a1, all public employees have a duty to testify upon subpoena or face removal from office. However, high-level government officials should not be subpoenaed absent a showing of first-hand knowledge or direct involvement in the events giving rise to the action, or absent a showing that their testimony is essential to prevent injustice. *Hyland v. Smollok*, 137 *N.J. Super.* 456, 460 (App. Div. 1975), *certif. denied*, 71 *N.J.* 328 (1976). In *Hyland*, the court denied a request to take the depositions of the Attorney General and the Director of Criminal Justice because such a showing had not been made. *Id.*

In *State v. Mitchell*, 164 *N.J. Super.* 198, 201 (App. Div. 1978), the court held that subpoenas *duces tecum* served upon the Attorney General and other top law enforcement officials were not enforceable where there was no preliminary showing that any of these officials had any first-hand knowledge of the facts of the case or that the taking of their depositions was necessary to prevent injustice.

In *State v. Medina*, 201 *N.J. Super.* 565, 580 (App. Div.), *certif. denied*, 102 *N.J.* 298 (1985), the Mercer County Prosecutor and an assistant prosecutor were subpoenaed to testify in a narcotics trial regarding an investigator's possible motives for entrapping the defendant in a cocaine sale. The trial court quashed the subpoenas, and the Appellate Division upheld the trial court's decision on the ground that the probative value of the evidence sought from the officials was greatly outweighed by its capacity to mislead and confuse the jury. *Id.*

Also in *Hyland*, 137 *N.J. Super.* at 462, plaintiff sought the removal from office of a school business manager who refused to obey a subpoena to appear before a grand jury investigating alleged corruption in the use of school funds and in connection with school contracts. The Appellate Division held that his belated offer to testify after three earlier refusals did not protect him from removal from office. *Id.* However, in *Municipal* Investigating Comm. of the City of Bayonne v. Servello, 200 N.J. Super. 413, 423 (Law Div. 1984), the court held that where a public employee refused to obey a subpoena *duces tecum* on valid self-incrimination grounds, the Public Employees Statute, *N.J.S.A.* 2A:81-17.2a *et seq.*, did not require the employee to obey the subpoena unless he was first offered use immunity as to the evidence sought.

B. Newsperson's Privilege (*See also*, **FREEDOM OF PRESS**, this Digest)

Under the Shield Law, also entitled the "newsperson's privilege," in *N.J.S.A.* 2A:84A-21 and *N.J.R.E.* 508, a newsperson may not be subpoenaed in any legal or quasi-legal proceeding or before any investigative body in order to disclose confidential sources of information. The newsperson's privilege not to disclose confidential sources or materials is absolute absent a conflict with other constitutional rights such as a criminal defendant's right to a fair trial. *Maressa v. New Jersey Monthly*, 89 *N.J.* 176, 189, *cert. denied*, 459 *U.S.* 907 (1982).

To invoke this privilege against disclosure, the newsperson claimant must make a prima facie showing that the subpoenaed materials were obtained during his or her professional activities. N.J.S.A. 2A:84A-21.3. The burden then shifts to the party seeking enforcement of the subpoena to show by clear and convincing evidence that the privilege has been waived or by a preponderance of the evidence that (1) the material sought is relevant, material, and necessary for the defense; (2) less intrusive sources are unavailable; (3) the value of the particular information as it bears upon the issue of guilt or innocence outweighs the importance of the privilege; and (4) the request is not overbroad, oppressive, or unreasonably burdensome. N.J.S.A. 2A:84A-21.3. The procedures for subpoenaing confidential materials from newspersons under N.J.S.A. 2A:84A-21.1 et seq. are available only to the defense in a criminal trial. These procedures could not, for example, be used by the prosecution in a criminal trial or at a grand jury proceeding. See Statement of Assembly Judiciary, Law, Public Safety and Defense Committee to Assembly Bill No. 3062 (1979).

In *State v. Boiardo*, 82 *N.J.* 446, 449 (1980), the Court reversed a trial court's order directing a reporter to produce a letter from a prosecution witness because the defendants failed to meet their burden of demonstrating by a preponderance of the evidence the nonavailability of

substantially similar evidence through less intrusive sources.

The expansion of the Shield Law by amendments shows the Legislature's continued commitment to protect newspersons from compulsory testimony, particularly when it is sought by the State. In re Schuman, 114 N.J. 14, 24 (1989); In re Woodhaven Lumber & Mill Work, 123 N.J. 481, 489 (1991). In re Schuman, 114 N.J. at 27, held that information that the reporter gathered in the course of his job was privileged, even though it had been published in the newspaper, and the State could not compel the reporter to testify. The Court explained that the 1979 amendment, which provides that "[p]ublication shall constitute a waiver [of the Shield Law] only as to the specific materials published," pertains only to information sought by criminal defendants in preparing a defense. Id. In re Woodhaven Lumber, 123 N.J. at 497-98, held that photographs taken by reporters at the scene of a burning fire did not come within the eyewitness exception to Shield Law, N.J.S.A. 2A:84A-21a(h), since that exception applies to only the doing of a thing or deed, and not all of the resulting consequences.

IV. SUBPOENA DUCES TECUM

A. Generally

A subpoena *duces tecum* is a process by which a court or other body requires the production before it of documents, papers, or tangible things. Subpoenas *duces tecum* issued by the courts are governed by R. 1:9-2.

A valid subpoena *duces tecum* must specify its subject with reasonable certainty, and there must be a substantial showing that the books or papers sought contain evidence relevant and material to the issue for which these materials are sought. State v. Cooper, 2 N.J. 540, 556 (1949); Greenblatt v. New Jersey Bd. of Pharmacy, 214 N.J. Super. 269, 275 (App. Div. 1986). If the specification is so broad and indefinite as to be oppressive and in excess of the demandant's necessities, the subpoena is not sustainable. Cooper, 2 N.J. at 556. Courts may quash or modify subpoenas if compliance would be unreasonable or oppressive. R. 1:9-2. While the allowable amount of pretrial discovery may be broad, is not unlimited. The information must be relevant to the subject matter involved in the pending action. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). The party seeking discovery has the burden of demonstrating relevance. American Elec. Power Co, Inc. v. United States, 191 F.R.D. 132, 136 (S.D. Ohio 1999). While relevance is a major factor to be considered in determining the amount of discovery to be produced, it is not conclusive and must be weighted against other factors, including burdensomeness. *NL Indus. Inc. v. Commercial Union Ins. Co. v. Certain Underwriters at Lloyd's*, 144 *F.R.D.* 225, 234 (D.N.J. 1992); *see Nestle Foods Corp. v. Aetna Ca. & Sur. Co.*, 135 *F.R.D.* 101, 106 (D.N.J. 1990), *aff'd*, No. 89-1701 (D.N.J. Nov. 13, 1990).

A non-party resisting a subpoena *duces tecum* may challenge the relevance of material sought to the underlying action. See Compaq Computer Corp. v. Packard Bell Elec., Inc., 163 F.R.D. 329, 335 (N.D.Cal. 1995); Composition Roofers Union Local 30 Welfare Trust Fund v. Gravely Roofing Enter., Inc., 160 F.R.D. 70, 73 (E.D.Pa. 1995). Status as a non-party to the underlying litigation entitles the witness to consideration of the expense and inconvenience. Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 49 (S.D.N.Y. 1996) (citing Fed.R.Civ.P. 45(c)(2)(B) ("an order to compel production shall protect any person who is not a party from significant expense. . . ")). The determination of issues of burden and reasonableness is committed to the sound discretion of the trial court. Concord, 169 F.R.D. at 49. "Whether a subpoena imposes upon a witness an 'undue burden' depends upon 'such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed." Id. (quoting United States v. International Bus. Mach. Corp., 83 F.R.D. 97, 104 (S.D.N.Y. 1979)). A subpoena that sweepingly pursues material with little apparent or likely relevance is considered overbroad on its face, exceeding the bounds of reasonable discovery. Concord, 169 F.R.D. at 50. Note that the standards of relevancy and materiality used to determine the reasonableness of a subpoena *duces tecum* at trial are more stringent than the tests employed for subpoenas issued by the grand jury. In re Grand Jury Subpoena Duces Tecum, 143 N.J. Super. 526, 534 (Law Div. 1976).

In *State v. Dyal*, 97 *N.J.* 229, 232 (1984), the Court held that where the police can show a reasonable basis to believe that the operator of a motor vehicle was intoxicated at the time of the accident, a municipal judge may issue a subpoena *duces tecum* for the results of a hospital's blood tests performed on him or her. In establishing the reasonable basis for their belief, the police may rely on objective facts known to them at the time of the event or within a reasonable time thereafter. *Id.* In *State v. Bodtmann*, 239 *N.J. Super.* 33, 40 (App. Div. 1990), the Appellate Division confirmed that less than probable cause is required for the issuance of a *Dyal* subpoena. The logical inference to be drawn from *Dyal* is that a person arrested for driving a motor vehicle under the influence has no legal right to refuse chemical testing and the police are not required to obtain his or her consent for such testing. *State v. Ravotto*, 333 *N.J. Super.* 247, 255-56 (App. Div.), *certif. granted*, 165 *N.J.* 677 (2000).

In another case where a subpoena *duces tecum* was directed at medical records, the Appellate Division held that a patient whose records are subpoenaed for production before either a grand or petit jury, has the right to resist, by appropriate application to a court, the disclosure of any portion of his records not reasonably related to the purpose of the proceeding in which the subpoena was issued. *Gabor v. Hyland*, 166 *N.J. Super.* 275, 279 (App. Div. 1979).

As to whether out-of-state records of a foreign corporation can be reached by a subpoena *duces tecum*, see *In re Subpoena Duces Tecum, Institutional Management Corp.*, 137 *N.J. Super.* 208, 216 (App. Div. 1975), holding that the criterion for determining the validity of such subpoenas is the same minimum-contacts test which governs the exercise of long-arm jurisdiction generally. Such records are subject to subpoena if the foreign corporation has such contacts with this state so that the "traditional notions of fair play and substantial justice" would not be offended by the exercise of compulsive process by the state. *Id.* (quoting *International Shoe Co. v. Washington*, 326 *U.S.* 310, 316 (1945)).

A challenge to the validity of a subpoena *duces tecum* is typically made by a motion to quash the subpoena. *R.* 1:9-2. In the case of a jury trial, a motion to quash should be made before the jury is empaneled and sworn. *Wasserstein v. Swern & Co.*, 84 *N.J. Super.* 1, 5 (App. Div. 1964).

In *State v. Weston*, 216 *N.J. Super.* 543, 545-48 (Law Div. 1986), the court held that a prosecutor seeking to obtain jail records should apply to the trial court for the subpoena *duces tecum*, and if a reasonable basis for the issuance of the subpoena is shown, the court may authorize it and require that the records first be examined by the court *in camera* to ensure that no information pertaining to defendant's trial strategy is revealed.

B. Confidential Investigative Files

It is this State's policy to vigorously protect the confidentiality of its investigative files. Nero v. Hyland, 76 N.J. 213, 224-25 (1978). In fact, "even inactive investigatory files may have to be kept confidential in order to convince citizens that they may safely confide in law enforcement officials." Id. at 225 (quoting Koch v. Department of Justice, 376 F. Supp. 313, 315 (D. D.C. 1974)). Investigative files and grand jury materials "are entitled to a greater degree of respect" in a civil proceeding, wherein the interest of the law enforcement agency in maintaining confidentiality is entitled to greater weight. Cashen v. Spann (I), 66 N.J. 541, 556, cert. denied, 423 U.S. 829 (1975). A request for information contained within an investigative file calls for a showing of more than mere desirability or convenience; it requires essentiality. Greenspan v. State, 174 N.J. Super. 332, 334-35 (App. Div. 1980). New Jersey courts are uniformly loath to force disclosure of law enforcement investigative files, particularly in the absence of a compelling and particularized need sufficient to override the government's interest in confidentiality. Cashen v. Spann (II), 77 N.J. 138, 142 (1978); State v. Milligan, 71 N.J. 373, 387 (1976); River Edge Savings & Loan Ass'n v. Hyland, 165 N.J. Super. 540, 544 (App. Div.), certif. denied 81 N.J. 58 (1979); State v. Mitchell, 164 N.J. Super. 198, 202 (App. Div. 1978); Doe v. Klein, 143 N.J. Super. 134, 141-143 (App. Div. 1976).

In the context of a citizen's request under the state "Right to Know" law and common law doctrine to examine investigative files of a county prosecutor, the New Jersey Supreme Court has restricted access to such confidential criminal investigation records. *Loigman v. Kimmelman*, 102 *N.J.* 98, 105-06 (1986). In *Moore v. Board of Freeholders*, 76 *N.J. Super.* 396, 407-08 (App. Div.), *mod.* 36 *N.J.* 26 (1962), the court, in holding that the plaintiffs had sufficient status to inspect and copy general public records of the county, but not confidential records of the prosecutor's office, explained that "records developed by the prosecutor's office in the course of investigating criminal activity, records which, if disclosed, would be detrimental to the public interest, should not be opened to inspection."

Where federal law provides the governing substantive law in a lawsuit, the federal common law of privileges governs. *E.g., Kelly v. City of San Jose*, 114 *F.R.D.* 653, 655 (N.D.Cal. 1987) (holding federal courts should look to interests behind state privileges as a matter of comity and adopting balancing test for official information privilege concerning information in police files). Where a federal civil action involves both federal and pendant state claims, and the asserted privilege is relevant to both claims, federal courts also appear to hold that privilege is governed by federal law. See Wm. T. Thompson Co. v. General Nutrician Corp., Inc., 671 F.2d 100, 103 (3d Cir. 1982); von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 141 (2d Cir.), cert. denied 481 U.S. 1015 (1987). But, as *Kelly* recognized, this is not to say that state privilege laws must be ignored. State law often protects important privacy interests, King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988), and a strong policy of comity between state and federal authority impels federal courts to recognize state privilege when possible without compromising federal substantive and procedural policy. Lora v. Board of Educ., 74 F.R.D. 565, 576 (E.D.N.Y. 1977); see also In re Hampers, 651 F.2d 19, 22 (1st Cir. 1981).

The same policy is respected by the United States Supreme Court. Douglas Oil Co. of Cal. v. Petrol Stops Northwest, 441 U.S. 211, 222-223 (1979). The public interest in keeping criminal investigation files is heightened if the criminal investigation is still in progress or is the subject of an imminent criminal prosecution. Flynn v. Church of Scientology Int'l, 116 F.R.D. 1, 5 (D.Mass. 1986); Jabraa v. Kelly, 75 F.R.D. 475, 493 (E.D.Mich. 1977); Shuttleworth v. City of Camden, 258 N.J. Super. 573, 585 (App. Div.), certif. denied 133 N.J. 429 (1992). However, that public interest cannot be disregarded simply because the principal investigation has apparently been concluded. Black v. Sheraton Corp. of Am., 564 F.2d 531, 546 (D.C.Cir. 1977). It has been repeatedly recognized that if investigatory files were made public after the completion of enforcement proceedings, future investigations would be seriously impaired because "'[f]ew persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings," and the investigative techniques would be disclosed to the public. Id. (quoting Aspin v. Department of Defense, 491 F.2d 24, 30 (D.C. Cir. 1973)).

Lower federal courts also generally recognize a "law enforcement" privilege, which is a qualified privilege established to prevent the disclosure of information that would be contrary to the public interest in effective law enforcement. *Tuite v. Henry*, 181 *F.R.D.* 175, 185 (D.D.C. 1998), *aff'd*, 203 *F.*3d 53 (D.C. Cir. 1999) ("By protecting relationships and values outside the courtroom, privileges demonstrate that even though the search for truth is of critical importance in the litigation process, it is not necessarily paramount to all other interests of society."); *Torres v. Kuzniasz*, 936 *F. Supp.* 1201, 1209 (D. N.J. 1996). The law enforcement privilege is one of a group of privileges, also including the government privilege, deliberative process privilege, and executive privilege, whose function is to protect "documents whose disclosure would seriously hamper the functions of government." *Siegfried v. City of Easton*, 146 *F.R.D.* 98, 101-02 (E.D.Pa. 1992); *Clark v. Township of Falls*, 124 *F.R.D.* 91, 92 (E.D.Pa. 1988); *Frankenhauser v. Rizzo*, 59 *F.R.D.* 339, 342 (E.D.Pa. 1973). These privileges are designed "to avoid the evils of 'government in a fishbowl.'" *Jupiter Painting Contracting Co. v. United States*, 87 *F.R.D.* 593, 597 (E.D.Pa. 1980).

Application of the law enforcement privilege requires a court to weigh the interest of the government ensuring the secrecy of the documents in question against the need of the adverse party to obtain the discovery. United States v. O'Neill, 619 F.2d 222, 227 (3d Cir. 1980); Torres, 936 F. Supp. at 1209; G-69 v. Degnan, 130 F.R.D. 326, 332 (D.N.J. 1990). In balancing whether the law enforcement privilege should be upheld with respect to internal police department files in civil rights lawsuits filed under 42 U.S.C. § 1983, the leading federal case, Frankenhauser v. Rizzo, recognized the need to balance "the public interest in the confidentiality of governmental information against the need of a litigant to obtain data, not otherwise available to him, with which to pursue a non-frivolous cause of action." 59 F.R.D. at 344. In that oft-cited case, Judge Becker recited ten factors to be considered in making that determination: (1) the degree to which disclosure will thwart governmental processes by discouraging citizens from providing the government with information; (2) the impact on those who have given information of having their identities disclosed; (3) the extent to which disclosure will chill governmental self-evaluation and consequent improvement; (4) whether the material sought constitutes factual data or evaluative summary; (5) whether the party seeking discovery is or may be a defendant in a criminal proceeding either pending or reasonably likely to follow; (6) whether the police investigation has been completed; (7) whether any internal disciplinary proceedings have resulted or may result from the investigation; (8) whether the plaintiff's suit has been brought in good faith and is not frivolous; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the material sought to the plaintiff's case. Frankenhauser, 59 F.R.D. at 344.

The law enforcement privilege preserves the integrity of law enforcement procedures and confidential sources, protects witnesses and law enforcement employees, safeguards the privacy of those under investigation, and prevents interference with future investigations. *Tuite*, 181 *F.R.D.* at 176-77; *Raphael v. Aetna Cas. & Sur. Co.*, 744 *F. Supp.* 71, 74 (S.D.N.Y. 1990). It also protects documents, the disclosure of which would reveal the evaluative processes in making discretionary prosecutorial decisions, would deter citizens from making complaints, and would compromise present and future criminal investigations and prosecution of wrongdoing. *Tuite*, 181 *F.R.D.* at 178-80.

It is well-settled that in camera review of documents sought to be protected from discovery is an appropriate means of evaluating a claim of privilege. *Borchers v. Commercial Union Assur. Co.*, 874 *F. Supp.* 78, 79 (S.D.N.Y. 1995). In the event that the court enters a turnover order, the State may move for a protective order pursuant to *R.* 3:13-3, requesting that discovery be provided with significant limitations and restrictions on dissemination to protect confidentiality.

C. Grand Jury Materials

Grand jury materials are protected from disclosure by the grand jury secrecy rule, R. 3:6-7. See Matter of Grand Jury Testimony, 124 N.J. 443, 449-50 (1991); Doe v. Klein, 143 N.J. Super. at 143. The party seeking disclosure of grand jury transcripts must establish "a strong showing of particularized need that outweighs the public interest in the secrecy of grand jury proceedings." State v. Doliner 96 N.J. 236, 241 (1984); see Matter of Grand Jury Testimony, 124 N.J. at 451; In the Matter of Allegations of Official Misconduct in the City of Elizabeth, 233 N.J.Super. 426, 433 (App. Div. 1989); State v. Arace Bros., 230 N.J.Super. 22, 28 (App. Div. 1989). The policy protected by the grand jury secrecy rule applies not only to information drawn from the transcripts of the grand jury proceedings, but also to anything which may reveal what occurred before the grand jury. United States v. Smith, 123 F.3d 140, 149 (3d Cir. 1997); In re Grand Jury Matter, 682 F.2d 61, 63 (3d Cir. 1982); United States v. Blackwell, 954 F. Supp. 944, 965 (D.N.J. 1997). This standard was adopted from the virtually identical test established for discovery of grand jury testimony pursuant to Fed.R.Cr.P. 6(e) in United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983), and Douglas Oil v. Petrol Stops, 441 U.S. at 211. The federal test provides that disclosure of grand jury material under Fed.R.Cr.P. 6(e) is permitted only where it is sought either "preliminarily to" or "in connection with" a judicial proceeding, and the applicant has demonstrated a particularized need for the requested material. Sells, 463 U.S. at 434. In Sells, the

Court noted that the standard for determining whether a movant has established need sufficient to outweigh the public interest in grand jury secrecy is "a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than others." 463 U.S. at 445; accord, Matter of Grand Jury Testimony, 124 N.J. at 451. This standard "seeks to reconcile the demands of justice with fundamental grand jury policy." Matter of Official Misconduct, 233 N.J. Super. at 433. Ultimate resolution of the conflict between the sound policy of secrecy of grand jury proceedings and the concept of liberal discovery in civil cases depends upon reconciliation of these competing values, which is best resolved by requiring applicants to demonstrate "compelling circumstances or need warranting disclosure of the grand jury minutes." Doe v. Klein, 143 N.J. Super. at 141-43. That is because the interests in preserving the confidentiality of the State's investigative files and the Grand Jury materials "are entitled to a greater degree of respect" in the context of a civil proceeding. Cashen v. Spann (I), 66 N.J. at 556 (balancing the interests of a civil litigant to obtain disclosure of an informant's identity). This showing of a particularized need must be made even when the grand jury whose transcripts are sought has concluded its proceedings. Douglas Oil, 441 U.S. at 222.

In United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958), the Supreme Court listed five public policy reasons that underlie the need for Grand Jury secrecy: (1) preventing the escape of those whose indictment may be contemplated; (2) ensuring free deliberations, and preventing those subject to indictment or their supporters from importuning the grand jurors; (3) preventing subornation of perjury or witness tampering; (4) encouraging disclosure by witnesses; and (5) protecting the innocent from exposure and from the expense of trial where there was no probability of guilt. In *State v. Doliner*, 96 *N.J.* at 247, the New Jersey Supreme Court recognized those five policy considerations that justify grand-jury secrecy.

Citing *Doliner* and applying these policies, the Court in *Matter of Grand Jury Testimony*, stated, "Because the grand jury ended its deliberations without returning any indictments, the first three of the five reasons for secrecy, which are related to the activities of an ongoing grandjury investigation . . . are no longer relevant." 124 *N.J.* at 455-56. It concluded, however, that because the grand jury there, unlike the grand jury in *Doliner*, returned a no-bill, the protection of those exonerated of criminal liability from the consequences of disclosure constitutes a significant basis for preserving the secrecy of the grand jury proceedings. *Id.* at 456. *See also Douglas Oil*, 441 *U.S.* at 222 (observing "courts must consider not only the immediate effects upon a particular grand jury, but also the possible effects upon the functioning of future grand juries," since "[f]ear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties").

In Doe v. Klein, a class of litigants, suing on behalf of patients at Greystone Park Psychiatric Hospital to enjoin employees of the hospital from violating plaintiffs' rights, moved to compel discovery of a transcript of testimony received by the grand jury that returned a number of indictments and a presentment criticizing Greystone management. 143 N.J. Super. at 136-37. The motion was denied on the grounds that the reputations of witnesses who had testified might be jeopardized and that the effectiveness of the grand jury system would be impaired if witnesses could not rely on the assurance that their testimony would remain secret. Id. at 139. The Appellate Division affirmed, finding that the plaintiffs had "failed to demonstrate compelling circumstances or need" sufficient to lift "the veil of secrecy accorded grand jury proceedings." Id. at 143.

A litigant in a federal civil action must, as a prerequisite, apply to the state judge supervising the State Grand Jury, as designated pursuant to *R*. 3:6-11(b) and *N.J.S.A.* 2B:22-5, for a court order and make a showing of particularized need to obtain grand jury materials. *Douglas Oil*, 441 *U.S.* at 225; *Socialist Workers Party v. Grubisic*, 619 *F.*2d 641, 644 (7th Cir. 1980) (holding comity dictates that federal courts defer action on disclosure requests until the litigant seeking disclosure shows that the state supervisory court has considered the request and has ruled on the continued need for secrecy).

State grand jury materials should be accorded at least the same degree of protection in federal courts that is provided to federal grand jury materials. *Socialist Workers Party v. Grubisic*, 619 *F.*2d at 643. Parties seeking grand jury transcripts under *Fed.R.Crim.P.* 6(e)(3)(C)(I) must show that the material they seek is necessary to avoid a possible injustice in another judicial proceeding, that the need for disclosure outweighs the need for continued secrecy, and that the request is tailored to cover only material needed. *Id.* at 644. The burden clearly rests on the applicant seeking disclosure to demonstrate that the need for disclosure outweighs the need for secrecy. *Douglas Oil,* 441 *U.S.* at 223; *In re Application of the United States for an Order Pursuant to the Provisions of Rule* 6(e), 505 *F. Supp.* 25, 26-27 (W.D.Pa. 1980) (an assertion that the testimony contained in the grand jury transcripts was relevant and useful in a civil action was not sufficient to counter the public policy of secrecy of grand jury proceedings).

D. Deliberative Process Privilege

A "deliberative process privilege" is a doctrine that allows the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). Although no statute or evidence rule expressly creates such a privilege, the New Jersey Supreme Court confirmed that a qualified deliberative process privilege exists in New Jersey to protect from disclosure administrative agency documents, which are predecisional, *i.e.*, those generated before the adoption of an agency's policy or decision, and deliberative in nature, containing opinions, recommendations, or advice about agency policies. *Id.* at 84-88. A state agency claiming the privilege bears the initial burden to demonstrate that the documents it seeks to shield are pre-decisional and deliberative in nature. Id. at 88. Once that is established, a presumption is created against disclosure. The burden then shifts to the party seeking disclosure to show a compelling need for disclosure that overrides the government's interest in non-disclosure. In this assessment, factors to be considered include the importance of the material to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies. Id.

Federal common law does not recognize a deliberative process privilege. *Scott v. Edinburg*, 101 *F. Supp.*2d 1017, 1021 (N.D. Ill. 2000).

E. Executive Privilege

The executive privilege, also known as the "official information" or "governmental" privilege, serves to prevent the disclosure of certain government information the disclosure of which would be contrary to the public interest in the effective performance of the executive branch. *Siegfried v. City of Easton*, 146 *F.R.D.* at 101; *Frankenhauser v. Rizzo*, 59 *F.R.D.* at 342. This qualified privilege belongs to the government, not the individual office holder, and therefore, must be asserted by the senior official. *Siegfried v. City of Easton*, 146 *F.R.D.* at 101. The privilege, which has been "sparingly recognized," requires the court to balance legitimate

concerns about disclosing information that could seriously hamper the operation of government against the interest of the applicant seeking disclosure. *Id.* at 101-02.

The privilege is expressed in this state's evidence rules at *N.J.R.E.* 515 (disclosure of "official information" of the State is precluded if found to be "harmful to the interests of the public") and in our statutes, in the identical *N.J.S.A.* 2A:84A-27.

F. Work-Product Privilege

In Hickman v. Taylor, 329 U.S. 495, 510 (1947), the Supreme Court recognized the work-product privilege, which prohibits "unwarranted inquiries into the files and the mental impressions of an attorney." New Jersey's work-product privilege, which is stated in stated in R. 4-10-2(c) and virtually mirrors Fed.R.Civ. P. 26(b)(3), requires that the party seeking discovery demonstrate a "substantial need of the materials in the preparation of the case" and an inability, "without undue hardship to obtain the substantial equivalent materials by other means." However, even after this showing is made, protection from disclosure is still afforded to mental impressions or legal theories. United States v. Gangi, 1 F. Supp.2d 256, 263 and n.4 (S.D.N.Y. 1998) (holding that a prosecution memorandum requesting approval for filing of proposed indictment was covered by workproduct privilege, as it set forth "the Government's legal theories, mental impressions, and thought processes" and was prepared in anticipation of litigation).

In *United States v. Nobles*, 422 *U.S.* 225, 238-39 (1975), the Supreme Court recognized that the attorney work-product privilege applies in federal criminal cases. Pursuant to *R.* 3:13-3(c), the privilege also applies to criminal cases in New Jersey.

See related attorney-client privilege which protects against disclosure of communications between client and attorney made in the course of the professional relationship. *N.J.R.E.* 504; *In re Advisory Opinion No.* 544 of the New Jersey Supreme Court Advisory Committee on Professional Ethics, 103 N.J. 399, 405 (1986).

V. TIMELINESS OF SUBPOENAS

Subpoenas compelling witnesses to testify at trial should be served at least five days before trial. *R.* 1:9-1. Subpoenas *duces tecum* should be served several weeks before trial so a motion to quash can also be made well before trial and to provide an opportunity for an

interlocutory appeal. *State v. Asherman*, 91 *N.J. Super.* 159, 163 (Cty. Ct. 1966). Whether the timing of service of process is reasonable depends on the circumstances of the case. In *State v. Zwillman*, 112 *N.J. Super.* 6, 14-15 (App. Div. 1970), *certif. denied*, 57 *N.J.* 603 (1971), the Appellate Division held that where a defendant had already started to testify at trial, a subpoena *duces tecum* served on him on a Sunday night requiring production of materials the following morning was unreasonable.

A subpoena *duces tecum* seeking records pertaining to fatal child abuse cases for the purpose of determining disproportionality in the event the death penalty was imposed, was held to be premature where the records were sought prior to the guilt phase of a capital trial. *State v. Bass*, 191 *N.J. Super.* 347, 351 (Law Div. 1983).

VI. ENFORCEMENT OF SUBPOENAS

A refusal to obey a subpoena or a subpoena *duces* tecum is punishable as contempt of court. N.J.S.A. 2A:81-15c; R. 1:9-5. Enforcement of subpoenas issued by public officers or agencies is governed by R. 1:9-6, which allows the issuing officer or agency to apply *ex parte* for such enforcement.

In *Hayes v. Gulli*, 175 *N.J. Super.* at 302-04, the court held that enforcement of subpoenas issued by the Office of Administrative Law may be sought pursuant to R. 1:9-6 without intervention of the agency for whom the hearing is being conducted.

As to the enforceability of investigative interrogatories served by the Attorney General under *N.J.S.A.* 2C:41-5, see *In re Doe*, 294 *N.J. Super.* 108 (Law Div. 1996), *aff'd*, 302 *N.J. Super.* 255 (App. Div.), *certif. denied*, 151 *N.J.* 468 (1997), *cert. denied*, 523 *U.S.* 1096 (1998). Regarding the enforcement of an investigative subpoena issued by an administrative agency to an outof-state resident and served in another jurisdiction, see *Silverman v. Berkson*, 141 *N.J.* at 412.

Substantive as well as jurisdictional challenges to the validity of a subpoena may be raised defensively in a *R*. 1:9-6 enforcement and sanction proceeding. *In re Vornado*, 159 *N.J. Super.* 32, 38-39 (App. Div.), *certif. denied*, 77 *N.J.* 489 (1978), held that allegations that a subpoena *duces tecum* issued by the Director of the Division of Civil Rights was overbroad in scope could be raised as a defense in an enforcement proceeding even if the issue was decided by the agency in response to a motion to quash.

VII. GRAND JURY SUBPOENAS (See also, GRAND JURY, this Digest)

The grand jury has broad investigative authority, and is afforded wide latitude in conducting investigations. *In re Grand Jury Investigation No. 2184-86*, 219 *N.J. Super.* 90, 92 (Law Div. 1987).

Under Fourth Amendment analysis, a subpoena *duces tecum* issued in aid of a grand jury investigation is reasonable without probable cause if it is "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *In re Addonizio*, 53 *N.J.* 107, 128 (1968) (quoting *See v. City of Seattle*, 387 *U.S.* 541, 544 (1967)). That same standard is applied in a challenge issued under New Jersey's racketeering statute, *N.J.S.A.* 2C:41-1 *et seq. In re Doe*, 294 *N.J. Super.* at 120. As with grand jury subpoenas, an unreasonably broad or overly burdensome administrative demand for documents may be set aside or modified. *Id.* at 119-20.

The tests of relevancy and materiality employed to determine the reasonableness of a subpoena duces tecum issued by a grand jury are less stringent than the standards used to test those issued for trials. To uphold the validity of the subpoena, the State need only establish (1) the existence of a grand jury investigation and (2) the nature and subject matter of that investigation. In re Grand Jury Subpoena Duces Tecum, 167 N.J. Super. 471, 472 (App. Div. 1979). The State may establish these elements by simple representation by counsel to the court; affidavits or other formal proofs are not required. To establish the relevancy of the documents Id. subpoenaed, the State need only show that the documents bear some possible relationship, however indirect, to the grand jury investigation. Id. at 473. See also In re Grand Jury Subpoena Duces Tecum, 143 N.J. Super. at 536-39 (holding that subpoenaed documents must bear some "possible" relationship to the matter being investigated, the descriptions of the materials must not be unreasonably vague and nonspecific, and the time period covered by the materials must be reasonable.

In *Grand Jury Investigation*, 219 *N.J. Super.* at 94, the Law Division held that a grand jury subpoena seeking fingerprints, palm prints, and handwriting exemplars from the target of an illegal gambling investigation was unreasonable in scope because it sought production of 2400 exemplars. The subpoena did not, however, violate the target's Fourth Amendment rights or his Fifth Amendment privilege against self-incrimination. *Id.* at 95.

In re Gail D., 217 *N.J. Super.* 226, 232 (App. Div. 1987), declined to recognize a novel claim of parentchild privilege as grounds for quashing grand jury subpoenas, which sought the testimony of two children whose father was the target of the investigation into the death of their mother. The court observed that "the adoption of a privilege restricting the flow of evidence is a substantial policy decision uniquely within the competence of the Supreme Court or the Legislature." *Id.*

VIII. RIGHT-TO-KNOW LAW

Where a party seeks to inspect public records for discovery purposes rather than for introduction at trial, the appropriate procedural method to be followed is an action in lieu of prerogative writ pursuant to *N.J.S.A.* 47:1A-4 of the Right-to-Know Law rather than the issuance of a subpoena *duces tecum* under *R.* 1:9-2. *Irval Realty v. Board of Pub. Util. Comm'rs* 115 *N.J. Super.* 338, 344-45 (App. Div. 1971), *aff'd*, 61 *N.J.* 366 (1972); *Bzozowski v. Penn-Reading Seashore Lines*, 107 *N.J. Super.* 467, 472-76 (Law Div. 1969).

Under either the Right-to-Know Law, *N.J.S.A.* 47:1A-1 *et seq.*, or common law theories of access to public records, the government entity may establish or request a court to establish reasonable time and place restrictions on the terms of the access. *Laufgas v. New Jersey Turnpike Auth.*, 156 *N.J.* 436, 440 (1998).

TERRORISTIC THREATS

A person is guilty of the crime of terroristic threats under *N.J.S.A.* 2C:12-3a if, with a purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, he or she threatens to commit a crime of violence or if he or she threatens to commit a crime of violence in reckless disregard of the risk of causing such terror or inconvenience. It does not matter whether the defendant actually intended to carry out the threat or the victim felt afraid as a result of the threat. *State v. Butterfoss*, 234 *N.J. Super.* 606, 612 (Law. Div. 1988).

Under N.J.S.A. 2C:12-3b, a person is guilty of terroristic threats if he or she threatens to kill another with a purpose to put the victim in imminent fear of death. The threat must be made under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out. The proofs must be assessed against an objective standard. Cesare v. Cesare, 154 N.J. 394, 402 (1998); State v. Smith, 262 N.J. Super. 487, 515 (App. Div.), certif. denied, 134 N.J. 476 (1993); State v. Nolan, 205 N.J. Super. 1 (App. Div. 1985). There need not be an "explicit threat to kill," however, if in light of the surrounding circumstances "a reasonable person in that situation would have felt fear." Cesare v. Cesare, 154 N.J. at 413-14 (following evidence sufficient to support finding that husband committed the crime of terroristic threats: husband's reference to having a "choice, which term he had used previously in context of a threat to kill his wife; his insistence, unusual after an argument, that she come up to the bedroom where the guns were kept; his prior threats, intimidation and abuse of their children); State v. Milano, 167 N.J. Super. 318, 322-23 (Law Div. 1979), aff'd, 172 N.J. Super. 361 (App. Div.), certif. denied, 84 N.J. 421 (1980). Thus, a defendant's prior acts of domestic violence against the victim are relevant and admissible in a prosecution for terroristic threats to show that the victim had reason to believe the defendant would carry out his threat. Cesare v. Cesare. 154 N.J. at 403; State v. Chenique-Puey, 145 N.J. 334, 342 (1996). A limiting instruction as to the evidence should be given upon request. State v. Chenique-Puey, 145 N.J. at 342; N.J.R.E. 105.

I. BREADTH, CONSOLIDATION AND GRADING OF OFFENSES

The theft statute broadly governs various thefts of property and services, by various means, and includes failure to make a required disposition, receipt of stolen property, and fencing stolen property. *N.J.S.A.* 2C:20-1 *et seq.*; *State v. Portuondo*, 277 *N.J. Super.* 337, 341-45 (App. Div. 1994) (holding that fencing is a crime with penalties and not just a harm with remedies). Aside from its breadth, the most significant change effectuated by the penal code is the consolidation of the theft offenses. The Legislature consolidated all theft offenses under *N.J.S.A.* 2C:20-2a.

The purpose of consolidation was to avoid the difficulties encountered under prior law which would permit a defendant charged with a theft by a particular method to be acquitted if the proofs demonstrated that the taking was actually committed by another method. See State v. Talley, 94 N.J. 385, 391 (1983). On the basis of consolidation, the Supreme Court in Talley reinstated the conviction of a defendant indicted for robbery. The State presented a case that defendant forced victims at gunpoint to turn over their wallets, while the defense presented a case that defendant deceived the victims into giving him money for herbal tea, which was misrepresented as marijuana. The Court noted that "[b]y virtue of the 'consolidation' provision of N.J.S.A. 2C:20-2a, a defendant charged with robbery is now on notice that . . . theft is within the four corners of the robbery indictment." Id. at 393. The specific kind of theft proven at trial need not have been considered by the grand jury. Ibid. However, the subject matter of the theft must relate to the harm protected against. State v. Freeman, 324 N.J. Super. 463, 470 (App. Div. 1999). In Talley, the security of the victims' money was the harm to be guarded against. Since theft is a necessarily included element of robbery, a conviction for theft must merge into the completed robbery. State v. Lawson, 217 N.J. Super. 47 (App. Div. 1987).

In *State v. Smith*, 136 *N.J.* 245 (1994), the Supreme Court of New Jersey held that where the State presented a case of a knife-point robbery of a cabdriver and where the defense presented a case of defendant simply absconding the cab without paying, resulting in a theft of services, the trial court need not instruct the jury on theft of services, since the harm to be guarded against was the theft of the cabdriver's money and not the theft of the

cab ride. N.J.S.A. 2C:20-2a only applies to the "involuntary transfer of the same property." To instruct the jury otherwise, would pervert the State's charging discretion. Where the State and defendant present different thefts, the trial court should analyze to see if the defendant's theft presentation is: 1) a lesser included offense; 2) or whether the subject matter of the theft relates to the harm protected against. Freeman, supra. Only if the theft is a lesser included or relates to the harm protected against should the trial court charge the jury with the theft in the defense presentation. Ibid. However, the trial court's instruction must first state that if the jury believes the defendant's version, defendant must be acquitted of the State's theft charges. Freeman, 324 N.J. Super. at 469.

With consolidation, the charges which would have been dismissed under prior law survive motions for acquittal. *In State v. Powell*, 182 *N.J. Super.* 386 (Law Div. 1981), a defendant indicted for receiving stolen property, *N.J.S.A.* 2C:20-7, was convicted of theft by unlawful taking, *N.J.S.A.* 2C:20-3a, when the proofs adduced at trial indicated that the defendant was actually the thief. *Id.* at 387-388.

N.J.S.A. 2C:20-2b sets forth the grading of the theft offenses, which is now mirrored in the shoplifting subsection. *N.J.S.A.* 2C:20-11 as amended by Pub. L. 2000, ch. 16, § 1 (effective April 28, 2000). Computer theft, *N.J.S.A.* 2C:20-23 et seq., and government benefits theft, *N.J.S.A.* 2C:20-35 et seq., are graded somewhat differently.

Where a defendant steals a motor vehicle which exceeds a certain value, he should be tried for the more serious second-degree crime based on the value deprived rather than the third-degree crime based on the nature of the property stolen. State v. Eure, 304 N.J. Super. 469 (App. Div.), certif. den., 152 N.J. 193 (1997). A similar analysis should apply to firearms, vessels, boats, horses, domestic companion animals or airplanes. N.J.S.A. 2C:20-2b(2)(b). Motor vehicle theft triggers penalties and mandatory motor vehicle license suspensions, which may be consecutive. N.J.S.A. 2C:20-2.1; State v. Eisenman, 153 N.J. 462, 477 (1998); State v. Black, 153 N.J. 438 (1998); State v. Rama, 298 N.J. Super. 339 (App. Div. 1997), aff'd o.b., 153 N.J. 162 (1998); but see State in the Interest of V.M., 279 N.J. Super. 535 (App. Div. 1995)(holding that mandatory penalties do not apply to a juvenile delinquent who is sentenced to a review period under N.J.S.A. 2A:4A-43b(1); State in the Interest of N.S., 272 N.J. Super. 492, 497 (Ch. Div. 1993)(same). Shoplifting three pieces of bubble gum was dismissed as a *de minimis* offense. *N.J.S.A.* 2C:2-11; *State v. Smith*, 195 *N.J. Super.* 468 (Law Div. 1984).

Theft of certain matter is not value sensitive. Theft of human remains is a second-degree crime. *N.J.S.A.* 2C:20-2b(1)(e) (effective May 3, 1999). Theft of a controlled dangerous substance is either a second or third-degree crime, depending on the weight of the substance. *Compare N.J.S.A.* 2C:20-2b(1)(c) with *N.J.S.A.* 2C:20-2b(2)(c). It is a third-degree crime to steal public records, research property, prescription blanks, and access devices. *N.J.S.A.* 2C:20-2b(2)(g), 2b(2)(I), 2b(2)(j), 2b(2)(k).

II. ELEMENTS

A. Generally

Property is broadly construed to include anything of value. N.J.S.A. 2C:20-1g; see, e.g., State v. Dixon, 114 N.J. 111, 114 (1989). Property of another is just that which does not belong to the actor alone. N.J.S.A. 2C:20-1h; State v. Mejia, 141 N.J. 475, 495 (1995). When the actor possesses a joint legal interest in the property deprived, his action constitutes theft when he is not privileged to infringe upon another's legal interest. *N.J.S.A.* 2C:20-1h. To deprive is to withhold permanently, or for a time which substantially devalues the property taken, or with a purpose to restore the property only upon compensation, or to dispose of the property such that it is unlikely to be recovered. N.J.S.A. 2C:20-1a. To obtain is to induce a transfer or purported transfer of a legal interest in property, or secure performance of a service. N.J.S.A. 2C:20-1f. Possession of stolen property may be gathered from the words or conduct of the suspect under the circumstances. State v. McCoy, 116 N.J. 293, 300-03 (1989).

Thefts should be indicted separately, because whether a theft is within a single scheme or course of conduct is an element. *State v. Childs*, 242 *N.J. Super.* 121, 131-32 (App. Div.), *certif. denied*, 127 *N.J.* 321 (1990). The court must instruct the jury to find which counts are part of one scheme or course of conduct and which are not. *Id.*

The amount of theft is an element of the offense which must be set forth in the indictment, but where a defendant does not challenge the sufficiency of the indictment below, a conviction that is supported by evidence at trial will be upheld. *State v. D'Amato*, 218 *N.J. Super.* 595 (App. Div. 1987), *certif. den.*, 110 *N.J.* 170 (1988). The trial court must instruct the jury regarding the amount of theft and the trier of fact must determine the amount involved in the theft. *N.J.S.A.* 2C:20-2b(4); *State v. Castaldo*, 271 *N.J. Super.* 254, 258 (App. Div. 1994); *State v. Burks*, 188 *N.J. Super.* 55, 60 (App. Div.), *certif. den.*, 93 *N.J.* 285 (1983). The amount of an attempted theft may be aggregated. *State v. Lindsey*, 245 *N.J. Super.* 466, 627-29 (App. Div. 1991). Attempted theft need not be charged in the indictment, but the jury must be instructed regarding attempt, and failure to do so results in reversal of the attempt counts. *Id.*

B. Theft from the Person

Where evidence demonstrated that the victim's purse was in her custody and control when stolen, the trial court's failure to instruct the jury that theft from the person, N.J.S.A. 2C:20-2b(2)(d), required the property to be in the custody and control of the victim was held to be harmless error. State v. Link, 197 N.J. Super. 615, 619 (App. Div. 1984), certif. den., 101 N.J. 234 (1985). A purse-snatching is, at this time, a theft and not a robbery. State v. Sein, 124 N.J. 209 (1991). The actor will be responsible for the value of all contents in the purse even though he has no knowledge of the contents. State v. Combariarti, 186 N.J. Super. 375 (Law Div.), aff'd, 192 N.J. Super. 131 (App. Div. 1983), certif. denied, 97 N.J. 694 (1984). The common law rule that unexplained possession of recently stolen property gives rise to an inference of knowledge that the property is stolen survives in the Code. State v. Alexander, 215 N.J. Super. 522 (App. Div. 1987); State v. Richardson, 208 N.J. Super. 399 (App. Div.), certif. denied, 105 N.J. 552 (1986).

An inoperable automobile remains movable property within the meaning of *N.J.S.A.* 2C:20-3, and the fact that tires have been removed does not mean that the property does not satisfy the statutory definition. *Richardson, supra.* Employing a juvenile in an automobile theft is a strict-liability second-degree crime which does not merge into the theft of the automobile. *N.J.S.A.* 2C:20-17.

C. Theft by Deception

While the intent to defraud is not an element of issuing bad checks, *N.J.S.A.* 2C:21-5, it is for theft by deception, *N.J.S.A.* 2C:20-4. *State v. Kelm*, 289 *N.J. Super.* 55 (App. Div.), *certif. den.*, 146 *N.J.* 68 (1996). Uttering a forged instrument merges into the theft by deception. *State v. Streater*, 233 *N.J. Super.* 537 (App. Div.), *certif. den.*, 117 *N.J.* 667 (1989); *State v. Alevras*, 213 *N.J. Super.* 331, 339-42 (App. Div. 1986)(merging bad check conviction, *N.J.S.A.* 2C:21-5, into theft by

deception conviction). The intent to defraud must be particularly instructed and molded to the facts of the case, especially a complex fraud. *State v. Damiano*, 322 *N.J. Super.* 22 (App. Div. 1999), *certif. den.*, 163 *N.J.* 396 (2000). Failure to do so resulted in reversal of 44 convictions. A deficient aggregation instruction provided another reason to reverse the convictions. *Id.*

Taking of money incident to a pyramid scheme is theft by deception. *State v. De Luzio*, 274 *N.J. Super.* 101, 118 (App. Div.), *aff'd in part*, 136 *N.J.* 363 (1993). Obtaining a loan on false documents and misrepresentation as to the status of liens on real estate pledged as collateral is theft by deception. *State v. Rodgers*, 230 *N.J. Super.* 593, 600-602 (App. Div.), *certif. den.*, 117 *N.J.* 54 (1989).

D. Theft by Extortion

N.J.S.A. 2C:20-5 proscribes theft by extortion. The elements "purposely threatens," "not substantially benefit the actor," and "materially harm another person" were found plain and unambiguous. *N.J.S.A.* 2C:20-5a, g; *State v. Roth,* 289 *N.J. Super.* 152, 162 (App. Div.), *certif. den.,* 146 *N.J.* 68 (1996). In *Roth,* the Appellate Division affirmed defendant's theft by extortion conviction for his threat to move to set aside a sheriff's sale of real estate, where he could not reasonably bid on the estate and where he had no interest in the estate (and thereby had no commercial nexus to the subject matter of the threat), unless the successful bidder paid him \$2,000. *Id.* at 158-62.

E. Receiving and Fencing Stolen Property

The common law rule that unexplained possession of recently stolen property gives rise to an inference of knowledge that the property is stolen survives in the Code. State v. Alexander, 215 N.J. Super. 522 (App. Div. 1987); State v. Richardson, 208 N.J. Super. 399 (App. Div.), certif. den., 105 N.J. 552 (1986). It is a crime under the code to knowingly bring movable property of another into the State believing it is probably stolen -this includes circumstances where defendant himself brings the property into the State. State v. Cole, 204 N.J. Super. 618 (App. Div. 1985). It is also criminal for a person to receive property of another, believing that it is probably stolen, even if the property was not stolen in fact. State v. Bujan, 274 N.J. Super. 132 (App. Div. 1994) (reinstating dismissal of theft charges regarding a sting operation in which defendants purchased pharmaceuticals they believed were stolen). Possession of another's access device raises an inference that it is

intended for an unlawful purpose. *N.J.S.A.* 2C:20-1.1 (effective January 24, 1997). Purchase of property at a price substantially below fair market value or without reasonably inquiring as to the property's authenticity, unless satisfactorily explained, provides an inference of knowledge that the property is stolen. *N.J.S.A.* 2C:20-7.1e(1), e(3). A merchant who fails to provide the usual indicia of ownership, unless satisfactorily explained, provides an inference that the property is stolen. *N.J.S.A.* 2C:20-7.1e(2).

Operating a facility for the sale of stolen automobile parts is a second-degree crime which also results in forfeiture of the privilege to operate a motor vehicle between three to five years. *N.J.S.A.* 2C:20-16. Leading an automobile theft network is a second-degree crime which does not merge with the object of the conspiracy. *N.J.S.A.* 2C:20-18.

F. Theft of Services

The Appellate Division interpreted this subsection to require the State to prove a verbal or physical act of deception or fraud. Merely accepting services which the defendant realizes he is not entitled to does not violate the statute. *State v. Kocen, 222 N.J. Super.* 517, 520 (App. Div. 1988).

This subsection is broadened to involve theft of any public service. *N.J.S.A.* 2C:20-8a. The Legislature extended inferences of an intent to defraud from tampering and possession of devices for service acquisition, disorderly persons offenses, to the crime of theft of services. *N.J.S.A.* 2C:20-8l superseding State v. Dixon, 114 N.J. 111, 120 (1989). The Appellate Division has given this amendment retroactive effect. State v. Swed, 255 N.J. Super. 228, 240 (App. Div. 1992). This effect did not violate due process. *Id.*

N.J.S.A. 2C:20-8k mandates an additional \$500 fine per offense in this subsection, and instructs the court to consider all remedial costs incurred by the victim in establishing restitution.

G. Theft by Failure to Make a Required Disposition

When the defendant is other than an officer or employee of a government or financial institution, to sustain a conviction for theft by failure to make required disposition the State must prove that the defendant obtained or retained property, failed to make the required payment as he knew the law required, and dealt with the property obtained as his own. *In re Hoerst*, 135 *N.J.* 98 (1994); *State v. Kelly*, 204 *N.J. Super.* 283 (App. Div. 1985), *certif. den.*, 103 *N.J.* 496-97 (1986). The fact that any payment or other disposition was made with a subsequently dishonored negotiable instrument is *prima facie* evidence of the actor's failure to make the required disposition, and the trier of fact may draw a permissive inference that the actor did not intend to make the required payment or other disposition. *N.J.S.A.* 2C:20-9. When the defendant is an officer or employee, there is a permissive inference that he knew of his obligation to make the disposition and that he dealt with property as his own if an audit revealed a shortage or falsification of accounts. *Id.*

It is especially important for the trial court in cases involving businesses in distress to distinguish between civil liability due to mismanagement, undercapitalization and efforts to ward off bankruptcy versus a criminal intent to defraud. *State v. Damiano*, 322 *N.J. Super.* 22, 36-42 (App. Div. 1999), *certif. den.*, 163 *N.J.* 396 (2000).

A conviction for failure to make a required disposition will not stand for a failure to collect sales tax by falsely listing a purchase of property as non-residents or taxexempt organizations, since the actor did not collect the tax and withhold it from the State. *State v. Altenberg*, 223 *N.J. Super.* 289, 297 (App. Div.), *aff'd o.b.*, 113 *N.J.* 508 (1988). Collecting the tax and withholding it from the State suffices for a conviction. *State v. Pescatore, 213 N.J. Super.* 22, 29 (App. Div. 1986), *aff'd o.b.*, 105 *N.J.* 441 (1987).

H. Unlawful Taking of a Means of Conveyance or Joyriding

This offense is subsumed by burglary. State v. Jijon, 264 N.J. Super. 405 (App. Div. 1993), aff'd o.b., 135 N.J. 471 (1994). The unlawful taking of a means of conveyance, N.J.S.A. 2C:20-10, is also a lesser included offense of theft of movable property, N.J.S.A. 2C:20-3, State v. Alexander, 215 N.J. Super. 522 (App. Div. 1987), and theft by failure to make a required disposition, N.J.S.A. 2C:20-9. State v. Dandy, 243 N.J. Super. 62, 64 (App. Div. 1990). Because theft requires an intent to deprive the owner of the property, there was no theft of a car under the terms of the insurance policy where the evidence demonstrated that the insuree's son borrowed the car merely for a joy ride. Meissner v. Aetna Cas. and Sur. Co., 195 N.J. Super. 462, 467-468 (Law Div. 1984).

I. Shoplifting and Theft from a Library Facility

Concealment of unpurchased property raises an inference of an intent to shoplift. N.J.S.A. 2C:20-11d; N.J.S.A. 2C:20-11a(6). Shoplifting includes purposeful concealment with the purpose of taking merchandise, State v. Smith, 195 N.J. Super. 468, 471 (Law Div. 1984), theft of merchandise, deprivation of merchandise from the merchant's benefit, purposeful alteration of merchandise prices coupled with an attempt to purchase the merchandise, purposeful under-ringing of merchandise, purposeful transfer of merchandise from one price display or container to a lower display or container coupled with an attempt to purchase the merchandise, or theft of a shopping cart. N.J.S.A. 2C:20-11b; N.J.S.A. 2C:20-11a(9). It is a disorderly persons offense to possess or use any anti-shoplifting or inventory control device countermeasure within any store. N.J.S.A. 2C:20-11f.

On August 28, 2000, the Attorney General issued uniformity guidelines for shoplifting prosecutions. *N.J.S.A.* 2C:20-11.1.

N.J.S.A. 2C:20-12 *et seq.* provides provisions analogous to shoplifting for library facilities, which are defined as any public library, or library of an educational, historical, or charitable institution, organization or society, or any museum.

J. Computer Theft

Jurisdiction for prosecution will lie if the location of the accessing computer, accessed computer, or actual damages occur in the State. *N.J.S.A.* 2C:20-34; *N.J.S.A.* 2C:1-3. Copying or altering a computer program that is less than \$1,000 is exempted from prosecution under this chapter and the chapter relating to forgery and fraud. *N.J.S.A.* 2C:20-33.

1. Access, alteration or damage without a value assessment

Unauthorized purposeful access of a computer without damaging or altering is a disorderly persons offense. *N.J.S.A.* 2C:20-32. Unauthorized purposeful access of a computer with a resulting disclosure of the contents of the computer, the value of which cannot be assessed, is a third-degree crime. *N.J.S.A.* 2C:20-31. Unauthorized purposeful access of a computer that alters or damages the computer or its contents, the value of which cannot be assessed, is a third-degree crime. *N.J.S.A.* 2C:20-30.

2. Access, alteration, damage or conversion

It is a crime to purposely or knowingly without authority alter or damage a computer or its contents, obtain property or services from the computer owner or a third party, or alter or obtain a financial instrument. *N.J.S.A.* 2C:20-25.

Computer damage may be assessed by fair market value, if there is a willing buyer and seller, or by the cost of the computer or its contents. N.J.S.A. 2C:20-24. It is a second-degree crime if the act causes more than \$75,000 in damage or substantially interrupts public services. It is a third-degree crime if the actor is reckless and causes more than \$75,000 in damage. N.J.S.A. 2C:20-26. It is a third-degree crime if the act causes more than \$500 and less than \$75,000 in damage. It is a fourth-degree crime if the actor is reckless. N.J.S.A. 2C:20-27. It is a fourth-degree crime if the act causes more than \$200 and less than \$500 in damage. It is a disorderly persons offense if the actor is reckless. It is a disorderly persons offense if the act causes less than \$200 in damage. It is a petty disorderly persons offense if the actor is reckless.

K. Government Benefits Theft

N.J.S.A. 2C:20-35 *et seq.* proscribes theft of certain government benefits. Purposely or knowingly and without authority taking, receiving, transferring, or converting more than \$150 of food stamp coupons is a fourth-degree crime. *N.J.S.A.* 2C:20-36. If it is less than \$150, it is a disorderly persons offense. *N.J.S.A.* 2C:20-37.

III. STORE AND LIBRARY FACILITY DETEN-TIONS

N.J.S.A. 2C:20-11e and 2C:20-14 permit law enforcement, special officers, merchants, or library personnel with objective probable cause, or wellgrounded suspicion, to detain or arrest a person. Carollo v. Supermarkets General, 251 N.J. Super. 264 (App. Div. 1991), certif. den., 127 N.J. 559 (1992); Pantalone v. Bally's Park Place, 228 N.J. Super. 121, 127-28 (App. The library subsection requires library Div. 1988). facilities to post a sign regarding reasonable detentions. *N.J.S.A.* 2C:20-15. A four-hour detention and interrogation of a 17-year old store employee for preparing fraudulent refund receipts does not fall within the privilege in N.J.S.A. 2C:20-11 permitting merchants to detain shoplifting suspects for investigation and protecting against malicious prosecution claims.

DeAngelis v. Jamesway Dept. Store, 205 N.J. Super. 519 (App. Div. 1985). A 30 to 45-minute detention is reasonable. Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 217 (App. Div. 1996); Henry v. Shopper's World, 200 N.J. Super. 14, 18-19 (App. Div. 1985). When there is probable cause for a merchant's agent to search a suspect, but the search reveals nothing, and the merchant thereafter prosecutes the suspect, the merchant is subject to a malicious prosecution lawsuit for prosecuting the suspect without probable cause, since the existence of probable cause was eliminated by the fruitless search. Horn v. Village Supermarkets, Inc., 260 N.J. Super. 165 (App. Div. 1992), certif. den., 133 N.J. 435 (1993).

IV. DEFENSES

It is an affirmative defense that the property deprived was not known to be that of another, *N.J.S.A.* 2C:20-2c(1); *N.J.S.A.* 2C:20-7.1d, but is a crime to purposely deprive the property of another where the identity of the owner is known. *N.J.S.A.* 2C:20-6.

It is an affirmative defense that the property deprived was subject to a claim of right. N.J.S.A. 2C:20-2c; *N.J.S.A.* 2C:20-7.1d. Failure to instruct the jury regarding this defense will result in reversal. State v. Ippolito, 287 N.J. Super. 375 (App. Div.)(reversing conviction of theft since defendant testified that codefendant informed him that defendant's boss "okayed" the removal of some lumber and the trial court failed to instruct the jury regarding the claim of right affirmative defense), certif. den., 144 N.J. 585 (1996). The defendant, however, must show that the property taken was his particular property, and not just property of another taken as leverage against defendant's property that is possessed by another. State v. Mejia, 141 N.J. 475, 496-97 (1995).

Theft from a spouse is not a defense. *N.J.S.A.* 2C:20-2d.

It is an affirmative defense to theft by extortion that the property obtained was claimed as restitution or indemnification for harm done in the circumstances or as lawful compensation for property or services. *N.J.S.A.* 2C:20-5.

It is an affirmative defense that the receipt of stolen property was with the purpose of restoring it to the owner. *N.J.S.A.* 2C:20-7a. Failure to instruct the jury regarding this defense will result in reversal. *State v. Underwood*, 286 *N.J. Super.* 129 (App. Div. 1995)(reversing conviction where defendant claimed that he borrowed his friend's car with an intent to return it, and the trial court failed to instruct the jury that defendant must be found guilty only if defendant formed the intent to deprive the owner and instead urged the jury not to worry about who stole the car and further failed to instruct the jury regarding the restoration affirmative defense).

TRESPASS AND DAMAGING TANGIBLE PROPERTY

I. TRESPASS

A. Scope of the Offense

1. Elements of criminal trespass under *N.J.S.A.* 2C:18-3a:

a. Entering or surreptitiously remaining in any structure or separately secured portion thereof.

b. Knowing that one is not licensed or privileged to do so.

2. Elements of defiant trespass under *N.J.S.A.* 2C:18-3b:

a. Entering or remaining in a place in which notice against trespass is given by actual communication, posting, or fencing.

b. Knowing that one is not licensed or privileged to do so.

3. Elements of peering under *N.J.S.A.* 2C:18-3c, effective January 31, 1997:

a. Peering into a window or other opening of a dwelling or other structure adapted for overnight accommodation with the purpose of invading the privacy of another person and under circumstances in which a reasonable person in the dwelling or other structure would not expect to be observed.

b. Knowing that one is not licensed or privileged to do so.

4. Caselaw

A municipal ordinance that bans signs does not apply to "no trespassing signs," since the ordinance unduly limits owner's trespass remedies. *Oliver v. United States*, 466 *U.S.* 170, 194, 104 *S.Ct.* 1735, 1750, 80 *L.Ed.*2d 214 (1984); *Dolecky v. Borough of Riverton*, 223 *N.J. Super.* 354 (Law Div. 1987).

B. Grading

Criminal trespass is a fourth-degree crime if committed in a structure, dwelling, research facility, or

on school property. *See N.J.S.A.* 2C:18-1 (defining structure); *N.J.S.A.* 2C:1-14p (defining research facility); *N.J.S.A.* 2C:35-7 (discussing school property). Otherwise, it is a disorderly persons offense. An unoccupied, essentially uninhabitable house without electricity or other utilities is not a dwelling for purposes of *N.J.S.A.* 2C:18-3a. The trial court's failure to define dwelling, and the lack of proof that the house was a dwelling, meant that defendant could not be convicted of fourth-degree criminal trespass. Rather, defendant had committed only a disorderly persons offense pursuant to the statute. *State v. Crutcher*, 313 *N.J. Super.* 203 (App. Div. 1998).

Defiant trespass is a petty disorderly persons offense. Defiant trespass is usually not a lesser included offense to unlicensed entry into a structure, especially as applied to a case where the evidence posited that defendant punched his fist through a glass door and forced his way into the dwelling. *State v. Braxton*, 330 *N.J. Super*. 561, 567 (App. Div. 2000).

C. Defenses

1. The structure was abandoned.

2. The structure was open to the public and the actor complied with all conditions.

3. The actor reasonably believed that he had license to remain or peer.

In State v. Santiago, 218 N.J. Super. 427 (Law Div. 1986), the trial court ruled that defendant, an inspector for the Department of Environmental Protection, could not be convicted of criminal trespass, N.J.S.A. 2C:18-3a, because the State failed to prove that she entered the property knowing she was not privileged to do so. Rather, because of statutory and administrative code authority for such entry, there existed reasonable doubt whether defendant realized she was not privileged to enter the premises and examine the company's records. However, where the belief is unreasonable, a trespass conviction will be affirmed. State v. Loce, 267 N.J. Super. (App. Div.), certif. den., 134 N.J. 563 10 (1993)(affirming trespass conviction to prevent an abortion); State v. Guice, 262 N.J. Super. 607 (Law Div. 1993)(affirming trespass conviction to distribute political literature and speak with students at Stevens Institute of Technology).

School authorities may sign a criminal complaint for defiant trespass against an eighteen-year old student who

returned to the school building for no apparent purpose, following actual notice by the principal to leave the premises; the affirmative defense was unavailable to defendant since his claim of license was unreasonable. *State v. Conk*, 180 *N.J. Super*. 140, 145-46 (App. Div. 1981).

The criminal trespass statute should not be used to prosecute persons who occupy premises pursuant to a claim of right, *i.e.*, a delinquent taxpayer or a month-to-month tenant. The purpose of the statute is to protect the actual possession of real estate from unlawful and forcible invasion. *State v. Pierce*, 175 *N.J. Super.* 149, 153-154 (Law Div. 1980).

Where defendants' municipal court convictions for defiant trespass were reversed in a trial *de novo* on the basis that defendants were not guilty of violating the statute because they were exercising their constitutional rights to engage in expressional activities on private property open to public use, *see State v. Schmid*, 84 *N.J.* 535 (1980), *appeal dismissed sub nom., Princeton Univ. v. Schmid*, 455 *U.S.* 100, 102 *S.Ct.* 867, 70 *L.Ed.*2d 855 (1981), the State is precluded from appeal of defendants' acquittal on principles of double jeopardy. *State v. Gerstmann*, 198 *N.J. Super.* 174, 181 (App. Div. 1985).

In *Schmid*, *supra*, the Supreme Court of New Jersey balanced the constitutionally guaranteed right of expression against the rights associated with the private ownership of property. The court noted that "private property does not 'lose' its private character merely because the public is generally invited to use it for designated purposes." The court therefore adopted a "sliding scale," finding that the "more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property." To determine the character of the property, the Court established criteria which include: (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

If, however, the general public is not invited to use the property, or it is not devoted to any public use, then the private owner is protected against "unwanted expressional activity." *See Bellemead Dev. Corp. v. Schneider*, 196 *N.J. Super.* 571 (App. Div. 1984), *aff'g* 193 *N.J. Super.* 85 (Ch. Div. 1983), *certif. den.*, 101 *N.J.* 210 (1985) (where court enjoined the distribution of leaflets to office workers by a union organizer at building entrances at the Meadowlands Corporate Center -- a development office building, warehouse, a motel, an automobile dealer and an athletic club); State v. Brown, 212 N.J. Super. 61 (App. Div. 1986), certif. den., 107 N.J. 53 (1987) (private office complex not devoted to public use; tenants, including an abortion clinic, and their invitees, were there by special invitation); State v. Guice, 262 N.J. Super. 607 (Law Div. 1993)(affirming municipal convictions for defiant trespass of defendants who sought to distribute political literature and speak with students at Stevens Institute of Technology and factually rejecting mistake of law and ignorance of law defenses); compare New Jersey Coal'n Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994), cert. den., 516 U.S. 812, 116 S.Ct. 62, 133 L.Ed.2d 25 (1995)(holding that regional shopping centers must permit right of expression on societal issues subject to reasonable restrictions).

In Airport Comm'rs of L.A. v. Jews for Jesus, 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987), the United States Supreme Court rejected as constitutionally overbroad a resolution banning all First Amendment activities at an airport. In International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992), the Court held that an airport must provide reasonable regulations of free expression that relate to its legitimate interest in providing efficient airport services. A post office must also provide reasonable regulations. United States v. Kokinda, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990); Paff v. Kaltenbach, 204 F.3d 425 (3d Cir. 2000).

In United States v. Albertini, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985), the Court found no First Amendment violation in a case where defendants were charged with illegal reentry onto a military base after receiving a letter from the base commander barring reentry. The Court recognized, however, that where a portion of a military base constitutes a public forum because the military has abandoned the right to exclude civilian traffic, thereby relinquishing any claim of special interest in regulating expression, a person may not be excluded from that area and barred from exercising protected First Amendment activity.

In *State v. Slobin*, 294 *N.J. Super.* 154 (App. Div. 1996), the Appellate Division held that the common-law right of property owners, in this case a casino, to exclude disruptive patrons who threaten the security of the premises and its occupants, or is disorderly or

intoxicated, is not limited to a *per se* 24-hour period. The language of *N.J.S.A.* 5:12-1 to 210 codifies this common-law right. This opinion limits the scope of the opinion in *State v. Morse*, 276 *N.J. Super.* 129 (Law Div. 1994).

II. DAMAGING TANGIBLE PROPERTY

A. Scope of the Offense

1. Elements of damaging tangible property under *N.J.S.A.* 2C:18-5:

a. Knowingly or recklessly;

b. Damaging tangible property, including any fence, building, feedstocks, crops, trees, or animals;

c. On the lands of another;

d. Without obtaining written permission of the owner, occupant or lessee of the lands and possessing such written permission while traversing the land.

2. Definitions

a. Land is defined as any agricultural field devoted to the production of plants and animals for sale or any field in agricultural use where public notice prohibiting trespass is given by actual communication, posting, or fencing. *N.J.S.A.* 2C:18-4.

3. Grading of the offense depends upon the amount of pecuniary damage to the property. *N.J.S.A.* 2C:18-6.

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES

I. PURPOSE OF THE ACT

The Uniform Act to Secure the Attendance of Witnesses (*N.J.S.A.* 2A:81-18 to 23) provides a procedure whereby a resident of New Jersey may be compelled to appear as a witness in a criminal prosecution in another jurisdiction and a non-resident may be compelled to appear as a witness in a New Jersey criminal prosecution. *In re Saperstein,* 30 *N.J.Super.* 373, 379-80 (App. Div.), *certif. denied,* 15 *N.J.* 613, *cert. denied,* 348 *U.S.* 874 (1954); *see Silverman v. Berkson,* 140 *N.J.* 412, 426, *cert. denied,* 516 *U.S.* 975 (1995). The underlying belief is that the law is entitled to every person's evidence. *State v. Roman,* 248 *N.J.Super.* 144, 150 (App. Div. 1991).

All 50 States as well as the District of Columbia, Puerto Rico and the Virgin Islands have enacted the Uniform Act. It is to be construed liberally to achieve its aims. *In re State Grand Jury Investigation into Corrup. in Lindenwold*, 136 *N.J.Super.* 163, 169 (App. Div. 1975).

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II. SCOPE AND OPERATION OF THE ACT
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The remedy of compulsory process under the Act's provisions is equally available to the State and defendant. *In re Cooper,* 127 *N.J.L.* 312 (Sup. Ct. 1941).

A determination that a witness is "material and necessary," that his or her production will not cause "undue hardship," and that the laws of the requesting state and states through which he or she must pass en route grant immunity from "arrest and the service of civil and criminal process," are prerequisites to issuing the summons. *N.J.S.A.* 2C:81-19; *New York v. O'Neill*, 359 *U.S.* 1, 4 (1959); *In re Cooper*, 127 *N.J.L.* at 313. A witness also can be "material" for grand jury purposes. *See In re State Grand Jury Investigation*, 242 *N.J.Super.* 281, 286-87 (App. Div.), *certif. denied*, 127 *N.J.* 324 (1990). The burden of proof that a witness is "material and necessary" rests upon the party seeking the testimony of that witness. *State v. Smith*, 87 *N.J.Super.* 98, 103 (App. Div. 1965).

The Act may be used to compel the production of documents as well as testimony. In *In re Saperstein, supra,* a New Jersey resident directed to appear as a witness in a criminal proceeding in New York objected to that portion of the order requiring him to produce books and

records in his possession. The court interpreted the term "subpoena" as used in the Act to include "subpoena *duces tecum*," and affirmed the order. Moreover, the statutory protection afforded to persons during appearances as a witness also apply to property the witness produces under a subpoena *duces tecum*. See also In re Grand Jury Investigation into Corrup. in Lindenwold, 136 N.J.Super. at 169-71 (affirming order requiring production of a New York law firm's records; nothing warranted disturbing trial judge's determination of materiality of records to an ongoing New Jersey Grand Jury investigation into possible municipal corruption).

A person entering New Jersey in obedience to a summons issued pursuant to the Act compelling his or her appearance in this State, or passing through the State to appear in obedience to such a summons as a witness in another state, is granted immunity from arrest or service of civil or criminal process in connection with matters which arose before his or her entrance into this State. *N.J.S.A.* 2A:81-21; *but see State v. Seefeldt,* 51 *N.J.* 472, 492-93 (1968) (immunity unavailable to one who reenters State voluntarily, rather than pursuant to summons issued in accordance with Act); *In re Subpoena Duces Tecum Inst. Management Corp.,* 137 *N.J.Super.* 208, 211-15 (App. Div. 1975); *In re Schuler,* 120 *N.J.Super.* 79, 83 (App. Div. 1972) (same).

As to the availability of witnesses, the Act provides a process for criminal defendants to exercise their constitutional right to produce witnesses, without jurisdictional proscription, if they are material and their address is known. Prosecutors must exercise good faith diligence in ascertaining a witness' whereabouts, even if that witness is a DEA informant and disclosing their address would raise "some safety concerns." State v. Farquharson, 280 N.J.Super. 239, 248-50, 253 (App. Div.), certif. denied, 142 N.J. 517 (1995); see also State v. Roman, 248 N.J.Super. at 147-49 (Act, which is drafted to deal with defiant witnesses, also applies to child witnesses; prosecutor cannot simply state that such witnesses are out-of-state, and thereby have admitted against defendant their hearsay statements, without exercising due diligence to locate them).

Furthermore, a witness who testified at defendant's first trial was not unavailable within the meaning of former *Evidence R.* 62(6) because the State did not invoke the Uniform Act's provisions to gain his attendance. Thus, the State should not have been permitted to read that witness' testimony at the retrial, and the error was not harmless since it deprived defendant of his confrontation right. *State v. Hamilton,* 217 *N.J.Super.*

51, 54-56 (App. Div.), *certif. denied*, 108 *N.J.* 581 (1987). In 1991 the Supreme Court of New Jersey replaced *Evidence R.* 62 with *N.J.R.E.* 801, the latter of which omitted any definition of the term "unavailable as a witness."

An order denying an application under the Act to compel witnesses to testify in a sister State is appealable. *State of New Jersey v. Bardoff*, 92 *A.D.*2d 890, 459 *N.Y.S.*2d 878, 879 (N.Y. App. Div. 1983).

VENUE

I. GENERAL PRINCIPLES

Generally, an offense must be prosecuted in the county in which it was committed. See R. 3:14-1 for rule and exceptions. Venue is not a jurisdictional matter and the improper laying of venue is not of constitutional dimension, but rather is a defect in the institution of proceedings which must be raised by pretrial motion or may be deemed to have been waived. State v. DiPaolo, 34 N.J. 279 (1961), cert. denied 368 U.S. 880 (1961); State v. Greco, 29 N.J. 94, 103-105 (1959); State v. Zicarelli, 122 N.J. Super. 225, 233-234 (App. Div. 1973), certif. denied 63 N.J. 252 (1973), cert. denied 414 U.S. 875 (1973); State v. Schultheis, 113 N.J. Super. 11, 19 (App. Div. 1971), certif. denied 58 N.J. 390 (1971); State v. Seaman, 114 N.J. Super. 19, 32 (App. Div. 1971), certif. denied 58 N.J. 594 (1971), cert. denied 404 U.S. 115 (1972). See also N.J.S.A. 2C:1-14h,e ("elements of an offense" defined, in relevant part, as a result of conduct that [e]stablishes jurisdiction or venue).

II. MOTIONS FOR CHANGE OF VENUE

A motion for change of venue may be made only by a defendant. *R.* 3:14-2. In a non-capital case, such motions are governed by the standard set forth in *State v. Wise*, 19 *N.J.* 59, 73 (1955). The test is whether an impartial jury could be obtained from among the citizens of the county or whether they are so aroused that they would not be qualified to sit as a jury to try the case. To merit a change of venue the evidence submitted must be "clear and convincing proof that a fair and impartial trial cannot be had before a jury of the county in which the indictment was found." *Id.* at 73-74.

In a capital case, the standard under Wise, supra, is not controlling. In State v. Biegenwald, 106 N.J. 13 (1987), the Supreme Court articulated that a change of venue will be granted when it is necessary to overcome the realistic likelihood of prejudice from pretrial publicity. To assist trial courts in the determination of whether a realistic likelihood or prejudice exists in particular cases, the court adopted the federal court distinction between cases in which the trial atmosphere is so corrupted by publicity, while extensive, is not as intrusive, thereby making the determinative issue the actual effect of the publicity on the impartiality of the jury panel. See also State v. Bey (I), 96 N.J. 625, 630 (1984); State v. Williams (I), 93 N.J. 39, 67-68 n.13 (1988). "When there is a reasonable likelihood that the trial of a capital case will be surrounded by presumptively prejudicial media

publicity, the court should transfer the case to another county. *State v. Harris*, 156 *N.J.* 122, 133 (1998).

Generally, where there is a realistic likelihood that the jury would be subjected to adverse trial publicity, an acceptable alternative to a change of venue is the impanelment of foreign jurors. *State v. Williams*, 93 *N.J.* 39, 67 n. 13 (1983). In a capital prosecution, however, a court should change the venue rather than empanel a foreign jury "when there is a realistic likelihood that presumptively prejudicial publicity will continue during the conduct of a trial." *State v. Harris*, 156 *N.J.* at 146-147.

In determining whether to grant a motion for change of venue, a trial court should analyze the publicity in accordance with the five factors articulated in *State v. Koedatich*, 112 *N.J.* 225, 271 (1988): 1) the nature and extent of the news coverage; 2) the nature and gravity of the offense; 3) the size of the community; 4) the respective standing of the deceased and the accused; 5) presence of any community hostility. *Accord, State v. Timmendequas*, 161 *N.J.* 515, 551-552 (1999); *State v. Koedatich, supra*, 112 *N.J.* at 282 (1988).

In selecting the source from which to draw a foreign jury, if the trial court exercises this option, the trial court should consider racial demographics together with other relevant factors including, but not limited to: the nature and extent of pretrial publicity; the relative burdens of courts in changing source of jury; the hardship to jurors in traveling from home county to site of trial; and the burden on the court in transporting jurors. *State v. Harris*, 282 *N.J. Super.* 409 (App. Div. 1995). Racial demographics should be a particularly weighty factor in selecting the source of a foreign jury when the victim and defendant belong to different races. *Id.* at 419-420.

Another factor in the change of venue analysis is the interplay with the Victim's Rights Amendment. *See State v. Timmendequas*, 161 *N.J.* at 554-556 (the burden to a murder victim's parents from a change of venue justified decision not to change venue, but to empanel a foreign jury).

III. STATE GRAND JURY MATTERS

An indictment by a State grand jury is returned to the assignment judge designated by the Chief Justice to impanel the grand jury without designation of venue. The assignment judge thereupon designates the county of venue for purpose of trial. *N.J.S.A.* 2B:22-7, superceding *N.J.S.A.* 2A:73A-8; *see R.* 3:6-11.

After an indictment has been allocated to a county for trial, all issues relating to venue, including a motion to change venue, must be addressed again to the assignment judge designated to impanel the State grand jury and not to the trial judge. *State v. Mullen,* 126 *N.J. Super.* 255 (App. Div. 1973), *certif. denied* 63 *N.J.* 252 (1973), *cert. denied* 414 *U.S.* 875 (1973).

I. GENERALLY

In New Jersey, a constitutional amendment was adopted in 1991, and amended in 1997, which requires that victims of crime be treated with "fairness, compassion and respect by the criminal justice system." In July, 1985, the "Crime Victims' Bill of Rights" (N.J.S.A. 52:4B-34 to 38) was signed into law. The "Drunk Driving Victims' Bill of Rights" (N.J.S.A. 39:4-50.9 to 13) was signed into law in January, 1986. These statutes together generally enumerate the rights of victims in the criminal justice system. Among some of the rights provided to victims by these laws are: the right to be notified of the status of the case; the right to be informed about the availability of compensation and social services; the right to be free from intimidation; the right to the prompt return of property; the right to secure waiting areas in courthouses; the right to have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible; and the right to be treated with dignity and compassion by the criminal justice system.

II. SERVICES THAT MUST BE PROVIDED TO THE VICTIM

In 1988, the Attorney General Standards to Ensure the Rights of Crime Victims was issued, pursuant to N.J.S.A. 52:4B-44. These Guidelines, revised in 1993, require law enforcement agencies to provide certain services to victims upon their request during the investigation and the prosecution of criminal cases.

In *State in the Interest of J.G., N.S. and J.T.*, 151 *N.J.* 565 (1997), the Supreme Court upheld *N.J.S.A.* 52:4B-44c, which gives the victim of an aggravated sexual assault or sexual assault the right to request that the accused offender be tested for acquired immune deficiency syndrome (AIDS) or infection with the human immunodeficiency virus (HIV). The *J.G.* Court also found that the victim had an obligation to show that there was probable cause to believe that there was an exchange of bodily fluids. Furthermore, the Court stated that the results of the AIDS or HIV test could not be used against the accused offender in a criminal prosecution.

In *State v. Timmendequas,* 161 *N.J.* 515 (1999), the Supreme Court found that the Victim's Rights Amendment entitled a victim to attend the trial and to

have inconveniences associated with attending the trial minimized.

Other services that must be provided to the victim under N.J.S.A. 52:4B-44 are: providing the victim with information about the criminal justice process; notifying the victim of any change in the status of the case and the final disposition of the case; information regarding available services for the victim; advance notification of arraignment dates, terms of any plea agreements, and the trial and sentencing of the accused. Further, the prosecutor's office is obligated to provide advance notification that the victim's presence is not needed in court; notification regarding available assistance, and in applying for services to aid in physical and emotional recovery; a waiting area which is separate from the defendant during court proceedings; an escort for intimidated victims/witnesses for court appearances; general information concerning the location of the courts and parking facilities, services to meet the special needs of the victim, and child care and transportation arrangements for the victim. Services must also include notification of a victim's or witness' employer if their participation in the trial causes them to be absent from work; notifying the victim of the final disposition of the trial and sentencing; the right to have their property returned expeditiously when the property is no longer needed as evidence; assisting victims in submitting a written impact statement to the prosecutor's office before the prosecutor accepts a negotiated plea agreement; notifying the victim of defendant's release from custody; and providing interpretive services for victims or witnesses who is hearing impaired or developmentally disabled.

III. VICTIM IMPACT STATEMENTS

N.J.S.A. 52:4B-36m and *N.J.S.A.* 52:4B-44b(15) provide for a victim to submit a written impact statement to the prosecutor's office which will be considered by the prosecutor in determining if criminal charges will be filed.

Additionally, *N.J.S.A.* 52:4B-44b(16) permits victims of capital and non-capital crimes to submit an impact statement which will be included with presentence report or will be reviewed by the parole board during the defendant's parole hearing. *(See also,* **HOMICIDE**, this Digest, discussing the Death Penalty.)

Furthermore, *N.J.S.A.* 52:4B-36n and *N.J.S.A.* 4B-44b(17) allow a victim of capital and non-capital crimes

to make an in-person impact statement directly to the court prior to sentencing. The in-person statement is permitted to be made even if the victim had already submitted a statement that was included in the presentence report pursuant to *N.J.S.A.* 2C:44-6.

I. DEFINITION

Voiceprint analysis is a method of sound identification which utilizes the spectrograph machine. This machine decomposes the sound of the human voice into frequency components which are graphically recorded, thus producing the spectrogram or voiceprint. Voiceprints are then compared by persons trained in the use of the method for possible identification purposes. Although the machine was invented during World War II, it was not until the 1960's that Lawrence Kersta conducted experiments in spectrography at Bell Telephone Laboratories which convinced him that there were unique characteristics of each person's voice which could be used for reliable identification of individuals by spectrograms. *State v. Andretta*, 61 *N.J.* 544 (1972); *D'Arc v. D'Arc*, 157 *N.J. Super.* 553 (Ch. Div. 1978).

II. NON-PRIVILEGED

The State may compel a criminal defendant to speak for a voiceprint test. *State v. Andretta*, 61 *N.J.* 544 (1972); *State v. Cary*, 49 *N.J.* 343 (1967).

III. ADMISSIBILITY

The results of the test will not be admitted into evidence until the trial judge holds a pre-trial hearing "to determine whether any identification arrived at through the use of this method is sufficiently reliable to be admissible in light of the proofs which will be adduced as to what the test shows, and such cross-examination of the State's experts and such opposing proofs as defendants may be able to offer." *State v. Andretta*, 61 *N.J.* 544, 551-552 (1972); *State v. Cary*, 49 *N.J.* 343 (1967).

In *Windmere, Inc. v. International Ins. Co.*, 105 *N.J.* 373 (1987), the Supreme Court held that adherence to our rules for determining the reliability of scientific evidence precluded the admissibility of voiceprints into evidence as reliable scientific tools for determining the identity of a human voice on the record presented. Each of the criteria for establishing the reliability of a scientific device was impugned with respect to voiceprints. It could not be said that there was general acceptance within the relevant scientific community. Authoritative scientific literature was in disarray and did not demonstrate that there was any measure of universal acceptance of the spectrograph's reliability. There was no general judicial acceptance of voiceprint analysis.

However, the Court observed "[w]hile in this case the voiceprint evidence should not have been admitted, its future use as a reasonably reliable scientific method may not be precluded forever if more thorough proofs as to reliability are introduced in other litigation." *Id.* at 386.

Improper admission of voiceprint evidence in criminal or civil trial can constitute harmless error if it was merely cumulative and not decisive of guilt. *Windmere, Inc. v. International Ins. Co.*, 105 *N.J.* 373 (1987).

WEAPONS

Chapter 39 of the Code of Criminal Justice (Code) sets forth various crimes relating to weapon possession, use and disposition, as well as pertinent definitions. Several subsections have not been subject to published judicial interpretation, including N.J.S.A. 2C:39-12, which provides for voluntary surrender of firearms, weapons and other instruments; N.J.S.A. 2C:39-13, which prohibits persons engaged in certain crimes to wear bullet-resistant body vests; N.J.S.A. 2C:39-14, which prohibits instruction in the use or making of firearms, explosions and destructive devices; N.J.S.A. 2C:39-15, which prohibits advertising the sale of a machine gun, semiautomatic rifle or assault firearm without specifying that the purchaser must hold a license; and N.J.S.A. 2C:39-16 which defines the crime of "leader of a firearms trafficking network" and prescribes penalties therefor. See also chapter 58 of the Code for the statutory subsections relating to the licensing of firearms and to N.J.S.A. 2C:39-10 for the penalties relating to violations of that chapter.

I. DEFINITIONS (N.J.S.A. 2C:39-1)

N.J.S.A. 2C:39-1 sets forth various definitions that apply in chapters 39 and 58 of the Code. *See also N.J.S.A.* 2C:11-1 (criminal homicide) and *N.J.S.A.* 2C:43-7.2d (No Early Release Act), which define "deadly weapon," and *N.J.S.A.* 2C:2-1, which defines "possession."

A. Constitutionality

Coalition of New Jersey Sportsmen v. Whitman, 44 F. Supp.2d 666 (D.N.J. 1999). The Federal District Court granted the State's motion for summary judgment and denied the Coalition's challenge to the constitutionality of New Jersey's assault firearms act, N.J.S.A. 2C:39-1, et seq. The court determined that the assault firearms law was not vague on its face and refrained from deciding if it was vague as applied, leaving the resolution of that issue for the state courts on a case-by-case basis. The court further ruled that the assault weapons law did not violate equal protection, the freedom of association, or the freedom of speech, and did not constitute a bill of attainder. See also, State v. Auringer, 335 N.J. Super. 94 (App. Div. 2000) (discussing federal Gun Control Act of 1968 vis-a-vis New Jersey weapons statutes); State v. Rackis, 333 N.J. Super. 332 (App. Div. 2000) (holding federal statutes concerning imitation firearms not preempt New Jersey statutes criminalizing carrying a BB gun without a permit).

State v. Warriner, 322 N.J. Super. 401 (App. Div. 1999), held that N.J.S.A. 2C:39-1w(1), listing "M1 carbine type" as an illegal assault weapon was not unconstitutionally vague, either facially or as applied, and reversed the trial court's dismissal of the indictment charging defendant with unlawful possession of an assault firearm under N.J.S.A. 2C:39-5f.

B. Firearms Generally

N.J.S.A. 2C:39-1f defines a firearm, in part, as any gun capable of firing a projectile, vapor or other noxious thing.

1. Operability (*N.J.S.A.* 2C:39-1)

In *State v. Elrose*, 277 *N.J. Super.* 548 (App. Div. 1994), defendant was convicted of unlawful possession of assault firearms and unlawful possession of large capacity ammunition magazine. The Appellate Division affirmed the convictions and held that (1) showing that firearms had been rendered "inoperable" within meaning of statute did not prevent conviction where defendant failed to file required certificate of inoperability; (2) conviction for possession of assault firearm did not require that State prove that weapon was "operable" and (3) conviction for unlawful possession of large capacity ammunition magazine was supported by evidence that at least three of the magazines contained more than 15 rounds, even if all of them did not.

State v. Orlando, 269 *N.J. Super.* 116 (App. Div. 1993), *certif. denied*, 136 *N.J.* 30 (1994), held there was sufficient evidence that a shotgun met statutory definition of "firearm" to support weapon convictions, even though gun was allegedly inoperable because barrel was stuffed with wooden dowel and lacked a firing pin.

State v. Harris & Formato, 218 N.J. Super. 251 (Law Div. 1986). Prior to enactment of N.J.S.A. 2C:39-1r(4) and N.J.S.A. 2C:39-3h stun guns were not expressly defined as weapons, and the possession of stun guns was not specifically prohibited under the Code. The trial court found the unamended statute unconstitutionally vague as applied to a defendant indicted for unlawful possession of a stun gun under N.J.S.A. 2C:39-5d and unlicenced disposition of a stun gun under N.J.S.A. 2C:39-9d. According to the court, the Legislature's subsequent prohibition of stun guns was not a clarification of the weapons provisions of the Code, but a broadening of the legislative scheme for weapons control. Consequently, the defendant, who was indicted

before the relevant amendments became effective, had no fair notice that his possession and transfer of a stun gun was forbidden; his indictment was therefore dismissed.

State v. Gantt, 186 N.J. Super. 262 (Law Div. 1982), aff'd, 195 N.J. Super. 114 (App. Div. 1984), aff'd, 101 N.J. 573 (1986). A machine gun, handgun, rifle and shotgun are defined in terms of their design, not their operability. See N.J.S.A. 2C:30-11, k, m, and n. Therefore, these weapons need not be operable to qualify as firearms under N.J.S.A. 2C:39-1f. See State v. Keely, 153 N.J. Super. 18 (App. Div. 1977), certif. denied, 75 N.J. 613 (1978); State v. Marques, 140 N.J. Super. 363 (App. Div. 1976); State v. Hepner, 136 N.J. Super. 509 (App. Div. 1975); State v. Morgan, 121 N.J. Super. 217 (App. Div. 1972).

State v. Cole, 154 *N.J. Super.* 138 (App. Div. 1977), *certif. denied*, 78 *N.J.* 415 (1978). Where defendant presented no evidence which negated operability of a gun, it was presumed to be operable, and the court was not required to submit the question of operability to the jury. Moreover, the inference of operability does not depend on the recovery of the weapon or its production in court.

State v. Schultheis, 113 *N.J. Super.* 11 (App. Div. 1971), *certif. denied*, 58 *N.J.* 390 (1971). Victims' testimony that defendant's gun appeared to be real supported an inference that gun was operable.

2. Method of propulsion and type of projectile

State v. Mieles, 199 *N.J. Super*. 29 (App. Div. 1985), *certif. denied*, 101 *N.J.* 265 (1985). *N.J.S.A.* 2C:39-1f divides firearms into two categories: (1) guns which are fired by cartridges, shells, explosives or by igniting inflammable or explosive substances, and (2) guns which are fired by a spring, elastic band, carbon dioxide or compressed gasses, and fire a bullet or missile smaller than three-eighths of an inch in diameter. A spring action BB gun meets the second enumerated criteria, and is therefore a firearm under the Code.

3. Jury Question

State v. Seng, 91 N.J. Super. 50 (App. Div. 1966). Whether a gun constitutes a firearm is a factual issue for the jury to determine, and could not properly be heard on a motion to dismiss an indictment. See also State v. Mieles, supra, State v. Morgan, supra.

C. Antique Firearms

N.J.S.A. 2C:39-1a defines an antique firearm as (1) any firearm or antique cannon manufactured before 1898 for which ammunition is not commercially available, (2) any firearm or antique cannon incapable of being fired or discharged, or (3) any firearm or antique cannon that does not fire fixed ammunition, regardless of the date of manufacture. All three categories of guns otherwise qualifying as antique firearms must be possessed only as curiosities, ornaments or for historical significance or value. *State v. Schreier*, 135 *N.J. Super*. 381 (App. Div. 1975) (court construed *N.J.S.A.* 2A:151-18 (repealed 1979), which is similar to *N.J.S.A.* 2C:39-1a). *See Service Armament Co. v. Hyland*, 70 *N.J.* 550 (1976); *State v. Kaniper*, 180 *N.J. Super*. 573 (Law Div. 1981).

D. Weapon

N.J.S.A. 2C:39-1r defines "weapon" in part as "anything readily capable of lethal use or of inflicting serious bodily injury." *See State v. Brown*, 185 *N.J. Super.* 489 (App. Div. 1982) (boning knife); *State v. McCauley*, 157 *N.J. Super.* 349 (App. Div. 1978), *certif. denied*, 77 *N.J.* 500 (1978) (garrotte, a piece of string used to strangle a murder victim, was not a weapon under *N.J.S.A.* 2C:151-5 (repealed 1979; *see* definition of weapon under *N.J.S.A.* 2C:39-1r); *State v. Tims*, 129 *N.J. Super.* 399 (App. Div. 1974), *certif. denied*, 66 *N.J.* 326 (1974) (bottle use in armed robbery constitutes a "bludgeon" under *N.J.S.A.* 2A:151-5 (repealed 1979; *see* definition of "weapon" under *N.J.S.A.* 2C:39-1r).

E. Deadly Weapon

N.J.S.A. 2C:11-1 defines "deadly weapon," in part, as any firearm or other weapon capable of producing death or serious bodily injury. Inasmuch as the definition of "weapon" under *N.J.S.A.* 2C:39-1r is "anything readily capable of lethal use or inflicting bodily injury" including firearms and other devices, the two definitions are similar. Note, however, that a "deadly weapon" also includes any object fashioned so that a victim *would believe* it was capable of producing death or serious bodily injury, whereas a "weapon" does not. *N.J.S.A.* 2C:11-1, as amended by Act of January 4, 1982, ch. 384, 1981 *N.J. Laws* 1415 (effective January 4, 1982).

Use of a deadly weapon raises the crime of simple assault to aggravated assault (*N.J.S.A.* 2C:12-1a, b), raises robbery to a crime of the first degree (*N.J.S.A.*

2C:15-1), and makes burglary a crime of the second degree (*N.J.S.A.* 2C:18-2).

(For a discussion of the elements of robbery, *see also,* **ROBBERY**, this Digest.)

1. Armed Robbery

State v. Brown, 325 *N.J. Super.* 447 (App. Div. 1999), *certif. denied*, 163 *N.J.* 76 (2000), held that defendant was not armed with a deadly weapon by carrying a kitchen knife in his pocket and did not commit first degree robbery.

State v. Riley, 306 *N.J. Super.* 141 (App. Div. 1997), reversed defendant's convictions for first degree armed robbery and fourth degree possession of a knife under circumstance not manifestly appropriate for lawful use. The Court held that defendant's pocket knife was not a "deadly weapon" within the meaning of first degree robbery statute and was not a "weapon" for purposes of fourth degree possession charge.

State v. Lopez, 276 N.J. Super. 296 (App. Div. 1994), certif. denied, 139 N.J. 289 (1994), rejected defendant's claim that he was convicted of a crime for which he had not been indicted because the jury found him guilty of armed robbery with a knife, although he had been indicted for armed robbery with a machine gun. The appellate court stated that where a grand jury indicts a defendant for armed robbery, the kind of deadly weapon used is not an essential element of the offense and thus need not be particularized in the indictment, although the State's version must be disclosed in discovery, as was done in this case. The type of weapon utilized is relevant only with regard to the sentencing provisions of the Graves Act, but has no impact on the jury's deliberations on the offenses charged and hence is not required to be included in the indictment. The Lopez Court noted that the indictment could have been amended to add "pistol" and "knife," as the State requested. The trial court had denied the amendment, but permitted the State to introduce evidence of the knife and gun and submitted special interrogatories to the jury on that issue.

State v. Ortiz, 187 *N.J. Super*. 44 (App. Div. 1982). Defendant used a fake gun to commit a robbery. He appealed his sentence for first degree robbery in reliance on the holding in *State v. Butler*, 89 *N.J.* 220 (1982), that use of a weapon actually capable of deadly force was necessary to constitute first degree robbery. The Appellate Division found, however, that defendant's use of the fake gun as a club made the gun capable of

producing serious bodily injury. Therefore, the fake gun was a deadly weapon, and his conviction for first degree robbery was affirmed.

2. Aggravated Assault

N.J.S.A. 2C:12-1b(4) defines aggravated assault as pointing a firearm at another "under circumstances manifesting extreme indifference to the value of human life . . . whether or not the actor believes [the firearm] to be loaded." In *State v. Diaz*, 190 *N.J. Super.* 639 (Law Div. 1983), the trial judge construed the statute to require that the gun used in an aggravated assault must pose an actual threat to life, and therefore must be loaded.

In *State v. Bill*, 194 *N.J. Super*. 192 (1984), however, the Appellate Division expressly disapproved of *State v. Diaz.* According to the Court, the drafters of *N.J.S.A.* 2C:12-2, determined that pointing a firearm at another was a reckless, dangerous act deserving enhanced punishment regardless of whether the firearm was loaded. Furthermore, the phrase "whether or not the actor believes [the firearm] to be loaded" did not refer to the condition of the firearm; the phrase was appended to the statute to make clear that an assailant's belief that he carried an unloaded firearm was no defense to the charge of aggravated assault.

F. Possession

N.J.S.A. 2C:2-1 states that "[p]ossession is an act . . . if the possessor knowingly procured or received that thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." The term "possession" is used in *N.J.S.A.* 2C:39-3, -4, -5, and -7 to make possession of certain weapons unlawful in specified circumstances. *See State v. Williams, et als.*, 315 *N.J. Super.* 384 (Law Div. 1998); *State v. Thomas,* 105 *N.J. Super.* 331 (App. Div. 1969), *aff'd o.b.,* 57 *N.J.* 143 (1970).

G. Graves Act

The Graves Act, *N.J.S.A.* 2C:43-6c, requires imprisonment of individuals who possess a firearm with the purpose to use it unlawfully against the person of another, or use or possess a firearm during the commission of certain specified crimes. *See State v. Hawkes*, 114 *N.J.* 359 (1989) (holding that Graves Act, which imposed a mandatory extended term of second or subsequent conviction of firearms offenses, applied to defendant whose prior conviction of firearm offense occurred subsequent to the commission of the firearms offense for which he was sentenced). (For a discussion of the minimum sentencing terms and hearing requirements of the Graves Act, *see also* **SENTENCING**, this Digest.)

1. Operability

State v. Gantt, 186 *N.J. Super*. 262 (Law Div. 1982), *aff'd*, 195 *N.J. Super*. 114 (App. Div. 1984), *aff'd*, 101 *N.J.* 573 (1986).

Defendant was found guilty of robbery while armed with a pistol. At sentencing, the State and defendant agreed that the operability of a gun must be shown for the gun to qualify as a firearm under *N.J.S.A.* 2C:39-1f, and for the Graves Act to be applicable. The Law Division reasoned, however, that the Code's definition of a handgun did not require a showing of present operability, but only that the gun was originally designed or manufactured to be fired with one hand. The clause in the statute which stated that a firearm was a weapon "from which may be fired . . . any . . . missile or bullet" was merely descriptive of certain types of gun-like weapons. A gun could therefore be inoperable yet still be a firearm. 186 *N.J. Super.* at 265-66. The Graves Act was therefore applicable to defendant.

The Supreme Court affirmed the Appellate Division judgment, which in turn affirmed the Graves Act sentence. The sentencing court need be satisfied only that the weapon was originally designed to deliver a potentially lethal projectile. The issue of inoperability should enter the case only if it bears on the question of design. There was no evidence to contradict the victim's description of the weapon as a small handgun, and this evidence was credible and sufficient for the factfinder to conclude the weapon was a firearm. *See State v. Hickman*, 204 *N.J. Super.* 409 (App. Div. 1985).

State v. Ortiz, 187 *N.J. Super*. 44 (App. Div. 1982). Toy or fake gun is not a "firearm" within the meaning of *N.J.S.A.* 2C:39-1f. The Graves Act is therefore inapplicable where defendant uses a toy or fake gun during the commission of a robbery.

2. Intent

State v. Camacho, 153 *N.J.* 54 (1998), held that the sentencing court, not the jury, was to determine whether defendant's purpose was to use firearm against the person, as opposed to the property, of another so as to warrant Graves Act sentence.

In *State v. DesMarets*, 92 *N.J.* 62 (1983), defendant committed a burglary during which he stole two handguns and subsequently fled the crime scene. He contended that his possession of the guns fell outside the Graves Act because he did not intend to use the guns against others. The court held, however, that defendant's lack of intent to use the stolen weapons against others was irrelevant. The Act sought to deter the violence accompanying crimes in which firearms are possessed regardless of whether the actor intended to use the firearm or not. Moreover, the statutory language evinced no legislative directive to make the provisions of the Act applicable only where the actor intended to use the weapon against others. *See also, State v. Stewart, infra.*

3. Constructive possession

In State v. Stewart, 96 N.J. 596 (1984), defendant was convicted of conspiracy to commit second degree (unarmed) robbery. Nevertheless, the jury found that defendant constructively possessed a gun during the commission of the crime. According to defendant, he was a passenger in a truck along with his two codefendants when one of them stole narcotics from an individual standing on a street corner. At that time there was a flare gun on the dashboard of the vehicle, which was later placed in the well behind the front seat. The court held that constructive possession immediately convertible to actual possession of the firearm was sufficient to warrant the imposition of a Graves Act sentence. The intention of the Graves Act was to remove guns from crime scenes to the greatest extent possible. Thus, where defendant had constructive possession and the ability to exercise imminent control over a gun, the Graves Act was applicable.

4. Accomplice liability

In *State v. White*, 98 *N.J.* 122 (1984), defendant was found guilty as an accomplice to armed robbery. The court held that because an accomplice to armed robbery has the same intent as the principle to armed robbery, the Graves Act applies to the accomplice. The Court also held that when the principal is found guilty of armed robbery, but the accomplice is found guilty of unarmed robbery, the Graves Act applies to the accomplice only if he knew or had reason to know that the principal would possess the firearm during the course of the crime.

H. No Early Release Act

The No Early Release Act (NERA), *N.J.S.A.* 2C:43-7.2, establishes a required minimum sentence of 85

percent parole ineligibility for crimes of the first and second degree where the actor, *inter alia*, uses or threatens to use a deadly weapon. The definition of "deadly weapon" set forth in *N.J.S.A.* 2C:43-7.2d is identical to that in *N.J.S.A.* 2C:11-1. *See also, State v. Mosley,* 335 *N.J. Super.* 144, 149-154 (App. Div. 2000) (comparing differences in weapons element between NERA and Graves Act offenses), *certif. denied, ____ N.J.* (March 2, 2001).

State v. Burford, 163 *N.J.* 16 (2000), affirmed the Appellate Division, 321 *N.J. Super.* 360 (App. Div. 1999), which held that defendant's second-degree eluding conviction does not qualify as a "violent crime" under NERA, because he did not intend to use the stolen automobile he was driving as a deadly weapon. The Supreme Court's opinion holds that while the literal language of the NERA statute may encompass defendant's actions, this was not its intent. *But see, State v. Griffith*, 336 *N.J. Super.* 514 (App. Div. 2001) (holding defendant used his car as a "deadly weapon" within meaning of NERA when he intentionally rammed police vehicle blocking him to effect his arrest).

In State v. Grawe, 327 N.J. Super. 579 (App. Div. 2000), defendant pled guilty to first degree robbery, but the trial court determined that he did not use or threaten the use of a deadly weapon and thus did not impose a NERA sentence. On the State's appeal, the Appellate Division affirmed the trial court's factual finding, explaining that no one alleged that defendant caused death or serious bodily injury. Because he used a hammer merely to break the front of a jewelry store's display case, did not brandish it in a threatening manner, and left it lying on top of the counter when he ran from the store, defendant did not use or threaten the immediate use of a deadly weapon as N.J.S.A. 2C:43-7.2d requires. Rather than using the hammer "as a menacing, deadly weapon," defendant employed it "as a burglar's tool." Although it may seem anomalous that a first degree robbery would not trigger a NERA sentence, the court determined the robbery statutes's definition of a "deadly weapon" is broader than that set forth in NERA. See also, State v. Johnson, 325 N.J. Super. 78 (App. Div. 1999) (holding that purely possessory crimes, such as second degree possession of a firearm with intent to use it unlawfully against another, are excluded from the purview of NERA), aff'd, N.J. (2001).

State v. Cheung, 328 *N.J. Super.* 368 (App. Div. 2000), affirmed defendant's robbery and burglary convictions stemming from guilty pleas. The court expressed reservation that defendant's appeal was

cognizable given his recognition in pleading guilty that NERA applied and his unwillingness to invalidate his guilty plea. It went on, however, to reject defendant's claims, reiterating that a BB gun is a deadly weapon for purposes of *N.J.S.A.* 2C:43-7.2, pursuant to *State v. Meyer, infra,* and that NERA applies to accomplices pursuant to *State v. Rumblin,* 326 *N.J. Super.* 296 (App. Div. 1999), *aff'd, ____ N.J. ____* (2001). The matter was remanded to the trial court for technical corrections of the judgment of conviction.

State v. Meyer, 327 *N.J. Super*. 50 (App. Div.), *certif. denied*, 164 *N.J.* 191 (2000), affirmed defendant's guilty plea to armed robbery and related crimes. A pellet gun used to commit the robbery was both a "firearm" and a "deadly weapon" for purposes of NERA. *But see, State v. Austin,* 335 *N.J. Super.* 486, 488-489 (App. Div. 2000) (holding inoperable BB gun not a deadly weapon for NERA sentencing purposes), *certif. pending, ____ N.J. ____* (2001).

In *State v. Ainis*, 317 *N.J. Super*. 127 (Law Div. 1998), the Law Division held that threatening the use of a hypodermic needle purportedly containing the AIDS virus to commit first degree armed robbery is a violent crime for purpose of NERA. In this case, the hypodermic needle was, under NERA, a "deadly weapon," a term the judge determined was substantially similar to the same term defined in *N.J.S.A.* 2C:11-1c and analyzed in *State v. Riley,* 306 *N.J. Super*. 141 (App. Div. 1997). Defendant wielded the needle toward a convenience store clerk, wanted her to believe that it contained a fatal virus, and threatened to kill her with it, thereby intending to convey the message that it was a deadly weapon. The *Ainis* court did not need to decide, though, if a needle alone was a deadly weapon.

II. PRESUMPTION AS TO POSSESSION, LICENSES AND PERMITS (*N.J.S.A.* 2C:39-2)

A. Possession in Vehicles

Prior law, *N.J.S.A.* 2A:151-7, created an unqualified presumption that a firearm or other weapon found in an automobile was possessed by all occupants. Judicial interpretation, however, limited the scope of this section. In *State v. Humphreys*, 54 *N.J.* 406 (1969), for example, the New Jersey Supreme Court held that *N.J.S.A.* 2A:151-7 allowed a permissible inference, but not a mandatory presumption, that a person in an auto possessed a firearm found therein. Also, the court held that it was error to read this statutory section to the jury because jury members might erroneously believe that the presumption was mandatory.

State v. Lewis, 93 *N.J. Super.* 212 (App. Div. 1966), *cert. denied*, 386 *U.S.* 986 (1967), further restricted the breadth of the statute in holding that the unexplained possession of a gun in the coat pocket of an automobile passenger did not justify a conviction of another passenger for illegal possession.

In contrast, *State v. Rodriguez*, 141 *N.J. Super*. 7 (App. Div. 1976), *certif. denied*, 71 *N.J.* 495 (1976), held that although defendant was a rear seat passenger and a gun was found in the front console of an automobile, the lower court improperly granted defendant's motion for a judgment *n.o.v.* on the charge of unlawful possession of a weapon. *See also, State v. Riley*, 69 *N.J.* 217 (1976) (where rifle was in back seat of car, constructive possession of a rifle was proper finding); *State v. Danzinger*, 121 *N.J. Super.* 44 (App. Div. 1972), *certif. denied*, 62 *N.J.* 191 (1973) (possession of a weapon inferred from proximity of a weapon to passengers).

The current statute, *N.J.S.A.* 2C:39-2a, evinces a legislative attempt to harmonize the former statute with the cases that construed it. See State v. Ingram, 98 N.J. 489 (1985); State v. Bolton, 230 N.J. Super. 476 (App. Div. 1989). See also, In the Matter of Two Seized Firearms, 127 N.J. 84 (1992), cert. denied sub nom. Sholtis v. New Jersey, 506 U.S. 823 (1992) (the federal statute which assures gun owners freedom to travel from state to state with weapon legally possessed in their state of residence, 18 U.S.C. § 926A, did not preclude forfeiture in New Jersey of a loaded handgun in a glove compartment being transported by a Florida motorist and a loaded handgun kept underneath and behind the driver's seat).

B. Lack of Licenses or Permits

N.J.S.A. 2C:39-2b creates a presumption that an individual does not have a license or permit for a weapon until he proves otherwise. *Cf. State v. Hock*, 54 *N.J.* 526 (1969), *cert. denied*, 399 *U.S.* 930 (1970) (prosecution need not prove defendant had no firearm permit where defendant denied ownership). *See State v. Harmon*, 104 *N.J.* 189 (1986); *State v. Johnson*, 287 *N.J. Super.* 197 (1996); *State v. Latimore*, 197 *N.J. Super.* (App. Div. 1984); *State v. McCandless*, 190 *N.J. Super.* 75 (App. Div. 1983), *certif. denied*, 95 *N.J.* 210 (1983).

III. PROHIBITED WEAPONS AND DEVICES (N.J.S.A. 2C:39-3)

N.J.S.A. 2C:39-3 prohibits the possession of certain specified weapons including "destructive devices,"

sawed-off shotguns, silencers, etc. The section makes possession of these weapons *per se* unlawful. *State v. Lee*, 96 *N.J.* 156, 160 (1984). Once the State proves possession of these weapons beyond a reasonable doubt, it has met its burden. *State v. Dunlap*, 181 *N.J. Super.* 71 (Law Div. 1981).

N.J.S.A. 2C:39-3e prohibits possession of certain weapons including gravity knives, switchblade knives, blackjacks, etc. "without any explainable lawful purpose" and exonerates possession of the specified weapons if defendant comes forward with such a purpose. State v. Lee, 96 N.J. 156 (1984). The subsection also creates a rebuttable presumption that a defendant possesses a weapon for an unlawful use. State v. Dunlap, 181 N.J. Super. at 77. Because the statute's presumption contains the requisite qualities of trustworthiness, it has withstood constitutional attack. Id. The statute is also not unconstitutionally vague because the phrase "explainable lawful purpose" plainly means that defendant may produce evidence to show that he does not possess an instrument for its use as a weapon. Id. at 78. See State v. Blaine, 221 N.J. Super. 66 (App. Div. 1987).

For cases testing the constitutionality of the prior statute (*N.J.S.A.* 2A:151-41), see U.S. ex rel Ebron v. Attorney General of State of N.J., 377 F. Supp. 396 (D.D.C. 1974); State v. Ebron, 122 N.J. Super. 552 (App. Div. 1973), certif. denied, 63 N.J. 250 (1973); State v. Horton, 98 N.J. Super. 258 (App. Div. 1967), certif. denied, 51 N.J. 393 (1968).

N.J.S.A. 2C:39-3g sets forth exceptions of the possession offenses described in subsections a through f. These exceptions inure to duly authorized military personnel while actually on duty and to law enforcement officers who are removing prohibited weapons from a criminal at a crime scene. *See P.B.A. Local 278 v. Degnan*, 175 *N.J. Super.* 102 (Ch. Div. 1980). *N.J.S.A.* 2C:39-3g also allows an individual to keep dum-dum bullets on his premises, and licensed ammunition dealers to sell dum-dum bullets provided that the dealers maintain records of each purchaser of such ammunition.

IV. POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSES (N.J.S.A. 2C:39-4)

Unlike *N.J.S.A.* 2C:39-3, *N.J.S.A.* 2C:39-4 prohibits possession of specified weapons if the actor possesses them "with the purpose to use (them) unlawfully against the person or property of another." Thus, proof of intent to use a weapon in the specified manner is necessary for a conviction under this section.

State v. Lee, 96 N.J. 156, 160 (1984). See State v. Villar, 150 N.J. 503 (1997) (defendant's weapon possession conviction was not precluded by the fact that his original purpose in possessing the beer stein was lawful); State v. Daniels, 231 N.J. Super. 555 (1989) (element of intent under N.J.S.A. 2C:39-4 was not determined as of time when the weapon was originally possessed).

A. Self-Defense

State v. Moore, 158 *N.J.* 292 (1999). In a majority opinion written by Justice Coleman, the Supreme Court of New Jersey held that *N.J.S.A.* 2C:3-11b, which provides that the brandishing of a deadly weapon for the limited purpose of scaring off a potential attacker is not deadly force, does not entitle a defendant to a self-defense charge based on non-deadly force rules once the weapon is actually discharged.

State v. Blanks, 313 *N.J. Super*. 55 (App. Div. 1998), held that defendant was entitled to self-defense charge, even though he did not admit using his handgun in self-defense and intentionally killing his aggressor.

State v. Bilek, 308 N.J. Super. 1 (App. Div. 1998), reversed defendant's conviction for fourth degree aggravated assault by pointing a firearm. Determining that self-defense was the key trial issue, the court concluded that the self-defense instruction was misleading and probably led to an unjust result. The reviewing court questioned whether the individuals at whom defendant pointed a firearm were even "victims." In addition, the court believed the mention of selfdefense as to the possession of a weapon charge, "added to other difficulties" in the self-defense charge itself. Also, the Appellate Division could not grasp how one arming himself or herself with a gun for lawful protective purposes could not thereafter point that gun at another without justification.

State v. Harmon, 104 *N.J.* 189 (1986). Defendant, after arguing with another individual, armed himself with a BB gun. During a subsequent encounter with the same man, defendant pointed the BB gun at him. The Court held that defendant's decision to carry a BB gun as a precaution before confronting his victim negated the intent required for possession of a firearm for an unlawful purpose within the meaning of *N.J.S.A.* 2C:39-4.

B. Concealment

The predecessor to *N.J.S.A.* 2C:39-4, *N.J.S.A.* 2A:151-14, was contained in Article 5 of the former

statute. That article was entitled "*Carrying Concealed Weapons*." The statute itself made no reference to concealment, however, and consequently, the courts held that concealment was not an element of the crime. *State v. Oritz*, 124 *N.J. Super*, 139 (App. Div. 1973); *State v. Ebron*, 122 *N.J. Super*. 552 (App. Div. 1973), *certif. denied*, 63 *N.J.* 250 (1973).

N.J.S.A. 2C:39-4, and chapter 39 within which it is contained, omit any reference to concealment as a necessary element of weapons offenses, except that *N.J.S.A.* 2C:39-2 sets up a presumption of possession as to firearms concealed in automobile glove compartments, trunks or other enclosures. *But see, State v. Huff*, 148 *N.J.* 78 (1997) (evidence sufficient to support a first-degree armed robbery conviction, concluding that it was "objectively reasonable for the victim to have believed defendant's simulation of a concealed gun").

C. Merger

State v. Carswell, 303 *N.J. Super*. 462 (App. Div. 1997), reversed defendant's convictions for aggravated assault and weapons offenses because the trial judge charged the jury on merger. The inclusion of the merger charge could have led the jury to compromise their verdict, particularly coming as it did after jurors expressed three times their difficulty in reaching a unanimous verdict with regard to the charge of possession of a weapon for an unlawful purpose.

State v. Bull, 268 N.J. Super. 504 (App. Div. 1993), certif. denied, 135 N.J. 304 (1994), held that defendant's conviction for possession of a handgun without a permit, N.J.S.A. 2C:39-5b, does not merge with offense of robbery while armed with the same gun; however, armed robbery and unlawful possession of a weapon under N.J.S.A. 2C:39-4d convictions should have been merged, where neither indictment, jury charge nor verdict identified which of two knives allegedly involved in an assault formed the basis for conviction.

State v. Bowens, 108 *N.J.* 622 (1987) held a conviction for possession of a weapon for an unlawful purpose (*N.J.S.A.* 2C:39-4a) does not merge with conviction for aggravated manslaughter (*N.J.S.A.* 2C:11-4a), because each crime requires proof of wholly different facts.

State v. Jones, 213 *N.J. Super.* 562 (1986), held a conviction for possession of a weapon for an unlawful purpose (*N.J.S.A.* 2C:39-4d) merges with conviction for unlawful possession of a weapon (*N.J.S.A.* 2C:39-5d).

Conviction for possession of a weapon for an unlawful purpose (*N.J.S.A.* 2C:39-4d) does not merge with conviction for armed robbery (*N.J.S.A.* 2C:15-1). *Contra, State v. Porter,* 210 *N.J. Super.* 383, *certif. denied,* 105 *N.J.* 556, 557 (1986).

State v. Williams, 213 *N.J. Super*. 30 (App. Div. 1986). To prevent merger of conviction for possession of a weapon for unlawful purpose with a conviction for criminal homicide or assault, the judge should ask the jury to determine, by separate verdicts, whether possession was solely with the specific unlawful purpose to use the weapon against the victim, or was the weapon possessed with a broader unlawful purpose.

State v. Cooper, 211 *N.J. Super*. 1 (App. Div. 1986) held that convictions for possession of a firearm for an unlawful purpose (*N.J.S.A.* 2C:39-4a) and unlawful possession of a handgun (*N.J.S.A.* 2C:39-5b) are not included offenses and do not merge.

State v. Johnson, 203 *N.J. Super*. 127 (App. Div. 1985), held conviction for possession of a firearm for an unlawful purpose (*N.J.S.A.* 2C:39-4a) does not merge with conviction for aggravated assault (*N.J.S.A.* 2C:12-1b(1)) where defendant possessed the firearm before he encountered his victim.

State v. Jones, 94 *N.J. Super*. 137 (App. Div. 1967) held that the crime of possession of a knife with the purpose to use it against another (*N.J.S.A.* 2A:152-56 (repealed 1979; *see N.J.S.A.* 2C:39-4)), merges with crime of armed robbery.

D. Jury Instructions

State v. Mello, 297 *N.J. Super.* 452 (App. Div. 1997), held that the purpose to use the weapon unlawfully must be proved particularly and cannot be inferred from proof that the weapon was unlicenced.

State v. Petties, 139 *N.J.* 310 (1995), held that defendant's acquittal on charges of aggravated assault for pointing a firearm at another did not preclude his conviction for possession of a weapon for an unlawful purpose under *N.J.S.A.* 2C:39-4a and reasoned that an acquittal on a substantive crime involving misuse of gun does not establish that prior possession has always been for lawful purpose. *But see, State v. Turner,* 310 *N.J. Super.* 423 (App. Div. 1998) (acquittal of aggravated assault precluded conviction of possession of a weapon for an unlawful purpose).

State v. Harmon, 104 *N.J.* 189 (1986). Jury instructions must adequately explain that the mental element of "unlawful purpose" in *N.J.S.A.* 2C:39-4 and require a specific finding that the accused possessed a weapon with the conscious, objective desire or specific intent to use the weapon to commit an illegal act, and not for some other purpose.

E. Indictment

State v. Holsten, 223 *N.J. Super.* 578 (App. Div. 1988). Evidence that victim was hit with a BB pellet gives rise to an inference of an unlawful purpose sufficient to return an indictment under *N.J.S.A.* 2C:39-4a.

V. UNLAWFUL POSSESSION OF WEAPONS (*N.J.S.A.* 2C:39-5)

N.J.S.A. 2C:39-5a, b and c, respectively, prohibit the possession of machine guns, handguns, and rifles and shotguns without a license or a firearms purchaser identification card. Thus, the absence of the license or permit is an element of the offense which the State must prove beyond a reasonable doubt. *See State v. Martini*, 131 *N.J.* 176 (1993); *State v. Vick*, 117 *N.J.* 288 (1989); *State v. Harmon*, 104 *N.J.* 189 (1986); *State v. Ingram*, 98 N.J. 489 (1985). That defendant is not aware of license or permit requirement is no defense. *State v. Mahoney*, 226 *N.J. Super.* 617 (App. Div. 1988).

N.J.S.A. 2C:39-5d makes possession of other weapons unlawful if they are possessed "under circumstances not manifestly appropriate for such lawful uses as (the weapons) may have" The intent to use unlawfully is not required. See State v. Lee, 96 N.J. 156 (1984), overruling State in the Interest of T.E.T., 184 N.J. Super. 324 (App. Div. 1982), certif. denied, 94 N.J. 508 (1983); State v. Wright, 96 N.J. 170 (1984), appeal dismissed, 469 U.S. 1146 (1985); State v. Colon, 186 N.J. Super. 355 (App. Div. 1982). See also, State v. Irizarry, 270 N.J. Super. 669 (App. Div. 1994) (circumstances of possession control, not defendant's subjective intent). Cf. State v. Brown, 138 N.J. 481 (1994) (reasoning that since essence of offense is possession without a permit or other specific circumstances, N.J.S.A. 2C:39-5 crimes rarely merge with substantive offense).

N.J.S.A. 2C:39-5e prohibits possession of a firearm at an educational institution without prior authorization, regardless of whether there exists a valid permit or firearms purchaser identification card for the firearm. *See State v. Blaine*, 221 *N.J. Super.* 66 (App. Div. 1987).

N.J.S.A. 2C:39-5f, prohibiting knowing possession of an assault firearm, was intended to proscribe knowing possession, as distinguished from knowledge of illegal character of, article possessed. *State v. Pelleteri*, 294 *N.J. Super*. 330 (App. Div. 1996), *certif. denied*, 148 *N.J.* 461 (1997). Possession of the weapon, even if it is actually inoperable, is illegal if the proper registration form has not been filed. *State v. Elrose*, 277 *N.J. Super.* 548 (App. Div. 1994).

VI. EXEMPTIONS FROM LICENSE, PERMIT AND IDENTIFICATION CARD REQUIRE-MENTS (N.J.S.A. 2C:39-6)

N.J.S.A. 2C:39-6 exempts specified individuals from all or part of the license, permit and firearms purchaser identification card requirements of *N.J.S.A.* 2C:39-5. These exemptions are to be narrowly construed. *State v. Rovito*, 99 *N.J.* 581 (1985).

For example, *N.J.S.A.* 2C:39-6a(7) exempts state, county and municipal police from all the license, permit, and firearms purchaser identification card requirements of *N.J.S.A.* 2C:39-5. Special police, airport security officers and boulevard police are likewise exempted, but only "while engaged in the actual performance of . . . official duties and when specifically authorized by the governing body to carry weapons." *See Belmar Policemen's Benev. Ass'n v. Belmar*, 89 *N.J.* 225 (1982); *New Jersey State Special Police Ass'n v. Atty. Gen.*, 201 *N.J. Super.* 75 (App. Div. 1985); *In re Rawls*, 197 *N.J. Super.* 78 (Law Div. 1984); *PBA Local 278, etc., Campus Police v. Degnan*, 175 *N.J. Super.* 102 (Ch. Div. 1980).

N.J.S.A. 2C:39-6e exempts persons who carry handguns, rifles or shotguns in their residence or place of business from the permit and firearms purchaser identification card requirements of *N.J.S.A.* 2C:39-5b and c. *N.J.S.A.* 2C:39-6e also allows an individual to transport a firearm from his residence of business to a place where firearms are repaired.

VII. PERSONS PROHIBITED FROM HAVING WEAPONS (*N.J.S.A.* 2C:39-7)

N.J.S.A. 2C:39-7 prohibits persons convicted of certain crimes and persons committed to a hospital for a mental disorder from possessing any weapon. The constitutionality of this statute has been upheld in *State v. Jones,* 198 *N.J. Super.* 533 (App. Div. 1985).

After amendment in 1987, *N.J.S.A.* 2C:39-7 (West Supp. 1988) provides that any person who has been convicted of the unlawful use, possession or sale of a controlled dangerous substance as defined in *N.J.S.A.* 2C:35-2 is prohibited from possessing a weapon. If the drug charge results in a conviction for only disorderly persons or petty disorderly persons offense, however, the prohibition does not apply. *See In re Sbitani*, 216 *N.J. Super*. 75 (App. Div. 1987) (prior to amendment, even disorderly persons conviction for drug charges triggered the prohibitions of *N.J.S.A.* 2C:39-7).

For cases discussing proof of prior conviction requisite to sustain a conviction of *N.J.S.A.* 2C:39-7, *see State v. (E.L.) v. G.P.N.*, 321 *N.J. Super.* 172 (App. Div. 1999); *State v. Harvey*, 318 *N.J. Super.* 167 (App. Div. 1999); *State v. Alvarez*, 318 *N.J. Super.* 137 (App. Div. 1999); *State v. Wright*, 155 *N.J. Super.* 137 (App. Div. 1978); *In re Clark*, 257 *N.J. Super.* 152 (Law Div. 1992); *State v. Kaniper*, 180 *N.J. Super.* 573 (Law Div. 1981).

When defendant is charged with *N.J.S.A.* 2C:39-7 and another offense simultaneously, the charges must be severed in order to avoid jury prejudice arising out of evidence that defendant is a convicted felon. *See State v. Ragland*, 105 N.J. 189 (1986); *State v. Ingenito*, 87 *N.J.* 204 (1981); *State v. Alvarez*, 318 *N.J. Super.* 137 (App. Div. 1999); *State v. Harvey*, 318 *N.J. Super.* 167 (App. Div. 1999); *State v. Williams*, 167 *N.J. Super.* 57 (App. Div. 1979); *State v. Middletown*, 143 *N.J. Super.* 98 (App. Div. 1976), *certif. denied*, 71 *N.J.* 531 (1976), *aff'd o.b.*, 75 *N.J.* 47 (1977); *State v. Smith*, 137 *N.J. Super.* 89 (Law Div. 1975).

VIII. MANUFACTURE, TRANSPORT, DISPO-SITION AND DEFACEMENT OF WEAPONS, DANGEROUS INSTRUMENTS AND APPLI-ANCES (N.J.S.A. 2C:39-9)

N.J.S.A. 2C:39-9a through d prohibit the manufacture, transport, sale, or disposition of certain firearms and firearm silencers, unless an individual is licensed or registered to do so under chapter 58 of the Code. *N.J.S.A.* 2C:39-9d prohibits the manufacture, transportation, sale or disposition of other weapons including certain knives and tear gas devices. *See State v. Rovito*, 99 *N.J.* 581 (1985) (criminal liability should be imposed for "knowing" conduct as defined in *N.J.S.A.* 2C:2-2b(2), and *N.J.S.A.* 2C:39-9d applies to private individuals and commercial dealers alike). *N.J.S.A.* 2C:39-9e prohibits defacement of firearms and the purchase, receipt, disposition or concealment of same.

N.J.S.A. 2C:39-39f prohibits the manufacture, transport, sale or disposition of body armor penetrating bullets.

WIRETAPPING

I. HISTORY-PURPOSE

Prior to the adoption of the New Jersey Wiretapping and Electronic Surveillance Control Act of 1968 (the Act), N.J.S.A. 2A:156-1 et seq., as amended effective June 30, 1999, it was unlawful for any person to tap a telephone line belonging to any other person or to disclose any communication obtained. See State v. Christy, 112 N.J. Super. 48, 53 (Law Div. 1970). The Act, which was enacted in 1969, repealed this earlier prohibition of all wiretapping (id.), and was modeled after Title III of the Federal Omnibus Crime Control Act and Safe Streets Act of 1968 (codified as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §2510 et seq.). State v. Diaz, 308 N.J. Super. 504, 509 (App. Div. 1998); State v. Fornino, 223 N.J. Super. 531, 543-44 (App. Div.), certif. denied, 111 N.J. 570, cert. denied, 488 U.S. 859, 109 S.Ct. 152 (1988); see also State v. Lane, 279 N.J. Super. 209, 217 (App. Div), certif. denied, 141 N.J. 94 (1995). Although wiretap laws are designed to provide specially trained law enforcement officers under judicial supervision with the tools necessary to combat crime without unnecessarily infringing upon the right of individual privacy, (see generally Scott v. United States, 436 U.S. 128, 130, 98 S.Ct. 1717, 1719 (1978)), the Act protects the high degree of privacy in telephone conversations. State v. Lane, 279 N.J. Super. at 219. The State's duty of protecting the public must prevail when balanced against the potential danger of unreasonable wiretapping. State v. Sidoti, 120 N.J. Super. 208, 214 (App. Div. 1972). Generally, the Act prohibits the interception of conversations, except under certain exceptional circumstances. State v. Worthy, 141 N.J. 368, 376 (1995). Both the Act and its federal counterpart generally provide that telephone calls and other wire or oral communications may not be "intercepted" except pursuant to a court order. State v. Lane, 279 N.J. Super. at 217; State v. Fornino, 223 N.J. Super. at 544.

II. VALIDITY

The Act has been held to be constitutional. *State v. Dye*, 60 *N.J.* 518, 535, *cert. denied*, 409 *U.S.* 1090, 93 *S.Ct.* 699 (1972); *State v. Braeunig*, 122 *N.J. Super.* 319, 325 (App. Div. 1973); *State v. Christy*, 112 *N.J. Super.* 48, 61 (Law Div. 1970). The Legislature's concern for privacy interests of individuals demands strict interpretation and application of the Act. *State v. Worthy*, 141 *N.J.* 368, 379 (1995); *State v. Catania*, 85 *N.J.* 418, 437 (1981); *In re Wire Communication*, 76 *N.J.* 255, 260 (1978); *State v. Bisaccia*, 251 *N.J. Super.* 508, 510 (Law Div. 1991).

The Federal Wiretap Act, (18 U.S.C.A. §2510 et seq.), is paramount, it binds federal and state officials, and sets a threshold that may not be lowered. State v. Minter, 116 N.J. 269, 274 (1989). In any electronic surveillance, there must be compliance with the provisions of the federal statute, as well as the state statute. State v. Barber, 169 N.J. Super. 26, 30 (Law Div. 1979). Interpretation of a state wiretap statute can never be controlling where it imposes requirements less stringent than the federal standard. Id. However, if the state sets forth procedures which are more exacting than those of the federal statute, as the case is in New Jersey, then the requirements of the state law would have to be met as well. Id. Accordingly, courts may construe their own state law so as to afford their citizens additional protection. State v. Catania, 85 N.J. at 436; see also State v. Hunt, 91 N.J. 338, 344-46 (1982). For example, in New Jersey, the police may not circumvent more restrictive requirements of the Act by bringing in federal agents and requesting that they tap the telephone in accordance with federal standards. See State v. Minter, 116 N.J. at 283.

The Act is intended to protect privacy interests to a greater extent than the federal wiretap statute, (*State v. Worthy*, 141 *N.J.* at 385), and is more restrictive in some respects. *State v. Diaz*, 308 *N.J. Super.* 504, 510 (App. Div. 1998); *State v. Lane*, 279 *N.J. Super.* 209, 217 (App. Div), *certif. denied*, 141 *N.J.* 94 (1995). However, when portions of the federal and state acts are substantially similar in language, it is appropriate to conclude that the intent of the Legislature when enacting sections of the Act was to follow the federal act. *State v. Diaz*, 308 *N.J. Super.* 31, 544 (App. Div.), *certif. denied*, 111 *N.J.* 570, *cert. denied*, 488 *U.S.* 859, 109 *S.Ct.* 152 (1988).

IV. DEFINITIONS IN THE ACT (N.J.S.A. 2A:156A-2)

The words and phrases used throughout the Act are defined in *N.J.S.A.* 2A:156A-2.

To be an aggrieved person for the purpose of challenging a wiretap, the person must be one who has been a target of a search and seizure by electronic surveillance, as distinguished from one who merely claims prejudice through the use of evidence gathered as a consequence of a search and seizure directed at someone else, or has been a party to any of the intercepted conversations. State v. Barber, 169 N.J. Super. 26, 31-34 (Law Div. 1979); State v. Murphy, 137 N.J. Super. 404, 413 (Law Div. 1975), rev'd o.g. 148 N.J. Super. 542 (App. Div. 1977) (defendants who did not participate in any of the intercepted telephone conversations pursuant to a court order and who did not have any proprietary interest in the premises from which the telephone conversations originated did not have standing to challenge the legality of the wiretap order); see also State v. Catania, 85 N.J. 418, 425 (1981) (a defendant who was a party to at least one conversation, innocent or incriminating, during the course of a wiretap has standing to suppress the entire wiretap results because of the State's failure to minimize its interception of nonrelevant conversations during the wiretap). Thus, in Barber, where the defendants were not a party to the overheard conversations which were claimed to have been illegally intercepted, and where the defendants were not targets of the wiretap, those defendants did not qualify as "aggrieved persons" under federal or state law, and therefore, had no standing to challenge that the interception of the information was unlawfully obtained. Id. at 31; see also State v. Catania, 85 N.J. at 425.

B. Electronic, mechanical or other device (*N.J.S.A.* 2A:156A-2d)

The Act is limited in its application to wiretapping mechanisms designed to intercept the substance of communications heard over telephone and other wire or cable facilities. *State v. Murphy*, 137 *N.J. Super.* at 433-34. In 1993, the term "intercepting device" was substituted by "electronic, mechanical or other device," and provided for the interception of electronic communications. *See N.J.S.A.* 2A:156A-2d

A touch-tone decoder is not an intercepting device within the meaning of the Act, since it cannot be used for any purpose other than to record the assigned numbers of telephones to which outgoing calls are made and to record the fact that the telephone is in use. *State v. Murphy*, 137 *N.J. Super.* at 433-34. An extension telephone regularly installed and being used by an investigative or law enforcement officer in the ordinary course of their duties is also not an intercepting device within the intent or purpose of the Act. State v. McDermott, 167 N.J. Super. 271, 277 (App. Div. 1979); see also Scott v. Scott, 277 N.J. Super. 601, 608 (Ch. Div. 1994) ("extension phone exception" of federal statute permits a parent to intercept their minor child's telephone conversations by use of an extension phone in the family home). Furthermore, where a telephone subscriber alerted the police after inadvertently hearing strange voices on a malfunctioning telephone, and the police upon invitation listened in on the telephone and recorded gambling oriented conversations by means of a tape recorder attached with a suction cup and induction coil to the back of the telephone receiver, the malfunctioning telephone was not an "intercepting device," and therefore, was not an interception within the purview of the Act. State v. McCartin, 135 N.J. Super. 81, 87-88 (Law Div. 1975). The Act does not apply to recorded silent video surveillance or the video portion of a videotape, which includes a sound component. State v. Diaz, 308 N.J. Super. 504, 512 (App. Div. 1998). Thus, a parents' act of installing video surveillance equipment in their home to videotape a babysitter did not implicate federal or state constitutional concerns, absent any involvement of the government or its agents. Id. at 506-507, n. 1.

C. Intercept (*N.J.S.A.* 2A:156A-2c)

Without the use of an intercepting device, an overhearing is not an "intercept" within the meaning of the Act. State v. McDermott, 167 N.J. Super. at 277. If there is no interception, there is no violation of the Act. State v. McCartin, 135 N.J. Super. at 88. For instance, an unindicted coconspirator's recording of his telephone conversations with the defendant by use of a tape recorder and special adapter attached to the telephone receiver did not constitute an "intercept" for purposes of the Act. State v. Gora, 148 N.J. Super. 582, 590-91 (App. Div.), certif. denied, 74 N.J. 275 (1977). "[T]he use of . . . recording apparatus to record what is lawfully overheard does not convert the overhearing or recording into a proscribed interception." State v. McDermott, 167 N.J. Super. at 280. In fact, "[a] tape recorder is a mere accessory to better memorialize the overheard conversation." State v. McCartin, 135 N.J. Super. at 88-89.

The taping of one's own telephone conversations with another is also not an "intercept" within the meaning of the Act. *State v. Gora*, 148 *N.J. Super*. at 590-91. However, it is unlawful and a violation of the Act to tape the conversations of others, including one's spouse

without their consent, when the spouse or person taping the conversation is not a party to the conversation. *State v. Lane, 279 N.J. Super. 209, 218 (App. Div), certif. denied, 141 N.J. 94 (1995).*

Monitoring of telephone calls made by a prison inmate on an inmate group telephone, where monitoring equipment was furnished by the telephone company in the ordinary course of business, and was used by correction officers in the ordinary course of their duties, did not constitute an "interception" within the meaning of the Act thereby requiring court authorization. State v. Fornino, 223 N.J. Super. 531, 545-46 (App. Div.), certif. denied, 111 N.J. 570, cert. denied, 488 U.S. 859, 109 S.Ct. 152 (1988); see also State v. Vandever, 314 N.J. Super. 124, 127-28 (App. Div. 1998) (a defendant who is properly administered Miranda warnings, does not need to be told by the police that he is being tape recorded or video recorded; there is also no violation of the Act). However, the Act was applicable to an interception of telephone conversations that originated from an outof-state telephone, where the phone calls involved conversations with a person in New Jersey, and the interception was undertaken to investigate criminal activity in New Jersey. State v. Worthy, 141 N.J. 368, 380 (1995).

V. ELEMENTS DEFENDANT MUST SHOW TO PROVE UNLAWFUL ELECTRONIC SURVEIL-LANCE

If a defendant claims that he has been subjected to an unlawful electronic surveillance, the defendant then has the burden to allege facts which reasonably led him to believe that he has been subjected to such a surveillance, and must further allege a proprietary, possessory, or participating interest in the place where the conversations were supposed to have been seized. *State v. Chaitkin*, 135 *N.J. Super.* 179, 188 (Law Div. 1975), *aff'd*, 164 *N.J. Super.* 93 (App. Div. 1978), *certif. denied*, 79 *N.J.* 494 (1979). The allegations must be reasonably precise, and they should set forth, insofar as practicable, the dates of suspected surveillance, and the identities of the persons, their telephone numbers and the facts relied upon which allegedly link the suspected surveillance to the trial proceedings. *Id.*

In *State v. Tirelli*, 208 *N.J. Super*. 628, 637-38 (App. Div. 1986), a law enforcement officer was convicted for unlawfully intercepting privileged conversations between an attorney and his client, a jailed suspect. The

court found that there was no exception for a prisoner's expectation of privacy. *Id.* at 638.

Except as specifically provided in the Act, it is a third degree crime to purposely intercept, endeavor to intercept, or procure another to intercept any wire, electronic or oral communication, or to purposely disclose or use, or endeavor to disclose or use, the contents of any wire, electronic, or oral communication, or evidence derived therefrom, with knowledge or having reason to know, that the information was obtained through an interception of a wire, electronic or oral communication. *N.J.S.A.* 2A:156A-3. Disclosure or use of the contents of a communication, or evidence derived therefrom, that was common knowledge or public information, would not apply. *Id.*

VI. EXCEPTIONS TO UNLAWFUL ELEC-TRONIC SURVEILLANCES (N.J.S.A. 2A:156A-4)

A. Construction

Because the federal and state constitutions protect an individual's right of privacy and the Legislature has prescribed an all-inclusive safeguard against wiretaps, it is proper to require that the State fully comply with the conditions under which an exception to the general prohibition may be permitted. *In re Wire Communication*, 76 *N.J.* 255, 261-62 (1978).

B. Exceptions

1. Communications intercepted by a provider of electronic or wire service which is necessary and incidental to its rendition of service are not subject to the Act. See N.J.S.A. 2A:156A-4a; State v. Droutman, 143 N.J. Super. 322, 333 (Law Div. 1976). For instance, in State v. Pemberthy, 224 N.J. Super. 280, 294-96 (App. Div.), certif. denied, 111 N.J. 633 (1988), it was held that where the defendant used a "blue box" enabling him to make long distance telephone calls thereby bypassing normal billing procedures, the telephone company's interception of the line would not result in the suppression of evidence absent State action; in order to protect the telephone company's property rights, the provider may intercept, disclose, or use the communication.

2. Consensual interceptions, *i.e.*, prior consent by a party to the communication, are exempted from the provisions of the Act. *State v. Anepete*, 145 *N.J. Super.* 22, 25-26 (App. Div. 1976); *see also Scott v. Scott*, 277 *N.J. Super.* 601, 609-610 (Ch. Div. 1994). It is unlawful and

a violation of the Act, however, to record telephone conversations of others, including one's spouse without their consent, when the other spouse or the person tapping the conversation is not a party to the conversation. *State v. Lane*, 279 *N.J. Super.* 209, 218 (App. Div.), *certif. denied*, 141 *N.J.* 94 (1995); *see also Scott v. Scott*, 277 *N.J. Super.* at 608-609 (no family status exemption for secretive wiretapping by spouse); *M.G. v. J.C.*, 254 *N.J. Super.* 470, 478-79 (Ch. Div. 1991) (no marital exemption for secretive wiretapping by spouse).

However, in *State v. Diaz*, 308 *N.J. Super.* 504, 516 (App. Div. 1998), the court held that *N.J.S.A.* 2A:156A-4d incorporated the theory of vicarious consent. Thus, the parents of a minor child could consent on their child's behalf to videotape and make a sound recording of a babysitter who was suspected of abusing their daughter. *Id.* Accordingly, both the video and sound portions of the tape were admissible. *Id.*; *see also Cacciarelli v. Boniface*, 325 *N.J. Super.* 133, 135-44 (Ch. Div. 1999) (father could vicariously consent to recordings of conversations between mother and children where there were allegations of verbal and mental abuse arising out of a custody battle).

The conditions for authorization of consensual wiretaps are not as strict as those applicable to nonconsensual wiretaps. *State v. Worthy*, 141 *N.J.* 368, 381-82 (1995); *see also State v. Bisaccia*, 251 *N.J. Super.* 508, 512 (Law Div. 1991).

a. Where the consenting party acts at the direction of a law enforcement officer, the only condition imposed by the Act is that the Attorney General, his designee, or county prosecutor, or his designee, must give prior approval. *N.J.S.A.* 2A:156A-4c. In 1999, the Legislature removed the requirement that was formerly imposed by statute and by case law that the Attorney General or the county prosecutor determine that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. *Cf. State v. Parisi*, 181 *N.J. Super.* 117, 119-20 (App. Div. 1981); *State v. Schultz*, 176 *N.J. Super.* 65, 67 (App. Div. 1980).

Although *N.J.S.A.* 2A:156A-8 requires that there be authorization in writing for a wiretap application, there is no similar requirement for authorization for a consensual interception. *See State v. Bisaccia*, 251 *N.J. Super.* at 512; *State v. Parisi*, 181 *N.J. Super.* at 120; *see also State v. Laurence*, 259 *N.J. Super.* 225, 233 (Law Div. 1992) (oral approval of forms authorizing consensual interception of conversations does not invalidate approval). Pursuant to *Laurence*, consent forms and procedures used to obtain authorization from the Attorney General to consensually intercept conversations amounts to an administrative rule, which falls within the intra-agency exception to the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, and does not have to be preceded by notice and a hearing. *State v. Laurence*, 259 *N.J. Super.* at 232.

b. Where the consenting party does not act under color of law to intercept a wire or oral communication, the interception is likewise exempted from the Act unless the communications are intercepted or used for the purpose of committing a criminal or tortuous act in violation of the Constitution or laws of the United States or of New Jersey or for the purpose of committing an injurious act. *N.J.S.A.* 2A:156A-4d; *see also State v. Gora*, 148 *N.J. Super.* 582, 591 (App. Div. 1977). Moreover, by statute, simply because a person is a telephone subscriber does not constitute consent to authorize the interception of communications among parties which does not include such person on that telephone. *N.J.S.A.* 2A:156A-4d.

3. It is also not unlawful for any investigative or law enforcement officer to intercept a wire, electronic, or oral communication, if the officer is a party to the communication, or where another officer who is a party to the communication requests or requires him to make an interception. *N.J.S.A.* 2A:156A-4b. For a listing of other exceptions, *see N.J.S.A.* 2A:156A-4e to i.

VII. POSSESSION, SALE, ETC. OF INTERCEPT-ING DEVICES (*N.J.S.A.* 2A:156A-5)

Except as provided in *N.J.S.A.* 2A:156A-6, any person who purposely possesses, sells, distributes, manufactures, assembles or advertises an electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the interception of a wire, electronic, or oral communication is guilty of a third degree crime. *N.J.S.A.* 2A:156A-5.

VIII. EXCEPTIONS TO *N.J.S.A.* 2A:156A-5 (*N.J.S.A.* 2A:156A-6)

Pursuant to *N.J.S.A.* 2A:156A-6, a provider of a wire or electronic communication service, or its officer, agent, or a person under contract with such a provider, the United States, a state or a political subdivision thereof, acting in furtherance of the appropriate activities of the United States, a state or political subdivision, or the provider of wire or electronic communications service, are exempt from the applicability of *N.J.S.A.* 2A:156A-5.

IX. WIRETAPPING DEVICES SUBJECT TO SEIZURE AND FORFEITURE (N.J.S.A. 2A:156A-7)

Pursuant to *N.J.S.A.* 2A:156A-7, any electronic, mechanical, or other device possessed, used, sent, distributed, manufactured, or assembled in violation of the Act may be seized and forfeited to the State.

X. PERSONS AUTHORIZED TO APPLY FOR AN ORDER TO INTERCEPT COMMUNICA-TIONS AND OFFENSES THAT MAY BE INVESTIGATED BY MEANS OF INTERCEPT-ING WIRE COMMUNICATIONS (*N.J.S.A.* 2A:156A-8)

A. The Attorney General, a county prosecutor, or a person so designated to act for such an official and to perform his or her duties during their absence or disability may authorize, in writing, an *ex parte* application to a judge for an order authorizing the interception of a wire, or electronic or oral communication by the law enforcement agency which may provide evidence of the offenses as listed in the Act. *See N.J.S.A.* 2A:156A-8. Persons authorized to apply for such orders must exercise mature judgment involving consideration of fundamental individual rights to determine whether those rights should be subjugated in the name of law enforcement. *State v. Travis*, 125 *N.J. Super.* 1, 11 (Law Div. 1973), *aff'd*, 133 *N.J. Super.* 326 (App. Div. 1975).

B. The county prosecutor may, in certain circumstances, such as in times of physical absence or disability, appoint a qualified person as acting prosecutor with powers of office, who may invoke and authorize wiretap applications under the Act. State v. Travis, 125 N.J. Super. at 9-10; see also State v. Burstein, 172 N.J. Super. 388, 398 (App. Div. 1980), aff'd, 85 N.J. 394 (1981). However, when such a delegation of authority is challenged on a motion to suppress, the State will be required to come forward with evidence to demonstrate that such delegation was necessary and justified in the situation presented. State v. Travis, 125 N.J. Super. at 9; cf. State v. Cocuzza, 123 N.J. Super. 14, 21-22 (Law Div. 1973) (the court observed that the Act does not allow such delegation on an *ad hoc* basis, but rather, requires that such delegation be restricted to instances in which the substitute prosecutor is a person empowered to exercise all of the duties of the prosecutor in and during the latter's actual absence or disability).

XI. THE CONTENTS OF THE APPLICATION FOR A WIRETAP ORDER (N.J.S.A. 2A:156A-9)

N.J.S.A. 2A:156A-9 provides that the application for an order must contain the following:

A. The authority of the applicant. *N.J.S.A.* 2A:156A-9a;

B. The identity and qualifications of the investigative or law enforcement officers or the agency for whom the authority to intercept a wire, electronic or oral communication is sought, including the identity of the person who authorized the application. *N.J.S.A.* 2A;156A-9b; *see also State v. Dye*, 60 *N.J.* 518, 527-28, *cert. denied*, 409 *U.S.* 1090 93 *S.Ct.* 699 (1972) (appellate court will not disturb a finding of qualification by the trial court unless there is an unreasonable evaluation of the facts and a mistaken use of discretion);

C. The identity of the suspect, if known, committing the offense and whose communications are to be intercepted. N.J.S.A. 2A:156A-9c(1). However, the wiretap order need not particularize and identify each and every individual whose conversation is to be overheard. See State v. Murphy, 148 N.J. Super. 542, 548 (App. Div. 1977) (where affidavits for wiretap clearly indicated that the defendants were targets of investigation and that the telephone to be taped were used by them, the defendants' names were improperly omitted from the intercept orders; however, the omission did not warrant suppression since there was no prejudice to the defendants); State v. Sanchez, 149 N.J. Super. 381, 386-87 (Law Div. 1977) (because the identity of the defendants were unknown until after wiretaps had begun, the defendants were not "targets" in any of the wiretaps, and thus, there was no requirement that they be named in the wiretap applications; moreover, assuming probable cause, the conversations of all persons using the telephone may be intercepted);

D. The details of the offense. N.J.S.A. 2A:156A-9c(2);

E. The type of communications to be intercepted. *N.J.S.A.* 2A:156A-9c(3); *see State v. Braeunig*, 122 *N.J. Super.* 319, 325 (App. Div. 1973) (an order referring to communications which are evidentiary of such offenses as bookmaking and conspiracy adequately described the type of communications that were to be intercepted);

F. Probable cause that the communication will occur over the particular wire or electronic communication facility that is being tapped. *N.J.S.A.* 2A:156A-9c(3); *see also State v. Benevento*, 138 *N.J. Super.* 211, 214 (App. Div. 1975), *certif. denied*, 70 *N.J.* 276 (1976);

G. The place where the wire or electronic communication facility is located or where the oral communication is to be intercepted. N.J.S.A. 2A:156A-9c(4). However, by amendment in 1993, an application need not contain such information for interception of an oral communication if the application: (1) is approved by the Attorney General or county prosecutor; (2) contains a full and complete statement as to why such a specification is unpractical and identifies the person committing the offense and whose communications are to be intercepted; and (3) a judge finds that such specification is unpractical. *N.J.S.A.* 2A:156A-9g(1). With regard to an interception of a wire or electronic communication, specificity of the information as required by this subsection is unnecessary, if the application: (1) is approved by the Attorney General or county prosecutor; (2) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant identifies the purpose on the part of the person thwarting interception by changing facilities; and (3) a judge finds that such a purpose has been adequately shown. N.J.S.A. 2A:156A-9g(2). In addition, an interception of a communication under this provision shall not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the order. N.J.S.A. 2A:156A-9g. Furthermore, a provider of a wire or electronic communication that has received such an order may make a motion that the court modify or quash the order on the ground that the provider's assistance with respect to the interception cannot be performed in a timely or reasonable fashion. Id. The court, upon notice to the Attorney General or county prosecutor, must decide such a motion expeditiously. *N.J.S.A.* 2A:156A-9c(4); N.J.S.A. 2A:156A-9g;

H. The period of time over which the interception is required. *N.J.S.A.* 2A:156A-9c(5). However, if the character of the investigation is such that authorization for the interception should not automatically terminate when the described type of communication has been first obtained, a statement is required establishing probable cause to believe that additional communications of the same type will occur thereafter. *Id.*;

I. Facts showing that other normal investigative procedures were tried but failed or reasonably appeared to be unlikely to succeed if tried or too dangerous to employ. N.J.S.A. 2A:156A-9c(6). A valid affidavit does not have to recite compelling and truly unique circumstances to satisfy this requirement. In State v. Tanchalk, 177 N.J. Super. 551, 555 (App. Div. 1981), the wiretap order was issued on the bare conclusory statements that normal investigative procedures would not have been effective in detecting the illegal gambling activity and may have been impossible to conduct. In State v. Braeunig, 122 N.J. Super. at 326, the affidavit did not explicitly relate that other investigative techniques had actually been utilized, but rather, reflected bare conclusions that electronic surveillance was necessary; the requirement of the statute was deemed satisfied because spot surveillances, toll-call analysis or personal interviews, were unlikely to succeed in revealing the substance of gambling communications or might have endangered the investigator. See also State v. Dye, 60 N.J. at 526;

J. If the application is for a renewal or extension of the order, a statement is required demonstrating the results obtained so far or a reasonable explanation of the failure to obtain such results. *N.J.S.A.* 2A:156A-9d; and

K. Facts concerning previous applications regarding similar persons or places. *N.J.S.A.* 2A:156A-9e.

XII. GROUNDS NECESSARY FOR THE AUTHORIZATION OF AN ORDER (N.J.S.A. 2A:156A-10)

The judge may enter an *ex parte* order authorizing the interception of a wire, electronic or oral communication if the judge determines on the basis of the facts submitted by the applicant that there is probable cause to believe that the criteria set forth in N.J.S.A. 2A:156A-9 has been satisfied. See N.J.S.A. 2A:156A-10; see, e.g., State v. Tanchalk, 177 N.J. Super. 551, 555-56 (App. Div. 1981); State v. Benevento, 138 N.J. Super. 211, 214 (App. Div. 1975). In State v. Pemberthy, 224 N.J. Super. 280, 296-98 (App. Div.), certif. denied, 111 N.J. 633 (1988), probable cause was supplied where the affidavit presented to the issuing judge demonstrated that normal investigative techniques had been tried during the investigation, and that these techniques, as well as alternate techniques, had failed. The determination of probable cause is based on the totality of the circumstances as contained in the supporting affidavit, the background information provided by the affiant, and their specialized experience. *State v. Murphy*, 137 *N.J. Super.* 404, 416 (Law Div. 1975), *rev'd o.g.*, 148 *N.J. Super.* 542 (1977).

XIII. ADDITIONAL GROUNDS FOR PUBLIC FACILITIES OR FACILITIES OF PERSONS ENTITLED TO PRIVILEGED COMMUNICA-TIONS (*N.J.S.A.* 2A:156A-11)

A. If the facilities from which a wire communication is to be intercepted are public, or are used by a licensed physician, a practicing psychologist, an attorney-at-law, a practicing clergy person, a newspaper person, or primarily for habitation by a husband and wife, no order shall issue, unless the court finds, in addition to the matters required in N.J.S.A. 2A:156A-9 and N.J.S.A. 2A:156A-10, a "special need," as defined in N.J.S.A. 2A:156A-11, is shown. For the requirements of "special need," see N.J.S.A. 2A:156A-11; State v. Dye, 60 N.J. 518, 526, cert. denied, 409 U.S. 1090, 93 S.Ct. 699 (1972); State v. Tanchalk, 177 N.J. Super. 551, 555 (App. Div. 1981); State v. Benevento, 138 N.J. Super. 211, 214 (App. Div. 1975); State v. Sidoti, 116 N.J. Super. 70, 78-80 (Law Div. 1971), rev'd o.g., 120 N.J. Super. 208, 211-12 (App. Div. 1972).

B. The requirement of showing a "special need" for a wiretap on public telephones must be considered separately in determining the admissibility of evidence obtained by an authorized wiretap. *State v. Sidoti*, 116 *N.J. Super.* at 211-12.

XIV. THE ORDER AUTHORIZING INTER-CEPTION, ITS CONTENTS, LIMITATIONS, EXTENSIONS AND RENEWALS, PROGRESS REPORTS, AND ASSISTANCE BY PROVIDER OF WIRE ELECTRONIC COMMUNICATION SERVICE (*N.J.S.A.* 2A:156A-12)

A. Contents

Each order shall state the authorization of the judge, the identity or a description of the person, if known, whose communications are to be intercepted, the character and location of the facilities that will be intercepted, the type of communications to be intercepted as it relates to the particular offense, the identity of the officers executing the order and their authorization, and the period of time during which the interception is authorized. *N.J.S.A.* 2A:156A-12a to f; *see, e.g., State v. Tango,* 287 *N.J. Super.* 416, 420-21 (App. Div. 1996), *certif. denied,* 144 *N.J.* 585 (1996) (because a cellular phone has no fixed location, wiretap order which specified telephone number and the name and address of the person to whom the cell phone was listed, included the required information to the extent practicable under the circumstances); *see also State v. Braeunig*, 122 *N.J. Super.* 319, 325 (App. Div. 1973); *State v. Sidoti*, 120 *N.J. Super.* 208, 212-13 (App. Div. 1972).

B. Limitations, Extensions and Renewals

1. No order shall authorize an interception for a period of time in excess of what is necessary under the circumstances. N.J.S.A. 2A:156A-12. Within statutory limits, this determination rests in the reasonable discretion of the judge. See State v. Dye, 60 N.J. 518, 527, cert. denied, 409 U.S. 1090, 93 S.Ct. 699 (1972). The order must require that interception begin and terminate "as soon as practicable" and that it be conducted in such a manner as to minimize or eliminate the interception of communications not otherwise subject to interception by making reasonable efforts, whenever possible, to reduce the hours of interception authorized by the order. *N.J.S.A.* 2A:156A-12. The purpose of minimization is to safeguard an individual's right to privacy. State v. Pemberthy, 224 N.J. Super. 280, 298 (App. Div.), certif. denied, 111 N.J. 633 (1988).

The initial authorization shall not exceed 20 days and extensions or renewals may be granted for two additional periods of not more than 10 days each. *N.J.S.A.* 2A:156A-12; *see, e.g., State v. Bain,* 212 *N.J. Super.* 548, 551 (App. Div.), *certif. denied,* 107 *N.J.* 68 (1986). In cases involving racketeering, leader of organized crime, or leader of narcotics trafficking network, the order may authorize the interception for a period not to exceed 30 days, without any limitation on the number of extension or renewal orders, but which are also limited to a period of 30 days, and provided, however, such orders shall not exceed six months. *N.J.S.A.* 2A:156A-12g.

2. Both extrinsic and intrinsic minimization of the interception of non-pertinent information is necessary.

a. Extrinsic minimization is accomplished by simply limiting the hours and total duration of the interception. *State v. Catania*, 85 *N.J.* 418, 429 (1981); *see also State v. Burstein*, 85 *N.J.* 394, 414 (1981); *cf., State v. Pemberthy*, 224 *N.J. Super.* at 298-99 (where the initial order did not require specification of hours of interception given the continuing nature of the conspiracy under investigation).

b. Intrinsic minimization is accomplished by terminating the interception of individual phone calls within the authorized hours as it becomes apparent to the monitors that the call is not relevant to the investigation. State v. Catania, 85 N.J. at 429; see also State v. Burstein, 85 N.J. at 414. Subjective good faith is required, along with objective reasonableness, based on the circumstances, in all minimization efforts. State v. Catania, 85 N.J. at 436, 444; see also State v. Burstein, 85 N.J. at 414. However, the police are not subjected to the impossible standard of terminating the interception of all nonrelevant phone calls; rather, what is required is that reasonable efforts be made to minimize or eliminate the interception of irrelevant calls. State v. Catania, 85 N.J. at 433.

The sufficiency of minimization efforts must be judged on a case-by-case basis; the following is to be considered in assessing the reasonableness of the monitors' minimization efforts: (i) the nature of certain phone calls, which may render minimization difficult; (ii) the scope of the enterprise under investigation; and (iii) the reasonable expectations of the monitors, at that stage of the conspiracy, as to the nature of the conversation. Id. at 433-34; see also State v. Burstein, 85 N.J. at 415. For instance, in State v. Pemberthy, 224 N.J. Super. at 299-300, the court found that the monitors had exercised subjective good faith in their minimization efforts, their efforts were objectively reasonable, such as the use of spot monitoring and the necessity of ascertaining the full scope of the conspiracy, and thus, had fully complied with the requirements of Catania.

3. An extension or renewal of a wiretap order must conform to the same procedures as those utilized in the initial application to insure that constitutional protections remain intact. *State v. Murphy*, 137 *N.J. Super.* 404, 430 (Law Div. 1975), *rev'd o.g.*, 148 *N.J. Super.* 542 (App. Div. 1977). In *State v. Gerardo*, 234 *N.J. Super.* 614, 617 (Law Div. 1988), the defendant was not entitled to suppress wiretap evidence, even though there was a one or two-day lapse between expiration of the order allowing the original wiretap and entry of the order providing for an extension of the previous order.

4. The court may require progress reports. *N.J.S.A.* 2A:156A-12h.

5. Upon the request of the applicant, an order may direct a provider of an electronic communication service to provide assistance in the interception. *N.J.S.A.* 2A:156A-12h.

XV. EMERGENCY SITUATIONS (N.J.S.A. 2A:156A-13)

Upon informal application by an authorized applicant, a judge may determine that an emergency situation exists that involves the investigation of conspiratorial activities involving organized crime or the immediate danger of death or serious bodily injury to a person, and thus, may grant verbal approval for an interception, conditioned upon the filing of a formal written application within 48 hours. *N.J.S.A.* 2A:156A-13. The interception must immediately terminate when the communication sought is obtained or when the application for an order is denied. *Id.* In the event no formal written application is made, the contents of the intercepted communication shall be treated as having been obtained in violation of the Act. *Id.*

XVI. RECORDING, DUPLICATING, CUS-TODY, SEALING, DESTRUCTION, INSPEC-TION AND DISCLOSURE OF INTERCEPTED COMMUNICATIONS (*N.J.S.A.* 2A:156A-14 TO 20)

A. Recording and Duplicating

The intercepted communication shall, if practicable, be recorded in such a way as will protect it from editing or other alteration. N.J.S.A. 2A:156A-14. Duplicates may by made for purposes of disclosure. Id. In State v. Sullivan, 244 N.J. Super. 357, 365 (App. Div. 1990), the court found that suppression of evidence of unrecorded communications, and evidence derived therefrom, could be an appropriate judicially-fashioned sanction for a section 14 recording violation. However, the court further held that the sanction does not extend to excluding evidence after such a violation has been remedied. Id. Thus, where the State failed to record conversations due to the malfunction of equipment during a wiretap, suppression of conversations intercepted and recorded after the malfunction had been corrected did not require suppression. Id. at 359-62.

B. Custody and Sealing

Immediately upon expiration of the order, including extensions and renewals, the tapes, wires, or other recordings are to be transferred to the judge who issued the order and then shall be sealed; custody is to be maintained wherever the court directs. *N.J.S.A.* 2A:156A-14. The import of this statute is two-fold: to protect the integrity of the tapes and to protect investigees from possible overreaching. *State v. Gerardo*, 234 *N.J. Super.* 614, 617 (Law Div. 1988). Failure to comply with § 14 sealing procedures requires exclusion of the recordings from evidence. *State v. Cerbo*, 78 *N.J.* 595, 603 (1979).

A delay in sealing is tantamount to the absence of a seal and the statutory requirement that there be a satisfactory explanation for such absence is applicable to a delay in sealing. Id. at 601. The relief occasioned by the absence of an immediately placed seal on a completed wiretap or a satisfactory explanation for its delay is the non-admissibility of its contents. Id. at 602-603. However, this rule, as enunciated in Cerbo, was not to be applied retroactively. State v. Burstein, 85 N.J. 394, 410-11 (1981); cf. State v. Tanchalk, 177 N.J. Super. 551, 553-55 (App. Div. 1981) (sealing may occur upon expiration of the original order or the expiration of any extension or renewal, where the interception is made continuous by the subsequent orders); State v. Schultz, 176 N.J. Super. 65, 67 (App. Div. 1980)(recording of phone conversations between a defendant and a third party obtained with consent of the third party was not subject to sealing requirement). Note, that if the judge who authorized the initial order is unavailable, sealing can be obtained from any authorized judge. State v. Barrise, 173 N.J. Super. 549, 551 (App. Div. 1980), aff'd, 85 N.J. 394, 402, n. 2 (1981).

C. Destruction

Intercepted communications, applications, and orders may not be destroyed, except upon a court order, and in any event, must be kept for 10 years. *N.J.S.A.* 2A:156A-14; *see also N.J.S.A.* 2A:156A-15.

D. Inspection

The Act contemplates reasonable discovery in a pretrial and trial setting. *State v. Braeunig*, 122 *N.J. Super.* 319, 329 (App. Div. 1973). Within a reasonable time, but not later than 90 days after the termination date, or extension or renewal period, or the date of denial of the order, the judge shall serve upon all pertinent persons, as identified in the Act, an inventory containing the following: notice of and date of entry of the order (or of its denial), the time period of authorization (or of its disapproval), and the fact as to whether communications were intercepted or not. *N.J.S.A.* 2A:156A-16a to d.

The court in its discretion and in the interests of justice, may make portions available for such persons' or their attorneys' inspection. *N.J.S.A.* 2A:156A-16. In

exercising its discretion in the interest of justice, the court must weigh the sometimes competing interests of the public, grand juries, police and prosecutors on the one hand against those of potential witnesses, targets, and defendants on the other. *In Re Doe Application for Pre-Indictment Discovery*, 184 *N.J. Super.* 492, 497 (Law Div. 1982).

When time is a critical factor, disclosure should be denied upon an *in camera* showing of a present need for secrecy while a criminal investigation is in progress. *Id.* If the contents of a wiretap are to be disclosed at trial, a copy of the order and accompanying application must be sent to the defendant at least ten days before trial. *N.J.S.A.* 2A:156A-20. The court may waive this requirement where it finds that the service is not practicable and the parties to the action will not be prejudiced by it. *State v. Dye*, 60 *N.J.* 518, 546, *cert. denied*, 409 *U.S.* 1090, 93 *S.Ct.* 699 (1972).

Furthermore, if it is demonstrated to the court that there are recorded conversations of innocent persons or persons wholly unconnected with the suspected criminal activities which have minimal evidential worth and their revelation might be unduly embarrassing or humiliating, these conversations may be withheld from disclosure. State v. Braeunig, 122 N.J. Super. at 330. Similarly, conversations concerning other criminal activities which may be the subject of pending investigations, privileged or confidential conversations, or communications which disclose the identity of informants or the nature or techniques of police investigative procedures may also be However, the withholding of such withheld. Id. conversations should be counter-balanced by the ultimate desideratum of full discovery for all legitimate pretrial and trial purposes. Id.

E. Disclosure

An investigative or law enforcement officer who has lawfully obtained knowledge of the contents of intercepted communications or evidence derived therefrom may disclose such knowledge to any other law enforcement officer if it is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. *N.J.S.A.* 2A:156A-17a; *see In re Spinelli*, 212 *N.J. Super.* 526, 530 (Law Div. 1986); *see, e.g., State v. Murphy*, 137 *N.J. Super.* 404, 423-24 (Law Div. 1975), *rev'd o.g.,* 148 *N.J. Super.* 542 (App. Div. 1977) (New Jersey officials may disclose information obtained by wiretapping to New York officials if they have a reasonable belief that such disclosure is permissible); *cf. In re Spinelli,* 212 *N.J. Super.* at 532 (it is unlawful to disclose properly intercepted tape recordings to a public official for the purpose of using the recording in a disciplinary proceedings of a police officer). Disclosure under the Act is limited to criminal matters. *See In re Spinelli*, 212 *N.J. Super.* at 537 (although the police chief was deemed an "investigative or law enforcement officer," in the context of a departmental disciplinary proceedings, the police chief was functioning as the administrative head of a municipal department in a purely civil matter; the intended use of the tape recording was not of the type envisioned by federal or state wiretap law).

In addition, any person who has lawfully obtained such knowledge may disclose it only while testifying under oath or affirmation in any criminal proceeding, provided that the contents of those interceptions may be initially disclosed solely through the use of the testimony of the witness to such communication or the actual recording of the communication. N.J.S.A. 2A:156A-17b; cf. State v. Braeunig, 122 N.J. Super. 319, 330 (App. Div. 1973) (recorded conversations of innocent persons or persons wholly unconnected with the suspected criminal activity, having minimal evidential worth and their revelation might be unduly embarrassing or humiliating, could be withheld from disclosure). The contents of intercepted communications or evidence derived therefrom may otherwise be disclosed only upon a showing of good cause. N.J.S.A. 2A:156A-17c.

Likewise, interception of communications relating to offenses other than those specified in the order may be disclosed only under the same circumstances as provided in *N.J.S.A.* 2A:156A-17. *N.J.S.A.* 2A:156A-18.

F. Notice

The contents of any intercepted communication shall not be disclosed in any trial, hearing, or proceeding, unless the parties to the action have been served, not less than 10 days before trial, with a copy of the order and accompanying application under which the application was authorized. *N.J.S.A.* 2A:156A-20. Service may be waived by the court if service is not practicable and the parties are not prejudiced by the failure of service. *Id.*

G. Criminal Liability

Unless specifically authorized pursuant to the Act, any person who knowingly uses or discloses the existence of an order authorizing an interception or its contents or information derived from it is guilty of a third degree crime. *N.J.S.A.* 2A:156A-19.

XVII. MOTION TO SUPPRESS THE CON-TENTS OF AN INTERCEPTED COMMUNICA-TION (N.J.S.A. 2A:156A-21)

A motion to suppress the contents of an intercepted communication must be made at least 10 days before trial. *N.J.S.A.* 2A:156A-21. To suppress the communication, the aggrieved person must show one of the following: (1) the communication was unlawfully intercepted; (2) the order of authorization was insufficient on its face; or (3) the interception was not made in conformity with the order of authorization or in accordance with N.J.S.A. 2A:156A-12. See generally, State v. Dye, 60 N.J. 518, cert. denied, 409 U.S. 1090, 93 S.Ct. 699 (1972); State v. Murphy, 137 N.J. Super. 404 (Law Div. 1975), rev'd o.g., 148 N.J. Super. 542 (App. Div. 1977); State v. Sidoti, 120 N.J. Super. 208 (App. Div. 1972).

If the motion is granted, the "entire contents" of all intercepted communications obtained during or after any interception which has been determined to be in violation of the Act, or evidence derived from it, is not admissible at trial, hearing, or any other proceeding. *N.J.S.A.* 2A:156A-21. Thus, all evidence derived from the illegal interception, which includes conversations recorded by the interception, conversations recorded after the unlawful interception, and other evidence derived from the interception, shall be excluded. *State v. Worthy*, 141 *N.J.* 368, 387 (1995). The State maintains the right to appeal from the granting of a motion to suppress. *N.J.S.A.* 2A:156A-21.

Not every failure to comply with the Act mandates suppression of the interception. *State v. Worthy*, 141 *N.J.* at 381; *State v. Sullivan*, 244 *N.J. Super*. 357, 363 (App. Div. 1990); *State v. Murphy*, 148 *N.J. Super*. 542, 547-48 (App. Div. 1977); *State v. Sidoti*, 134 *N.J. Super*. 426, 429-30 (App. Div. 1975). Violation of a procedural requirement of the Act triggers the suppression remedy only for those statutory requirements considered "critical." *State v. Worthy*, 141 *N.J.* at 381; *State v. Cerbo*, 78 *N.J.* 595, 603 (1979); *State v. Sullivan*, 244 *N.J. Super*. at 363.

For example, in *State v. Sullivan, supra*, the State's failure to record conversations due to a malfunction of wiretap equipment violated the Act, but did not require suppression of the conversations intercepted and recorded after the malfunction had been corrected. *Id.* at 361-62; *see also State v. Burstein,* 85 *N.J.* 394, 413-14 (1981) (holding that when tapes are suppressed because of a sealing violation, evidence derived from other

wiretaps or search warrants based on those tapes is nevertheless admissible at trial where the derivative wiretap or search warrant was authorized prior to the sealing violation that tainted the tapes and made their integrity suspect).

For specific technical violations ruled insufficient to warrant suppression, see State v. Parisi, 181 N.J. Super. 117, 120 (App. Div. 1981) (authorization forms for consensual telephonic interceptions lost or misplaced); State v. Luciano, 148 N.J. Super. 551, 555 (App. Div. 1977) and State v. Cirillo, 146 N.J. Super. 577, 585 (App. Div. 1977) (omission of the defendant's name from the order); State v. Sidoti, 134 N.J. Super. at 429-30 (inadvertent delay in service of inventory); State v. Sanchez, 149 N.J. Super. 381, 390 (Law Div. 1977) (failure to provide issuing judge with the names of individuals unnamed in intercept orders but overheard during electronic surveillance for service of inventory purposes); see also State v. Laurence, 259 N.J. Super. 225, 233 (Law Div. 1992)(orders of authorization were not deficient where forms for the consensual interception of communications were orally approved by the Attorney General's designee).

To find that evidence was obtained by means sufficiently independent of an illegal wiretap to dissipate any taint of illegal police conduct, the court must weigh three factors: temporal proximity between the illegal conduct and the challenged evidence; the presence of intervening circumstances; and the flagrancy and purpose of the police misconduct. *State v. Worthy*, 273 *N.J. Super.* 147, 155 (App. Div. 1994), *aff'd*, 141 *N.J.* 368 (1995).

In *State v. Minter*, 116 *N.J.* 269, 283 (1989), the Supreme Court held that State investigators may not circumvent the law by merely bringing in federal agents and having them tap a phone. However, if the wiretap evidence is obtained by federal agents pursuant to federal law, but does not satisfy State standards under the Act, it does not necessarily result in suppression. *Id.* at 278. However, when the relationship between federal and state agents implicate the concerns that prompted the special requirements of the Act, the wiretap evidence would be inadmissible in the State proceeding. *Id.* at 271.

XVIII. REPORT BY ISSUING OR DENYING JUDGE TO THE ADMINISTRATIVE DIREC-TOR OF THE COURTS (*N.J.S.A.* 2A:156A-22)

Pursuant to *N.J.S.A.* 2A:156A-22, within 30 days after the expiration of a wiretap order or any extension or renewal thereof, or the denial of an order confirming verbal approval of an interception, the judge authorizing or denying the interception must file a report with the Administrative Director of the Courts containing the following information:

1. An application had been made for an order, extension, or renewal thereof;

2. The kind of order applied for;

3. Whether the order was granted, modified, or denied;

4. The period of the interceptions authorized by the order and the number or duration of any extensions or renewals of the order;

5. The offense specified in the order or any extension or renewal thereof;

6. The identity of the person authorizing the application and of the investigative or law enforcement officer and agency for whom it was made; and

7. The character of the facilities from which or the place where the communications were to be intercepted.

XIX. ANNUAL REPORTS OF THE SUPERIOR COURT, SUPREME COURT, AND THE ATTORNEY GENERAL; RECORDS OF THE ATTORNEY GENERAL AND COUNTY PROS-ECUTORS (*N.J.S.A.* 2A:156A-23)

A. Superior Court judges who are authorized to issue orders pursuant to the Act must submit annual reports concerning the operation of the Act to the Administrative Director of the Courts. The reports must contain the following information:

- 1. The number of applications made;
- 2. The number of orders issued;
- 3. The effective periods of such orders;

4. The number and duration of any renewals thereof;

5. The crimes in connection with which the conversations were sought;

6. The names of the applicants; and

7. Any other details which may be required by the Administrative Director of the Courts. *N.J.S.A.* 2A:156A-23a.

B. The Attorney General is also required to submit an annual report to the Administrative Director of the Courts. In addition to the above information, with the exception of item (7), the Attorney General must provide the following additional information:

1. The number of indictments resulting from each application;

2. The crime(s) which each indictment charges; and

3. The disposition of each indictment. *N.J.S.A.* 2A:156A-23b.

C. The Attorney General is mandated to receive and maintain records of all interceptions authorized pursuant to *N.J.S.A.* 2A:156A-4. This information must be included in the Attorney General's annual report to the Governor and the Legislature. Accordingly, all law enforcement agencies in the State must provide the Attorney General, utilizing forms prescribed by the latter, information pertinent to *N.J.S.A.* 2A:156A-4b. The information on such forms must include, but not limited to the following:

1. The name of the investigative or law enforcement officer making the interception;

2. The law enforcement agency employing the officer involved in the interception;

3. The character of the investigation or activity involved; and

4. The results of such activity. *N.J.S.A.* 2A:156A-23c.

D. Both the Attorney General and the county prosecutors must maintain records of all interceptions authorized by them pursuant to *N.J.S.A.* 2A:156A-4c, and must also include the following information:

1. The name of the person requesting the authorization;

- 2. The reasons for the request; and
- 3. The results of any authorized authorization.

In addition, copies of such records maintained by the county prosecutors shall be filed periodically with the Attorney General, who in turn, must report annually to the Governor and the Legislature on the operation of *N.J.S.A.* 2A:156-4c. *N.J.S.A.* 2A:156A-23d.

E. The Chief Justice of the Supreme Court and the Attorney General are to report each year to the Governor and the Legislature on such aspects of the Act as are deemed appropriate, including recommendations for legislative changes, as well as improvement to effectuate the purpose of the Act and to assure the protection of individual rights. *N.J.S.A.* 2A:156A-23e.

XX. CIVIL ACTION AND DAMAGES (N.J.S.A. 2A:156A-24)

Pursuant to *N.J.S.A.* 2A:156A-24, any person whose wire, electronic, or oral communication is intercepted, disclosed, or used in violation of the Act shall have a civil cause of action against any person who commits such acts or procures another to do so. Such a party would be entitled to recover the following:

1. Actual damages, but not less than liquidated damages computed at the rate of \$100.00 per day for each day of violation, or \$1,000.00, whichever is higher;

2. Punitive damages; and

3. Attorney's fees and litigation costs. *N.J.S.A.* 2A:156A-24.

However, pursuant to *N.J.S.A.* 2A:156A-25, a good faith reliance on a court order authorizing the interception shall constitute a complete defense to a civil or criminal action brought under the Act or to administrative proceedings brought against a law enforcement officer.

XXI. UNLAWFUL ACCESS TO STORED COMMUNICATIONS (*N.J.S.A.* 2A:156A-27)

A person is guilty of a crime of the fourth degree if he (1) knowingly accesses without authorization a facility through which an electronic communication service is provided or exceeds an authorization to access that facility, and (2) obtains, alters, or prevents the authorized access to a wire or electronic communication while that communication is in electronic storage. N.J.S.A. 2A:156A-27a. The crime is upgraded to the third degree if the person commits the offense for the purpose of commercial advantage, private commercial gain, or malicious destruction or damage. N.J.S.A. 2A:156A-27b. This section does not apply to conduct authorized: (1) by the person or entity providing a wire or electronic communication service; or (2) by a user of that service with respect to a communication of or intended for that user; or (3) by N.J.S.A. 2A:156A-10, 2A:156A-13, 2A:156A-29, or 2A:156A-30. N.J.S.A. 2A:156A-27c.

XXII. DISCLOSURE OF CONTENTS (N.J.S.A. 2A:156A-28)

A person or entity providing an electronic communication service to the public shall not knowingly divulge the contents of a communication while in electronic storage by that service. *N.J.S.A.* 2A:156A-28a(1). In addition, a person or entity providing remote computing service to the public shall not knowingly divulge the contents of any communication which is carried or maintained on that service under the conditions identified in the statute. *See N.J.S.A.* 2A:156A-28a(2)(a), (b). However, a person or entity may divulge the contents of a communication in the following circumstances:

1. To an addressee or intended recipient of the communication or their agent;

2. As authorized or required by *N.J.S.A.* 2A:156-4, 2A:156A-17, 2A:156A-18, or 2A:156A-29;

3. With the lawful consent of the originator or an addressee or intended recipient of the communication, or the subscriber in the case of a remote computing service;

4. To a person employed or authorized or whose facilities are used to forward the communication to its destination;

5. As may be necessarily incident to the rendition of the service or for the protection of the rights or property of the provider; or

6. To a law enforcement agency, if the contents were inadvertently obtained by the provider and appear to pertain to the commission of a crime. *N.J.S.A.* 2A:156A-28b.

XXIII. REQUIREMENTS FOR ACCESS (N.J.S.A. 2A:156A-29)

A. A law enforcement agency, but no other governmental entity, may require the disclosure by a provider of electronic communication or remote computing services of the contents of an electronic communication without notice to the subscriber or the customer if the law enforcement agency obtains a warrant. *N.J.S.A.* 2A:156A-29a.

B. A provider of electronic communication or remote computing services may disclose a record or other information pertaining to a subscriber or customer of the service to any person other than a governmental entity, but shall not apply to the contents covered by *N.J.S.A.* 2A:156A-29a. *N.J.S.A.* 2A:156A-29b.

C. A provider of electronic communication or remote computing services must disclose a record or other information pertaining to a subscriber or customer of the service, other than the contents covered by *N.J.S.A.* 2A:156A-29a and 2A:156A-29f, to a law enforcement agency under the following circumstances:

1. The law enforcement agency has obtained a warrant;

2. The law enforcement agency has obtained the consent of the subscriber or customer to the disclosure; or

3. The law enforcement agency has obtained a court order for such disclosure under *N.J.S.A.* 2A:156A-29e.

A law enforcement agency receiving records or information under this subsection is not required to provide notice to the customer or subscriber. *N.J.S.A.* 2A:156A-29c.

D. No service provider, its officers, employees, agents, or other specified persons are liable in any civil action for damages as a result of providing information, facilities, or assistance in accordance with the terms of a court order or warrant under this section. *N.J.S.A.* 2A:156A-29d.

E. A court order for disclosure under *N.J.S.A.* 2A:156A-29b or 2A:156A-29c may be issued by a judge and shall only issue if the law enforcement agency offers specific and articulable facts showing that there are reasonable grounds to believe that the record or other information pertaining to a subscriber or customer of an electronic communication or remote computing service is relevant and material to an ongoing criminal investigation. *N.J.S.A.* 2A:156A-29e. A judge who has issued such an order, on a motion made promptly by the service provider, may quash or modify the order, if the information or the requested records are unusually voluminous or compliance with such an order would cause an undue burden on the provider. *Id.*

F. A provider of electronic communication or remote computing services must disclose to a law enforcement agency the name, address, telephone number or other subscriber number or identity, and length of service provided to a subscriber or customer of such service and the types of services the subscriber or customer utilized, when the law enforcement entity obtains a grand jury or trial subpoena. *N.J.S.A.* 2A:156A-29f.

G. Upon the request of a law enforcement agency, a provider of wire or electronic or remote computing service must take all the necessary steps to preserve for 90 days, records and other evidence in its possession pending the issuance of a warrant. *N.J.S.A.* 2A:156A-29g. The preservation period shall be extended for an additional 90 days upon the request of the law enforcement agency. *Id.*

XXIV. BACKUP PRESERVATION (*N.J.S.A.* 2A:156A-30)

A law enforcement agency acting pursuant to *N.J.S.A.* 2A:156A-29 may include in a court order a requirement that the service provider to whom the request is directed that it create a backup copy of the contents of the electronic communication sought in order to preserve those communications. *N.J.S.A.* 2A:156A-30a(1). This section also provides the detailed procedures that are to be followed, including, but not limited to, requirements as to notice, applications to vacate the order, service, and providing for further proceedings if deemed necessary by the court, as well as the standards for the court to deny the application or ordering the process quashed. *See N.J.S.A.* 2A:156A-30a to e.

XXV. COST REIMBURSEMENT (N.J.S.A. 2A:156A-31)

A law enforcement agency obtaining the contents of communications, records, or other information under N.J.S.A. 2A:156A-28, 2A:156A-29, or 2A:156A-30, shall reimburse the person or provider for costs and which have been directly incurred for searching, assembling, reproducing, and otherwise providing information, as well as the costs due to the necessary disruption of normal operations of any electronic communication or remote computing service in which the information may be *N.J.S.A.* 2A:156A-31a. The amount of stored. reimbursement can be mutually agreed upon by the law enforcement agency and the service provider, and in the absence of an agreement, by the court. N.J.S.A. 2A:156A-31b. This section does not apply to records or other information maintained by a provider of wire or electronic communication service which relates to telephone toll records and telephone listings obtained pursuant to N.J.S.A. 2A:156A-29, unless the court determines that the required information is voluminous or causes an undue burden on the provider. N.J.S.A. 2A:156A-31c.

XXVI. CIVIL ACTION AND DAMAGES (N.J.S.A. 2A:156A-32)

Except as provided in *N.J.S.A.* 2A:156A-29d, any service provider, subscriber, or customer, aggrieved by any violation of *N.J.S.A.* 2A:156A-27 to 30, may recover, in a civil action, from the person or entity which knowingly or purposefully engaged in the conduct constituting the violation. *N.J.S.A.* 2A:156A-32a. Appropriate relief may include the following:

1. Preliminary and other equitable or declaratory relief;

2. Actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than \$1,000; and

3. Attorney fees and litigation costs. *N.J.S.A.* 2A:156A-32b, c.

A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation. *N.J.S.A.* 2A:156A-32d. However, pursuant to *N.J.S.A.* 2A:156A-33, it shall be a complete defense to any civil or criminal action brought pursuant to *N.J.S.A.* 2A:156A-27 to 30 and 2A:156A-32, that the person made a good faith reliance on the following:

1. A court warrant or order, legislative authorization, or a statutory authorization;

2. A request of an investigative or law enforcement officer under *N.J.S.A.* 2A:156A-13; or

3. A good faith determination that *N.J.S.A.* 2A:156A-4 permitted the conduct which is the subject of the complaint.

XXVII. THE FEDERAL WIRETAP ACT

A. History-Purpose

Following the United States Supreme Court decisions in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967) and Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873 (1967), the Omnibus Crime Control and Safe Streets Act of 1968 (codified as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510, et seq., and also known as the Federal Wiretap Act) was passed, thereby creating a limited system of wire surveillance and electronic eavesdropping within the framework of the Fourth Amendment and the guidelines of Katz and Berger. State v. Minter, 116 N.J. 269, 274-75 (1989). The Federal Wiretap Act applies to any interception of a telephone call, regardless of whether parallel state legislation has been enacted. State v. Fornino, 223 N.J. Super. 531, 543 (App. Div.), certif. denied, 111 N.J. 570, cert. denied, 488 U.S. 859, 109 S.Ct. 152 (1988) (citing United States v. Smith, 726 F.2d 852, 860-61 (1st Cir.), cert. denied sub nom., Torres v. United States, 469 U.S. 841, 105 S.Ct. 143 (1984)); see also State v. Minter, 116 N.J. at 274 ("Federal wiretap law is paramount; it binds federal and state officials alike, setting a threshold that may not be lowered"). Nonetheless, the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 et seq., was modeled after the Federal Wiretap Act, and is in some respects, more restrictive than the federal legislation. State v. Fornino, 223 N.J. Super. at 544.

B. Construction

In *United States v. New York Telephone*, 434 *U.S.* 159, 165-68, 98 *S.Ct.* 364, 369-70 (1977), the United States Supreme Court held that pen registers, which are

mechanical devices that identify all outgoing numbers dialed, whether completed or not from monitored telephones, do not intercept wire or oral communications within the meaning of the federal statute. Moreover, the installation and use of a pen register by the telephone company at the request of the police does not constitute a "search" requiring the issuance of a warrant under the Fourth Amendment since there is no legitimate expectation of privacy. Smith v. Maryland, 442 U.S. 735, 745-46, 99 S.Ct. 2577, 2583 (1979); but see State v. Hunt, 91 N.J. 338, 348-50 (1982) (after analogizing toll billing records, which reflect long distance completed calls, with pen registers, the New Jersey Supreme Court concluded that the former were entitled to Fourth Amendment protection and prohibited the police from obtaining toll billing records without a warrant). In Dalia v. United States, 441 U.S. 238, 246-48, 99 S.Ct. 1682, 1688-89 (1979), the United States Supreme Court held that a covert entry to install court-ordered electronic surveillance devices was authorized by the Federal Wiretap Act and did not violate the Fourth Amendment.

C. Application for a Wiretap Order

In *United States v. Adams*, 759 *F.*2d 1099, 1114 (3d Cir.), *cert. denied*, 474 *U.S.* 971, 106 *S.Ct.* 336 (1985), the Third Circuit found that the government need not exhaust all possible traditional investigative techniques prior to applying for a wiretap. *Id.* at 1114. In *Adams*, because of the danger involved and the strong possibility of discovery, the investigation merited the use of wiretaps. *Id.*

The Federal Wiretap Act, similar to New Jersey law, requires that a wiretap application name any individual the government has probable cause to believe is engaged in the criminal activity under investigation and whose conversations the government expects to intercept via the target telephone. See United States v. Donovan, 429 U.S. 413, 423-24, 97 S.Ct. 658, 665-66 (1977). The government must also provide the judge with a description of the general class or classes which the unnamed, intercepted individuals compromise. Id. at 428-32. In Donovan, the United States Supreme Court found that the government inadvertently failed to comply with the provisions, but held nonetheless, that the omission did not warrant suppression. *Id.* at 432-34; see also United States v. Adams, 759 F.2d at 1115 (suppression was unnecessary where the government failed to name the defendant as a target in its application for an extension of the wiretap; the information necessary to name the defendant as a target was not available to the government until after the application was filed).

D. Minimization

In *Scott v. United States*, 436 *U.S.* 128, 137, 98 *S.Ct.* 1717, 1723 (1978), the United States Supreme Court set forth the standards to be utilized for an analysis of the minimization requirement, *i.e.*, it is based on an objective assessment of an officer's actions in light of the facts and circumstances then known to the officer. In *United States v. Adams*, the Third Circuit found that even though the number of non-pertinent intercepted calls was high, there was no minimization violation because the conspiracy involved a large number of individuals and the participants spoke in coded language. *Id.* at 1115.

E. The Sealing Requirement

In United States v. Ojeda Rios, 495 U.S. 257, 110 S.Ct. 1845 (1990), the United States Supreme Court considered the proper analysis when there is a violation of the sealing requirement as provided by federal law. See 18 U.S.C. §2518(8)(a). As a prerequisite to admissibility, electronic surveillance tapes must be sealed immediately upon the expiration of the underlying surveillance order in order to ensure the reliability and integrity of evidence obtained by means of electronic surveillance, or must provide a "satisfactory explanation" for the absence of a seal. United States v. Ojeda Rios, 495 U.S. at 259-60, 262-63; see also 18 U.S.C. §2518(8)(a). The sealing requirement applies not only to a complete failure to seal, but also to a delay in sealing. United States v. Ojeda Rios, 495 U.S. at 264. The Court further held that the "satisfactory explanation" must be understood to require that the government explain not only why a delay occurred, but also why it is excusable. Id. at 265. In establishing a reasonable excuse for a delay in sealing, the government is not required to prove that a particular understanding of the law is correct, but rather, that its interpretation was objectively reasonable at the time. Id. at 266.

It should be noted that *Ojeda Rios* expressly overruled *United States v. Falcone*, 505 *F.*2d 478, 484 (3d Cir. 1974), *cert. denied*, 420 *U.S.* 955, 95 *S.Ct.* 1339 (1975) which had previously held that the failure to seal tapes in a timely manner would not require suppression so long as the government could prove that the integrity of the tapes had not been compromised. *See United States v. Ojeda Rios*, 495 *U.S.* at 265 n. 5; *see also United States v. Carson*, 969 *F.*2d 1480, 1483 (3d Cir. 1992); *United States v.*

Vastola (II), 915 F.2d 865, 870 (3d Cir. 1990), cert. denied, 498 U.S. 1120, 111 S.Ct. 1073 (1991).

In Vastola II, supra, the Third Circuit interpreted the term "immediately," as contained in 18 U.S.C.A. § 2518(8)(a), which requires that the tapes be sealed "[i]mmediately upon the expiration of the period of the order, or extensions thereof," to mean "as soon as was practical' and not *instanter.*" United States v. Carson, 969 F.2d at 1487 (quoting in part United States v. Vastola II, 915 F.2d at 875). As further noted in Vastola II, if the tapes are not sealed immediately, *i.e.*, as soon as administratively practical, they must be suppressed at trial unless the government can provide a satisfactory explanation for its failure to comply with the sealing requirements. United States v. Carson, 969 F.2d at 1487 (citing United States v. Vastola II, 915 F.2d at 870).

In *Carson*, the Third Circuit interpreted the phrase, "or extensions thereof," as provided in the federal sealing provision, Section 2518(8)(a). See id. at 1487. The Third Circuit held that an order authorizing a surveillance on the same subject, at the same location, and regarding the same matter as an earlier authorized surveillance, would constitute an "extension" of the earlier authorization, if, but only if, the new authorization was obtained as soon as administratively practical or any delay was satisfactorily explained, *i.e.*, shown to have occurred without the fault or bad faith on the part of the government. Id. at 1488. In Carson, the court also explained that there were two types of justifiable government delays: (1) short, administrative delays necessitated to comply with the provisions of the Federal Wiretap Act; and (2) longer, non-administrative delays attributable to reasonable causes, e.g., mistakes of law or unexpected, extrinsic events beyond the government's control. Id. The Third Circuit noted in Carson that Vastola II's "as soon as practical" standard also applied to extensions. United States v. Carson, 969 F.2d at 1490.

F. Disclosure

The Third Circuit in *In re Grand Jury*, 111 *F*.3d 1066, 1077-79 (3d Cir. 1997), held that the "clean hands exception" did not apply to the exclusionary rule of the Federal Wiretap Act, *i.e.*, the government could not direct a witness of a privately executed wiretap to disclose recordings of unlawfully intercepted communications to a federal grand jury despite the government's claim of non-participation in the wiretap.

In *United States v. Aguilar*, 515 *U.S.* 593, 602-605, 115 *S.Ct.* 2357, 2363-64 (1995), the United States Supreme Court interpreted federal wiretap provisions which prohibit the disclosure of information resulting from a wiretap, included "possible interception," thereby criminalizing the disclosure of pending wiretap applications or authorizations, and not just those interceptions which were "factually possible," and even though the defendant does not know if the wiretap would result in an actual interception.

WITNESSES

(See also, EVIDENCE and IMMUNITY, thisDigest)

I. CROSS EXAMINATION

A. Impeachment Through Use of Prior Conviction

N.J.S.A. 2A:81-12 allows the evidentiary admission of any prior conviction of a crime to affect the credibility of any witness. See also N.J.R.E. 609. In State v. Hawthorne, 49 N.J. 130 (1967), the New Jersey Supreme Court interpreted the statute to require the evidentiary admission of every crime to affect the credibility of a witness. In State v. Sands, 76 N.J. 127 (1978), the Court, after repeatedly rejecting attacks on the principle of Hawthorne, decided that its view in Hawthorne was mistaken, and that the statute should be interpreted to vest discretion in the trial judge to admit or exclude a criminal defendant's prior convictions. This was found to insure a fairer trial by allowing for the exclusion of a remotely related conviction with its tendency to lead jurors to believe that the defendant has a criminal disposition. Also, mandatory admissibility was found to discourage defendants from testifying, to the detriment of the fact-finding process. 76 N.J. at 141-42.

The Court in *Sands* rejected arguments that some crimes have no bearing on credibility, as those who do not live within the law reasonably may be deemed less credible than those who do. Prior convictions should generally be admitted and the defendant must shoulder the burden of proof to justify exclusion. *Id.* at 144. Exclusion is only warranted upon a strong showing of remoteness, but even a temporally remote offense may be admitted if it is one of a series of criminal convictions. *Id.* at 145. Remoteness arises from the length of time between the conviction and the trial as well as from the nature of the offense with regard to the defendant's honesty and veracity. These factors must be balanced against the prejudice to a defendant.

In *State v. Paige*, 256 *N.J. Super.* 362, 373 (App. Div. 1992), *certif. denied*, 130 *N.J.* 17 (1992), the Appellate Division disagreed with the contention that a 16-year-old murder conviction was too remote to be admissible for impeachment. In approving the use of a ten-year-old murder conviction, the Appellate Division in *State v. Morris*, 242 *N.J. Super.* 532, 543-45 (App. Div. 1990), *certif. denied*, 127 *N.J.* 321 (1990), noted the seriousness of the crime and the defendant's long criminal history.

The decision to admit or preclude a defendant's prior convictions rests within the sound discretion of the trial judge, who has a wide latitude in which to make the decision. *State v. Hicks*, 283 *N.J. Super.* 301, 306 (App. Div. 1995), *certif. denied*, 143 *N.J.* 327 (1996). Ordinarily the prior conviction should be admitted; the burden to justify exclusion rests on the defendant. *Sands*, 76 *N.J.* at 144; *Hicks, supra, State v. Paige*, 256 *N.J. Super.* at 373. The trial court makes the decision by weighing the impeachment value of the evidence against its capacity for undue prejudice. *State v. Paige*, 256 *N.J. Super.* at 372; *see also N.J.R.E.* 403. Undue prejudice is found where the conviction is remote, that is, whether because of its age or type it has little value as a reflection of the defendant's credibility. *Sands*, 76 *N.J.* at 144-45.

This balancing standard is applicable to the use of prior convictions to impeach the credibility of *all* witnesses, specifically including non-defendant witnesses in a criminal trial. *State v. Balthrop*, 92 *N.J.* 542, 546 (1983); *State v. Harkins*, 177 *N.J. Super.* 397, 401 (App. Div. 1981). In applying this standard, "the balance will necessarily be affected by whose credibility it is that is sought to be impeached by use of the prior conviction." *State v. Balthrop, supra* at 546.

Moreover, the trial court must explain to the jury the limited purpose of prior-conviction evidence. *State v. Sands*, 76 *N.J.* at 142 n.3; *State v. Ellis*, 280 *N.J.* 533, 548 (App. Div. 1995).

The Court revisited the prior-crimes impeachment issue again in State v. Brunson, 132 N.J. 377 (1993). Although it had rejected the idea of sanitization three years earlier in State v. Pennington, 119 N.J. 547 (1990), the Court modified Sands to hold that a defendant's prior crimes that are similar to an offense being tried must be sanitized. "Sanitization" limits the State's crossexamination of a defendant to the degree of his prior similar crime and the date of the offense. 132 N.J. at 391. A defendant wary of jury speculation may waive sanitization and introduce the nature of the offense. 132 N.J. at 392. A defendant with many prior crimes, some similar to the charged offense and others dissimilar, is rewarded in that the State must sanitize all of the prior convictions, unless the State introduces only the dissimilar convictions. 132 N.J. at 394.

In *State v. Singleton*, 308 *N.J. Super.* 407 (App. Div. 1999), the trial court's failure to follow the *Brunson* rule that all convictions must be sanitized if one conviction must be sanitized was found to be reversible error.

In *State v. Carl White*, 297 *N.J. Super.* 376 (App. Div. 1997), the Appellate Division reversed defendant's convictions for robbery and endangering the welfare of a child because the trial court failed to sanitize defendant's prior conviction for receiving stolen property when it was used to impeach his credibility as required by *State v. Brunson*, 132 *N.J.* 377 (1993). The court ruled that the theft conviction was similar to the robbery charge for which defendant was on trial.

In State v. Farguharson, 321 N.J. Super. 117 (App. Div. 1999), certif. denied, 162 N.J. 129 (1999), the Appellate Division reversed defendant's drug convictions that resulted after a retrial following a 1995 reversal. Defendant testified at his first trial, but did not at his second; the State was permitted to read his prior testimony to the second jury. As a general proposition, defendant's claim that admitting his prior testimony was erroneous was without merit. But the trial court should have redacted reference to his prior sanitized convictions, which were admissible only to affect credibility. The Appellate Division concluded that defendant was not a witness at his retrial, and it was not he who had sought admission of his prior testimony, and the issue would be "quite different" if he had. Admitting prior crime evidence for impeachment purposes absent defendant taking the stand would be fatal no matter how strong the evidence of guilt. At a subsequent retrial the State could introduce that part of defendant's testimony that would be admissible as a prior voluntary statement. Finally, the doctrine of completeness did not validate this use of defendant's prior convictions because they had nothing to do with the crimes that were the subject of the trial.

N.J.R.E. 609 applies only to convictions of crimes. State v. Jenkins, 299 N.J. Super. 61, 72 (App. Div. 1997).

In *State v. Jenkins*, 299 *N.J. Super.* 61, the Appellate Division held that because a probation violation is not a criminal conviction it cannot be used for impeachment. The sentence received for a probation violation may, however, be used. The Court found the admission of such sentencing information particularly appropriate where the prior conviction was sanitized under *Brunson*.

This sentiment was expressed earlier in *State v. Hicks*, 283 *N.J. Super.* 301 (App. Div. 1995), *certif. denied*, 143 *N.J.* 327 (1996), where the court observed that, post-*Brunson*, sentencing information becomes more critical so that the jury can measure the severity of the prior conviction. Its severity is a negative measure of the defendant's credibility. 283 *N.J. Super.* at 309.

In *State v. Blue*, 129 *N.J. Super.* 8 (App. Div. 1974), *certif. denied*, 66 *N.J.* 328 (1974), the Court held that a conviction still on appeal cannot be used for impeachment. The court found *Blue* unpersuasive in *State v. Anderson*, 177 *N.J. Super.* 334 (App. Div. 1981), where the challenge on appeal was solely on the ground that the sentence was excessive.

The rule of *Brunson* applies only prospectively. *Brunson, supra; State v. Rush,* 278 *N.J. Super.* 44 (App. Div. 1994).

A defendant does not waive appellate review of this issue by a refusal to take the stand at trial. *State v. Whitehead*, 104 *N.J.* 353 (1986).

B. Impeachment by Religious Beliefs or Opinions

Evidence of a witness' religious beliefs is not admissible to show that because of the nature of such beliefs the witness is or is not credible. *N.J.R.E.* 610.

C. Impeachment with Extrinsic Evidence

In *State v. Harris*, 316 *N.J. Super.* 384 (App. Div. 1998), the Appellate Division held that a defendant's confrontation rights require disclosure of police personnel records if some factual predicate is advanced making it reasonably likely that information in the records could affect the officer's credibility.

In *State v. Wormley*, 305 *N.J. Super.* 57 (App. Div. 1997), *certif. denied*, 154 *N.J.* 607 (1998), the Appellate Division reversed defendants' robbery and weapons convictions. The court held that evidence of the robbery victim's past drug use, precluded at trial because the trial court concluded after hearing the victim that he had not used drugs when he was robbed, was admissible to impeach the victim's observations and conduct after the "alleged" robbery "at best, questionable," and went on to explain why it saw him as not credible.

In *State v. Gorrell*, 297 *N.J. Super.* 142 (App. Div. 1996), the Appellate Division reversed defendant's convictions for aggravated assault and possession of a knife for an unlawful purpose because the trial court ruled that a witness proffered by defendant could not be questioned regarding threats a key witness against defendant had made because it would be hearsay. The appellate court stated that bias against the defendant by a witness may be shown by extrinsic evidence including

other witnesses to threats uttered by the witness in question.

In *State v. James*, 144 *N.J.* 538 (1996), the Supreme Court held that once out-of-court and in-court identification evidence is excluded as impermissibly suggestive, it was error to admit this evidence substantively under the "opening the door", "completeness" or "curative admissibility" doctrines if defendant sought to question a carjacking victim about an earlier misidentification of another as the perpetrator or about his earlier description of the perpetrator. Forcing defendant to chose between his right to cross-examine the victim about the earlier misidentification and his due process right to exclusion of unreliable identification evidence was reversible error.

A prosecutor is entitled to obtain, through a subpoena *duces tecum*, a transcript of the defendant's parole revocation proceeding for the prosecutor's use at trial, including cross-examination of defendant and his witnesses. Records of parole revocation proceedings are not privileged from such use as "official information" under either *Evid. R.* 34 (*N.J.R.E.* 515) or the confidentiality provisions of *N.J.A.C.* 10:70-12.1 or *N.J.A.C.* 10:70-12.3 promulgated pursuant to *N.J.S.A.* 30:4-123.31. *State v. Singleton*, 158 *N.J. Super.* 517 (App. Div. 1978), *aff'g* 137 *N.J. Super.* 436 (Law Div. 1975)

A witness may be impeached through crossexamination which focuses on his interest for testifying. It was error for a court to restrict a cross-examination of a prosecution witness to discover if the witness's testimony is motivated by the prosecutor's decision to cease an investigation into the general business operations of the witness. State v. Mazur, 158 N.J. Super. 89, 103-105 (App. Div. 1978), certif. denied, 78 N.J. 399 (1978). This limitation was improper although there was no evidence of an actual agreement between the prosecutor and the witness to halt the investigation and the investigation was not necessarily criminal in nature. Id. It is the witness's own motives which an opposing party must be able to probe, not the objective fact of whether there exists a bargain between the witness and the prosecutor.

The trial courts do, however, have broad discretion in determining the limits of cross-examination of witnesses on issues of credibility, and the defense right to show the interest of a witness does not give license to roam at will under the guise of impeachment. *State v. Kelly*, 207 *N.J. Super.* 114 (App. Div. 1986).

D. Impeachment with Prior Inconsistent Omission

In *State v. Silva*, 131 *N.J.* 438 (1993), the New Jersey Supreme Court held that a prior statement of a witness that omits a material circumstance within the present testimony is sufficiently inconsistent to be used for impeachment. Cross-examination in this area is permissible if the proper foundation exists.

In *State v. Perez*, 304 *N.J. Super.* 609 (App. Div. 1997), the Appellate Division ruled that the reference in the prosecutor's summation to the failure of defendant's aunt, a trial witness, to earlier come forward and exonerate him did not violate *State v. Silva*, 131 *N.J.* 438 (1993).

In *State v. Dreher*, 302 *N.J. Super.* 408 (App. Div. 1997), *certif. denied*, 152 *N.J.* 10 (1997), *cert. denied*, 524 *U.S.* 943 (1998), the Appellate Division upheld defendant's conviction for the brutal murder of his wife rejecting, among other claims, defendant's assertion that his pre-arrest silence was improperly used against him both substantively and for impeachment. The Appellate Court found defendant's silence was not compelled and was properly admitted as relevant and its probative value outweighed the prejudicial effect.

It is not inherently unfair to allow cross-examination on a defendant's notice of alibi that the defendant was required to file before his attorney completed his investigation where the trial court properly balanced the probative value of the information against its potential prejudice. The inconsistency between defendant's trial testimony and the original alibi notice was a permissible subject of cross-examination. *State v. Irving*, 114 *N.J.* 427, 437-40 (1989).

If a defendant does not testify, however, comment on the alibi notice is improper. *State v. Lumumba*, 253 *N.J. Super*. 375, 396-97 (App. Div. 1992).

II. FAILURE TO PRODUCE WITNESS

In *State v. Clawans*, 38 *N.J.* 162 (1962), the Supreme Court determined that generally the failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference unfavorable to him. But such an inference cannot arise except upon certain conditions and the inference is always open to destruction by explanation of circumstances which make some other hypothesis a more natural one than the party's fear of exposure.

For an inference to be drawn from the nonproduction of a witness, it must appear that the person was within the power of the party to produce, and that his testimony would have been superior to that already utilized in respect to the fact proved. For obvious reasons, the inference is not proper if the witness is for some reason unavailable or is either a person who by his position would be so prejudiced against the party that the latter would not be expected to obtain the unbiased truth from him, or a person whose testimony would be cumulative, unimportant or inferior to what had already been utilized. *See State v. Wilson*, 128 *N.J.* 233, 244 (1992).

The better practice is for the party seeking to obtain such a charge to advise the trial judge out of the presence of the jury as to what he intends to request. This would accord the party failing to call the witness the opportunity to explain the failure or to call the witness. *See generally, Wild v. Roman,* 91 *N.J. Super.* 410 (App. Div. 1966), and *Wilson, supra.*

It is now clear that a prosecutor may argue to the jury the adverse inference from the absence of a crucial defense witness. *State v. Singleton*, 158 *N.J. Super.* 517 (App. Div. 1978); *State v. Hare*, 139 *N.J. Super.* 150 (App. Div. 1976), *certif. denied*, 70 *N.J.* 525 (1976). *Cf. State v. Kennedy*, 135 *N.J. Super.* 513, 527 (App. Div. 1975) (court refused to consider whether comment on the absence of a defense witness is improper if a request for an adverse inference charge has not first been made and ruled upon favorably, because no objection was made to the comment below). The defense must be allowed an adequate opportunity to present an explanation of why the witness was not called to testify. *State v. Hare, supra*, at 156.

The State is also allowed to show that its inability to procure the attendance of a presumably favorable witness should not be grounds for either an adverse jury instruction or a defense argument in summation. In *State v. Casey*, 157 *N.J. Super.* 311 (App. Div. 1978), *certif. denied*, 79 *N.J.* 490 (1979), an undercover agent who initiated an illegal drug sale failed to appear at trial in response to a subpoena issued by the State. This witness was not "available" to the State, and, hence, the trial court acted properly in denying a defense motion for a jury instruction on the missing witness, and precluding any defense comment on that subject in summation. *Id.*

Failure to call a witness available to both parties does not necessarily preclude raising an inference against either. *State v. Carter*, 91 *N.J.* 86, 127 (1982). "Where one party has superior knowledge of the identity of a witness or of what testimony might be expected or where a certain relationship, such as employer-employee, exists between the witness and a party, the adverse inference may properly be argued to the jury." Id. at 127-128. A request to comment in summation on the nonproduction of witnesses should be made out of the presence of the jury at the close of the adversary's case. Id. In *Carter*, though the prosecutor did not request prior permission from the court, his summation comments in question were not objected to by defense counsel. Under these circumstances, the failure of the court to explore the defendants' explanation for nonproduction of witnesses did not constitute plain error. Id. at 128-129. See also State v. Hickman, 204 N.J. Super. 409 (App. Div. 1985); State v. Crews, 208 N.J. Super. 224 (App. Div. 1986) (ruling that defense could avoid Clawans instruction only by presenting witness and having him assert privilege before jury was error, since trial court failed to voir dire witness and ascertain if he was available to the defense), aff'd 105 N.J. 498 (1987).

Where defendant has raised an alibi defense, and the prosecutor has requested a *Clawans* charge, thus placing defendant on notice that the prosecutor intended to comment on the failure of defendant to produce the witness with whom he had spent the time, then defendant's objection to the prosecutor's comment is without merit. *State v. Driker*, 214 *N.J. Super.* 467 (App. Div. 1987).

Where the prosecutor intends to ask the jury to draw an adverse inference from defendant's failure to produce a witness, a *R*. 8 (now *N.J.R.E.* 104(c)) hearing must be held to allow the court to determine that the witness was within defendant's power to produce and that the witness' testimony would have been superior to the testimony used. *State v. McBride*, 211 *N.J. Super.* 699 (App. Div. 1986).

III. LIMITATION OF NUMBER

The trial court may, in its sound discretion and with proper regard to the nature and circumstances of a case, reasonably limit the number of witnesses on collateral issues. The court has no right, however, to limit the number of witnesses on a controlling fact and the circumstances relevant to the proof of that fact. Limitation of witnesses on a contested issue is sustainable only when it is apparent that a party is trifling with the court and seeking in bad faith to waste its time and obstruct the administration of justice, because it is impossible for a court to be certain that additional substantive evidence or witnesses, if received, would not be determinative of a case. *State v. Mucci*, 25 *N.J.* 423 (1957); *see N.J.R.E.* 403.

The limitation cannot be applied where the subject of the inquiry is composed of many elements, and one witness might be qualified on one element and another witness on another, or where persuasion could turn on particular knowledge and testimonial qualifications of a given witness or upon consultation. Cumulative evidence is defined as additional evidence to support the same point and of the same character already produced. A party does not have an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment, or whim. See State v. Mucci, supra; Matter of Cole, 194 N.J. Super. 237, 246 (App. Div. 1984) (doctor's request that 70 patients be allowed to testify on his behalf properly denied as unreasonable). See also State v. Carter, 91 N.J. 86, 106 (1982).

IV. PRIVILEGE AGAINST SELF-INCRIMINA-TION

It is fundamental that the privilege against selfincrimination is personal to the individual claimant, and the election to invoke it must be exercised by the witness himself, on the stand and under oath, after hearing a question or questions addressed to him. The privilege cannot be invoked by an attorney as his surrogate. Thus, it is error for a trial judge to infer a claim of privilege by a witness from his counsel's several statements that he is advising the witness not to testify and for the attorney to invoke that witness's privilege. A witness must claim the privilege himself. *State v. Jennings*, 126 *N.J. Super.* 70 (App. Div. 1972), *certif. denied*, 60 *N.J.* 512 (1972). *Accord, State v. Jamison*, 64 *N.J.* 363, 378-379 (1974).

If the State calls a witness who states in advance that he will exercise his Fifth Amendment privilege and refuse to answer any questions, it is ordinarily preferable first to examine the witness on *voir dire*, as otherwise the circumstances may lead the jury to draw unfavorable inferences against defendant. *State v. Jamison, supra*, at 373, n.1. If the witness then declines to testify on *voir dire*, the court may, in its discretion, preclude the State from calling the witness before the jury. *Id. See State v. Jordan*, 197 *N.J. Super.* 489, 502 (App. Div. 1984).

If a *defendant* calls before a jury a witness who states in advance that he will invoke his Fifth Amendment privilege and refuse to testify, *State v. Cito*, 196 *N.J. Super.* 220 (Law Div. 1984), holds that that witness may be brought before the jury *only* when the trial court knows that the witness has evidence which could have some impact on the facts in issue or the innocence of the defendant. *Id.* at 227. However, *State v. Karlein*, 197 *N.J. Super.* 451, 455-456 (Law Div. 1984), holds that the defense may not call a witness for the sole purpose of asserting his Fifth Amendment privilege in the presence of a jury. *State v. Schlanger*, 197 *N.J. Super.* 548, 553 (Law Div. 1984), holds that a state's witness, under cross-examination, should not be brought before the jury to claim his privilege as to a collateral matter not in issue. *See also, State v. Morales*, 138 *N.J. Super.* 225, 230 (App. Div. 1975).

In *State v. Crews*, 208 *N.J. Super.* 224, the Court reversed a conviction where the trial judge ruled that it could only avoid a *Clawans* instruction by presenting the witness and having him assert the privilege in the presence of the jury. Rather, the proper procedure was for the court to determine if a witness will exercise the Fifth Amendment privilege is for the court to hold a *R.* 8 (now *N.J.R.E.* 104(c)) hearing out of the presence of the jury. *State v. Crews*, 105 *N.J.* 498 (1987), *affirming State v. Crews*, 208 *N.J. Super.* 224 (App. Div. 1986).

A trial judge was found to have abused his discretion by apprising a witness that he was subject to criminal charges and had the right to remain silent. By so doing, the Court found that the principles of *State v. Jamison*, 64 *N.J.* 363 (1974) had been transgressed. *State v. Johnson*, 223 *N.J. Super.* 122 (App. Div. 1988). Where the witness is the defendant at trial, the trial court has no duty to advise the defendant that he had a right not to testify. The ultimate decision rests with the defendant to be made with the advice of counsel. *State v. Bogus*, 223 *N.J. Super.* 409 (App. Div. 1988), *certif. denied*, 111 *N.J.* 567 (1988).

If a witness is willing to voluntarily testify on behalf of a criminal defendant that the witness, not the defendant, committed the offense, the trial court should not impede this testimony by insisting on appointing counsel for the witness prior to allowing him to testify. State v. Jamison, supra at 377. The primary function of a trial is to arrive at the truth and all privileges of witnesses should be strictly construed to advance the truthfinding function. If the witness later properly claims the privilege against self-incrimination, on the ground that his voir dire admission of guilt may be prosecuted as perjury through his subsequent recantation under oath, the subsequent statements will be accorded a limited use immunity by the judiciary. In addition, if the trial court improperly rejects a well-founded claim of privilege and compels a witness to testify, then that witness is cloaked with a

judicially conferred use immunity with respect to the compelled testimony. *State v. Jamison*, 64 *N.J.* at 377; *see State v. DeCola*, 33 *N.J.* 335, 352-353 (1960).

In State v. Burris, 145 N.J. 509 (1996), the New Jersey Supreme Court held that a defendant's statement, given freely and voluntarily without any compelling influences after a violation of a suspect's state and federal constitutional rights against self-incrimination, is admissible for impeachment purposes. The statement must be voluntary, and the circumstances of the interrogation are among the factors to be weighed in the voluntariness determination. The Court suggested that voluntariness should be determined before trial at the Miranda hearing itself. Even a voluntary statement may be excluded for impeachment purposes if it is overly prejudicial or otherwise excludable under N.J.R.E. 403. If the court finds the statement voluntary, it should advise the defendant that the State may use the suppressed statement for impeachment so that defendant can take that fact into account in deciding whether to testify. Also, the trial judge must instruct the jury that the statement is admitted for the limited purpose of impeachment, that it is not substantive evidence of guilt, and that the jurors may, but need not, consider whether the statement affects the defendant's credibility.

In *State v. Dreher*, 302 *N.J. Super.* 408, the Appellate Division rejected defendant's assertion that his pre-arrest silence was improperly used against him both substantively and for impeachment. The Appellate Court found defendant's silence was not compelled and was properly admitted as relevant and its probative value outweighed the prejudicial effect.

In State v. Feaster, 156 N.J. 1 (1998), the Supreme Court of New Jersey set forth the circumstances under which a law enforcement witness may testify that he or she terminated an interview with an accused because the accused invoked his or her constitutional rights. At trial, an investigating officer who had interviewed defendant testified about defendant's statements concerning his employment. He also testified, over defense counsel's objection, that the interview ended when defendant asked for an attorney. The Court determined that when the purpose of the testimony is to relate defendant's statement about the underlying crime, the trial court may in its discretion permit testimony explaining why the interview terminated in those instances where that testimony is essential to the complete presentation of the witness's testimony and its omission would be likely to mislead or confuse the jury. When the testimony about the statement is unrelated to the crime itself, however,

the witness should not offer an explanation of how or why the interview ended, since under those circumstances it is not likely that the jury would speculate about what later transpired if it is not provided with an explanation of why the interview ended. In those cases where the witness testifies that the interview terminated when the accused invoked his or her constitutional rights, the trial court must give a cautionary instruction that people decline to speak with the police for many reasons, emphasizing that a defendant's invocation of his or her right to counsel or right to remain silent may not in any way be used to infer guilt.

V. REFUSAL TO ANSWER

The Supreme Court of New Jersey established in *In re Boiardo*, 34 *N.J.* 599 (1961) that, except where the question itself contains the threat, as for example, a question whether the witness bribed an official, a refusal to answer must be supplemented by a statement of the area or the nature of the criminal exposure which is feared. Quite obviously a court cannot be asked to scan the myriad offenses under the laws of all the States and the United States in search of a possible connection between the question and one of them. The area must be pinpointed to the extent to which it is possible to do so without eliciting a hurtful answer.

The trial judge is not to accept the witness's mere statement that the answer will tend to incriminate them. In re Pillo, 11 N.J. 9, 19 (1952). Rather, the court must evaluate the hazard. Here again, an obstacle ensues from the basic approach that the ordinary witness need not speak and it will be his own undoing if he does. Although the rule might have been that upon a claim of privilege, the witness must reveal the details, the accepted thesis forecloses a demand for such disclosure even for the purpose of the judge's decision. Rather, the witness must somehow show enough to indicate a basis for fear while withholding facts which would prove it. The witness must demonstrate a factual basis to justify the privilege claim. E.g., State v. McGraw, 129 N.J. 68, 77 (1992). As was stated in Pillo, there must appear reasonable ground to apprehend the peril. 11 N.J. at 119. Moreover, where the context of the questioning in conjunction with the nature of the questions reveals that a claim of selfincrimination is well founded, the privilege has been validly asserted and no further demonstration of possible incrimination is necessary. In re Ippolito, 75 N.J. 435 (1978). Thus, a witness properly asserted his privilege against self-incrimination when, during an SCI investigation into organized crime, he declined to answer

a series of questions regarding whether or not he knew persons reputed to be involved in organized crime. *Id.*

VI. SEQUESTRATION; N.J.R.E. 615

In *State v. Tillman*, 122 *N.J. Super*. 137 (App. Div. 1973), *certif. denied*, 62 *N.J.* 428 (1973), the Appellate Division reversed a judgment of conviction because of the prosecutor's violation of a sequestration order. In essence, the prosecutor discussed the facts of the case with a witness, who had previously testified, in the presence of another witness who was to testify the next day. The prosecutor's explanation for his action was that he thought he had the right to do so and that he was not limited in talking with his witnesses. The Court held that what occurred went far beyond a simple interview of witnesses. Even if the witnesses did not speak directly to one another but merely listened to the prosecutor, the necessary effect was to violate both the letter and the spirit of the sequestration order.

The prosecutor's desire to interview his witnesses did not excuse the violation of the order. That could readily be accomplished by interviewing the witnesses out of the presence of each other. Violation of the sequestration order may result in (1) a mistrial; (2) refusal to permit the witness to testify; or (3) calling the disobedience of the order to the attention of the jury as bearing on the credibility of the witness involved. *Id.* Ordinarily, a trial court should grant a motion to sequester witnesses.

In State v. Horton, 199 N.J. Super. 368 (App. Div. 1985), defendant's mother, the most important (in terms of knowledge of defendant's whereabouts) of six alibi witnesses in a robbery identification case, unintentionally violated a sequestration order and sat in court during the testimony of the first alibi witness. The trial court precluded her from testifying. The Appellate Division reversed defendant's conviction, ruling that there is no automatic exclusion rule based on a witness' inadvertent violation of a sequestration order. State v. Rather, said the court, less drastic Horton, supra. remedies should be considered, such as calling the disobedience of the order to the jury's attention as bearing on the issue of credibility. See also, State v. Ross, 189 N.J. Super. 67, 71 (App. Div. 1983) (witness sequestration order itself does not violate any right of a defendant). Exclusion of the testimony of a criminal defense witness should be a last resort. State v. Dayton, 292 N.J. Super. 76, 91 (App. Div. 1996).

Sanctions, including an adverse instruction to the jury, should not be imposed for mere technical violations

of a sequestration order. In State v. Singleton, 158 N.J. Super. 517 (App. Div. 1978), certif. denied, 79 N.J. 470 (1978), a sequestration order was entered. However, a witness and his wife met a detective in the courthouse. The detective was not aware that the witness testified at a prior suppression hearing or that a sequestration order was entered by the trial court. The witness and his spouse began to discuss with the detective the bail situation of the witness's son who was incarcerated on unrelated charges. This conversation was continued in the presence of an investigator. During the conversation, the witness revealed that he recanted his prior statement, inculpating the defendant, because one of the witness's friends was also a friend to the defendant's father. The assistant prosecutor trying the case then came on the scene and the witness repeated the statements he made to the detective and investigator. There was no discussion of the witness's prior or prospective testimony. The trial court denied the defendant's motion to exclude the testimony of the detective and the witness and also declined to inform the jury of the violation of the sequestration order. The court did order that neither witness could testify regarding threats made to the witness. *Id.* The Appellate Division held that this was an appropriate remedy because the violation "was merely technical" and there was no showing of prejudice to the defense.

The necessity of a trial court's granting a belated defense motion for sequestration was considered in State v. Modica, 73 N.J. Super. 1 (App. Div. 1962), aff'd 40 N.J. 404 (1963). In that case, after the State examined one of three identification witnesses the defendant moved to exclude the other two witnesses from the courtroom. The trial court denied the motion. The Appellate Division, in holding that this ruling did not constitute prejudicial error, stated that ordinarily in a criminal case, a motion to seclude the State's witnesses from the courtroom prior to their actually testifying should be granted. See State v. Williams, 29 N.J. 27, 46 (1960). However, the court in Modica further ruled that the granting or denial of such a motion is for the sound discretion of the trial judge under the circumstances of the particular case. In the case before the court, the defendant's motion was not made until after the direct examination of the State's first witness had been completed and was limited to excluding the other two identification witnesses during the cross-examination.

In *State v. Talbot*, 135 *N.J. Super.* 500, 512 (App. Div. 1975), *aff'd* 71 *N.J.* 160 (1976), it was ruled that the trial court did not abuse its discretion in excepting from a sequestration order a police officer needed to assist the prosecutor.

A newspaper reporter who has acted as an investigator and may have personal knowledge of material facts is subject to sequestration from a trial if he is subpoenaed by the defense and rejects an opportunity from the court to testify *in camera* prior to, and after, the State's case. *State v. Jascalevich*, 158 *N.J. Super.* 488 (Law Div. 1978).

In State v. Cooper, 307 N.J. Super. 196 (App. Div. 1997), the Appellate Division reversed the trial court's dismissal of the State's indictment. The trial judge had done so at defendant's request because the prosecutor had violated a sequestration order, and ruled that double jeopardy barred any retrial because of the State's "inexcusable neglect." The Appellate Division acknowledged that the United States Supreme Court in Oregon v. Kennedy, 456 U.S. 667 (1982), had held that defendant's successful mistrial motion can preclude a retrial only when the conduct giving rise to the motion was intended to provoke defendant into so moving, and had narrowed the exception to the general rule that a defendant's mistrial motion constituted a waiver of his or her double jeopardy rights. Reaffirming that the state double jeopardy protection was coextensive with the federal constitutional standard, the court was satisfied that even if the prosecutor here acted improperly or inexcusably, he did not "goad" defendant into moving for a mistrial. Defendant, in choosing to seek a mistrial, elected not to take his chances with the jury and seek reversal on appeal for violation of the sequestration order, in which event he could have been retried. The trial court had relied upon the improper "inexcusable neglect" standard, and Kennedy had overruled the decision the judge had relied on, State v. Nappo, 185 N.J. Super. 600 (Law Div. 1982).

In *State v. Dayton*, 292 *N.J. Super.* 76 (App. Div. 1996), the Appellate Division held that the trial court erred in not permitting defendant's counsel to withdraw because he was defendant's only witness to statements made by the alleged victim during an interview by defense counsel. The court also expressed concern over defense counsel's interview of the victims of the alleged offense without the presence of a third party or investigator who could be called to testify. The court also found reversible error in the trial court's refusal to let a key defense witness testify on surrebuttal because of a violation of the sequestration order.

Sequestration is within the discretion of the trial court, and reviewed on appeal by an abuse of discretion standard. *State v. Miller*, 299 *N.J. Super.* 387, 399 (App. Div. 1997), *certif. denied*, 151 *N.J.* 464 (1997). The judge should clarify the terms of the sequestration order.

State v. Cooper, 307 *N.J. Super.* 196, 199 n.1 (App. Div. 1997).

VII. AVAILABILITY AND RIGHT TO CON-FRONT WITNESSES AND TO COMPULSORY PROCESS

Defendants charged jointly often attempt to justify severance by claiming that they intend to rely for their defense on the testimony of one or more of their codefendants. In such a case the codefendant indicated that he would assert his privilege against selfincrimination. State v. Morales, 138 N.J. Super. 225 (App. Div. 1975). The defendant responded with a motion for severance or for an order compelling the codefendants to testify. The Appellate Division held that both motions were properly denied because a defendant who is on trial in a criminal case cannot be compelled to testify for the State, a codefendant, or even on his own behalf. With regard to the issue of severance, the court held that when a defendant's case rests upon the exculpatory testimony of a codefendant who is fearful of prejudicing his own defense if he testifies, a separate trial However, there must be some should be ordered. showing that the proffered testimony will be forthcoming. Moreover, as a matter of common sense, it is difficult to conceive of a situation in which an accused will be willing to testify at a separate trial but not at a joint one. An additional prerequisite is a showing that the testimony of the codefendant would be exculpatory of the defendant who seeks to call him as a witness. Id. See State v. Scovil, 159 N.J. Super. 194 (Law Div. 1978).

R. 3:13-2 provides for the use of depositions in a criminal trial where a witness is unavailable to testify. The witness must be unable to testify at the trial because of death or physical or mental incapacity, and the deposition must be necessary to prevent a "manifest injustice." *R.* 3:13-2(a); *State v. Harris,* 263 *N.J. Super.* 418, 422-23 (Law Div. 1993). This rule was amended effective January, 1987, to limit the use of depositions in criminal cases to those situations where it is truly necessary. *Pressler, Current N.J. Court Rules,* Comment 1 to *R.* 3:13-2, (Gann).

In State v. Driker, 204 N.J. Super. 558 (Law Div. 1985), aff'd 214 N.J. Super. 467 (App. Div. 1987), the trial court allowed the use of a videotaped deposition of a witness at defendant's robbery and burglary trial when the witness became ill and was unable to testify. The court found that *R*. 3:13-2 implicitly authorized the use of such videotaped depositions. *Id.* Further, the court

rejected a Sixth Amendment right to confrontation claim, finding that because the witness was under oath, the right to cross-examination was preserved. Also rejected were any claims regarding the technical distortions of the image that the medium might cause. The court stated that "any technical shortcomings fall equally on both the state and the defendant." *Id. See also State v. Washington, 202 N.J. Super.* 187 (App. Div. 1985); *State v. Crews, 208 N.J. Super.* 224 (App. Div. 1986), *aff'd* 105 *N.J.* 498 (1987).

In *State v. Rodriguez*, 135 *N.J.* 3 (1994), a *per curiam* opinion, the New Jersey Supreme Court affirmed defendant's convictions for kidnaping and related offenses on the basis of the Appellate Division's opinion below. *See State v. Rodriguez*, 264 *N.J.Super.* 261 (App. Div.1993). The appeal concerned the propriety of using video-taping of the victim-witness's cross-examination after he suffered an apparent heart attack while testifying in court. The court held that the videotaping of the victim-witness did not violate the defendant's right of confrontation.

In State v. Bunyan, 154 N.J. 261 (1998), the Supreme Court of New Jersey held that the trial court had correctly denied defendant's motion for a new trial based on the exculpatory statement of a murder witness made to a defense investigator nearly six years after the trial. The Appellate Division, State v. Bunyan, 299 N.J. Super. 467 (App. Div. 1997), had reversed the denial of the new trial motion and remanded the matter for an evidentiary hearing on the reliability of the statement, ruling that under Chambers v. Mississippi, 410 U.S. 284 (1973), the rights to due process and a fair trial required a new trial for defendant if the statement was found reliable. The Supreme Court ruled that while Chambers held that the federal constitution might on occasion require the admission of evidence, otherwise inadmissible under state evidence law, favorable to a defendant, that holding was "intimately related" to the "facts and circumstances" of that case. Comparing the statement herein to the hearsay in Chambers, the Court found that it did not have the same measure of reliability. The statement in this case was not against the witness' interests, was made years after the murder, was not spontaneous but was in response to the questions of a defense investigator, and was immediately threatened to be disavowed by the The Court further noted that unlike the witness. declarant in Chambers, the declarant in this case was unavailable for cross-examination due to her death. Stating that the right to present relevant evidence is not unlimited and is subject to restrictions, the Court concluded that the exclusion of the statement did not so prevent a fair trial for defendant as to be unconstitutional.

In *State v. Maben*, 132 *N.J.* 487 (1993), the New Jersey Supreme Court ruled that before the State may introduce hearsay statements pursuant to *Evid. R.* 63(33), (now *N.J.R.E.* 803(c)(27)) the State must prove that the child is "truly unavailable." The State must demonstrate to the trial court that it has exercised "due diligence" in its attempt to locate a missing witness.

In State v. Farguharson, 280 N.J. Super. 239 (App. Div. 1995), certif. denied, 142 N.J. 517 (1995), the court ordered the prosecutor to provide the defendant with the current address of a codefendant who had absconded, or accept a dismissal of the drug charges. According to defendant's counsel, his codefendant had "vehemently" denied purchasing drugs from defendant, which the appellate court found crucial to the defense, even though it appears that the codefendant also pled guilty to the offense. Finding a clear lack of good-faith diligence on the part of the prosecutor, the court fashioned a remedy authorized, "without question," by its own appropriateness. Id. at 247. Although the court admitted that its power was not limitless, it nonetheless found no reason to not reverse the conviction and force the prosecutor to find the codefendant, based on a prosecutor's duty to see that justice is done, and a defendant's right to compulsory process. Resting on cases dealing with the State's burden to locate out-of-state witnesses where the State itself seeks to use their unavailability to justify the use of hearsay, like Maben, supra, the court justified imposing this burden because the State had "permitted a crucial defense witness" to leave the State, if only by inaction. Id. at 252. The Court found that the trial court's action, having permitted defense counsel to give the testimony himself, was a poor substitute. At the retrial the missing witness was produced, but she recanted and testified for the State. State v. Farquharson, 321 N.J. Super. 117, 119 (App. Div. 1999), certif. denied, 162 N.J. 129 (1999). The Court was nonetheless "[o]nce again ... constrained to reverse." See § I.A., Impeachment through use of Prior Conviction, supra.

In *State v. Dayton*, 292 *N.J. Super.* 76 (App. Div. 1996), the Appellate Division held that the trial court erred in not permitting defendant's counsel to withdraw because he was defendant's only witness to statements made by the alleged victim during an interview by defense counsel.

In *State v. Correa*, 308 *N.J. Super.* 480 (App. Div. 1998), the Appellate Division reversed defendant's

aggravated manslaughter conviction. In a plea agreement a codefendant, the shooter, had agreed not to testify on defendant's behalf at trial after the trial court had denied defendant's motion to sever his trial from that of codefendant. Defendant never knew of this "no testimony" agreement, nor was it part of the record or a restriction disclosed in the plea agreement, contrary to *State v. Fort*, 101 *N.J.* 123 (1985). Codefendant subsequently indicated that he would have testified on defendant's behalf if the State had not "threatened" him with an extended term.

The Appellate Division found controlling the Fort holding that a codefendant's plea agreement requirement not to testify favorably for defendant violated defendant's Sixth Amendment right to compulsory process. Once the State extracted a promise not to testify, it became practically impossible to determine if the witness refused to do so because of a true fear of self-incrimination or because of a desire to perform the promise. Here, codefendant's plea agreement obscured the basis for his decision not to testify at defendant's trial. The court refused the State's request to remand the matter for a preliminary hearing "because a court will seldom be able to determine exactly what evidence would have been brought out had the witness been allowed to testify freely."

VIII. INFANTS

The declared policy in New Jersey is that generally everyone is qualified to be a witness and give relevant evidence. State v. Carter, 91 N.J. 86, 124 (1982). N.J.R.E. 601. Witness disgualification is an exception. Id. When the testimony of a child witness is tendered in a criminal case, the trial court should conduct an inquiry to determine the testimonial capacity of the infant to assure that he or she has "sufficient discernment and comprehension to invest the testimony with probative worth." State v. Grossmick, 153 N.J. Super. 190, 192 (App. Div. 1976), aff'd o.b. 75 N.J. 48 (1977). This form of capacity focuses on the ability to comprehend questions and to frame and express intelligent answers. Id. at 192. State in Interest of R.R., 79 N.J. 97, 114 (1979). In State v. Grossmick, supra, the Supreme Court affirmed the decision of a trial judge who excluded, on the ground of incapacity, the testimony of a defense witness, the defendant's six-year-old daughter, who was an eyewitness to the sexual assault of her babysitter.

Even if the trial court finds the infant competent to testify, a defendant may still be allowed to develop evidence pertaining to the child's capacity to testify through the introduction of psychological or psychiatric evidence. *State v. R.W.*, 200 *N.J. Super.* 560, 568 (App. Div. 1985), *aff'd*, 104 *N.J.* 14 (1986). This is especially true where the infant is of tender years. *Id.*

It was error for the trial court to award a child with cookies, candy, etc., in the presence of a jury because such actions may appear to be an endorsement of the child's testimony. *State v. R.W., supra* at 569-570. Such rewards may be given by the court, however, out of the jury's presence. *Id.*

Once testimonial capacity is established, the witness, including an infant, must be administered an oath pursuant to N.J.R.E. 603. However, "it is not necessary that an infant mouth the traditional litany nor comprehend its legal significance." State in Interest of *R.R.*, 79 *N.J.* at 111. "Any ceremony which obtains from an infant a commitment to comply with this obligation on pain of future punishment of any kind constitutes an acceptable oath under the common law, and hence a valid Evid. R. 18 oath." Id. The traditional oath, however, should not be routinely dispensed with merely because a child is involved. State v. Zamorsky, 170 N.J. Super. 198, 204 (App. Div. 1979), certif. denied, 82 N.J. 287 (1980), cert. denied, 449 U.S. 861 (1980). The court in Zamorsky recommends deviation from the traditional oath only if "special circumstances" are present. Id.

The difficulty of child witnesses, who have been the victims of sexual offenses, to withstand unnecessarily vigorous cross-examination, sometimes justifies the use of ameliorative devices. In State v. Kozarski, 143 N.J. Super. 12 (App. Div. 1976), certif. denied, 71 N.J. 532 (1976), the defendant was charged with performing an act of fellatio on an 11-year-old child. The victim testified that the defendant also suggested acts of anal intercourse. Defense counsel then sought to cross-examine the victim with regard to the victim's prior statements which did not refer to anal intercourse. The trial court anticipated difficulties with an interrogation and, instead, suggested a stipulation by the parties that the victim's prior statements omitted mention of anal intercourse. The Appellate Division held that the trial court acted properly and that the defendant was not entitled, in lieu of cross-examination, to have the court strike the victim's testimony regarding anal intercourse. State v. Kozarski, 143 N.J. Super. at 17.

In *State v. Cranmer*, 134 *N.J. Super.* 117 (App. Div. 1975), *certif. denied*, 68 *N.J.* 283 (1975), the eight-yearold victim of a sexual assault testified at trial and identified the defendant. Defense counsel cross-

examined the victim regarding events which occurred after the defendant's flight. The victim became hysterical and, despite a recess, could not be calmed by his mother or by the judge. When the victim again became hysterical after the recess, the trial judge concluded that continuation of cross-examination might cause permanent emotional damage to the victim and terminated cross-examination. The Appellate Division held that under these circumstances, this was an appropriate exercise of discretion and did not deny the defendant his right to confrontation. State v. Cranmer, 134 N.J. Super. at 122. And, see State v. Sheppard, 197 N.J. Super. 411, 442 (Law Div. 1984) (where court allowed testimony of child victim in child sex abuse case to be elicited from room outside courtroom through use of video equipment, and held that defendant, by threatening to kill the child if she revealed his activities, had waived his right to confrontation).

In *State v. Smith*, 158 *N.J.* 376 (1999), the Supreme Court of New Jersey reversed the Appellate Division decision and reinstated defendant's conviction for aggravated sexual assault. The Court held that the trial judge's decision to allow the child-victim to testify by closed circuit television was proper pursuant to *N.J.S.A.* 2A:84A-32.4, as was his admission of the minor's reinterview videotaped statement pursuant to *N.J.R.E.* 803(c)(27).

The Appellate Division had ruled that the closed circuit television procedure could be employed only to protect a child-victim from "face-to-face confrontation" with defendant and that fear of the courtroom alone was insufficient. The Supreme Court rejected this position, stating that "the protection of children from undue trauma associated with testifying is an important public policy goal" and that a trial judge should examine "the result of [a victim's] fear, not simply its origin" to determine whether to invoke *N.J.S.A.* 2A:84A-32.4.

The Court also rejected the Appellate Division's holding that the minor-victim's reinterview videotaped statement was "akin to cross-examination." The Court stated that "the use of leading questions to facilitate an examination of child witnesses who are hesitant, evasive or reluctant is not improper."

A different type of problem arises where a criminal defendant is also the parent who refuses to allow a child, with possible information concerning the defendant's involvement in the crime, to be interviewed by the State. Faced with such a problem in *State v. Freeman*, 203 *N.J. Super.* 351 (Law Div. 1985), the court found that its

most important function was to protect the interests of both the State and the child. The court found that the best method for ensuring a balance between both interests was to have a guardian *ad litum* appointed. The guardian *ad litum's* function in such a situation is to examine all parties involved with the child (or children), including the infant himself, in order to determine if, under all the circumstances, an interview by the State is in the child's best interest or not. *Id*.

Youth alone is not a basis upon which to order psychiatric tests. The determination of the competency of a witness is within the court's discretion. The party requesting such testimony must present evidence which reasonably indicates something unique about the young witness that would influence their competency. Where the tests have a probative value in relation to the competency of the young witness, the tests may be admitted by either party. State v. R.W., 104 N.J. 14 (1986). Following the holding in *R.W.*, the Appellate Division in State v. Capone, 215 N.J. Super. 497 (App. Div. 1987), remanded to the trial court to allow the judge to ascertain details of the infant witness' disorder to determine whether it would affect his competency to testify. To allow such evidence, the requesting party must show "some deviation from acceptable norms, such as an identifiable clinical, psychiatric or similar disorder" to justify consideration of school and medical records in an evaluation of juvenile witness' competency.

In State v. Henries, 306 N.J. Super. 512 (App. Div. 1997), the Appellate Division reversed defendant's double murder, burglary, and weapons convictions rendered by a jury and his guilty pleas to separate aggravated assaults and a related weapons offense, finding on its own that the medical evidence "overwhelmingly" depicted the eyewitness as having impaired and unreliable cognitive and recollective ability both at the time of the murders and at trial. The court relied extensively on another jury's acquittal of a coindictee as further support for its reversal, and focused much of its opinion on the testimony concerning the boy's psychiatric evaluations. In fact, the court itself concluded that had the jurors heard the State's and defendant's expert witnesses concerning the eyewitness' mental status, they certainly would have accepted the defense analysis. It disagreed with the trial court's considered conclusion that the evidence was merely impeaching, and instead determined that it went directly to the heart of the State's case and that the boy's mental capacity was both material and the trial's focal point. It could not fathom the trial judge's conclusion that such evidence was but of an impeachment nature, believed that the jury

"must have" struggled to reach its verdict, and was "absolutely certain" that the witness' reliability problems "would have become insurmountable hurdles."

In *State v. Maben*, 132 *N.J.* 487 (1993), the New Jersey Supreme Court ruled that before the State may introduce hearsay statements pursuant to the tender years exception, *Evid. R.* 63(33), (now *N.J.R.E.* 803(c)(27)) the State must prove that the child is "truly unavailable." The State must demonstrate to the trial court that it has exercised "due diligence" in its attempt to locate a missing witness.

In State v. Michaels, 136 N.J. 299 (1994), the New Jersey Supreme Court gave defense counsel a potent weapon to fight charges of child abuse against their clients. The Court ruled that since it is generally accepted that a coercive or highly suggestive interrogation technique can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony of that child, if a defendant comes forward with "some evidence" that the victim's statements were the product of suggestive or coercive interview techniques, a pretrial N.J.R.E. 104 (formerly *Evid. R.* 8) hearing must be held. At that point, it becomes the State's burden to prove by "clear and convincing evidence" that the statements and testimony are reliable. The ultimate determination for the trial court to make is whether, despite the presence of some suggestive or coercive interview techniques, under the totality of the circumstances of the interviews, the statements or testimony retain a sufficient degree of reliability to outweigh the effects of the improper interview techniques. The State may also demonstrate that the investigatory procedures used did not have the effect of tainting an individual child's recollection of an event. To meet its burden, the State may call experts with regard to the suggestiveness of the techniques and defendant can counter with his or her own experts. Neither expert should proffer any opinion as to the child's credibility. The State may also use independent indicia of reliability to demonstrate the reliability of the child's statements.

The Court enumerated a list of factors to consider in determining whether the interrogation could have affected the reliability of a child's statements: a lack of investigatory independence; pursuit of a preconceived notion on the part of the interviewer as to what happened to the child; use of leading questions; a lack of control of outside influences on the child's statements, such as conversations with parents or peers; the use of incessantly repeated questions; explicit vilification of the alleged perpetrator; an interviewer's bias with respect to a suspect's guilt or innocence and transmission of that belief through the tone of voice, mild threats, praise, cajoling, bribes and rewards and any resort to peer pressure.

When victim-impact evidence is presented in capital prosecutions, minor witnesses generally should not be permitted to present this type of testimony. Minors should not give victim-impact evidence unless there are no suitable adult survivors and the child is the closest living relative to the murder victim. *State v. Muhammad*, 145 *N.J.* 23, 54 (1996).

IX. RECANTATION

N.J.R.E. 607, formerly Evid. R. 20, provides that prior inconsistent statements can be offered substantively to prove the truth of a matter asserted if the statements are in a form which satisfy the reliability criteria established by N.J.R.E. 803(a)(1) (prior testimony or a written statement signed by the witness in circumstances establishing its reliability or given under oath subject to the penalty of perjury), whether the prior inconsistent statement is offered by the proponent of a witness or another party. This generally resolves the problem of the witness who gives the police a pretrial statement and then recants when called to the witness stand. See State v. Ross, 80 N.J. 239, 248-250 (1979); State v. Hacker, 177 N.J. Super. 533, 537 (App. Div. 1981), certif. denied, 87 N.J. 364 (1981). Both *Ross* and *Hacker* appear to disfavor the prior approved practice of the trial judge calling the recanting witness, previously determined on voir dire, as the court's own witness so as to enable both parties to cross-examine the witness and confront him with his prior statements. See State v. Singleton, 158 N.J. Super. 517 (App. Div.), certif. denied, 79 N.J. 470 (1978). Since the old "voucher" rule previously embodied in Evid. R. 20 (i.e., one "vouches" for the credibility of one's own witnesses) has been eliminated, and in view of the available use of prior inconsistent statements under N.J.R.E. 607/Evid. R. 20, it appears unnecessary for the court to neutrally call the witness as its own. See State v. Ross, supra, at 252-253; State v. Hacker, supra, at 537. See also State v. Gross, 121 N.J. 1, 7-8 (1990).

X. EXPERT TESTIMONY

When expert testimony, in the form of a psychiatric witness with a report, is placed in evidence, the court should hold an *in camera* review to determine whether fairness compels disclosure of otherwise privileged

communication. *State v. McBride*, 213 *N.J. Super.* 255 (App. Div. 1986).

Isoenzyme procedure test may be admitted when brought in with a qualified expert witness. *State v. King*, 215 *N.J. Super.* 504 (App. Div. 1987).

Defendant does not have the right to force admission of a polygraph test to which the State has not stipulated. Defendant may bring in his own expert witness to testify as to a stipulated polygraph test. *State v. Capone*, 215 *N.J. Super.* 497 (App. Div. 1987).

In *State v. Jamerson*, 153 *N.J.* 318 (1998), the Supreme Court reversed the reckless manslaughter convictions of a drunk driver who killed an elderly couple in a collision because the Court found that the medical examiner testified to matters beyond his sphere of expertise. Specifically, the Court objected to the medical examiner's testimony that the deaths were homicides, that the defendant was reckless, that the defendant's recklessness caused the deaths, and that a witness to the accident who favored the defense was mistaken. The Court held that a medical examiner's testimony should be limited to "describing the mechanics of death."

In *State v. Clowney*, 299 *N.J.Super*. 1 (App. Div. 1997), *certif. denied*, 151 *N.J.* 77 (1997), a *per curiam* opinion, the Appellate Division *inter alia* ruled proper the cross-examination of defendant's expert, ruling that the prosecutor's questions regarding the crime of rape and profile of rapists were not offered to demonstrate that defendant fit a profile but only to refute the expert's claim that defendant did not have the requisite state of mind necessary for the crime.

A criminal defendant may cross-examine a State's expert on the facts, methodology and rationale underlying the expert's opinion, but the right to confrontation does not guarantee unlimited cross-examination of a witness. *State v. Harvey*, 151 *N.J.* 117, 187 (1997), *cert. denied*, 120 *S.Ct.* 811 (2000).

In State v. Jackson, 278 N.J. Super. 69 (App. Div. 1994), certif. denied, 141 N.J. 95 (1995), the Appellate Division held that a police officer in a drug case may properly testify both as an expert witness and a fact witness, but the court should clarify those dual roles in the instruction to the jury to prevent confusion.

XI. DISCOVERY OF WITNESSES (See also, DISCOVERY, this Digest)

R. 3:13-3 imposes a continuing duty on the part of each party to disclose the names and addresses of potential witnesses. Where the party knows a witness will definitely be called, the party is bound to provide the information. *State v. Stevens*, 222 *N.J. Super.* 602 (App. Div. 1988), *aff*^{*}*d*, 115 *N.J.* 289 (1989).

The State's failure to provide interview notes with witnesses was not grounds for a mistrial where the defense was not prejudiced. *State v. Marshall*, 123 *N.J.* 1, 134 (1991), *cert. denied*, 507 *U.S.* 929 (1993).

WITNESS TAMPERING

The crime of witness tampering and retaliation against a witness is defined in *N.J.S.A.* 2C:28-5, included in Part 4 of the Code of Criminal Justice, entitled "Offenses Against Public Administration." Section 2C:28-5 is similar to the *Model Penal* Code § 241.6; however, the Legislature inserted the term "knowingly" before the term "attempts" when it enacted the statute. *State v. Speth*, 323 *N.J. Super.* 67, 85 (App. Div. 1999).

The statute has survived a constitutional attack on vagueness and overbreadth grounds. *State v. Crescenzi*, 224 *N.J. Super*. 142, 148 (App. Div. 1988), *certif. denied*, 111 *N.J.* 597 (1988). And, in *State v. Mancine*, 124 *N.J.* 232, 256, 260 (1991), the Supreme Court, in relevant part, reinstated defendant's conviction for witness tampering, holding that a criminal charge can be proven through the use of a prior inconsistent statement, alone, provided that the statement was made under circumstances supporting its reliability, and the defendant has the opportunity to cross-examine the declarant.

In Crescenzi, the Appellate Division construed N.J.S.A. 2C:28-5a to require both a knowing attempt and purposeful action. 224 N.J. Super. at 147. The Court took its cue from N.J.S.A. 2C:2-2b(2) which defines "knowingly" in terms of knowing the nature of the conduct or the attendant circumstances and knowing the result of the conduct. Id. It also relied on N.J.S.A. 2C:5-1, which requires purposeful conduct for the inchoate crime of attempt. Id. In Speth, the Appellate Division ruled that in the case of witness tampering, the criminal act is completed when the defendant attempts to witness tamper; it does not matter whether the result is achieved. 323 N.J. Super. at 87. Thus, the latter half of the definition of "knowingly", which requires that the actor be practically certain that his conduct will cause a particular result, is not an element of N.J.S.A. 2C:28-5. Id. Defendant need only be aware that he was attempting to tamper with a witness. Id. The Speth Court observed that in N.J.S.A. 2C:28-5 the term "knowingly" modifies the term "attempts." Id. As such, it makes "little sense" to require the defendant to be "practically certain" his conduct will cause a particular result. Id. at 87-88.

The Court in *Speth* also ruled that the trial court did not err by not charging the jury on the "substantial step" requirement for the crime of attempt under *N.J.S.A.* 2C:5-1a(3). *Id.* at 88. The evidence showed that defendant attempted to witness tamper when he requested a meeting with the State medical examiner and offered her a *quid pro quo. Id.* He did more than simply request a meeting; hence, the "substantial step" charge was not necessary. *Id.*