

# SENTENCING PRIMER

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## **PREFACE**

The Sentencing Primer (hereafter Primer) briefly summarizes the sentencing provisions embodied in *Title 2C, New Jersey Code of Criminal Justice*. It is not intended as a substitute for a careful reading of the statutes, court rules, or the court opinions. The Primer will not be simultaneously updated in response to legislative changes, court opinions, or amendments to the court rules. Therefore, it is strongly recommended that the relevant statutes, court opinions, or court rules be reviewed for the most up-to-date information. Additionally, the Primer is only for the Judiciary's use, and is not to be distributed to anyone outside the Judiciary.

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# §100: OVERVIEW OF SENTENCING

## § 101: IN GENERAL

### § 101.1: Crime Degrees and Ordinary Terms of Imprisonment

The New Jersey Code of Criminal Justice, Title 2C (hereafter Title 2C) classifies crimes into four degrees (first through fourth). N.J.S.A. 2C:43-1(a). A crime is of the first, second, third or fourth degree when it is so designated. “An offense, declared to be a crime, without specification of the degree, is of the fourth degree.” *Ibid.*

A crime defined by any other statute other than Title 2C as a high misdemeanor is a crime of the third degree. Except as provided in N.J.S.A. 2C:1-4(c) and 2C:1-5(b) and notwithstanding any other provision of law, a crime defined by any statute other than Title 2C and designated as a misdemeanor is a crime of the fourth degree. N.J.S.A. 2C:43-1(b).

N.J.S.A. 2C:43-6(a) sets forth the following ordinary terms of imprisonment for first through fourth degree crimes, while N.J.S.A. 2C:43-8 provides for disorderly persons and petty disorderly persons offenses.

- First Degree crime - between ten and twenty years
- Second Degree crime - between five and ten years
- Third Degree crime - between three and five years
- Fourth Degree crime - not to exceed eighteen months
- Disorderly Persons Offense - a term not to exceed six months
- Petty Disorderly Persons Offense - a term not to exceed thirty days

**Note:** Some first degree offenses carry greater sentencing terms, for example: murder, aggravated manslaughter, kidnapping, and carjacking.

### § 101.2: Plea Agreements

A defendant may waive the right to a jury trial and enter a guilty plea. A plea of guilty or a failure to so plead shall not be considered by the court in withholding or imposing a sentence of imprisonment. N.J.S.A. 2C:44-1(c)(1).

**Plea Discussions:** R. 3:9-3 authorizes the prosecutor and defense counsel to engage in plea negotiations relating to pleas and sentences and discussions about such matters as will promote a fair and expeditious disposition of the case, but except as authorized under this rule, the judge shall take no part in such discussions.

**Disclosure to Court:** On request by the parties, the court in the presence of both counsel may permit the disclosure of the tentative agreement and the reasons in advance of the time for tender of the plea or, if no tentative agreement has been reached, the status of the negotiations toward a plea agreement. The court may then indicate whether it will concur in the tentative agreement, or in the alternative, and with the consent of both counsel, the maximum sentence it would impose in the event of a guilty plea, assuming the information in the presentence report is as

represented to the court and supports its determination that the interests of justice would be served. *R. 3:9-3(c)*.

**Conditional Pleas:** With the approval of the court and consent of the prosecutor, the defendant may enter a conditional plea of guilty, reserving the right to appeal from the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he or she shall have the right to withdraw the plea. *R. 3:9-3(f)*. See *State v. Desir*, 461 N.J. Super. 185, 194 (App. Div. 2019) (The remedy for a defendant who successfully obtains a reversal of a pre-trial motion following a conditional guilty plea is clearly set forth in *R. 3:9-3(f)*, i.e., “defendant may elect either to withdraw his plea and proceed to trial... or to accept his earlier conviction and sentence. *State v. Cummings*, 184 N.J. 84, 100 (2005).”). The defendant can also seek to renegotiate his plea. *Note:* Certification was granted in *State v. Desir*, 240 N.J. 553 (2020).

**Plea Cut Off:** After the pretrial conference has been conducted and a trial date set, the court shall not accept negotiated pleas absent approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice. *R. 3:9-3(g)*.

**Accepting a Plea:** *R. 3:9-2* provides in part:

The court, in its discretion, may refuse to accept a plea of guilty and shall not accept such plea without first questioning the defendant personally, under oath or by affirmation, and determining by inquiry of the defendant and others, in the court’s discretion, that there is a factual basis for the plea and that the plea is made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea...Before accepting a plea of guilty, the court shall require the defendant to complete, insofar as applicable, and sign the appropriate form ... which shall then be filed with the criminal division manager’s office.

A plea agreement may not restrict the court’s discretion in imposing sentence. *State v. Hess*, 207 N.J. 123, 151 (2011). Additionally, a plea agreement that restricts the defendant’s ability to present mitigating evidence, or to argue for a lesser sentence than the one agreed to, denies the defendant the right to effective assistance of counsel. *Id.* at 152-53.

See also Commentary to *R. 3:9-2* for a discussion on the court’s determination of a factual basis for a plea, understanding the consequences of the plea, and the penal and collateral consequences of a plea.

The court may not impose an illegal sentence, even if the prosecutor and defendant request the sentence. *State v. Crawford*, 379 N.J. Super. 250, 258 (App. Div. 2005).

**Written Stipulation:** The court, in addition to its inquiry of the defendant, may accept a written stipulation of facts, opinion, or state of mind that the defendant admits to be true, provided it is signed by the defendant, defense counsel, and the prosecutor. *R. 3:9-2*.



**Agreements Involving Right to Appeal:** Whenever a plea agreement includes a waiver of the right to appeal, the court shall advise the defendant that notwithstanding that provision, the defendant has the right to take a timely appeal if the plea agreement is accepted, but if the defendant does so the prosecutor has the right to annul the plea agreement, in which event all charges shall be restored to the same status as immediately before the entry of the plea. *R. 3:9-3(d)*.

**Consolidation of Charges in More than One County:** When a defendant has charges in more than one county at any stage before sentencing, either the defendant, or the prosecutor in any such county with consent of the defendant, may move before the Criminal Presiding Judge in the county in which consolidation is sought, or before any judge designated to hear the motion, for consolidation for purposes of entering a plea or for sentencing. If the plea agreement does not resolve all charges, the judge shall order each unresolved charge to be returned immediately to the originating county. *R. 3:25A-1*.

**Refusal:** If a plea of guilty is refused, no admission by the defendant shall be admissible in evidence against the defendant at trial. If a defendant refuses to plead or stands mute, or if the court refuses to accept a plea of guilty, a plea of not guilty shall be entered. *R. 3:9-2*.

**Withdrawal of Plea:** If at the time of sentencing, the court determines that the interests of justice would not be served by effectuating the agreement reached by the parties, or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea. *R. 3:9-3(e)*.

A motion to withdraw a plea of guilty shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice. *R. 3:21-1*.

The prosecutor may not rescind the plea agreement if the court sentences the defendant to a term less than the prosecutor's recommendation. *State v. Hess*, 207 N.J. 123, 151 (2011), citing to *State v. Warren*, 115 N.J. 433, 442 (1989).

**Note:** The plea forms are located on the *InfoNet* on the Criminal Division Forms webpage.

### **§ 101.3: Sentencing Procedures**

**Defendant's Presence:** A sentence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present. *R. 3:21-4(b)*. See however, *State v. Tedesco*, 214 N.J. 177 (2013), in which the Supreme Court held that the court has the discretion to deny the defendant's application to waive his/her presence. *Tedesco* also sets forth factors for this decision.

**Defendant's Statement:** Before imposing the sentence, the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement or present information in mitigation of punishment. The defendant may answer personally or by his or her attorney. *R. 3:21-4(b)*.

The court shall state on the record the reasons for imposing the sentence, including its findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-

1 to 2C:44-3, the factual basis supporting its findings of particular aggravating or mitigating factors affecting sentence, and where imprisonment is imposed, consideration of the defendant's eligibility for release under the law governing parole. N.J.S.A. 2C:43-2(e). *See also* R. 3:21-4(g) requiring the court to state its reasons for imposing the sentence.

In imposing the sentence, the sentencing court should view a defendant "as he or she stands before the court on the day of sentencing. This means evidence of post-offense conduct, rehabilitative or otherwise, must be considered in assessing the applicability of, and weight to be given to, aggravating and mitigating factors." *State v. Jaffe*, 220 N.J. 114, 124 (2014) (citing to *State v. Randolph*, 210 N.J. 330, 354 (2012)).

Pursuant to N.J.S.A. 2C:43-2(f), the court must explain the parole laws as they apply to the sentence and state:

- (1) The approximate period of time in years and months the defendant will serve in custody before parole eligibility;
- (2) The jail credits or the amount of time the defendant has already served;
- (3) That the defendant may be entitled to good time and work credits; and
- (4) That the defendant may be eligible for participation in the Intensive Supervision Program.

*See* Appendix A State Parole Board Parole Eligibility Table.

**Right to Appeal and File Petitions for Post-Conviction Relief:** After imposing sentence the court shall advise the defendant of the right to appeal and inform the defendant of the time limitations to file a petition for post-conviction relief. *See* Directive #05-14 "Amended Form – Notice of Appeal Rights and Time to File a Petition for Post-Conviction Relief and Colloquy" issued by Hon. Glenn A. Grant, Acting Administrator Director of the Courts, on August 25, 2014. *See also* R. 3:21-4(h).

## **§ 102: AUTHORIZED DISPOSITIONS (N.J.S.A. 2C:43-2)**

The court may, except where otherwise provided by Title 2C, suspend imposition of the sentence, or sentence as follows:

- Pay a fine or make restitution; or
- Probation, or probation with up to 364 days in jail for a crime, or up to 90 days in jail for a disorderly persons offense as a condition of probation; or
- To a term of imprisonment; or
- Pay a fine, make restitution and probation, or fine, restitution and imprisonment; or
- Release under supervision in the community or require the performance of community-related service; or
- To a halfway house or other residential facility; or
- To imprisonment at night or on weekends.

Instead of or in addition, the court may postpone, suspend or revoke the driver's license or registration, or both, for a period not to exceed 2 years for a crime, disorderly persons offense or

petty disorderly persons offense in which a motor vehicle was used. *See* N.J.S.A. 2C:43-2(c). Note: Effective January 1, 2021, the standard to postpone, suspend or revoke a driver’s license or registration was amended for the court to consider the “circumstances of the violation, and whether the loss of driving privileges will result in extreme hardship and alternative means of transportation are not readily available.”

## **§ 103: PRESUMPTION OF IMPRISONMENT OR NON-IMPRISONMENT**

### **§ 103.1: “In-Out” Decision**

When sentencing, the court must first make the “in-out” decision on whether a term of imprisonment is appropriate, in light of the relevant presumptions for and against imprisonment. *See* N.J.S.A. 2C:44-1(d), (e).

### **§ 103.2: Presumption of Non-Imprisonment (N.J.S.A. 2C:44-1(e))**

The presumption of non-imprisonment applies to persons convicted of any offense other than crimes of the first or second degree, who have not been previously convicted of an offense.

**Exceptions:** The presumption of non-imprisonment does not apply if the court finds that one of the following aggravating factors in N.J.S.A. 2C:44-1(a) applies: aggravating factor (5) that the defendant is involved in organized criminal activity, aggravating factor (14) that the offense involved an act of domestic violence in the presence of a child under sixteen years of age, or aggravating factor (15) that the offense involved an act of domestic violence and the defendant committed at least one act of domestic violence on more than one occasion, or the defendant is convicted of the third and fourth degree crimes listed in N.J.S.A. 2C:44-1(e). Those crimes include, theft of a motor vehicle; unlawful taking of a motor vehicle; strict liability vehicular homicide (N.J.S.A. 2C:11-5.3); eluding; use of false government document; distribution, manufacture or possession of an item containing personal identifying information (N.J.S.A. 2C:21-17.3); knowingly leaving the scene of a motor vehicle accident resulting in serious bodily injury; attempts to or causes significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life, recklessly causes significant bodily injury to a person who, with respect to the actor, meets the definition of a victim of domestic violence (N.J.S.A. 2C:12-1(b)(12)); third or fourth degree crime of bias intimidation (N.J.S.A.2C:16-1); third or fourth degree gang criminality or promoting organized street crime.

*See* § 103.3 regarding the Presumption of Imprisonment.

**Note:** Relevant statutory provisions should be reviewed regarding the application of the presumption of non-imprisonment as certain statutory provisions specifically prohibit its application to persons convicted of certain third and fourth degree crimes, who do not have a prior conviction, that are not listed in N.J.S.A. 2C:44-1(e) such as: third degree corrupting or influencing a jury (N.J.S.A. 2C:29-8(c)), and third degree pattern of official misconduct (N.J.S.A. 2C:30-7(b)).

**Overcoming the Presumption of Non-Imprisonment:** The court may overcome the presumption of non-imprisonment if, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, the court finds that imprisonment is necessary for the protection of the public under the criteria for the aggravating factors under N.J.S.A. 2C:44-1(a). The court must make a specific finding that there are aggravating factors that make imprisonment necessary for the protection of the public. *State v. Roth*, 95 N.J. 334, 357 (1984).

Even if the presumption of non-imprisonment is not overcome, a defendant may be sentenced to the county jail as a condition of probation. *State v. Hartye*, 105 N.J. 411 (1987) (a defendant may be sentenced up to 364 days in jail even where the presumption of non-imprisonment applies). However, a county jail sentence is not a substitute for imprisonment if there is a presumption of imprisonment and it has not been overcome. A prison term must be imposed. *State v. O'Connor*, 105 N.J. 399 (1987).

### **§ 103.3: Presumption of Imprisonment (N.J.S.A. 2C:44-1(d))**

The presumption of imprisonment applies to persons convicted of first and second-degree crimes, or a third degree crime if the court finds one of the following aggravating factors in N.J.S.A. 2C:44-1(a) applies: aggravating factor (5) that the defendant is involved in organized criminal activity, aggravating factor (14) that the offense involved an act of domestic violence in the presence of a child under sixteen years of age, or aggravating factor (15) that the offense involved an act of domestic violence and the defendant committed at least one act of domestic violence on more than one occasion, even where it is not a first or second degree offense. Additionally, there is a presumption of imprisonment for a person convicted of theft of a motor vehicle or unlawful taking of a motor vehicle if there is a prior conviction of either offense.

**Overcoming the Presumption of Imprisonment:** The presumption of imprisonment can be overcome for a first or second degree crime, or a crime of the third degree where the court finds one of the aggravating factors (5), (14), or (15) applies, or a person convicted of theft of a motor vehicle or unlawful taking of a motor vehicle who has previously been convicted of either offense, if the court finds, having regard to the character and condition of the defendant, that imprisonment would be a serious injustice which overrides the need to deter such conduct by others. N.J.S.A. 2C:44-1(d).

The presumption of imprisonment can be overcome only under extraordinary circumstances, where the court makes a specific finding that a sentence of imprisonment would constitute a serious injustice that overrides the need to deter others. *State v. Jabbour*, 118 N.J. 1, 6-7 (1990).

*See State v. Thomas*, 459 N.J. Super. 426, 434-35 (App. Div. 2019), in which the State appealed the court's decision to impose a probationary sentence for third degree aggravated assault involving domestic violence, although aggravating factor (15), N.J.S.A. 2C:44-1(a)(15), was found by the court and thus a presumption of imprisonment applied under N.J.S.A. 2C:44-1(d). The Appellate Division held that the State has no authority to appeal from a third degree sentence, even where the prosecutor disagrees with the court's finding that the presumption of imprisonment is overcome.

**§ 104: AGGRAVATING and MITIGATING FACTORS  
(N.J.S.A. 2C:44-1(a) and -1(b))**

**§ 104.1: Aggravating Factors**

N.J.S.A. 2C:44-1(a) provides:

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

- (1) The nature and circumstances of the offense, and the role of the actor in committing the offense, including whether or not it was committed in an especially heinous, cruel, or depraved manner;
- (2) The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance;
- (3) The risk that the defendant will commit another offense;
- (4) A lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of the public trust under chapters 27 and 30 of this title, or the defendant took advantage of a position of trust or confidence to commit the offense;
- (5) There is a substantial likelihood that the defendant is involved in organized criminal activity;
- (6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted;
- (7) The defendant committed the offense pursuant to an agreement to either pay or be paid for the commission of the offense and the pecuniary incentive was beyond that inherent in the offense itself;
- (8) The defendant committed the offense against a police or other law enforcement officer, correctional employee or firefighter, acting in the performance of the officer, employee, or firefighter duties while in uniform or exhibiting evidence of his authority; the defendant committed the offense because of the status of the victim as a public servant; or the defendant committed the offense against a sports official, athletic coach or manager, acting in or immediately following the performance of the person's duties or because of the person's status as a sports official, coach or manager;
- (9) The need for deterring the defendant and others from violating the law;

- (10) The offense involved fraudulent or deceptive practices committed against any department or division of State government;
- (11) The imposition of a fine, penalty or order of restitution without also imposing a term of imprisonment would be perceived by the defendant or others merely as part of the cost of doing business, or as an acceptable contingent business or operating expense associated with the initial decision to resort to unlawful practices;
- (12) The defendant committed the offense against a person who the defendant knew or should have known was 60 years of age or older, or disabled;
- (13) The defendant, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a stolen motor vehicle;
- (14) The offense involved an act of domestic violence, as that term is defined in P.L.1991, c. 261 (C.2C:25-19), committed in the presence of a child under 16 years of age; and
- (15) The offense involved an act of domestic violence, as that term is defined in subsection a. of section 3 of P.L.1991, c. 261 (C.2C:25-19) and the defendant committed at least one act of domestic violence on more than one occasion.

#### **§ 104.2: Mitigating Factors**

N.J.S.A. 2C:44-1(b) provides:

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

- (1) The defendant's conduct neither caused nor threatened serious harm;
- (2) The defendant did not contemplate that the defendant's conduct would cause or threaten serious harm;
- (3) The defendant acted under a strong provocation;
- (4) There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;
- (5) The victim of the defendant's conduct induced or facilitated its commission;
- (6) The defendant has compensated or will compensate the victim of the defendant's conduct for the damage or injury that the victim sustained, or will participate in a program of community service;

- (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;
- (8) The defendant's conduct was the result of circumstances unlikely to recur;
- (9) The character and attitude of the defendant indicate that the defendant is unlikely to commit another offense;
- (10) The defendant is particularly likely to respond affirmatively to probationary treatment;
- (11) The imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents;
- (12) The willingness of the defendant to cooperate with law enforcement authorities;
- (13) The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant.
- (14) The defendant was under 26 years of age at the time of the commission of the offense (*Note*: this new mitigating factor was enacted October 19, 2020 to be effective immediately).

*See State v. Dalziel*, 182 N.J. 494, 504-05 (2005), in which the Supreme Court concluded that notwithstanding the language in N.J.S.A. 2C:44-1(a) that the court "shall consider" aggravating factors and the language in N.J.S.A. 2C:44-1(b) that the court "may consider" mitigating factors, a mitigating factor that can be supported must be part of the deliberative process. The weight to be given to the mitigating factor is to be determined by the judge.

In determining the appropriate sentence to be imposed the court must qualitatively weigh the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and -1(b). *See State v. Case*, 220 N.J. 49, 65 (2014).

The Supreme Court in *Case* provided the following guidance as to the sentencing analysis:

Whether a sentence should gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors. *Fuentes*, 217 N.J. 57, 72 (2014). '[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range.' *Natale*, 184 N.J. 458, 488 (2015). The balancing process, however, is more than counting whether one set of factors outnumbers the other. *Fuentes*, 217 N.J. at 72. Rather, the court must qualitatively assess the relevant aggravating and mitigating factors, assigning each factor its appropriate weight. *Id.* at 72-73.  
[*Id.* at 64-65.]

Where the aggravating and mitigating factors are in equipoise, a term in the middle of the sentencing range will be an appropriate sentence. *State v. Fuentes*, 217 N.J. 57, 73 (2014) (citing to *State v. Natale*, 184 N.J. 458, 488 (2005)).

**Double Counting Prohibited:** An element of the offense per se may not be cited as an aggravating factor to increase punishment. *See State v. Fuentes*, 217 N.J. at 74-75 (citing to *State v. Kromphold*, 162 N.J. 345, 353 (2000)). *See* CANNEL, CRIMINAL CODE ANNOTATED, (GANN) comment to N.J.S.A. 2C:44-1 on aggravating factors and double counting. *See also State v. Miller*, 237 N.J. 15, 31-32 (2019), in which the Supreme Court held that extreme youth of the victim may be used as an aggravating factor even though age was an element of the child pornography offense.

Title 2C “delegates to judges, not juries the consideration of aggravating [and mitigating] factors for the purpose of imposing fair and uniform sentences.” Judges must “state on the record” how they arrived at a particular sentence. *State v. Cassidy*, 198 N.J. 165, 180 (2009) (quoting *State v. Natale*, 184 N.J. 458, 486, 488 (2005)).

**Appellate Review:** The Court has emphasized that “critical to the sentencing process and appellate review is the need for the sentencing court to explain clearly why an aggravating or mitigating factor presented by the parties was found or rejected and how the factors were balanced to arrive at the sentence. *State v. Case*, 220 N.J. 49, 66 (2014) (citing to *Fuentes*, 217 N.J. at 73). *See State v. Randolph*, 210 N.J. 330, 354 (2012) (holding that “when ‘reconsideration’ of sentence or ‘resentencing’ is ordered after appeal, the trial court should view defendant as he stands before the court on that day unless the remand order specifies a different and more limited resentencing proceeding such as correction of a plainly technical error or a directive to the judge to view the particular sentencing issue from the vantage point of the original sentencing.”).

*See also* CANNEL, CRIMINAL CODE ANNOTATED, comments to N.J.S.A. 2C:44-1 for a discussion on individual aggravating and mitigating factors.

### **§ 105: SENTENCING AS IF ONE DEGREE LOWER (DOWNGRADE) (N.J.S.A. 2C:44-1(f)(2))**

For convictions involving first or second degree crimes (except murder), the offender may be sentenced to a term appropriate for a crime one degree lower than that for which the defendant was convicted if the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands. If the court does impose a sentence of one degree lower or a noncustodial or probationary sentence for a first or second degree crime, the sentence shall not become final for 10 days to permit the State to appeal. *See also R. 3:21-4(i)*.

The Supreme Court in *State v. Megargel*, 143 N.J. 484 (1996), provided the following guidance:

[T]he standard for downgrading an offense for the purpose of sentencing under section 2C:44-1f(2) is two-pronged: first, the court must be ‘clearly convinced’ that the mitigating factors ‘substantially’ outweigh the



aggravating ones, and second, the court must find that the ‘interest of justice’ demands that the sentence be downgraded. The reasons justifying a downgrade must be ‘compelling,’ and something in addition to and separate from, the mitigating factors that substantially outweigh the aggravating factors.  
[*Id.* at 504-05.]

**Enhanced Penalty:** In cases in which the Legislature has acted to provide an enhanced penalty for conviction of a particular offense, the downgrade of that offense requires more compelling reasons than the downgrade of an offense for which the Legislature has not attached an enhanced penalty. By its description of the sentence, the Legislature has indicated that an enhanced sentence was contemplated for this crime. *State v. Megargel*, 143 N.J. at 502 (citing to *State v. Maguire*, 84 N.J. 508, 514 (1980)). Under such circumstances, trial courts must exercise extreme caution. A mandatory minimum sentence requirement for a particular offense, *i.e.*, kidnapping (N.J.S.A. 2C:13-1(c)(2)), is not subject to a sentence downgrade. *State v. Lopez*, 395 N.J. Super. 98 (App. Div. 2007). The power to sentence one degree lower may not be used if the Legislature has provided a mandatory penalty for a specific crime. *Id.* at 108-09.

**Presumption of Imprisonment:** A downgraded sentence does not eliminate the presumption of imprisonment or minimum parole ineligibility term applicable to first or second degree crimes. *State v. O’Connor*, 105 N.J. 399, 405 (1987); *State v. Barber*, 262 N.J. Super. 157 (App. Div.1993).

**The No Early Release Act (NERA):** When a defendant pleads guilty to a second degree crime subject to NERA (N.J.S.A. 2C:43-7.2), and the court downgrades to a third degree range for sentencing purposes, a term of incarceration must be imposed because the crime to which the defendant pled guilty was subject to a mandatory minimum term of imprisonment. *State v. L.V.*, 410 N.J. Super. 90, 113 (App. Div. 2009).

*See also* CANNEL, CRIMINAL CODE ANNOTATED, comment to N.J.S.A. 2C:44-1(f)(2) on sentencing for a crime one degree lower.

## § 106: PROBATION

When the court suspends the imposition of sentence or sentences a person to be placed on probation, it shall attach such reasonable conditions authorized by this section as it deems necessary to insure that the person will lead a law-abiding life or is likely to assist in doing so. N.J.S.A. 2C:45-1(a). *See also* R. 3:21-7(a).

### § 106.1: Period of Suspension or Probation

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

When the court has suspended imposition of sentence or has sentenced a defendant to be placed on probation, the period of the suspension shall be fixed by the court at not to exceed the maximum term which could have been imposed or more than 5 years whichever is lesser.

When suspending the imposition of a sentence, the Judgment of Conviction should reflect the following:

The Court hereby suspends imposition of the sentence for \_\_\_\_\_ years \_\_\_\_\_ months. [List all other conditions that are imposed.] All fines are to be collected through the Probation Division.

See discussion on Probation and Suspended Sentences in the *Guide on the Preparation of Judgments of Conviction and Other Judgment Related Topics* on the Judiciary's *InfoNet* under the Criminal Practice Division/manuals webpage.

### **§ 106.2: Length of Probation**

The period of probation shall be fixed by the court at not less than 1 year or more than 5 years. N.J.S.A. 2C:45-2(a).

At the time of sentence, the court shall inform defendants sentenced to probation what penalties might be imposed on revocation should they not adhere to their conditions of probation. R. 3:21-4(c).

### **§ 106.3: Conditions of Probation (N.J.S.A. 2C:45-1(b))**

The court may require the defendant:

- To support dependents and meet family responsibilities;
- To find and continue in gainful employment;
- To undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose;
- To pursue a prescribed secular course of study or vocational training;
- To attend or reside in a facility established for the instruction, recreation or residence of persons on probation;
- To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;
- Not to possess any firearm or other dangerous weapon unless granted written permission;
- To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in address or employment;
- To report as directed to the court or the probation officer, to permit the officer to visit the home, and to answer all reasonable inquiries by the probation officer;
- To pay a fine;
- To satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of liberty or incompatible with freedom of conscience;
- To require the performance of community-related service; and
- To be subject to internet access conditions as set forth in N.J.S.A. 2C:45-1(d)(2).

In addition to any condition imposed, the court shall order a person placed on probation to pay a supervision fee of up to \$25.00 a month. This fee may be waived in case of indigency upon application of the chief probation officer to the sentencing court. N.J.S.A. 2C:45-1(d)(1).

#### **§ 106.4: Probation and Sex Offense Restraining Order (N.J.S.A. 2C:45-1(b))**

In addition to any condition of probation, the court may enter an order prohibiting a defendant who is convicted of a sex offense (as defined in N.J.S.A. 2C:7-2(b)) from having any contact with the victim, as well as the victim's family, and household members where appropriate. *See* also § 408 - Sex Offender Restraining Orders (N.J.S.A. 2C:44-8).

#### **§ 106.5: Probation and Term of Imprisonment (N.J.S.A. 2C:45-1(e))**

The court may sentence a defendant who has been convicted of a crime to probation and a term of imprisonment not exceeding 364 days as an additional condition of its order. The court may sentence a defendant who has been convicted of a disorderly persons offense to probation and a term of imprisonment not exceeding 90 days as an additional condition of its order. In imposing a term of imprisonment, the sentencing court shall specifically place the reasons on the record, which justify the sentence imposed. The term of imprisonment shall be treated as part of the sentence, and in the event of a sentence of imprisonment upon the revocation of probation, the term of imprisonment shall be credited toward service of such subsequent sentence.

N.J.S.A. 2C:43-2(g) provides that a court imposing sentence on a defendant convicted of any of the following offenses in N.J.S.A. 2C:43-6.4 ("Special Sentence of Parole Supervision for Life") may not sentence the defendant to be placed on probation:

- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Sexual assault (N.J.S.A. 2C:14-2(b) or (c));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Kidnapping (N.J.S.A. 2C:13-1(c)(2));
- Endangering the welfare of a child by engaging in sexual conduct that impairs or debauches the morals of the child (N.J.S.A. 2C:24-4(a));
- Endangering the welfare of a child by way of child pornography (N.J.S.A. 2C:24-4(b)(3), or N.J.S.A. 2C:24-4b(5)(b)(i) or (ii) if offense occurred on or after February 1, 2018);
- Luring (N.J.S.A. 2C:13-6);
- Violating a special sentence of Community Supervision for Life (N.J.S.A. 2C:43-6.4(d)) or
- An attempt to commit the above offenses.

#### **§ 106.6: Modification or Discharge of Probation (N.J.S.A. 2C:45-2)**

**Modification:** During the period of the suspension or probation, the court, on application of a probation officer or of the defendant, or on its own motion, may (1) modify the requirements imposed on the defendant; or (2) add further requirements authorized by N.J.S.A. 2C:45-1. The court shall eliminate any requirements that impose an unreasonable burden on the defendant. N.J.S.A. 2C:45-2(b).

**Discharge:** The court on application of a probation officer or of the defendant, or on its own motion, may discharge the defendant. N.J.S.A. 2C:45-2(a).

Upon the termination of the period of suspension or probation or the earlier discharge of the defendant, the defendant shall be relieved of any obligations imposed by the court and shall have satisfied the sentence for the offense unless the defendant has failed to satisfy the payments for a fine, assessment, and/or make restitution for which the court can extend probation up to a total maximum of five years. The extension may be entered by the court without the defendant's appearance in court if the defendant agrees to the extension. N.J.S.A. 2C:45-2(c).

A court order imposed on a defendant convicted of a sex offense (as defined in N.J.S.A. 2C:7-2(b)) prohibiting contact with a victim shall continue in effect following the termination of probation supervision until further order of the court. N.J.S.A. 2C:45-2(c).

### **§ 106.7: Violation of Probation (VOP) (N.J.S.A. 2C:45-3)**

At any time before the discharge of the defendant or the termination of the period of suspension or probation, the court may summon the defendant to appear before it or may issue an arrest warrant. If the court has probable cause that defendant committed another offense, it may commit him without bail, pending determination of the charge. N.J.S.A. 2C:45-3(a)(3). See N.J.S.A. 2C:45-4 requiring written notice and a hearing to revoke a suspension of sentence or probation, add, or modify conditions of probation.

If the court is satisfied that defendant has inexcusably failed to comply with a substantial requirement of a condition or has been convicted of another offense, it may revoke the suspension or probation and sentence or resentence defendant. 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:45-3(a)(4).

Upon revocation, the court may impose any sentence that might have been imposed originally for the offense. N.J.S.A. 2C:45-3(b). But see § 106.8 on waiver of the parole disqualifier pursuant to N.J.S.A. 2C:35-12. The court may consider only those aggravating factors that were found at the time of the original sentence. While the violation of probation can be considered as to mitigating factors, it cannot be considered as to aggravating factors. Additionally, the violation of probation itself is not a factor in imposing concurrent or consecutive sentences. When resentencing the defendant, the court should state for the record the reasons for imposing a custodial sentence. *State v. Molina*, 114 N.J. 181 (1989); *State v. Baylass*, 114 N.J. 169 (1989).

**Violation by Commission of Another Offense:** In *State v. Mosley*, 232 N.J. 169 (2018), the State charged defendant with violating probation by committing another criminal offense and proceeded first with the VOP charge. The Court acknowledged that it was permissible for the trial court to adjudicate the VOP while the new charge was still pending, but also stated the “recognized preferable procedure” is to “delay substantive action on the probation violation until after the criminal conviction is secured.” *Id.* at 182. The Court reversed the trial court’s decision to revoke probation and impose a prison sentence on due process grounds, because the proof that the defendant committed a new offense consisted only of hearsay, and the State failed to explain why the arresting officer was not available to testify.

The *Mosley* Court provided additional guidance:

Although we adhere to the use of hearsay at VOP hearings, we endorse a balancing approach that includes assessment of the reasons for the government's

proceeding through the use of hearsay in addition to testing the evidence's reliability. Merely because the rules of evidence are inapplicable to VOP hearings does not control whether due process would be violated by the court's acceptance and reliance on unreliable evidence to sustain a VOP charge. The evidence to support the VOP charge must be reliable to meet due process concerns, and the reason for relying on hearsay informs the decision on the evidence's overall reliability. We conclude that the *Walker* [*United States v. Walker*, 117 F.3d 417, 420 (9th Cir. 1997)] factors provide a helpful refinement of the guidance already existing in New Jersey from the *Reyes* decision [207 N.J. Super. 126, 138 (App. Div. 1986)] (noting that right to confrontation is 'one element among several to be considered and weighed by the hearing body'). The *Walker* factors that we adopt to guide trial courts bear repeating: (1) the importance of the evidence to the court's finding; (2) the probationer's opportunity to refute the evidence; (3) the consequences for the probationer of the court's finding; (4) the difficulty and expense of procuring witnesses; and (5) the traditional indicia of reliability borne by the evidence... Each factor can assist the trial court in analyzing the reliability of the hearsay being offered by the State and the fairness of its use. And, in the context of what is or is not being contested by the defendant, the court should explain its reasons for determining that the hearsay evidence is reliable for its stated purposes.  
[*Id.* at 189-90.]

**Violation of a Condition When Court Suspends Imposition of Sentence:** The guidelines in *State v. Baylass*, 114 N.J. 169 (1989), apply when a violation of a condition of the suspension is at issue. See *State v. Hannigan*, 408 N.J. Super. 388, 392 (App. Div. 2009); *State v. Cullen*, 351 N.J. Super. 505, 511 (App. Div. 2002).

### **§ 106.8: Waiver of Parole Disqualifier pursuant to N.J.S.A. 2C:35-12**

Once a parole disqualifier is waived pursuant to N.J.S.A. 2C:35-12, it is waived forever. The prosecutor cannot condition a plea agreement on the requirement of an imposition of a parole disqualifier upon a VOP. To impose a parole disqualifier for purposes of re-sentencing for a VOP, the court must weigh the aggravating and mitigating factors as set forth in *Baylass* and *Molina*. See *State v. Vasquez*, 129 N.J. 189 (1992); *State v. Peters*, 129 N.J. 210 (1992).

**Exception:** Pursuant to N.J.S.A. 2C:35-14, which authorizes special probation for drug and alcohol dependent persons, even if the court did not impose a mandatory period of parole ineligibility at the original sentence, upon a VOP, the defendant can receive whatever the original sentence would have been, including a mandatory minimum term. See discussion in § 305.5 on revocation of special probation.

### **§ 106.9: Revocation of Probation and No Early Release Act (NERA)**

A NERA parole disqualifier is mandatory when a term of incarceration is imposed following the revocation of probation on a NERA mandated crime. *State v. Kearns*, 393 N.J. Super. 107, 111 (App. Div. 2007). This is distinguishable from a waiver of parole disqualifier pursuant to N.J.S.A. 2C:35-12 above. There is no authority for the court or the prosecutor to waive the 85% parole ineligibility term on a NERA prison sentence under N.J.S.A. 2C:43-7.2.

**§ 106.10: Sentencing on the New Offense where the Court Does Not Revoke  
Probation or Suspension (N.J.S.A. 2C:44-5(g))**

When a defendant is convicted of an offense committed while under suspension of sentence or on probation and such suspension or probation is not revoked, the following applies:

- (1) If sentenced to imprisonment in excess of one year, the service of such sentence shall not satisfy the prior suspended sentence or sentence to probation, unless the court determines otherwise at the time of sentencing.
- (2) If sentenced to imprisonment of one year or less, the period of the suspension or probation shall not run during the period of such imprisonment; and
- (3) If the sentence is suspended or sentenced to probation, the period of such suspension or probation shall run concurrently with or consecutively to the remainder of the prior periods, as the court determines at the time of sentence.

**§ 107: YOUNG ADULT OFFENDERS ACT (YAOA) (N.J.S.A. 2C:43-5)**

Any person who, at the time of sentencing is less than 26 years of age and who has been convicted of a crime may be sentenced to an indeterminate term at the Youth Correctional Institution Complex (men) or Correctional Institute for Women, instead of the sentences otherwise authorized by Title 2C.

This provision does not apply to persons under 26 years old at the time of sentencing who qualify for a mandatory minimum term without parole eligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c). Notwithstanding the provisions of N.J.S.A. 2C:43-6(c), the mandatory minimum terms may be served at the Youth Correctional Institution Complex or the Correctional Institution for Women.

A young adult offender sentence cannot be imposed on a conviction for a mandatory minimum term under NERA. *See State v. Corriero*, 357 N.J. Super. 214, 218-20 (App. Div. 2003).

The *Corriero* court stated:

NERA mandates, without exception, a parole disqualifier. N.J.S.A. 2C:43-7.2(a). The YAOA, on the other hand, which provides for indeterminate sentences, precludes a parole disqualifier. N.J.S.A. 30:4-5; *State v. White*, 186 N.J. Super. 15 (Law Div.1982). Thus, a person convicted of a Graves Act offense which carries a mandatory period of parole ineligibility, N.J.S.A. 2C:43-6(c), is not eligible for a YAOA sentence. *State v. Des Marets*, 92 N.J. 62, 75-76 (1983). So too is the YAOA unavailable to a person convicted of drug offenses which carry a mandatory parole disqualifier pursuant to N.J.S.A. 2C:35-5(b)(1) and (7). *State v. Luna*, 278 N.J. Super. 433, 438, 651 A.2d 483 (App.Div.1995).  
[*Id.* at 217-18.]

**Maximum Length of Term:** N.J.S.A. 30:4-148 provides that the maximum sentence shall not exceed 5 years, or the maximum term provided by law for the crime convicted, if such maximum is less than 5 years. The court, in its discretion, for good cause shown, may impose a sentence greater than 5 years, but in no case greater than the maximum provided by law. *See State v.*

*Scherzer*, 301 N.J. Super. 363, 497 (App. Div. 1997) (the court should place its reasons on the record if the outside number is in excess of 5 years).

**Consecutive Indeterminate Sentences for Youthful Offenders:** The Supreme Court in *State v. Carroll*, 66 N.J. 558, 561-62 (1975) stated:

A sentence to the Youth Correctional Institution Complex under N.J.S.A. 30:4-147 contemplates rehabilitation as its primary purpose... Since the basic purpose of the reformatory sentence is rehabilitation, consecutive indeterminate sentences should be the exception rather than the rule... However, under certain circumstances, the imposition of consecutive indeterminate sentences serves a valid penological purpose... the judge, in stating the reasons for imposing sentence, if consecutive indeterminate sentences are imposed, should say why they are being made consecutive, and why concurrent sentences would not be appropriate.

The criteria on whether to impose consecutive indeterminate sentences for youthful offenders must be justified with reference to offender-based criteria centered on rehabilitation, and subject to *Carroll's* direction to avoid routine use of consecutive terms for youthful offenders. *State v. Hannigan*, 408 N.J. Super. 388, 398-400 (App. Div. 2009).

## **§ 108: INCARCERATION MANDATED BY STATUTE**

### **§ 108.1: Sentencing Under the Graves Act (N.J.S.A. 2C:43-6(c))**

The Graves Act (N.J.S.A. 2C:43-6(c)) was amended August 8, 2013 to require a defendant sentenced pursuant to the Graves Act to have a minimum term of imprisonment that shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater, or 18 months in the case of a fourth degree crime, during which the person is ineligible for parole. Prior to August 13, 2013, the mandatory parole ineligibility under the Graves Act was one-third to one-half of the sentence or three years, whichever is greater, or 18 months in the case of a fourth degree crime.

The crimes enumerated under the Graves Act are as follows:

- Possession of a sawed-off shotgun (N.J.S.A. 2C:39-3(b));
- Possession of a defaced firearm (N.J.S.A. 2C:39-3(d));
- Possession of a firearm with purpose to use it unlawfully against a person or property of another (N.J.S.A. 2C:39-4(a));
- Possession of a firearm while committing certain drug offenses or bias intimidation (N.J.S.A. 2C:16-1) (N.J.S.A. 2C:39-4.1(a));
- Possession of a machine gun, handgun, rifle and shotgun, or assault firearm (N.J.S.A. 2C:39-5(a), (b), (c), or (f));
- Possession of a weapon by a certain person (N.J.S.A. 2C:39-7(a), (b)(2), or (b)(3)); or
- Manufacture, transport, disposition and defacement of machine guns, sawed-off shot gun, defaced firearm, or assault firearm (N.J.S.A. 2C:39-9(a), (b), (e) or (g));

- or a crime under the following sections where the defendant used, or was in possession of, a firearm, while committing or attempting to commit the crime, including the immediate flight therefrom:
  - Murder (N.J.S.A. 2C:11-3);
  - Manslaughter (N.J.S.A. 2C:11-4);
  - Aggravated Assault (N.J.S.A. 2C:12-1(b));
  - Kidnapping (N.J.S.A. 2C:13-1);
  - Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
  - Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
  - Robbery (N.J.S.A. 2C:15-1);
  - Burglary (N.J.S.A. 2C:18-2); or
  - Escape (N.J.S.A. 2C:29-5).

**Offenses Excluded from Graves Act Sentencing:** Unlawful possession of a handgun in which the propelling force is air or similar force (N.J.S.A. 2C:39-5(b)(2)); Unlawful possession of a rifle or shotgun in which the propelling force is air or similar force (N.J.S.A. 2C:39-5(c)(2)); and Possession of a rifle or shotgun without a firearms purchaser identification card (N.J.S.A. 2C:39-5(c)(1)).

*See State v. Benjamin*, 228 N.J. 358, 368 (2017) (even if the trial court finds that the mitigating factors of N.J.S.A. 2C:44-1(b) outweigh the aggravating factors listed in subsection (a) of that statute, the court must still impose the minimum term of incarceration.)

**Hearing for a Graves Act Sentence:** The court shall not impose a mandatory Graves Act sentence unless the prosecutor establishes by a preponderance of the evidence at a hearing, which may occur at the time of sentencing, “that the weapon used or possessed was a firearm.” The court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and other relevant information. N.J.S.A. 2C:43-6(d).

**Note:** The continued constitutionality of this hearing, in light of the constitutional limitations on enhanced mandatory sentencing on facts relating to the commission of the crime as determined by a judge, is doubtful. *See Alleyne v. United States*, 570 U.S. 99 (2013).

In *Alleyne*, the United States Supreme Court held:

Any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt... Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.

[*Id.* at 103.]

*See also State v. Grate*, 220 N.J. 317, 334-35 (2015), adopting with respect to another statutory provision the position of *Alleyne* that, other than prior crimes, any fact that increases a mandatory minimum is an element of the offense which must be proved to a jury beyond a



reasonable doubt, or admitted by the defendant during a plea proceeding. *See also* CANNEL, CRIMINAL CODE ANNOTATED, comment 5 to N.J.S.A. 2C:43-6 on the Graves Act hearing.

### **§ 108.1(a): Graves Act Extended Term with Parole Disqualifier for Certain Repeat Offenders**

N.J.S.A. 2C:43-6(c) provides that the court must impose an extended term as authorized by 2C:43-7(c) if the defendant was convicted of a Graves Act offense, who used or possessed a firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of a firearm as defined in N.J.S.A. 2C:44-3(d) (Second Offender with a Firearm), is at least 18 years old, and has a prior conviction for committing with a firearm any of the following:

- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Aggravated Assault (N.J.S.A. 2C:12-1(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Robbery (N.J.S.A. 2C:15-1);
- Burglary (N.J.S.A. 2C: 18-2);
- Escape (N.J.S.A. 2C:29-5);
- Possession of a firearm for an unlawful purpose (N.J.S.A. 2C:39-4(a)); or
- Any offense in Title 2A (Administration of Civil and Criminal Justice), or under any statute of the United States or another state which is substantially equivalent to the above offenses.

**Parole Ineligibility for Extended Term:** Pursuant to N.J.S.A. 2C:43-7(c), the minimum period of parole ineligibility shall, except as may be provided in N.J.S.A. 2C:43-6(f), be fixed at one-third and one-half of the sentence or 5 years, whichever is greater. Where the sentence is life, the parole ineligibility is 25 years, or 30 years for a violation of N.J.S.A. 2C:35-3.

**Burden of Proof for Extended Term:** In *State v. Franklin*, 184 N.J. 516 (2005), the Court held that the second-offender provision of the Graves Act, which permits the imposition of an extended term based on judicial factfinding by a preponderance of the evidence, violates a defendant’s right to trial by jury and right to due process. Therefore, judges are not authorized to decide whether a defendant possessed or used a gun in second-offender Graves Act cases. “In the future, if the State intends to seek an extended term under the Graves Act, it must obtain an indictment charging possession or use of the gun in the commission of one of the designated crimes and then submit the charge to the jury.” *Id.* at 539-40.

As to plea bargaining on Graves Act cases, *See* Directive # 09-18 “Guidelines for Downgrades/Dismissals under the Graves Act: Strict Enforcement of Mandatory Minimum Custodial Terms for Offenses Involving Firearms” issued by Hon. Glenn A. Grant, Acting Administrative Director of the Courts, on July 2, 2018.

**§ 108.1(b): Exception to Graves Act Mandatory Minimum Terms for First-Time Offenders (N.J.S.A. 2C:43-6.2)**

On motion made by the prosecutor, or on referral of the sentencing court with the approval of the prosecutor, the Assignment Judge (or Presiding Criminal Judge as designee) has the authority to grant an exception and place the defendant on probation or reduce the mandatory minimum term of parole ineligibility to one year for an offense under N.J.S.A. 2C:43-6(c) for a defendant not previously convicted of an offense under that subsection, or an offense under N.J.S.A. 2C:39-10(e) (illegal transfer of a gun to person under 18) for a defendant not previously convicted of an offense under Chapter 39 of Title 2C.

*See State v. Nance*, 228 N.J. 378, 397 (2017), in which the Supreme Court held:

The assignment judge, not the sentencing court, has the authority to determine whether the defendant will be sentenced to a probationary term pursuant to N.J.S.A. 2C:43-2, or a term of incarceration with a one-year period of parole ineligibility. N.J.S.A. 2C:43-6.2. In that determination, the assignment judge or designee may accept the prosecutor's recommendation as to the appropriate sentence, but is not bound by that recommendation. *Ibid.*; *Hess*, 207 N.J. 123, 151 (2011). When the defendant has been convicted of a first-degree or second-degree Graves Act offense, the assignment judge, or the presiding judge as his or her designee, must consider the presumption of incarceration set forth in N.J.S.A. 2C:44-1(d).

Following the assignment judge's or designee's determination, the sentencing court, applying N.J.S.A. 2C:44-1 and other pertinent provisions of the Code, exercises its discretion to weigh the aggravating and mitigating factors and determine the remaining terms of the sentence; it may impose the sentence recommended as part of the plea agreement, but is not required to do so. *See* N.J.S.A. 2C:44-1.

*See* the June 12, 2017 Memorandum to Assignment Judges by Hon. Glenn A. Grant, Acting Administrative Director of the Courts, "Criminal - Motions for Waiver of the Graves Act Mandatory Minimum Term and Sentencing — Clarification based on *State v. Nance*."

**§ 108.2: Sentencing for Possession of Machine Gun or Assault Firearm (N.J.S.A. 2C:43-6(g))**

N.J.S.A. 2C:43-6(g) requires a minimum term of 10 years for a first or second degree crime, 5 years for a third degree crime, or 18 months for a fourth degree crime during which the person is ineligible for parole for the following convictions:

- Possession of a firearm for an unlawful purpose (N.J.S.A. 2C:39-4(a));
- or a crime under the following sections where the defendant used, or was in possession of, a machine gun or assault firearm, while committing or attempting to commit the crime, including the immediate flight therefrom:
  - Murder (N.J.S.A. 2C:11-3);
  - Manslaughter (N.J.S.A. 2C:11-4);

- Aggravated Assault (N.J.S.A. 2C:12-1(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Robbery (N.J.S.A. 2C:15-1);
- Burglary (N.J.S.A. 2C: 18-2);
- Escape (N.J.S.A. 2C:29-5); or
- Manufacture, distribute or dispense a controlled dangerous substance (N.J.S.A. 2C:35-5).

**Hearing Required for an Assault Weapons Sentence:** The prosecutor is required to establish at a hearing by a preponderance of the evidence that the weapon used or possessed was a machine gun or assault firearm. The court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. N.J.S.A. 2C:43-6(h).

See discussion above as to the concerns about the continued constitutionality of the Graves Act hearing in light of *Alleyne v. United States*, 570 U.S. 99 (2013).

**§ 108.2(a): Extended Term with Parole Disqualifier for Certain Repeat Assault Firearms Offenders**

N.J.S.A. 2C:43-6(g) further provides that the court must impose an extended term as authorized by N.J.S.A. 2C:43-7(d) if the defendant is at least 18 years old, is convicted of the enumerated offenses in subsection (g), used or possessed a machine gun or assault firearm during its commission, attempted commission or flight therefrom and has been previously convicted of any offense involving the use or possession of a firearm defined in N.J.S.A. 2C:44-3(d) (Second Offender with a firearm), which are as follows:

- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Aggravated Assault (N.J.S.A. 2C:12-1(b));
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Robbery (N.J.S.A. 2C:15-1);
- Burglary (N.J.S.A. 2C: 18-2);
- Escape (N.J.S.A. 2C:29-5);
- Possession of a firearm for an unlawful purpose (N.J.S.A. 2C:39-4(a)); or
- Any offense in Title 2A (Administration of Civil and Criminal Justice).

If the defendant commits an offense as noted above while possessing a machine gun or assault weapon, the court must impose a term of parole ineligibility as set forth in N.J.S.A. 2C:43-7(d) which requires:

- 15 years for a first or second degree crime;
- 8 years for a third degree crime;

- 5 years for a fourth degree crime; or
- Where the sentence is life imprisonment, the parole ineligibility term is 25 years, or 30 years for a violation of N.J.S.A. 2C:35-3 (leader of a narcotics trafficking network).

*Note:* See discussion above as to the concerns about the continued constitutionality of the hearing under N.J.S.A. 2C:43-6(h) to impose a mandatory sentence under N.J.S.A. 2C:43-6(g), in light of *Alleyne v. United States*, 570 U.S. 99 (2013).

## **§ 109: PAROLE INELIGIBILITY**

There are certain offenses where a period of parole ineligibility is mandated by statute. Pursuant to the No Early Release Act (N.J.S.A. 2C:43-7.2), the court is required to impose a mandatory term of parole ineligibility. Additionally, an optional minimum term of parole ineligibility may be imposed under N.J.S.A. 2C:43-6(b), where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors.

### **§ 109.1: No Early Release Act (NERA) (N.J.S.A. 2C:43-7.2)**

Pursuant to subsection (d), the following first or second degree crimes including attempts or conspiracies to commit the offense require a minimum parole ineligibility term of 85% of the sentence imposed:

- (1) Murder (N.J.S.A. 2C:11-3);
- (2) Aggravated manslaughter or manslaughter (N.J.S.A. 2C:11-4);
- (3) Vehicular homicide (N.J.S.A. 2C:11-5);
- (4) Aggravated assault (N.J.S.A. 2C:12-1(b));
- (5) Disarming a law enforcement officer (N.J.S.A. 2C:12-11);
- (6) Kidnapping (N.J.S.A. 2C:13-1);
- (7) Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- (8) Sexual assault (N.J.S.A. 2C:14-2(b) and (c)(1));
- (9) Robbery (N.J.S.A. 2C:15-1);
- (10) Carjacking (N.J.S.A. 2C:15-2);
- (11) Aggravated arson (N.J.S.A. 2C:17-1(a)(1));
- (12) Burglary (N.J.S.A. 2C:18-2);
- (13) Extortion (N.J.S.A. 2C:20-5(a));
- (14) Booby traps in manufacturing or distribution facilities (N.J.S.A. 2C:35-4.1);
- (15) Strict liability for drug induced deaths (N.J.S.A. 2C:35-9);
- (16) Terrorism (N.J.S.A. 2C:38-2);
- (17) Producing or possessing chemical weapons, biological agents or nuclear or radiological devices (N.J.S.A. 2C:38-3);
- (18) Racketeering, when it is a crime of the first degree (N.J.S.A. 2C:41-2);
- (19) Firearms trafficking (N.J.S.A. 2C:39-9(i)); or
- (20) Causing or permitting a child to engage in a prohibited sexual act, knowing that the act may be reproduced or reconstructed in any manner, or be part of an exhibition or performance (N.J.S.A. 2C:24-4(b)(3)).

The term applies to every conviction of an enumerated offense, “whether the sentence is imposed as an ordinary term (N.J.S.A. 2C:43-6), an extended term (N.J.S.A. 2C:43-7), a term for murder (N.J.S.A. 2C:11-3), or a term pursuant to any other provision of law, and shall be calculated based upon the sentence of incarceration actually imposed.” N.J.S.A. 2C:43-7.2(b).

**Note:** For NERA purposes, a life sentence is calculated at 75 years. N.J.S.A. 2C:43-7.2(b).

NERA is mandatory, and the failure to impose the statutory period of parole ineligibility renders the sentence illegal. *State v. Kearns*, 393 N.J. Super. 107, 113 (App. Div. 2007).

**Parole Supervision:** Additionally, the court must impose the mandatory period of parole supervision:

5 years for a first-degree offense, or  
3 years for a second-degree offense.

**Note:** If the defendant is sentenced to consecutive terms on NERA offenses, the parole supervision terms shall also run consecutively. *State v. Friedman*, 209 N.J. 102, 120 (2012).

In *State v. Njango*, 463 N.J. Super. 1, 10 (App. Div. 2020), the Appellate Division concluded that mandatory periods of parole supervision imposed under NERA cannot be reduced by prior service credits, even where the defendant was imprisoned longer than he should have been due to a failure to properly award such credit. But note, certification was granted by the Supreme Court, 243 N.J. 264 (2020).

**NERA and the JOC:** The Judgment of Conviction (JOC) must reflect the 85% parole disqualifier statement in the Sentencing Statement section. Each applicable count must contain the statement “must serve 85% of the maximum term.” The court must also impose a five-year term of parole supervision pursuant to NERA if the defendant is being sentenced for a crime of the first degree or a three-year term of parole supervision if the defendant is sentenced for a crime of the second degree. Even if the sentence imposed is for one degree lower, the length of the parole supervision term attaches to the degree of the crime – not to the range of the sentence.

See CANNEL, CRIMINAL CODE ANNOTATED, comment on N.J.S.A. 2C:43-7.2 for a discussion on sentencing under the NERA statute.

See also *Guide on the Preparation of Judgments of Conviction and Other Judgment Related Topics* on the *InfoNet* under the Criminal Practice Division/manuals webpage.

### **§ 109.2: Convictions with Graves Act and NERA Offenses**

When imposing a sentence for a NERA offense and a Graves Act offense, the judgment should reflect that the 85% ineligibility term applies only to the NERA offense, and not to a non-NERA offense. See *State v. Cheung*, 328 N.J. Super. 368 (App. Div. 2000), in which the Appellate Division explained that “while the 85% parole disqualifier under NERA more than satisfies the mandatory parole ineligibility term required for a Graves Act offense, the judgment should reflect that the other offense was a Graves Act conviction so that the record is clear in the event defendant commits a second Graves Act offense, in which case a mandatory extended term is required.” *Id.* at 371-72.

### § 109.3: Non-Mandatory Parole Ineligibility Offenses (N.J.S.A. 2C:43-6(b))

An optional minimum term of parole ineligibility may be imposed under N.J.S.A. 2C:43-6(b) for any crime where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors under N.J.S.A. 2C:44-1(a) and (b), or the court finds that aggravating factor 5 of N.J.S.A. 2C:44-1 (involvement in organized criminal activity) applies. In such instances the court may impose a minimum term of parole ineligibility not to exceed one-half of the term set pursuant to N.J.S.A. 2C:43-6(a), or one-half of the maximum term of incarceration for the crime in any statute other than Title 2C; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole. But *see State v. Grate*, 220 N.J. 317 (2015), which prohibits the automatic imposition of a 5-year mandatory minimum term based upon a judge's finding of aggravated factor 5.

The Supreme Court in *State v. Kiriakakis*, 235 N.J. 420 (2018), held that the four-year period of parole ineligibility imposed by the sentencing court pursuant to N.J.S.A. 2C:43-6(b) fell within the range authorized by the jury's guilty verdict for a second degree crime, and therefore did not violate *Alleyne v. United States*, 570 U.S. 99 (2013), or the Sixth Amendment.

The *Kiriakakis* Court further explained that in setting the appropriate sentence in either range, the sentencing court must engage in several steps of discretionary decision making.

First, the court must determine whether any of the aggravating factors or mitigating factors enumerated in N.J.S.A. 2C:44-1(a) and (b) are supported by credible evidence in the record. *See Natale*, 184 N.J. 458, 487 (2005). Second, the court must assign an appropriate weight to any established factor. *See Fuentes*, 217 N.J. 57, 72-73 (2014). Third, the court must balance any aggravating factors against any mitigating factors and decide whether one set of factors outweighs the other. *See id.* 217 N.J. at 72. In the case of an ordinary-term sentence, 'when the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range.' *Natale*, 184 N.J. at 488. In the case of imposing a minimum period of parole ineligibility under N.J.S.A. 2C:43-6(b), the court must be 'clearly convinced that the aggravating factors substantially outweigh the mitigating factors,' and even then the court is not required to impose such a sentence.

[*Id.* at 442-43.]

In *State v. Case*, 220 N.J. 49 (2014), the Supreme Court provided the following guidance on discretionary parole disqualifiers:

The sentencing court, when 'clearly convinced that the aggravating factors substantially outweigh the mitigating factors,' may sentence a defendant to 'a minimum term not to exceed one-half of the term' allowed by the statute. N.J.S.A. 2C:43-6(b). In doing so, however, the court must "specifically place on the record the aggravating factors . . . which justify the imposition of a minimum term.' N.J.S.A. 2C:44-1(f)(1). In *Kruse* [105 N.J. 354, 359 (1987)], we compared the standard for sentencing to a term within the range (whether the court is persuaded 'there is a preponderance of aggravating or mitigating factors') to the standard for

imposing a parole disqualifier (whether the court is ‘clearly convinced that the aggravating factors substantially outweigh the mitigating factors’)... see N.J.S.A. 2C:43-6(b). We emphasized that ‘[t]he different standard reflects the fact that periods of parole ineligibility are the exception and not the rule. They are not to be treated as routine or commonplace.’ *Ibid.* (quoting *State v. Martelli*, 201 N.J. Super. 378, 382-83 (App. Div. 1985)). Again, critical to the sentencing process and appellate review is the need for the sentencing court to explain clearly why an aggravating or mitigating factor presented by the parties was found or rejected and how the factors were balanced to arrive at the sentence. [*Id.* at 65-67.]

**Parole Ineligibility Term When Resentencing:** Upon resentencing, the original period of parole ineligibility cannot be increased, and the new specific term sentence cannot result in a specific term 85% of which is greater than the original period of ineligibility. *State v. Cooper*, 402 N.J. Super. 110, 117 (App. Div. 2008).

### **§ 110: EXTENDED TERMS (N.J.S.A. 2C:43-7 and N.J.S.A. 2C:44-3)**

Unless otherwise mandated by statute, upon application of the prosecutor an extended term of imprisonment may be imposed for certain crimes.

While Title 2C contains presumptive terms for extended term sentences (N.J.S.A. 2C:43-7), in *State v. Young*, 379 N.J. Super. 498 (App. Div. 2005), the Appellate Division, following the decision in *Natale*, eliminated the presumptive term from the process of imposing an extended term. These prior presumptive terms of years are now considered to be the mid-range of the sentence exposure.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme Court invalidated the extended term provisions in New Jersey’s Hate Crime Statute, N.J.S.A. 2C:44-3(e) (repealed 2001, c. 443 § 8) and held “[o]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.”

#### **§ 110.1: Motion and Hearing for Extended Term**

The prosecutor must provide the defendant written notice of the basis for the extended term, and the court must provide the defendant an opportunity to respond at a hearing. N.J.S.A. 2C:44-6(e). A motion for the imposition of an extended term of imprisonment pursuant to N.J.S.A. 2C:44-3 or N.J.S.A. 2C:43-6(f), or a motion for enhanced sentence pursuant to N.J.S.A. 2C:35-8, shall be filed by the prosecutor within 14 days of the entry of the defendant's guilty plea or the return of the verdict. R. 3:21-4(e).

Where the defendant is pleading guilty pursuant to a negotiated disposition, the prosecutor shall make the motion at or prior to the plea. If the negotiated disposition includes the recommendation of an extended term, the prosecutor's oral notice and the recordation of the extended term exposure in the plea form completed by defendant and reviewed on the record shall serve as the State's motion. For good cause shown the court may extend the time for filing the motion. R. 3:21-4(e).

The sentence shall include a determination as to whether the defendant was convicted and sentenced to an extended term of imprisonment as provided in N.J.S.A. 2C:43-7, 2C:44-3 and 2C:44-6(e), N.J.S.A. 2C:43-6(f) or whether the defendant was being sentenced pursuant to N.J.S.A. 2C:35-8, and the commitment or order of sentence which directs the defendant's confinement shall so specify. *R.* 3:21-4(e).

### **§ 110.2: Discretionary Extended Terms (N.J.S.A. 2C:44-3(a))**

The court may impose an extended term for a first, second or third degree crime on application of the prosecutor for a defendant who:

- is a persistent offender (N.J.S.A. 2C:44-3(a)) – 21 years old or over, who has been previously convicted on at least 2 separate occasions of 2 crimes, committed at different times, when at least 18 years of age, if the latest crime or the date of defendant's last release from confinement, whichever is later, is within 10 years of the crime for which the defendant is being sentenced;
- is a professional criminal (N.J.S.A. 2C:44-3(b)) – a person who committed a crime as part of a continuing criminal activity in concert with 2 or more persons, and the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood;
- committed the crime for payment or pecuniary value (N.J.S.A. 2C:44-3(c)); or
- has been convicted of manslaughter, aggravated assault, kidnapping, aggravated sexual assault, aggravated criminal sexual contact, robbery, burglary, resisting arrest and eluding an officer, escape, or drug manufacture, distribution, and in the course of committing or attempting to commit the offense, including the immediate flight therefrom, the defendant used or was in possession of a stolen motor vehicle (N.J.S.A. 2C:44-3(f)).

### **§ 110.3: Persistent Offender (N.J.S.A. 2C:44-3(a))**

**Prior Crime:** In *State v. Clarity*, 454 N.J. Super. 603, 608 (App. Div. 2018), the Appellate Division stated, “A crime occurs on the date or dates the accused acted in a manner prescribed by a criminal statute.” A “conviction happens when an accused is legally determined to have committed a crime or offense.” Additionally, the court noted that “By phrasing the statute as it did, the Legislature must be assumed to have meant what it said: the date of the ‘crime’ and not the date of the ‘conviction’ is the relevant event for the persistent-offender statute.” *Id.* at 608-09.

**Release from Confinement:** Additionally, in *State v. Clarity*, the Appellate Division held that “an individual serving a probationary term cannot be considered to be confined within the meaning of N.J.S.A. 2C:44-3(a).” *Id.* at 611. The court explained that an “individual serving a probationary term is not ‘off the streets’ and, thus, should be entitled to take advantage of the time that passes while on probation prior to the crime for which he or she is later charged. Thus, an individual serving a probationary term cannot be considered to be confined within the meaning of N.J.S.A. 2C:44-3(a).” *Ibid.*



Prior Conviction of a Crime is defined as “An adjudication by a court of competent jurisdiction that the defendant committed a crime constitutes a prior conviction, although sentence or the execution thereof was suspended, provided that the time to appeal has expired and that the defendant was not pardoned on the ground of innocence.” N.J.S.A. 2C:44-4(b).

Prior Conviction in another jurisdiction is defined as “A conviction in another jurisdiction shall constitute a prior conviction of a crime if a sentence of imprisonment in excess of 6 months was authorized under the law of the other jurisdiction.” N.J.S.A. 2C:44-4(c).

Proof of Prior Conviction may be proved “by any evidence, including fingerprint records made in connection with arrest, conviction or imprisonment, that reasonably satisfies the court that the defendant was convicted.” N.J.S.A. 2C:44-4(d).

A sentencing court does not engage in impermissible fact-finding when it assesses a prior record of convictions and determines that a defendant is statutorily eligible for a discretionary extended term as a persistent offender. *State v. Pierce*, 188 N.J. 155 (2006).

In *Pierce*, the Court stated:

[O]nce the court finds that those statutory eligibility requirements are met, the maximum sentence to which defendant may be subject, for purposes of *Apprendi*, is the top of the extended-term range. Stated differently, the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range. By recognizing that the top of the extended-term range is the ‘top’ applicable to a persistent offender, we do not make mandatory a defendant's sentencing within the enhanced range. Rather, we merely acknowledge that the permissible range has expanded so that it reaches from the bottom of the original-term range to the top of the extended-term range. Where, within that range of sentences, the court chooses to sentence a defendant remains in the sound judgment of the court--subject to reasonableness and the existence of credible evidence in the record to support the court's finding of aggravating and mitigating factors and the court's weighing and balancing of those factors found.

[*Id.* at 169.]

**Concession by Defense Counsel:** In *State v. Clarity*, 461 N.J. Super. 320 (App. Div. 2019), the Appellate Division held that sentencing judges are permitted to rely on concessions by defense counsel of the necessary factual predicate that the defendant was eligible for an extended term as a persistent offender.

#### **§ 110.4: Extended Term Ranges (N.J.S.A. 2C:43-7)**

- Murder (N.J.S.A. 2C:11-3) – 35 years to life imprisonment with a 35 year parole disqualifier (N.J.S.A. 2C:43-7(a)(6));
- Aggravated manslaughter (N.J.S.A. 2C:11-4(c)), first degree kidnapping (N.J.S.A. 2C:13-1(c)(1), or aggravated sexual assault (N.J.S.A. 2C:14-2) – 30 years to life imprisonment (N.J.S.A. 2C:43-7(a)(1));

- First degree kidnapping of a child age 16 years or less pursuant to N.J.S.A. 2C:13-1(c)(2) – 30 years to life imprisonment with a 30 years parole disqualifier (N.J.S.A. 2C:43-7(a)(7));
- Other first degree crimes – 20 years to life imprisonment (N.J.S.A. 2C:43-7(a)(2));
- Second degree crime – 10 to 20 years (N.J.S.A. 2C:43-7(a)(3));
- Third degree crime – 5 to 10 years (N.J.S.A. 2C:43-7(a)(4));
- Fourth degree crime pursuant to N.J.S.A. 2C:43-6(c), N.J.S.A. 2C:43-6(g), and N.J.S.A. 2C:44-3(d) - 5 years (N.J.S.A. 2C:43-7(a)(5));
- Any other fourth degree crime – 3-5 years (N.J.S.A. 2C:43-7(a)(5)).

### § 110.5: Mandatory Extended Terms

*Note:* Several of the extended term statutes listed below may have the same constitutional infirmities as the Hate Crimes Statute invalidated in *Apprendi* and the Graves Act extended term invalidated in *State v. Franklin*, 184 N.J. 516 (2005), if there is not a jury finding of the relevant factors triggering the extended term. However, factors supporting an extended term and parole ineligibility term based on persistent offender status may be found by a trial judge as opposed to a jury.

**Second Offender with a Firearm (N.J.S.A. 2C:44-3(d)):** A defendant who is at least 18 years of age and has previously been convicted of the enumerated crimes, and used or possessed a firearm in the course of committing or attempting to commit any of those crimes, including the immediate flight therefrom, is subject to an extended term. *See* discussion on extended terms and the Graves Act § 108 above.

**Sex Offenders (N.J.S.A. 2C:44-3(g)):** Upon application by the prosecutor, if a person is convicted of a crime under N.J.S.A. 2C:14-2, or N.J.S.A. 2C:14-3 involving violence or a threat of violence and the victim is 16 years of age or less.

A defendant may not be sentenced to an extended term pursuant to N.J.S.A. 2C:44-3(g) unless the indictment alleges that the crime involved violence or a threat of violence, and the victim is 16 years of age or less. *State v. Velasquez*, 391 N.J. Super. 291, 316-19 (App. Div. 2007).

**Solicitation, Recruitment to Join a Criminal Street Gang (N.J.S.A. 2C:33-28(f)):** A defendant convicted of soliciting, recruiting, coercing or threatening a person under 18 years old in violation of N.J.S.A. 2C:33-28(c) or (e) is subject to an extended term pursuant to N.J.S.A. 2C:43-7(a).

**Parole Supervision for Life (N.J.S.A. 2C:43-6.4(e)):** A person serving a parole supervision sentence and who commits certain enumerated crimes is subject to an extended term pursuant to N.J.S.A. 2C:43-7.

**Three Strikes Law (N.J.S.A. 2C:43-7.1):** *See* § 111 below.

**Release on Bail (N.J.S.A. 2C:44-5.1(a)):** A person convicted of the following crimes committed while released on bail or their own recognizance for one of the following crimes, and who is convicted of that crime, is subject to an extended term pursuant to N.J.S.A. 2C:43-7:

- Possession of a firearm for an unlawful purpose (N.J.S.A. 2C:39-4(a)); or
- Murder (N.J.S.A. 2C:11-3);
- Manslaughter (N.J.S.A. 2C:11-4);
- Kidnapping (N.J.S.A. 2C:13-1);
- Aggravated sexual assault (N.J.S.A. 2C:14-2(a));
- Aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a));
- Robbery (N.J.S.A. 2C:15-1);
- Burglary (N.J.S.A. 2C: 18-2) if the crime is of the second degree or the structure was adapted for overnight accommodations of persons; or
- First, second, or third degree aggravated assault (N.J.S.A. 2C:12-1(b)).

**Repeat Drug Offender (N.J.S.A. 2C:43-6(f)):** Upon application of the prosecutor for conviction of certain drug offenses and where the person was previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute a CDS or controlled substance analog is subject to an extended term pursuant to N.J.S.A. 2C:43-7(c). In *State v. Thomas*, 188 N.J. 137, 152-53 (2006), the Supreme Court held that a sentencing court’s finding of fact of a defendant’s prior convictions for imposition of an extended term pursuant to N.J.S.A. 2C:43-6(f) does not violate the Sixth Amendment. *See also* § 303 Repeat Drug Offenders and § 304 Waiver of Mandatory Minimum and Extended Terms.

#### **§ 110.6: Discretionary Minimum Parole Disqualifier for Extended Terms**

As part of an extended term the court may impose a minimum term of parole ineligibility not to exceed one-half of the term set pursuant to N.J.S.A. 2C:43-7(a) or 25 years in the case of life imprisonment, provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole. N.J.S.A. 2C:43-7(b).

#### **§ 110.7: Multiple Extended Terms (N.J.S.A. 2C:44-5)**

A court is prohibited from imposing more than one sentence for an extended term under N.J.S.A. 2C:44-5(a)(2). However, the court must impose an extended term if it is mandated by the statute, even if it results in multiple extended terms. The court may not impose a discretionary extended term in addition to a mandatory extended term in the same sentence. When a defendant is eligible for both types of extended terms, the State may elect which type of extended term to pursue. *See State v. Robinson*, 217 N.J. 594, 610-12 (2014).

### **§ 111: THREE STRIKES LAW (N.J.S.A. 2C:43-7.1)**

#### **§ 111.1: Life Imprisonment without Parole (N.J.S.A. 2C:43-7.1(a))**

A defendant who is convicted of murder (N.J.S.A. 2C:11-3), aggravated manslaughter (N.J.S.A. 2C:11-4(a)), first-degree kidnapping (N.J.S.A. 2C:13-1), aggravated sexual assault (N.J.S.A. 2C:14-2(a)(3) to (6)), robbery (N.J.S.A. 2C:15-1), or carjacking (N.J.S.A. 2C:15-2), or their substantial equivalent under any similar statute of the United States, this State or another state, and who has been convicted of two or more crimes that were committed on prior and separate occasions, regardless of the dates of the convictions, shall be sentenced to a term of life imprisonment without parole.

Predicate offenses to impose a sentence of life imprisonment without parole under N.J.S.A. 2C:43-7.1(a) must be first-degree crimes. *See State v. Jordan*, 378 N.J. Super. 254 (App. Div. 2005), rejecting sentence under the Three Strikes Law where one of the predicate crimes was second degree robbery.

Term of life means the natural life of defendant except that a defendant who is 70 years old may be released if he or she has served at least 35 years in prison if the full Parole Board determines that the defendant is not a danger to the safety of any other person or the community. *See* N.J.S.A. 2C:43-7.1(e).

### **§ 111.2: Extended Term for Repeat Violent Offenders (N.J.S.A. 2C:43-7.1(b))**

A defendant is required to be sentenced to an extended term pursuant to N.J.S.A. 2C:43-7 if:

- (1) Convicted of second degree manslaughter (N.J.S.A. 2C:11-4), second or third degree assault (N.J.S.A. 2C:12-1(b)), second degree kidnapping (N.J.S.A. 2C:13-1), aggravated criminal sexual contact (N.J.S.A. 2C:14-3) under any of the circumstances in N.J.S.A. 2C:14-2(a)(3) to (6), second degree robbery (N.J.S.A. 2C:15-1), second degree burglary (N.J.S.A. 2C:18-2), or second degree possession of weapons for unlawful purposes (N.J.S.A. 2C:39-4), and the person has been convicted of any of the foregoing crimes or any of the crimes enumerated in N.J.S.A. 2C:43-7.1(a) (Life Imprisonment Without Parole), or under any similar statute of the United States, this State, or any other state for a crime that is substantially equivalent to a crime enumerated in N.J.S.A. 2C:43-7.1(a) committed on two or more prior and separate occasions regardless of the dates of the convictions; or
- (2) Convicted of a crime enumerated in N.J.S.A. 2C:43-7.1(a), does not have two or more prior convictions that require sentencing under N.J.S.A. 2C:43-7.1(a), and has two or more prior convictions that would require sentencing under N.J.S.A. 2C:43-7.1(b)(1) if the person had been convicted of a crime enumerated in N.J.S.A. 2C:43-7.1(b)(1).

### **§ 111.3: Prior Crimes**

The Three Strikes Law applies if the two prior crimes are committed on separate occasions and the crime for which the defendant is being sentenced was committed either within 10 years of the defendant's last release from confinement for commission of any crime or within 10 years of the date of the commission of the most recent of the crimes for which the defendant has a prior conviction. *See* N.J.S.A. 2C:43-7.1(c).

*See State v. Parks*, 192 N.J. 483 (2007), discussing application of the Three Strikes Law and the 2003 amendment, which requires two or more of the designated crimes to be committed on prior and separate occasions, regardless of the dates of the convictions.

### **§ 111.4: Notice and Hearing**

The State must provide defendant with notice as to the grounds proposed. A hearing must be held with the defendant having the right to controvert the evidence against him and to offer evidence. The court must determine eligibility for an extended term by a preponderance of the

evidence. *See* N.J.S.A. 2C:43-7.1(d); *State v. Oliver*, 162 N.J. 580, 590-92 (2000).

A notice to impose sentence pursuant to N.J.S.A. 2C:43-7.1 shall be filed with the court and served upon the defendant by the prosecutor within 14 days of the entry of the defendant's guilty plea or return of the verdict. Where the defendant is pleading guilty pursuant to a negotiated disposition, the prosecutor shall file and serve the notice at or prior to the plea. If the negotiated disposition includes the recommendation of an extended term, the prosecutor's oral notice and the recordation of the extended term exposure in the plea form completed by defendant and reviewed on the record shall serve as the State's notice. For good cause shown the court may extend the time for filing the notice. *R.* 3:21-4(f).

## **§ 112: MULTIPLE CONVICTIONS - CONCURRENT AND CONSECUTIVE TERMS (N.J.S.A. 2C:44-5)**

N.J.S.A. 2C:44-5(a) provides that when multiple sentences of imprisonment are imposed for more than one offense, including an offense for which a previous suspended sentence or sentence of probation has been revoked, such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence, except that:

1. The aggregate of the consecutive terms to a county institution shall not exceed 18 months; and
2. Not more than one sentence for an extended term shall be imposed.

There shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses. N.J.S.A. 2C:44-5(a).

### **§ 112.1: Calculation of Concurrent and Consecutive Terms of Imprisonment**

N.J.S.A. 2C:44-5(e)(1) instructs that when terms run concurrently, "the shorter terms merge in, and are satisfied by discharge of the longest term." When the terms run consecutively, they "are added to arrive at an aggregate term to be served equal to the sum of all terms."

### **§ 112.2: Guidelines in *State v. Yarbough***

In *State v. Yarbough*, 100 N.J. 627, 643-44 (1985), the Supreme Court set forth the following "general sentencing guidelines" for use when a court is determining if a consecutive or concurrent sentence should be imposed when sentence is pronounced on one occasion on an offender who has engaged in a pattern of behavior constituting a series of separate offenses or committed multiple offenses in separate, unrelated episodes:

- (1) There can be no free crimes in a system for which punishment shall fit the crime;
- (2) The reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) Some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
  - (a) the crimes and their objective were predominantly independent of each other;

- (b) the crimes involved separate acts of violence or threats of violence;
  - (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
  - (d) any of the crimes involved multiple victims; or
  - (e) the convictions for which the sentences are to be imposed are numerous.
- (4) There should be no double counting of aggravating factors; and
  - (5) Successive terms for the same offense should not ordinarily be equal to punishment for the first offense.

In *State v. Carey*, 168 N.J. 413, 423 (2001), the Supreme Court explained the above guidelines:

The first guideline —‘no free crimes’-- tilts in the direction of consecutive sentences because the Code focuses on the crime, not the criminal. *Yarbough*, 100 N.J. 627, 630 (1985). Obviously, the "no free crimes" guideline is not easily implemented. *State v. Rogers*, 124 N.J. 113, 119 (1991). The *Yarbough* guideline that provides the ‘clearest guidance’ to sentencing courts is the third one, which sets forth five factors that focus on the facts relating to the crime. *Id.* at 121 (instructing trial court to focus on ‘the five facts relating to the crimes referred to in *Yarbough* guideline 3). In *State v. Baylass*, 114 N.J. 169 (1989), we summarized those five factors as follows: ‘[I]t suffices to note that they generally concentrate on such considerations as the nature and number of offenses for which the defendant is being sentenced, whether the offenses occurred at different times or places, and whether they involve numerous or separate victims.’

Additionally, the *Carey* Court advised:

The *Yarbough* guidelines are just that -- guidelines. They were intended to promote uniformity in sentencing while retaining a fair degree of discretion in the sentencing courts. As such, the five ‘facts relating to the crimes’ contained in *Yarbough's* third guideline should be applied qualitatively, not quantitatively.’ *Cf. State v. Kruse*, 105 N.J. 354, 363 (1987) (observing that ‘[m]erely enumerating [aggravating and mitigating] factors does not provide any insight into the sentencing decision, which follows not from a quantitative, but from a qualitative, analysis’). It follows that a sentencing court may impose consecutive sentences even though a majority of the *Yarbough* factors support concurrent sentences... When deciding whether to impose concurrent or consecutive sentences, the court should determine whether the *Yarbough* factor under consideration ‘renders the collective group of offenses distinctively worse than the group of offenses would be were that circumstance not present... Crimes involving multiple deaths or victims who have sustained serious bodily injuries represent especially suitable circumstances for the imposition of consecutive sentences. [*Id.* at 427-28.]

*See also State v. Molina*, 168 N.J. 436 (2001), in which the Supreme Court upheld the trial court’s decision to impose consecutive sentences for vehicular homicide with multiple victims. “As we observed in *Carey*, the multiple-victims factor under the *Yarbough* sentencing guidelines is entitled to great weight and should ordinarily result in the imposition of at least two consecutive sentences. *Id.* at 442.

In *State v. Liepe*, 239 N.J. 359 (2019), the Court upheld the trial court’s decision to impose consecutive sentences when it found the injuries inflicted on multiple victims warranted consecutive sentences consistent with *Yarbough* and *Carey*, and reversed the Appellate Division decision (453 N.J. Super. 126 (App. Div. 2018)). The Court explained that it “has never imposed on a trial court the obligation to demonstrate that a sentence comports with sentences imposed by other courts in similar cases. See N.J.S.A. 2C:44-5,” and citing to *Yarbough*, 100 N.J. 643-44. The Court further stated that “The *Yarbough* Guidelines promote proportionality not by a comparative analysis of the sentencing practices of different courts, but by focusing the trial court on the ‘facts relating to’ the defendant’s crimes.” (Citing to *Carey*, 168 N.J. at 423 and *Yarbough*, 100 N.J. at 643-44.) *Id.* at 379.

**§ 112.3: Imposing Sentences of Imprisonment at Different Times  
(N.J.S.A. 2C:44-5(b))**

When a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for an offense committed prior to the former sentence, other than an offense committed while in custody:

- (1) The multiple sentences imposed shall so far as possible conform to N.J.S.A. 2C:44-5(a); and
- (2) Whether the court determines that the terms shall run concurrently or consecutively, the defendant shall be credited with time served in imprisonment on the prior sentence in determining the permissible aggregate length of the term or terms remaining to be served; and
- (3) When a new sentence is imposed on a prisoner who is on parole, the balance of the parole term on the former sentence shall not be deemed to run during the period of the new imprisonment unless the court determines otherwise at the time of sentencing.

**§ 112.4: Offenses Committed While on Parole (N.J.S.A. 2C:44-5(c))**

When a defendant is sentenced to imprisonment for an offense committed while on parole in this State, such term of imprisonment and any period of reimprisonment that the parole board may require the defendant to serve upon the revocation of his parole shall run consecutively unless the court orders these sentences to run concurrently.

**§ 112.5: Offenses Committed While Released Pending Disposition of a  
Previous Offense (N.J.S.A. 2C:44-5(h))**

When a defendant is sentenced to imprisonment for an offense committed while released, with or without bail, pending disposition of a previous offense, the term of imprisonment shall run consecutively to any sentence of imprisonment imposed for the previous offense, unless the court, in consideration of the character and conditions of the defendant, finds that imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others.

## § 112.6: Additional Considerations

In *State v. Miller*, 205 N.J. 109, 129 (2011), the Supreme Court explained “When a sentencing court properly evaluates the *Yarbough* factors in light of the record, the court's decision will not normally be disturbed on appeal... However, if the court does not explain why consecutive sentences are warranted, a remand is ordinarily needed for the judge to place reasons on the record.”

In *State v. Cuff*, 239 N.J. 321 (2019), the Court remanded for resentencing to consider whether certain offenses committed within the same criminal episode warranted concurrent rather than consecutive sentence, as well as whether the decision to make the sentences consecutive rather than concurrent made the aggregate sentence imposed on defendant an abuse of discretion. The Court advised that “In resentencing the defendant on remand, the trial court should consider the fairness of the aggregate sentence imposed” and cited to *State v. Abdullah*, 184 N.J. 497, 515 (2005)(reminding our courts that when imposing either consecutive or concurrent sentences, “[t]he focus should be on the fairness of the overall sentence, and that they should articulate the reasons for their decisions with specific reference to the *Yarbough* factors”). *Id.* at 352.

As to a federal sentence, the Appellate Division advised in *State v. Mercadante*, 299 N.J. Super. 522, 532 (App. Div. 1997), that:

[A] sentencing court has discretion to run multiple sentences consecutive or concurrent. N.J.S.A. 2C:44-5(d). However, this grant of authority does not permit a sentencing judge to run a sentence concurrent to a prior expired sentence. While a New Jersey sentence can be run concurrent to a federal sentence, here there was no longer any federal sentence to run concurrent with because it had fully expired prior to defendant's initial sentencing on the New Jersey charge. Further, there was no indication that the federal court intended that its sentence run concurrently with the New Jersey sentence... Defendant's federal drug conviction occurred four years before the New Jersey offense and in the interim there was a period of federal confinement and parole. There was no lawful basis to run the sentences concurrent with each other.

## § 113: MANDATORY CONSECUTIVE TERMS: STATUTORY PROVISIONS

The following are some offenses requiring mandatory consecutive terms. Please refer to the relevant statute for the most up-to-date provisions.

### § 113.1: Assault on a Corrections Employee (N.J.S.A. 2C:44-5(i))

A sentence of imprisonment imposed on an inmate of a State or county correctional facility for an assault on a corrections employee of a correctional facility, juvenile facility, county sheriff's department, or law enforcement officer shall run consecutive to any term of imprisonment currently being served and to any other term imposed for any other offense committed at the time of the assault.



**§ 113.2: Knowingly Leaving the Scene of Motor Vehicle Accident Resulting in Death (N.J.S.A. 2C:11-5.1)**

When the court imposes multiple sentences of imprisonment for more than one offense, those sentences shall run consecutively.

**§ 113.3: Leaving the Scene of a Boating Accident (N.J.S.A. 2C:11-5.2)**

N.J.S.A. 2C:11-5.2(d) provides that when the court imposes multiple sentences of imprisonment for more than one offense, those sentences shall run consecutively.

**§ 113.4: Knowingly Leaving the Scene of Motor Vehicle Accident Resulting in Serious Bodily Injury (N.J.S.A. 2C:12-1.1)**

Whenever in the case of multiple convictions the court imposes multiple sentences of imprisonment for more than one offense, those sentences shall run consecutively.

**§ 113.5: Endangering an Injured Victim (N.J.S.A. 2C:12-1.2)**

A sentence imposed shall be served consecutively to that imposed for any conviction of the crime that rendered the person physically helpless or mentally incapacitated.

**§ 113.6: Throwing Bodily Fluid at Certain Law Enforcement Officers (N.J.S.A. 2C:12-13)**

A term of imprisonment for this offense shall run consecutive to any term of imprisonment currently being served and to any other term imposed for another offense committed at the time of the assault.

**§ 113.7: Kidnapping Resulting in Death (N.J.S.A. 2C:13-1(c)(2))**

If the defendant is convicted of criminal homicide of a victim of a kidnapping under Chapter 11, any sentence imposed for kidnapping under subsection (c)(2) shall run consecutive to any sentence imposed for the homicide.

**§ 113.8: Financial Facilitation of Criminal Activity (N.J.S.A. 2C:21-25)**

A sentence imposed for an offense defined in N.J.S.A. 2C:21-25 shall run consecutive to that imposed for any offense constituting criminal activity involved or from which the property was derived. N.J.S.A. 2C:21-27(c).

**§ 113.9: Tampering with Witnesses and Informants; Retaliation Against Them (N.J.S.A. 2C:28-5)**

A sentence imposed in violation of N.J.S.A. 2C:28-5 shall run consecutively to that imposed for the conviction that was the subject of the official proceeding or investigation.

**§ 113.10: Solicitation, Recruitment to Join a Criminal Street Gang  
(N.J.S.A. 2C:33-28)**

A sentence imposed for a violation of N.J.S.A. 2C:33-28(a) where the defendant solicited or recruits another to join a criminal street gang while under official detention shall be served consecutively to the period or periods of detention he or she was serving at the time of the violation. N.J.S.A. 2C:33-28(e). A sentence imposed for a violation of N.J.S.A. 2C:33-28(a) on school property shall be served consecutively to a conviction for any criminal offense committed while involved in criminal street gang related activity. N.J.S.A. 2C:33-28(g).

**§ 113.11: Gang Criminality (N.J.S.A. 2C:33-29(b))**

A sentence imposed must be served consecutively to the sentence imposed upon conviction of any of the following underlying offenses: any crime specified in Chapters 11 through 18, 20, 33, 35 or 37 of Title 2C; prostitution (N.J.S.A. 2C:34-1); possession of prohibited weapons and devices (N.J.S.A. 2C:39-3); possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4); possession of a firearm while committing certain offenses (N.J.S.A. 2C:39-4.1); unlawful possession of a weapon (N.J.S.A. 2C:39-5); or manufacturing weapons (N.J.S.A. 2C:39-9).

**§ 113.12: Promoting Organized Street Crime (N.J.S.A. 2C:33-30(b))**

A sentence imposed must be served consecutively to the sentence imposed upon conviction of any of the following underlying offenses: any crime specified in Chapters 11 through 18, 20, 33, 35, or 37 of Title 2C, prostitution (N.J.S.A. 2C:34-1); possession of prohibited weapons and devices (N.J.S.A. 2C:39-3); possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4); possession of a firearm while committing certain offenses (N.J.S.A. 2C:39-4.1); unlawful possession of a weapon (N.J.S.A. 2C:39-5); or manufacturing weapons (N.J.S.A. 2C:39-9).

**§ 113.13: Booby Traps in Manufacturing or Distribution Facilities  
(N.J.S.A. 2C:35-4.1)**

A sentence imposed for a violation of N.J.S.A. 2C:35-4.1 shall run consecutive to that imposed for any other conviction arising under Chapter 35 of Title 2C or for conspiracy or attempt to violate any section under Chapter 35 of Title 2C unless the court, in consideration of the character and circumstances of the defendant, finds that the imposition of consecutive sentences would be a serious injustice which overrides the need to deter others.

**§ 113.14: Possession of a Weapon in Furtherance of Drug or Bias Crime  
(N.J.S.A. 2C:39-4.1)**

A sentence imposed for a violation of N.J.S.A. 2C:39-4.1 shall run consecutively to the sentence imposed for any of the following offenses, including a conviction for conspiracy or an attempt to commit:

- Leader of a narcotics trafficking network (N.J.S.A. 2C:35-3);
- Maintaining or operating a drug production facility (N.J.S.A. 2C:35-4);
- Manufacturing or distributing drugs (N.J.S.A. 2C:35-5);

- Manufacturing and dispensing Gamma Hydroxybutyrate (N.J.S.A. 2C:35-5.2);
- Manufacturing and dispensing Flunitrazepam (N.J.S.A. 2C:35-5.3);
- Employing a juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6);
- Possession of drugs near or on school property (N.J.S.A. 2C:35-7);
- Distribution or possession of drugs within 500 feet of certain public property (N.J.S.A. 2C:35-7.1);
- Possession, distribution, or manufacturing imitation drugs (N.J.S.A. 2C:35-11); or
- Bias intimidation (N.J.S.A. 2C:16-1).

### **§ 114: DNA SAMPLE (N.J.S.A. 53:1-20.20)**

This statute was amended on September 22, 2003, to expand the requirements for a DNA sample to all persons convicted of a crime or found not guilty by reason of insanity pursuant to N.J.S.A. 53:1-20.20(g).

Prior to the amendment, certain sex crimes as listed in subsection (a) required a DNA sample if the conviction was entered on or after January 1, 1995. An acquittal by reason of insanity for those sex crimes required a DNA sample if the acquittal occurred on or after January 1, 1998. Additional offenses were added in subsection (d) if the conviction or acquittal by reason of insanity was entered on or after January 1, 2000. Juveniles whose adjudication would have constituted a crime if committed by an adult were also required to submit a DNA sample.

This statute was further expanded, effective July 1, 2017, to require all persons to submit a DNA sample if convicted or found not guilty by reason of insanity, including juveniles if the act, which if committed by an adult would constitute a specified disorderly persons offense. *See* subsection (h). The disorderly persons offenses are assault constituting domestic violence as defined under N.J.S.A. 2C:25-19; prostitution pursuant to N.J.S.A. 2C:34-1; any disorderly persons offense relating to CDS for which a person is required to be fingerprinted pursuant to N.J.S.A. 53:1-18.1, except for possession of 50 grams or less of marijuana, or 5 grams or less of hashish pursuant to N.J.S.A. 2C:35-10; or any other disorderly persons offense for which a person is required to be fingerprinted pursuant to N.J.S.A. 53:1-15. This requirement for a DNA sample does not include shoplifting pursuant to N.J.S.A. 2C:20-11.

*See* the August 28, 2017 Memorandum to Assignment Judges by Hon. Glenn A. Grant, Acting Administrative Director of the Courts, “Requirement of DNA Sample from Certain Disorderly Persons Offenders – Implementation of DNA Legislation (*L. 2015, c. 263*)” setting forth the protocols for collecting DNA samples for the specified disorderly persons offenses.

**Constitutionality:** In *State v. O’Hagen*, 189 N.J. 140 (2007), the Supreme Court held that the DNA Act is constitutional and does not constitute an unreasonable search and seizure or violate the equal protection clause of the New Jersey or federal constitutions.

In *A.A. v. Attorney General*, 189 N.J. 128, 140 (2007), the Supreme Court stated that “DNA test results are much like fingerprints and photographs in that the results reveal identifying information that can be stored for further use. There is no constitutional bar to using a photograph or a fingerprint in helping to solve a crime, regardless of when the crime was committed, and we find insufficient reason to treat DNA test results in a different manner... We

conclude that DNA test results lawfully obtained pursuant to the Act may be used to solve crimes committed prior to the taking of the DNA test.”

*Note:* See *State v. Camey*, 239 N.J. 282 (2019), in which the Supreme Court held that if a prior DNA sample has been suppressed, the State may apply for a new DNA buccal swab under R. 3:5A. The State must demonstrate probable cause for the new search. That showing may include evidence that existed before the initial invalid search, but the showing cannot be tainted by the results of the prior search. In addition, the State must show by clear and convincing evidence that the initial impermissible search was not the result of flagrant police misconduct. *Id.* at 290.

## § 200:OFFENSES WITH SPECIAL TERMS OF IMPRISONMENT

Special terms of imprisonment can be imposed for certain offenses that are outside the ordinary terms of imprisonment under N.J.S.A. 2C:43-6(a). For sentencing for drug offenses see section § 300 and for sexual offenses see § 400 in this Primer. For a discussion on the No Early Release Act (NERA) see § 109, or for extended terms see § 110. For the most-up-to-date sentencing information please review the relevant statute in Title 2C.

### § 201: MURDER (N.J.S.A. 2C:11-3)

Except as provided in N.J.S.A. 2C:11-3(b)(2), (3) and (4), a person convicted of murder shall be sentenced to a term of 30 years imprisonment without eligibility for parole or a specific term of years between 30 years to life imprisonment, with a 30 year period of parole ineligibility. N.J.S.A. 2C:11-3(b)(1).

Pursuant to N.J.S.A. 2C:11-3(b)(5), a juvenile who is tried as an adult and convicted of murder shall be sentenced as noted above under N.J.S.A. 2C:11-3(b)(1). *Note: L. 2017, c. 150, effective July 21, 2017, amended subsection (b)(5) to eliminate mandatory life imprisonment for juveniles in accordance with Miller v. Alabama, 567 U.S. 460 (2012).*

In sentencing juveniles to life in prison without the possibility of parole, the Supreme Court in *State v. Zuber*, 227 N.J. 422, 445-46 (2017), held that the United States Supreme Court in *Miller v. Alabama*, 567 U.S. at 480, did not "foreclose life without parole for juveniles convicted of a homicide offense... But the Court required sentencing judges to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

The *Zuber* Court further stated:

The focus at a juvenile's sentencing hearing belongs on the real-time consequences of the aggregate sentence. To that end, judges must evaluate the *Miller* factors, when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense. They must do the same when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times—when judges decide whether to run counts consecutively, and when they determine the length of the aggregate sentence. [*Id.* at 447.]

[T]he court should consider factors such as defendant's 'immaturity, impetuosity, and failure to appreciate risks and consequences; family and home environment; family and peer pressures; inability to deal with police officers or prosecutors or his own attorney; and the possibility of rehabilitation.' *Miller*, 567 U.S. at 478. The sentencing judge should also 'view defendant as he stands before the court' at resentencing and consider any rehabilitative efforts since his original sentence. *State v. Randolph*, 210 N.J. 330, 354 (2012). [*Zuber* at 453.]

**§ 201.1: Mandatory Sentence of Life Imprisonment without Parole (N.J.S.A. 2C:11-3(b)(2), (3), (4))**

A person convicted of murder under the following circumstances shall receive a sentence of life imprisonment without parole eligibility:

- Law Enforcement Victim (N.J.S.A. 2C:11-3(b)(2)) - the victim was a law enforcement officer murdered while performing official duties or because of his or her law enforcement status.
- Sexual Offense Against Victim Under 18 (N.J.S.A. 2C:11-3(b)(3)) - the victim is under 18 years old, and the murder was committed during a sexual assault, N.J.S.A. 2C:14-2, or criminal sexual contact, N.J.S.A. 2C:14-3. *Note:* Prior to the July 21, 2017 amendment, the victim had to be under 14 years old.
- Certain Murders and an Aggravating Factor Jury Finding (N.J.S.A. 2C:11-3(b)(4)) - The defendant purposely or knowingly caused the death, or serious bodily injury resulting in death, and either:
  - committed the homicidal act by his own conduct;
  - as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value;
  - as a leader of a narcotics trafficking network and in furtherance of a conspiracy enumerated in N.J.S.A. 2C:35-3, commanded or by threat or promise solicited the commission of the offense; or
  - if the murder occurred during the commission of the crime of terrorism (N.J.S.A. 2C:38-2),

and the jury finds beyond a reasonable doubt that any of the twelve aggravating factors enumerated in N.J.S.A. 2C:11-3(b)(4) exist.

**§ 201.2: No Early Release Act (NERA) (N.J.S.A. 2C:43-7.2)**

If the murder occurred on or after June 29, 2001, the No Early Release Act applies, and in addition to the sentence imposed for the murder conviction as described above, the judge must impose a period of parole ineligibility equal to 85% of the sentence imposed and the 5-year parole supervision term for first degree crimes. A sentence of life imprisonment is calculated at 75 years pursuant to N.J.S.A. 2C:43-7.2(b). *Note:* 85% of 75 years is 63.75 for purposes of calculating the minimum term of parole ineligibility.

The parole ineligibility provisions of NERA apply to the entire term imposed for murder, not just the part of the sentence in excess of the mandatory 30 year parole disqualifier under N.J.S.A. 2C:11-3(b). *See State v. Rambo*, 401 N.J. Super. 506, 522 (App. Div. 2008).

### **§ 201.3: Extended Term for Murder (N.J.S.A. 2C:43-7(a)(6))**

In the case of murder, a defendant who qualifies for an extended term of imprisonment shall be sentenced to a specific term of years which shall be fixed between 35 years to life imprisonment with a 35 year period of parole ineligibility.

**No Early Release Act for Extended Term (N.J.S.A. 2C:43-7.2):** If the murder occurred on or after June 29, 2001, the No Early Release Act applies to extended terms and the period of parole ineligibility should be 35 years or 85% of the sentence imposed, whichever is greater, along with the five-year parole supervision term.

### **§ 201.4: Attempt or Conspiracy to Commit Murder of 5 or More Persons (N.J.S.A. 2C:5-4(a))**

A conviction for an attempt or conspiracy to commit murder of 5 or more persons requires a sentence of 30 years with 30 years parole ineligibility, or to a specific term of years between 30 years and life imprisonment with not less than 30 years of parole ineligibility.

### **§ 202: FIRST DEGREE AGGRAVATED MANSLAUGHTER (N.J.S.A. 2C:11-4(a)(1))**

A person convicted of aggravated manslaughter by recklessly causing death under circumstances manifesting extreme indifference to human life may be sentenced to between 10 to 30 years imprisonment. N.J.S.A. 2C:11-4(c).

**No Early Release Act (N.J.S.A. 2C:43-7.2):** If the offense occurred on or after June 29, 2001, the No Early Release Act applies and the defendant shall receive a period of parole ineligibility equal to 85% of the sentence imposed and the five-year parole supervision term.

**Extended Term for Aggravated Manslaughter:** A specific term of years between 30 years and life imprisonment pursuant to N.J.S.A. 2C:43-7(a)(1).

### **§ 203: DEATH BY AUTO (RECKLESS VEHICULAR HOMICIDE) (N.J.S.A. 2C:11-5)**

A person convicted of second degree reckless vehicular homicide by operating an auto or vessel while under influence of any liquor or certain drugs or with a certain blood alcohol level or driving while his license was revoked or suspended under N.J.S.A. 39:4-50, or a violation of N.J.S.A. 39:4-50.4(a) (revocation for refusal to submit to breath test), or a violation of N.J.S.A. 39:4-96 (reckless driving), requires a parole ineligibility term between one-third and one-half of the sentence imposed, or three years, whichever is greater. N.J.S.A. 2C:11-5(b)(1).

N.J.S.A. 2C:11-5(b)(2) provides that the court shall not impose a mandatory sentence pursuant to N.J.S.A. 2C:11-5(b)(1) unless the grounds therefor have been established at a hearing by a preponderance of the evidence.

But see *State v. Locane*, 454 N.J. Super. 98, 111-12 (App. Div. 2018), in which the Appellate Division referred to the United States Supreme Court decision in *Alleyne v. United States*, 570 U.S. 99, 115-16 (2013), which “stands for the proposition that a mandatory minimum sentence, such as the three-year parole bar found in our vehicular homicide statute, violates the Sixth Amendment right to a jury trial when a fact upon which it is predicated, such as intoxication, is not submitted to the jury for their determination...In other words, unless a jury finds a defendant was intoxicated when the homicide occurred, no sentence enhancement can be imposed.”

**No Early Release Act (N.J.S.A. 2C:43-7.2):** The No Early Release Act applies and the defendant shall receive a period of parole ineligibility equal to 85% of the sentence imposed and the parole supervision term of five years for a first degree crime, or three years for a second degree crime.

### **§ 204: ASSAULT - CAUSING BODILY INJURY WHILE ELUDING (N.J.S.A. 2C:12-1(b)(6))**

A person convicted under N.J.S.A. 2C:12-1(b)(6) of causing bodily injury while eluding shall receive a minimum term of imprisonment fixed at or between one-third to one-half of the sentence imposed pursuant to N.J.S.A. 2C:43-6(i).

### **§ 205: KIDNAPPING (N.J.S.A. 2C:13-1)**

Except as required under subsection (c)(2), a sentence for first degree kidnapping can be between 15 and 30 years imprisonment. However, kidnapping can be a second degree crime if the defendant releases the victim unharmed and in a safe place prior to apprehension. See N.J.S.A. 2C:13-1(c)(1).

Pursuant to subsection (c)(2), a term of imprisonment of 25 years without parole eligibility, or a term between 25 years and life imprisonment with a 25-year term of parole ineligibility, must be imposed where the victim is less than 16 years old and the defendant committed:

- an aggravated sexual assault, sexual assault, or aggravated criminal sexual contact against the victim;
- a crime under the endangering welfare of children statute (N.J.S.A. 2C:24-4(b)) committed against the victim; or
- sold or delivered the victim to another for pecuniary gain and the circumstances did not lead to the victim’s return to a parent or guardian, or other person responsible for the general supervision of the victim.

If the defendant is convicted of criminal homicide of the kidnapping victim under Chapter 11 of Title 2C, the sentence imposed shall be served consecutively to the sentence imposed under Chapter 11.

The 25-year period of parole ineligibility contained in N.J.S.A. 2C:13-1(c)(2) for certain kidnapping offenses is not amenable to a sentence downgrade pursuant to N.J.S.A. 2C:44-1(f)(2). *State v. Lopez*, 395 N.J. Super. 98, 108-09 (App. Div. 2007).



**No Early Release Act (N.J.S.A. 2C:43-7.2):** The No Early Release Act applies and the defendant shall receive a minimum parole ineligibility term of 85% of the sentence imposed and the parole supervision term of five-years for a first degree crime, or three-years for a second degree crime. For a conviction under N.J.S.A. 2C:13-1(c)(2) a minimum of 25 years parole ineligibility must be imposed.

**Extended Term Ranges:** Sentencing for first degree kidnapping under N.J.S.A. 2C:13-1(c)(1) requires a specific term between 30 years to life imprisonment pursuant to N.J.S.A. 2C:43-7(a)(1). For kidnapping under N.J.S.A. 2C:13-1(c)(2), the extended term shall be between 30 years to life imprisonment with a 30-year parole ineligibility term pursuant to N.J.S.A. 2C:43-7(a)(7).

## **§ 206: LURING/ENTICING AN ADULT (N.J.S.A. 2C:13-7)**

### **§ 206.1: Second or Subsequent Luring/Enticing an Adult (N.J.S.A. 2C:13-7(d))**

A person convicted of a second or subsequent luring/enticing an adult offense shall receive a term of imprisonment with a period of parole ineligibility of one-third to one-half of the sentence imposed or 1 year, whichever is greater, unless the sentence is for an extended term. If the sentence is for an extended term pursuant to N.J.S.A. 2C:43-7, the period of parole ineligibility shall be one-third to one-half of the sentence imposed, or 5 years, whichever is greater. The court may not suspend or make any other non-custodial disposition.

### **§ 206.2: Certain Prior Convictions (N.J.S.A. 2C:13-7(e))**

A person convicted of luring/enticing an adult with a prior conviction for aggravated sexual assault or sexual assault (N.J.S.A. 2C:14-2), aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a), or endangering the welfare of a child (N.J.S.A. 2C:24-4) shall receive a term of imprisonment with a period of parole ineligibility of 3 years, unless the sentence is for an extended term pursuant to N.J.S.A. 2C:43-7. The court may not suspend or make any other non-custodial disposition.

## **§ 207: HUMAN TRAFFICKING (N.J.S.A. 2C:13-8)**

N.J.S.A. 2C:13-8(d) requires a person convicted of first degree human trafficking under subsection (a)(2) as an organizer, supervisor, financier or manager who received anything of value, or (a)(3) knowingly holds, recruits, lures, a child under 18 years of age to engage in sexual activity, to receive either a term of imprisonment of 20 years during which the person shall not be eligible for parole, or a specific term between 20 years and life imprisonment, of which the person shall serve 20 years before being eligible for parole.

## **§ 208: ASSISTING IN HUMAN TRAFFICKING (N.J.S.A. 2C:13-9)**

N.J.S.A. 2C:13-9(c)(1) requires a parole ineligibility term of one-third to one-half of the term of imprisonment, or three years, whichever is greater.

## **§ 209: CARJACKING (N.J.S.A. 2C:15-2)**

A person convicted of first degree carjacking may be sentenced to a term of imprisonment between 10 and 30 years, with at least a 5-year period of parole ineligibility. N.J.S.A. 2C:15-2(b).

**No Early Release Act (N.J.S.A. 2C:43-7.2):** The No Early Release Act applies and the defendant shall receive a period of parole ineligibility equal to 85% of the sentence imposed, and the five-year parole supervision term for first degree crimes.

## **§ 210: BIAS INTIMIDATION (N.J.S.A. 2C:16-1)**

Upon conviction for the first degree crime of bias intimidation, the person may be sentenced to a term of imprisonment of between 15 to 30 years, with a presumptive term of 20 years. N.J.S.A. 2C:16-1(c). A conviction for bias intimidation shall not merge with a conviction for the underlying offense. The court must impose separate sentences for the bias intimidation conviction and a conviction of an underlying offense. *See* N.J.S.A. 2C:16-1(e).

## **§ 211: ARSON (N.J.S.A. 2C:17-1)**

Pursuant to N.J.S.A. 2C:17-1(g), a person convicted of certain first degree arson crimes where the structure is a church, synagogue, temple or other place of public worship is subject to a term of imprisonment with a 15-year period of parole ineligibility. The court may not suspend or make any other noncustodial disposition of a person sentenced pursuant to subsection (g).

Pursuant to N.J.S.A. 2C:17-1(e), a person convicted of certain arson crimes where the structure is a health care facility or a physician's office shall be subject to a term of imprisonment. The court may not suspend or make any other noncustodial disposition of a person sentenced pursuant to subsection (e).

**No Early Release Act (N.J.S.A. 2C:43-7.2):** For a conviction for aggravated arson under N.J.S.A. 2C:17-1(a)(1), the No Early Release Act applies and a defendant shall receive a period of parole ineligibility equal to 85% of the sentence imposed along with the required parole supervision term of 5 years for a first degree crime, or 3 years for a second degree crime.

## **§ 212: DAMAGE TO NUCLEAR PLANT RESULTING IN RELEASE OF RADIATION (N.J.S.A. 2C:17-7)**

A person convicted of this first degree crime shall be sentenced to term of imprisonment between 15 and 30 years, unless an extended term of imprisonment is imposed of between 20 years to life imprisonment pursuant to N.J.S.A. 2C:43-7(a)(2).

## **§ 213: DAMAGE TO NUCLEAR PLANT RESULTING IN DEATH BY RADIATION (N.J.S.A. 2C:17-8)**

A person convicted of this first degree crime may be sentenced to an extended term of imprisonment between 20 years and life pursuant to N.J.S.A. 2C:43-7(a)(2).

**§ 214: DAMAGE TO NUCLEAR PLANT RESULTING IN INJURY  
BY RADIATION (N.J.S.A. 2C:17-9)**

A person convicted of this second degree crime may be sentenced to an extended term of imprisonment between 10 and 20 years pursuant to N.J.S.A. 2C:43-7(a)(3).

**§ 215: SECOND OR SUBSEQUENT OFFENSE -- LEADER OF A  
CARGO THEFT NETWORK AND THEFT FROM A CARGO  
CARRIER (N.J.S.A. 2C:20-2.4 and 2.6)**

**§ 215.1: Leader of a Cargo Theft Network (N.J.S.A. 2C:20-2.4(e))**

A person convicted of a second or subsequent offense shall be sentenced to a term of imprisonment with a parole ineligibility term of one-third to one-half of the sentence imposed. The court may not suspend or make any other non-custodial disposition of any person sentenced as a second or subsequent offender.

**§ 215.2: Theft from a Cargo Carrier (N.J.S.A. 2C:20-2.6(c))**

A person convicted of a second or subsequent offense shall be sentenced to a term of imprisonment with a parole ineligibility term of one-third to one-half of the sentence imposed. The court may not suspend or make any other non-custodial disposition of any person sentenced as a second or subsequent offender.

**§ 216: THIRD OR SUBSEQUENT SHOPLIFTING OFFENSE  
(N.J.S.A. 2C:20-11(c)(4))**

A person convicted of a third or subsequent shoplifting offense shall serve a minimum term of imprisonment of not less than 90 days. The court must also impose community service of up to 25 days.

**§ 217: COMPUTER THEFT (N.J.S.A. 2C:20-25)**

A person convicted of first degree computer theft who receives a sentence of imprisonment shall have a parole ineligibility term of between one-third to one-half of the sentence imposed pursuant to N.J.S.A. 2C:20-25(g).

A person convicted of any degree crime of computer theft, where the victim is a government agency, shall have a parole ineligibility term of between one-third to one-half of the sentence imposed pursuant to N.J.S.A. 2C:20-25(h).

But *see* CANNEL, CRIMINAL CODE ANNOTATED, comment to N.J.S.A. 2C:20-25(h) addressing the enhanced penalty for a government agency victim recognizing that “Throughout the criminal statutes the status of the victim, resulting in increased penalties, is considered an element of a distinct offense requiring that it be proved to the jury beyond a reasonable doubt,” and citing to *State v. Grate*, 220 N.J. 317, 334-35 (2015), which adopted the position in *Alleyne*

*v. United States*, 570 U.S. 99 (2013), that imposition of a mandatory minimum sentence creates an element of the offense which must be proved to a jury beyond a reasonable doubt, or admitted by the defendant during a plea proceeding.

**§ 218: UNAUTHORIZED ACCESS TO COMPUTER DATA  
(N.J.S.A. 2C:20-31(b))**

N.J.S.A. 2C:20-31(b) requires for a second degree conviction a term of imprisonment with a parole ineligibility term of between one-third to one-half of the sentence imposed.

**§ 219: FINANCIAL FACILITATION OF CRIMINAL ACTIVITY  
(N.J.S.A. 2C:21-27)**

A person convicted of first degree financial facilitation of criminal activity shall receive a term of imprisonment with a parole ineligibility term of between one-third to one-half of the sentence imposed. *See* N.J.S.A. 2C:21-27(a).

**§ 220: HINDERING APPREHENSION OR PROSECUTION  
(N.J.S.A. 2C:29-3)**

**§ 220.1 Hindering Apprehension of Another (Third Degree Crime)**

A conviction under subsection (a)(3) or (a)(7) where the conduct which the actor knows has been charged or is liable to be charged against another person would constitute leaving the scene of a motor vehicle accident that results in the death of another person in violation of N.J.S.A. 2C:11-5.1 requires a term of imprisonment, which shall be fixed at not less than one year, during which the actor shall not be eligible for parole.

**§ 220.2 Hindering One's Own Apprehension (Third Degree Crime)**

A conviction under subsection (b)(1) or (b)(4) where the conduct which the actor knows has been charged or is liable to be charged against him would constitute leaving the scene of a motor vehicle accident that results in the death of another person in violation of N.J.S.A. 2C:11-5.1 requires a term of imprisonment which shall be fixed at not less than one year, during which the actor shall not be eligible for parole.

**§ 221: HARM TO A LAW ENFORCEMENT ANIMAL  
(N.J.S.A. 2C:29-3.1)**

N.J.S.A. 2C:29-3.1(a) requires for a third degree conviction for purposely killing a dog, horse, or other animal owned or used by a law enforcement agency or a search and rescue dog a minimum term of imprisonment of 5 years with parole ineligibility.

## **§ 222: IMPLEMENTS FOR ESCAPE FROM INSTITUTION OR FACILITY (N.J.S.A. 2C:29-6)**

A second degree conviction under subsections (a)(1) or (a)(2) for a weapon defined under N.J.S.A. 2C:39-1(r) requires a minimum term of imprisonment of three years. Otherwise it is a crime of the third degree.

## **§ 223: GANG CRIMINALITY (N.J.S.A. 2C:33-29)**

A person convicted of first degree gang criminality shall be sentenced to a term of imprisonment of between 15-30 years. A sentence to imprisonment for a crime of gang criminality shall run consecutively to any sentence of imprisonment imposed upon conviction for the underlying offense in N.J.S.A. 2C:33-29(a).

## **§ 224: PROMOTING ORGANIZED STREET CRIME (N.J.S.A. 2C:33-30)**

A person convicted of first degree promotion of organized street crime shall be sentenced to a term of imprisonment between 15-30 years. A sentence to imprisonment for a crime of promoting organized street crime shall run consecutively to any sentence of imprisonment imposed for the conviction for the underlying offense in N.J.S.A. 2C:33-30(a).

## **§ 225: TERRORISM (N.J.S.A. 2C:38-2)**

A person convicted of terrorism shall receive a sentence of imprisonment of 30 years without parole eligibility, or a specific term of 30 years to life imprisonment with a period of 30 years parole ineligibility. If death results, the defendant shall receive a sentence of life imprisonment without parole.

**No Early Release Act (N.J.S.A. 2C:43-7.2):** The No Early Release Act applies, and the defendant shall receive a parole ineligibility term equal to 85% of the sentence imposed, along with the five-year parole supervision term for this first degree crime.

## **§ 226: PRODUCING OR POSSESSING CHEMICAL WEAPONS (N.J.S.A. 2C:38-3)**

A person convicted of producing or possessing chemical weapons, biological agents or nuclear or radiological devices shall receive a sentence of imprisonment of 30 years without parole eligibility, or to a specific term of between 30 years and life imprisonment with a 30-parole ineligibility term. If death results, the defendant shall receive a sentence of life imprisonment without parole.

**No Early Release Act (N.J.S.A. 2C:43-7.2):** The No Early Release Act applies, and the defendant shall receive a parole ineligibility term equal to 85% of the sentence imposed along with the five-year parole supervision term for this first degree crime.

**§ 227: POSSESSION OF WEAPON FOR UNLAWFUL PURPOSE –  
COMMUNITY GUN (N.J.S.A. 2C:39-4(a)(2))**

A person convicted of possessing, receiving or transferring a community gun shall be sentenced to a term of imprisonment with a parole ineligibility term of one-half of the sentence imposed or 3 years, whichever is greater.

**§ 228: UNLAWFUL POSSESSION OF A MACHINE GUN, HANDGUN,  
OR ASSAULT FIREARM (N.J.S.A. 2C:39-5(i))**

Pursuant to N.J.S.A. 2C:39-5(i), a person convicted of unlawful possession of a machine gun, handgun or assault firearm shall receive a sentence of imprisonment, which shall include a parole ineligibility term of 5 years if the court finds the aggravating circumstances under N.J.S.A. 2C:44-1(a)(5) that “there is a substantial likelihood that the defendant is involved in organized criminal activity.”

*Note:* The above mandatory minimum parole ineligibility term was found unconstitutional in *State v. Grate*, 220 N.J. 317, 334-35 (2015), citing to *Alleyne v. United States*, 570 U.S. 99 (2013), because any fact that increases the mandatory minimum sentence is an element that must be determined by a jury beyond a reasonable doubt, or admitted to by the defendant, and not based upon a judicial finding. A judge, however, may consider this factor when deciding what sentence to impose within the statutory range.

**§ 229: CERTAIN PERSONS NOT TO HAVE WEAPONS  
(N.J.S.A. 2C:39-7(b)(1))**

N.J.S.A. 2C:39-7(b)(1) requires a minimum term of imprisonment of 5 years with parole ineligibility if the person has been convicted in this State or elsewhere of the crime, or an attempt or conspiracy to commit the crime of aggravated assault, arson, burglary, escape, extortion, homicide, kidnapping, robbery, aggravated sexual assault, sexual assault, bias intimidation, carjacking, (N.J.S.A. 2C:15-2), gang criminality (N.J.S.A. 2C:33-29), racketeering, (N.J.S.A. 2C:41-2), terroristic threats (N.J.S.A. 2C:12-3) unlawful possession of a machine gun (N.J.S.A. 2C:39-5(a), unlawful possession of a handgun (N.J.S.A. 2C:39-5(b)(1)), unlawful possession of an assault firearm (N.J.S.A. 2C:39-5(f)), leader of firearms trafficking network (N.J.S.A. 2C:39-16), endangering the welfare of a child (N.J.S.A. 2C:24-4) , stalking (N.J.S.A. 2C:12-10), or a crime, or an attempt or conspiracy to commit a crime involving domestic violence as defined in N.J.S.A. 2C:25-19 whether or not armed with or having in possession a weapon defined in N.J.S.A. 2C:39-1(f), or a person having been convicted, or an attempt or conspiracy to commit certain drug offenses (N.J.S.A. 2C:35-3 through N.J.S.A. 2C:35-6); N.J.S.A. 2C:35-7, N.J.S.A. 2C:35-11, or certain weapons offenses (N.J.S.A. 2C:39-3, N.J.S.A. 2C:39-4, or N.J.S.A. 2C:39-9), who purchases, owns, possesses or controls a firearm.

If the defendant is sentenced to an extended term of imprisonment pursuant to N.J.S.A. 2C:43-7, the minimum term shall be fixed at or between one third and one-half of the sentence imposed or 5 years, whichever is greater, during which the person is ineligible for parole.

**§ 230: VIOLATION OF REGULATORY PROVISIONS RELATING  
TO FIREARMS TRANSFER OR SALE OF FIREARMS  
(SECOND DEGREE) (N.J.S.A. 2C:39-10)**

A licensed dealer convicted of the second degree crime under subsection (a)(4) for selling or transferring a firearm to a person knowing that person intends to sell, transfer, assign, or otherwise dispose of that firearm to a person who is disqualified from possessing a firearm under State or federal law shall receive a minimum term of imprisonment of 18 months of parole ineligibility. If the firearm was used in the commission of a crime, the sentence imposed shall include a minimum term of imprisonment of 3 years of parole ineligibility. N.J.S.A. 2C:39-10(a)(4).

A person convicted of transferring, giving, assigning, or selling a firearm to a person under 18 years old is guilty of a second degree crime, and shall receive a minimum term of imprisonment of 5 years of parole ineligibility. N.J.S.A. 2C:39-10(e).

**§ 231: OPERATING A MOTOR VEHICLE WITH A SUSPENDED  
LICENSE (N.J.S.A. 2C:40-26)**

Pursuant to N.J.S.A. 2C:40-26(c), the court must impose a sentence of not less than 180 days during which the defendant shall not be eligible for parole for a conviction of operating a motor vehicle with a suspended license suspension if (1) the license suspension resulted from a first violation of N.J.S.A. 39:4-50 (driving while intoxicated) or N.J.S.A. 39:4-50.4(a) (revocation for refusal to submit to a breath test), and the person had a prior conviction of N.J.S.A. 39:3-40 (driving while license was suspended, revoked or refused) during the same suspension period (*see* N.J.S.A. 2C:40-26(a)); or (2) the license was suspended or revoked for a second or subsequent violation of N.J.S.A. 39:4-50 or N.J.S.A. 39:4-50.4(a) (*see* N.J.S.A. 2C:40-26(b)).

The Supreme Court in *State v. Rodriguez*, 238 N.J. 105, 108 (2019), concluded that “an individual sentenced to a fixed minimum term of parole ineligibility under N.J.S.A. 2C:40-26(c) may not serve his or her sentence intermittently at night or on weekends pursuant to N.J.S.A. 2C:43-2(b)(7).” *See also State v. Pimentel*, 461 N.J. Super. 468, 493 (App. Div. 2019) (affirming the trial court’s decision to impose the mandatory 180-day custodial sentence: “There is simply no interpretative basis for a sentencing judge to have the discretion to impose a lesser sanction” and citing to the decision in *Rodriguez* as to the statute’s mandatory “fixed” period of incarceration).

Split Sentences and Mandatory Parole Ineligibility Terms: In *State v. Chavarria*, 464 N.J. Super. 1 (App. Div. 2020), the Appellate Division affirmed the mandatory minimum 180-days term of imprisonment as a condition of probation on each of defendant’s convictions for violating N.J.S.A. 2C:40-26.

The Appellate Division stated:

Imposition of the parole ineligibility period required under N.J.S.A. 2C:40-26(c) is not inconsistent with imposition of a split sentence. The period of parole ineligibility merely defines the manner in which the term of imprisonment that is imposed as a condition of probation will be

served. The plain language of N.J.S.A. 2C:43-2(b)(2) imposes only one condition related to the permissible term of imprisonment for a split sentence; it must be 364 days or less. Defendant's sentences, individually and in the aggregate, satisfy that condition, and they are therefore authorized by N.J.S.A. 2C:43-2(b)(2).

But the *Chavarria* court vacated the consecutive sentences of imprisonment and probationary terms and remanded for the sentencing court to make findings under *State v. Yarbough*, 100 N.J. 627 (1985) to impose concurrent or consecutive sentences for the mandatory terms of imprisonment for defendant's convictions under N.J.S.A. 2C:40-26. "In its determination concerning the imposition of probationary terms for defendant's split sentences, the court shall: consider it cannot impose sentences that are partially consecutive and partially concurrent; precisely define when any probationary terms imposed shall begin and end; and address and make findings concerning the imposition of sentences for multiple offenses under N.J.S.A. 2C:44-5(f)."

**§ 232: PUBLIC OFFICER OR EMPLOYEE CONVICTED OF CERTAIN CRIMES (N.J.S.A. 2C:43-6.5)**

A person who serves as a state or municipal government public officer or employee who is convicted of a crime that touches such office or employment as set forth in N.J.S.A. 2C:43-6.5(b) shall receive the following mandatory minimum term without eligibility for parole, unless another law provides for a higher mandatory minimum term:

First degree = 10 years	Third degree = 2 years
Second degree = 5 years	Fourth degree = 1 year

The court may waive or reduce the mandatory minimum term upon motion by the prosecutor as set forth in N.J.S.A. 2C:43-6.5(c). In explaining the standard under N.J.S.A. 2C:43-6.5(c), the Supreme Court in *State v. Trinidad*, 241 N.J. 425, 456 (2020) stated that "The 'serious injustice' threshold is higher than the showing necessary to downgrade an offense. *Megargel*, 143 N.J. at 501."

The *Trinidad* Court further explained:

The inquiry focuses on whether the mitigating factors are "*extraordinary*," such that "they so greatly exceed any aggravating factors that imprisonment would constitute a serious injustice overriding the need for deterrence." *State v. Evers*, 175 N.J. 355, 393-94, 815 A.2d 432 (2003). We also consider "the gravity of the offense with respect to the peculiar facts of a case to determine how paramount deterrence will be in the equation." *Id.* at 395. There is a presumption of valuable deterrence in a custodial term for first-and second-degree offenders. *Ibid.* [*Id.* at 456.]

But note, for the sentence enhancement in light of *Alleyne v. United States*, 570 U.S. 99 (2013), it would seem that the jury should determine that the defendant was a public officer or employee,



and that the underlying crime involved or touched their office or employment, or admitted by the defendant during a plea proceeding, to impose the mandatory parole ineligibility term. *See State v. Grate*, 220 N.J. 317, 334-35 (2015).

### **§ 233: SENTENCING FOR CERTAIN DOMESTIC VIOLENCE OFFENSES (N.J.S.A. 2C:43-6.8)**

Unless the provisions of any other law provide for a higher mandatory minimum term of imprisonment, a person convicted of the following crimes of domestic violence, effective August 1, 2017:

- (1) Homicide (N.J.S.A. 2C:11-1 et seq.);
- (2) Aggravated assault (N.J.S.A. 2C:12-1(b)(1), (2), (3), (4), (6), (7) or (8));
- (3) Assault by auto or vessel (N.J.S.A. 2C:12-1(c));
- (4) Kidnapping (N.J.S.A. 2C:13-1);
- (5) Criminal restraint (N.J.S.A. 2C:13-2);
- (6) Sexual assault (N.J.S.A. 2C:14-2); or
- (7) Criminal sexual contact (N.J.S.A. 2C:14-3);

must be sentenced to a term of imprisonment as follows: for a second or subsequent crime of the fourth degree set forth above, 18 months; for a second or subsequent crime of the third degree set forth above, five years; for a crime of the second degree, 10 years; and for a crime of the first degree, 20 years.

Pursuant to subsection (b)(2) of N.J.S.A. 2C:43-6.8, a parole ineligibility term must be imposed of one-half of the sentence imposed or 42 months, whichever is greater, or 18 months for a fourth degree crime.

### **§ 234: THIRD OR SUBSEQUENT DWI OFFENDER (N.J.S.A 39:4-50(a)(3))**

N.J.S.A. 39:4-50(a)(3), amended effective December 1, 2019, provides that for a third or subsequent DWI violation, the person shall be sentenced to imprisonment of not less than 180 days in a county jail or workhouse, except that the court may lower such term for each day, not exceeding 90 days, served in a drug or alcohol inpatient rehabilitation program and shall thereafter forfeit the right to operate a motor vehicle for eight years. *See also* N.J.S.A. 39:4-50.17 for the information that must be provided to the court concerning mandatory installation of ignition interlock device. Note: a second DWI violation requires a term of imprisonment of not less than 48 consecutive hours, which shall not be suspended or served on probation, or more than 90 days, and to forfeit the right to operate a motor vehicle for a period of not less than one year or more than two years, and installation of an ignition interlock device. *See* N.J.S.A. 39:4-50(a)(2).

The Appellate Division held that a “third or subsequent DWI offender is ineligible for periodic service of the mandatory 180-day sentence” required by N.J.S.A. 39:4-50(a)(3). *State v. Anicama*, 455 N.J. Super. 365, 368 (App. Div. 2018).

See Directive # 04-11 “Disposition of Municipal Court Matters in the Superior Court and Notification to Municipal Court” issued by Hon. Glenn A. Grant, Acting Administrative Director of the Courts, on July 12, 2011.

Sentencing a First-time DWI Offender: In *State v. Faber*, 2020 N.J. Super. LEXIS 220 (App. Div. 2020), the Appellate Division remanded the sentencing to the Law Division, because in deciding the municipal appeal both the Law Division judge and the Municipal Court judge did not adhere to the Legislature's sentencing scheme for DWI offenders and require mandatory participation in the IDRC as part of the sentence. Note: Because the offender committed the violation prior to December 1, 2019, the requirement to install the ignition interlock device could not be imposed on this defendant.

Stay of a DWI Sentence: The Appellate Division in *State v. Faber* also noted that the Law Division, in granting a stay of the driver's license suspension pending further appeal, did not address the standards set forth by the Supreme Court in *State v. Robertson*, 228 N.J. 138, 152 (2017). The *Robertson* Court set forth the standard for deciding when to grant defendant's application for a stay of sentence pending appeal where a defendant is convicted of DWI by the Law Division. “[T]he defendant has the burden to justify a stay of a driver's license suspension pending appeal to the Appellate Division. Courts may grant a stay only if the defendant demonstrates that (1) "it appears that the case involves a substantial question that should be determined" on appeal, (2) the safety of any person or the community "will not be seriously threatened" if defendant's license is not suspended, and (3) "there is no significant risk of defendant's flight." R. 2:9-4.

See also Directive # 25-19 “Implementation of New DWI Law (L. 2019, c. 248) – Includes Expanded Use of Ignition Interlock Devices for First-Time Offenders” issued by Hon. Glenn A. Grant, Acting Administrative Director of the Courts, on December 4, 2019.

## **§ 300: SENTENCING FOR DRUG OFFENSES**

This Section describes provisions that relate to sentencing for drug offenses. The specific statutory provisions in Title 2C should be reviewed for the most up-to-date provisions. For information on Drug Court, see the *New Jersey Statewide Drug Court Manual* promulgated by the July 5, 2019 memorandum to the Assignment Judges by Hon. Glenn A. Grant, Acting Administrative Director of the Courts, on the *InfoNet* under the Criminal Practice Division or Probation Division webpage.

### **§ 301: SENTENCING PROVISIONS FOR CERTAIN OFFENSES**

#### **§ 301.1: Leader of Narcotics Trafficking Network (N.J.S.A. 2C:35-3)**

**Sentence:** Except as provided in N.J.S.A. 2C:35-12 (waiver of mandatory minimum sentence), a person convicted of being a leader of a narcotics trafficking network shall receive a term of life imprisonment with a 25 years period of parole ineligibility. If the court imposes an extended term under N.J.S.A. 2C:43-7(d), the period of parole ineligibility is 30 years.

**Merger:** A conviction for leader of narcotics trafficking network shall not merge with the conviction for any offense which is the object of the conspiracy.

**Fine:** The court may impose a fine not to exceed \$750,000.00 or five times the street value of the drugs involved, whichever is greater.

#### **§ 301.2: Maintaining or Operating a Drug Production Facility (N.J.S.A. 2C:35-4)**

**Sentence:** Except as provided in N.J.S.A. 2C:35-12 (waiver of mandatory minimum sentence), a person convicted of maintaining or operating a CDS production facility shall be sentenced to a term of imprisonment, which shall include a period of parole ineligibility fixed at, or between, one-third and one-half of the sentence imposed.

**Fine:** The court may impose a fine not to exceed \$750,000.00 or five times the street value of all drugs at any time manufactured or stored at such premises, place or facility, whichever is greater.

#### **§ 301.3: Booby Traps in Manufacturing or Distribution Facilities (N.J.S.A. 2C:35-4.1)**

**No Early Release Act (NERA):** This is a NERA offense and the court must order a period of parole ineligibility equal to 85% of the sentence along with the 5-year (first degree) or 3-year (second degree) parole supervision term under N.J.S.A. 2C:43-7.2.

**Consecutive Sentence:** A sentence imposed upon conviction of N.J.S.A. 2C:35-4.1 shall be consecutive to the sentence for any other conviction under Chapter 35 or for conspiracy or attempt to violate any section under Chapter 35, unless the court, in consideration of the character and circumstances of the defendant, finds that imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others. N.J.S.A. 2C:35-4.1(e).

**Merger:** A conviction for N.J.S.A. 2C:35-4.1 shall not merge with a conviction under Chapter 35, or for conspiring or attempting to violate any section of Chapter 35.

**State's Appeal:** If the court does not impose a consecutive sentence, the sentence shall not become final for 10 days to allow the State to appeal.

**§ 301.4: Manufacturing, Distributing or Dispensing Drugs  
(N.J.S.A. 2C:35-5)**

It shall be a crime for persons to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense CDS, a CDS analog or counterfeit CDS. The degree and penalty upon conviction for a violation of N.J.S.A. 2C:35-5 will depend upon the CDS that is manufactured, distributed or dispensed and the total weight of the CDS.

**Determining the Quantity of the Drugs (N.J.S.A. 2C:35-5(c)):** Where the degree of the offense depends on the quantity of the substance, the quantity involved shall be determined by the trier of fact. Where the indictment or accusation so provides, the quantity involved in individual acts may be aggregated in determining the degree of the offense.

First Degree Convictions under subsections (b)(1) and (b)(6) to manufacture, distribute or dispense, or to possess with intent to manufacture, distribute or dispense the substances noted below, require a term of imprisonment, which shall include the imposition of a period of parole ineligibility fixed at, or between, one-third and one-half of the sentence imposed, except as provided in N.J.S.A. 2C:35-12 (Waiver of Mandatory Minimum - see discussion at § 304).

N.J.S.A. 2C:35-5(b)(1) if the drug is heroin, or its analog; coca leaves and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, or analogs in a quantity of five ounces or more including any adulterants or dilutants.

N.J.S.A. 2C:35-5(b)(6) if the drug is L.S.D. or its analog in a quantity of 100 milligrams or more, or phencyclidine in a quantity of 10 grams or more.

Additionally, a fine up to \$500,000 may be imposed.

See subsection (b) of N.J.S.A. 2C:35-5 for the fines that can be imposed for other substances and amounts.

**§ 301.5: Employing a Juvenile in a Drug Distribution Scheme  
(N.J.S.A. 2C:35-6)**

**Sentence:** A conviction for employing a juvenile in a drug distribution scheme requires a minimum term of imprisonment fixed at, or between, one-third and one-half of the sentence imposed, or 5 years, whichever is greater, during which the person is ineligible for parole.

**Merger:** A conviction shall not merge with a conviction under N.J.S.A. 2C:35-3 (leader of a narcotics trafficking network); N.J.S.A. 2C:35-4 (maintaining or operating a CDS production

facility); N.J.S.A. 2C:35-5 (manufacturing, distributing or dispensing), or N.J.S.A. 2C:35-9 (strict liability for drug induced death).

**Fine:** The court may impose a fine not to exceed \$500,000 or five times the street value of the CDS or CDS analog involved, whichever is greater.

**§ 301.6: Distributing, Dispensing or Possessing CDS or Analog on or within 1,000 Feet of School Property or Bus (School Zone) (N.J.S.A. 2C:35-7)**

**Sentence:** If the violation involves less than one ounce of marijuana, the term of imprisonment must include a minimum term fixed at, or between, one-third and one-half of the sentence imposed, or one year, whichever is greater, during which the defendant shall be ineligible for parole. In all other cases, the term of imprisonment must include a minimum term fixed at, or between, one-third and one-half of the sentence imposed, or three years, whichever is greater, during which the defendant shall be ineligible for parole.

**Merger:** Notwithstanding subsection (c), which bars merger of distribution within a school zone with a charge for possession with intent to distribute under N.J.S.A. 2C:35-5, the Supreme Court has held that third degree possession of cocaine with intent to distribute (N.J.S.A. 2C:35-5(a)) merges into a related count of third degree possession with intent to distribute within a school zone (N.J.S.A. 2C:35-7). *See State v. Gonzalez*, 123 N.J. 462 (1991). The *Gonzalez* Court also limited its decision to third and fourth degree cases. *Id.* at 464.

Similarly, in *State v. Dillihay*, 127 N.J. 42, 45 (1992), the Supreme Court held that convictions for school-zone offenses must merge into convictions for related first- or second-degree N.J.S.A. 2C:35-5 offenses, but that in such cases a mandatory minimum sentence no less severe than that required by the school-zone statute should nevertheless be imposed on defendants convicted of the N.J.S.A. 2C:35-5 offense. Federal double jeopardy principles require merger; however, the mandatory minimum term must be preserved under N.J.S.A. 2C:35-7. *Id.* at 50-51. *See State v. Brana*, 127 N.J. 64 (1992) (decided the same day as *Dillihay* for the same reasons – conviction of distribution of cocaine in school zone (2C:35-7) merges into first degree conviction for distribution of cocaine (N.J.S.A. 2C:35-5(a)(1))).

*See also* CANNEL, CRIMINAL CODE ANNOTATED, comment to N.J.S.A. 2C:35-7 on Merger.

**Fine:** The court may impose a fine up to \$150,000.

**Waiver or Reduction of Parole Ineligibility Term in School Zone Cases (N.J.S.A. 2C:35-7(b)(1)):** Notwithstanding N.J.S.A. 2C:35-12 (Waiver of Mandatory Minimum) or N.J.S.A. 2C:35-7(a), the court may waive or reduce the minimum term of parole ineligibility or place the defendant on probation pursuant to N.J.S.A. 2C:43-2(b)(2). In making this determination, the court shall consider the following factors:

- (1) extent of the defendant's prior criminal record and the seriousness of the offenses for which the defendant has been convicted;

- (2) specific location of the present offense in relation to the school property, including distance from the school and the reasonable likelihood of exposing children to drug-related activities at that location;
- (3) whether school was in session at the time of the offense; and
- (4) whether children were present at or in the immediate vicinity of the location when the offense took place.

**Exception to Waiver or Reduction of Parole Ineligibility Term (N.J.S.A. 2C:35-7(b)(2)):** The court shall not waive or reduce the parole ineligibility term or sentence the defendant to probation if the court finds that:

- (1) the offense took place while on school property used for school purposes which is owned or leased to any elementary or secondary school or school board or while on a school bus; or
- (2) the defendant in the course of committing the offense used or threatened violence or was in possession of a firearm.

**State's Appeal:** If the court elects not to impose a period of parole ineligibility, imposes a term lower than the minimum term in N.J.S.A. 2C:35-7(a), or places a defendant on probation, the sentence shall not become final for 10 days to permit the State to appeal.

**Presumption of Imprisonment:** Nothing in the waiver provisions shall be construed to establish a basis for overcoming the presumption of imprisonment in N.J.S.A. 2C:44-1(d), or a basis for not imposing a prison term or parole ineligibility term pursuant to N.J.S.A. 2C:43-6(f) (extended term), or upon conviction for another crime.

*But see* CANNEL, CRIMINAL CODE ANNOTATED (comment 7 to N.J.S.A. 2C:35-7) on the judge's fact determinations for sentencing under subsection (b)(2) being constitutionally suspect, because these facts relate to the commission of the offense itself and result in an enhanced penalty. *See State v. Grate*, 220 N.J. 317, 334-35 (2015), adopting the position in *Alleyne v. United States*, 570 U.S. 99 (2013), that imposition of a mandatory minimum sentence creates an element of an offense, which must be proved by the jury beyond a reasonable doubt, or admitted by the defendant during a plea proceeding.

**§ 301.7: Distributing, Dispensing or Possessing Controlled Substances  
Within 500 Feet of Public Housing Facilities, Public Park or  
Public Building (N.J.S.A. 2C:35-7.1)**

**Merger:** Notwithstanding the statutory language under subsection (c) of N.J.S.A. 2C:35-7.1, which bars merger, see *State v. Parker*, 335 N.J. Super. 415, 426 (App. Div. 2000), in which the Appellate Division required merger of a third degree conviction for distributing within 1,000 feet of a school (N.J.S.A. 2C:35-7), with a second degree conviction for possession of CDS within 500 feet of a public park (N.J.S.A. 2C:35-7.1), where defendant's conduct represented a single criminal event; the underlying offending conduct consisted solely of possession of cocaine on a single date, in a single location, which fell within two statutorily prohibited zones, a school and a

park. The court concluded that punishing defendant separately under each statute would violate double jeopardy principles, due process, and principles of fundamental fairness. *See State v. Gregory*, 336 N.J. Super. 601, 608 (App. Div. 2001), merging a third degree conviction for possession of cocaine with intent to distribute under N.J.S.A. 2C:35-5(a)(1) into a second degree conviction for possession of cocaine with intent to distribute within 500 feet of public property under N.J.S.A. 2C:35-7.1, so that the defendant was sentenced as a second-degree offender consistent with N.J.S.A. 2C:35-7.1.

*See also* the discussion above on merger in *State v. Dillihay*, 127 N.J. 42 (1992), and *State v. Brana*, 127 N.J. 64 (1992), under N.J.S.A. 2C:35-7. For a discussion on merger *see* CANNEL, CRIMINAL CODE ANNOTATED, comment to N.J.S.A. 2C:35-7.1.

**Extended Term for Certain Repeat Offenders under N.J.S.A. 2C:43-6(f):** *See State v. Patterson*, 435 N.J. Super. 498, 515 (App. Div. 2014), in which the Appellate Division held that the mandatory extended term provisions for repeat offenders under N.J.S.A. 2C:43-6(f) do not apply to convictions under N.J.S.A. 2C:35-7.1, because it is not an enumerated predicate offense for this enhanced sentence.

#### **§ 301.8. Distribution to Persons under Age 18 or Pregnant Person - Enhanced Punishment (N.J.S.A. 2C:35-8)**

**Sentence:** Pursuant to N.J.S.A. 2C:35-8, upon application of the prosecutor, any person at least 18 years old who has been convicted under N.J.S.A. 2C:35-5(a) or N.J.S.A. 2C:35-7 (school zone) for distributing CDS or analog to a pregnant female or a person 17 years of age or younger shall, except as provided in N.J.S.A. 2C:35-12, be subject to twice the term of imprisonment, including twice the parole ineligibility term, and twice the fine and penalty. The prosecutor must establish grounds for the enhanced sentence by a preponderance of the evidence at a hearing. The presumption of non-imprisonment set forth in N.J.S.A. 2C:44-1(e) shall not apply. The court shall not impose more than one enhanced sentence under N.J.S.A. 2C:35-8. If the defendant is convicted of more than one offense, which is otherwise subject to enhanced punishment pursuant to N.J.S.A. 2C:35-8, the court shall impose enhanced punishment for the most serious offense, or, where applicable, the offense which mandates the imposition of the longest term of parole ineligibility.

*See R. 3:21-4(e)* requiring this motion within 14 days of the defendant's guilty plea or the return of the verdict. For good cause shown the court may extend the time for filing the motion. Where the defendant is pleading guilty pursuant to a negotiated disposition, the prosecutor shall make the motion at or prior to the plea. If the negotiated disposition includes the recommendation of an extended term, the prosecutor's oral notice and the recordation of the extended term exposure in the plea form completed by the defendant and reviewed on the record shall serve as the State's motion. The sentence and the order of commitment or confinement shall include a determination that the defendant was convicted and sentenced to an enhanced sentence. *R. 3:21-4(e)*.

But *see Alleyne v. United States*, 570 U.S. 99 (2013), as to the viability of the judge making the findings by a preponderance of the evidence to automatically impose an enhanced sentence as opposed to being admitted by the defendant during a plea proceeding, or submitted as an element of the offense to the jury to determine beyond a reasonable doubt.

### **§ 301.9: Strict Liability for Drug-Induced Deaths (N.J.S.A. 2C:35-9)**

**Merger:** A conviction for strict liability for drug-induced deaths shall not merge with a conviction for leader of narcotics trafficking network (N.J.S.A.2C:35-3), maintaining or operating a CDS production facility (N.J.S.A.2C:35-4), or for unlawfully manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense the CDS or CDS analog which resulted in the death (N.J.S.A. 2C:35-5).

But *see State v. Maldonado*, 137 N.J. 536, 584-85 (1994), noting that a conviction under N.J.S.A. 2C:35-9 will merge with a conviction under N.J.S.A. 2C:35-5(a), the basic distributing/manufacturing/dispensing offense, if the crimes arise out of the same transaction. The court found that the anti-merger provision in subsection (d) does not apply to a merger of the generic offense into the basic offense and citing to *State v. Dillihay*, 127 N.J. 42, 51 (1992), holding that "multiple punishments for related convictions for the generic distribution offense and the school zone offense are constitutionally impermissible."

**No Early Release Act:** The court must order a period of parole ineligibility equal to 85% of the sentence imposed along with the parole supervision term of five years (first degree) under the *NERA* statute. N.J.S.A. 2C:43-7.2.

### **§ 302: POSSESSION OF A WEAPON WHILE COMMITTING CERTAIN CDS CRIMES (N.J.S.A. 2C:39-4.1)**

Pursuant to N.J.S.A. 2C:39-4.1(d), a conviction under this section for possession of a weapon during commission of the following Chapter 35 offenses or a N.J.S.A. 2C:16-1 (Bias Intimidation) offense does not merge, and shall be served consecutively to that imposed for a conviction for:

- Leader of Narcotics Trafficking Network (N.J.S.A. 2C:35-3),
- Maintaining or operating a drug production facility (N.J.S.A. 2C:35-4),
- Manufacturing or distributing drugs (N.J.S.A. 2C:35-5),
- Manufacturing and dispensing gamma hydroxybutyrate (N.J.S.A. 2C:35-5.2),
- Manufacturing and dispensing flunitrazepam (N.J.S.A. 2C:35-5.3),
- Employing a Juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6),
- Possession of Drugs on or near school property (N.J.S.A. 2C:35-7),
- Distribution or possession of drugs on public property (N.J.S.A. 2C:35-7.1),
- Possession, distribution or manufacturing imitation drugs (N.J.S.A. 2C:35-11).

### **§ 303: REPEAT DRUG OFFENDERS – Mandatory Extended Terms of Parole Ineligibility (N.J.S.A. 2C:43-6(f))**

On the prosecutor's application, N.J.S.A. 2C:43-6(f) provides that the court must impose an extended term authorized by N.J.S.A. 2C:43-7(c) with a parole disqualifier if convicted of the following crimes where the defendant has previously been convicted of manufacturing, distributing, dispensing or possession with intent to distribute a CDS or CDS analog:

- (1) Manufacturing, distributing, dispensing or possessing with intent to distribute any CDS or CDS analog (N.J.S.A. 2C:35-5),



- (2) Maintaining or operating a CDS production facility (N.J.S.A. 2C:35-4),
- (3) Employing a juvenile in a drug distribution scheme (N.J.S.A. 2C:35-6),
- (4) Leader of a narcotics trafficking network (N.J.S.A. 2C:35-3), or
- (5) Distributing, dispensing or possessing with intent to distribute on or near school property or buses (N.J.S.A. 2C:35-7).

But see *State v. Lagares*, 127 N.J. 20, 32-33 (1992), in which the Supreme Court found that while the “shall” language in the statute does not render the statute unconstitutional, prosecutors must state their reasons on the record for seeking an extended sentence. The trial court may deny the extended term where the defendant has clearly and convincingly shown that the prosecutor’s application for an extended term was arbitrary and capricious.

**Motion for Extended Term (R. 3:21-4(e)):** A motion for an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6(f) shall be filed by the prosecutor within 14 days of the entry of the defendant’s guilty plea or the return of the verdict. Where the defendant is pleading guilty pursuant to a negotiated disposition, the prosecutor shall make the motion at or prior to the plea. If the negotiated disposition includes the recommendation of an extended term, the prosecutor’s oral notice and the recordation of the extended term exposure in the plea form and reviewed on the record shall serve as the State’s motion. For good cause shown the court may extend the time for filing the motion.

Pursuant to N.J.S.A. 2C:43-6(f), the court shall not impose an extended term unless the grounds have been established at a hearing, which may occur at the time of sentencing. The prosecutor must establish the grounds by a preponderance of the evidence. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information.

**Minimum Term:** Pursuant to N.J.S.A. 2C:43-6(f), the extended term of imprisonment shall, except as provided under N.J.S.A. 2C:35-12 (waiver of extended term), be fixed at, or between, one-third and one-half of the sentence or 3 years, whichever is greater, not less than 7 years for a violation of N.J.S.A. 2C:35-6, or 18 months in the case of a fourth degree crime, during which the person shall be ineligible for parole. Where the sentence is life, the parole ineligibility term shall be 25 years, except where a life term is imposed for a conviction of N.J.S.A. 2C:35-3, in which case the parole ineligibility term shall be 30 years. See N.J.S.A. 2C:43-7(c). See also § 304 on waiver of the extended term under N.J.S.A. 2C:35-12.

**“Previously Been Convicted Of”:** An extended term sentence based upon convictions and sentences entered in the same proceeding is an illegal sentence not authorized by N.J.S.A. 2C:43-6(f). There must be a prior qualifying adjudication at the time the extended term is imposed. *State v. Owens*, 381 N.J. Super. 503, 506-07 (App. Div. 2005). In *Owens*, the defendant was found guilty by a jury on one indictment and pled guilty to another offense. There was a single sentencing proceeding, so at the time of sentence, defendant had not been “previously convicted.” *Id.* at 514.

In *State v. Thomas*, 188 N.J. 137, 152-53 (2006), the Court found that a sentencing court may find as fact the existence of a prior conviction to determine a defendant’s statutory eligibility for an extended term under a mandatory sentence-enhancing statute. The factual finding of a prior

conviction by the judge is permissible under the Sixth Amendment and does not run afoul of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

**Chronological Sequence of Offenses:** In *State v. Hill*, 327 N.J. Super. 33, 35-36 (App. Div. 1999), the court held that where the second offense was committed before the conviction for the first, or predicate, offense was obtained, the statute does not compel chronological necessity, *i.e.*, that the conviction for the first offense be formalized before the conviction for the second offense is obtained. So long as a defendant "has been previously convicted," *see* N.J.S.A. 2C:43-6(f), of a predicate offense at the time of sentencing, the defendant qualifies for an enhanced sentence.

### **§ 304: WAIVER OF MANDATORY MINIMUM AND EXTENDED TERMS (N.J.S.A. 2C:35-12)**

If an offense in Chapter 35 specifies a mandatory prison term with a period of parole ineligibility, a mandatory extended term with a parole ineligibility term or an anti-drug profiteering penalty (N.J.S.A. 2C:35A-1, *et. seq.*), the court must impose the mandatory sentence or anti-drug profiteering penalty unless the defendant has pleaded guilty pursuant to a negotiated agreement or, in tried cases, the defendant and prosecutor entered into a post-conviction agreement, providing for a lesser sentence, period of parole ineligibility, or anti-drug profiteering penalty.

The negotiated plea or post-conviction agreement may include a specific ordinary or extended term, parole ineligibility term, fine, anti-drug profiteering penalty, or other disposition. In that event, the court shall not impose a lesser prison term, lesser period of parole ineligibility, lesser fine or lesser anti-drug profiteering penalty than in the plea or post-conviction agreement.

If the court accepts the negotiated guilty plea pursuant to N.J.S.A. 2C:35-12, it is bound by the specific terms and conditions of that negotiated agreement for purposes of imposing the sentence. *State v. Thomas*, 392 N.J. Super. 169, 180-81 (App. Div. 2007). "Allowing a court to sentence below the term agreed upon undermines the clear legislative purpose of encouraging defendants to cooperate with law enforcement authorities by insuring that both the State and the defendant receive the full benefit of their negotiated agreement (citing to *State v. Bridges*, 131 N.J. 402, 409-10 (1993))." *Id.* at 181. *But see* N.J.S.A. 2C:35-7(b)(1), which permits the court to reduce or waive a mandatory minimum term under certain circumstances. *See also State v. Courtney*, 243 N.J. 77 (2020), in which the Supreme Court held that N.J.S.A. 2C:35-12 does not require a formal application by the State when a prosecutor agrees not to request a mandatory extended term sentence under N.J.S.A. 2C:42-6(f) yet seeks the benefit of a Section 12 plea agreement. The Court also provided guidance for future cases to address when the prosecutor agrees as part of the plea agreement not to request an extended term but still seeks the benefit of a negotiated waiver of the mandatory sentencing requirements under N.J.S.A. 2C:35-12 to ensure consistency and accuracy in the sentencing record.

**Exception:** "The parties cannot negotiate an illegal sentence, and N.J.S.A. 2C:35-12 does not suggest otherwise... That statute provides that [t]he negotiated plea . . . agreement may provide for a specified term of imprisonment within the range of ordinary or extended sentences authorized by law [or] a specified period of parole ineligibility based thereon. But it must be a legal sentence." *State v. Smith*, 372 N.J. Super. 539, 542 (App. Div. 2004).

**Waiver Continues to Resentencing for a Violation of Probation:** In *State v. Vasquez*, 129 N.J. 189, 201-02 (1992), the Court found that if the prosecutor waives the mandatory sentence provisions and the sentence is imposed, the waiver continues to be effective for resentencing if there is a violation of probation. “The statute does not expressly authorize prosecutors to exercise sentencing authority on resentencing, nor does it specifically authorize prosecutors through either “waiver” or the making of a request to demand that a period of parole disqualification be affixed to the sentence.” *Id.* at 203.

## **§ 305: DRUG COURT**

The following is a brief overview of Drug Court. Please note that each vicinage has judges designated to handle Drug Court cases. For more specific information on the procedures and policies for Drug Court, see the *New Jersey Statewide Drug Court Manual* promulgated by the July 5, 2019 memorandum to the Assignment Judges by Hon. Glenn A. Grant, Acting Administrative Director of the Courts, which is posted on the *InfoNet* under the Criminal Practice Division or Probation Division webpage. See also *State v. Meyer*, 192 N.J. 421 (2007), for the background on Drug Court.

### **§ 305.1: Eligibility**

There are two tracks for admission to Drug Court. Track One includes defendants who are subject to a presumption of incarceration or a mandatory minimum parole ineligibility term, and who meet the statutory requirements to be sentenced to a term of special probation under N.J.S.A. 2C:35-14. Track Two includes defendants admitted to Drug Court who do not qualify under Track One, but are otherwise eligible for the Drug Court program, and would otherwise be sentenced to regular probation under N.J.S.A. 2C:45-1. See discussion on Drug Court Eligibility in the Drug Court Manual at 8-11.

Pursuant to N.J.S.A. 2C:35-14(a), “Any person who is ineligible for probation due to a conviction for a crime which is subject to a presumption of incarceration or a mandatory minimum period of parole ineligibility may be sentenced to a term of special probation in accordance with this section, and may not apply for drug and alcohol treatment pursuant to N.J.S.A. 2C:45-1.”

Additionally, pursuant to N.J.S.A. 2C:35-14(a), “Notwithstanding the presumption of incarceration pursuant to the provisions of subsection d. of N.J.S.A. 2C:44-1, whenever a drug or alcohol dependent person who is subject to sentencing ... is convicted of or adjudicated delinquent for an offense, other than one described in subsection b. ... the court, upon notice to the prosecutor, may, on motion of the person, or on the court’s own motion, place the person on special probation, which shall be for a term of five years, provided that the court finds on the record that:

- (1) the person has undergone a professional diagnostic assessment to determine whether and to what extent the person is drug or alcohol dependent and would benefit from treatment; and

- (2) the person is a drug or alcohol dependent person within the meaning of N.J.S.A. 2C:35-2 and was drug or alcohol dependent at the time of the commission of the present offense; and
- (3) the present offense was committed while the person was under the influence of a controlled dangerous substance, controlled substance analog or alcohol or was committed to acquire property or monies in order to support the person's drug or alcohol dependency; and
- (4) substance use disorders treatment and monitoring will serve to benefit the person by addressing the person's drug or alcohol dependency and will thereby reduce the likelihood that the person will thereafter commit another offense; and
- (5) the person did not possess a firearm at the time of the present offense and did not possess a firearm at the time of any pending criminal charge; and
- (6) the person has not been previously convicted on two or more separate occasions of crimes of the first or second degree, other than those listed in paragraph (7); or the person has not been previously convicted on two or more separate occasions, where one of the offenses is a crime of the third degree, other than crimes defined in N.J.S.A. 2C:35-10, and one of the offenses is a crime of the first or second degree; and
- (7) the person has not been previously convicted or adjudicated delinquent for, and does not have a pending charge of murder, aggravated manslaughter, manslaughter, kidnapping, aggravated assault, aggravated sexual assault or sexual assault, or a similar crime under the laws of any other state or the United States; and
- (8) a suitable treatment facility licensed and approved by the Division of Mental Health and Addiction Services in the Department of Human Services is able and has agreed to provide appropriate treatment services in accordance with the requirements of this section; and
- (9) no danger to the community will result from the person being placed on special probation pursuant to this section.

In *State v. Figaro*, 462 N.J. Super. 564 (App. Div. 2020), the Appellate Division considered the 2019 *New Jersey Statewide Drug Court Manual* (which replaced the 2002 Manual) and whether defendants who were previously convicted for offenses that make them ineligible for special probation pursuant to N.J.S.A. 2C:35-14 (Track One), are eligible for Drug Court under regular probation, N.J.S.A. 2C:45-1 (Track Two). The Appellate Panel concluded that the changes to the Manual regarding Drug Court eligibility must be read to require the court to consider a Track Two application even when the defendant has prior convictions that would statutorily bar admission under Track One. The Panel went on to note that “the Manual permits the prosecutor to recommend against admission of a Track Two applicant based on the statutory bar” and the Manual further states that “[t]he drug court judge makes all final decisions about *program eligibility*.” *Id.* at 578. Additionally, the Panel noted that “a judge in considering whether a

Track Two applicant is a candidate for Drug Court must, of course, decide whether a probationary sentence is appropriate in the first instance.” *Id.* at 579.

**Drug or Alcohol Dependent Person (N.J.S.A. 2C:35-2):** A drug or alcohol dependent person means a person who as a result of using a controlled dangerous substance or controlled substance analog or alcohol has been in a state of psychic or physical dependence, or both, arising from the use of that controlled dangerous substance or controlled substance analog or alcohol on a continuous or repetitive basis. Drug or alcohol dependence is characterized by behavioral and other responses, including but not limited to a strong compulsion to take the substance on a recurring basis in order to experience its psychic effects, or to avoid the discomfort of its absence.

*See State v. Clarke*, 203 N.J. 166 (2010), in which the Supreme Court stated that “even if an offender achieved some level of success in his or her rehabilitation efforts by the time of sentencing, or more pertinent to this matter at the time of seeking admission to the Drug Court program, the offender may still be found drug or alcohol dependent.” *Id.* at 181.

### **§ 305.2: Ineligibility**

Pursuant to N.J.S.A. 2C:35-14(b), a defendant is not eligible for special probation if convicted of or adjudicated delinquent for:

- (1) a crime of the first degree;
- (2) a crime of the first or second degree enumerated in the No Early Release Act (N.J.S.A. 2C:43-7.2(d), other than a crime of the second degree involving N.J.S.A. 2C:15-1 (robbery) or N.J.S.A. 2C:18-2 (burglary);
- (3) a crime, other than N.J.S.A. 2C:35-7 (drug distribution within 1000 feet of school property) for which a mandatory minimum period of incarceration is prescribed under chapter 35 of this Title or any other law; or
- (4) an offense that involved the distribution or the conspiracy or attempt to distribute a controlled dangerous substance or controlled substance analog to a juvenile near or on school property.

**Note:** The Appellate Division in *State v. Ancrum*, 449 N.J. Super. 526, 534 (App. Div. 2017), held that the Legislature was clear that it intended to exclude from Drug Court those convicted of aggravated assault under N.J.S.A. 2C:35-14(a)(7). The court concluded that the merger of two counts of aggravated assault into second degree burglary and second degree robbery did not eliminate the ineligibility for admission. *Id.* at 538-39.

**§ 305.3: Special Probation for Certain Drug Offenders  
(N.J.S.A. 2C:35-14.2)**

N.J.S.A. 2C:35-14.2(b) provides “Notwithstanding any law to the contrary, where the court finds that a defendant is a person in need of treatment as defined in subsection f. ... and that the defendant additionally meets all the requirements of N.J.S.A. 2C:35-14, the court shall sentence a defendant to special probation pursuant to the provisions of N.J.S.A. 2C:35-14 for the purpose of participating in a court-supervised drug treatment program, regardless of whether the defendant has sought or consents to such a sentence, unless:

- (1) the court finds that a sentence of imprisonment must be imposed consistent with the provisions of chapters 43 and 44 of Title 2C of the New Jersey Statutes, in which case a sentence of imprisonment shall be imposed; or
- (2) the court is clearly convinced that:
  - (a) the treatment, monitoring, and supervision services that will be provided under N.J.S.A. 2C:45-1 are adequate to address the defendant’s clinical needs;
  - (b) the defendant’s treatment needs would not be better addressed by sentencing the defendant to special probation pursuant to N.J.S.A. 2C:35-14;
  - (c) no danger to the community would result from placing the person on regular probation pursuant to N.J.S.A. 2C:45-1; and
  - (d) a sentence of probation authorized under N.J.S.A. 2C:45-1 would be consistent with the provisions of chapters 43 and 44 of Title 2C of the New Jersey Statutes.

Pursuant to N.J.S.A. 2C:35-14.2(c), the court is required to “consider all relevant circumstances, and take judicial notice of any evidence, testimony, or information adduced at the trial, plea hearing, or other court proceedings, and shall also consider the presentence report and the results of any professional diagnostic assessment.”

If the court imposes regular probation under N.J.S.A. 2C:45-1 instead of special probation pursuant to N.J.S.A. 2C:35-14(b)(2), the sentence shall not be final for 10 days to allow the prosecutor time to file an appeal. *See* N.J.S.A. 2C:35-14.2(d).

**§ 305.4: Appeal of a Drug Court Sentence**

The Supreme Court in *State v. Hyland*, 238 N.J. 135, 139 (2019), held that the State may appeal as illegal the imposition of a Drug Court sentence only when the sentencing judge makes a plainly mistaken, non-discretionary, non-factual finding under N.J.S.A. 2C:35-14(a). The Court explained that “Certain eligibility criteria, such as N.J.S.A. 2C:35-14(a)(4) and (9), are discretionary determinations requiring the sentencing judge to engage in fact-finding.” *Id.* at 147.

“Because application of N.J.S.A. 2C:35-14(a)(9) requires fact-finding and an exercise of the sentencing judge's discretion, a sentence based on application of that factor is not appealable as an illegal sentence.” *Id.* at 139.

The *Hyland* Court further explained:

Not all of the eligibility criteria set forth in N.J.S.A. 2C:35-14(a) necessitate fact-finding or an exercise of discretion by the sentencing judge. Rather, some factors -- for example, N.J.S.A. 2C:35-14(a)(1), (6), (7), and (8) -- require objective, per se legal determinations. Because the sentencing court must find all nine factors under N.J.S.A. 2C:35-14(a) before imposing a special probation Drug Court sentence, improper application by the sentencing judge of one of the nondiscretionary factors would constitute a sentence that is "not imposed in accordance with law." [citations omitted] Such a sentence would be appealable as illegal under our Criminal Code. *See Ancrum*, 449 N.J. Super. 526, 531, 539 (App. Div. 2017) (permitting appeal because the judge improperly interpreted N.J.S.A. 2C:35-14(b)(2), which bars the imposition of a Drug Court sentence for defendants convicted of disqualifying second-degree crimes). [*Id.* at 147-48.]

### **§ 305.5: Revocation of Special Probation (N.J.S.A. 2C:35-14(f))**

Pursuant to N.J.S.A. 2C:35-14(f)(1), the court in its discretion may permanently revoke special probation upon a first violation of any term or condition of special probation.

**Second or Subsequent Violation:** Upon a second or subsequent violation, the court shall revoke special probation unless the court finds that there is a substantial likelihood that the person will successfully complete the treatment program if permitted to continue on special probation, and the court is clearly convinced, considering the nature and seriousness of the violations, that no danger to the community will result from permitting the person to continue on special probation. N.J.S.A. 2C:35-14(f)(2).

If the court permanently revokes the person's special probation pursuant to N.J.S.A. 2C:35-14(f)(4), the court shall impose any sentence that might have been imposed, or that would have been required to be imposed, originally for the offense for which the person was convicted or adjudicated delinquent. The court shall conduct a de novo review of any aggravating and mitigating factors present at the time of both original sentencing and resentencing. If the court determines or is required pursuant to any other provision of this chapter or any other law to impose a term of imprisonment, the person shall receive credit for any time served in custody pursuant to N.J.S.A. 2C:45-1 or while awaiting placement in a treatment facility, and for each day during which the person satisfactorily complied with the terms and conditions of special probation while committed to a residential treatment facility. N.J.S.A. 2C:35-14(f)(4). *See also* R. 3:21-8 permitting jail credit for Drug Court participants on a custodial sentence for time spent in a residential treatment facility for each day during which they satisfactorily complied with the terms of Drug Court.

*See State v. Bishop*, 429 N.J. Super. 533, 536 (App. Div. 2013), in which the Appellate Division held that mandatory periods of parole ineligibility and mandatory extended term provisions that existed at the time of original sentencing survive during the term of special probation and remain applicable at the time of resentencing upon permanent revocation of special probation. *Note*: This court opinion only deals with offenders sentenced to special probation under N.J.S.A. 2C:35-14 whose probation is subsequently permanently revoked. It does not address those admitted to Drug Court under Track 2 or regular probation. *Id.* at 540.

The *Bishop* court found that the standard for resentencing under N.J.S.A. 2C:35-14(f)(4) is different than the standard for violations of regular probation under *State v. Bayless*, 114 N.J. 169 (1989). *Id.* at 546-547. The Court stated that the “legislative intent to provide a separate VOP resentencing regime for special probation than that which had previously existed and continues to exist for regular probation... constitutes a marked departure from the regular probation standard and provides express statutory direction preserving all sentencing provisions available at the original sentencing in the event of revocation of special probation. *Id.* at 547.

In *State v. Dunlap*, 462 N.J. Super. 274 (App. Div. 2020), the Appellate Division considered whether the defendant’s revocation of special probation and resentencing to a ten-year prison sentence after having served four years on special probation was an unconstitutional extension of the statutory ten-year maximum sentence for a second-degree robbery conviction under N.J.S.A. 2C:43-6(a)(2), contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Appellate Division affirmed the sentencing court’s decision. The sentencing court had conducted a comprehensive review of the relevant aggravating and mitigating factors at the time of both original sentencing and resentencing pursuant to N.J.S.A. 2C:35-14(f)(4), and acted within its discretion to impose the recommended alternate ten-year sentence in the plea agreement, which was within the statutory maximum prison term. *Id.* at 296.

The *Dunlap* court further concluded that the *Apprendi* principles “do not apply to non-custodial forms of punishment, such as special probation.” The court rejected the “notion that time spent in the community on non-custodial special probation is functionally equivalent to time spent incarcerated.” The court stated that “when determining whether the ‘prescribed statutory maximum’ has been exceeded for purposes of *Apprendi* analysis, we look to the length of time the defendant is incarcerated, not to the length of time he or she serves on non-custodial probation. We note in this regard that the United States Supreme Court has never held that non-custodial sentences raise *Apprendi* concerns.” *Id.* at 287-289.

### **§ 306: PENALTIES, FINES, AND OTHER REQUIREMENTS**

N.J.S.A. 2C:43-3 provides that the following amounts may be imposed for fines:

First degree crime = up to \$200,000	Fourth degree crime = up to \$10,000
Second degree crime = up to \$150,000	Disorderly persons offense = up to \$1,000
Third degree crime = up to \$15,000	Petty disorderly persons offense = up to \$500

*Note*: Certain statutes also include specific amounts that can be imposed for fines.



**§ 306.1: Drug Abuse Education Fund (DAEF) (N.J.S.A. 2C:43-3.5)**

In addition to any term or condition that may be included in an agreement for supervisory treatment pursuant to N.J.S.A. 2C:43-13 (Pretrial Intervention Program) or imposed as a term or condition of conditional discharge pursuant to N.J.S.A. 2C:36A-1 for a violation of any offense defined in Chapter 35 or 36 of Title 2C, the offender shall be assessed a Drug Abuse Education Fund (DAEF) penalty of \$50 for each adjudication or conviction.

**§ 306.2: Drug Enforcement and Demand Reduction (DEDR) Penalty (N.J.S.A. 2C:35-15)**

N.J.S.A. 2C:35-15(a)(1) requires that every person convicted for a Chapter 35 or 36 offense shall be assessed the following penalty for each such offense:

First degree = \$3,000	Fourth degree = \$750
Second degree = \$2,000	Disorderly persons = \$500
Third degree - \$1,000	Petty disorderly persons = \$500

Note: This statute was amended, effective November 1, 2020, to make it inapplicable to adjudications of delinquency.

**Double DEDR Penalty (N.J.S.A. 2C:35-5.11):** A conviction for possessing, distributing, dispensing, 3,4-Methylenedioxymethamphetamine, 3,4-Methylenedioxyamphetamine, Gamma-butyrolactone, Gamma Hydroxybutyrate or Flunitrazepam requires a DEDR penalty of twice the amount otherwise applicable to the offense.

**Participation in Drug or Alcohol Rehabilitation Program:** The court may suspend collection of the DEDR Penalty during the offender’s court-imposed participation in an approved rehabilitation program, and the offender’s agreement to pay for all or some portion of the costs associated with the program. Upon successful completion, the person may apply for a reduction of the penalty by any amount the defendant paid for participation in the program. If the person’s participation in the program is terminated before successful completion, collection for the entire penalty imposed shall be enforced. *See* N.J.S.A. 2C:35-15(e).

**Single Penalty for Multiple Offenses (N.J.S.A. 2C:35-15(a)(2)):** A person being sentenced to more than one offense in Chapter 35 or 36 of Title 2C, who is not placed in supervisory treatment or ordered to perform reformatory service may, in the discretion of the court, be assessed a single penalty applicable to the highest degree offense for which the person is convicted. The court must find that the defendant has established the following: (1) the imposition of multiple penalties would constitute a serious hardship that outweighs the need to deter the defendant from future criminal activity; and (2) the imposition of a single penalty would foster the defendant’s rehabilitation.

A person placed in the conditional discharge program or PTI for a violation of any offense under Chapter 35 or 36 shall be assessed the DEDR penalty applicable to the highest offense charged, except that the court shall not impose more than one such penalty regardless of the number of offenses charged. *See* N.J.S.A. 2C:35-15(a).

**Reformative Service (N.J.S.A. 2C:35-15(f)):** A person required to pay a penalty may propose to the court and the prosecutor a plan to perform reformative service in lieu of a payment of up to one-half of the penalty amount imposed. An application for entry into a court-administered alcohol and drug rehabilitation program shall have the same effect as the submission of a reformative service plan to the court.

**DEDR Penalty and Conspiracy:** In *In re W.M.*, 237 N.J. Super. 111 (App. Div. 1989), the court considered whether a person charged with conspiracy to distribute cocaine is required to pay the mandatory drug penalties: the DEDR penalty, the forensic laboratory fee (N.J.S.A. 2C:35-20), and the six-month postponement of driving privileges (N.J.S.A. 2C:35-16)). The court held that “the mere conviction under N.J.S.A. 2C:5-2 for the ‘ordinary’ crime of conspiracy, does not render a person subject to the mandatory penalties of the Comprehensive Drug Reform Act, even if the object of that conspiracy constitutes a Chapter 35 offense.” *Id.* at 118.

Additionally, the *W.M.* court stated “The plain language of the three statutes in question indicate the penalties do not apply to convictions of conspiracy since conspiracy is not an offense defined under either Chapter 35 or 36... Hence, absent a clearer statement from the Legislature, the penalties cannot be imposed without violating principles of fundamental fairness.” *Id.* at 116.

**§ 306.3: Forensic Laboratory Fee (FLF) (N.J.S.A. 2C:35-20)**

A Forensic Laboratory Fee (FLF) of \$50 for each Chapter 35 offense for which the defendant is convicted shall be assessed, including those who are admitted into PTI or placed on conditional discharge. A FLF of \$25 is required for each adjudication of delinquency. Unlike the DEDR penalty, the FLF does not apply to a Chapter 36 offense.

**§ 306.4: Anti-Drug Profiteering Penalty (N.J.S.A. 2C:35A-4)**

Upon application of the prosecutor, if the court finds at a hearing that the prosecutor established by a preponderance of the evidence one or more of the grounds enumerated in N.J.S.A. 2C:35A-3 exist, the court shall impose the following penalty:

First degree = \$200,000	Third degree - \$50,000
Second degree = \$100,000	Fourth degree = 25,000

or an amount equal to three times the street value of all CDS, or three times the market value of all drug paraphernalia involved, if this amount is greater than the above listed amounts, or an amount equal to three times the value of any benefit illegally obtained by the actor or any injury.

**§ 306.5: Manufacturing, Distributing or Dispensing Gamma Hydroxybutyrate (N.J.S.A. 2C:35-5.2(b))**

The court may impose a fine up to \$150,000.

**§ 306.6: Manufacturing, Distributing and Dispensing Flunitrazepam  
(N.J.S.A. 2C:35-5.3)**

The court may impose a fine up to \$250,000 for a first degree crime, or \$150,000 for a second degree crime.

**§ 306.7: Possession, Use or Being under the Influence, or Failure to Make Lawful Disposition (N.J.S.A. 2C:35-10)**

The court may impose the following fines:

Third degree offense involving a Schedule I, II, III, or IV drug - up to \$35,000.

Fourth degree offense involving a Schedule V drug- up to \$15,000.

Fourth degree offense involving more than 50 grams of marijuana, or more than 5 grams of hashish - up to \$25,000.

**Community Service (N.J.S.A. 2C:35-10(a)):** If the offense is committed on or within 1,000 feet of school property or a school bus, or on a school bus and the person is not sentenced to a term of imprisonment, the person shall, in addition to any other sentence, be required to perform not less than 100 hours of community service.

**§ 306.8: Obtaining or Possessing Gamma Hydroxybutyrate Without a Prescription (“Rape Drug”) (N.J.S.A. 2C:35-10.2)**

The court may impose a fine of up to \$100,000.

**§ 306.9: Obtaining or Possessing Flunitrazepam Without a Prescription (“Rape Drug”) (N.J.S.A. 2C:35-10.3)**

The court may impose a fine of up to \$100,000.

**§ 306.10: Distribution of Prescription Legend Drug (N.J.S.A. 2C:35-10.5)**

The court may impose a fine up to \$300,000 for the second degree crime, or \$200,000 for a third degree crime.

**§ 306.11: Imitation Controlled Dangerous Substances (N.J.S.A. 2C:35-11)**

The court may impose a fine of up to \$200,000.

**§ 306.12. Obtaining by Fraud (N.J.S.A. 2C:35-13)**

The court may impose a fine up to \$50,000.

**§ 306.13: Forfeiture or Postponement of Driving Privileges  
(N.J.S.A. 2C:35-16) - Repealed**

This provision, which provided for the forfeiture or suspension of driving privileges for convictions under Chapters 35 or 36, was repealed effective December 27, 2019.

**§ 306.14: Notification to Owner of Leased Premises (N.J.S.A. 2C:35-16.1)**

Upon conviction, guilty plea, or adjudication of delinquency for an offense under N.J.S.A. 2C:35-1, *et al.*, involving use, possession, manufacture, dispensing or distribution of a CDS, a CDS analog or paraphernalia, the court shall ascertain whether the offense or act took place on leased premises in which the defendant resided at the time of offense, and if so, give notice of the conviction, adjudication or plea to the owner or appropriate agent.

**§ 307: DRUG OFFENDER RESTRAINING ORDER (DORO)  
(N.J.S.A. 2C:35-5.4 to -5.10)**

**Issuance (N.J.S.A. 2C:35-5.7(h)):** When a person is convicted or adjudicated delinquent for any criminal offense, the court, upon application of a law enforcement officer or prosecutor, shall by separate order or within the judgment of conviction issue an order prohibiting the person from entering a certain place. The order shall remain in effect for such period of time fixed by the court but not longer than the maximum term of imprisonment or incarceration allowed for the underlying offense(s). N.J.S.A. 2C:35-5.7(j).

**Exception:** Pursuant to N.J.S.A. 2C:35-5.7(e), the court may forego issuance of a restraining order if the defendant establishes clear and convincing evidence that (1) the defendant lawfully resides at or has legitimate business on or near the place, or (2) issuance of the restraining order would cause undue hardship to innocent persons and would constitute a serious injustice which overrides the need to protect the rights, safety and health of persons residing in or having business in the place.

**Appeal:** When the court denies a request to impose a drug offender restraining order, the sentence imposed by the court shall not become final for ten days to permit the State to appeal. *See State v. Fitzpatrick*, 443 N.J. Super. 316 (App. Div. 2015), in which the Appellate Division held that a plain reading of N.J.S.A. 2C:35-5.7(k) limits the State's right to appeal to ten days from imposition of the sentence.

**Violations (N.J.S.A. 2C:35-5.8):** A violation of a DORO shall subject the person to civil contempt, criminal contempt, revocation of bail, probation or parole, or any combination of these sanctions and any other sanctions authorized by law.

For a further discussion of procedures to implement the Drug Offender Restraining Order Act, see Memorandum to Assignment Judges from Hon. Richard J. Williams, Administrative Director of the Courts, dated May 3, 2002, "Amendments to the Drug Offender Restraining Order Act of 1999." *See also* the Memorandum to Assignment Judges from Hon. Glenn A. Grant, Acting Administrative Director of the Courts, dated March 17, 2011, "Procedures for the Telephonic Issuance of Orders Pursuant to the Drug Offender Restraining Act (DORA) and Nicole's Law – Pretrial."

## § 400: SEXUAL OFFENSES

This Section summarizes provisions that relate to sentencing for sex offenses. The specific statutory provisions should be reviewed for the most current sentencing requirements. See § 407 for a chart on sentencing adult sex offenders. See § 109 on the No Early Release Act (N.J.S.A. 2C:43-7.2) for the sex offenses that require a minimum period of parole ineligibility of 85% of the sentence imposed, and a five-year term of parole supervision for a first degree crime, or a three-year term of parole supervision for a second degree crime.

### § 401: SEX OFFENDER TREATMENT: ADULT DIAGNOSTIC AND TREATMENT CENTER (ADTC) (N.J.S.A. 2C:47-1 to -10)

#### § 401.1: Examination (N.J.S.A. 2C:47-1)

Pursuant to N.J.S.A. 2C:47-1, the judge shall order the Department of Corrections to complete a psychological examination for a defendant convicted of: aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to N.J.S.A. 2C:13-1(c)(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to N.J.S.A. 2C:24-4(a), endangering the welfare of a child (pornography) pursuant to N.J.S.A. 2C:24-4(b)(4), N.J.S.A. 2C:24-4(b)(5), leader of a child pornography network pursuant to N.J.S.A. 2C:24-4.1, or an attempt to commit any such crime, unless the offender is sentenced to a term of life imprisonment without eligibility for parole.

The examination shall include a determination of whether the offender's conduct was characterized by a pattern of repetitive, compulsive behavior and, if it was, a further determination of the offender's amenability to sex offender treatment and willingness to participate in such treatment. (The examination is commonly referred to as an "Avenel evaluation" because the evaluation is conducted at the Adult Diagnostic and Treatment Center, which is located in an area of Woodbridge Township, Middlesex County, known as Avenel.)

See also the Supplemental Plea Forms for Sexual Offenses (committed prior to December 1, 1998), or the Additional Questions for Certain Sexual Offenses (committed on or after December 1, 1998), which must be used for a defendant pleading guilty to an offense contained in N.J.S.A. 2C:47-1.

#### § 401.2: Disposition (N.J.S.A. 2C:47-3)

**Repetitive, Compulsive, Amenable and Willing:** If the offender's conduct was characterized by a pattern of repetitive, compulsive behavior and the offender is amenable to sex offender treatment and is willing to participate in such treatment, the court shall sentence the offender to the ADTC, or place the offender on probation with the requirement, as a condition of probation, to receive outpatient psychological or psychiatric treatment. N.J.S.A. 2C:47-3(b).

**Not Repetitive, Compulsive or Not Amenable:** If the offender's conduct is not characterized by a pattern of repetitive, compulsive behavior or the offender is not amenable to sex offender treatment, the sentence shall not be to ADTC. The sentence shall not thereafter be reduced by

commutation time for good behavior or credits for diligent application to work and other institutional assignments. N.J.S.A. 2C:47-3(d).

**Repetitive, Compulsive, Amenable and Not Willing:** If the court finds the offender's conduct was characterized by a pattern of repetitive, compulsive behavior and that the offender is amenable to sex offender treatment, but that the offender is not willing to participate in such treatment, the court shall sentence the offender to a prison sentence to be served in a facility other than ADTC. *See* N.J.S.A. 2C:47-3(f). The offender shall become primarily eligible for parole not in accordance with ordinary parole rules but in accordance with N.J.S.A. 2C:47-5, which conditions parole release on a referral from a special classification review board and achievement of a satisfactory level of progress in sex offender treatment.

Parole eligibility for a sex offender is set forth under N.J.S.A. 30:4-123.51(e) as follows:

Each adult inmate sentenced for an offense specified in N.J.S.2C:47-1 shall become primarily eligible for parole as follows:

(1) If the court finds that the offender's conduct was not characterized by a pattern of repetitive, compulsive behavior or finds that the offender is not amenable to sex offender treatment, or if after sentencing the Department of Corrections in its most recent examination determines that the offender is not amenable to sex offender treatment, the offender shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum term or one-third of the sentence imposed where no mandatory minimum term has been imposed. Neither such term shall be reduced by commutation time for good behavior pursuant to R.S.30:4-140 or credits for diligent application to work and other institutional assignments pursuant to R.S.30:4-92.

(2) All other offenders shall be eligible for parole pursuant to the provisions of N.J.S.2C:47-5, except no offender shall become primarily eligible for parole prior to the expiration of any judicial or statutory mandatory minimum term.

*Note:* Effective November 1, 2020, N.J.S.A. 30:4-123.51(e)(2) was amended to replace "All other offenders" with "Young adult offenders."

The findings that result in the commitment of a defendant to the ADTC are found by the judge by a preponderance of the evidence. *State v. Howard*, 110 N.J. 113 (1988); *State v. Luckey*, 366 N.J. Super. 79 (App. Div. 2004).

If the offender later indicates willingness to participate in treatment, a psychological evaluation will be conducted, and the DOC may choose to transfer the person to the ADTC.

### **§ 401.3: Transfer to ADTC (N.J.S.A. 2C:47-3(g))**

If the offender was originally sentenced pursuant to subsection (f), the sentence may not be reduced by commutation time for good behavior or credits for diligent application to work and other institutional assignments for any year or fractional part of any year that the offender is

confined in a facility other than ADTC. However, if the defendant is later transferred to the ADTC, the sentence imposed shall be reduced by commutation time for good behavior and work credits for the time he/she is incarcerated at the ADTC following the date of such transfer.

#### **§ 401.4: Term of Incarceration (N.J.S.A. 2C:47-3(h))**

**Seven Years or Less:** If the court imposes a sentence of seven years or less, the offender shall be confined in the ADTC as soon as practicable after the date of sentence.

**More Than Seven Years:** If the court imposes a sentence of more than seven years, the initial portion of the sentence will be served in prison. When the offender is within five years of expiration of the sentence, the DOC will conduct a psychological examination to determine the offender's amenability and willingness to participate in sex offender treatment.

**Sex Offender Treatment at ADTC:** Pursuant to N.J.S.A. 2C:47-3(k), the Commissioner is only required to provide treatment for a sex offender who is incarcerated at the ADTC. This requirement shall not apply when the offender is incarcerated in another facility.

**Exception: Life Imprisonment without Parole (N.J.S.A. 2C:47-3(j)):** An offender who is sentenced to a term of life imprisonment without eligibility for parole shall not be confined in the ADTC but shall be confined in another facility designated by the Commissioner.

### **§ 402: COMMUNITY SUPERVISION FOR LIFE (CSL) OR PAROLE SUPERVISION FOR LIFE (PSL) (N.J.S.A. 2C:43-6.4)**

*Note: CSL sentences apply to offenses committed on or after October 31, 1994 and before January 14, 2004. If an offense occurred on or after January 14, 2004, see the next section on Parole Supervision for Life sentences.*

#### **§ 402.1 Community Supervision for Life (CSL)**

A term of community supervision for life (CSL) shall be imposed for convictions for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to N.J.S.A. 2C:13-1(c)(2), endangering the welfare of a child by engaging in sexual conduct pursuant to N.J.S.A. 2C:24-4(a), luring, or an attempt to commit these offenses, if the offense occurred on or after October 31, 1994 and before January 14, 2004.

Community supervision begins immediately upon the defendant's release from incarceration or immediately if the court suspends imposition of the sentence. N.J.S.A. 2C:43-6.4(b).

**Failure to Impose:** Where the court imposed probation, but did not impose CSL, double jeopardy protections preclude it from being added after the defendant had completed the probation sentence. *State v. Schubert*, 212 N.J. 295, 305-08 (2012).

**Guilty Pleas:** Defense counsel must adequately advise the defendant that a guilty plea will result in CSL, which is a penal consequence. *State v. Perez*, 220 N.J. 423, 440 (2015). *See also State v. Smullen*, 437 N.J. Super. 102, 109-10 (App. Div. 2014), in which the Appellate Division required defense counsel to advise the defendant that a guilty plea will result in CSL, and how

the consequences would affect defendant, an out-of-state resident, before engaging in plea negotiations with the State.

**CSL Violations and Extended Terms:** Because the consequences of PSL are more severe than those of CSL, a defendant who commits an offense listed in N.J.S.A. 2C:43-6.4(e) while serving CSL may not be sentenced to an extended term without the possibility of parole (the sentence required if the defendant had committed the offense while on PSL). *State v. Perez*, 220 N.J. at 442. The Supreme Court held that the 2003 statutory amendment (effective January 14, 2004), to N.J.S.A. 2C:43-6.4(e) violated the Ex Post Facto Clauses of the Federal and State Constitutions because it enhanced the punitive consequences for a defendant sentenced under CSL. *See also* § 402.5 below on Violations and the Retroactive Application of the 2014 Amendment.

### **§ 402.2. Parole Supervision for Life (PSL) (N.J.S.A. 2C:43-6.4)**

*Note: Prior to January 14, 2004, N.J.S.A. 2C:43-6.4 required imposition of community supervision for life (CSL) for offenses committed on or after October 31, 1994 and before January 14, 2004 -- See above section for CSL. This statute was amended, effective January 14, 2004, to replace CSL with Parole Supervision for Life (PSL).*

N.J.S.A. 2C:43-6.4 requires imposition of parole supervision for life (PSL) in addition to any other sentence authorized by Title 2C, for the following offenses committed on or after January 14, 2004: aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to N.J.S.A. 2C:13-1(c)(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to N.J.S.A. 2C:24-4(a), endangering the welfare of a child pursuant to N.J.S.A. 2C:24-4(b)(3), (b)(5)(b)(i) or (ii), luring, or an attempt to commit any of these offenses.

**Parole Supervision for Life Upon Motion by the Prosecutor:** If the defendant is convicted of endangering the welfare of a child in violation of N.J.S.A. 2C:24-4(b)(4), N.J.S.A. 2C:24-4(b)(5)(a) (effective 1/16/18), N.J.S.A. 2C:24-4(b)(5)(b)(iii) (effective 2/1/18), or a leader of a child pornography network(N.J.S.A. 2C:24-4.1) (effective 2/1/18), or an attempt to commit any of these offenses, the court shall impose a sentence of parole supervision for life if the prosecutor so requests, unless the court finds that the sentence "is not needed to protect the community or deter the defendant from future criminal activity." N.J.S.A. 2C:43-6.4(a).

**Probation Not Permitted N.J.S.A. 2C:43-2(g):** When a person is convicted of an offense requiring a term of CSL or PSL under N.J.S.A. 2C:43-6.4(a), the court may not sentence the defendant to be placed on probation.

### **§ 402.3. Commencement Date**

If a defendant receives a custodial sentence, parole supervision commences upon the defendant's release from incarceration. If a defendant is serving multiple custodial sentences, the term of parole supervision does not begin until the defendant is "actually released from incarceration for the other offense." N.J.S.A. 2C:43-6.4(b).

If the court suspends imposition of a custodial sentence, the court may not suspend imposition of parole supervision for life. When a sentence is suspended, parole supervision begins



immediately and supervision is to be provided by the Division of Parole, as opposed to the Probation Division. N.J.S.A. 2C:43-6.4(b).

#### **§ 402.4. Conditions of PSL**

**General Conditions:** A person serving a special sentence of PSL shall be supervised by the Division of Parole and be subject to conditions appropriate to protect the public and foster rehabilitation. *See* N.J.S.A. 2C:43-6.4(b).

Pursuant to N.J.S.A. 2C:43-6.4(f), the special sentence of PSL may include certain internet access conditions.

#### **§ 402.5: Violations (N.J.S.A. 2C:43-6.4(d))**

On July 14, 2014, a violation of Parole Supervision for Life was upgraded from a fourth degree to a third degree crime, with a presumption of imprisonment, unless the court is clearly convinced that the interests of justice so far outweigh the need to deter this conduct and the interest in public safety that a sentence to imprisonment would be a manifest injustice.

**Retroactive Application of the 2014 Amendment:** In *State v. Hester*, 233 N.J. 381 (2018), the Supreme Court considered the constitutionality of the retroactive application of the 2014 amendment to N.J.S.A. 2C:43-6.4 for defendants who were sentenced to CSL prior to the amendment, which upon conviction for a violation required a presumptive term of imprisonment and converted CSL to Parole Supervision for Life. Unlike CSL, PSL authorizes the New Jersey Parole Board to revoke an offender's supervised release for a violation and return the offender to prison. The Court held that the Ex Post Facto Clauses of the Federal and State Constitutions bar the retroactive application of the 2014 amendment to defendants who were sentenced to CSL prior to the amendment.

#### **§ 402.6: Mandatory Extended Term for Violation of PSL (N.J.S.A. 2C:43-6.4(e))**

A person who, while serving a sentence of parole supervision for life commits any of the following offenses shall be sentenced to an extended term of imprisonment pursuant to N.J.S.A. 2C:43-7, which shall be served in its entirety prior to resumption of PSL: murder, (N.J.S.A. 2C:11-3), manslaughter (N.J.S.A. 2C:11-4), reckless vehicular homicide, (N.J.S.A. 2C:11-5), aggravated assault, (N.J.S.A. 2C:12-1(b)), kidnapping, (N.J.S.A. 2C:13-1), luring a child, (N.J.S.A. 2C:13-6), sexual assault, (N.J.S.A. 2C:14-2), criminal sexual contact, (N.J.S.A. 2C:14-3), endangering the welfare of a child, (N.J.S.A. 2C:24-4), leader of a child pornography network, (N.J.S.A. 2C:24-4.1(a)), second degree burglary (N.J.S.A. 2C:18-2) or possession of a weapon for an unlawful purpose (N.J.S.A. 2C:39-4(a)).

#### **§ 402.7: Termination/Release (N.J.S.A. 2C:43-6.4(c))**

An offender sentenced to CSL/PSL may petition the court to terminate the supervision. The court may, in its discretion, terminate the term of parole supervision if the offender establishes by clear and convincing evidence that the offender (1) has not committed a crime for 15 years since the last

conviction or release from incarceration, whichever is later, and (2) is not likely to pose a threat to the safety of others if released from parole supervision.

### **§ 403: MEGAN’S LAW (REGISTRATION OF SEX OFFENDERS) (N.J.S.A. 2C:7-2)**

A person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sex offense defined under N.J.S.A. 2C:7-2(b) is required to register either: (1) every 90 days if the court found that the offender’s conduct was characterized by a pattern of repetitive, compulsive behavior regardless of the date of the commission of the offense or the date of conviction for an offense enumerated in N.J.S.A. 2C:7-2(b)(1); or (2) annually upon conviction of an offense enumerated under N.J.S.A. 2C:7-2(b)(2). *See* § 406 for a chart listing the sex offenses that are subject to the registration requirements under Megan’s Law.

Failure to comply with the registration requirements is a third degree crime. N.J.S.A. 2C:7-2(d). *See State v. Timmendequas*, 460 N.J. Super. 346 (App. Div. 2019), which held that the 2007 statutory amendments increasing failure to register to a third degree crime could not apply retroactively to defendants sentenced prior to the amendments when failure to register was a fourth degree crime.

Please note that each vicinage has Superior Court judges who are designated to handle Megan’s Law proceedings.

**Termination of the Obligation to Register (N.J.S.A. 2C:7-2(f)):** Pursuant to N.J.S.A. 2C:7-2(f), a person required to register under Megan’s Law “may make application to the Superior Court of this State to terminate the registration obligation upon proof that the person has not committed an offense within 15 years following conviction or release from a correctional facility for any term of imprisonment imposed, whichever is later, and is not likely to pose a threat to the safety of others.” However, persons convicted or acquitted by reason of insanity for more than one sex offense as defined in N.J.S.A. 2C:7-2(b) or who have been convicted or acquitted by reason of insanity for aggravated sexual assault or sexual assault involving physical force or coercion (N.J.S.A. 2C:14-2(c)(1)) cannot petition the Superior Court to terminate the registration obligation. *See* N.J.S.A. 2C:7-2(g).

**Note:** Subsection (g) includes persons “adjudicated delinquent,” however, the Supreme Court has found this provision unconstitutional for juveniles adjudicated delinquent for a sex offense. *See State in Interest of C.K.*, 233 N.J. 44, 48 (2018). Therefore, a juvenile offender can apply to terminate the registration obligation fifteen years after the juvenile adjudication pursuant to N.J.S.A. 2C:7-2(f), and must demonstrate “by clear and convincing evidence that he has not reoffended and no longer poses a threat to others and therefore has a right to be relieved of his Megan’s Law obligations and his status as a sex-offender registrant.” *Id.* at 77. *See also In re Registrant G.H.*, 455 N.J. Super 515, 538 (App. Div. 2018), in which the Appellate Division concluded that subsection (g) could not be applied retroactively to registrants convicted prior to its enactment in 2002. The Supreme Court affirmed the Appellate Division decision. *In re Registrant G.H.*, 240 N.J. 113 (2019).

## § 404: INTERNET ACCESS CONDITIONS FOR CERTAIN SEX OFFENDERS (N.J.S.A. 2C:43-6.6)

Pursuant to N.J.S.A. 2C:43-6.6, the court shall order Internet access conditions for: (1) A person convicted, adjudicated delinquent or found not guilty by reason of insanity for a Megan's Law sex offense (N.J.S.A. 2C:7-2(b)) and who is required to register under *Megan's Law*, or (2) A person who is serving a special sentence of Community Supervision For Life (CSL) or Parole Supervision for Life (PSL) (N.J.S.A. 2C:43-6.4), or (3) A person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity of obscenity for persons under 18 (N.J.S.A. 2C:34-3) and the trier of fact finds that a computer or another device with Internet capability was used to facilitate the commission of the crime. Failure to comply with the Internet access restrictions is a fourth degree crime pursuant to N.J.S.A. 2C:43-6.6(b).

**Probation and Internet Access Conditions:** A defendant sentenced to probation can also be restricted from accessing the Internet pursuant to N.J.S.A. 2C:45-1(d)(2). See the July 6, 2018 Assignment Judge memorandum by Hon. Glenn A. Grant, Acting Administrative Director of the Courts, on the *Protocol for Supervision of Adult Probationers Prohibited or Restricted by Court Order from Accessing or Using a Computer or Other Device with Storage or Internet Capabilities*.

### INTERNET ACCESS CONDITIONS

- a. Prohibit person from accessing or using a computer or device with Internet capability without the prior written approval of the court except for employment or search for employment;
- b. Require the person to submit to periodic unannounced examinations of the person's computer or device with Internet capability including the retrieval, copying and removal of all data;
- c. Require the person to submit to the installation, at the person's expense, of hardware or software systems to monitor the Internet use; and
- d. Require the person to submit to other appropriate restrictions concerning the person's use or access of a computer or any other device with Internet capability.

**Constitutionality of Internet Restrictions:** In reviewing the Internet access conditions in terms of a CSL offender who was denied access to the Internet, the Supreme Court held:

Conditions imposed on CSL offenders—like those imposed on regular parolees—are intended to promote public safety, reduce recidivism, and foster the offender's reintegration into society. Arbitrarily imposed Internet restrictions that are not tethered to those objectives are inconsistent with the administrative regime governing CSL offenders. We agree with the position taken by federal courts that Internet conditions attached to the supervised release of sex offenders should not be more restrictive than necessary.

[*J.I. v. New Jersey State Parole Board*, 228 N.J. 204, 211 (2017).]

In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the United States Supreme Court held that the North Carolina law which made it a felony for sex offenders to access commercial networking sites, including common social media sites like Facebook and Twitter, was unconstitutional because it impermissibly restricted lawful speech in violation of the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment.

In *K.G. v. New Jersey State Parole Board*, 458 N.J. Super 1, 13 (App. Div. 2019), the Appellate Division held that the Parole Board's imposition of Internet monitoring conditions upon PSL offenders, including the use of monitoring software, mandatory password disclosure, and unannounced device inspections, does not facially violate the constitutional protections against unreasonable searches or the constitutional rights to privacy. Additionally, the court held that all conditions restricting Internet access, including monitoring conditions, should be reasonably tailored to the circumstances of the individual offender, "taking into account such factors as the underlying offense and any prior criminal history, whether the Internet was used as a tool to perpetrate the offense, the rehabilitative needs of the offender, and the imperative of public safety." Citing to *J.I. v. New Jersey State Parole Board*, 228 N.J. at 224.

See also *State v. R.K.*, 463 N.J. Super. 386 (App. Div. 2020), in which the Appellate Division held that a CSL condition completely banning the use of the Internet to access social media is unconstitutional on its face and impedes free speech rights. The court stated that "Supervised release conditions must be specifically designed to address the goals of recidivism, rehabilitation, and public safety, which are specifically tied to the individual parolee's underlying offenses. Statutes and regulations must not afford parole supervisors and officers unlimited personal discretion to determine what conditions are constitutionally permissive."

## **§ 405. OTHER SENTENCING PROVISIONS**

### **§ 405.1: Luring/Enticing a Child (N.J.S.A. 2C:13-6)**

A person convicted of a second or subsequent offense of luring/enticing a child shall receive a term of imprisonment with a period of parole ineligibility of one-third to one-half of the sentence imposed, or 3 years, whichever is greater. If the sentence is for an extended term under N.J.S.A. 2C:43-7, the period of parole ineligibility shall be one-third to one-half of the sentence imposed, or 5 years, whichever is greater. The court may not suspend or make any other non-custodial disposition for a person sentenced as a second or subsequent offender. *See* N.J.S.A. 2C:13-6(d).

A person convicted of luring or enticing a child who has a prior conviction for aggravated sexual assault or sexual assault (N.J.S.A. 2C:14-2), aggravated criminal sexual contact (N.J.S.A. 2C:14-3(a)), or endangering the welfare of a child (N.J.S.A. 2C:24-4) shall receive a minimum term of imprisonment of 5 years during which the person shall be ineligible for parole, unless the person is sentenced to an extended term pursuant to N.J.S.A. 2C:43-7. The court may not suspend or make any other non-custodial disposition. *See* N.J.S.A. 2C:13-6(e).

### **§ 405.2: Aggravated Sexual Assault (Jessica Lunsford Act)**

Pursuant to N.J.S.A. 2C:14-2(a), a person convicted of aggravated sexual assault by an act of sexual penetration where the victim is less than 13 years old (N.J.S.A. 2C:14-2(a)(1)) shall be

sentenced to a specific term of between 25 years and life imprisonment of which the person shall serve 25 years before being eligible for parole, unless a longer parole ineligibility term is provided under Title 2C.

**Exception:** The prosecutor, in consideration of the interests of the victim, may offer a negotiated plea agreement with a sentence to a specific term of not less than 15 years during which the person shall not be eligible for parole. If the court accepts the plea agreement it may not impose a lesser term of imprisonment or parole or a lesser parole ineligibility term than provided for in the plea agreement. N.J.S.A. 2C:14-2(d).

*See State v. A.T.C.*, 239 N.J. 450, 456 (2019), in which the Supreme Court held that the Jessica Lunsford Act (JLA), N.J.S.A. 2C:14-2(a), (d), does not violate the separation of powers principles provided that: (1) the State presents a written statement of reasons explaining the departure from the 25 year mandatory minimum sentence in N.J.S.A. 2C:14-2(a), and (2) the sentencing court reviews the prosecutor's exercise to "protect against arbitrary and capricious prosecutorial decisions." The Court requested that the JLA Guidelines previously issued by the Attorney General be amended to instruct prosecutors to provide the sentencing court with a statement of reasons for a decision to offer a defendant, in a plea agreement, a term of incarceration or a term of parole ineligibility between 15 and 25 years. *Id.* at 475.

#### **§ 405.3: Second or Subsequent Offender (N.J.S.A. 2C:14-6)**

A person convicted of a second or subsequent offense of aggravated sexual assault, sexual assault, or aggravated criminal sexual contact, or of a similar statute in any other state or the United States, shall be sentenced to a fixed minimum sentence of not less than 5 years during which the person shall not be eligible for parole, unless the person is sentenced pursuant to N.J.S.A. 2C:43-7 (extended term).

#### **§ 405.4: Endangering the Welfare of a Child (Child Pornography)**

**Distribution or Possession with Intent to Distribute Child Pornography (N.J.S.A. 2C:24-4(b)(5)(a)):** Where the offense involved at least 25 but less than 1,000 items depicting the sexual exploitation or abuse of a child, a mandatory minimum term of imprisonment must be imposed fixed at between one-third to one-half of the sentence imposed by the court, or 5 years, whichever is greater, during which the person shall be ineligible for parole.

Where the offense involved 1,000 or more items depicting the sexual exploitation or abuse of a child, a mandatory minimum term of imprisonment must be imposed fixed at between one-third to one-half of the sentence imposed by the court, or 10 years, whichever is greater, during which the person shall be ineligible for parole.

**Extended Term for Repeat Offender:** Pursuant to N.J.S.A. 2C:24-4(b)(5)(a), a conviction for a second or subsequent offense requires an extended term under N.J.S.A. 2C:43-7.

**Possession of Child Pornography (N.J.S.A. 2C:24-4(b)(5)(b)):** Where the offense involved 100 or more items depicting the sexual exploitation or abuse of a child, a sentence of imprisonment is required, unless the court after considering the character and condition of the

defendants finds that imprisonment would be a serious injustice, which overrides the need to deter such conduct by others.

**Extended Term for Repeat Offender:** Pursuant to N.J.S.A. 2C:24-4(b)(5)(b), a conviction for a second or subsequent offense requires an extended term under N.J.S.A. 2C:43-7.

**§ 405.5: Extended Term for Sexual Assault and Criminal Sexual Contact  
(N.J.S.A. 2C:44-3)**

An extended term can be imposed upon application by the prosecutor when a defendant is convicted of sexual assault (N.J.S.A. 2C:14-2) or criminal sexual contact (N.J.S.A. 2C:14-3) involving violence or threat of violence and the victim was 16 years or less pursuant to N.J.S.A. 2C:44-3(g). A crime involves violence or the threat of violence if the victim sustains serious bodily injury as defined in N.J.S.A. 2C:11-1(b), or the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon as defined in N.J.S.A. 2C:11-1(c), or threatens to inflict serious bodily injury.

A defendant may not be sentenced to an extended term pursuant to N.J.S.A. 2C:44-3(g) unless the indictment alleges that the crime involved violence or a threat of violence, as defined therein, and the victim is 16 years of age or less. *State v. Velasquez*, 391 N.J. Super. 291, 316-19 (App. Div. 2007).

For general information on extended terms see § 110 “Extended Terms.”

See the following page for a chart on sentencing adult offenders.

## § 406: SEXUAL OFFENSE CHART FOR ADULT OFFENDERS

OFFENSE (OR ATTEMPT)	MEGAN'S LAW N.J.S.A. 2C:7-2(b)(2) (Includes Adjudication of Delinquency & NGRI)	COMMUNITY SUPERVISION FOR LIFE (CSL) N.J.S.A. 2C:43-6.4	PAROLE SUPERVISION FOR LIFE (PSL) N.J.S.A. 2C:43-6.4	ADTC (AVENEL EVALUATION) N.J.S.A. 2C:47-1
Effective Date	On or After 10/31/1994	10/31/1994 to 1/13/2004	On or After 1/14/2004	
Aggrav. Sexual Assault	Yes <sup>1</sup>	Yes	Yes	Yes
Sexual Assault	Yes <sup>1</sup>	Yes	Yes	Yes
Aggravated Criminal Sexual Contact	Yes <sup>1</sup>	Yes	Yes	Yes
Criminal Sexual Contact	If victim is a minor	No	No	No
Kidnapping (N.J.S.A 2C:13- 1(c)(2))	Yes <sup>1</sup>	Yes	Yes	Yes
EWC (sexual conduct; N.J.S.A 2C:24-4(a))	Yes	Yes	Yes	Yes
EWC (causes or permits child to engage in child porn., N.J.S.A 2C:24- 4(b)(3))	Yes <sup>2</sup>	No	Yes	No
EWC (creates/ reproduces/reconstructs child porn.; N.J.S.A 2C:24- 4(b)(4))	Yes	No	Yes <sup>3</sup>	Yes
EWC (distributes or possesses child porn., N.J.S.A 2C:24-4(b)(5))	Subsection (5)(a) <sup>2</sup>	No	Yes <sup>3</sup>	Yes for offenses committed on or after 2/1/18
EWC (possesses/views/ controls items depicting sexual exploitation if offense occurred on or after 2/1/18 - N.J.S.A. 2C:24-4(b)(5)(b)(i) or (ii))	Yes	No	Yes	Yes
Leader of a Child Pornography Network if offense occurred on or after 2/1/18 (N.J.S.A. 2C:24-4.1)	Yes	No	Yes - only upon a motion of the prosecutor	Yes
Luring/Enticing	Yes	Yes	Yes	No
Kidnapping (N.J.S.A 2C:13-1)	If victim is a minor & offender is not a parent	No	No	No
Criminal Restraint (N.J.S.A 2C:13-2)	If victim is a minor & offender is not a parent	No	No	No
False Imprisonment (N.J.S.A 2C:13-3)	If victim is a minor & offender is not a parent	No	No	No
Child Prostitution if offense occurred on or after 1/8/02 (N.J.S.A 2C:34-1(b)(3) or (b)(4))	Yes	No	No	No

<sup>1</sup> Applies regardless of the dates of the commission of the offense or the conviction if the court finds the offender's conduct was characterized by a pattern of repetitive, compulsive behavior. (N.J.S.A. 2C:7-2(b)(1)).

<sup>2</sup> Applies if the offense occurred on or after 4/8/04.

<sup>3</sup> Upon motion of the prosecutor if the offense occurred on or after 8/14/13, unless the court finds that the special sentence is not needed to protect the community or deter defendant from future criminal activity. Note: subsection (b)(5) was rewritten in 2018 - subsection (b)(5)(a) requires PSL upon motion of the prosecutor for offenses committed on or after January 16, 2018, and subsection (b)(5)(b)(iii) requires PSL upon motion of the prosecutor for offenses committed on or after February 1, 2018, unless the court finds that special sentence is not needed to protect the community or deter defendant from future criminal activity.

## **§ 407: PENALTIES**

### **§ 407.1: Statewide Sexual Assault Nurse Examiner Program Fund (N.J.S.A. 2C:43-3.6)**

A person convicted of a sex offense defined in N.J.S.A. 2C:7-2 (Megan's Law) shall be assessed an \$800 penalty for each such offense.

### **§ 407.2: Surcharge for Certain Sex Offenses (N.J.S.A. 2C:43-3.7)**

A person convicted of aggravated sexual assault or sexual assault (N.J.S.A. 2C:14-2), or aggravated criminal sexual contact or criminal sexual contact (N.J.S.A. 2C:14-3), shall be assessed a surcharge of \$100 to fund programs and grants for the prevention of violence against women.

### **§ 407.3: Sex Crime Victim Treatment Fund Penalty (N.J.S.A. 2C:14-10)**

A person convicted of a sex offense as defined in N.J.S.A. 2C:7-2 (Megan's Law) shall be assessed a penalty for each offense not to exceed: \$2000 for a first degree crime; \$1000 for a second degree crime; \$750 for a third degree crime; and \$500 for a fourth degree crime.

In *State v. Bolvito*, 217 N.J. 221 (2014), the Supreme Court held that the "not to exceed" language in N.J.S.A. 2C:14-10(a) imposes a ceiling, not a floor, on the amount to be assessed. Accordingly, the judge may impose a penalty in any amount, from a nominal amount up to the statutory maximum based upon the defendant's offense. *Id.* at 231-32. Additionally, the Court identified two factors that should be evaluated when deciding the amount of this penalty. First, the court should consider the nature of the offense in determining the statutory range. Second, the court should consider the ability of the defendant to pay the amount assessed. *Id.* at 233-34.

### **§ 407.4: Sex Offender Supervision Fund Penalty (N.J.S.A. 30:4-123.97)**

Effective July 1, 2014, upon conviction of a sex offense as defined in N.J.S.A. 2C:7-2 (Megan's Law), the defendant shall be assessed a penalty of \$30 a month, unless the person's income does not exceed 149% of the federal poverty level.

## **§ 408: SEX OFFENDER RESTRAINING ORDERS (N.J.S.A 2C:44-8)**

N.J.S.A. 2C:44-8 provides that in addition to restricting defendant's contact with the victim, the court may enter an order:

- (1) restraining 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.



- (2) restraining defendant from making contact with the victim or others, including 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.
- (3) prohibiting defendant from stalking or following, or threatening to harm, to stalk or to follow, the victim or any other person named in the order in a manner that, taken in the context of past actions of defendant, would put the victim in reasonable fear that the defendant would cause the death or injury of the victim or any other person.
- (4) providing for any other appropriate restraints necessary to protect the victim.

*See* Directive # 01-10 (March 2, 2010) and the Supplement to Directive #01-10 (March 19, 2018) on the Nicole's Law Restraining Order.

**§ 409: NO CONTACT CONDITIONS OF PROBATION  
(N.J.S.A. 2C:45-2(c))**

Any court order prohibiting contact with the victim or others on a defendant convicted of a sex offense (as defined in N.J.S.A. 2C:7-2), shall continue following the termination of probation supervision, until further order of the court pursuant to N.J.S.A. 2C:45-2(c).

## **§ 500: FINES, PENALTIES, RESTITUTION, AND RESTRAINING ORDERS**

This Section addresses provisions concerning fines, penalties, restitution, and restraining orders. For provisions specific to drug offenses see § 301 and §306, and for sex offenses see § 407 to 409.

### **§ 501: IN GENERAL**

The court may, except where otherwise provided by Title 2C, sentence the defendant to pay a fine or make restitution authorized by N.J.S.A. 2C:43-3 or N.J.S.A. 2C:43-3.4 *et al.* See N.J.S.A. 2C:43-2(b)(1). The court may also sentence the defendant to pay a fine, make restitution, and probation, or pay a fine, restitution, and imprisonment. See N.J.S.A. 2C:43-2(b)(4). *Note:* certain statutes require imposition of a fine, penalty, or restitution upon conviction.

### **§ 502: AMOUNTS (N.J.S.A. 2C:43-3)**

A person who has been convicted of an offense may be sentenced to pay a fine, restitution, or both, such fine not to exceed:

- (a) (1) First degree crime - up to \$200,000;  
(2) Second degree crime - up to \$150,000;
- (b) (1) Third degree crime - up to \$15,000;  
(2) Fourth degree crime - up to \$10,000;
- (c) Disorderly persons offense - up to \$1,000;
- (d) Petty disorderly persons offense - up to \$500;
- (e) Any higher amount equal to double the pecuniary gain to the offender or loss to the victim caused by the conduct constituting the offense by the offender;
- (f) Any higher amount specifically authorized by another section of Title 2C or any other statute;
- (g) Up to twice the amounts authorized in subsections (a) through (d) of this statute, in the case of a second or subsequent conviction of any tax offense defined in Title 54 or Title 54A, as amended and supplemented, or of any offense defined in chapter 20 or 21 of Title 2C;
- (h) In the case of violations of chapter 35 (“Controlled Dangerous Substances”), any higher amount equal to three times the street value of the controlled dangerous substance or controlled substance analog.

### **§ 503: CRITERIA FOR IMPOSING FINES AND RESTITUTION**

#### **§ 503.1: Fines**

Pursuant to N.J.S.A. 2C:44-2(a), the court may sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation if:

- The defendant has derived a pecuniary gain from the offense, or the court is of opinion that a fine is specially adapted to deterrence of the type of offense involved or to the correction of the offender;

- The defendant is able, or given a fair opportunity to do so, will be able to pay the fine; and
- The fine will not prevent the defendant from making restitution to the victim of the offense.

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

*See State v. Ferguson*, 273 N.J. Super. 486, 500 (App. Div. 1994), requiring the court to “state on the record the reasons for imposing the sentence, including [its] findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-1 to 2C:44-3.” The court also cited to R. 3:21-4(g) (“Reasons for Sentence”), which states “At the time sentence is imposed the judge shall state reasons for imposing such sentence including findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-1 to -3; the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence; and, if applicable, the reasons for ordering forfeiture of public office, position or employment, pursuant to N.J.S.A. 2C:51-2.”

*See also* CANNEL, CRIMINAL CODE ANNOTATED, comment to N.J.S.A. 2C:43-3 stating “Because a fine is a form of punishment, the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies so that facts increasing the maximum potential fine must be submitted to the jury or admitted by the defendant. *Southern Union Company v. United States*, 567 U.S. 343 (2012).”

### **§ 503.2: Restitution (N.J.S.A. 2C:44-2(b))**

The court shall sentence a defendant to pay restitution in addition to a sentence of imprisonment or probation if:

- (1) The victim, or in the case of a homicide, the nearest relative of the victim, suffered a loss; and
- (2) The defendant is able to pay or, given a fair opportunity, will be able to pay restitution.

N.J.S.A. 2C:43-3(h) provides:

The restitution ordered paid to the victim shall not exceed the victim’s loss, except in cases involving the failure to pay any State tax, the amount of restitution to the State shall be the full amount of the tax avoided or evaded, including full civil penalties and interest as provided by law. In any case where the victim of the offense is any department or division of State government, the court shall order restitution to the victim. Any restitution imposed on a person shall be in addition to any fine which may be imposed pursuant to this section.

In determining the amount and method of payment of restitution, N.J.S.A. 2C:44-2(c)(2) provides:

[T]he court shall take into account all financial resources of the defendant, including the defendant’s likely future earnings, and shall set the amount of restitution so as to provide the victim with the fullest compensation for loss that is

consistent with the defendant's ability to pay. The court shall not reduce a restitution award by any amount that the victim has received from the Violent Crimes Compensation Board, but shall order the defendant to pay any restitution ordered for a loss previously compensated by the Board to the Violent Crimes Compensation Board. If restitution to more than one person is set at the same time, the court shall set priorities of payment.

Additional guidance on restitution was provided by the Supreme Court in *RSI Bank v. Providence Mutual*, 234 N.J. 459, 476-78 (2018), as follows:

[R]estitution serves to rehabilitate the wrongdoer and to compensate the victim of the wrongdoer's conduct. *State v. Newman*, 132 N.J. 159 (1993). An order of restitution is designed 'to strip a defendant of pecuniary gain from the crime where that gain is directly related to the crime itself and the defendant has the ability (though not necessarily the immediate means) to pay.' *State v. Pulasty*, 259 N.J. Super. 274, 283 (App. Div. 1992). As such, a restitution order is distinct 'from a civil judgment, which is intended to make the victim whole.' *Felicioni v. AOC*, 404 N.J. Super. 382, 394 (App. Div. 2008).

A court imposing restitution must 'conduct at least a summary hearing' to determine the ability to pay. *State v. Paladino*, 203 N.J. Super. 537, 547 (App. Div. 1985)... In setting the restitution amount and the schedule for payment, the court shall take into account all financial resources of the defendant, including the defendant's likely future earnings, and shall set the amount of restitution so as to provide the victim with the fullest compensation for loss that is consistent with the defendant's ability to pay. N.J.S.A. 2C:44-2(c)(2).

When a sentencing court has not conducted a meaningful evaluation of a defendant's ability to pay, appellate courts routinely vacate restitution orders and remand for reconsideration... Thus, in the sentencing context, a restitution order will not survive appellate review if the sentencing court has not specified the restitution amount and determined whether the defendant will be capable of paying the amount required.

See *State v. Scribner*, 298 N.J. Super. 366, 371-72 (App. Div. 1997), as to the imposition of joint and several liability for restitution among co-defendants and requiring the sentencing judge "to consider defendant's ability to pay before imposition of a specific restitutionary figure and before imposition of joint and several responsibility for the obligation." See also the October 30, 2020 Memorandum to Assignment Judges by Hon. Glenn A. Grant and Bench Card regarding "Imposing Joint and Several Restitution in Multi-Defendant Criminal Division Cases."

### **§ 503.3: Time and Method of Payment (N.J.S.A. 2C:46-1(a))**

The court may grant permission for the payment to be made within a specified period of time or in specified installments when a defendant is sentenced to pay an assessment pursuant to N.J.S.A. 2C:43-3.1 (Victims of Crime Compensation Office (VCCO)), a fine, a penalty pursuant to N.J.S.A. 2C:35-15 (Drug Enforcement and Demand Reduction (DEDR)), a forensic laboratory fee imposed pursuant to N.J.S.A. 2C:35-20, a penalty imposed pursuant to N.J.S.A. 2C:43-3.5

(Drug Abuse Education Fund (DAEF)), a penalty imposed pursuant to N.J.S.A. 2C:43-3.6 (Sexual Assault Nurse Examiner Program Fund (SANEPF)), or penalty imposed pursuant to N.J.S.A. 2C:14-10 (Sex Crime Victim Treatment Fund), or to make restitution.

If no such permission is embodied in the sentence, the assessment, fine, penalty, fee or restitution shall be payable forthwith, and the court shall file a copy of the judgment of conviction with the Clerk of the Superior Court.

*Note:* A sentencing court has no authority to enter a civil consent judgment for restitution that was agreed to as part of a plea agreement. *See State v. Masce*, 452 N.J. Super. 347, 353-54 (App. Div. 2017), in which the Appellate Division stated:

The Legislature did not provide for entry of a civil judgment in favor of a victim even in the event of a default in payment of restitution by a defendant. Courts are not permitted to impose an alternative sentence in anticipation of a default; courts may respond only after non-payment, and then only in accordance with the statutory framework. N.J.S.A. 2C:44-2(d). Upon default, and after a motion is filed, a hearing held, and a finding made by the court that the default was without good cause and willful, a court can take the actions set forth in N.J.S.A. 2C:46-2(a) and (b). Although a number of options are available under those sections, the entry of a civil judgment is not among them.

### **§ 504: Nonpayment (N.J.S.A. 2C:46-2)**

For a default in payment, the court shall afford the person notice and an opportunity to be heard. The standard of proof shall be by a preponderance of the evidence, and the burden of establishing good cause for a default shall be on the person who defaulted. N.J.S.A. 2C:46-2(a). Effective January 1, 2021, N.J.S.A. 2C:46-2(a)(1) was revised to make the consequences for when the person defaults without good cause discretionary rather than mandatory.

Specifically, if the court finds that the person has defaulted without good cause, the court may:

- (a) order the suspension of the driver's license or the nonresident reciprocity driving privilege of the person; or
- (b) prohibit the person from obtaining a driver's license or exercising reciprocity driving privileges until the person has made all past due payments; or
- (c) take such other actions authorized by law.

The court shall notify the Chief Administrator of the New Jersey Motor Vehicle Commission of any action taken pursuant to subsection (a)(1).

#### **§ 504.1: Willful Default (N.J.S.A. 2C:46-2(a)(2))**

If the court finds that the person defaulted without good cause and finds that the default was willful, the court may, in addition to the action required by subsection (a)(1), impose a term of imprisonment or participation in a labor assistance program or enforced community service. These options shall not reduce the amount owed by the person in default. The term of

imprisonment or enforced community service or participation in a labor assistance program in such case shall be specified in the order of commitment. It need not be equated with any particular dollar amount but, in the case of a fine it shall not exceed one day for each \$50 of the fine nor shall it exceed a period of 90 consecutive days. The total period of imprisonment for a disorderly persons offense for both the sentence of imprisonment and failure to pay a fine cannot exceed 6 months.

#### **§ 504.2: Other Actions**

N.J.S.A. 2C:46-2(a)(3) provides that except where incarceration is ordered pursuant to subsection (a)(2), if the court finds that the person has defaulted the court may take one or more of the following actions:

- (a) the court shall take appropriate action to modify or establish a reasonable schedule for payment;
- (b) in the case of a fine, if the court finds that the circumstances that warranted the fine have changed or that it would be unjust to require payment, the court may revoke or suspend the fine or the unpaid portion of the fine; or
- (c) if the defendant has served jail time for default on a court-imposed financial obligation, the court may order that credit for each day of confinement be given against the amount owed. The amount of the credit shall be determined at the discretion of the court but shall be not less than \$50 for each day of confinement served.

#### **§ 504.3: Civil Judgment**

Pursuant to N.J.S.A. 2C:46-2(b), a civil judgment can be sought against the defendant for any unpaid balance of a fine, assessment, penalties, or restitution. A victim can also institute summary collection proceedings upon a default in payment of restitution under N.J.S.A. 2C:46-2(c). The Violent Crimes Compensation Office (VCCO) can also pursue a summary collection proceeding for a default in payment of the VCCO penalty under N.J.S.A. 2C:46-2(d).

#### **§ 505: PETITION FOR REVOCATION OF A FINE (N.J.S.A. 2C:46-3)**

A defendant may also petition the court for revocation of a fine or of any unpaid portion at any time under N.J.S.A. 2C:46-3. If the court finds that the circumstances have changed, or that it would be otherwise unjust to require payment, the court may revoke the fine or the unpaid portion in whole or in part.

#### **§ 506: MANDATORY PENALTIES, FINES, OR ASSESSMENTS**

The following are offenses that require imposition of a penalty or a fine upon conviction. Please review the current statute for the most up-to-date provisions.

##### **§ 506.1: Human Trafficking (N.J.S.A. 2C:13-8)**

A first degree conviction for human trafficking requires a fine of not less than \$25,000 pursuant to N.J.S.A. 2C:13-8(d).

### **§ 506.2: Assisting in Human Trafficking (N.J.S.A. 2C:13-9)**

A second degree conviction for assisting in human trafficking requires a fine of at least \$15,000 pursuant to N.J.S.A. 2C:13-9(c)(1).

### **§ 506.3: Advertising Commercial Sexual Abuse of a Minor (N.J.S.A. 2C:13-10)**

A first degree conviction requires a fine of at least \$25,000 pursuant to N.J.S.A. 2C:13-10(c).

### **§ 506.4: Auto Theft Penalty or Unlawful Taking Penalty (N.J.S.A. 2C:20-2.1)**

In addition to any other disposition, a person convicted under the provisions of Chapter 20 in Title 2C of theft or unlawful taking of a motor vehicle can be sentenced as follows:

- For the first offense, to a penalty of \$500.00 and to the suspension or postponement of the person's driver's license for one year – Note effective 1/1/2021 this provision has been amended to provide for a discretionary license suspension “not to exceed one year.”
- For a second offense, to a penalty of \$750.00 and to the suspension or postponement of the person's driver's license for two years -- Note effective 1/1/2021 this provision has been amended to provide for a discretionary license suspension “not to exceed two years.”
- For a third or subsequent offense, to a penalty of \$1,000.00, and to the suspension or postponement of the person's driver's license for 10 years -- Note effective 1/1/2021 this provision has been amended to provide for a discretionary license suspension “not to exceed ten years.”

Pursuant to N.J.S.A. 2C:20-2.1(b), the suspension or postponement of the driver's license shall commence on the day the sentence is imposed. If the defendant has a driver's license from another jurisdiction, the court shall not collect the license but shall notify the Director of the N.J. Division of Motor Vehicles who shall notify the appropriate officials in the licensing jurisdiction.

*Note: See State in Interest of N.S.*, 272 N.J. Super. 492, 497 (Ch. Div. 1993), in which the Family Part judge did not impose this penalty on the juvenile adjudication which, if committed by an adult, would constitute receiving stolen property in violation of N.J.S.A. 2C:20-7. The court found that “in the absence of a specific provision in the Code of Juvenile Justice attaching a penalty to a given offense, and in the absence of specific language in the Criminal Code imposing a given sanction on juveniles adjudicated delinquent, penalties set out in the Criminal Code should not be imposed on juveniles in the Family Part.” *See also State in Interest of V.M.*, 279 N.J. Super. 535, 539 (App. Div. 1995), in which the Appellate Division found that the penalty under N.J.S.A. 2C:20-2.1 did not apply to a juvenile adjudicated delinquent and sentenced to an adjournment of “formal entry of disposition” under N.J.S.A. 2A:4A-43(b)(1), because the Legislature had not expressly provided for it in that statute.

**§ 506.5: Additional Penalty for Certain Offenses Involving the Taking of Property or Leader of a Cargo Theft Network or Theft from a Cargo Carrier (N.J.S.A. 2C:20-2.5)**

In addition to any other disposition, a person convicted under Chapter 20 of Title 2C for an offense involving the taking of property by a fiduciary, or a person convicted under N.J.S.A. 2C:20-2.4 *et al.* for a leader of a cargo theft network or operating a facility for the sale or storage of property stolen from a cargo carrier, shall be subject to the following penalties for a:

- First Degree crime or any crime where the person has a prior conviction for a crime defined in Chapter 20 of Title 2C - \$5,000
- Second Degree crime - \$ 2,500
- Third Degree crime - \$ 500.

**§ 506.6: Business of Criminal Usury (N.J.S.A. 2C:21-19)**

Pursuant to N.J.S.A. 2C:21-19(b), the court shall impose a fine of not more than \$250,000 for the second degree crime of business of criminal usury.

**§ 506.7: Trademark Counterfeiting (N.J.S.A. 2C:21-32)**

Pursuant to N.J.S.A. 2C:21-32(d), a fine is required to be imposed in an amount up to threefold the retail value of the items or services involved, that shall not exceed the following:

- Crime of the Second Degree - \$500,000.00
- Crime of the Third Degree - \$250,000.00
- Crime of the Fourth Degree - \$100,000.00

**§ 506.8: Unlawful Disposition of Body Parts (N.J.S.A. 2C:22-2)**

A conviction requires the court to impose a fine of not more than \$50,000.

**§ 506.9: Surcharge for Domestic Violence (N.J.S.A. 2C:25-29.4)**

The court shall impose a \$100 surcharge for persons convicted of an act of domestic violence as defined under N.J.S.A. 2C:25-19. The Domestic Violence Surcharge does not apply to attempts, including attempted murder since attempts are not included in the definition of offenses in N.J.S.A. 2C:25-19. *State v. Lee*, 411 N.J. Super. 349 (App. Div. 2010).

**§ 506.10: Harm to Law Enforcement Agency Animal (N.J.S.A. 2C:29-3.1)**

A \$15,000 fine is required for a conviction for purposefully killing the animal or search and rescue dog. *See* N.J.S.A. 2C:29-3.1(a).

**§ 506.11: Public Corruption Profiteering Penalty (N.J.S.A. 2C:30-8)**

N.J.S.A. 2C:30-8(d) provides that upon the prosecutor's motion for the crimes in subsection (c), including but not limited to a violation of Chapters 21, 27, 28, 29, or 30 of Title 2C, or an



attempt or conspiracy involving the negotiation, award, performance or payment of a local, county or State contract, the court shall assess a public corruption profiteering penalty:

- First degree - \$500,000;
- Second degree -\$250,000;
- Third degree - \$75,000; or
- An amount equal to 3 times the value of any property involved.

Note: Subsection (e) permits the court for good cause to establish a payment plan.

#### **§ 506.12: Prostitution (N.J.S.A. 2C:34-1)**

For a conviction under subsection (b)(2), (3), (4), (5), (6) or (7), a penalty is required of at least \$10,000 but not more than \$50,000, except if the offense involved promotion of prostitution of a child under 18, then the penalty shall be at least \$25,000. *See* N.J.S.A. 2C:34-1(f)(2)).

#### **§ 506.13: Promoting Gambling (N.J.S.A. 2C:37-2)**

The court shall impose a fine of not more than \$35,000 for the third degree crime of promoting gambling. For a fourth degree conviction, the court shall impose a fine of not more than \$25,000. A disorderly persons offense requires a fine of not more than \$10,000. *See* N.J.S.A. 2C:37-2(b)(2).

#### **§ 506.14: Possession of Gambling Records (N.J.S.A. 2C:37-3)**

The court shall impose a fine of not more than \$35,000 for the third degree crime of possession of gambling records, otherwise it is a disorderly persons offense subject to a fine of not more than \$20,000. *See* N.J.S.A. 2C:37-3(c).

#### **§ 506.15: Maintenance of Gambling Resort (N.J.S.A. 2C:37-4)**

The court shall impose a fine of not more than \$25,000 for this fourth degree crime.

#### **§ 506.16: Producing or Possessing Chemical Weapons, Biological Agents or Nuclear or Radiological Devices (N.J.S.A. 2C:38-3)**

For a second degree conviction under subsection (b), the court shall impose a fine of up to \$250,000 for each violation pursuant to N.J.S.A. 2C:38-3(b).

#### **§ 506.17: Dispensing Contact Lenses Without a License (N.J.S.A. 2C:40-25)**

This fourth degree crime requires a fine of: (1) not less than \$1,000 for a first offense, (2) not less than \$5,000 and 40 hours of community service for a second offense, and (3) not less than \$10,000 and 100 hours of community service for a third and subsequent offense.

**§ 506.18: Victims of Crimes Compensation Office (VCCO)  
Assessment (N.J.S.A. 2C:43-3.1)**

N.J.S.A. 2C:43-3.1(a)(1) provides that “Any person convicted of a crime of violence, theft of an automobile pursuant to N.J.S.A. 2C:20-2, eluding a law enforcement officer pursuant to N.J.S.A. 2C:29-2(b) or unlawful taking of a motor vehicle pursuant to N.J.S.A. 2C:20-10(b), (c), or (d) shall be assessed at least \$100.00, but not to exceed \$10,000.00 for each such crime for which he was convicted which resulted in the injury or death of another person. In imposing this assessment, the court shall consider factors such as the severity of the crime, the defendant’s criminal record, defendant’s ability to pay and the economic impact of the assessment on the defendant’s dependents.”

N.J.S.A. 2C:43-3.1(a)(2) provides that “Any person convicted of any disorderly persons offense, any petty disorderly persons offense, or any crime not resulting in the injury or death of any other person shall be assessed \$50.00 for each such offense or crime for which he was convicted.”

N.J.S.A. 2C:43-3.1(c) provides that “Any person convicted of operating a motor vehicle, commercial motor vehicle or vessel while under the influence of liquor or drugs shall be assessed \$50.00.”

N.J.S.A. 2C:43-3.1(d) provides that “In addition to any term or condition that may be included in an agreement for supervisory treatment pursuant to N.J.S.A. 2C:43-13 (PTI) or imposed as a term or condition of conditional discharge pursuant to N.J.S.A. 2C:36A-1, a participant in either program shall be required to pay an assessment of \$50.00.”

**§ 506.19: Safe Neighborhoods Services Fund (SNSF)  
(N.J.S.A. 2C:43-3.2)**

Any person convicted of a crime, disorderly persons offense, or petty disorderly persons offense or violation of N.J.S.A. 39:4-50 (DWI) shall be assessed \$75 for each conviction. In addition to any term or condition that may be included in an agreement for supervisory treatment pursuant to N.J.S.A. 2C:43-13 (PTI) or imposed as a term or condition of conditional discharge pursuant to N.J.S.A. 2C:36A-1, a participant in either program shall be required to pay an assessment of \$75.

**§ 506.20: Law Enforcement Officers Training Equipment Fund (LEOTEF)  
(N.J.S.A. 2C:43-3.3)**

Any person convicted of a crime shall be assessed a penalty of \$30. One penalty is assessed per sentence, regardless of the number of counts or indictments.

**§ 506.21: Computer Crime Prevention Fund (N.J.S.A. 2C:43-3.8)**

Persons convicted of or adjudicated delinquent for a violation of N.J.S.A. 2C:24-4(b)(3) (causes or permits child to engage in sexual act photographed or exhibited committed on or after February 1, 2018), N.J.S.A. 2C:24-4(b)(4) (photographs or films a child in sexual act committed on or after February 1, 2018), N.J.S.A. 2C:24-4(b)(5)(b) (knowingly possessing or knowingly viewing child pornography), N.J.S.A. 2C:24-4.1 (leader of a child pornography network

committed on or after February 1, 2018), N.J.S.A. 2C:34-3 (selling, distributing or exhibiting obscene material to a person under the age of 18), or an offense involving computer criminal activity in violation of any provision of Title 2C, Chapter 20, shall be assessed the following for each offense:

- \$2,000 in the case of a crime of the first degree;
- \$1,000 in the case of a crime of the second degree;
- \$750 in the case of a crime of the third degree;
- \$500 in the case of a crime of the fourth degree;
- \$250 in the case of a disorderly persons or petty disorderly persons offense.

#### **§ 506.22: Probation Supervision Fee (N.J.S.A. 2C:45-1)**

As a condition of a probation sentence, the court shall order a defendant to pay a fee not to exceed \$25 per month for the probationary term. This fee may be waived for indigency. *See* N.J.S.A. 2C:45-1(d)(1).

### **§ 507: DISCRETIONARY FINES**

The following are offenses that have fines that are at the court's discretion. Please review the current statute for the most up-to-date provisions.

#### **§ 507.1: Invasion of Privacy (N.J.S.A. 2C:14-9)**

Pursuant to N.J.S.A. 2C:14-9(c), the court may impose a fine not to exceed \$30,000 for the third degree crime of disclosure of any photograph, film, videotape, recording or any other reproduction of an image taken in violation of subsection (b).

#### **§ 507.2: Additional Fine for Auto Theft (N.J.S.A. 2C:20-2.2)**

If the fair market value of the automobile and its contents at the time it was stolen exceeds \$7,500.00 and the automobile is not recovered, the court may sentence the defendant to pay a fine for that higher amount.

#### **§ 507.3: Leader of Cargo Theft Network (N.J.S.A. 2C:20-2.4)**

For a conviction for first degree leader of a cargo theft network, the court may impose a fine not to exceed \$500,000 or five times the retail value of the property seized at the time of arrest, whichever is greater pursuant to N.J.S.A. 2C:20-2.4(a)(2).

For a second degree conviction, the court may impose a fine not to exceed \$250,000 or five times the retail value of the property seized at the time of arrest, whichever is greater pursuant to N.J.S.A. 2C:20-2.4(a)(1).

#### **§ 507.4: Theft from a Cargo Carrier (N.J.S.A. 2C:20-2.6)**

Upon conviction, the court may impose a fine not to exceed \$250,000 or five times the retail value of the property stolen from the carrier seized at the time of the arrest, whichever is greater

pursuant to N.J.S.A. 2C:20-2.6(b).

**§ 507.5: Leader of Organized Retail Theft Enterprise  
(N.J.S.A. 2C:20-11.2)**

Upon conviction for this second degree crime, the court may impose a fine not to exceed \$250,000 or five times the retail value of the merchandise seized at the time of the arrest, whichever is greater.

**§ 507.6: Leader of Auto Theft Trafficking Network  
(N.J.S.A. 2C:20-18)**

Upon conviction for this second degree crime, the court may impose a fine not to exceed \$250,000 or five times the retail value of the automobiles seized at the time of the arrest, whichever is greater.

**§ 507.7: Participation in Pyramid Promotional Scheme (N.J.S.A. 2C:20-39)**

N.J.S.A. 2C:20-39 permits a fine not to exceed \$250,000 for a second degree conviction.

**§ 507.8: Health Care Claims Fraud (N.J.S.A. 2C:21-4.3)**

N.J.S.A. 2C:21-4.3(c) provides that a person convicted for knowingly committing health care claims fraud may be subject to a fine of up to five times the pecuniary benefit obtained or sought to be obtained. N.J.S.A. 2C:21-4.3(d) provides that a person convicted for recklessly committing health care claims fraud may be subject to a fine of up to five times the pecuniary benefit obtained or sought to be obtained.

**§ 507.9: New Jersey Anti-Piracy Act (N.J.S.A. 2C:21-21)**

Pursuant to N.J.S.A. 2C:21-21(d), the court may impose the following fines:

- Up to \$250,000 for any offense, which involves at least 1,000 unlawful sound recordings or at least 65 audiovisual works within any 180-day period.
- Up to \$150,000 for any offense, which involves more than 100 but less than 1,000 unlawful sound recordings or more than 7 but less than 65 unlawful audiovisual works within any 180-day period.
- Up to \$25,000 for any offense not described above for a first offense.
- For a second offense, a fine of up to \$50,000.
- For a third and subsequent offense, a fine of up to \$100,000.

**§ 507.10: Money Laundering (N.J.S.A. 2C:21-27)**

Pursuant to N.J.S.A. 2C:21-27(a), the court may impose a fine not to exceed \$500,000 for a conviction for money laundering. *See also* Anti-Money Laundering Profiteering Penalty under N.J.S.A. 2C:21-27.1 and 27.2 for imposition of the anti-money laundering profiteering penalty upon application of the prosecutor.

### **§ 507.11: Leader of a Firearms Trafficking Network (N.J.S.A. 2C:39-16)**

Upon conviction for this first degree crime, the court may impose a fine not to exceed \$500,000 or five times the value of the firearms involved, whichever is greater.

## **§ 508: SPECIFIC RESTITUTION PROVISIONS**

The following are offenses that specifically include provisions for restitution. Please review the current statute for the most up-to-date provisions.

### **§ 508.1: Restitution for Murder (N.J.S.A. 2C:11-3c)**

In addition to any other provisions requiring restitution, persons convicted of murder shall be required to pay restitution to the nearest surviving relative of the victim. The court shall determine the amount and duration of the restitution pursuant to N.J.S.A. 2C:43-3 and the provisions of Chapter 46 of Title 2C.

### **§ 508.2: Restitution for Interference With Custody (N.J.S.A. 2C:13-4)**

A conviction under subsection (a) for interference with the custody of children requires restitution of all reasonable expenses and costs, including reasonable counsel fees, incurred by the parent in securing the child's return pursuant to N.J.S.A. 2C:13-4(f)(1).

### **§ 508.3: Human Trafficking (N.J.S.A. 2C:13-8)**

A conviction requires restitution to the victim which is the greater of: (1) the gross income or value to the defendant of the victim's labor or services; or (2) the value of the victim's labor or services pursuant to N.J.S.A. 2C:13-8(e).

### **§ 508.4: Restitution and Fines for Trespass (N.J.S.A. 2C:18-6)**

A conviction of an offense under N.J.S.A. 2C:18-4 *et seq.* requires the court to impose restitution and a fine of not less than \$500 for a third degree crime; not less than \$200 for a fourth degree crime; and not less than \$100 for a disorderly persons offense pursuant to N.J.S.A. 2C:18-6(b). *See* also subsection (c) for convictions under N.J.S.A. 2C:18-5 for payment of expenses for damage to property.

### **§ 508.5: Restitution and Fine for Theft of Services (N.J.S.A. 2C:20-8)**

Pursuant to N.J.S.A. 2C:20-8(k), for a conviction of theft of services, the court shall order restitution to the vendor and impose a minimum fine of \$500.00 for each offense. In determining the amount of restitution, the court shall consider the costs expended by the vendor, including but not limited to the repair and replacement of damaged equipment, the cost of the services unlawfully obtained, investigation expenses, and attorney fees.

### **§ 508.6: Restitution for Auto Theft or Unlawful Taking (N.J.S.A. 2C:43-2.1)**

A conviction of an offense involving the theft or unlawful taking of a motor vehicle requires restitution to the owner of the motor vehicle for any reasonable and necessary expense incurred by the owner in recovering the motor vehicle and for any damage to the motor vehicle prior to its recovery by the owner. In the sentencing proceedings, the owner may submit evidence of expenses incurred and damages sustained. The court shall make a finding of the amount of expenses incurred and damages sustained, and if the record does not contain sufficient evidence to support such a finding, the court may conduct a hearing upon the issue. The court shall order the person convicted of the offense to make restitution to the owner in the amount of the expenses and damages found by the court.

### **§ 508.7: Restitution for Extradition Costs (N.J.S.A. 2C:43-3.4)**

The court may sentence a defendant to make restitution for costs incurred by any law enforcement entity in extraditing the defendant from another jurisdiction if the court finds that, at the time of the extradition, the defendant was located in the other jurisdiction in order to avoid prosecution for a crime committed in this State or service of a criminal sentence imposed by a court of this State.

## **§ 509: RESTRAINING ORDERS**

For the Drug Offender Restraining Order (DORO) see § 307 and for the Sex Offender Restraining Order (SORO) see § 408.

### **§ 509.1: Stalking Restraining Order (N.J.S.A. 2C:12-10.1)**

A judgment of conviction for stalking shall act as an application for a permanent restraining order between the defendant and the victim.

The Superior Court shall hold a hearing on the application for a permanent restraining order at the time of the verdict or guilty plea, unless the victim requests otherwise.

N.J.S.A. 2C:12-10.1(b) sets forth the possible relief that may be granted in the permanent restraining order, including:

- restraining defendant from entering the victim's residence, property, school or place of employment or other place named in the order and frequented regularly by the victim.
- restraining defendant from making contact with the victim, including making contact through an agent initiating communication likely to cause annoyance or alarm, including, personal, written, telephone or contact via electronic device with the victim, the victim's employers, employees, fellow workers, or others with whom communication would be likely to cause annoyance or alarm to the victim.

**Termination:** The Stalking Restraining Order may be dissolved upon application of the stalking victim to the court which granted the order.

## § 600: CUSTODIAL CREDITS

### § 601: JAIL CREDITS

#### § 601.1: *Rule 3:21-8* “Credit for Confinement Pending Sentence and Re-Sentence”

*R. 3:21-8* provides that defendants “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 the imposition of sentence.” The key to determining if jail credit is applicable for a period of pre-sentencing confinement is determining if the confinement was “custodial” in nature. Ordinarily, confinement is considered to be “custodial” if it is imposed by a court and is involuntary in the sense that a defendant is not at liberty to leave a facility at will. A voluntary commitment to a state psychiatric hospital for instance would not be considered custodial confinement. *State v. Towey*, 114 N.J. 69, 86 (1989).

#### § 601.2: Voluntariness of Guilty Plea

The Supreme Court, in *State v. McNeal*, 237 N.J. 494 (2019), stated that an incorrect calculation of a defendant’s jail credits may impact the voluntariness of the guilty plea. However, the Court found that where the trial court repeatedly and explicitly warned the defendant that the estimated jail credit may not affect his period of parole ineligibility and that he should not enter the plea agreement expecting as much, the defendant could not now credibly argue that he relied on the belief that the entire amount would be applied to his parole ineligibility term.

#### § 601.3: Multiple Charges

The Supreme Court’s decision in *State v. Hernandez*, 208 N.J. 24 (2011), dramatically changed the way in which jail credit is to be awarded when a defendant is sentenced on multiple charges. But see the next section on consecutive sentences for changes pursuant to *State v. C.H.*, 228 N.J. 111 (2017).

In *Hernandez*, the Court held that *R. 3:21-8* means exactly what it says: that “[t]he 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 the imposition of sentence.” [Italics added.] As a result, the awarding of “double credit” is now permissible, and defendants facing multiple sets of charges will generally receive significantly more jail credit than they would have received prior to *Hernandez*. *Hernandez* also reiterated that jail credit stops accruing on all charges when the defendant begins serving a sentence.

In *State v. Rippy*, 431 N.J. Super. 338, 348 (App. Div. 2013), the Appellate Division interpreted *Hernandez* as holding that:

A defendant is entitled to jail credits on all cases for all days of confinement after his arrest in that case and prior to imposition of the first sentence, and that is so even if a subsequent period of confinement is on an arrest for a new charge and regardless of matters of happenstance

within the prosecutor's control – such as whether bail on one or more of the prior charges has been revoked.

The court later added that pursuant to *Hernandez*:

[I]f a defendant is released and subsequently arrested and confined pending release on bail for commission of another offense, defendant is entitled to jail credits for both periods of pre-sentence confinement on the first charge and on the second charge to jail credits for the period of confinement that follows his arrest on that charge.  
[*Id.* at 352.]

#### **§ 601.4: Consecutive Sentences**

The Supreme Court modified the holding in *Hernandez* in *State v. C.H.*, 228 N.J. 111 (2017), in regards to consecutive sentences only. In *C.H.* the Court held that double credit is not allowed when a defendant is sentenced to consecutive sentences under separate indictments and receives the optimal benefit of jail credit for time simultaneously spent in pre-sentence custody. Instead, the sentences should be treated as a unified proceeding and jail credit should be applied to the front end of the aggregate sentence. As such, when a defendant is sentenced to consecutive sentences under separate indictments, jail credit is to be awarded on one of the consecutive sentences, not both/all. If one of the consecutive sentences includes a mandatory minimum term, that is, a period of parole ineligibility or NERA, jail credit should be awarded towards that sentence, i.e., should be listed on that specific JOC, in order for the defendant to receive the optimal benefit towards the aggregate sentence.

#### **§ 601.5: Violation of Probation**

When a defendant on probation is charged with a violation of probation (VOP), he/she is entitled to jail credit on that charge for any time in custody on or after the date the VOP statement of charges is filed (regardless of whether the VOP statement of charges is accompanied by a warrant or summons) – and until sentenced on the VOP or another charge. *State v. DiAngelo*, 434 N.J. Super. 443 (App. Div. 2014).

In *State v. Adams*, 436 N.J. Super. 106 (App. Div. 2014), the Appellate Division determined that a defendant in the Intensive Supervision Program (ISP) is similarly situated to a defendant on probation in that both defendants are not under the service of a sentence. Accordingly, the Appellate Division concluded that a defendant on ISP who is charged with a new crime is entitled to jail credit on the new crime for any confinement from the date of his/her arrest to the date that he/she is sentenced on the new crime or the ISP judge panel reimposes the original sentence, whichever occurs first.

#### **§ 601.6: Parole Detainers/*Harvey* Decision**

If a defendant who has been released on parole is arrested for a new offense and a parole detainer is subsequently lodged, credit ceases to accrue on the new charge and begins to accrue on the sentence from which the defendant was originally paroled. *State v. Harvey*, 273 N.J. Super. 572 (App. Div. 1994). *See also State v. Black*, 153 N.J. 438, 461 (1998), in which the Court held that



when a parolee is taken into custody on a parole warrant, the confinement is attributable to the original offense on which the parole was granted and not to any offense or offenses committed during the parolee's release.

#### **§ 601.7: Out-of-State Arrests/Extradition**

If a defendant is arrested and confined out of state on non-New Jersey charges, he is not entitled to jail credit for time spent in pre-sentence confinement until he is held solely on New Jersey charges. *State v. Joe*, 228 N.J. 125 (2017). *See also State v. Rippy*, 431 N.J. Super. 338 (App. Div. 2013), in which the Appellate Division did not award the defendant any jail credit on his multiple pending New Jersey charges for the time he was in custody on charges in Rhode Island.

#### **§ 601.8: Interstate Agreement on Detainers Act**

When a defendant is in a New Jersey jail or prison via the Interstate Agreement on Detainers Act, credit does not accrue on the New Jersey charge, but is attributable only to the sentence being served in the foreign jurisdiction. *State v. Council*, 137 N.J. Super. 306 (App. Div. 1975).

#### **§ 601.9: Drug Court; Credit for Time Served in Drug/Alcohol Rehabilitation**

The Supreme Court modified R. 3:21-8, effective September 1, 2017, to include a provision for jail credit for Drug Court participants. As a result, both Track 1 (special probation pursuant to N.J.S.A. 2C:35-14) and Track 2 (general probation pursuant to N.J.S.A. 2C:45-1) defendants shall receive jail credit on a custodial VOP sentence for time spent in a residential treatment facility for each day during which they satisfactorily complied with the terms of their Drug Court probation. In addition, the Court shall consider the recommendation of the treatment provider in determining the appropriate number of jail credits.

Voluntary participation in a residential drug/alcohol treatment program is not considered to be custodial confinement and time spent therein would thus not generally be awarded as jail credit. Time spent in a residential treatment program as a condition of probation would also not be considered custodial confinement and would not result in an award of jail credit. *State v. Reyes*, 207 N.J. Super. 126, 144 (App. Div. 1986).

#### **§ 601.10: Electronic Monitoring**

A defendant is not entitled to jail credit for the time spent in an electronic monitoring wristlet program as a condition of his pretrial release. *State v. Mastapeter*, 290 N.J. Super. 56 (App. Div. 1996).

#### **§ 602: PRIOR SERVICE CREDIT**

When a defendant is resentenced, the court should distinguish on the Judgment of Conviction which portion of the jail credit represents "prior service" of the sentence and which portion represents pre-sentencing "jail credits." Pursuant to N.J.S.A. 30:4-140, commutation credit (good-time credit) is not authorized to be awarded on jail credit. As prior service time is the service of a custodial term and not jail credit (pre-dispositional credit), commutation credit is

awarded on prior service time. The award of commutation credit impacts on the calculation of the offender's maximum expiration date and the calculation of the offender's parole eligibility date (unless a mandatory minimum term controls the parole eligibility date calculation). "Jail credit" should be awarded for any time in custody prior to the original sentencing date, while "prior service" credit should be awarded for any time spent in service of the sentence after the original sentencing date.

### **§ 603: ROSADO CREDIT**

When a defendant is sentenced to a period of confinement in a county jail as a condition of probation and he/she is subsequently charged with a violation of probation and sentenced to a term of imprisonment, he/she is entitled to credit towards the sentence of imprisonment not only for previous time served in the county jail (prior service credit), but also for time spent on county parole from the initial county jail sentence. *State v. Rosado*, 131 N.J. 423 (1993). Parole has been held to be a continuation of custody and as such, the defendant receives credit for time served *successfully* on county parole as if he had been confined for that period. *Rosado* credit stops on the date a person is discharged from county parole supervision.

### **§ 604: GAP TIME**

#### **§ 604.1: N.J.S.A. 2C:44-5(b)(2)**

Gap time is awarded pursuant to N.J.S.A. 2C:44-5(b)(2), which states, in relevant part, as follows:

When a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for an offense committed prior to the former sentence, other than an offense committed while in custody ... whether the court determines that the terms shall run concurrently or consecutively, the defendant shall be credited with time served in imprisonment on the prior sentence in determining the permissible aggregate length of the term or terms remaining to be served.

Gap time is awarded when a case meets the following three-pronged test as to a defendant who is:

- (1) sentenced to a term of imprisonment; and
- (2) is subsequently sentenced to another term of imprisonment;
- (3) for an offense that pre-dates the imposition of the first sentence.

#### **§ 604.2: Effect of Gap Time**

Gap time credit is applied to the "back end" of the sentence to reduce the aggregate sentence. *Booker v. New Jersey State Parole Board*, 136 N.J. 257 (1994). Because gap time is deducted from the aggregate sentence, it will not reduce a period of parole ineligibility. *Sheil v. New Jersey State Parole Board*, 244 N.J. Super. 521 (App. Div. 1990).

### **§ 604.3: Violation of Probation**

When a defendant is sentenced for a violation of probation (VOP) and is later sentenced for another offense, and both offenses occurred prior to the date of the VOP sentencing, the defendant should receive gap time credit from the date of the VOP sentencing to the date of the second sentencing. Gap time also applies if both sentencings involve VOPs. The date of offense when a VOP is involved is the date the VOP was officially filed. *State v. Guaman*, 271 N.J. Super. 130 (App. Div. 1994). See also *State v. DiAngelo*, 434 N.J. at 462, in which the Supreme Court stated, “Absent a showing of an abusive exercise of authority, it would be unreasonable to grant defendant credit for the custodial time elapsing prior to the filing of a VOP statement of charges.” Thus, it would seem that credit could be given prior to the filing of the VOP if the court found an abusive exercise of authority in the delay in filing the VOP.

### **§ 604.4: Parole Violations**

A defendant who commits a new offense and whose parole is revoked prior to the sentencing on the new offense is not entitled to gap time credit from the date of the parole revocation to the date of the imposition of the new sentence. Parole violations are distinguishable from violations of probation in that there is no new sentencing involved in a parole violation. Since the parole revocation is an administrative action and not a sentencing event, there is no “gap” between two sentences. *State v. Hunt*, 272 N.J. Super. 182 (App. Div. 1994).

### **§ 604.5: Out-of-State Sentences**

When a defendant commits an offense in New Jersey, is convicted and sentenced for an out-of-state offense, and is subsequently sentenced on the New Jersey offense, gap time should not be awarded on the New Jersey sentence for the time between the two sentence dates. Gap time applies only if the previous sentence is a New Jersey sentence. *State v. Carreker*, 172 N.J. 100 (2002).

### **§ 604.6: Sentences That Have Already Been Completed**

In *State v. L.H.*, 206 N.J. 528 (2011), the defendant committed a sexual assault in 1994, but was not convicted (and sentenced) until 2009, after DNA evidence tied him to the crime. Because the defendant had served, and completed, several sentences in the intervening 15 years, he was awarded 2,145 days of gap time credit. The Supreme Court unanimously agreed that the defendant was not entitled to any gap time credit, but in two separate concurring opinions, split 3-3 on the reasons why the defendant was not entitled to that credit. Three Justices concluded that gap time was available only when the defendant was currently serving a sentence – in other words, the first sentence has not expired prior to the imposition of the second sentence. The other Justices, however, concluded that there was no requirement that the sentences overlap, but the defendant should nevertheless be denied gap time credit because under the facts of this case it was impossible for the State to have manipulated the defendant’s prosecution.

### **§ 604.7: Prior Incarceration for a Title 39 Violation**

In *State v. Walters*, 445 N.J. Super. 596 (App. Div. 2016), the defendant was sentenced on DWI to a term of 180 days in the county jail. The defendant was subsequently sentenced to a three-

year state prison term for an indictable offense. At the time of the sentence in the Superior Court, the DWI sentence had already been completed. The Appellate Division concluded that, since both offenses had occurred prior to the imposition of the first sentence (DWI), the defendant was entitled to receive 94 days of gap time credit for the time spent serving the DWI sentence on the sentence for the indictable offense. As a result, gap time is now applicable to all cases where the defendant satisfies the three criteria under N.J.S.A. 2C:44-5(b)(2) and is sentenced on the subsequent sentence for an offense, i.e., the degree of the final charge is a petty disorderly offense or higher.

**§ 605: JAIL CREDITS CHART**

STATE			COUNTY	
	Statute/Regulation	Credit	Statute/Regulation	Credit
<b>Confinement Prior to Sentence</b>	R. 3:21-8	Day for day	R. 3:21-8	Day for day
<b>Commutation</b>	N.J.S.A. 30:4:140 N.J.A.C. 10A:9-5.1(a)	72 days for 1 <sup>st</sup> year Chart increases for year 2 and subsequent years	N.J.S.A. 2A:164-24	1 day for every 6
<b>Work</b>	N.J.S.A. 30:4-92 N.J.A.C. 10A:9-5.1(b)(2)	1 day for every 5 days worked	N.J.A.C. 10A:31-23.1(a)(1) N.J.A.C. 10A:31-23.1(c)	1 day for every 5 days worked
<b>Minimum Custody</b>	N.J.S.A. 30:4-92 N.J.A.C. 10A:9-5.1(b)(3)	3 days per month: 1 <sup>st</sup> year 5 days per month: thereafter	N.J.A.C. 10A:31-23.1(b)	3 days per month

# **APPENDIX A**

## **State Parole Board Parole Eligibility Table**

**STATE PAROLE BOARD  
PAROLE ELIGIBILITY TABLE**

A	B	C**	D**	E**	F**	G**
Sentence	Flat Eligibility (where no man. min.)	Commutation Credits (Note: Based on 1/3 of max minus jail credits)	Estimated Work Credits (Maximum possible)	Estimated Minimum Custody Credits (Maximum possible)	Earliest Eligibility Includes: 1. C.C. 2. Max W.C. 3. Max M.C.	Latest Eligibility Includes: 1. C.C. 2. No W.C. 3. No M.C.
Years	yrs.-mos.	days	days	days	yrs.-mos.-days	yrs.-mos.-days
1	0 - 4	24	19	8	0 - 9 - 0*	0 - 9 - 0*
2	0 - 8	48	38	16	0 - 9 - 0*	0 - 9 - 0*
3	1 - 0	72	45	22	0 - 9 - 0*	0 - 9 - 23
	1 - 1	79	48	24	0 - 9 - 0*	0 - 10 - 17
	1 - 2	86	52	26	0 - 9 - 0*	0 - 11 - 8
	1 - 3	93	57	28	0 - 9 - 7	0 - 11 - 28
4	1 - 4	100	59	30	0 - 9 - 26	1 - 0 - 20
	1 - 5	107	62	31	0 - 10 - 16	1 - 1 - 14
	1 - 6	114	66	33	0 - 11 - 3	1 - 2 - 7
	1 - 7	121	69	35	0 - 11 - 22	1 - 3 - 1
5	1 - 8	128	73	37	1 - 0 - 5	1 - 3 - 25
	1 - 9	135	76	40	1 - 0 - 22	1 - 4 - 18
	1 - 10	142	80	43	1 - 1 - 9	1 - 5 - 12
	1 - 11	149	83	46	1 - 1 - 26	1 - 6 - 5
6	2 - 0	156	87	49	1 - 2 - 13	1 - 6 - 29
	2 - 1	164	90	51	1 - 3 - 1	1 - 7 - 22
	2 - 2	172	93	53	1 - 3 - 16	1 - 8 - 12
	2 - 3	180	96	56	1 - 4 - 3	1 - 9 - 5
7	2 - 4	188	100	59	1 - 4 - 18	1 - 9 - 27
	2 - 5	196	103	61	1 - 5 - 6	1 - 10 - 20
	2 - 6	204	106	64	1 - 5 - 22	1 - 11 - 12
	2 - 7	212	109	67	1 - 6 - 9	2 - 0 - 0
8	2 - 8	220	113	70	1 - 6 - 25	2 - 0 - 23
	2 - 9	228	116	73	1 - 7 - 11	2 - 1 - 15
	2 - 10	236	119	76	1 - 7 - 28	2 - 2 - 8
	2 - 11	244	122	78	1 - 8 - 15	2 - 3 - 0
9	3 - 0	252	126	81	1 - 9 - 1	2 - 3 - 23
	3 - 1	260	129	83	1 - 9 - 19	2 - 4 - 16
	3 - 2	268	132	86	1 - 10 - 3	2 - 5 - 6
	3 - 3	276	135	89	1 - 10 - 20	2 - 5 - 29
10	3 - 4	284	139	92	1 - 11 - 5	2 - 6 - 21
	3 - 5	292	150	41	2 - 1 - 3	2 - 7 - 14
	3 - 6	300	154	43	2 - 1 - 19	2 - 8 - 6
	3 - 7	308	157	46	2 - 2 - 6	2 - 8 - 29
11	3 - 8	316	160	49	2 - 2 - 23	2 - 9 - 22
	3 - 9	324	163	52	2 - 3 - 9	2 - 10 - 14
	3 - 10	332	167	55	2 - 3 - 25	2 - 11 - 7
	3 - 11	340	170	58	2 - 4 - 11	2 - 11 - 25
12	4 - 0	348	173	61	2 - 4 - 28	3 - 0 - 17
	4 - 1	356	176	63	2 - 5 - 16	3 - 1 - 10
	4 - 2	364	180	66	2 - 5 - 29	3 - 2 - 0
	4 - 3	372	183	68	2 - 6 - 17	3 - 2 - 23
13	4 - 4	380	186	71	2 - 7 - 3	3 - 3 - 15
	4 - 5	388	189	74	2 - 7 - 20	3 - 4 - 8
	4 - 6	396	193	77	2 - 8 - 5	3 - 5 - 0
	4 - 7	404	196	79	2 - 8 - 23	3 - 5 - 23
14	4 - 8	412	199	81	2 - 9 - 11	3 - 6 - 16
	4 - 9	420	202	84	2 - 9 - 27	3 - 7 - 8
	4 - 10	428	206	88	2 - 10 - 12	3 - 8 - 1
	4 - 11	436	209	90	2 - 10 - 29	3 - 8 - 23
15	5 - 0	444	213	93	2 - 11 - 15	3 - 9 - 16
	5 - 1	452	224	43	3 - 1 - 12	3 - 10 - 9
	5 - 2	460	227	45	3 - 1 - 27	3 - 10 - 29
	5 - 3	468	231	48	3 - 2 - 13	3 - 11 - 22
16	5 - 4	476	233	51	3 - 3 - 0	4 - 0 - 9
	5 - 5	484	237	53	3 - 3 - 17	4 - 1 - 2
	5 - 6	492	241	56	3 - 4 - 2	4 - 1 - 24
	5 - 7	500	244	59	3 - 4 - 19	4 - 2 - 17
17	5 - 8	508	247	62	3 - 5 - 6	4 - 3 - 10
	5 - 9	516	250	64	3 - 5 - 23	4 - 4 - 2
	5 - 10	524	254	67	3 - 6 - 9	4 - 4 - 25
	5 - 11	532	257	70	3 - 6 - 25	4 - 5 - 11
18	6 - 0	540	260	73	3 - 7 - 12	4 - 6 - 10
	6 - 1	548	264	76	3 - 7 - 28	4 - 7 - 3
	6 - 2	556	267	78	3 - 8 - 13	4 - 7 - 23
	6 - 3	564	270	81	3 - 9 - 0	4 - 8 - 16
19	6 - 4	572	273	83	3 - 9 - 17	4 - 9 - 8
	6 - 5	580	276	86	3 - 10 - 4	4 - 10 - 1
	6 - 6	588	280	89	3 - 10 - 19	4 - 10 - 23
	6 - 7	596	283	92	3 - 11 - 6	4 - 11 - 16
20	6 - 8	604	286	95	3 - 11 - 23	5 - 0 - 4
21	7 - 0	636	308	52	4 - 3 - 7	5 - 3 - 4
22	7 - 4	676	319	61	4 - 5 - 4	5 - 5 - 24
23	7 - 8	716	330	71	4 - 7 - 5	5 - 8 - 14
24	8 - 0	756	342	81	4 - 9 - 9	5 - 11 - 9
25	8 - 4	796	358	89	4 - 11 - 2	6 - 1 - 24
26	8 - 8	836	374	47	5 - 2 - 20	6 - 4 - 16
27	9 - 0	876	392	62	5 - 4 - 10	6 - 7 - 9
28	9 - 4	916	397	67	5 - 6 - 18	6 - 9 - 26
29	9 - 8	956	409	77	5 - 8 - 18	7 - 0 - 17
30	10 - 0	996	421	87	5 - 10 - 20	7 - 3 - 9
35	11 - 8	1196	488	83	6 - 9 - 28	8 - 4 - 21
40	13 - 4	1412	550	134	7 - 6 - 20	9 - 5 - 18
45	15 - 0	1632	593	170	8 - 5 - 8	10 - 6 - 13
50	16 - 8	1852	660	226	9 - 1 - 27	11 - 7 - 5
55	18 - 4	2088	712	269	9 - 10 - 29	12 - 7 - 10
60	20 - 0	2328	768	316	10 - 7 - 26	13 - 7 - 17
65	21 - 8	2568	795	348	11 - 5 - 29	14 - 7 - 25
70	23 - 4	2824	843	383	12 - 2 - 24	15 - 7 - 4
Life	25 - 0	3084	916	439	12 - 10 - 4	16 - 6 - 21

\* Nine month restriction applies to all 2C cases only.

\*\* All figures based on zero jail credits.