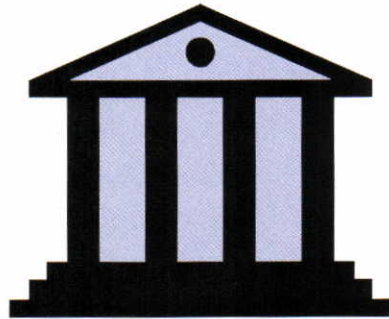


Advanced New Jersey Criminal Law

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About the Speakers



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HELMER, PAUL, CONLEY & KASSELMAN, P.A., is a growing New Jersey law firm with offices in Haddon Heights, Vineland, New Brunswick, Somers Point, and Salem. The firm includes

experienced attorneys, four of whom are certified by the Supreme Court of New Jersey in their respective fields, multilingual and well-trained support staff, flexible scheduling and videoconferencing capability. These resources allow the firm to deliver legal services across New Jersey, focusing primarily in the areas of criminal defense, municipal court, administrative law, family law, immigration law, worker's compensation, labor law, and personal injury. Helmer, Paul, Conley & Kasselmann is always glad to assist other attorneys, and can be reached by phone toll-free at (888) HELMER1 (435-6371) or online at www.helmerlegal.com.

Table of Contents

Affirmative Defenses	1
Attempt	1
Attorney Criminal Conduct.....	1
Bail	1
Child Abuse and Neglect	2
Controlled Dangerous Substances.....	2
Cases.....	2
Statutory Updates.....	2
Deportation	3
Detainers, Interstate Agreement On.....	3
DNA Analysis.....	3
Domestic Violence.....	3
Double Jeopardy	4
Driving While Intoxicated (DWI)	4
Alcotest Evidence	4
Laboratory Results	5
Language Issues	5
Penalties.....	5
Other Cases	6
Statutes	6
Drug Court	6
Endangering / Child Pornography.....	6
Evidence	7
Destruction and Loss of Evidence	7
Preclusion of Evidence	7
Prejudice.....	7
Expungements	8
Cases.....	8
Statutes	8
Gangs	8
Grand Juries.....	9
Hearsay.....	9
Excited Utterances.....	9
Forfeiture by Wrongdoing	9
Laboratory Certificates.....	9
Past Recollection Recorded.....	9
Res Gestae	10
State of Mind	10
Identification	10
Cases.....	10
Developments.....	11
Immigration	11

Cases.....	11
Directives.....	12
Insanity	12
Juries (Petit)	12
Charges.....	12
Deliberations	13
Juveniles.....	13
School Notification.....	13
“Sexting”	14
Waivers.....	14
Lewdness	14
Limitations, Statute of.....	14
Medicinal Marijuana.....	15
Statutes	15
Cases.....	15
<i>Miranda</i> Warnings.....	15
Money Laundering.....	16
Municipal Court.....	16
Cases.....	16
Directives.....	17
Statutes	18
Other Bad Acts.....	18
Plea Agreements	18
Parole.....	19
Generally	19
Megan’s Law	19
Plea Agreements	19
Cases.....	19
Developments.....	20
Polygraphs	20
Post-Conviction Relief (PCR)	20
Pre-Trial Intervention (PTI) Program	20
Cases.....	20
Guidelines.....	21
Privilege.....	21
Attorney-Client	21
Spousal	21
Prosecutorial Misconduct.....	22
Public Officials	22
Forfeiture of Public Office.....	22
Official Misconduct	22
Pension Forfeiture	22
Search and Seizure	23
Automobiles	23
Dwellings.....	25

Expectation of Privacy	26
Persons	27
Schools	28
Standing.....	28
Warrants	28
Sentencing	29
Generally	29
Extended Terms	29
Factors.....	30
Jail Credits	30
Resentencing.....	30
Sequestration	30
Sex Offenses.....	30
Civil Commitment	31
Corrections	31
Restraining Orders	31
Sixth Amendment Issues.....	31
Incompetence of Counsel	31
Right to Confront Witnesses	32
Right to Counsel.....	32
Right to Public Trial.....	33
Stalking	33
Summation.....	33
Underage Drinking	33
Video Playback	34
Witnesses	34
Generally	34
Experts	34
Lay Witnesses	35
Police Officers	35
Additional Factors and Precedent to Consider When Handling Criminal Cases	36
Appendix	41

Affirmative Defenses

A defendant who wishes to present a substantive defense (here, insanity) should not first be required to submit to trial on the sole issue of insanity. Instead, the appropriate procedure is a bifurcated trial in which the issue of insanity is tried in a second phase before the same jury with appropriate instructions.

State v. Handy, 421 N.J. Super. 559 (App. Div. 2011).

Trial court erred by not *sua sponte* providing a jury charge with respect to felony murder when the defendant claimed he had only intended to rob the victim, had not seriously injured him, did not know his co-defendant had brought a weapon with him, and had left prior to the commission of the murder. (The evidence presented at the trial required a *sua sponte* charge with respect to the affirmative defense to felony murder, as provided in N.J.S.A. 2C:11-3(a)(3)(a)-(d), because that testimony, if believed, would have satisfied the required statutory elements of the affirmative defense. However, since the jury's findings with respect to other charges negated the factors of the felony murder affirmative defense, no reversal of the conviction was warranted.)

State v. Walker, 203 N.J. 73 (2010).

Attempt

When the trial court failed to instruct the jury that in order to convict the defendant for attempt crimes, the State had to prove beyond a reasonable doubt that the defendant's actions were "strongly corroborative" of his criminal intent, reversal of convictions was mandated. (The defendant contacted officers of the Atlantic County Prosecutor's Office who were posing as an underage girl in an Internet chat room. He sent the fictitious girl a video of himself masturbating and tried to lure her to a bowling alley. He was arrested after he contacted the bowling alley to find her and was charged with a litany of sexually-related attempt crimes as well as sexual assault and criminal sexual conduct. While his behavior constituted the elements of the attempt crimes with which he was charged, as of the time of his arrest he had arguably not taken all the requisite steps to be guilty of sexual assault or criminal sexual conduct. The Appellate Division reversed his convictions for those two charges because the trial court had not properly instructed the jury on its obligation to find that his behavior constituted "substantial step[s]" toward the commission of those crimes.)

State v. Kuhn, 415 N.J. Super. 89 (App. Div. 2010), certif. den., 205 N.J. 78 (2011).

Attorney Criminal Conduct

A new bill regulating attorney solicitations has passed both houses and is poised for Gov. Christie's signature. S-2316 bans any written communications by professionals to specific accident victims for the first thirty (30) days after the incident giving rise to the solicitation. The rule would not be applicable to general solicitations, or when the accident victim contacted the attorney first. (See Appendix at A-6)

Bail

With the passage of A-1491 (see Appendix at A-4), those accused of violating domestic violence (DV) restraining orders must now post their bail in full cash. Previously DV offenders could secure their release by posting only 10% of their full bail amount. Now they must put up the entire amount in cash or a surety bond, or a bail bond secured by real estate for the full amount plus \$20,000.

Defendants will be required to post full cash (and no other form of bond) if: (1) they have two other indictable matters pending at the time, have two prior convictions for first or second degree crimes, has one prior conviction for certain violent crimes, was on parole at the time of the arrest, or had previously violated a DV restraining order.

Child Abuse and Neglect

A stepmother who had (1) occasionally slapped her minor stepdaughter on the face, (2) not remedied a persistent problem with the home's heating system, (3) taken a portion of the minor's paychecks to pay family bills, (4) not taken the minor to a pediatrician in more than two years, and (5) limited minor's contact with her grandmother could not be found guilty of child abuse within the statutory framework of Title 9.

New Jersey Div. of Youth and Family Services v. P.W.R., 205 N.J. 17 (2011).

Controlled Dangerous Substances

Cases

Defendants may apply for resentencing pursuant to the 2010 amendments to N.J.S.A. 2C:35-7, even if they have previously received (in their plea agreement) the benefit of the State's Brimage waiver of an extended term or a reduction of the mandatory minimum term.

State v. Oliver, 2011 WL 3611359 (App. Div. Unpub. August 18, 2011).

Day care facilities, nursing care facilities, and preschool providers, even ones containing small kindergarten classes, are not "school zones" for the purposes of sentencing enhancements under N.J.S.A. 2C:35-7.

State v. Shelley, 205 N.J. 320 (2011).

The personal use exemption relating to medical marijuana is not a defense to a charge of first-degree manufacturing of marijuana.

State v. Wilson, 421 N.J. Super. 301 (App. Div. 2011).

Statutory Updates

N.J.S.A. 2C:35-7, the statute governing distribution of C.D.S. within 1,000 feet of a school zone, was amended in 2009 (by adding subsection "b"). The law now allows the court to waive or reduce minimum term of parole ineligibility or place the defendant on probation based on the following factors:

1. The extent of the person's prior criminal record and the seriousness of the offenses;
2. Where the offense was committed in relation to the school property, including distance from the school or bus, and the reasonable likelihood of exposing children to drug-related activities there;
3. Whether the school was in session at the time of the offense; and
4. Whether children were present in, at or in the immediate vicinity of where the offense occurred.

However, the court cannot waive or reduce the minimum term if it finds that:

1. The offense was committed on school property or a school bus; or
2. Violence was used or threatened or that the defendant possessed a weapon.

Deportation

Where defendant, who was subject to mandatory deportation, had absented herself from her PCR hearing with respect to the immigration consequences of her guilty plea because she believed the date was only a scheduling conference, she was entitled to a new hearing on the PCR motion. State v. Connolly, 2011 WL 4577151 (App. Div. Unpub. Oct. 5, 2011).

Convictions reversed for defendants not advised of mandatory deportation. Foreign born defendants must be thoroughly warned that mandatory deportation will result from pleading guilty to serious crimes. In State v. Duroseau, Docket No. A-1740-08T4 (App. Div. November 16, 2010, unpublished), and State v. Delgado, Docket No. A-3276-08T4 (App. Div. November 18, 2010, unpublished), two different panels said that failure to so advise means the defendant is entitled to another day in court. Both cases applied recent rulings by the State Supreme Court, in State v. Nunez-Valdez, 200 N.J. 129 (2009), and the U.S. Supreme Court, in Padilla v. Kentucky, 130 S.Ct. 1473 (2010), which said foreigners must be warned in no uncertain terms about the impact of criminal convictions on their immigration status.

The holding in State v. Nuñez-Valdéz, 200 N.J. 129 (2009), which rejected the position that immigration consequences to criminal convictions are collateral instead of direct consequences for Sixth Amendment purposes, must be afforded pipeline retroactivity. State v. Gaitan, 419 N.J. Super. 365 (App. Div. 2011).

Detainers, Interstate Agreement On

The Interstate Agreement on Detainers is not the exclusive means of securing a prisoner from another state. Both the formal extradition process, as well as the IAD, are viable options. State v. Nguyen, 419 N.J. Super. 413 (App. Div. 2011).

DNA Analysis

Y-STR DNA analysis is permissible in the State of New Jersey, and the results of such examinations are admissible as evidence in criminal trials. (Y-STR analysis examines a specific DNA marker of which all men in a paternal lineage will possess an identical version. Thus although fathers, sons, brothers, uncles, and paternal cousins cannot be distinguished from one another through the use of the Y-STR profile, the test is useful in excluding potential suspects.)

State v. Calleia, 414 N.J. Super. 125 (App. Div. 2010), rev'd on other grnds, State v. Calleia, 206 N.J. 274 (2011).

Domestic Violence

When the plaintiff in a domestic violence matter is a minor, the minor should be appointed a *guardian ad litem* (who may be a parent if one is available) to represent his or her interests at trial, or, where the defendant is an adult represented by counsel, a licensed attorney representative.

J.L. v. G.D., 422 N.J. Super. 487 (Ch. Div. 2010).

An invited social guest, living in a home for a period of several months, meets the definition of "household member" for purposes of the Prevention of Domestic Violence Act, even though he did not have a familial, romantic, or sexual relationship with any of the members of the family with whom he had been staying, and therefore the enhanced protections found in the Act could be applied against him.

S.Z. v. M.C., 417 N.J. Super. 622 (App. Div. 2011).

Due Process prevents a trial court in a domestic violence hearing from expanding the hearing to include acts of domestic violence not alleged in the complaint. If additional acts are alleged during the course of the hearing, the complaint must be formally amended. Furthermore, “not all offensive or bothersome behavior...constitutes harassment.” For the purposes of the Domestic Violence Act, it must be clear that the actor had a conscious intent to alarm or annoy; that intent must be supported by evidence other than the history of the relationship.

J.D. v. M.D.F., 207 N.J. 458 (2011).

Excessive text messaging (in this case, eighteen (18) messages over the course of three (3) hours) between divorced spouses does not necessarily amount to harassment. Such behavior must demonstrate the requisite intent to harass in order to be considered harassment.

L.M.F. v. J.A.F., Jr., Docket No. 421 N.J. Super. 523 (App. Div. 2011).

Double Jeopardy

When a jury renders inconsistent verdicts and a retrial is subsequently ordered, the defendant may properly be retried on all the charges in the first trial unless he can somehow show that the jury determined an ultimate fact which would preclude retrial on some or all of those charges. (Following a jury trial, the defendant was convicted of murder, felony murder, and armed robbery for the shooting deaths of two individuals, but was acquitted of possessing a firearm for an unlawful purpose for that same crime. A co-defendant was also charged for the murders and was to be tried separately, but after evidence of perjury emerged during the defendant’s trial, the charges against the co-defendant were dismissed. The defendant moved for a new trial due to the perjury and that motion was granted. However, the trial court held that he could only be tried as a principal and not an accomplice for the murder and felony murder charges, because the charges against the co-defendant had been dismissed. The court also rejected the defendant’s argument that he could not be retried on the murder and robbery charges because the first jury had found him not guilty of possessing the firearm used in the crimes. The Appellate Division and the Supreme Court upheld the trial court’s legal decisions, finding that neither double jeopardy nor collateral estoppel barred a retrial on the murder and robbery charges in light of the jury’s inconsistent verdicts in the first trial.)

State v. Kelly, 201 N.J. 471 (2010).

A guilty plea to fourth-degree creating a risk of widespread injury or death under N.J.S.A. 2C:17-2(c) precluded the defendant’s subsequent prosecution for driving under the influence (DWI) when the plea to the former was based on driving while intoxicated.

State v. Hand, 416 N.J. Super. 622 (App. Div. 2010).

Driving While Intoxicated (DWI)

Alcotest Evidence

There is no bright-line “two minute rule” governing the minimum time period between taking of breath samples from an Alcotest machine. Given that the machine self-calibrates and locks until it is ready to receive additional samples, the Chun decision cannot be read to mandate a two-minute period between samples.

State v. Mukherjee, 2012 WL 33892 (App. Div. Unpub. Jan. 9, 2012).

Any witness, not only the Alcotest operator, may observe a defendant during the 20 minutes prior to the administration of the Alcotest.

State v. Ugrovics, 410 N.J. Super. 482 (App. Div. 2009), certif. denied, 202 N.J. 346 (2010).

A temperature probe that is substantially similar to the ones manufactured by the Ertco-Hart company, such as the widely-used and cheaper versions made by Control Company, are acceptable for use in Alcotest machines. (On remand to the Law Division, a Monmouth County judge found the Control Company probe scientifically reliable and therefore acceptable for use with calibration.)
State v. Holland, 422 N.J. Super. 185 (App Div. 2011).

The State must provide, as part of its required DWI discovery, the repair logs and historical test data (in addition to the foundational documents identified in *Chun*) for any Alcotest machine from which breath measurements were taken. The State must also provide the digital data downloads and repair records for any Alcotest 7110 machine.

State v. Maricic, 417 N.J. Super. 280 (App. Div. 2010).

Laboratory Results

The ten (10) day period in which a defendant must object to the introduction of a laboratory certificate (pursuant to N.J.S.A. 2C:35-19) begins to run only after the State has provided him with all lab reports related to the analysis in question.

State v. Heisler, 422 N.J. Super. 399 (App. Div. 2011).

The defendant's confrontation clause rights were not met when, during a DWI prosecution, the State called a technician who was not involved with the original laboratory tests to testify about those tests as an expert witness.

State v. Rehmann, 419 N.J. Super. 451 (App. Div. 2011).

Language Issues

Following the arrest for DWI of a driver who does not understand English, the police must translate the standard statement under the breath test refusal statute, N.J.S.A. 39:4-50.2(e), into a language they can understand. Defendants cannot be convicted of violating the implied consent law unless they are made aware of its provisions in a language they can understand.

State v. Marquez, 202 N.J. 485 (2010).

The decision in State v. Marquez, *supra*, must be afforded pipeline retroactivity.

State v. Rodriguez-Alejo, 419 N.J. Super. 33 (App. Div. 2011).

Penalties

A prior refusal is not interchangeable with a DWI to enhance the penalties imposed for a subsequent DWI.

State v. Ciancaglini, 204 N.J. 597 (2011).

Defendants in Sussex County who are convicted of DWI, and subsequently convicted of Driving While Suspended (N.J.S.A. 39:3-40) during the period of license suspension resulting from the DWI, are not eligible to serve their jail sentence through the Sheriff's Labor Assistance Program (SLAP).

State v. White, 413 N.J. Super. 301 (Law Div. 2010).

Defendants seeking relief pursuant to State v. Laurick, 120 N.J. 1 (1990), must do more than simply claim, without any proof, that their prior DWI conviction(s) were uncounseled when the records are no longer available. The defendant has the burden of making a *prima facie* showing that they are entitled to relief or their application will be rejected.

State v. Weil, 421 N.J. Super. 121 (App. Div. 2011).

Other Cases

When the defendant agrees to submit to the Alcotest, but then fails without reasonable excuse to provide a valid sample, the police are *not* required to read Part Two (the “Additional Statement”) of the “Standard Statement” concerning the consequence of refusal to take the Alcotest.

State v. Schmidt, 206 N.J. 71 (2011).

DWI is an absolute liability crime, and involuntary intoxication by chemicals is not a defense. (The defendant was found asleep in a stopped car. He smelled of alcohol and performed poorly in field sobriety tests, resulting in his arrest. At trial, he presented evidence that he was not under the influence of alcohol, but rather suffering from neurotoxicity resulting from involuntary exposure to toxic chemicals at his workplace. The court rejected this defense for substantially the same reasons that it has rejected the defense of involuntary intoxication by alcohol.)

State v. Federico, 414 N.J. Super. 321 (App. Div. 2010).

The burden of proof in DWI cases is, like all criminal and quasi-criminal matters, on the State. Defendant’s conviction for DWI was reversed when the municipal court stated three times in its decision that defendant had failed to prove her defense (which pertained to various medical conditions from which she had been suffering at the time of her arrest) beyond a reasonable doubt.

State v. Driscoll, 2011 WL 650544 (App. Div. Unpub. February 24, 2011).

Statutes

“Ricci’s Law” was passed and signed into law in January 2010. It amends the drunk-driving statutes (N.J.S.A. 39:4-50 et. seq.) to require ignition interlock devices for first-time DWI offenders who Alcotest at 0.15% or above. These interlocks are required for six to twelve months for first time offenders and one to three years for second time offenders. Ignition interlocks are also now required for persons convicted of refusing to submit to breath tests. Note that the defendant is required to pay the lease fees for the device, although some discounts are available in cases of indigency.

Drug Court

No formal, plenary hearing is required when there is an objection to a drug court application. An informal hearing of the type used in the pre-trial intervention (PTI) program is sufficient. Courts may consider submitted documentation and arguments by counsel, as well as comments from interested parties.

State v. Clarke, 203 N.J. 166 (2010).

Endangering / Child Pornography

Putting child pornography into a shared folder on a computer constitutes distribution of child pornography under N.J.S.A. 2C:24-4b(5)(a).

State v. Lyons, 417 N.J. Super. 251 (App. Div. 2010).

There is no requirement in the Endangering the Welfare of a Child statute, N.J.S.A. 2C:24-4(a), that a defendant knows that his sexual conduct will impair or debauch the morals of a child; the “knowing” culpability requirement pertains only to the sexual conduct itself. State v. Bryant, 419 N.J. Super. 15 (App. Div. 2011).

Evidence

Destruction and Loss of Evidence

Cases

The contemporaneous written notes of interviews and observations made by police officers during their investigations are discoverable in criminal trials. Appropriate sanctions are warranted when the State fails to preserve those records and provide them in discovery. State v. W.B., 205 N.J. 588 (2011).

Defendant’s conviction was reversed because the police discarded the small piece of cotton they had taken from his clothes and tested for the presence of blood after his alleged participation in a robbery. Although the presumptive test for blood had returned a positive result, it was executed by a police officer with no prior experience with the test who had little knowledge about it. Furthermore, the police decision to discard the cloth prevented any further testing, violating the defendant’s confrontation clause rights.

State v. Pittman, 419 N.J. Super. 584 (App. Div. 2011).

Pursuant to R. 3:13-3(c)(6-8), county prosecutors are responsible for producing in discovery the writings of all law enforcement officers in the county. When county prosecutors are unable to produce the contemporaneous notes made by investigators over the course of their investigations, a sanction, such as an adverse inference charge, is warranted.

State v. W.B., 205 N.J. 588 (2011).

Directives

The New Jersey Attorney General promulgated Directive No. 2011-2 on May 23, 2011, in response to the holding in State v. W.B., *supra*. The directive requires all local law enforcement agencies to retain any contemporaneous notes made of witness interviews or at crime scenes, and to transmit those notes to the county prosecutor’s office for later provision during discovery. The directive took effect May 27, 2011.

Preclusion of Evidence

A DYFS proceeding is not a “civil proceeding” within the meaning of the evidentiary preclusion provision of R. 3:9-2, thus the prior guilty plea of a defendant to child abuse was properly admitted during a subsequent DYFS proceeding against that same defendant.

State v. Lacey, 416 N.J. Super. 1223 (App. Div. 2010).

Prejudice

Admission of evidence pertaining to the defendant’s membership in a gang, including a letter written by the defendant and a statement he made to the victim’s girlfriend, was proper because it was

relevant to the issue of the defendant's motive for killing a friendly acquaintance and its probative value outweighed any potential prejudice.

State v. Goodman, 415 N.J. Super. 210 (App. Div. 2010).

Expungements

Cases

A mandatory order of permanent forfeiture of public employment must be severed from – and preserved from the expungement of – the conviction that originally triggered the order of forfeiture.

In the Matter of the Expungement Petition of D.H., 204 N.J. 7 (2010).

Statutes

The Legislature recently made some important changes to our expungement laws in passing A-1771. That bill amended our expungement statutes (N.J.S.A. 2C:52-1 et. seq.) in two key ways: (1) expungements of criminal convictions (for indictable offenses) can now be granted after only five years (down from ten), and (2) expungements can now be granted for most convictions relating to C.D.S. distribution.

In order to apply to expunge a criminal conviction after only five years, the applicant must show that he has paid all fines and penalties, has had no new convictions, and that expungement would be “in the public interest, giving due consideration to the nature of the offense, and the applicant’s character and conduct since conviction”. Most violent crimes, as well as crimes of a sexual nature, are still barred from expungement.

However, crimes involving possession and/or distribution of C.D.S. of the third or fourth degree are now eligible for expungement. Almost all C.D.S.-related convictions were previously barred from expungement regardless of the length of time that had elapsed following the conviction. Under the new law, an applicant with a prior C.D.S. conviction must wait the five years and demonstrate that the expungement would be “in the public interest” based on the same factors mentioned above.

Juveniles are now eligible to have their entire juvenile histories expunged after a period of five years if they have had no subsequent convictions, have not had an adult conviction expunged, and have not used PTI or another diversionary program (assuming the adjudications were not for crimes that, if committed by adults, were not expungable, such as murder).

Gangs

Defendant, the leader of a street gang, could not obtain access to various state records pertaining to the investigation which led to his convictions by way of an Open Public Records Act (OPRA) request. His OPRA requests were overbroad and in contravention of the criminal records and several other exceptions.

Gatson v. Somerset County Prosecutor’s Office, 2011 WL 6153618 (App. Div. Unpub. Dec. 13, 2011), Gatson v. Borough of Cliffside Park Police Dept., 2011 WL 6153621 (App. Div. Unpub. Dec. 13, 2011), Gatson v. Bergen County Prosecutor’s Office, 2011 WL 6153628 (App. Div. Unpub. Dec. 13, 2011).

Defendant's alleged affiliation with a street gang so pervasively affected both his trial and sentencing that partial remand for retrial and resentencing was required.
State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011).

Grand Juries

A prosecutor's failure to read and reference the elements of the specific offense(s) with which a defendant is accused to the grand jury charged with indicting him requires dismissal of the subsequent indictment. (The defendant was accused of criminal sexual conduct. The jury received basic legal definitions of criminal offenses some 11 weeks prior to them actually being presented with the defendant's case. No refresher definitions were provided, nor were they ever instructed on the legal difference between the phrase "sexual assault" as used by the prosecutor during the grand jury hearing and the actual legal definition of criminal sexual conduct. The Appellate Division dismissed the indictment because the jury could not have been expected to remember and understand the elements of the offense for which they ultimately indicted the defendant.)
State v. Triestman, 416 N.J. Super. 195 (App. Div. 2010).

Hearsay

Excited Utterances

The initial utterance to police by a robbery victim whose throat had been slashed by his assailant was admissible because it was non-testimonial in nature. It was intended by the victim to help resolve a dangerous situation, not to memorialize details in anticipation of future litigation. Furthermore, even if it was testimonial, it would be admissible as an excited utterance.
State v. Manigo, 2011 WL 3241488 (App. Div. Unpub. August 1, 2011).

Forfeiture by Wrongdoing

On September 15, 2010, the N.J. Supreme Court adopted a proposed amendment to the evidence rules. The so-called "forfeiture by wrongdoing" exception to the hearsay rule (N.J.R.E. 804(b)(9)) allows the admission of a witness' "statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." This exception is discussed in greater detail in State v. Byrd, 198 N.J. 319 (2009), wherein the N.J. Supreme Court recommended to the N.J. Legislature that it create such a rule. When the Legislature failed to timely enact the exception, the Supreme Court did so in their stead. The amended rule took effect on July 1, 2011.

Laboratory Certificates

The prosecution cannot, consistent with a defendant's Confrontation Clause rights, introduce a laboratory certificate to prove any fact at trial by way of the testimony of a technician not involved in the actual scientific analysis described in the report.
Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011).

Past Recollection Recorded

A written copy of a defendant's formal confession, using a past recollection recorded by an examining police detective, was admissible where there was no objection from the defendant and where the requirements of Evidence Rule 803(c)(5) were otherwise satisfied.
State v. Gore, 205 N.J. 363 (2011).

Res Gestae

The concept of *res gestae* (“things done”) has been supplanted by the more modern Rules of Evidence, which control the admission of other crimes evidence. Consequently, *res gestae* is no longer a valid hearsay exception.

State v. Rose, 206 N.J. 141 (2011).

State of Mind

Murder victim’s hearsay statements to the effect that she was unhappy, wanted a divorce, and was seeking a lawyer were admissible in subsequent trial of her husband for her murder. The comments were state-of-mind hearsay statements which were admissible because they tended to establish a motive for her murder, and were more probative than prejudicial.

State v. Calleja, 206 N.J. 274 (2011).

The testimony of the girlfriend of a defendant’s alleged coconspirator to the effect that he and the defendant were planning on robbing someone matching the victim’s description was not relevant to the defendant’s state of mind at the time the statement was made. The statement was therefore not admissible as state-of-mind hearsay at defendant’s trial unless the portions pertaining to the defendant were redacted.

State v. McLaughlin, 205 N.J. 185 (2011).

Identification

Cases

As eyewitness identifications are the single greatest cause of mistaken convictions, and because the Manson/Madison test for the admissibility of those identifications is outdated, it no longer controls. Instead, courts must account for all system and estimator variables in assessing the reliability of identifications and suppress identifications deemed unreliable. When identifications are admitted, specially tailored jury charges are required to reduce any potential prejudice.

State v. Henderson, 208 N.J. 208 (2011). See companion case, State v. Chen, *infra*.

When a defendant presents evidence that an identification was made under suggestive circumstances which could have tainted it, trial courts should conduct hearings to determine the admissibility of the identification evidence. The defendant should first request a pretrial hearing and present evidence of bias, after which the State must then present evidence of the reliability of the identification, accounting for system and estimator variables. The defendant must then meet his burden of demonstrating that the identification was not reliable. Courts should consider the following factors in assessing reliability of identifications: (1) the level of stress of the witness at the time of the identification, (2) whether the suspect had a weapon, (3) the amount of time the witness had to view the suspect, (4) the distance between the witness and the suspect, and the lighting at the time, (5) the characteristics of the witness, including age and sobriety, (6) the characteristics of the perpetrator, including any disguise, (7) memory decay over time, (8) whether the suspect and witness are of differing races, and (9) to whom and how many people the witness has spoken about the incident since it occurred.

State v. Chen, 207 N.J. 404 (2011).

Wounded victim's identification of shooter and location of shooting, which identification resulted in defendant's arrest and conviction, were not testimonial statements because they had a "primary purpose" of assisting the police in meeting an ongoing emergency.
Michigan v. Bryant, 131 S.Ct. 1143 (2011).

On-scene identification of the defendant by a citizen informant-witness (at whom the defendant had allegedly pointed a shotgun and yelled threats) and corroborative discovery of the weapon used to threaten that witness gave officers probable cause to arrest the defendant and, therefore, his volunteered statement to police should not have been suppressed. However, the court held that the non-appearing informant's testimonial hearsay statement to the officers was inadmissible under the Confrontation Clause.
State v. Basil, 202 N.J. 570 (2010).

Developments

The U.S. Supreme Court has yet to issue a ruling in Perry v. New Hampshire, in which they must decide the reliability of eyewitness identifications made in suggestive circumstances, even where the police were not involved. Many courts are reexamining the reliability of eyewitness identifications as a growing number of studies and other evidence reveals the great number of mistaken identifications made every year.

Immigration

Cases

Incorrect advice by counsel that the defendant may not or will not be deported when such deportation is statutorily assured will result in the guilty plea being vacated. (In 1998, the defendant entered a guilty plea to a fourth-degree sex crime, and was informed by his counsel that he would not be deported by virtue of his guilty plea. He was subsequently deported as a result of the plea. He filed a PCR motion to vacate the plea based on his assertion that he would not have pled had he understood the immigration consequences. The Court granted his PCR motion and vacated his guilty plea as not "knowing, voluntary or intelligent.")
State v. Nunez-Valdez, 200 N.J. 129 (2009). See discussion of subsequent consequences of this decision for PCR motions in the "Post-Conviction Relief" section, *infra*.

A defendant was not deprived of the effective assistance of counsel when his attorney told him, prior to his guilty plea to third-degree child endangerment in 2004, that he "might" rather than "would" be deported. No more was required because, at least at the time, the situation was so complex that it was impossible to know what the actual immigration consequences would be.
State v. Telford, 420 N.J. Super. 465 (App. Div. 2011).

The Supreme Court is in the process of deciding State v. Gaitan, 206 N.J. 330 (2011), a matter involving a PCR application due to counsel's failure to inform a defendant of the immigration consequences of his plea. The Gaitan court has suspended all such PCR requests until it resolves the matter (see Appendix at A-1 for copy of stay order).

Directives

Per AOC Directive #09-11, issued December 28, 2011 (see Appendix at A-22), municipal court judges are now required to explicitly warn defendants of the possible immigration consequences of their guilty pleas. The directive requires that municipal court judges inform defendants at three stages: (1) the opening of the court session, (2) the defendant's first appearance, and (3) during the plea colloquy. If a defendant expresses any concern over possible immigration consequences, municipal courts shall adjourn the proceedings to permit the defendant to consult an attorney.

Insanity

Where a defendant claims to have acted by virtue of a command from God, the jury must be instructed that, for the purposes of evaluating the defendant's claim of insanity, the concept of "wrongness" includes both legal and moral wrongs.

State v. Singleton, 418 N.J. Super. 177 (App. Div. 2011).

A defendant who wishes to present a substantive defense (here, insanity) should not first be required to submit to trial on the sole issue of insanity. Instead, the appropriate procedure is a bifurcated trial in which the issue of insanity is tried in a second phase before the same jury with appropriate instructions.

State v. Handy, 421 N.J. Super. 559 (App. Div. 2011).

Juries (Petit)

Charges

Trial court's decision to permit jurors in attempted murder case to *take home copies of certain portions of the jury charges* over a weekend did not violate defendant's constitutional rights. Nevertheless, Appellate Division urged Supreme Court to review this practice and issue a bright-line rule permitting or prohibiting it in the future.

State v. Morgan, 2011 WL 6820182 (App. Div. Dec. 29, 2011).

Trial court erred by not *sua sponte* providing a jury charge with respect to felony murder when the defendant claimed he had only intended to rob the victim, had not seriously injured him, did not know his co-defendant had brought a weapon with him, and had left prior to the commission of the murder. (The evidence presented at the trial required a *sua sponte charge with respect to the affirmative defense to felony murder*, as provided in N.J.S.A. 2C:11-3(a)(3)(a)-(d), because that testimony, if believed, would have satisfied the required statutory elements of the affirmative defense. However, since the jury's findings with respect to other charges negated the factors of the felony murder affirmative defense, no reversal of the conviction was warranted.)

State v. Walker, 203 N.J. 73 (2010).

Where a defendant was convicted of murder following a jury trial in which aggravated manslaughter and *manslaughter* were *not charged as lesser-included offenses*, conviction was proper because no evidence was presented to mitigate the *mens rea* of purposeful murder or to establish the elements of the lesser charges (i.e. recklessness), nor would it have been logically consistent to conclude that they were appropriate given that the victim was assassinated.

State v. Ramsey, 415 N.J. Super. 257 (App. Div. 2010).

A conviction for felony murder will be reversed if the trial court fails to provide a jury charge indicating that the defendant *could be liable for felony murder only when the death of the victim is not too remote, accidental, or too dependent on another person's volitional act to break the causal chain.* (The defendant participated in a scheme to rob a victim; his participation was, as agreed, to push the defendant down stairs prior to robbing him. After the defendant knocked the victim over, others beat him to death. The defendant did not participate in the beating, nor was he aware it would occur beforehand. Trial court did not properly explain the proofs needed to convict on felony murder to the jury, so the defendant's conviction on that charge was reversed, while his convictions for robbery and aggravated assault were upheld.)

State v. Belliard, 415 N.J. Super. 51 (App. Div. 2010).

Although it was not erroneous for a trial court to explain the law of attempt prior to explaining the law regarding the substantive crime the defendant was accused of attempting, it was *improper to charge the jury with respect to all three types of attempt when only one was applicable.*

State v. Kornberger, 419 N.J. Super. 295 (App. Div. 2011).

New Jersey Supreme Court affirmed Appellate Division's decision to reverse defendant's conviction for sexual offenses against a minor (see State v. R.T., 411 N.J. Super. 35 (App. Div. 2009)). Appellate Division had found that a jury charge *regarding voluntary intoxication should be given over defense objection only where the facts in evidence clearly support such a charge*, and that in this case, the charge was not only unnecessary, but it impermissibly interfered with defendant's trial strategy.

State v. R.T., 205 N.J. 493 (2011).

Defendants cannot be forced into a *catch-22* situation wherein they must choose between *presenting evidence of their own crimes or facing a jury charge on flight that excludes pertinent facts*, because that situation diminishes the State's burden to prove all elements of a charged crime beyond a reasonable doubt.

State v. Latney, 415 N.J. Super. 169 (App. Div. 2010).

Deliberations

Juries cannot be permitted unfettered access to recorded video interviews of witnesses. Although they may be permitted to review video evidence during deliberations, the replays must be done in open court to permit the defendant to be present and to ensure that the jury is not prejudiced.

State v. A.R., 2011 WL 3476875 (App. Div. Unpub. Aug. 10, 2011).

Juveniles

School Notification

With the passage of A-2655, N.J.S.A. 2C:43-5.1 has been amended to create the requirement that when a student is charged with a crime, or when they are either adjudicated delinquent in the case of minors or convicted of a crime in the case of adults, the State must notify the principal of the secondary school at which the student is enrolled. These notifications are required whenever students are charged with crimes originating in schools, as well as for crimes occurring outside of school when they:

1. Involve serious injury or death;
2. Involve firearms;
3. Involve drugs;
4. Are classifiable as hate crimes; or

5. Are of the first, second, or third degree.

The notifications are confidential but can be shared with faculty members for their safety at the principal's discretion.

“Sexting”

A bill designed to permit *alternative disposition of juvenile “sexting”* (sending text and picture messages of a sexual nature via cell phones) cases was passed on September 16, 2011. The measure, A-1561/S-2700 (see Appendix at A-2), amends N.J.S.A. 2A:4A-71 to enable juveniles without prior sex offense histories to enroll in an educational program explaining the potential consequences of sharing sexually-explicit materials in exchange for a dismissal of the sexual charges against them.

Waivers

Cases involving mandatory *waivers to adult court require a simple finding of probable cause*. The State is not required to produce sufficient evidence to convict a juvenile or even to establish a *prima facie* case for conviction.

State in re T.M., 412 N.J. Super. 225 (App. Div. 2010).

A judge's personal distaste for the waiver statute *cannot* be allowed to color his review of the legal issues surrounding the application of it, nor can he be permitted to *consider factors outside of those stated in the Attorney General's Waiver Guidelines*. (Middlesex County Family Court judge apparently did not approve of the waiver statute, and considered, *inter alia*, various scientific studies, briefs, and an Allstate insurance advertisement in deciding to deny waiver.)

State ex rel. V.A., 420 N.J. Super. 302 (App. Div. 2011).

Courts may not incarcerate juveniles as a condition of probation in the same way that they can impose county jail sentences on similarly situated adults.

State ex rel. T.S., 413 N.J. Super. 540 (App. Div. 2010).

Although the practice of having a parent read to their child his or her constitutional rights prior to police questioning is improper, there is no need for a broad requirement that an attorney be present to represent the child in any case where there is a perceived clash between the interests of the child and the parent.

State in re A.S., 203 N.J. 131 (2010).

Lewdness

Where a defendant's sexual contact is with his own intimate parts in view of an adult victim, conviction on a charge of criminal sexual contact under N.J.S.A. 2C:14-3b and 2C:14-2c(1) requires proof of physical force or coercion beyond the defendant's act of touching himself.

State v. Lee, 417 N.J. Super. 219 (App. Div. 2010).

Limitations, Statute of

Statute of limitations period for continuing theft by deception scheme did not begin tolling until the last date for repayment of received goods had passed, not the last date goods were actually received. (Defendant planned to purchase goods through his company on credit and then declare bankruptcy to avoid paying for them. He was indicted within five (5) years of the last date his company was

contractually obligated to pay for the goods, but not within five (5) years of the last physical shipment of goods. Nevertheless, the court held that the statute of limitations period on the subsequent theft by deception indictment had not begun to run until the last day of the repayment period. Thus the indictment was not barred by the statute of limitations and was valid.)

State v. Diorio, 422 N.J. Super. 445 (App. Div. 2011).

Medicinal Marijuana

Statutes

Governor Christie signed the New Jersey Compassionate Use Medical Marijuana Act (N.J.S.A. 24:6I-1 et. seq.) into law on January 18, 2010. Per S-2105, the effective date of the Compassionate Use Act was October 1, 2010.

The Act permits the use of marijuana by patients suffering from “debilitating medical conditions,” including cancer, glaucoma, HIV, AIDS, as well as any other condition that causes wasting syndrome, severe or chronic pain, severe nausea, seizure, muscle spasms, or any other condition that is approved by the Department of Health and Senior Services (DHSS). These individuals must be formally diagnosed with an approved condition by a licensed physician who opines that the use of marijuana to alleviate symptoms outweighs the medical risks. They must then register with the DHSS and keep their registry card. They can purchase marijuana legally from the authorized medical marijuana alternative treatment centers in which it is to be grown.

Patients and their “primary caregivers” meeting the requirements may not be prosecuted for possessing or using less than six marijuana plants and one ounce of usable marijuana. No person in the vicinity of a medical marijuana user can be prosecuted for constructive possession, nor can anyone running or working at an approved alternative treatment center.

The Act has not yet gone into effect because Governor Christie had indicated that he wanted assurances that the U.S. Justice Department (USDOJ) would not prosecute State workers implementing the Act. On July 20, 2011, Governor Christie indicated that he would no longer wait for explicit USDOJ approval (stating that he believes that the strict provisions of the Act would not offend federal prosecutors) and ordered the provisions of the Act be carried out. New Jersey’s six medical marijuana dispensaries should open before the end of 2011.

Cases

The personal use exemption relating to medical marijuana is not a defense to a charge of first-degree manufacturing of marijuana.

State v. Wilson, 421 N.J. Super. 301 (App. Div. 2011).

Miranda Warnings

Where a suspect has invoked his Miranda rights and requested the assistance of counsel, but where police questioning continues due to poor communication between the various police officers involved and the suspect continues giving voluntary responses, the statements are admissible because the defendant waived his right to counsel by answering the questions.

State v. Melendez, 423 N.J. Super. 1 (App. Div. 2011).

Sniffing of defendant's breath for the scent of alcohol, where defendant was detained by officers on suspicion of underage drinking, constituted custodial interrogation and implicated defendant's Miranda rights.

State v. Koch, 2011 WL 4434949 (App. Div. Unpub. Sept. 26, 2011).

There exists a presumption that once a suspect invokes his Miranda rights and requests counsel, any future waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary.

Maryland v. Shatzer, 130 S. Ct. 1213 (2010).

The Court considered whether the circumstances of an appeal involved the "question-first, warn-later" interrogation procedure that requires application of the framework described in State v. O'Neill, 193 N.J. 148 (2007). In a four with three concurring opinion, the Supremes conclude: State v. O'Neill does not apply in this case, where police did not use a "question-first, warn-later" approach and the defendant said nothing relevant to the crimes being investigated before receiving proper warnings. Under the familiar totality of the circumstances test, the defendant's waiver of his rights was knowing, voluntary and intelligent.

State v. Yohnson, 204 N.J. 43 (2010).

Money Laundering

New Jersey's money laundering statute was upheld as constitutional in a recent challenge. In Amaya v. New Jersey, 766 F.Supp.2d 533 (2011), two criminal defense attorneys challenged the statute as vague and overbroad on the theory that it criminalizes the possession of large quantities of U.S. currency, the possession of which is otherwise entirely legal. District Judge Dickinson Debevoise dismissed the challenge, holding that the law was not unclear, did not burden interstate commerce, and did not shift the burden of proof to the defense.

Municipal Court

Cases

Laurick Orders

The Law Division is not bound by an improperly granted order under State v. Laurick, 120 N.J. 1 (1990). The order in question provided that the defendant's previous municipal court DWI conviction could not be used for sentence enhancement purposes. However, the Law Division declined to follow the order based upon the fact that underlying relief would never have been granted in municipal court as the defendant was legally ineligible for relief under Laurick. The Appellate Division's ruling affirms this decision by the Law Division.

State v. Enright, 416 N.J. Super. 391 (App. Div. 2010).

License Suspensions

Municipal court judges can suspend drivers' licenses at their discretion for up to 45 days for any "willful violations" pursuant to N.J.S.A. 39:5-31, taking into consideration the following factors: (1) the nature and circumstances of defendant's conduct, including the risk of harm and damage to property, (2) defendant's driving history, (3) whether the defendant was infraction-free for a substantial time preceding the most recent violation, and the likelihood of future violations, (4) the

character and attitude of the defendant, (5) whether the conduct was the result of circumstances unlikely to recur, (6) the hardship to the defendant and his dependents, (7) the need for personal deterrence, and (8) any other relevant factors.

State v. Moran, 202 N.J. 311 (2010).

Off-Duty Police Complaints

Since New Jersey has placed such high standards on police activity, and because police officers are able to recognize probable cause regardless of whether they are on-duty or off-duty, an officer could properly issue an officer's complaint for a violation he observed in his off-duty, private occupation. (An officer was employed in his off-hours as a school bus driver, and observed a vehicle pass his school bus while the flashing lights and sign were engaged. He wrote down the license plate number and reported the incident, and the driver was subsequently ticketed.)

State v. Gebbia, 414 N.J. Super. 406 (App. Div. 2010).

Private Citizens' Complaints

Since a private citizen is not a "prosecuting attorney" as defined in R. 3:23-9, if a judge or court administrator does not find probable cause to issue a complaint on behalf of the citizen, he has no standing to appeal the decision.

State v. Bradley, 420 N.J. Super. 138 (App. Div. 2011).

Statutory Construction

The statute for failing to maintain a lane of travel, N.J.S.A. 39:4-88(b), proscribes two separate and independent offenses: (1) failure to maintain a single lane of travel, and (2) changing lanes unsafely. The State need not necessarily prove that there was a lane-changing violation in order to establish a failure to maintain a lane.

State v. Regis, 2011 WL 6184454 (New Jersey Supreme Court Dec. 14, 2011).

Directives

Directive #04-11

The Administrative Office of the Courts (AOC) recently promulgated Directive #04-11 (see Appendix at A-19), which sets forth procedures for the disposition of municipal court matters associated with Superior Court matters. Citing increased efficiency in the court system and referring to State v. Hand, *supra*, the directive states that "unless there is some compelling reason otherwise, a Superior Court judge should dispose of all parts of a case before the court, including any associated municipal court matters."

When a Superior Court judge disposes of related municipal court matters, the tickets, completed forms, and other necessary disposition information are to be forwarded to the relevant municipal court for entry into the appropriate computer systems. Superior Courts are not to collect monies in satisfaction of fines, costs, etc. from defendants, but are instead to instruct those defendants to pay the relevant municipal court directly. If a Superior Court judge decides not to dispose of related municipal matters for some good cause, the county prosecutor has a maximum of seven days to return the relevant paperwork to the municipal court for disposition there.

Directive #02-10

The AOC promulgated Directive #02-10 in March 2010 (see Appendix at A-15) in response to legislation permitting municipal courts to provide alternative payment arrangements for indigents and others who cannot pay their fines and penalties in full. That Directive establishes procedures and guidance for municipal courts to follow in determining those payment arrangements. After the court has found that a person does not have the ability to pay, there are several available remedies. Following a default on payments, the court can:

1. Reduce, suspend, or modify the payment installments;
2. Credit the defendant for days served in jail;
3. Revoke any remaining unpaid portion of the penalty;
4. Order community service in lieu of payment; or
5. Impose any other lawful alternative in lieu of payment.

Note that those alternatives are only available after a defendant defaults on installment payments ordered by the court, not at the time of sentencing. Additionally, the court cannot modify the \$250 surcharge for an Unsafe Driving (N.J.S.A. 39:4-97.2) violation and cannot reduce or eliminate any amount of restitution ordered.

Statutes

With the passage of A-4302, the penalties for knowingly allowing a suspended driver to operate one's vehicle have increased. Per N.J.S.A. 39:3-40(h), knowingly permitting a suspended driver to use one's car carries a potential \$1,000 fine, 15 days of jail time, and up to a 90 day suspension. The owner must know either that the suspension was based on a conviction for drunk driving or that the person is suspended and has, within the last five (5) years, driven while on the revoked list.

Other Bad Acts

Admission of several pieces of irrelevant and prejudicial other bad acts evidence with respect to the defendant required reversal of his conviction. (Defendant was charged with killing the mother of his on-again, off-again girlfriend in their family home. During the course of the trial, evidence was presented to the effect that: (1) the defendant had neglected his son, (2) the defendant had been unfaithful to his girlfriend, (3) the defendant had been a male stripper, (4) the defendant had amassed substantial credit card debt, and (5) the defendant had forged his son's name on a credit application. The defendant objected to this evidence but the trial court admitted it without any limiting instructions. This evidence, which was clearly irrelevant, likely prejudiced the jury and led to an unfair result, and reversal of the conviction was required.)

State v. Foglia, 415 N.J. Super. 106 (App. Div. 2010).

Evidence of other crimes must be sanitized, and the jury must be provided with a clear limiting instruction to prevent its inherent prejudice from violating a defendant's rights.

State v. Gillispie, 208 N.J. 59 (2011).

Plea Agreements

The Appellate Division here noted that the Supreme Court has said, generally, once an agreement is reached and the defendant pleads guilty, "[d]ue process concerns...inhibit the ability of the prosecutor to withdraw from a guilty plea." State v. Means, 191 N.J. 610, 618 (2007). The Panel infers that to safeguard a defendant's constitutional rights, a plea agreement must generally be

enforced according to its terms, without implying unstated terms favorable to the State and unfavorable to the defendant.

State v. Conway, 416 N.J. Super. 406 (App. Div. 2010).

In evaluating the necessity of granting a defendant's request for an adjournment to obtain counsel of his choice to prosecute his motion to vacate his guilty plea, the court must balance its need to control its calendar and effectuate justice quickly against a defendant's right to counsel of his choice. Absent a showing of abuse of discretion causing "manifest wrong or injury," no reversal is required. State v. Hayes, 205 N.J. 522 (2011).

Parole

Generally

The parole board's failure to obtain and consider an inmate's recent psychological reports prior to setting an extended future eligibility term (FET) for that inmate required that the FET be vacated and reconsidered in light of the reports.

Geiger v. N.J. State Parole Bd., 2010 WL 3932333 (App Div. Unpub. September 17, 2010).

Megan's Law

Where defendant pled guilty as a minor to conduct that would subject him to Megan's Law without a full understanding of the Megan's Law consequences of his plea, his plea may be retracted to permit him to plead to a non-Megan's Law offense (in this case, child abuse under Title 9). However, his motion to vacate his multiple interim convictions for failing to register, as required by Megan's Law for the original conviction, will not be granted.

State v. G.L., 420 N.J. Super. 158 (App. Div. 2011).

Where a defendant could put forth a *prima facie* case that the actual restrictions placed upon him pursuant to the Community Supervision for Life (CSL) provisions of Megan's Law were more burdensome than had been explained to him at the time of his guilty plea, he was entitled to a remand for an evidentiary hearing as to his ineffective assistance of counsel claim.

State v. Villanueva, 2011 WL 2802267 (App. Div. Unpub. July 19, 2011).

Plea Agreements

Cases

The failure of defendant's attorney to present mitigating information at sentencing, seek a lesser sentence for defendant, or object to a prejudicial victim-impact video, even when the plea agreement specifically prohibited him from doing so, required reversal of the conviction due to counsel's incompetence.

State v. Hess, 207 N.J. 123 (2011).

Defendant, who presented evidence that his attorney incorrectly informed him that his plea to criminal sexual conduct could not be used to civilly commit him under the Sexually Violent Predator Act, was entitled to an evidentiary hearing with respect to his Sixth Amendment incompetence of counsel claim.

State v. Maldon, 422 N.J. Super. 475 (App. Div. 2011).

Developments

The U.S. Supreme Court should soon rule on two cases dealing with attorneys' responsibilities with respect to plea bargains. In Lafler v. Cooper and Missouri v. Frye, the Court must consider whether one attorney's poor advice to reject a plea offer, and another attorney's failure to disclose a plea offer to his client, constituted ineffective assistance of counsel in violation of the Sixth Amendment.

Polygraphs

Citing State v. A.O., 198 N.J. 69 (2009), the Appellate Division held that, even when counsel stipulate to the admissibility of polygraph results, those results cannot be introduced without a Frye hearing to determine their reliability. Furthermore, the State's expert witness improperly opined about the infallibility of polygraph tests (with the implication being that defendant must be guilty). State v. Mervilus, 418 N.J. Super. 138 (App. Div. 2011).

Where defendant had initially invoked his Miranda rights but then waived those rights without a full understanding of that waiver, the results of the subsequently polygraph test and statements he made during and after the test required suppression. State v. Carty, 2010 WL 5185110 (App. Div. Unpub. December 23, 2010).

Post-Conviction Relief (PCR)

Where a defendant can make a *prima facie* showing that a favorable plea offer had been made and that he had rejected that offer solely because of deficient advice from his attorney concerning his potential criminal exposure, he is entitled to an evidentiary hearing regarding a withdrawal of his plea.

State v. Dennis, 2011 WL 31360 (App. Div. Unpub. January 6, 2011).

The New Jersey Supreme Court granted certification in State v. Gaitan, 206 N.J. 330 (2011). The court will decide whether the decisions in Padilla v. Kentucky, 130 S.Ct. 1473 (2010) and State v. Nunez-Valdez, 200 N.J. 129 (2009), apply to Mr. Gaitan's argument that he should be granted post-conviction relief based on his attorney's failure to discuss the immigration consequences of his guilty plea with him. In the interim, the Supreme Court has issued a stay order (see Appendix at A-1) holding all litigation involving petitions for post-conviction relief based on immigration issues until the Gaitan case is resolved.

Pre-Trial Intervention (PTI) Program

Cases

Every defendant must be permitted to apply to the Pre-trial Intervention Program, even if their chances of acceptance are slim. PTI directors must do a full work up on all applications regardless of the likelihood of acceptance. (The Monmouth County PTI unit previously had a policy of discouraging defendants accused of certain offenses from seeking PTI, and advised them that they would be rejected unless the prosecutor joined in their applications. A defendant with a CDS distribution charge applied for PTI and was rejected on the basis of this policy without substantive consideration. The court held that such disqualification without consideration was not required under R. 3:28 and was improper.)

State v. Green, 413 N.J. Super. 556 (App. Div. 2010).

It was improper for the State to require the defendant to plead guilty to the charges as a condition of acceptance into PTI. The PTI guidelines expressly forbid prosecutors from conditioning acceptance on a plea of guilty.

State v. Davies, 2010 WL 2471409 (App. Div. Unpub. June 18, 2010).

Pre-trial intervention is not available to a defendant whose prior conditional discharge was vacated by court order. Although in the legal sense the conditional discharge “never happened,” it did happen as a matter of fact, barring PTI as an option.

State v. O’Brien, 418 N.J. Super. 428 (App. Div. 2011).

Guidelines

Pursuant to Guideline 4 of R. 3:28 of the New Jersey Court Rules, “enrollment in PTI programs should be conditioned upon neither informal admission nor entry of a plea of guilt. Enrollment of defendants who maintain their innocence should be permitted unless the defendant's attitude would render pretrial intervention ineffective.” The commentary to Guideline 4 elaborates:

A PTI program is presented to defendants as an opportunity to earn a dismissal of charges for social reasons and reasons of present and future behavior, legal guilt or innocence notwithstanding. This stance produces a relation of trust between counselor and defendant. Within the context of pretrial intervention when and whether guilt should be admitted is a decision for counselors. Counselors should be free to handle each case individually according to their best judgment.

Neither admission of guilt nor acknowledgement of responsibility is required. Steps to bar participation solely on such grounds would be an unwarranted discrimination.

Nevertheless, many guilty defendants blame their behavior on society, family, friends or circumstance, and avoid recognition of the extent of their own role and responsibility. While such an attitude continues, it is unlikely that behavioral change can occur as a result of short-term rehabilitative work. An understanding and acceptance of responsibility for behavior achieved through counseling, can and often does, result in the beginnings of the defendant's ability to control his/her acts and is an indication that rehabilitation may, in large measure, have been achieved.

Privilege

Attorney-Client

A defendant's application for a public defender, and all materials submitted in support of that application, are protected by the attorney-client privilege and not subject to subpoena by the prosecutor's office.

In re Custodian of Records, Criminal Div. Manager, 420 N.J. Super. 182 (App. Div. 2011).

Spousal

When a defendant is married to his spouse at the time of trial, the spousal privilege applies and bars testimony from the spouse, even about events that occurred prior to the marriage. (The defendant used date-rape drugs to sexually assault the sister of his then-girlfriend, now wife. The future wife conducted her own investigation of the allegations prior to any police involvement, and thus had important information about the case. She had, in the interim between the attack and the trial, apparently come to disbelieve her sister, and had gone on to marry the defendant. The Appellate Division found that the spousal privilege was applicable because there was an existing marriage, and

thus the wife could not testify about the attack, even though it had occurred before she had married the defendant.)

State v. Mauti, 416 N.J. Super. 178 (App. Div. 2010).

Prosecutorial Misconduct

A prosecutor's attempt to vouch for the credibility of police witnesses during his summation by stating that the police witnesses would have no incentive to lie, required reversal of conviction.

State v. Murphy, 412 N.J. Super. 553 (App. Div. 2010).

Prosecutor committed prejudicial error by remarking in summation that he was precluded by the rules of evidence from explaining why a detective had chosen defendant's picture to include in a photo array. Defendant's right to a fair trial was further prejudiced by police detective's statement that he had chosen defendant's picture from a database called a "Mug Master."

State v. Johnson, 421 N.J. Super. 511 (App. Div. 2011).

Public Officials

Forfeiture of Public Office

A police officer who pled guilty to fourth-degree Criminal Sexual Contact and who agreed not to seek future employment in law enforcement should not have been barred from all future public employment because his offense was not directly related to his performance of, or in circumstances flowing from, his specific public office. The N.J. Supreme Court here strongly suggested that, henceforth, prosecutors fully address possible employment implications at the time of the plea bargain.

State v. Hupka, 203 N.J. 222 (2010).

Tampering with evidence is an "offense of dishonesty" under the Forfeiture of Public Office statute, N.J.S.A. 2C:51-2(a)(1), requiring mandatory forfeiture of public employment.

State v. Kennedy, 419 N.J. Super. 475 (App. Div. 2011).

Official Misconduct

A police officer's conviction for misconduct in office was reversed because his use of the victim's bank card, which was accidentally left in an ATM machine, to withdraw cash from her account was not sufficiently related to his office to constitute Official Misconduct since he was on vacation and out of his jurisdiction.

State v. Kueny, 411 N.J. Super. 392 (App. Div. 2010).

The promise of a municipal job in return for dropping out of a political campaign is a crime of the second degree even though the benefit does not have a specific pecuniary measurement.

State v. Lake, 408 N.J. Super. 313 (App. Div. 2009).

Pension Forfeiture

A defendant who is convicted of official misconduct is required to forfeit the entire pension he has accrued in whatever pension system he is currently enrolled in, starting from the date of his enrollment, not the date of the crime. He is not, however, required to forfeit any pensions earned in other pension systems in which he was not enrolled at the time of his crime.

State v. Steele, 420 N.J. Super. 129 (App. Div. 2011).

Search and Seizure

Automobiles

Pena-Flores

Warrantless automobile searches are permissible only when the police have both probable cause to believe the vehicle in question contains evidence or contraband and there are exigent circumstances that justify proceeding without a warrant.

State v. Pena-Flores, 198 N.J. 6 (2009).

Pena-Flores is an extremely important holding because it creates problems for the State in virtually all automobile searches. In that case, the police had stopped a vehicle with tinted windows and noticed the odor of marijuana. The driver acted suspiciously and produced a driver's license he later admitted was not his. After securing him and his passenger, the police searched the car and found a gun and drugs. The Court suppressed the evidence and held the following:

Thus, in accordance with “our unwavering precedent,” ... the warrantless search of an automobile in New Jersey is permissible where (1) the stop is unexpected; (2) the police have probable cause to believe that the vehicle contains contraband or evidence of a crime; and (3) exigent circumstances exist under which it is impracticable to obtain a warrant. The notion of exigency encompasses far broader considerations than the mere mobility of the vehicle. Exigency must be determined on a case-by-case basis. No one factor is dispositive; courts must consider the totality of the circumstances. How the facts of the case bear on the issues of officer safety and the preservation of evidence is the fundamental inquiry. There is no magic formula--it is merely the compendium of facts that make it impracticable to secure a warrant. In each case it is the circumstances facing the officers that tell the tale.

Id. at 28-29 (citations omitted). There are a variety of factors that courts will consider in evaluating whether exigent circumstances were present and weighty enough to justify a warrantless automobile search:

1. The time of day;
2. The location of the stop;
3. The nature of the neighborhood;
4. The unfolding of the events establishing probable cause;
5. The ratio of officers to suspects;
6. The existence of confederates who knew the location of the car and could remove any of its content;
7. Whether the arrest was observed by a passerby who could tamper with the car's contents;
8. Whether it would be safe to leave the car unguarded; and
9. If not, whether the delay that would be caused by obtaining a warrant would place the officers or the evidence at risk.

Furthermore, the Court discussed at length the procedures for obtaining electronic or telephonic search warrants for use in these types of situations, and strongly encouraged law enforcement to utilize those types of warrants in the future rather than continuing to routinely conduct warrantless automobile searches. Id. at 33-36.

However, see State v. Mann, 203 N.J. 328 (2010), wherein the New Jersey Supreme Court held that the warrantless search of a vehicle was justified by the plain view exception, regardless of the existence of any exigency.

Other Automobile Cases

Generally

As an issue of first impression in New Jersey, the Appellate Division decided that, in keeping with the vast majority of precedent in other jurisdictions, a defendant has no expectation of privacy with respect to preventing his cell phone carrier from disclosing his general location. Thus his provider could give the police his general location, approximated at a roughly municipal level by determining to which cell tower he was connected, without a warrant. His privacy interest in his exact location, as determined by his cell phone's GPS, was not decided here.

State v. Earls, 420 N.J. Super. 583 (App. Div. 2011).

Officer had received reports of a vehicle driving suspiciously and proceeded to the area in question, approaching a parked vehicle matching the description he had received. He walked up to the vehicle and overheard defendant speaking loudly and in a slurred manner on a cell phone; defendant also smelled of alcohol and admitted he had just come from drinking at a pub. The "common-law right to inquire," which was what the officer was doing in approaching defendant here, was justified as part of officer's community caretaking functions, and his use of his police cruiser's flashing lights did not convert the initial inquiry into a Terry-type investigative detention.

State v. Adubato, 420 N.J. Super. 167 (App. Div. 2011).

Police are authorized to open the door of a vehicle they have stopped, as part of the process of ordering a passenger to exit, when there is legitimate concern about safety.

State v. Mai, 202 N.J. 12 (2010).

When police have a reasonable and articulable suspicion enabling them to conduct a Terry-type investigatory detention, and when, in the course of that detention, they see contraband in plain view, the warrantless seizure of that contraband is permissible. (The police had search and arrest warrants for the co-defendant, who was suspected of selling drugs. They observed the defendant approach him and engage in a suspected drug transaction. As the police approached the defendant to investigate, he fled from them. Officers apprehended him and saw drugs in his car during the flight.)

State v. Mann, 203 N.J. 328 (2010).

Discovery Issues

A motorist who has been charged with speeding is entitled to discovery respecting: (1) the speed-measuring device's make, model, and description; (2) the history of the officer's training on that speed-measuring device, where he was trained, and who trained him; (3) the training manuals for the speed-measuring device and its operating manuals; (4) the state's training manuals and operating manuals for the speed-measuring device; (5) the officer's log book of tickets written on the day of

defendant's alleged violation; (6) the repair history of the speed-measuring device used to determine defendant's speed for the past 12 months; and (7) any engineering and speed studies used to set the speed limit at the section of highway where defendant's speed was measured. Furthermore, the reliability of the Stalker Lidar speed-measuring device has not yet been proven.

State v. Green, 417 N.J. Super. 190 (App. Div. 2010).

The state (municipality) cannot deny discovery on the grounds that it does not have the information sought (laboratory information), and discovery cannot be limited to what the State intends to use.

State v. Green, 417 N.J. Super. 190 (App. Div. 2010).

Exigency

Although exigent circumstances existed at the scene of a car stop that permitted the police to seize the vehicle in question, once it was seized and the exigency no longer existed, the police were required to obtain a search warrant prior to searching the impounded vehicle. (Police stopped a vehicle involved in an armed robbery and arrested its occupants. They towed the vehicle and searched it the next day. Court granted a motion to suppress because exigency no longer existed as of the time of the search, thus a warrant was required.)

State v. Minitee, 415 N.J. Super. 475 (App. Div. 2010).

When considering the totality of the circumstances, including the fact that the stop of the defendant's car occurred at night and in a high-crime area, the vehicle could easily have been seen and accessed by passersby, there were at least five or six other individuals in the vicinity, backup was delayed, the suspects were not placed under arrest or secured in police vehicles, and occupants of the vehicle had acted suspiciously, exigent circumstances existed to justify a warrantless search of the vehicle.

State v. Lewis, 411 N.J. Super. 483 (App. Div. 2010).

Although the odor of raw marijuana may create the probable cause needed to search a vehicle, it does not in and of itself also provide the necessary exigency. As a result, a police search of the cab of a tractor trailer, based upon the smell of marijuana therein, was thrown out for lack of exigency.

State v. Pompa, 414 N.J. Super. 219 (App. Div. 2010).

Search of an automobile conducted during daylight hours, in a residential area, where four officers were present as opposed to only one suspect, where no testimony was elicited indicating danger, was not exigent as required by State v. Pena-Flores, *supra*, and evidence required suppression.

State v. Shannon, 2011 WL 1562610 (App. Div. Unpub. April 27, 2011).

Dwellings

Community Caretaking

The community caretaking doctrine cannot be used to justify warrantless searches of a home. Whether that exception can ever apply outside the context of an automobile search, we need not now decide. It is enough to say that, in the context of a search of a home, it does not override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement.

Ray v. Township of Warren, 626 F.3d 170 (3rd Cir. 2010).

Appellate Division declined to apply the holding in Ray v. Township of Warren, *supra*, to exclude evidence seized from a residence during a search purportedly executed as a community caretaking function. Instead, court decided to retain existing precedent in New Jersey which favored evaluation of the community caretaking exception as applied to homes on a case-by-case, fact-sensitive basis. (Court did reverse denial of suppression motion in this case, however, because there was no evidence that the search was conducted pursuant to any legitimate community caretaking function.) State v. Witczak, 421 N.J. Super. 180 (App. Div. 2011).

Police action in following a defendant into a bedroom without a warrant for the purpose of investigating a report of loud screaming was reasonable, despite the defendant's plausible explanation for the screams.

State v. McGacken, 2010 WL 910258 (App. Div. Unpub. March 15, 2010).

Other

Without a warrant, police cannot lawfully enter a defendant's home to conduct a Terry-type investigative detention. (The defendant's vehicle had been identified by an anonymous caller as having possibly been involved in a sale of drugs and/or a gunfight. Without a warrant, police went to the registered address of the vehicle and saw the defendant, who matched the caller's description, inside. When he opened the door partially in response to their demands, they forced it open the rest of the way and detained him. They subsequently searched him and found drugs, which the court here required to be suppressed because the police entry into the defendant's home was illegal.)

State v. Jefferson, 413 N.J. Super. 344 (App. Div. 2010).

The entry of police officers into a residence to process a crime scene some 30 to 40 minutes after entering it pursuant to the emergency aid exception to the warrant requirement was a reasonable continuation of the initial entry and allowed investigators to seize evidence in plain view they had first observed when they responded to the emergency. (The defendant's sister found the defendant's child dead and called 911. The responding police officers saw blood on the victim and the defendant, who was largely incoherent. After securing the location and removing the defendant, officers from the prosecutor's office arrived and seized incriminating evidence. The evidence they seized was held admissible as a continuation of the entrance made under the emergency aid exception, although evidence retrieved the following day without a warrant was not.)

State v. O'Donnell, 203 N.J. 160 (2010).

Law enforcement officers can conduct protective sweeps of residences only when: (1) they are lawfully within private premises for a legitimate purpose, which could include consent to enter; and (2) they have a reasonable articulable suspicion that the area to be swept harbored an individual posing a danger. Such sweeps will only be upheld if they are conducted quickly and restricted to areas where the person posing a danger could hide. When an arrest is not the basis for entry, police must point to dangerous circumstances that developed once they were at the scene.

State v. Davila, 203 N.J. 97 (2010).

Expectation of Privacy

The destination location of cellular calls made by municipal employees on government-issued cell phones was not covered by any reasonable right of privacy, and thus that information could be released pursuant to an Open Public Records Act (OPRA) request.

LiVecchia v. Borough of Mount Arlington, 421 N.J. Super. 24 (App. Div. 2011).

Persons

Search Incident to Arrest

Proceeds of search incident to arrest of defendant suppressed where arrest was the result of dispatcher error and officer therefore had no valid basis to arrest defendant. (Defendant's name was spelled differently from the individual against whom warrant had been issued and he had a different date of birth, but the officer arrested him nonetheless, subsequently finding drugs on his person.) State v. Handy, 206 N.J. 39 (2011).

Suppression of C.D.S. found on the defendant during a search incident to his arrest was mandated by the unreasonable act of the police dispatcher in incorrectly indicating to the arresting officer that the defendant had outstanding warrants. State v. Handy, 412 N.J. Super. 492 (App. Div. 2010).

Stop and Frisk (Terry)

The stop and frisk of a defendant was proper when he roughly matched the physical description that was given by an anonymous caller who reported a man in the area with a gun, was known to officers as a member of a violent gang, acted nervously and attempted to walk away when approached by officers, and reached for his waistband, but officer's act of lifting his t-shirt during frisk exceeded the scope of a permissible Terry search and was held unconstitutional. State v. Privott, 203 N.J. 16 (2010).

A police officer did not have the requisite reasonable and articulable suspicion to conduct a Terry stop of the defendant merely because he had been sitting at a park bench on which graffiti had sometime recently been scribbled and had acted nervously when approached; furthermore, the defendant's act of knocking documents out of the officer's hand and running away from him did not constitute obstruction that would justify the seizure of a bag the defendant was holding (which was later found to contain C.D.S.). State v. Wright, 2010 WL 2795062 (App. Div. Unpub. July 14, 2010).

Other

Sniffing of defendant's breath for the scent of alcohol, where defendant was detained by officers on suspicion of underage drinking, constituted custodial interrogation and implicated defendant's Miranda rights. State v. Koch, 2011 WL 4434949 (App. Div. Unpub. Sept. 26, 2011).

The defendant's flight from an unconstitutional stop, although it might have justified his arrest for obstruction, did not justify the admission of evidence revealed during the flight because there was no significant continuity between the stop and the seizure of the evidence. (Police went to a housing complex to deter a possible retaliatory shooting following gang violence there. The defendant rode by the officers on his bike, and when he noticed they were police, pedaled away despite their commands to stop. They eventually grabbed and arrested him, and they retrieved a box of cocaine that he threw away during the stop. The court ruled that the cocaine was inadmissible because there was not "significant attenuation" between the illegal police behavior in seizing the defendant and the retrieval of the evidence.) State v. Williams, 410 N.J. Super. 549 (App. Div. 2009), certif. den., 201 N.J. 440 (2010).

No Fourth Amendment violation occurs when the government retains the lawfully-obtained DNA profile and sample of an ex-probationer in the FBI's Combined DNA Index System (CODIS) database despite his objection to the retention of that information.

Boroian v. Mueller, 616 F.3d 60 (1st Cir. 2010).

Schools

It was reasonable for a school vice-principal to search the defendant's car, which was parked on school property, as it was reasonably related to the scope of locations on school property into which the defendant might have placed his contraband (i.e. his person, his locker, his car).

State v. Best, 201 N.J. 100 (2010).

Standing

A person who abandons property has no standing to bring a motion to suppress criminal evidence that is subsequently seized by the police from the property. (Police received a tip that an individual would be transporting drugs by bus. They met the bus at a scheduled stop and saw the defendant, who matched the description of the transporter. He acted nervous and evasive. They then asked all passengers to verify their luggage; a single unclaimed bag remained after this was done. The police asked the defendant if the bag was his, and he indicated that it was not. A drug dog signaled that the bag contained drugs and the police searched it. They found heroin and documents with the defendant's name on them, and the defendant was arrested. The Appellate Division held that the denial of his motion to suppress and his subsequent conviction were proper because he had abandoned the bag and thus had no standing to object to a search of it.)

State v. Carvajal, 202 N.J. 214 (2010).

Warrants

Arrest

Police prepared seriously deficient warrant for defendant's arrest and proceeded to his girlfriend's home to arrest him. When they arrived, defendant fled onto an adjacent roof, where he remained for some time until the police eventually talked him down. Although there had been no valid warrant, defendant's arrest was proper because he had fled into a public area (where no warrant was needed, merely probable cause) and because he had committed a crime in the presence of the officers (resisting arrest) that did not require a warrant as a predicate of arrest.

State v. Brown, 205 N.J. 133 (2011).

Electronic Data

The United States Supreme Court is scheduled to hear a case regarding the warrantless use of Global Positioning System (GPS) tracking data by law enforcement. In the case, United States v. Jones, No. 10-1259, police in Washington, D.C. obtained a warrant to attach a GPS tracker to a suspect's car for ten days. They continued to track the suspect for around four weeks, however, and never requested additional time from the court. The Third Circuit held that to be an unreasonable search, and the Supreme Court will now have the opportunity to review the matter.

Good Faith

When police conduct a warrantless search in objectively reasonable reliance on binding appellate precedent (doing so in “good faith”), the exclusionary rule does not apply to any evidence recovered during the search.

Davis v. U.S., 131 S.Ct. 2419 (2011).

Jurisdiction

The order authorizing all municipal court judges in a county to serve as acting judges for one another was valid. (The case also sets forth procedures to be followed in cross-jurisdictional situations).

State v. Broom-Smith, 201 N.J. 229 (2010).

Suppression of evidence obtained by way of a search in another state which complied with both the United States and New Jersey Constitutions is not required, even when the search violated statutes in the other state.

State v. Nguyen, 419 N.J. Super. 413 (App. Div. 2011).

Sentencing

Generally

Life sentence without the possibility of parole, as applied to convicted multiple murderer, was not unconstitutional *ex post facto* punishment because the sentencing provisions in place at the time of his crimes required a life sentence when the jury found at least one statutory aggravating factor. Recent amendments to the murder statute, made after his crimes, were of no moment to his sentencing.

State v. Baylor, 2011 WL 6820176 (App. Div. Dec. 29, 2011).

The retroactive application of the intensive monitoring and supervision provisions of the Sex Offender Monitoring Act to defendants whose offenses were committed prior to the effective date of the Act is unlawful as *ex post facto*.

Riley v. New Jersey State Parole Bd., 2011 WL 4388170 (App. Div. Sept. 22, 2011).

When defendants are convicted of multiple No Early Release Act (NERA) crimes with consecutive prison sentences, the multiple mandatory parole supervision periods following their release must run concurrently, not consecutively.

State v. Friedman, 413 N.J. Super. 480 (App. Div. 2010).

Family members of defendants may have no legal right to address the court at their relative’s sentencing.

State v. Blackmon, 202 N.J. 283 (2010).

Extended Terms

An extended term sentence could not be imposed on defendant, where he was already serving an extended term sentence for a crime committed after the one for which he was currently being sentenced.

State v. Pennington, 418 N.J. Super. 548 (App. Div. 2011).

Factors

At sentencing for aggravated manslaughter and driving while intoxicated (DWI), court could not properly consider injuries suffered by other victims of a fatal traffic accident when defendant pled guilty only with respect to a single victim. Court could also not properly rely on multiple prior DWI convictions as aggravating factors because DWI is not a crime in New Jersey.

State v. Lawless, 2011 WL 6057835 (App. Div. Dec. 7, 2011).

Jail Credits

Pursuant to R. 3:21-8, defendants are entitled to credits against all sentences “for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence” on each case. This rule must be applied consistently to ensure fairness and uniformity in sentencing.

State v. Hernandez, 208 N.J. 24 (2011).

Resentencing

Cases

Defendants may apply for resentencing pursuant to the 2010 amendments to N.J.S.A. 2C:35-7, even if they have previously received (in their plea agreement) the benefit of the State’s Brimage waiver of an extended term or a reduction of the mandatory minimum term.

State v. Oliver, 2011 WL 3611359 (App. Div. Unpub. August 18, 2011).

Directives

United States Attorney General Eric Holder issued a memorandum on July 15, 2011, in which he instructed federal prosecutors to implement the provisions of the Fair Sentencing Act (FSA) retroactively, instead of prospectively, as had been his previous position. The FSA drastically reduced the disparity in punishment for possession of crack cocaine as compared to powder cocaine. AG Holder had previously required all defendants whose offenses occurred prior to the passage of the FSA to be prosecuted under the prior, harsher possession law. With this memorandum, all defendants with pending cases will be eligible for the more lenient FSA penalties.

Sequestration

No violation of a defendant’s constitutional rights occurred when the victim remained in the courtroom after testifying and overheard the defendant speak, and was then recalled to make vocal identification.

State v. Williams, 404 N.J. Super. 147 (App. Div. 2009), certif. den., 201 N.J. 440 (2010).

Sex Offenses

The retroactive application of the intensive monitoring and supervision provisions of the Sex Offender Monitoring Act to defendants whose offenses were committed prior to the effective date of the Act is unlawful as *ex post facto*.

Riley v. New Jersey State Parole Bd., 2011 WL 4388170 (App. Div. Sept. 22, 2011).

Juvenile aggressors’ act of restraining two victim juveniles and touching their bare buttocks to the victims’ faces was not simply “inappropriate horseplay.” In fact, because it involved intimate body parts and was intended to degrade the victim, it met the statutory definition of fourth-degree

criminal sexual contact even though no sexual gratification was involved. Furthermore, because the victims were under 13, Megan's Law registration was required for the offenders.
State ex rel. B.P.C., 421 N.J. Super. 329 (App. Div. 2011).

N.J.S.A. 2C:14-2(a)(3) elevates the crime of sexual assault to first-degree aggravated sexual assault when the defendant perpetrates a violent crime, such as aggravated assault, on a third person during the course of the sexual assault in order to force the victim to submit. An aggravated assault against the sexual assault victim does not fall under this section.
State v. Rangel, 422 N.J. Super. 1 (App. Div. 2011).

Civil Commitment

Defendant, who presented evidence that his attorney incorrectly informed him that his plea to criminal sexual conduct could not be used to civilly commit him under the Sexually Violent Predator Act, was entitled to an evidentiary hearing with respect to his Sixth Amendment incompetence of counsel claim.
State v. Maldon, 422 N.J. Super. 475 (App. Div. 2011).

The Sexually Violent Predator Act is not punitive, and therefore unconstitutional, as applied to inmates who were not provided with specialized treatment prior to civil commitment.
In the Matter of the Civil Commitment of W.X.C., 204 N.J. 179 (2010).

Corrections

The only sex offenders who may be confined to the Adult Diagnostic Treatment Center (ADTC) are those who meet *all* three (3) factors set forth in the Sex Offender Act (SOA). Those factors are: (1) the offender's behavior was repetitive and compulsive, (2) the offender is amenable to sex offense treatment, and (3) the offender is willing to participate in sex offense treatment.
Williams v. New Jersey Dept. of Corrections, 31 A.3d 645 (App. Div. 2011).

Restraining Orders

The AOC promulgated Directive #01-10 on March 2, 2010 (see Appendix at A-10). The directive deals with "Nicole's Law," which refers to a combination of N.J.S.A. 2C:14-12 and N.J.S.A. 2C:44-8. Nicole's Law permits courts to prohibit (as a condition of bail, or as a new or continued previous order) defendants in sex offense cases from having any contact with the victim(s). The order is similar to a domestic violence restraining order but there is no need to establish that a domestic relationship existed between the parties. The AOC directive provides procedures for notification of the issuance of such orders as well as conflict resolution procedures; (for example, in situations where a parent is barred from seeing their child by a criminal judge, but is granted visitation by a family judge).

Sixth Amendment Issues

Incompetence of Counsel

Defendant, who presented evidence that his attorney incorrectly informed him that his plea to criminal sexual contact could not be used to civilly commit him under the Sexually Violent Predator Act, was entitled to an evidentiary hearing with respect to his Sixth Amendment incompetence of counsel claim.

State v. Maldon, 422 N.J. Super. 475 (App. Div. 2011).

Defense counsel declined to file a motion on client's behalf to retract his guilty plea, and, at sentencing when the issue was raised, disclosed to the court independent investigation that she had done suggesting his guilt. This created a situation in which the defendant effectively stood alone against two prosecutors, a clear violation of his right to counsel.

State v. Barlow, 419 N.J. Super. 527 (App. Div. 2011).

The failure of defendant's attorney to present mitigating information at sentencing, seek a lesser sentence for defendant, or object to a prejudicial victim-impact video, even when the plea agreement specifically prohibited counsel from doing so, required reversal of the conviction due to counsel's incompetence.

State v. Hess, 207 N.J. 123 (2011).

Where counsel failed to advise defendant of the twenty-two (22) restrictions of the Community Supervision for Life (CSL) requirements of his plea to a Megan's Law offense, defendant was entitled to a hearing to withdraw his plea and vacate his conviction based on incompetence of counsel.

State v. Villanueva, 2011 WL 2802267 (App. Div. Unpub. July 19, 2011).

Right to Confront Witnesses

When a defendant requests medical treatment during a trial, does not request a postponement of the trial, and no prejudice results from his absence, he has waived his constitutional right to be present at his trial and his subsequent conviction will not be overturned under R. 3:16.

State v. Dellisanti, 203 N.J. 444 (2010).

Right to Counsel

A defense attorney representing a criminal defendant, who the State may call as a material witness in the case against that defendant, need not be disqualified as counsel, especially where his testimony is of marginal probative value.

State v. Williams, 2011 WL 6412140 (App. Div. Unpub. Dec. 22, 2011).

That a defendant first met his substituted attorney on the morning of his scheduled suppression hearing, and that the court declined to grant him an adjournment, is insufficient to reverse his conviction unless he suffered "manifest wrong or injury."

State v. Miller, 420 N.J. Super. 75 (App. Div. 2011).

The holding in State v. O'Neill does not apply in this case, where police did not use a "question-first, warn-later" approach and the defendant said nothing relevant to the crimes being investigated before receiving proper warnings. Under the familiar totality-of-the-circumstances test, the defendant's waiver of his rights was knowing, voluntary and intelligent.

State v. Yohnnson, 204 N.J. 43 (2010).

A defendant's request for advice from a detective regarding the use of an attorney during questioning does not amount to an ambiguous request for counsel which the police would have had to scrupulously honor by terminating questioning. When a defendant understands his rights, and the

police do not use any inaccurate or misleading language concerning his rights, suppression of his statements is not required.

State v. Alston, 204 N.J. 614 (2011).

Right to Public Trial

The trial court's exclusion of the defendant's uncle during *voir dire* resulted in reversal by the U.S. Supreme Court. Trial courts are obligated to take every reasonable step to accommodate public attendance at criminal trials.

Presley v. Georgia, 130 S. Ct. 721 (2010).

A defendant was not entitled to a reversal of his conviction based on the trial court's announcement that members of the victim's and defendant's families would not be allowed in the courtroom during jury selection because no family members were ever present, nor did the defendant object to the court's declaration when it was made.

State v. Venable, 411 N.J. Super. 458 (App. Div. 2010).

Stalking

There is no need for the State to prove that a stalker had knowledge of the fear he inspired, only that he acted in a way that would cause a reasonable person to fear harm or death.

State v. Gandhi, 201 N.J. 161 (2010).

Summation

Prosecutor committed prejudicial error by remarking in summation that he was precluded by the rules of evidence from explaining why a detective had chosen defendant's picture to include in a photo array. Defendant's right to a fair trial was further prejudiced by police detective's statement that he had chosen defendant's picture from a database called a "Mug Master."

State v. Johnson, 421 N.J. Super. 511 (App. Div. 2011).

A prosecutor's attempt to vouch for the credibility of police witnesses during his summation by stating that the police witnesses would have no incentive to lie, required reversal of conviction.

State v. Murphy, 412 N.J. Super. 553 (App. Div. 2010).

Underage Drinking

With the passage of A-3160 in October 2010, New Jersey's underage drinking laws have changed. N.J.S.A. 2C:33-15, the underage drinking statute, has been amended to include immunity from prosecution for underage drinkers who take affirmative steps to ensure medical treatment for other underage drinkers that are suffering from alcohol-related medical emergencies. The immunity requires that:

1. The underage person seeking immunity called 911 for medical aid for the underage drinker experiencing the emergency;
2. He (and one or two of his friends) gave their names to the 911 operator;
3. He was the first person to make the 911 report; and
4. He remained at the scene and cooperated with emergency responders.

The section also provides immunity for the underage drinker receiving medical assistance. The immunity extends to prosecution under both the state statute and any municipal ordinances regarding underage drinking authorized by the statute.

Video Playback

Juries should be permitted to see video playbacks of recorded trial testimony upon their request, subject to reasonable safeguards (outlined in this opinion).

State v. Miller, 205 N.J. 109 (2011).

Jurors may be permitted to watch videotaped interviews of witnesses, but must do so in open court. They cannot be permitted to have unfettered access to such materials because of the possibility of prejudice.

State v. A.R., 2011 WL 3476875 (App. Div. Unpub. August 10, 2011).

Witnesses

Generally

The holding in State v. Artwell, 177 N.J. 526 (2003), which held that defendants cannot be compelled to testify in prison garb and that when restraints are necessary for courtroom security, juries must be given an appropriate instruction not to consider them, was a new rule of law which does not require full retroactivity.

State v. Dock, 205 N.J. 237 (2011).

A trial court's act in barring cross-examination of a witness regarding a remote, unrelated conviction was not reversible error. (The defendant robbed the victim at gunpoint and stole his car. Shortly thereafter, the defendant was involved in a car accident and the victim was brought to the scene to identify him. Following the victim's testimony in court and identification, the defendant sought to question the victim about a prior conviction for aggravated assault from 1993. The court barred those questions because conviction was temporally remote and unrelated to his honesty or motive to lie.)

State v. Leonard, 410 N.J. Super. 182 (App. Div. 2009), certif. den. 201 N.J. 157 (2010).

Experts

Suppression of the defendant's confession was not required, despite the psychiatrist's testimony that the defendant suffered from an adjustment disorder that would have rendered his confession involuntary, because the expert had not testified that the defendant suffered from the disorder at the time he gave the confession and because the expert had relied on the defendant's assertions of police threats, which was a credibility decision to be made by the jury.

State v. Rosales, 202 N.J. 549 (2010).

"Tool mark analysis" was a proper subject for expert witness testimony. (The State's expert testified that the trash bags used to wrap body of murder victim came from the same source as trash bags the defendant used to dispose of the victim's clothes several weeks earlier.)

State v. McGuire, 419 N.J. Super. 88 (2011).

Police officer could not permissibly testify that defendant had engaged in hand-to-hand drug transactions because he had not been qualified as an expert, because that testimony expressed a specific belief in the defendant's guilt, and because it presumed to give an opinion on matters that the jury could have understood without any expert assistance.

State v. McLean, 205 N.J. 438 (2011).

Lay Witnesses

Lay witness testimony concerning esoteric medical information and opining as to the plausibility of a claim of sexual assault went well beyond the type of ordinary, common-sense information and observations that can properly be presented by way of lay testimony, and because the witness was not called as an expert and did not provide an expert report in advance of trial, reversal of conviction was mandated.

State v. Flores-Alfaro, 2010 WL 3516887 (App. Div. Unpub. September 1, 2010).

Police Officers

The contemporaneous written notes of interviews and observations made by police officers during their investigations are discoverable in criminal trials. Appropriate sanctions are warranted when the State fails to preserve those records and provide them in discovery.

State v. W.B., 205 N.J. 588 (2011).

Additional Factors and Precedent to Consider When Handling Criminal Cases

I. DEFENDING CERTAIN PROFESSIONALS

- A. Domestic violence complaints against law enforcement officials (how to prevent loss of employment).
- B. Domestic violence or disorderly person's offense cases against nurses/teachers/child care providers. Dealing with DYFS (Convictions and loss of employment).
- C. Domestic violence restraining orders/ civil restraints.
- D. Drug cases against teachers.
- E. Theft/shoplifting against public employees.
- F. Questioning of public.

II. BAIL ISSUES

- A. Source of bail issues (New Jersey Court Rules, R. 3:26-8, effective September 10, 2008).
- B. Bail Assignments: how to get paid on them before the case is over.

III. DISCOVERY

- A. Discovery
 - 1. D.Y.F.S. records;
 - 2. School records;
 - 3. Juvenile records;
 - 4. In Camera review.
- B. Disclosure restrictions
 - 1. Utilization of these records against state witnesses. Use of any offenses including traffic cases against state's witnesses that were pending or disposed of while the case against the defendant was pending. Davis v. Alaska, 415 U.S. 308 (1974), State v. Hare, 139 N.J. Super. 150 (1976).
 - 2. Necessity of having witness to attorney interviews of victim and/or witness who may be unfriendly now or in the future. RPC 3.7. (Lawyer as witness prohibited.)
- C. Probable cause hearing

IV. HAVING CLIENT TESTIFY AT GRAND JURY HEARING

V. PLEA NEGOTIATIONS

- A. Importance of pro-active plea negotiations (pre-indictment)
- B. Plea negotiations in C.D.S. crimes.
 - 1. Expungement
 - a. Youthful offender (N.J.S.A. 2C:52-5) eligible for expungement one year after conviction, probation or parole if not distribution for sale (except for marijuana 25 grams or less or Hashish 5 grams or less) (creative guilty pleas on

- factual basis) (conspiracy to distribute versus possession with intent to distribute including conspiracy with John Doe for reluctant defendant or intent to share).
2. Other C.D.S. criminal convictions (N.J.S.A. 2C:52-2)
 3. Loss of driving privileges. N.J.S.A. 2C:35-16a. See State v. Bendix, 396 N.J. Super. 91 (App. Div. 2007), for a discussion of the hardship exception and its applicability.
- C. Plea negotiations in sex crimes
1. Creative plea agreements to avoid 85%, prison, or Megan's law.
 2. Orders to include with Judgment of Conviction when endangering conviction is based on non sexual conduct when original charge involved allegation of sexual misconduct .
 3. Plea negotiations in juvenile sex crimes where defendant was under 14 at the time of the incident (can make a motion when defendant turns 18 to have Megan's Law requirements terminated). In re Registrant J.G., 169 N.J. 304 (2001).
- D. Plea negotiations in Juvenile cases.
1. Avoiding waiver.
 2. The rule (N.J.S.A. 2A:4A-43(b)(1)).
- E. Plea negotiations in arson cases.
1. Ramifications of arson conviction.
 - a. More severe confinement (no minimum security or most prison programs).
 - b. No admission to most in-patient and many out-patient programs.
 - c. Criminal mischief or other offense does not carry this stigma.
- F. Plea negotiations in theft of car cases.
1. First conviction requires one year suspension or postponement of driving privileges and a \$500.00 fine, 2C:20-2.1(a)(1).
 2. Second conviction requires two years suspension or postponement of driving privileges and a \$750.00 fine, 2C:20-2.1(a)(2).
 3. Third or subsequent conviction requires ten years suspension or postponement of driving privileges and a \$1000.00 fine, 2C:20-2.1(a)(3).
- G. Plea negotiations in escape cases.
- H. Negotiating forfeitures, drug profiteering penalties.
- I. Plea negotiations with court.
- J. Intra family kidnapping and custody cases
- K. Juvenile waivers to adult court.
1. Mental deficiency of 17 year old not necessary for prosecutor to consider, State v. Reed, 397 N.J. Super. 598 (App. Div. 2008).
- L. Importance of psychological/psychiatric examinations of non-insane clients.
- M. Drug Court alternative pros and cons.
- N. Use of polygraphs and voice stress analysis examinations

VI. PRE-TRIAL INTERVENTION

- A. Pre-Trial Intervention for shop lifting over \$200.00 (upgrading cases to superior court).

- B. Out of state equivalent to PTI or a juvenile court rule not a bar to PTI unlike a conditional discharge. State v. McKeon, 385 N.J. Super. 559 (App. Div. 2006).
- C. Court remanded for reconsideration State's determination denying PTI based on four months of unemployment insurance fraud that State determined was a "continuing criminal business or enterprise".

VII. PRE-TRIAL MOTIONS

- A. False Allegations
 - 1. Under State v. Guenther, 181 N.J. 129 (2004), inquiry into false allegations of criminal conduct made by a victim-witness prior to those forming the basis of the present criminal charges is permissible under narrow circumstances.
 - 2. In State v. A.O., 198 N.J. 69 (2009), the Supreme Court held that evidence of similar false allegations made after the current allegations are similarly admissible for impeachment purposes.
- B. Hearsay
 - 1. The U.S. Supreme Court has held that cross-examination is required in order to admit any prior testimonial statements of witnesses that have since become unavailable. Admission of such hearsay testimonial statements without cross-examination violates a defendant's Sixth Amendment Confrontation Clause rights. Crawford v. Washington, 541 U.S. 36 (2004).
- C. Identification
 - 1. Where defense can provide evidence of potential bias in an eyewitness' identification, that identification will be suppressed at trial. See State v. Henderson and State v. Chen, *supra*.
 - 2. Per Chen/Henderson, courts should consider the following factors in assessing reliability of identifications: (1) the level of stress of the witness at the time of the identification, (2) whether the suspect had a weapon, (3) the amount of time the witness had to view the suspect, (4) the distance between the witness and the suspect, and the lighting at the time, (5) the characteristics of the witness, including age and sobriety, (6) the characteristics of the perpetrator, including any disguise, (7) memory decay over time, (8) whether the suspect and witness are of differing races, (9) to whom and how many people the witness has spoken about the incident since it occurred.
- D. Miranda
 - 1. If the State uses a "question first, warn later" approach to questioning, any statements given will be suppressed (as well as the inverse). See State v. Yohnnson, 204 N.J. 43 (2010).
 - 2. AG Directive #2011-2 (titled "Retention of Contemporaneous Investigation Notes") requires police to retain the notes they make of interviews and observations during their investigations. (See Appendix at A-26)
- E. Search and Seizure

1. The bedrock holding of State v. Pena-Flores, 198 N.J. 6 (2009), requires not only probable cause, but also exigency in order for police to conduct a warrantless automobile search.
2. Per Ray v. Township of Warren, 626 F.3d 170 (3rd Cir. 2010), there can be no community caretaking warrant exception for residences.
3. When a search is conducted incident to an illegal arrest caused by dispatcher error, the results of that search will be suppressed, even if the officer conducting the search did so in good faith. State v. Handy, 206 N.J. 39 (2011).
4. Terry-style pat downs for weapons do not enable police to lift the t-shirts of suspects being patted down (in order to check their waistbands). State v. Privott, 203 N.J. 16 (2010).

VIII. DEFENSES

- A. Alibi defense.
 1. Helping the State win the case.
 2. Failure to give notice by defense almost never a basis to preclude alibi witnesses and certainly not basis to preclude defendant from testifying to same. State v. Bradshaw, 195 N.J. 493 (2008).
- B. Use of force: menacing a trespasser with a deadly weapon; e.g., pointing a gun is not using deadly force and is often legal. See State v Moore, 309 N.J. Super. 463 (App. Div. 1998), affirmed as to this issue, 158 N.J. 292 (1999); State v Harmon, 203 N.J. Super. (App. Div. 1985), reversed on other grounds, 104 N.J. 189 (1986).
- C. 2C:3-11: "A threat to cause death or serious bodily harm by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force." 2C:3-6(a) and (b) use of force justifiable to terminate commission or attempted commission of a trespass, theft, criminal mischief, or interference with property.
- D. Search and Seizure
- E. Court's failure to adjourn case to enforce order to produce a defense witness from another county jail results in reversal of conviction. State v. Garcia, 195 N.J. 192 (2008).

IX. POST CONVICTION ISSUES

- A. Expungements.
 1. What can and cannot be expunged.
 2. Pre Trial Intervention .
 3. Drug Crimes.
 4. Youthful drug offenders.
 5. Distribution of C.D.S.
 6. Conspiracy.
- B. Nunc Pro Tunc.
- C. Change of Custody to an alcohol or drug rehabilitation in patient program.
- D. How does a period of parole ineligibility affect the defendant's ability to successfully apply for a Change of Custody and when one can qualify before that parole ineligibility period is over.

E. Megan's law tiering: How to have a Tier 2 treated as a Tier 1.

X. PAROLE

A. Parole concerns.

1. When is someone eligible for parole?
2. How to utilize the parole chart/parole eligibility calculations.
3. Impact of prior prison sentences on parole.
4. Consecutive sentences with periods of parole ineligibility (order is important).
5. How to prepare a client for parole before sentencing.
6. How to prepare a client for his parole hearing.
7. How to speed up the parole process.
8. What does the parole board consider.
9. What to send to the parole board and to whom.

Appendix

New Jersey Supreme Court

Immigration-Related PCR Stay Order, <u>State v. Gaitan</u> , 206 N.J. 330 (2011), July 26, 2011.....	A-1
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New Jersey Legislature

A-1561, Amendments to N.J.S.A. 2A:4A-71 (“Sexting” Diversionary Program), September 16, 2011.....	A-2
A-1491, Amendments to N.J.S.A. 2A:162-12 (Bail in Matters Concerning Domestic Violence Restraining Orders), November 7, 2011.....	A-4
S-2316, Amendments to N.J.S.A. 2C:40A-4 (Professional Solicitation), December 15, 2011.....	A-6

Administrative Office of the Courts (AOC)

Directive #01-10, Nicole’s Law Restraining Order and Notification Procedures, March 2, 2010.....	A-10
Directive #02-10, Municipal Court Payment Alternatives, March 2, 2010.....	A-15
Directive #04-11, Disposition of Related Municipal Matters in Superior Court, July 12, 2011.....	A-19
Directive #09-11, Informing Municipal Court Defendants of Immigration Consequences of Guilty Pleas	A-22

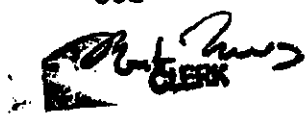
Attorney General’s Office

Directive 2011-2, Retention of Contemporaneous Investigation Notes, May 23, 2011.....	A-26
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STATE OF NEW JERSEY,
Plaintiff-Appellant,
v.
FRESNEL GAITAN,
Defendant-Respondent.

FILED

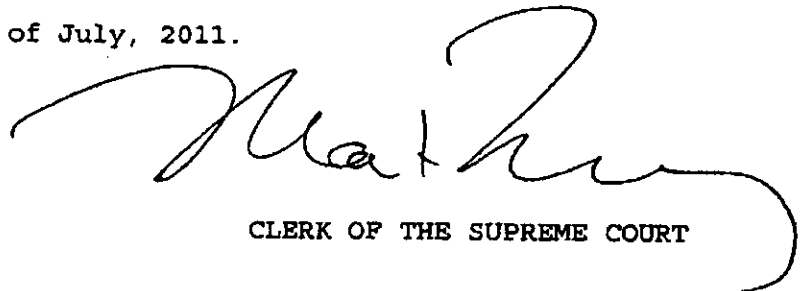
JUL 26 2011


CLERK

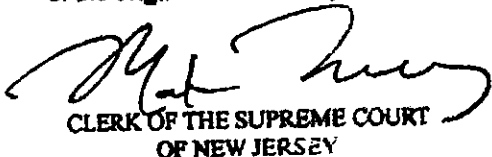
O R D E R

This matter having been duly presented to the Court on its own motion, it is ORDERED that all litigation involving petitions for post-conviction relief that include claims regarding the application of State v. Nunez-Valdez, 200 N.J. 129 (2009), and Padilla v. Kentucky, 130 S.Ct. 1473 (2010), are hereby stayed pending disposition of this appeal; provided that a trial or appellate court is authorized to order a lifting of the stay in individual cases where a defendant faces immediate removal or otherwise to prevent irreparable harm.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 26th day of July, 2011.


CLERK OF THE SUPREME COURT

The foregoing is a true copy
of the original on file in my office.


CLERK OF THE SUPREME COURT
OF NEW JERSEY

CHAPTER 128

AN ACT concerning diversionary programs for certain juveniles, amending P.L.1982, c.81 and supplementing Title 2A of the New Jersey Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 2 of P.L.1982, c.81 (C.2A:4A-71) is amended to read as follows:

C.2A:4A-71 Review and processing of complaints.

2. Review and processing of complaints. a. The jurisdiction of the court in any complaint filed pursuant to section 11 of P.L.1982, c.77 (C.2A:4A-30) shall extend to the juvenile who is the subject of the complaint and his parents or guardian.

b. Every complaint shall be reviewed by court intake services for recommendation as to whether the complaint should be dismissed, diverted, or referred for court action. Where the complaint alleges a crime which, if committed by an adult, would be a crime of the first, second, third or fourth degree, or alleges a repetitive disorderly persons offense or any disorderly persons offense defined in chapter 35 or chapter 36 of Title 2C, the complaint shall be referred for court action, unless the prosecutor otherwise consents to diversion. Court intake services shall consider the following factors in determining whether to recommend diversion:

- (1) The seriousness of the alleged offense or conduct and the circumstances in which it occurred;
- (2) The age and maturity of the juvenile;
- (3) The risk that the juvenile presents as a substantial danger to others;
- (4) The family circumstances, including any history of drugs, alcohol abuse or child abuse on the part of the juvenile, his parents or guardian;
- (5) The nature and number of contacts with court intake services and the court that the juvenile or his family have had;
- (6) The outcome of those contacts, including the services to which the juvenile or family have been referred and the results of those referrals;
- (7) The availability of appropriate services outside referral to the court;
- (8) Any recommendations expressed by the victim or complainant, or arresting officer, as to how the case should be resolved;
- (9) Any recommendation expressed by the county prosecutor; and
- (10) The amenability of the juvenile to participation in a remedial education or counseling program that satisfies the requirements of subsection b. of section 2 of P.L.2011, c.128 (C.2A:4A-71.1) if the offense alleged is an eligible offense as defined in subsection c. of section 2 of P.L.2011, c.128 (C.2A:4A-71.1).

C.2A:4A-71.1 Diversionary programs for certain juveniles.

2. a. Where a complaint against a juvenile pursuant to section 11 of P.L.1982, c.77 (C.2A:4A-30) alleges that the juvenile has committed an eligible offense as defined in subsection c. of this section and the court has approved diversion of the complaint pursuant to section 4 of P.L.1982, c.81 (C.2A:4A-73), the resolution of the complaint shall include the juvenile's participation in a remedial education or counseling program. The parents or guardian of the juvenile shall bear the cost of participation in the program, except that the court shall take into consideration the ability of the juvenile's parents or guardian to pay and the availability of such a program in the area in which the juvenile resides and, where appropriate, may permit the juvenile to participate in a self-guided awareness program in lieu

of a remedial education or counseling program provided that it satisfies the requirements of subsection b. of this section.

b. A remedial education or counseling program satisfies the requirements of this act if the program is designed to increase the juvenile's awareness of:

(1) the legal consequences and penalties for sharing sexually suggestive or explicit materials, including applicable federal and State statutes;

(2) the non-legal consequences of sharing sexually suggestive or explicit materials including, but not limited to, the effect on relationships, loss of educational and employment opportunities, and being barred or removed from school programs and extracurricular activities;

(3) the potential, based upon the unique characteristics of cyberspace and the Internet, of long-term and unforeseen consequences for sharing sexually suggestive or explicit materials; and

(4) the possible connection between bullying and cyber-bullying and juveniles sharing sexually suggestive or explicit materials.

c. As used in this act, "eligible offense" means an offense in which:

(1) the facts of the case involve the creation, exhibition or distribution of a photograph depicting nudity as defined in N.J.S.2C:24-4 through the use of an electronic communication device, an interactive wireless communications device, or a computer; and

(2) the creator and subject of the photograph are juveniles or were juveniles at the time of its making.

3. This act shall take effect on the first day of the seventh month after enactment.

Approved September 16, 2011.

CHAPTER 138

AN ACT concerning bail and domestic violence and amending P.L.1994, c. 144.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 1 of P.L.1994, c.144 (C.2A:162-12) is amended to read as follows:

C.2A:162-12 Crimes with bail restrictions; posting of bail.

1. a. As used in this section:

"Crime with bail restrictions" means a crime of the first or second degree charged under any of the following sections:

- | | |
|---|------------------------------------|
| (1) Murder | 2C:11-3. |
| (2) Manslaughter | 2C:11-4. |
| (3) Kidnapping | 2C:13-1. |
| (4) Sexual Assault | 2C:14-2. |
| (5) Robbery | 2C:15-1. |
| (6) Carjacking | P.L.1993, c.221, s.1 (C.2C:15-2). |
| (7) Arson and Related Offenses | 2C:17-1. |
| (8) Causing or Risking Widespread
Injury or Damage | 2C:17-2. |
| (9) Burglary | 2C:18-2. |
| (10) Theft by Extortion | 2C:20-5. |
| (11) Endangering the Welfare of Children | 2C:24-4. |
| (12) Resisting Arrest; Eluding Officer | 2C:29-2. |
| (13) Escape | 2C:29-5. |
| (14) Corrupting or Influencing a Jury | 2C:29-8. |
| (15) Possession of Weapons for Unlawful Purposes | 2C:39-4. |
| (16) Weapons Training for Illegal Activities | P.L.1983, c.229, s.1 (C.2C:39-14). |
| (17) Soliciting or Recruiting Gang Members | P.L.1999, c.160, s.1 (C.2C:33-28). |

"Crime with bail restrictions" also includes any first or second degree drug-related crimes under chapter 35 of Title 2C of the New Jersey Statutes and any first or second degree racketeering crimes under chapter 41 of Title 2C of the New Jersey Statutes.

"Crime with bail restrictions" also includes any crime or offense involving domestic violence, as defined in subsection a. of section 3 of P.L.1991, c. 261 (C.2C:25-19), where the defendant was subject to a temporary or permanent restraining order issued pursuant to the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et al.) and is charged with a crime committed against a person protected under the order or where the defendant is charged with contempt pursuant to N.J.S.2C:29-9.

b. Subject to the provisions of subsection c. of this section, a person charged with a crime with bail restrictions may post the required amount of bail only in the form of:

- (1) Full cash;
- (2) A surety bond executed by a corporation authorized under chapter 31 of Title 17 of the Revised Statutes; or
- (3) A bail bond secured by real property situated in this State with an unencumbered equity equal to the amount of bail undertaken plus \$20,000.

c. There shall be a presumption in favor of the court designating the posting of full United States currency cash bail to the exclusion of other forms of bail when a defendant is charged with an offense as set forth in subsection a. of this section and:

- (1) has two other indictable cases pending at the time of the arrest; or
- (2) has two prior convictions for a first or second degree crime or for a violation of section 1 of P.L.1987, c.101 (C.2C:35-7) or any combination thereof; or
- (3) has one prior conviction for murder, aggravated manslaughter, aggravated sexual assault, kidnapping or bail jumping; or
- (4) was on parole at the time of the arrest; or
- (5) was subject to a temporary or permanent restraining order issued pursuant to the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et al.), was charged with a crime committed against a person protected under that order, including a charge of contempt pursuant to N.J.S.2C:29-9, and either: (a) is charged with commission of a domestic violence crime that resulted in serious bodily injury to the victim; or (b) has at least one prior conviction for a crime or offense involving domestic violence against the same victim or has previously violated a final restraining order protecting the same victim,

unless the court finds on the record that another form of bail authorized in subsection b. of this section will ensure the defendant's presence in court when required.

d. When bail is posted in the form of a bail bond secured by real property, the owner of the real property, whether the person is admitted to bail or a surety, shall also file an affidavit containing:

- (1) A legal description of the real property;
- (2) A description of each encumbrance on the real property;
- (3) The market value of the unencumbered equity owned by the affiant as determined in a full appraisal conducted by an appraiser licensed by the State of New Jersey; and
- (4) A statement that the affiant is the sole owner of the unencumbered equity.

e. Nothing herein is intended to preclude a court from releasing a person on the person's own recognizance when the court determines that such person is deserving.

2. This act shall take effect immediately.

Approved November 7, 2011.

[Third Reprint]
SENATE, No. 2316

STATE OF NEW JERSEY
214th LEGISLATURE

INTRODUCED SEPTEMBER 30, 2010

Sponsored by:

Senator NICHOLAS P. SCUTARI
District 22 (Middlesex, Somerset and Union)
Senator GERALD CARDINALE
District 39 (Bergen)

Co-Sponsored by:

Senator Oroho

SYNOPSIS

Bars solicitation of professional employment for 30 days after date of accident or disaster under certain circumstances.

CURRENT VERSION OF TEXT

As amended



(Sponsorship Updated As Of: 11/23/2010)

1 AN ACT concerning certain solicitations ¹[by attorneys] ³[.] and³
 2 amending P.L.1999, c.325 ³[and supplementing Title 2C of the
 3 New Jersey Statutes]³.

4
 5 **BE IT ENACTED** by the Senate and General Assembly of the State
 6 of New Jersey:

7
 8 ³[1. (New section) The Legislature finds and declares that,
 9 increasingly, certain ²[attorneys] professionals² are sending
 10 intrusive and unwarranted solicitation letters to victims of motor
 11 vehicle accidents, drivers who receive traffic tickets, and persons
 12 charged with offenses. The ²[attorneys] professionals² obtain these
 13 people's names, addresses and other personal information through
 14 public information sources such as police reports and court records,
 15 and send the letters in an attempt to solicit business. The
 16 Legislature finds that this practice constitutes an abuse of our
 17 system of open public records, constitutes an invasion of these
 18 individuals' privacy, and increases the public's mistrust and
 19 suspicion of ²[the legal profession] certain professions².]³

20
 21 ³[2. (New section) a. No ²[attorney] person² shall send any
 22 written communication soliciting professional employment on the
 23 ²[attorney's] person's² own behalf to any person whose name,
 24 address or other personal information was obtained from a public
 25 record such as a police report, accident report or court record
 26 'unless at least 30 days have passed since the incident resulting in
 27 such report or record¹. This ¹[subsection] section¹ shall not apply
 28 to any solicitation through advertising which is not directed to a
 29 specific person. ¹[This section shall not apply if contact with the
 30 attorney was initiated by the person who is the subject of the public
 31 record.¹] ²[This section shall not apply if contact with the
 32 professional was initiated by the person who is the subject of the
 33 public record. This section shall not apply to written
 34 communications soliciting professional employment which are
 35 directed to persons engaged in tax appeals pursuant to Title 54 of
 36 the Revised Statutes.²

37 ²b. For purposes of this section:

38 "Professional employment" means any services rendered by an
 39 attorney licensed to practice law in this State or any person
 40 licensed, certified, or otherwise permitted by law or regulation to
 41 practice a profession or occupation regulated under Title 45 of the
 42 Revised Statutes.²

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Senate SJU committee amendments adopted November 15, 2010.

²Senate floor amendments adopted September 26, 2011.

³Senate floor amendments adopted December 15, 2011.

1 ²[b.] c.² Violation of this section is a crime of the third
2 degree.]³

3
4 ³[3.] 1.³ Section 1 of P.L.1999, c.325 (C.2C:40A-4) is amended
5 to read as follows:

6 1. a. No person shall solicit professional employment from an
7 accident or disaster victim or an accident or disaster victim's
8 relative concerning an action for personal injury or wrongful death
9 involving that accident or disaster victim for a period of 30 days
10 after the date on which the accident or disaster occurred. ³No
11 person shall solicit professional employment from, or contact, a
12 person whose name, address or other personal information was
13 obtained from a public record of a motor vehicle accident for a
14 period of 30 days after the date on which the accident occurred.³

15 b. Subsection a. of this section shall not apply if the accident or
16 disaster victim, or his relative, ³or person whose personal
17 information was obtained from a public record of a motor vehicle
18 accident.³ as the case may be, had a previous professional business
19 relationship with the professional ¹or if ³[the accident or disaster
20 victim or his relative] such person³ initiated the contact with the
21 professional¹.

22 c. Subsection a. of this section shall not apply to
23 recommendations or referrals by past or present clients or patients,
24 friends, relatives or other individuals relying on the reputation of
25 the professional, provided the recommendation or referral is not
26 made for value.

27 d. Subsection a. of this section shall not apply to any solicitation
28 through advertising which is not directed to the victim or victims of
29 a specific accident or disaster.

30 e. Subsection a. of this section shall not apply to emergency
31 medical care.

32 f. For the purposes of this section:

33 "Professional employment" means services rendered by a
34 ¹[physician, chiropractor or other health care professional] person
35 licensed, certified, or otherwise permitted by law or regulation to
36 practice a profession or occupation ³[regulated under Title 45 of the
37 Revised Statutes]¹³.

38 "Solicit" means to contact a person with a request or plea, which
39 is made in person, by telephone ¹[or], by¹ other electronic
40 medium¹, or by any writing¹.

41 g. A person who violates the provisions of this section, and who
42 acts with intent to accept money or something of value for his
43 services, shall be guilty of a crime of the third degree.

44 (cf: P.L.1999, c.325, s.1)

1 ²['[3.] 4.'] Section 2 of P.L. 1999, c.325 (C.2C:40A-5) is
2 amended to read as follows:

3 2. In addition to any other sanction that may be imposed by the
4 Supreme Court, an attorney who violates the Rules of Professional
5 Conduct promulgated by the Supreme Court of New Jersey by
6 contacting an accident or disaster victim or an accident or disaster
7 victim's relative[, using means other than written communication,]
8 to solicit professional employment on the attorney's own behalf, and
9 who acts with intent to accept money or something of value for his
10 services, shall be guilty of a crime of the third degree.
11 (cf. P.L.1999, c.325, s.2)]²

12
13 ¹[4.] ²[5.'] ³[4.2] 2.³ This act shall take effect immediately
14 ³and shall apply to solicitations of professional employment
15 occurring on or after the effective date³.

**ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY**

GLENN A. GRANT, J.A.D.
ACTING ADMINISTRATIVE
DIRECTOR OF THE COURTS



RICHARD J. HUGHES
JUSTICE COMPLEX
PO Box 037
TRENTON, NEW JERSEY 08625-0037

TO: ASSIGNMENT JUDGES **DIRECTIVE # 01-10**

FROM: GLENN A. GRANT, J.A.D.

DATE: MARCH 2, 2010

**SUBJ: NICOLE'S LAW (N.J.S.A. 2C:14-12 AND N.J.S.A. 2C:44-8) – RESTRAINING
ORDER AND NOTIFICATION PROCEDURES**

This directive promulgates a model restraining order and notification procedures to be used in situations involving "Nicole's Law," N.J.S.A. 2C:14-12 and N.J.S.A. 2C:44-8. The model order and the procedures were jointly developed by the Conferences of Criminal Presiding Judges, Family Presiding Judges, and Municipal Court Presiding Judges and were approved by the Judicial Council.

Nicole's Law permits the court to issue an order as a condition of bail or to continue a prior order or issue a new order upon conviction, prohibiting a defendant charged with or convicted of a sex offense from having any contact with a victim, including restraining the defendant from entering a victim's residence, place of employment, business or school and from harassing or stalking the victim or victim's relatives. The law defines "sex offense" by referencing Megan's Law, N.J.S.A. 2C:7-2. Nicole's Law restraining orders are similar to domestic violence restraining orders, except that there need not be a domestic relationship between the defendant and the victim for a Nicole's Law restraining order to be entered if a defendant has been charged with or convicted of certain sex offenses.

This Directive defines the distribution procedure for the Criminal Division and municipal courts to use in order to provide notification of the issuance of a Nicole's Law restraining order to parties and entities having an interest in the matter. This Directive also provides a mechanism to avoid the issuance of conflicting orders by a Criminal Division or Municipal Court judge and a Family Division judge. Conflicting orders might arise, for example, when (a) a parent is charged with a sex offense as so defined in N.J.S.A. 2C:7-2, such as endangering the welfare of a child, (b) the Criminal Division or

Municipal Court judge enters a Nicole's Law restraining order restricting the parent's contact with the child, but (c) the Family Division judge orders visitation or reunification in a parallel child abuse/neglect proceeding or a dissolution or non-dissolution matter. Again, the notification procedures set forth below are designed to avoid issuance of any such conflicting orders.

**NOTIFICATION PROCEDURE FOR THE ISSUANCE OF NICOLE'S LAW
RESTRAINING ORDERS (N.J.S.A. 2C:14-12 AND N.J.S.A. 2C:44-8)**

1. When a Criminal Division judge or a Municipal Court judge enters a Nicole's Law restraining order prohibiting defendant's contact with the victim or others, as provided by statute, either as a condition of bail or any time thereafter, the Criminal Division Manager or the Municipal Court Administrator shall distribute copies of that restraining order to all of the following:
 - a. the local police department where the victim resides
 - b. the local police department where the defendant resides (if different)
 - c. the County Prosecutor's Office
 - d. the victim
 - e. the defendant
 - f. the Family Division Manager's Office (if the victim is a child)
 - g. the Criminal Division Manager's Office (if the order is entered by a Municipal Court Judge)
2. Upon receipt of a Nicole's Law restraining order entered by a Criminal Division or Municipal Court judge that involves a child-victim, Family Division staff shall determine whether any Family Judge has issued an order authorizing contact between the defendant and the victim that would appear to conflict with that restraining order.
3. When any such apparently conflicting order is identified, the Criminal Division or Municipal Court judge who issued the Nicole's Law restraining order and the Family Division judge who entered the Family Part order shall consult with each other to resolve that conflict as expeditiously as practicable. Any order modified as a result of that consultation shall be placed on the record and shall be distributed in accordance with paragraph 1 above, as well as forwarded to the Criminal and Family Divisions and to the municipal court (if the Nicole's Law order was issued by a Municipal Court judge). If, however, the conflict cannot be resolved through consultation by the two issuing judges, the Assignment Judge or designee shall conduct a hearing to resolve the conflict and, if appropriate, modify the order. All interested parties, including the victim (victim's family, if the victim is a minor), Prosecutor, DYFS, and defendant shall be notified of the hearing on the conflicting orders. If, after any such hearing the Assignment

Judge or designee modifies an order, copies of the modified order shall be distributed in accordance with paragraph 1 above and forwarded to Criminal and Family Divisions and to the municipal court (if the Nicole's Law order was issued by a Municipal Court judge).

Any questions or comments regarding this Directive, or the appended form, may be directed to Assistant Director Joseph J. Barraco at 609-292-4638 (Criminal), Assistant Director Harry T. Cassidy at 609-984-4228 (Family), or Assistant Director Debra A. Jenkins at 609-984-8241 (Municipal).

G.A.G.

/mp
Attachment (model order)

cc: Chief Justice Stuart Rabner
Attorney General Paula T. Dow
Public Defender Yvonne Smith Segars
Criminal Division Judges
Family Division Judges
Municipal Court Judges
Stephen J. Taylor, Director, DCJ
County Prosecutors
AOC Directors and Assistant Directors
Trial Court Administrators
Criminal Division Managers
Family Division Managers
Assistant Criminal Division Managers
Municipal Division Managers
Municipal Court Administrators and Directors
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant
Joanne M. Dietrich, Chief, Family Practice
John J. Wieck, Chief, Criminal Practice
Carol A. Welsch, Municipal Court Services
Melaney S. Payne, Criminal Practice

State of New Jersey

v.

Defendant

Superior Court, Law Division _____ County
 Municipal Court of _____
Complaint/Warrant #: _____

Sex Offense Restraining Order
pursuant to *N.J.S.A. 2C:14-12, N.J.S.A. 2C:44-8*
("Nicole's Law")

_____ having been charged in the above complaint with or convicted of violation(s) of:
(Defendant Name)

<input type="checkbox"/> Aggravated Sexual Assault, <i>N.J.S.A. 2C:14-2*</i>	<input type="checkbox"/> Endangering the Welfare of a Child, <i>N.J.S.A. 2C:24-b(5)(a)</i>
<input type="checkbox"/> Sexual Assault, <i>N.J.S.A. 2C:14-2*</i>	<input type="checkbox"/> Luring or Enticing, <i>N.J.S.A. 2C:13-6</i>
<input type="checkbox"/> Aggravated Criminal Sexual Contact, <i>N.J.S.A. 2C:14-3a*</i>	<input type="checkbox"/> Criminal Sexual Contact, <i>N.J.S.A. 2C:14-3b</i> if the victim is a minor
<input type="checkbox"/> Kidnapping, <i>N.J.S.A. 2C:13-1c(2)*</i>	<input type="checkbox"/> Criminal Restraint, <i>N.J.S.A. 2C:13-2</i> , if the victim is a minor and the offender is not the parent
<input type="checkbox"/> Kidnapping, <i>N.J.S.A. 2C:13-1</i> , if the victim is a minor and the offender is not the parent*	<input type="checkbox"/> False Imprisonment, <i>N.J.S.A. 2C:13-3</i> if the victim is a minor and the offender is not the parent
<input type="checkbox"/> Endangering the Welfare of a Child, <i>N.J.S.A. 2C:24-4a</i>	<input type="checkbox"/> Promoting Child Prostitution, <i>N.J.S.A. 2C:34-1b(3)</i>
<input type="checkbox"/> Endangering the Welfare of a Child, <i>N.J.S.A. 2C:24-4b(3)</i>	<input type="checkbox"/> Promoting Child Prostitution, <i>N.J.S.A. 2C:34-1b(4)</i>
<input type="checkbox"/> Endangering the Welfare of a Child, <i>N.J.S.A. 2C:24-4b(4)</i>	<input type="checkbox"/> Attempt to commit any of the above offenses

Only a Superior Court Judge may set the bail for these crimes. R. 3:26-2(a)

In addition to any other conditions ordered by the Court, it is on this _____ day of _____, 20____ hereby

ORDERED, pursuant to *N.J.S.A. 2C:14-12, N.J.S.A. 2C:44-8*, that you are prohibited from having any contact

with the victim, _____, including, but not limited to the following restrictions.
(Victim's Name)

Check the appropriate box(es):

1. You are barred from the following location(s):

- Residence(s) of Victim Place (s) of Employment of Victim
 Schools of Victim Other _____

If these locations are known to the defendant, list with specificity _____

2. You are:

- Prohibited from having **any** oral, written, personal, electronic, or other form of contact with the victim or others identified in this order.
 Prohibited from making or causing anyone else to make harassing communication to the victim or others identified in this order.
 Prohibited from stalking, following, or threatening to harm, to stalk or to follow the victim or others identified in this order.

3. Other appropriate relief: _____

Duration of Order

It is Ordered that this Order shall remain in effect until modified or terminated by further Order of the Court or until the prosecutor administratively dismisses or downgrades the charge(s) supporting the issuance of this Order. This Order is vacated effective on the date of the no bill by the grand jury or the date of the administrative dismissal or downgrade of the complaint by the prosecutor or acquittal at trial.

(Date)

(Judge's Signature)

Notice to Defendant: Violation of the provisions of this Order may constitute criminal contempt pursuant to N.J.S.A. 2C:29-9(a) and will result in your arrest and criminal prosecution and, if convicted, may result in a custodial term of up to 18 months in prison. A violation may also result in a revocation of bail on the above-cited charge or charges.

Defendant's Acknowledgment

I acknowledge that I received a copy of this Restraining Order on _____, 20____. I understand that pursuant to this court Order, I am not to have any contact with the victim or others, as permitted by statute, as set forth in this Order, unless any modifications are specifically authorized by the Court, even if the victim agrees to the contact or invites me onto the premises and that I can be arrested and prosecuted if I violate this Order.

(Print Defendant's Name)

(Defendant's Signature)

Copies: Court, Police, County Prosecutor's Office, Victim, Defendant, Family Division (if victim is a child), Criminal Division (if order entered by Municipal Court Judge)

**ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY**

GLENN A. GRANT, J.A.D.
ACTING ADMINISTRATIVE
DIRECTOR OF THE COURTS



RICHARD J. HUGHES
JUSTICE COMPLEX
P.O. Box 037
TRENTON, NEW JERSEY 08625-0037

MEMORANDUM

Directive # 02-10

To: Assignment Judges
Municipal Court Presiding Judges
Municipal Court Judges
Trial Court Administrators
Municipal Division Managers
Municipal Court Directors and Administrators

From: Glenn A. Grant, J.A.D.

Subj: Implementation of L. 2009, c. 317, Authorizing Municipal Courts to Provide Payment Alternatives

Date: March 2, 2010

Legislation authorizing municipal courts to provide payment alternatives was enacted effective January 18, 2010. L. 2009, c. 317. This memorandum is intended to provide the municipal courts with guidance on implementation of that enactment.

Establishment of a Time-Payment Order

L. 2009, c. 317 (emphasis added) provides that "if a municipal court finds that a person does not have the ability to pay a penalty in full on the date of the hearing . . . , the court may order the payment of the penalty in installments for a period of time determined by the court." Thus, for the court to establish a time-payment plan under this statute, the municipal court judge is required to first make a finding that the defendant is unable to pay the full amount on the date of the hearing.

By memorandum of November 20, 2003 directed to Municipal Court judges, then Administrative Director Richard Williams indicated that the "Financial Questionnaire to Establish Indigency - Municipal Courts" (Financial Questionnaire) should be used "in determining the indigency status of defendants . . . for payment of fines in installments." That policy remains unchanged. A completed Financial Questionnaire will contain the financial information that a judge needs in order to be able to make a reasoned decision

as to whether the defendant has an ability to pay a penalty in full or whether to grant defendant a time payment.

Additionally, judges also should continue to follow the long-established practice of considering the federal poverty guidelines as one factor in determining whether a defendant has the ability to pay fines and penalties in full on the day of the hearing. The most recently distributed guidelines (copy attached) suggest in that regard that defendants earning up to 250% of the federal poverty guidelines be considered for time-payment orders. Updated guidelines for 2010 will be issued by this office in the spring.

Payment Alternatives After Default

The new statute also includes provisions to cover the situation where an individual defaults on a previously ordered time-payment because the individual does not have the ability to pay. In those situations the court is provided a number of options. The statute specifically provides as follows:

If a person defaults on any payment and a municipal court finds that the defendant does not have the ability to pay, the court may:

- (1) reduce the penalty, suspend the penalty, or modify the installment plan;
- (2) order that credit be given against the amount owed for each day of confinement, if the court finds that the person has served jail time for the default;
- (3) revoke any unpaid portion of the penalty, if the court finds that the circumstances that warranted the imposition have changed or that it would be unjust to require payment;
- (4) order the person to perform community service in lieu of payment of the penalty; or
- (5) impose any other alternative permitted by law in lieu of payment of the penalty. [L. 2009, c. 317, § 1.]

The two situations in which a defendant shall be considered to be in default are (a) if defendant's driver's license has been suspended after a failure to pay (N.J.S.A. 2B:12-31(a)(2)), or (b) if a warrant has been issued for defendant's arrest after a failure to pay.

These payment alternatives may only be used under this statute after a defendant defaults on an already established time-payment order. They may not be used at a defendant's initial sentencing hearing. Moreover, the court may resort to the payment alternatives only after a finding that the defendant does not have the ability to pay. Just as when determining whether to establish a time-payment order, a

determination of ability to pay should be based on the financial information on a current Financial Questionnaire completed by the defendant. Also as with time-payment order determinations, the judge in determining ability to pay should consider, as one factor, whether defendant's income is less than 250% of the federal poverty guidelines (again, see the attachment).

In addition, these payment alternatives may not be used to reduce, revoke or suspend payment of restitution or of the \$250 surcharge assessed for operating a vehicle in an unsafe manner under N.J.S.A. 39:4-97.2(f). L. 2009, c. 317, § 1.

With specific regard to the court's ability to revoke the unpaid portion of the penalty (subsection 3 above), a judge before implementing this particular alternative must make one of two additional findings. The judge must find either that "the circumstances that warranted the imposition [of the penalty] have changed" or that it would be unjust to require defendant to pay. The judge must place on the record the facts upon which these findings are based. See R. 1:7-4(a).

If a judge wishes to implement a payment alternative for only a portion of the outstanding balance, then the judge should merely designate the lump sum dollar amount that is to be reduced, revoked or suspended, without indicating which individual fines, penalties or assessments are to be affected. For example, a judge could order that defendant's time-payment order is reduced by \$100. The judge should not specify that \$50 is reduced from VCCO and \$50 from the fine. Any future payment of the remaining portion of the penalty will be disbursed consistent with N.J.S.A. 2C:46-4.1.

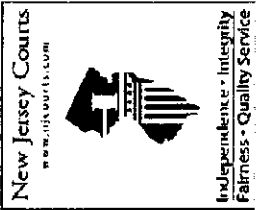
As with all changes of sentence, the implementation of any of the payment alternatives must be made in open court on notice to the defendant and the prosecuting attorney. R. 7:9-4.

Any questions regarding this directive should be directed to Assistant Director Debra A. Jenkins, Municipal Court Services Division, at 609-984-8241.

G.A.G.

attachment

cc: Chief Justice Stuart Rabner
AOC Directors and Assistant Directors
Lawrence Walton, Municipal Court Services Division
Steven Somogyi, Municipal Court Services Division
Carol A. Welsch, Municipal Court Services Division
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant



As distributed by May 14,
2009 memo from the
Administrative Director.

2009 Income Eligibility Guidelines for Establishing Time Payments

Data reflect 250% of the Federal poverty guidelines as defined by the U.S. Department of Health and Human Services

Household Size	One	Two	Three	Four	Five	Six	Seven	Eight
Annual Gross Income	\$27,075.00	\$36,425.00	\$45,775.00	\$55,125.00	\$64,475.00	\$73,825.00	\$83,175.00	\$92,525.00
Monthly Gross Income	\$ 2,256.25	\$ 3,035.42	\$ 3,814.58	\$ 4,593.75	\$ 5,372.92	\$ 6,152.08	\$ 6,931.25	\$ 7,710.42
Weekly Gross Income	\$ 520.67	\$ 700.48	\$ 880.29	\$ 1,060.10	\$ 1,239.90	\$ 1,419.71	\$ 1,599.52	\$ 1,779.33

* If the household size exceeds eight, add \$9,350.00 gross income per year, \$779.17 per month, or \$179.81 per week for each additional member of the household.

Source data:

Poverty Guidelines updated by the U.S. Department of Health and Human Services, published in the *Federal Register*, Vol. 74, No. 14, January 23, 2009, pp. 4200.

GLENN A. GRANT, J.A.D.
Acting Administrative Director of the Courts

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Directive # 04-11
Supersedes Directive #40-64

Questions or comments may be
directed to 609- 984-8241

TO: Assignment Judges

FROM: Glenn A. Grant, J.A.D.

**SUBJ: Disposition of Municipal Court Matters in the Superior Court
and Notification to Municipal Court**

DATE: July 12, 2011

This Directive supersedes Directive #40-64 and sets out procedures for recording and reporting municipal court matters that are disposed of by a Superior Court judge sitting as a municipal court judge. Directive #40-64, issued on July 9, 1965 by then Administrative Director Edward B. McConnell, permitted Superior Court judges, acting as municipal court judges, to fully dispose of municipal court matters.

Unless there is some compelling reason otherwise, a Superior Court judge should dispose of all parts of a case before the court, including any associated municipal court matters. This procedure increases the overall efficiency of the court system. It also avoids having the defendant appear for a second matter that arose out of the same event, thus eliminating potential double jeopardy issues. See, e.g., State v. Hand, 416 N.J. Super. 622 (App. Div. 2010). Indeed, when an indictable offense goes to trial, the court is required by Rule 3:15-3 to join any pending non-indictable complaint that is based on the same conduct or arising from the same episode, unless the defendant or the State would be prejudiced by doing so. See also Rule 3:1-6(a).

Adjudication of Motor Vehicle Offenses (Title 39)

When a Superior Court judge adjudicates a Title 39 motor vehicle offense because it is associated with an indictable charge, the court must by e-mail or fax transmit a copy of the completed traffic ticket, including the disposition (and whether defendant's driving privilege is suspended) and all other related paperwork, to the municipal court where the charge originated within 48 hours of sentencing or by the next business day, whichever is later. The municipal court when it receives the completed ticket and disposition will enter that disposition into the Automated Traffic System (ATS) (the statewide municipal court computer system), indicating in

the case notes that the disposition was made in the Superior Court. The Superior Court thereafter must return the original of the previously e-mailed or faxed traffic ticket and disposition to the originating municipal court as soon as practicable, but no later than 20 days after sentencing. ATS will electronically transfer the data regarding the Title 39 disposition to the Motor Vehicle Commission (MVC) and the data will thereby be included on the defendant's driving record (including any suspension of driving privileges).

While a Superior Court judge may impose fines, penalties, and assessments associated with the conviction for a motor vehicle offense, the Superior Court must not collect any such fines, penalties, or assessments. Instead, the Superior Court judge must instruct the defendant to pay the motor vehicle fines, penalties, and assessments as imposed by the Superior Court to the municipal court where the charge originated and to do so by a specified date. The municipal court administrator of the originating court will be responsible for the collection and appropriate disbursement of any such monies. See N.J.S.A. 39:5-41(a) and 2C:46-4(a)(2).

Additionally, at the time of sentencing, the Superior Court must have the defendant sign any necessary Title 39-related forms, such as the statutorily-required "Notice to Defendant Upon Conviction on N.J.S.A. 39:4-50(a) and (g)".* The Superior Court shall forward any such completed and signed forms to the originating municipal court within 20 days after sentencing.

Adjudication of Disorderly Persons or Other Quasi-Criminal Offenses

When a Superior Court judge adjudicates a disorderly persons or petty disorderly persons offense or other non-motor-vehicle quasi-criminal matter usually adjudicated in municipal court (such as local ordinance, weights and measures, or fish and game violations), the Superior Court shall record the disposition in PROMIS/Gavel, the electronic criminal case management system, and shall retain the paperwork. In such matters the Superior Court also shall retain jurisdiction of the matter. The county Probation Division shall be responsible for collecting any fines, penalties, or assessments associated with such adjudication. See N.J.S.A. 2C:46-4(a)(1). All such monies collected shall be distributed in accordance with statute, including N.J.S.A. 2C:46-4.

Nonadjudicated Matters

If a Superior Court judge is aware of an associated municipal court complaint, whether motor vehicle or quasi-criminal, and for good reason does not adjudicate that associated complaint, the Superior Court judge shall instruct the prosecutor to return the original paperwork to the appropriate municipal court without delay, but no later than 7 days after such direction, so that the municipal court can schedule a court date for that matter.

Suspension of Driving Privileges – Notification to MVC

As noted above, when a Superior Court judge adjudicates a Title 39 motor vehicle offense, the court shall forward the disposition, including any suspension of defendant's driving privileges, to the originating municipal court within 48 hours, with the municipal court then to

* Posted at <http://ttnapacheweb1.courts.judiciary.state.nj.us:84/mcs/mcsmemo/idrcpenaltiesrevoked.pdf>

enter that information into ATS which then automatically forwards that suspension information to the Motor Vehicle Commission ("MVC"). However, when a Superior Court judge suspends a defendant's driving privileges as a result of a criminal or quasi-criminal non-motor-vehicle conviction, the Superior Court must directly notify the MVC of the suspension through use of an MF-1 (conviction) or MF-4 (appeal) card.

G.A.G.

cc: Chief Justice Stuart Rabner
Criminal Presiding Judges
Family Presiding Judges
Vicinage Municipal Court Presiding Judges
Municipal Court Judges
Steven D. Bonville, Chief of Staff
AOC Directors and Assistant Directors
Trial Court Administrators
Criminal Division Managers
Family Division Managers
Municipal Division Managers
Municipal Court Administrators
Gurpreet M. Singh, Special Assistant
Steven Somogyi, Chief, Mun. Ct. Services
Carol A. Welsch, Acting Chief, Mun. Ct. Services
John Wieck, Chief, Criminal Practice

GLENN A. GRANT, J.A.D.
Acting Administrative Director of the Courts

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MEMORANDUM

DIRECTIVE # 09-11

**To: Assignment Judges
Presiding Judges-Municipal Courts
Municipal Court Judges**

From: Glenn A. Grant

**Subj: Informing Municipal Court Defendants of the Immigration
Consequences of Guilty Pleas**

Date: December 28, 2011

This Directive promulgates procedures to be followed in the municipal courts to inform defendants that a guilty plea to or conviction of certain municipal court offenses may negatively affect their immigration status, including possibly resulting in deportation. The Supreme Court approved these procedures on the recommendation of the Conference of Presiding Judges-Municipal Courts.

In State v. Nunez-Valdez, 200 N.J. 129, 131 (2009), the New Jersey Supreme Court held that defense counsel, in failing to inform the defendant that under federal law his conviction would mandate deportation, did not provide effective assistance to the defendant. Similarly, in Padilla v. Kentucky, ____ U.S. ____, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010), the United States Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.

In 2011, the New Jersey Supreme Court addressed this constitutional requirement in Superior Court criminal cases; see Directive #05-11 ("Criminal Plea Form – Question Regarding the Immigration Consequences of a Guilty Plea"). Consistent with Nunez-Valdez, Padilla, and Directive #05-11, this Directive addresses the same concerns in municipal court cases by requiring municipal court judges (1) to inform defendants that a guilty plea or a finding of guilt as to certain offenses may result in negative immigration consequences and (2) to inform defendants that they have a right to seek advice from an attorney regarding those potential consequences.

A municipal court judge shall inform defendants of possible immigration consequences and of their right to seek counsel on these matters at three stages of the court process: (A) as part of the court's opening statement for each court session; (B) at defendant's first appearance; and (C) as part of the guilty plea colloquy.

A. Opening Statement

The municipal court judge shall include the following language in the opening statement for each municipal court session:

If you are not a United States citizen and if you plead guilty to or are convicted of certain offenses heard in the municipal court, including some motor vehicle offenses, it may result in your being deported from the United States, or it may prevent you from being re-admitted to the United States if you leave voluntarily, or it may prevent you from ever becoming a naturalized American citizen. You have a right to seek advice from an attorney about the effect a guilty plea will have on your immigration status.

This language will be incorporated into each of the three model opening statements that the Supreme Court adopted in 2008 – one model opening statement for sessions handling criminal matters only, one for sessions handling motor vehicle offenses only, and one for combined sessions.

B. First Appearance

At the first appearance proceeding, any defendant charged with the following offenses shall be advised of the immigration consequences of a guilty plea:

- (1) all disorderly or petty disorderly persons offenses;
- (2) driving while intoxicated (N.J.S.A. 39:4-50; N.J.S.A. 39:4-50.14; N.J.S.A. 39:3-10.13; N.J.S.A. 12:7-46);
- (3) operating motor vehicle while in possession of a CDS (N.J.S.A. 39:4-49.1).

The municipal court judge shall engage in the following colloquy with defendants charged with the above-listed offenses at first appearance proceeding:

If you are not a United States citizen and if you plead guilty to or are convicted of certain offenses heard in the municipal court, including some motor vehicle offenses, it may result in your being deported from the United States, or it may

prevent you from being re-admitted to the United States if you leave voluntarily, or it may prevent you from ever becoming a naturalized American citizen. Do you understand?

You have a right to seek advice from a private attorney about the effect a guilty plea or conviction will have on your immigration status. If you qualify for a court-appointed attorney, you can speak to the public defender about the immigration consequences of your plea. Do you understand?

The municipal court judge shall engage in this colloquy during the first appearance for all defendants charged with any of the above-listed offenses, regardless of the defendant's name, appearance, or English proficiency. This requirement is not intended to in any way limit the judge's discretion to engage in this same colloquy with other defendants who have been charged with offenses other than those listed above.

C. Guilty Plea

Before accepting a guilty plea to any of the above-listed offenses, the municipal court judge shall engage in the following colloquy with the defendant:

(1) Are you a citizen of the United States?

(If defendant answers "No" to question 1, defendant must answer questions 2 through 6.)

(2) Do you understand that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or may stop you from being able to legally enter or re-enter the United States?

(3) Do you understand that you have the right to seek individualized advice from an attorney about the effect your guilty plea may have on your immigration status?

(4) Have you discussed with an attorney the potential immigration consequences of your plea?

(If defendant answers "No" to question 4, defendant should next answer question 5. If defendant answers "Yes" to question 4, defendant should next answer question 6.)

(5) Would you like the opportunity to do so?

(6) Having been advised of the possible immigration consequences and of your right to seek individualized advice on your immigration consequences, do you still wish to plead guilty?

If during the plea colloquy an indigent defendant seeks the opportunity to discuss with an attorney the potential immigration consequences of the plea and the offense charged would result in a consequence of magnitude, the court should adjourn the proceedings and appoint the municipal public defender to represent defendant. The municipal court judge is under no obligation to appoint additional separate counsel for an indigent defendant to advise defendant on the immigration consequences of a plea.

Additionally, if during the plea colloquy an indigent defendant who is not charged with an offense that would result in a consequence of magnitude seeks the opportunity to discuss with an attorney the possible immigration consequences of the plea, the court should adjourn the matter to give the defendant the opportunity to do so.

Similarly, if during the plea colloquy a non-indigent defendant seeks the opportunity to discuss with an attorney the possible immigration consequences of the plea, whether or not there are possible consequences of magnitude, the court should adjourn the matter to give the defendant the opportunity to do so.

Finally, at no point in the proceedings should the municipal court judge attempt to advise defendants on an individualized basis as to what the actual immigration consequences of a particular plea might be. Both Padilla, 130 S. Ct. at 1486, and Nunez-Valdez, 200 N.J. at 131, made it clear that such individualized advice is the responsibility of counsel, not the judge. As stated previously, the judge's responsibility is limited to informing defendants that a plea or a guilty finding may result in negative immigration consequences and that defendants in that situation have the right to seek advice from an attorney regarding the potential consequences.

Any questions or comments regarding this Directive may be directed to Debra Jenkins, Assistant Director for Municipal Court Services, at 609-984-8241.

G.A.G.

cc:	Chief Justice Stuart Rabner	Criminal Division Managers
	Attorney General Paula T. Dow	Family Division Managers
	Attorney General Designate Jeffrey Chiesa	Municipal Division Managers
	Joseph E. Krakora, Public Defender	Municipal Court Administrators and Directors
	Assignment Judges	Gurpreet M. Singh, Special Assistant
	Criminal Division Judges	Susan Callaghan, Chief
	Family Division Judges	Steven A. Somogyi, Chief
	Steven D. Bonville, Chief of Staff	Carol A. Welsch, Acting Chief
	AOC Directors and Assistant Directors	Melaney S. Payne, Criminal Practice
	Trial Court Administrators	Assistant Criminal Division Managers



CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lieutenant Governor

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TRENTON, NJ 08625-0080

PAULA T. DOW
Attorney General

DIRECTIVE NO. 2011- 2

**TO: DIRECTOR, DIVISION OF CRIMINAL JUSTICE
ALL COUNTY PROSECUTORS
SUPERINTENDENT, NEW JERSEY STATE POLICE
ALL POLICE CHIEFS
ALL LAW ENFORCEMENT CHIEF EXECUTIVES**

FROM: PAULA T. DOW, ATTORNEY GENERAL

DATE: May 23, 2011

**SUBJECT: ATTORNEY GENERAL DIRECTIVE REGARDING RETENTION AND
TRANSMITTAL OF CONTEMPORANEOUS NOTES OF WITNESS
INTERVIEWS AND CRIME SCENES**

Pursuant to my authority as chief law enforcement officer of the State of New Jersey, and to ensure uniform statewide compliance with the requirements set forth in the Supreme Court's ruling in State v. W.B., __ N.J. __ (2011), I hereby issue the following Directive:

A. DEFINITIONS

For the purposes of this Directive:

1. The term "contemporaneous notes" means any notation, whether handwritten, typed, entered into an electronic note-taking device or audio recorded, that describes or memorializes the note taker's personal perception of what transpired in the course of a witness interview or that memorializes the officer's personal observations at the scene of the crime. The term includes notations made after the witness interview, provided that they memorialize the officer's personal recollection of what transpired during the interview. The term does not include, among other things, notations concerning investigative tasks to be accomplished (*i.e.*, a "to do" list), references to



information from outside the interview to be checked against statements made by the witness to verify or dispel the witness's account, possible lines of inquiry, specific questions that were not pursued or actually posed to the witness, and other investigative techniques or deliberative processes.

2. The term "witness interview" means an interview of a witness done in the course of investigating a crime of the first, second, third, or fourth degree under New Jersey law, whether committed by an adult or a juvenile.

B. GENERAL RETENTION AND TRANSMITTAL RULES

1. Prohibition on Policy or Practice of Destroying Contemporaneous Notes of Witness Interviews and Crime Scene Observations

Any existing law enforcement policy or practice to destroy contemporaneous notes of a witness interview or of a crime scene observation after the contents of those notes have been incorporated into a final report is hereby rescinded and prohibited as contrary to the law of this State. Henceforth, when a law enforcement officer during the course of an investigation of a crime conducts or participates in a witness interview, the officer shall retain any original contemporaneous notes of the interview that the officer made. The officer also shall retain any original contemporaneous notes made of his or her personal observations of the crime scene.

2. Transmittal of Notes of Witness Interviews and Crime Scene Observations to Prosecuting Agency

Whenever a law enforcement officer transmits to the prosecuting agency a report concerning a witness interview that the officer conducted or participated in, or concerning a crime scene observation made by the officer, the officer shall also transmit to the prosecuting agency a printed or electronic copy of any contemporaneous notes of the interview and/or crime scene observation that had been taken by the officer. For ease of identification, the copy of the contemporaneous notes shall be labeled with the case number on the report.

3. Notice to Prosecutor of Material That May be Confidential or Privileged

Whenever a law enforcement officer provides a copy of contemporaneous notes to a prosecuting agency pursuant to paragraph 2 of this Section, the officer shall alert the prosecuting agency if the officer believes that the contemporaneous notes may include or otherwise reveal confidential or privileged information, or where the officer believes that further disclosure of the

contemporaneous notes or any portion thereof may endanger any person or interfere with an investigation. It is the responsibility of the prosecuting agency to determine whether the contemporaneous notes are discoverable pursuant to R. 3:13-3, whether any non-discoverable portions of such notes should be redacted prior to providing discovery, and/or whether it is appropriate or necessary to apply for a protective order denying, restricting or deferring discovery of such notes, or portions thereof, pursuant to R. 3:13-3(f).

4. Effect on Existing Note-Taking Policies and Practices

Nothing in this Directive shall be construed either to require law enforcement officers to take contemporaneous notes of a witness interview or of crime scene observations, or to discourage law enforcement officers from taking any such notes. Nor does this Directive modify existing requirements for electronic recordation of statements pursuant to State v. Cook, 179 N.J. 533 (2004) and R. 3:17.

5. Training on Note-Taking Techniques

When a law enforcement officer take notes of a witness interview, the officer should whenever feasible avoid memorializing what transpired during the course of the interview on the same page that include notations that do not pertain to what transpired during the witness interview (e.g., follow-up investigative tasks to be performed). This approach will enable officers to transmit to the prosecuting agency only those pages that are required to be transmitted pursuant to paragraph 2 of this Section, and will also assist the prosecuting agency in distinguishing and separating notations that must be provided in discovery from non-discoverable material. The Division of Criminal Justice and the County Prosecutors, in consultation with the New Jersey Association of Chiefs of Police, shall develop and make available training materials concerning effective note-taking techniques in furtherance of this Directive.

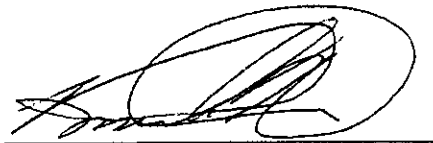
C. SCOPE, EFFECTIVE DATE AND IMPLEMENTATION

This Directive shall apply to every law enforcement agency and officer operating under the authority of the laws of the State of New Jersey. This Directive shall take effect on May 27, 2011, and shall remain in force and effect unless and until repealed, amended or superseded by Order of the Attorney General. Every police department and law enforcement agency shall take such steps as may be necessary and appropriate to implement this Directive, and every department and agency shall review and, as necessary, revise its rules, regulations, standing operating procedures, and/or training programs to ensure compliance with this Directive.

D. INTERPRETATION

Questions by police agencies or officers concerning the application of this Directive to specific cases should be addressed to the prosecuting agency handling the case. Questions by County Prosecutors regarding the content or interpretation of this Directive should be addressed to the Division of Criminal Justice, Prosecutors Supervision and Coordination Bureau.

Given under my hand and seal, this 23rd day of May, in the year Two Thousand and Eleven, and of the Independence of the United States, the Two Hundred and Thirty-Fifth.



Paula T. Dow
Attorney General

Attest:



Phillip Kwon
First Assistant Attorney General

