

# **RECENT DEVELOPMENTS IN NEW JERSEY CRIMINAL LAW: What You Don't Know *Can* Hurt You**

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## **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, Docket No. A-0401-09T4 (App. Div. August 4, 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).

## **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, Docket No. A-5851-09T1 (App. Div. 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**

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**

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., Docket No. A-115-09 (New Jersey Supreme Court, July 28, 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. A-0121-10T3 (App. Div. August 22, 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**

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, Docket Nos. A-4384-09T3 and A-4775-09T3 (App Div. April 5, 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 *Chum*) 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, Docket No. A-6281-08T4 (App. Div. March 28, 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 (January 19, 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, Docket No. A-5842-08T4 (App. Div. February 24, 2011, unpublished).

## **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’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).

## **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, Docket No. A-2592-08T4 (App. Div. August 1, 2011, unpublished).

### **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)) “allow[s] 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 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 Legislature will still need to accede to the Supreme Court’s decision.

### **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**

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, Docket No. A-8-08 (New Jersey Supreme Court, August 24, 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, Docket No. A-69-08 (New Jersey Supreme Court, August 24, 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).

## **Immigration**

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).

## **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, Docket No. A-0401-09T4 (App. Div. August 4, 2011).

## Jury Charges

### **Petit (Trial) Juries**

#### *Murder*

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).

#### *Other*

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).

### **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).

### **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 “sexting” (sending text and picture messages of a sexual nature via cell phones) cases has passed both the House and Senate and is poised for Governor Christie's signature. The measure, A-1561/S-2700, would 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).

## **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**

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. Yohnnson, 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, Civ. No. 10-0915 (DRD) (D.N.J. October 15, 2010), 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 offense proscribed by N.J.S.A. 39:4-88(b) is the failure to maintain a lane of travel by changing lanes without first ensuring that it is safe to do so. Thus in order to successfully prosecute that offense, the State must prove *both* that a lane change occurred and that it was unsafe to the defendant or other drivers.  
State v. Regis, Docket No. A-6142-08T4 (App. Div. September 8, 2010, unpublished).

## **Directives**

### *Directive #04-11*

The Administrative Office of the Courts (AOC) recently promulgated Directive #04-11, 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 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 (see Appendix), 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, Docket No. A-101-09 (New Jersey Supreme Court, June 9, 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., Docket No. A-3358-08T2 (App Div. September 17, 2010, unpublished).

### **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, Docket No. A-3209-09T1 (App. Div. July 19, 2011, unpublished).

## **Plea Agreements**

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).

## **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, Docket No. A-3119-09T4 (App. Div. December 23, 2010, unpublished).

## **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, Docket No. A-3934-07T1 (App. Div. January 6, 2011, unpublished).

The New Jersey Supreme Court is currently in the process of deciding State v. Gaitan, Docket No. A-109-10. 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) 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, Docket No. A-1454-08T4 (App. Div. June 18, 2010, unpublished).

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, Docket No. A-5686-08T4 (App. Div. August 19, 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 of 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.

### *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. Minitie, 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, Docket No. A-5821-08T4 (App. Div. April 27, 2011, unpublished).

## **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, Docket No. A-4527-08T4 (App. Div. March 15, 2010, unpublished).

#### *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, Docket No. A-0896-08T4 (App. Div. July 14, 2010, unpublished).

### *Other*

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 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**

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).

### **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, Docket No. A-64-09 (New Jersey Supreme Court, June 8, 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, Docket No. A-5851-09T1 (App. Div. 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**

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, Docket No. A-2051-09T3 (App. Div. August 22, 2011).

## **Civil Commitment**

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).

## **Restraining Orders**

The A.O.C. promulgated Directive #01-10 on March 2, 2010. 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 A.O.C. 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**

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, Docket. No. A-3209-09T1 (App. Div. July 19, 2011, unpublished).

### **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**

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. Yohnson, 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, Docket No. A-5686-08T4 (App. Div. August 19, 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., Docket No. A-3405-08T3 (App. Div. 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, Docket No. A-3969-08T4 (App. Div. September 1, 2010, unpublished).

### **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).

## Some Important Factors and Cases 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.

### 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.

### IMMIGRATION

#### **XI. IMMIGRATION CONSIDERATION / MINEFIELDS IN DEFENDING NON-CITIZENS LEGAL OR OTHERWISE IN CRIMINAL CASES**

1. New Jersey Attorney General Directive, dated August 22, 2007: (Law enforcement shall only ask about immigration status while investigating suspects in serious crimes), (Clearly limited to “any indictable crime, or for driving while intoxicated”), (Seton Hall study dated April 15, 2009, states that New Jersey police have exceeded directive).
2. Sources of Law: Immigration and Nationality Act (“INA”), CFR Title 8, Board of Immigration Appeals Case Law, Federal Circuit Cases, and US Supreme Court.
3. Commonly employed sections of law relating to immigration consequences of criminal activity: INA Sec. 101(a)(43); INA Sec. 212(a)(2)(A); INA Sec. 236(c); INA Sec. 237(a)(2).
4. Aggravated Felony: What is it? Can an “aggravated felon” stay in the US and avoid deportation?
5. Immigration Detainers and Requesting Bond from an Immigration Judge.
6. Mandatory Detention: Approaches to such detention, and the criminal attorney’s responsibility to avoid such a consequence.
7. Inadmissibility vs. deportability: understanding both concepts as they relate to criminal activity by an alien.
8. Applications before the U.S. Department of Homeland Security for permanent residency and naturalization (no need for actual conviction for ability of government to deny an individual naturalization) and how criminal activity can complicate the process.
9. Relief available for criminal aliens before the Immigration Court; i.e. those aliens charged with immigration violations and placed into removal (deportation) proceedings, cancellation of removal for permanent residents, cancellation of removal for certain nonpermanent residents.
10. What is a conviction for immigration purposes?
11. Pretrial Intervention or Diversion NOT a conviction for immigration purposes (no formal admission of guilt). (Any signed statement of guilt to the prosecutor as a quid pro quo for acceptance into such program NOT an “admission of guilt” for immigration purposes.)
12. Expungements and Record Sealings vs. Post-Conviction Relief on the Merits: crucial distinctions for immigration purposes.

13. Discussion of Matter of Pickering, 23 I&N Dec. 621 (BIA 2003). (Post-Conviction Relief cannot be solely for immigration purposes - instead, conviction must be vacated on the merits.)
14. "S" snitch visas.
15. Crime of domestic violence.
16. Victim of domestic violence (immigration possibilities for such a victim - self petition, and waiver for victims of domestic violence outline at INA Sec. 237(a)(7)(A).

## Appendix

### New Jersey Supreme Court

1. Immigration-Related PCR Stay Order, State v. Gaitan, Docket No. A-109-10, July 26, 2011.

### New Jersey Legislature

2. A-4302, Amendments to N.J.S.A. 39:3-40 (Driving While Suspended), January 18, 2010.

### Administrative Office of the Courts (AOC)

3. Directive #01-10, Nicole's Law Restraining Order and Notification Procedures, March 2, 2010.
4. Directive #02-10, Municipal Court Payment Alternatives, March 2, 2010.
5. Directive #04-11, Disposition of Related Municipal Matters in Superior Court, July 12, 2011.

### Attorney General's Office

6. Directive 2011-2, Retention of Contemporaneous Investigation Notes, May 23, 2011.