CRIMINAL TRIAL PREPARATION

PRACTICAL SKILLS SERIES

2013 Edition

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PROCEDURAL STEPS AND PRACTICE POINTERS – CAPSULE

1. Get retained - you must have a retainer letter **(***See* Form 5 Retainer Letter). While the scope of your work may change depending upon your client's needs and wants and your own needs and wants, you will need confirmation that, at least for initial purposes, you have been retained.

2. Meet with your clients - you must obtain basic facts regarding charges or nature of investigation. Try to do so as soon as possible. He or she is most probably emotionally upset and distraught and will need your support and guidance.

   A. If your client is incarcerated, you can visit him or her at any time.

      i. ***Practice Pointer*** - Call ahead to avoid meal times and movement of inmates.

   B. Immediately advise your client not to talk to the police or anyone else, except you, about facts and circumstances of the offense. Try to avoid prolonged discussions with your client at this time regarding the underlying facts. Focus instead on facts that would be relevant at a bail hearing, such as your client's roots in the community (*i.e.* family, residence, employment), and whether or not your client knew about any investigation prior to his or her arrest. Remind your client again not to talk to anyone. If you are not a criminal law specialist, you should urge your client to retain a criminal law specialist immediately. Your client's liberty interests are at stake, and your client needs and deserves a specialist.

3. If your client has been charged, immediately advise authorities that you have been retained and that your client is not to be interviewed without your consent and presence (Form 6 Letter to Prosecutor Re: Representation of Client). If your client is incarcerated, call up the jail where your client is being held. Ask to speak to the arresting officer or supervisor. Advise the police that you have been asked to represent your client. Advise them that all questioning of your client must cease until you have had a chance to talk with your client and to make an informed decision at a later point about whether your client wishes to cooperate. Take notes of your discussions. If your client is only under investigation, consider whether to advise authorities that you have been retained.

   A. ***Practice Pointer*** - Be aware of any parallel civil proceeding. Be mindful of potential waiver of Fifth Amendment privilege, or elicitation of potentially inculpatory (or false exculpatory) testimony, documents or information if your client testifies, answers interrogatories or requests to admit, or produces documents in the parallel civil case.

4. If your client is being detained, ascertain the bail status from the police. Consider an informal or formal motion to reduce bail. (See Form 4, Notice of Motion to Reduce Bail.) If no bail has been set, find out what the State's recommendation will be regarding bail, and whether there can be agreement on reasonable bail. If not, be prepared for a bail hearing as soon as possible, assuming that your client cannot meet the bail requirements. [Sometimes, the client's family will be able to meet the following morning with a bail bondsperson, or to post property as collateral. In that case, a motion to reduce bail may be unnecessary.] Facts that are relevant at a bail hearing, in addition to the charges, are your client's roots in the community (*i.e.*, family, residence, employment), and whether or not your client knew about any investigation prior to his or her arrest. *See* discussion on issues in setting bail.

5. Obtain discovery from the prosecutor.

   A. If your client has been formally charged, request discovery pursuant to *R.* 3:13-3(c)(1)-(9) (Chapter ill(C)(l)). (*See* Form 14 Discovery Letter).

   B. If your client has not yet been charged, consider meeting with the prosecution.

   C. ***Practice Pointer*** - If your client is the subject or target of grand jury investigation (Chapter I(D)), interview grand jury witnesses immediately after their testimony or obtain such information via a joint defense agreement (Chapter II(B)(3) (*See* Form 7 Joint Defense Agreement).

6. Review with your client the strengths and weaknesses of the prosecution's case.

   A. Review the indictment (*See* Forms 2 and 3 Sample Indictments).

   B. Explore the possibility of filing motions (Chapter III).

      i. to suppress physical evidence or statements (Chapter III(E)(2)(b)(iii)(d) (*See* Form 19 Notice of Motion to Suppress Evidence)).

      ii. to obtain further discovery or a bill of particulars (Form 16 Notice of Motion for a Bill of Particulars; Chapters III(C)(6) and III(D), respectively).

      iii. to dismiss based upon, *e.g.*, statute of limitations, double jeopardy, or grand jury irregularities (Chapter III(E)(2)(a)).

      iv. for a severance (Chapter III(e)(2)(b)(i)) (*See* Forms 17 Notice of Motion to Sever Counts and 18 Notice of Motion to Sever Defendants) or change of venue (Chapter III(E)(2)(b)(iii)).

   C. Explore possible defenses, including the interview of potential witnesses for both defense and the prosecution.

i. ***Practice Pointer*** - There is no prohibition on contacting and attempting to speak with prospective government witnesses.

ii. ***Practice Pointer*** - When you interview witnesses (except your client), make certain that there is someone else with you in attendance to ensure that you don't become a witness in the event the witness later contradicts himself or herself at trial.

iii. ***Practice Pointer*** - If you, on behalf of the defendant, have sought discovery from the state, remember that any witness statements obtained by the defense must be turned over to the prosecution as reciprocal discovery under *R.* 3:13-3(d)(4) (Chapter III(C)(2)).

D. Explore potential applications for Pre-Trial Intervention or Conditional Discharge (Chapter III(E); *see* Form 8 Pretrial Intervention Notice).

E. Explore the possibility of a Plea Bargain (Chapter III(F)), including potentially a cooperation agreement (*See* Forms 10 Plea Agreement and 11 Cooperation Agreement).

i. ***Practice Pointer*** - Beware of Plea Cut-Off Dates.

ii. ***Practice Pointer*** - Fully explore with the client collateral consequences of a guilty plea, including immigration consequences and a potential parole and/or probation violation.

7. Proceed to Trial.

A. Prepare trial memorandum (Chapter III(F); *see* Form 21 Trial Memorandum).

B. Prepare *voir dire* requests (Chapter IV(D)(i); *see* Form 22 Proposed *Voir Dire* Questions).

C. Prepare requests to charge (Chapter IV(J)).

i. ***Practice Pointer*** – Attorneys, and judges and their staff may use the Automated Model Criminal Jury Charges System (AMCJCS) to generate criminal jury charges. It can be accessed by a link to the Criminal Model Jury Charges at the Judiciary's internal website at www.judiciary.state.nj.us/criminal/juryindx.pdf (which also contains model charges for various criminal statutes).

D. Consider filing a motion for a Witness Sequestration Order (Chapter IV(F)).

E. Make Opening Statement (Chapter IV(E)).

i. ***Practice Pointer*** - Never waive opening statement.

F. Make a motion for judgment of acquittal after prosecution has rested (Chapter IV(H)).

8. Prepare for Sentencing.

A Prepare a sentencing memorandum (Chapter V(A)) discussing the aggravating (*N.J.S.A.* 2C:44-1a) and mitigating factors (*N.J.S.A.* 2C:44-lb) (Chapter V(C)(l)).

i. Include letters from family, friends, members of community, clergy, attesting to other good attributes of client.

ii. ***Practice Pointer*** - Provide a copy not only to judge and opposing counsel, but to the probation department.

B. You and your client should meet/talk with the Probation Officer conducting the pre-sentence investigation (Chapter V(A)).

C. Consider a motion for Eligibility for Entry to Supervision Program (Chapter V).

D. ***Practice Pointer*** - Consider a request that judge recommend a specific institution if the defendant will be incarcerated (Chapter V(C)(2)(a)).

9. Consider an Appeal.

A Consider filing a Motion for Bail Pending Appeal (Chapter V(G)).

B. Be mindful of the operative time period - 45 days from the entry of judgment (*R.* 2:4-1) (Chapter V(G)). *See* Form 25 Notice of Appeal; Form 26 Criminal Case Information Statement; Form 28 Request for Transcript.

10. Consider an Application for Post-Conviction Relief - *R.* 3:22-1 (Chapter V(H)).

11. Consider filing for Expungement of the Conviction (Chapter V(I)); *See* Form 28 Expungement Order).

I. THE GOVERNMENT'S INVESTIGATION

A. Interrogations and Confessions

An individual is most vulnerable upon being confronted by police interrogation. Some clients believe that they can talk their way out of potential criminal troubles by providing information to the police. Others are so susceptible to questioning by authorities that they feel compelled to give the police a full accounting. In almost every circumstance, it is a bad idea for an individual to respond to police interrogation without having a lawyer present. Therefore, it is good advice to recommend very strongly to a client that he or she not talk to the police or other investigating authorities, to the extent that you can prevent your client from doing so.

Often, however, counsel finds out about a client's confession or response to police interrogation after the fact. Therefore, as defense counsel attacking such a confession or as a prosecutor giving guidance to police or detectives working to prepare a case, it is important to know the operative rules governing confessions and incriminating statements.

1. Non-Custodial Interrogations

Individuals interrogated in a non-custodial setting enjoy fewer protections than those interrogated while in custody. In the seminal *Miranda* case, the United States Supreme Court stated that the famed *Miranda* warnings[1] must be administered by the police only during custodial interrogations. *Miranda v. Arizona*, 384 *U.S.* 436, 444 (1966). Thus, "*Miranda* does not apply to noncustodial interrogation." *State v. Zucconi*, 50 *N.J.* 361, 363 (1967). The *Miranda* Court explained that such custodial interrogations begin upon "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 *U.S.* at 444. The *Miranda* decision was grounded on the Fifth Amendment privilege against self-incrimination and ancillary rights such as the right to counsel, necessary to protect the privilege against self-incrimination. *Miranda v. Arizona*, 384 *U.S.* at 478; *State v. Reed*, 133 *N.J.* 237, 251 (1993). The *Miranda*

[1] A suspect must be warned as follows:

a. He or she has the right to remain silent;
b. Any statement he or she does make may be used as evidence against him or her;
c. He or she has a right to the presence of an attorney;
d. If he or she cannot afford an attorney, an attorney will be appointed for him or her; and
e. He or she has the continuing opportunity to exercise these rights at any time during the questioning.

Miranda v. Arizona, 384 U.S. 436, 444 (1966).

decision was re-endorsed by the United States Supreme Court in *Dickerson v. United States*, 530 *U.S.* 428 (2000).

Since *Miranda,* the United States Supreme Court and the New Jersey Supreme Court have held that the question of "custody" is determined by reference to whether a reasonable person would believe that he or she is free to leave. *California v. Hodari D.*, 499 *U.S.* 621, 628 (1991); *State v. Tucker,* 136 *N.J.* 158, 163-165 (1994). There is a considerable amount of jurisprudence on the issue of custody. An individual who voluntarily goes to a police station and is told that he is not under arrest has been found not to be in custody. *Oregon v. Mathiason,* 429 *U.S.* 492, 495 (1977). *See State v. Lacaillade,* 266 *N.J. Super.* 522, 527 (App. Div. 1993) *(Miranda* warnings not required where suspect, a police officer, was questioned at police headquarters without the threat of restraint). In addition, questioning in one's own home does not necessarily constitute a custodial interrogation. *Beckwith v. United States,* 425 *U.S.* 341, 347 (1976); *State v. PZ,* 152 *N.J.* 86, 102-105 (1997) (Defendant interviewed in his home, with his father nearby, by a caseworker from the Division of Youth and Family Services regarding potential child abuse, was not subjected to custodial interrogation); *State v. Keating*, 277 *N.J. Super.* 141, 143 (App. Div. 1994) (questioning by investigators, who questioned a defendant in the living room of his home, did not constitute custodial interrogation even though investigators kept tabs on defendant as he performed domestic chores, took a shower and changed his clothes). However, an individual questioned in his or her bedroom has been found to be not free to leave and consequently under arrest. *Orozco v. Texas*, 394 *U.S.* 324, 326-327 (1969). In *State v. Stott,* 171 *N.J.* 343 (2002), the defendant, a patient in a state psychiatric hospital, was in custody when he gave incriminating statements during police interviews, where the defendant was questioned by four law enforcement officers in a secluded basement area within the complex, isolated from other patients. The issue is not what the police have in mind, but whether the defendant reasonably believed he or she was in custody when being questioned. *Stansburg v. California,* 511 *U.S.* 318, 114, *S.Ct.* 1526, 128 *L.Ed.2d* 293, 299-300 (1994); *State v. Graves,* 60 *N.J.* 441, 449-50 (1972); *State v. Keating,* 277 *N.J. Super.* at 148.

Recently, the United States Supreme Court decided a case with potential wide-ranging implications concerning the questioning of an individual in a non-custodial context. In *Salinas v. Texas*, 570 *U.S.* ___, 133 *S.Ct.* 2174, (2013), the Court upheld the murder conviction of a defendant whose refusal to answer a question during a precustody interview was later introduced

at trial by prosecutors as implicit evidence of his guilt. Justice Alito's plurality opinion found that the Fifth Amendment's protections do not automatically extend to statements, or refusals to make statements, made in a voluntary interview unless the defendant explicitly invokes his or her constitutional right to remain silent.

In contrast, under New Jersey law, pre-arrest silence that is not "at or near" the time of arrest, when there is no government compulsion and the objective circumstances demonstrate that a reasonable person in a defendant's position would have acted differently, can be used to impeach that defendant's credibility with an appropriate limiting instruction. *State v. Stas*, 212 *N.J.* 37, 58 (2012); *State v. Brown*, 190 *N.J.* 144, 158-159 (2007). However, the defendant's silence cannot be used as substantive evidence of a defendant's guilt. *Stas*, 212 *N.J.* at 58; *Brown*, 190 *N.J.* at 158-159.

2. Interrogation

Miranda bars the admission of a statement given without the warnings in response to interrogation. *Miranda,* 384 *U.S.* at 478. A question that has arisen frequently is whether the police engaged in interrogation. In *Rhode Island v. Innis*, 446 *U.S.* 291, 301 (1980), the Supreme Court held that police words or actions "normally attendant to arrest and custody" do not fall within the ambit of interrogation. Thus, booking procedures and routine questions are ministerial in nature and need not be preceded by *Miranda* warnings. *Pennsylvania v. Muniz,* 496 *U.S.* 582, 601-602 (1990); *State v. Mallozzi,* 246 *N.J. Super.* 509, 515-516 (App. Div.), *certif. denied,* 126 *N.J.* 331 (1991). In *South Dakota v. Neville,* 459 *U.S.* 553, 564 n. 15 (1983), the United States Supreme Court held that asking a suspect to submit to a blood-alcohol test also does not constitute "interrogation" and a suspect's "choice of refusal thus enjoys no prophylactic *Miranda* protection." In *State v. Stever,* 107 *N.J.* 543, 557-58, *cert. denied*, 484 *U.S.* 954 (1987), the New Jersey Supreme Court adopted the *Neville* rationale. *See also State v. DeLorenzo,* 210 *N.J. Super.* 100, 104-05 (App. Div.) ("a simple request to submit to a chemical test does not constitute interrogation"), *certif. denied,* 105 *N.J.* 507 (1986). Accordingly, the term interrogation under *Miranda* refers to express questioning and any words or actions by the police that they "should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 *U.S.* at 301. *See also State v. Lozada,* 257 *N.J. Super.* 260, 268 (App. Div.), *certif. denied,* 130 *N.J.* 595 (1992).

In addition to the "routine booking" exception to *Miranda*, there is also a "public safety" exception. Thus, in *New York v. Quarles*, 467 *U.S.* 649, 655-656 (1984), the Supreme Court held that questions asked by police "reasonably prompted by a concern for public safety" such as "where is the gun?" need not be preceded by *Miranda* warnings. *See also State in Interest of A.S.*, 227 *N.J. Super.* 541, 547 (App. Div. 1988).

3. Invocation and Waiver of Right to Remain Silent

Custodial interrogation of a suspect must cease if he or she "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent." *Miranda v. Arizona*, 384 *U.S.* at 473-474. The suspect need not assert his or her privilege to remain silent with the "utmost of legal precision." *State v. Johnson*, 120 *N.J.* 263, 281 (1990) (quoting *State v. Bey (I)*, 112 *N.J.* 45, 65 (1988)). Silence itself can be deemed to be an invocation of the privilege against self-incrimination. *State v. Johnson*, 120 *N.J.* at 281. A suspect's request to terminate questioning must be honored, regardless of how ambiguously or equivocally the request is worded. *State v. Harvey*, 121 *N.J.* 407, 417, 419 (1990) (the defendant's statement that he would tell the police about the murder, but first he wanted to speak to his father, was held to be an invocation of his self-incrimination privilege), *cert. denied*, 499 *U.S.* 931 (1991); *State v. Bey (I)*, 112 *N.J.* 45, 64-65 (1988) (defendant's statement that he "did not want to talk about it" deemed to be an invocation of the privilege); *State v. Bohuk*, 269 *N.J. Super*. 581, 593 (App. Div.) (refusal to respond to even preliminary questions concerning a drunk driving charge must be regarded as an assertion by the defendant of the Fifth Amendment privilege), *certif. denied*, 136 *N.J.* 29, *cert. denied*, 513 *U.S.* 865, 115 *S.Ct.* 183, 130 *L.Ed.2d* 117 (1994). Note the contrast to federal constitutional law, where a suspect must unambiguously invoke his or her right to remain silent. *Berghuis v. Thompkins*, 560 *U.S.* ____, 130 *S.Ct.* 2250, 2259-60 (2010).

Once the right to remain silent has been asserted, it must be "scrupulously honored." *Michigan v. Mosley* 423 *U.S.* 96, 102-103 (1975); *State v. Adams*, 127 *N.J.* 438, 445 (1992); *State v. Fuller*, 118 *N.J.* 75, 81 (1990). Under New Jersey law, once a suspect has invoked his or her right to remain silent, the police must issue a new set of *Miranda* warnings before questioning may resume. *State v. Hartley*, 103 *N.J.* 252, 267 (1986). Any statement obtained without administering fresh warnings is unconstitutionally compelled and inadmissible. *State v. Hartley*, 103 *N.J.* at 256. Moreover, where the police have not "scrupulously honored" a

previously invoked right to silence, readministration of *Miranda* rights may not necessarily cure the violation, when the second questioning follows so closely on the first as to be part and parcel of a continuous interrogation. *State v. Hartley*, 103 *N.J.* at 280-281; *State v. Mallon*, 288 *N.J. Super*. 139, 147 (App. Div. 1996). *See also Westover v. United States*, 384 *U.S.* 436, 496-497 (1996).

If after invoking his or her right to silence, the suspect initiates further conversation with the police, the resumption of police questioning will not constitute a failure to "scrupulously honor" that right. *State v. Fuller*, 118 *N.J.* at 83; *State v. Mallon*, 288 *N.J. Super*. at 147. If there is any uncertainty or ambiguity about whether or not a suspect has asserted the right to remain silent, the police must cease asking questions about the crime, *State v. Dixon*, 125 *N.J.* 223, 240-241 (1991), but may question the suspect to clarify if the suspect intends to assert his or her right to remain silent. *State v. Harvey*, 151 N.J. 117, 221 (1997); *State v. Johnson*, 120 *N.J.* at 283. *See also State v. Harvey*, 121 *N.J.* at 418-19. "Only if the suspect [then] makes clear that he is not invoking his *Miranda* rights should substantive questioning be resumed." *State v. Wright*, 97 *N.J.* 113, 120 n. 4 (1984) (quoting *U.S. v. Riggs*, 537 *F.2d* 1219 (4th Cir. 1976)); *See also State v. Bohuk*, 269 *N.J. Super*. at 593.

Waiver of the right to remain silent must be knowing, intelligent and voluntary. *Miranda v. Arizona*, 384 *U.S.* at 463-466; *State v. Hartley*, 103 *N.J.* at 260. The question of waiver is to be determined on a case by case basis, taking into account, among other circumstances, the background, experience and conduct of the accused. *North Carolina v. Butler*, 441 *U.S.* 369, 374-375 (1979); *State v. Kennedy*, 97 *N.J.* 278, 286 (1984). The State bears the heavy burden of proof to show beyond a reasonable doubt that a defendant has waived his or her right against self-incrimination, *State v. Reed*, 133 *N.J.* at 251; *State v. Bey (II)*, 112 *N.J.* 123, 135 (1988), in contrast to the federal preponderance of the evidence standard. *Colorado v. Connelly*, 479 *U.S.* 157, 165 (1986). *State v. Hartley*, 103 *N.J.* at 260. The issue of waiver arises only if the police have scrupulously honored the suspect's right to silence once invoked, or if the suspect never invoked his or her *Miranda* rights. *State v. Adams*, 127 *N.J.* 438, 445-446 (1992); *State v. Hartley*, 103 *N.J.* at 261.

The police need not necessarily also advise an individual that he or she is a suspect, as long as the police advise the individual of his or her *Miranda* rights. *State v. Nyhammer*, 197 *N.J.* 383, 404-405 (2009).

Alleged misrepresentations by police officers during the course of questioning a suspect, by themselves, are not generally sufficient to justify a finding of involuntariness or lack of knowledge. However, misrepresentations by police officers are relevant in analyzing the totality of the circumstances. If the misrepresentations by the police officer actually induced the confession or waiver, the defendant's statements will be deemed to be involuntary. *State v. Cooper,* 151 *N.J.* 326, 355 (1997); *State v. Chew,* 150 *N.J.* 30, 66 (1997). When police knowingly fail to inform a suspect that an attorney is present or available to confer with the suspect, a *Miranda* waiver is per se invalid. *Reed,* 133 *N.J.* at 261-262, 269. Pursuant to *State v. A.G.D.,* 178 *N.J.* 56, 68 (2003), a *Miranda* waiver is per se invalid when the police who were questioning a defendant withhold from him the fact that they had on hand a criminal complaint and a warrant for his arrest.

The State may draw no negative inference from a defendant's invocation of his or her right to remain silent while under police interrogation. *State v. Reed,* 133 *N.J.* at 250; *State v. Ripa,* 45 *N.J.* 199, 204 (1965). Thus, when a defendant expressly refuses to answer questions, no inference can be drawn against him or her under the doctrine of acquiescence by silence or any other concept, and no comment thereon may be made to the jury. *Brecht v. Abramson,* 507 *U.S.* 619, 123 *L.Ed.2d* 353, 366 (1993); *Doyle v. Ripa,* 45 *N.J.* at 204; *State v. Lanzo*, 44 *N.J.* 560, 563 (1965). Moreover, the defendant cannot be impeached by asking why he or she did not volunteer exculpatory information about which he or she later testifies at trial. *Doyle v. Ohio,* 426 *U.S.* at 619; *State v. Deatore*, 70 *N.J.* at 115. Note, however, that a defendant's pre-arrest silence may be admitted for impeachment purposes, provided that no governmental compulsion is involved. *State v. Brown*, 118 *N.J.* 595, 613 (1990). *See also Jenkins v. Anderson*, 447 *U.S.* 231, 238-239 (1980). This pre-arrest silence is admissible if, when viewed objectively and neutrally in light of all the circumstances, it generates an inference of consciousness of guilt that bears on the credibility of the defendant when measured against the defendant's apparent exculpatory testimony. *State v. Brown*, 118 *N.J.* at 615.

Note also that a defendant's formal confession which the State had transcribed as he was providing it, but which the defendant neither signed nor acknowledged to be correct, may be admitted at trial as a past recollection recorded by an examining police detective, provided that there is no objection and all foundation requirements, pursuant to New Jersey Evidence Rule 803(c)(5) and 803(b)(1), are satisfied. *State v. Gore*, 205 *N.J.* 363, 381-382 (2011).

Also, in *State v. W.B.*, 205 *N.J.* 588, 607-609 (2011), the New Jersey Supreme Court recently held that the police must preserve contemporaneous notes of interviews and observations at a crime scene. If an officer's notes are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference jury instruction.

Finally, if a confession was elicited in violation of a defendant's *Miranda* rights, but is found to have been given voluntarily (*see* Voluntariness, section I.A.5, *infra*), the confession may be used by the State to impeach the credibility of the defendant if the defendant takes the stand and testifies inconsistently with his or her prior statement. *Harris v. New York*, 401 *U.S.* 222, 226 (1971); *State v. Slobodian*, 120 *N.J. Super.* 68, 73 (App. Div.), *certif. denied*, 62 *N.J.* 77 (1972). This rule applies only to voluntary statements. *Mincey v. Arizona*, 437 *U.S.* 385, 398 (1978).

4. Right to Counsel

The right to counsel is one of the most significant adjuncts to safeguard an accused's privilege against self-incrimination. *Fare v. Michael C.*, 442 *U.S.* 707, 719 (1979); *State v. Reed*, 133 *N.J.* at 253. The right to counsel implicated in the pre-indictment custodial interrogation is distinct from the right to counsel that is constitutionally guaranteed once a defendant has been indicted. *State v. Reed*, 133 *N.J.* at 263; *State v. Sanchez*, 129 *N.J.* 261, 276, 277 (1992). As the *Miranda* decision recognized, presence of counsel for a suspect during interrogation not only serves to allow a suspect to make an informed decision about whether or not to talk to the police, but also can help to assure that any statement given is truthful and accurate. *Miranda v. Arizona*, 384 *U.S.* at 463-466. *See also State v. Sanchez*, 129 *N.J.* at 266. Accordingly, not only must the police advise a subject subjected to custodial interrogation that he or she has a generalized right to an attorney, but the police must further advise the suspect that an attorney will be provided at the state's expense if the suspect is unable to afford an attorney. *Miranda v. Arizona*, 384 *U.S.* at 473; *State v. Reed* , 133 *N.J.* at 253.

If an individual states that he or she wants an attorney, the questioning must cease until the attorney arrives. *Miranda v. Arizona*, 384 *U.S.* at 474; *State v. Kennedy*, 97 *N.J.* 278, 285 (1984). In *Edwards v. Arizona*, 451 *U.S.* 477, 484-485 (1981), the United States Supreme Court established a per se rule that an accused who invokes his or her right to counsel is not subject to further interrogation until counsel has been made available. *See also Minnick v. Mississippi*, 498

U.S. 146, 153 (1990). All dialogue with a suspect who has requested counsel must cease "unless the accused himself initiates further communication, exchanges or conversations with the police." *Edwards v. Arizona*, 451 *U.S.* at 485. *See also State v. Kennedy*, 97 *N.J.* at 285. To establish a waiver under such circumstances, the government must show that the accused, not the police, reopened the dialogue with the authorities. *Edwards v. Arizona*, 451 *U.S.* at 485 n. 9; *State v. Kennedy*, 97 *N.J.* at 285.

In *State v. Reed*, the New Jersey Supreme Court held that if the police know that an attorney representing an accused is present or available, and the attorney has communicated a desire to confer with the suspect, the police must make that information known to the suspect before custodial interrogation can proceed or continue. *Reed*, 133 *N.J.* at 261-262. If the police fail to give the suspect this information, the suspect's subsequent waiver of the privilege against self-incrimination is per se invalid. *Reed*, 133 *N.J.* at 262.

As with the invocation of the right to remain silent, a suspect's request for counsel need not be "articulate, clear or explicit;...any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel." *State v. Reed*, 133 *N.J.* at 253. *See also State v. Bey (II)*, 112 *N.J.* at 142. New Jersey law may differ from federal law on the invocation of a request for counsel. Under federal law, an ambiguous or equivocal request is not sufficient. Rather, the response must be such that a reasonable officer under the circumstances would have understood it to be an expression of a request for counsel. *Davis v. United States*, 512 *U.S.* 452, 114 *S.Ct.* 2350, 129 *L.Ed.2d* 362, 371-373 (1994).

Federal and New Jersey law are consistent in holding that the Sixth Amendment is "offense specific." *McNeil v. Wisconsin*, 501 *U.S.* 171, 175 (1991); *State v. Tucker*, 137 *N.J.* 259, 278 (1994), *cert. denied*, 513 *U.S.* 1090, 115 *S.Ct.* 751, 130 *L.Ed.2d* 651 (1995). *McNeil* held that a defendant's assertion of a right to counsel during his court appearance on a robbery complaint did not preclude police initiated interrogation on an unrelated homicide. *McNeil*, 501 *U.S.* at 175-176. The New Jersey Supreme Court's gloss on *McNeil* is that if the offense under investigation is based on essentially the same factual context as the charged offense, a defendant's assertion of his or her Sixth Amendment right to counsel should bar police-initiated interrogation on the related charge. *Tucker*, 137 *N.J.* at 278.

In *State v. O'Neill*, 193 *N.J.* 148, 180-181 (2007), the New Jersey Supreme Court unanimously held that when *Miranda* warnings are given after a custodial investigation already

has elicited incriminating statements, the admissibility of post-warning statements will depend on whether the warnings effectively served to provide the defendant the ability to exercise his state law privilege against self-incrimination. In making that determination, the courts must consider all relevant factors, including: (1) the extent of questioning and the nature of any admissions made by defendant before being informed of his *Miranda* rights; (2) the proximity in time and place between the pre- and post-warning questioning; (3) whether the same law enforcement officers conducted both the unwarned and warned interrogations; (4) whether the officers informed defendant that the defendant's pre-warning statements could be used against the defendant (a factor which is given "great weight"); and (5) the degree to which the post-warning questioning is a continuation of the pre-warning questioning. In addition to these factors, the defendant's prior experience with the criminal justice system is also relevant. *State v. Johnson*, 204 *N.J.* 43, 60 (2010); *O'Neill*, 193 *N.J.* at 187.

The right for individuals to be free from self-incrimination is protected by Federal and State constitutions, but the right is a purely personal one, which cannot be asserted vicariously. Thus, in *State v. Baum*, 199 *N.J.* 407, 419-420 (2009), the New Jersey Supreme Court found that a car passenger had no standing to object, on Fifth Amendment grounds, to the questioning of the driver.

An individual's right to counsel post-indictment is implicated pursuant to the Sixth Amendment to the United States Constitution or Article 1, paragraph 10 of the New Jersey Constitution. *See Kirby v. Illinois*, 406 *U.S.* 682, 688-689 (1972); *State v. Clausell*, 121 *N.J.* 298, 350-355 (1990). There is a difference between federal and state constitutional law regarding the permissibility of questioning an accused post-indictment in the absence of counsel. In *Patterson v. Illinois*, 487 *U.S.* 285, 298-299 (1988), the United States Supreme Court held that *Miranda* warnings were sufficient to support a waiver of the defendant's right to counsel under those circumstances. However, in *State v. Sanchez*, 129 *N.J.* at 274-279, the New Jersey Supreme Court held that in order to vindicate the unique State recognition of the importance of counsel to protect an accused in the post-indictment context, "as a general rule, after an indictment and before arraignment, prosecutors or their representatives should not initiate a conversation with defendants without the consent of defense counsel." *Id.* at 277. A waiver of a defendant's post-indictment and post-arraignment right to counsel may be valid if a judicial officer has advised the defendant (1) that he or she has been indicted, (2) of the significance of

an indictment, (3) that the accused has a right to counsel, and (4) of the seriousness of the situation in the event that the accused should decide to answer questions of any law enforcement officers in the absence of counsel. *State v. Sanchez*, 129 *N.J.* at 276 (quoting *United States v. Mohabir*, 624 *F.2d* 1140, 1153 (2d. Cir. 1980)).

In *State v. Tucker*, 137 *N.J.* at 291, the New Jersey Supreme Court, in 1994, declined to extend the *Sanchez* holding to a defendant's first appearance. Thus, consistent with federal law pursuant to *Michigan v. Jackson*, 475 *U.S.* 625, 635-636 (1986), only if a defendant asserts his or her right to counsel at an initial appearance or similar proceedings are the police barred from interrogating a defendant. *Tucker*, 137 *N.J.* at 291.

5. *Voluntariness*

Even if a defendant's statement is admissible as not being in violation of *Miranda*, the defendant has a constitutional right to raise the issue of the voluntary nature of the confession before the trial judge; upon an adverse ruling, the defendant has the constitutional right to place an issue of credibility of the statement before the jury. *See Jackson v. Denno*, 378 *U.S.* 368, 385 (1964); *State v. Hampton*, 61 *N.J.* 250, 272 (1972); *State v. Boyle*, 198 *N.J. Super.* 64, 74 (App. Div. 1984); *N.J.R.E.* 104(c). If the judge finds that the statement should be admitted, the judge may not instruct the jury of his or her findings, but rather only that they must disregard the statement if' they find that it is not credible. *State v. Hampton*, 61 *N.J.* at 272; *State v. Jones*, 287 *N.J. Super.* 478, 493-495 (App. Div. 1996). A *Hampton* charge (*i.e.*, that the jury must determine the credibility of a defendant's oral or written statement without any knowledge that the court already has determined the statement to be voluntary) must always be given unless the defendant requests otherwise, and the court determines the defendant's request to have merit. *State v. Jordan*, 147 *N.J.* 409, 425 (1997). However, the failure to give a *Hampton* charge is not per se reversible error, but rather is reviewable under a plain error standard. *Id.* at 425. A defendant must be allowed to present to the jury all factors concerning the circumstances under which the statement was taken. The circumstances bear not only on the voluntariness of the confession but also to its credibility. *See Crane v. Kentucky*, 476 *U.S.* 683, 688 (1986); *State v. Boyle*, 198 *N.J. Super.* at 73-74.

Relevant factors to be considered in the voluntariness determination include the suspect's age, education and intelligence, advice concerning constitutional rights, length of detention,

whether the questioning was repeated and prolonged in nature, and whether physical punishment or mental exhaustion were involved. *Schneckloth v. Bustamante,* 412 *U.S.* 218, 226 (1973); *State v. Miller,* 76 *N.J.* 392, 402 (1978). "The real issue is whether the person's decision to confess results from a change of mind rather than from an overbearing of the suspect's will." *State v. Galloway,* 133 *N.J.* 631, 655 (1993). *See also Schneckloth v. Bustamante,* 412 *U.S.* at 225-226.

As a general rule, a confession obtained through custodial interrogation after an illegal arrest should be excluded unless the chain of causation between the illegal arrest and the confession is sufficiently attenuated. *State v. Chippero,* 164 *N.J.* 342, 353 (2000); *State v. Worlock,* 1l7 *N.J.* 596, 261 (1990). New Jersey courts follow the three part federal test enunciated in *Brown v. Illinois,* 422 *U.S.* 590, 604 n.l0 (1975) to determine whether the confession is the "fruit" of an. illegal arrest. *Chippero,* 164 *N.J.* at 353; *State v. Barry,* 86 *N.J.* 80, 87, *cert. denied,* 454 U.S. 1017 (1981). The factors to be considered by the courts in making this determination are as follows: (1) the temporal proximity of the arrest and the confession (which is the least determinative factor, *Worlock,* 117 *N.J.* at 623); (2) the presence of intervening circumstances, and, particularly, (3) the purpose and flagrancy of the official misconduct.

Under New Jersey State law, "[t]he State must prove the voluntariness of a confession beyond a reasonable doubt." *State v. Galloway,* 133 *N.J.* at 654; *State v. Kelly,* 61 *N.J.* 283, 294 (1972). In contrast, the federal burden of proof for voluntariness of a confession is by a preponderance of the evidence. *Lego v. Twomey,* 404 *U.S.* 477, 489 (1972). Further, unlike federal law, New Jersey law requires that the voluntariness issue be demonstrated by admissible evidence. Compare *N.J.R.E.* 104(c) with *Fed. R. Evid.* 1101(d)(l); *See State v. Cavallo,* 88 *N.J.* 508, 526, 529 (1986).

It should be noted that even if the State establishes the admissibility of a defendant's confession, it must still adduce independent proof of facts and circumstances to corroborate the confession, plus independent proof of the crime. *State v. Maben,* 132 *N.J.* 487, 491, 502 (1993); *State v. Johnson,* 31 *N.J.* 489, 502-503 (1960).

6. Co-Defendant's Confessions

Under *Bruton v. United States,* 391 *U.S.* 123, 137 (1968), it is a violation of a defendant's Sixth Amendment Confrontation Clause right to allow the government to introduce a

co-defendant's statement which implicates the defendant as evidence in its case in chief in a joint trial, even if limiting instructions are given to the jury. The first defendant cannot call the second defendant to the stand because of the co-defendant's privilege against self-incrimination, and thus, the first defendant cannot adequately confront the evidence against him or her. *Bruton,* 391 *U.S.* at 127; *State v. Sanchez,* 224 *N.J. Super.* 231, 245 (App. Div.), *certif. denied,* 111 *N.J.* 653 (1988). This rule has been extended to the situation where the non-declarant is on trial alone. *State v. Laboy,* 270 *N.J. Super.* 296, 302-307 (App. Div. 1994); *State v. Colon,* 246 *N.J. Super.* 608, 612 (App. Div. 1991). However, if the co-defendant does take the stand in his or her own defense and denies making the statement and testifies favorably to the defendant, there are no Sixth or Fourteenth Amendment violations in allowing the statements to be used by the prosecution. *Nelson v. O'Neill,* 402 *U.S.* 622, 627 (1971); *State v. Gardner,* 54 *N.J.* 37, 44-45 (1969); *State v. Stupi,* 231 *N.J. Super.* 284, 291-292 (App. Div. 1989). Moreover, the statement may be used in a joint trial if all portions of it which incriminate anyone other than the declarant can be redacted effectively. *State v. Gardner,* 54 *N.J.* at 44; *State v. Young,* 46 *N.J.* 152, 159 (1965); *R.* 3:15-2(a). However, severance must be granted if effective deletion cannot be made to avoid undue prejudice either to the declarant defendant or the co-defendant. *State v. Barnett,* 53 *N.J.* 559, 565 (1969). A defendant may waive his or her right to insist on a severance where there is a confession by a co-defendant which incriminates the defendant but only after the defendant's attorney explained to the defendant the ramifications of such a waiver. *State v. Buonadonna,* 122 *N.J.* 22, 39-40 (1991). It is better practice to acknowledge on the record that the attorney has discussed this matter with his or her client. *Id.*

Under New Jersey state law, the proscription against use of a co-defendant's confession implicating the other defendant applies even if both defendants implicate each other. *State v. Haskell,* 100 *N.J.* 469, 478-479 (1985). This decision foreshadowed the change in federal law, which previously allowed these interlocking confessions in a joint trial, *Parker v. Randolph,* 442 *U.S.* 62, 73 (1979), but was later repudiated in *Cruz v. New York,* 481 *U.S.* 186, 193 (1987).

B. Searches and Seizures

The Fourth Amendment to the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution assure citizens their right to be secure in their person, houses,

papers and effects against unreasonable searches and seizures. Few areas in the criminal law have generated more opinions, or more controversy, than the area of search and seizure. The touchstone of the courts' analysis of these issues turns on the reasonableness of the search or seizure, which in turn hinges on whether an individual had a reasonable expectation of privacy which was violated by the search or seizure. *Katz v. United States*, 389 *U.S.* 347, 350 (1967); *State v. Hempele*, 120 *N.J.* 182, 198-200 (1990) (dispensing with the need, under New Jersey law, for a defendant to have subjective expectation of privacy). Any evidence seized during an invalid search, as well as any derivative evidence obtained, is inadmissible as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 *U.S.* 471, 484-485 (1963).

1. Standing

At some point in numerous cases, the issues of whether the search conducted by the police was legal and whether the evidence seized can be suppressed will arise. Before filing motions to suppress the evidence, the initial inquiry must be whether the particular defendant has standing to challenge the search, and thus the seizure.

New Jersey departs from the federal standard of determining who has standing to challenge a search. The federal standard limits standing to those defendants who can show that they had a reasonable expectation of privacy in the place searched. *United States v. Salvucci*, 448 *U.S.* 83, 93 (1980); *Rakas v. Illinois*, 439 *U.S.* 128, 134, 143 (1978). New Jersey, however, finds standing when the defendant "has a proprietary, possessory or participatory interest in the place searched or the property seized." *State v. Alston*, 88 *N.J.* 211, 228 (1981). A proprietary interest is based on the defendant's ownership of the property seized or the place searched. *See State v. Wade*, 89 *N.J. Super.* 139, 149 (App. Div. 1965). The defendant does not have to be in actual possession of the evidence seized in order to have standing; a possessory interest in the evidence is sufficient. *State v. Curry*, 109 *N.J.* 1, 9 (1987). Finally, participatory interest is defined as having some culpable role in the criminal activity generating the evidence. *State v. Mollica*, 114 *N.J.* 329, 339-340 (1989).

A defendant may also have "automatic standing." Automatic standing is granted to those defendants who are charged with a possessory crime -- those crimes in which possession of the seized evidence is an essential element of the crime charged. *State v. Mollica*, 114 *N.J.* at 338; *State v. Curry*, 109 *N.J.* at 7-8; *State v. Alston*, 88 *N.J.* at 228. In *State v. Carvajal*, 202 *N.J.* 214

(2010), the New Jersey Supreme Court recently reiterated and reapplied its holding in *State v. Johnson*, 193 *N.J.* 528 (2008), wherein the Court carved out a narrow exception to the automatic standing rule. Thus, a defendant has no standing to object to the search or seizure of abandoned property. Property is abandoned if: (1) a person has control or dominion over property; (2) he knowingly and voluntarily relinquishes any possessory or ownership interest in it; and (3) there are no other apparent or known owners of the property. *Carvajal*, 202 *N.J.* at 223; *Johnson*, 193 *N.J.* at 549.

In electronic surveillance cases, another standard to establish standing is used. Pursuant to the Wiretapping Statute, *N.J.S.A.* 2A:156A-1 *et seq*., only an aggrieved person may challenge the admissibility of the contents of intercepted communications. *N.J.S.A.* 2A:156A-21. The statute defines an aggrieved person as "a person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed." *N.J.S.A.* 2A:156A-2(k). The courts have interpreted this section to afford standing to a person named as a target in the order authorizing the electronic surveillance, in addition to a party to the intercepted conversation. *State v. Catania*, 85 *N.J.* 418, 425 (1981). *See also State v. Mollica*, 114 *N.J.* at 340 (participatory interest in criminal gambling activity gives rise to standing to challenge the seizure of telephone toll records of another when the toll calls were made in furtherance of the crime). For a further discussion of Electronic Surveillance, see section I.B.5, *infra*.

Note that under New Jersey law police must obtain a warrant before tracking a criminal suspect's cellphone location, pursuant to *State v. Earls*, 70 *A.3d* 630, ___ *N.J.* ___ (2013). The United States Supreme Court found, in *United States v. Jones*, 565 *U.S.* 945 (2012), that physical installation of a GPS device on a car amounted to a Fourth Amendment search that required a warrant.

2. Probable Cause

In order to obtain a search warrant, the police must present facts which justify a prudent and cautious person to believe that a crime has been, or is about to be, committed. *Carroll v. United States*, 267 *U.S.* 132, 162 (1925); *State v. Macri*, 39 *N.J.* 250, 260 (1963). The necessary evidence is more than mere suspicion of a crime but less than proof beyond a reasonable doubt. *State v. Dilley*, 49 *N.J.* 460, 463-464 (1967); *State v. Mark*, 46 *N.J.* 262, 271 (1966). Probable

cause has been further defined as a "'well-grounded' suspicion that a crime has been or is being committed." *State v. Waltz*, 61 *N.J.* 83, 87 (1972). Essentially, the probable cause necessary to issue a search warrant is the same as the probable cause required to issue an arrest warrant. *State v. Sims*, 75 *N.J.* 337, 355 (1978). Probable cause is also a requisite for many of the warrantless searches discussed in Exceptions to the Warrant Rule, section I.B.4, *infra*.

Preferably, an impartial magistrate will determine whether probable cause exists. *Johnson v. United States*, 333 *U.S.* 10, 13-14 (1948); *State v. Demeter*, 124 *N.J.* 374, 381 (1991). The magistrate or judge must review the facts generating probable cause; mere conclusory statements are insufficient to establish probable cause. *Whiteley v. Warden*, 401 *U.S.* 560, 564-565 (1971); *State v. Macri*, 39 *N.J.* at 257. However, when the circumstances are such that insufficient time exists to present facts to an impartial magistrate or judge, the police officers conducting a warrantless search must know, prior to the search, the facts which give rise to probable cause. *Carroll*, 267 *U.S.* at 156.

In determining whether probable cause exists, a magistrate may consider hearsay evidence. In fact, hearsay, by itself, is sufficient to prove probable cause provided that there is a basis set forth for crediting this hearsay information. *Jones v. United States*, 362 *U.S.* 257, 269 (1960); *State v. Ebron*, 61 *N.J.* 207, 212 (1972).

In 1964, the United States Supreme Court set forth a two-prong test to be used when evaluating the sufficiency of hearsay information provided by an informant. *Aguilar v. Texas*, 378 *U.S.* 108, 114-115 (1964). The first prong is the "basis of knowledge." To satisfy this prong the information must have been sufficiently specific and detailed so as to indicate the basis of the informant's knowledge. *Illinois v. Gates*, 462 *U.S.* 213, 267 (1983); *State v. Novembrino*, 105 *N.J.* 95, 112 (1987); *State v. Perry*, 59 *N.J.* 383, 390-392 (1971). In the second prong, known as the "veracity" prong, the reliability of the informant must be established. This is satisfied by indicating that this informant has provided information in the past that was found to be accurate. *Aguilar v. Texas*, 378 *U.S.* at 114; *State v. Novembrino*, 105 *N.J.* at 121; *State v. Perry*, 59 *N.J.* at 387, 389-390.

In 1969, the United States Supreme Court held that defects in either of the *Aguilar* prongs may be remedied by a police investigation which verified the details of the informant's tip. *Spinelli v. United States*, 393 *U.S.* 410, 415-416 (1969).

In *Illinois v. Gates,* 462 *U.S.* at 238-39, the United States Supreme Court adopted a "totality of the circumstances" standard when determining whether to issue a search warrant. Under this standard, the magistrate is to consider all the circumstances and make a common sense decision as to whether a fair probability exists that evidence of a crime or contraband will be found in a particular place.

New Jersey adopted the *Gates* rule in 1987 in *State v. Novembrino,* 105 *N.J.* at 122-123. In applying the "totality of the circumstances" test, however, the courts still refer to the *Aguilar/Spinelli* test for guidance. *Illinois v. Gates,* 462 *U.S.* at 238-239; *State v. Sullivan,* 169 *N.J.* 204, 212 (2001); *State v. Lewis,* 116 *N.J.* 477, 486 (1989); *State v. Novembrino,* 105 *N.J.* at 123.

When the informant is a citizen or victim, instead of a criminal seeking beneficial treatment of some sort, the reliability of the informant is not in question. *State v. Alvarez,* 238 *N.J. Super.* 560, 566 (App. Div. 1990); *State v. Perez,* 176 *N.J. Super.* 292, 299 (App. Div. 1980); *State v. Kurland,* 130 *N.J. Super.* 110, 114-115 (App. Div. 1974); *State v. Lakomy,* 126 *N.J. Super.* 430, 435 (App. Div. 1974). The informant, however, must still provide information indicating the circumstances from which the informant concluded that the material sought can be found where the informant says it is located. *State v. Kurland,* 130 *N.J. Super.* at 115.

In addition to supplying facts which indicate the informant's reliability and the basis of his or her knowledge, the informant must also supply facts indicating the time period of the criminal activity, so that the magistrate can reasonably conclude that current evidence of a crime will be found at the indicated location. *State v. Novembrino,* 105 *N.J.* at 124; *State v. Altenburg,* 223 *N.J. Super.* 289, 294 (App. Div.), *aff'd o.b.,* 113 *N.J.* 508 (1988).

The applicant for a search warrant must personally appear before the magistrate or judge and aver to the facts constituting probable cause. *R.* 3:5-3(a). Under exigent circumstances, the application for a warrant "may be communicated to the judge by telephone, radio or other means of electronic communication" provided that the conversations are recorded or otherwise memorialized in writing by the judge's contemporaneous notes. *R.* 3:5-3(b); *State v. Fariello,* 71 *N.J.* 552, 560 (1976). The affidavit or testimony supporting the search is kept secret until the warrant is executed, *R.* 3:5-4, and, in some cases, until after indictment. *R.* 3:5-6(c). *In re Search of C Co. Premises,* 115 *N.J. Super.* 262, 265-266 (App. Div. 1971).

3. Warrants

Upon a finding of probable cause, the magistrate or judge will issue a search warrant. Pursuant to the Fourth Amendment to the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution, the warrant must be specific as to the place to be searched and the items to be seized. The United States Supreme Court set forth a standard to be used in determining whether the warrant is sufficiently particularized: "It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended..." *Steele v. United States,* 267 *U.S.* 498, 503 (1924). New Jersey clarified the particularization requirement by stating that a warrant is sufficient if it describes the property so that the intended property is recognizable from neighboring properties. *See State v. Daniels,* 46 *N.J.* 428, 437 (1966). *See also State v. Muldowney,* 60 *N.J.* 594, 600 (1972). If the warrant describes the property with such particularity so as to clearly identify the property, an incorrect street address on the warrant will not invalidate it. *State v. Bisaccia,* 58 *N.J.* 586, 592 (1971); *State v. Ferrara,* 98 *N.J. Super.* 534, 537-538 (App. Div. 1968). *But see State v. Horton,* 207 *N.J. Super.* 555, 558-559 (Law Div. 1985) (invalidating warrant where affidavit set forth wrong address and contained insufficient description of the house).

As with the place to be searched, the items to be seized must be particularly identified under both the Fourth Amendment to the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution. *See Marron v. United States,* 275 *U.S.* 192, 196 (1927). Exceptions to this particularity requirement consist of inadvertently discovered items and items in plain view. These exceptions are discussed respectively in sections I.B.4(f) and 4(i), *infra*, in the context of Exceptions to the Warrant Rule.

Seizure of microscopic evidence (such as fingerprints, hair fibers, clothing fibers and blood) is more difficult, especially when a suspect resides at or owns the property which is the scene of a crime. In order to search for evidence under these circumstances, the police must obtain a search warrant. *Thompson v. Louisiana,* 469 *U.S.* 17, 18-20 (1985). The search warrant authorizing a search for this type of evidence may contain an extensive list of every possible item at the crime scene which may contain microscopic evidence. Any evidence found on an item seized pursuant to this warrant is lawfully seized. *See State v. Seefeldt,* 51 *N.J.* 472, 490 (1968). Additionally, a warrant may authorize the officers to search for microscopic

evidence linking a criminal to a crime scene and authorize that any materials seized be sent to a crime lab. *See generally, State v. Reldan,* 100 *N.J.* 187, 199 (1985).

An anticipatory search warrant is a "warrant based upon an affidavit showing probable cause that at some future time, but not presently, certain evidence of [a] crime will be located at [a] specified place." *Black's Law Dictionary* 93 (6th ed. 1990). It may be issued under certain circumstances. This type of warrant is most often available for a controlled delivery of contraband. *State v. Ulrich,* 265 *N.J. Super.* 569, 574-575 (App. Div. 1993), *certif. denied,* 135 *N.J.* 304 (1994). Although probable cause for the search warrant must exist at the time the warrant is issued, *State v. Foreshaw,* 245 *N.J. Super.* 166, 175-176 (App. Div. 1993), the warrant must specifically state that it is not to be executed until a specified event occurs. *Ulrich,* 265 *N.J. Super.* at 576.

A search warrant may be executed by any law enforcement officer. *R.* 3:5-5(a). It must be executed within 10 days of its issuance and within the hours specified on the warrant (usually within the "daytime hours" unless a judge specifies that it may be executed at any time of day or night). *Id.* The officer who seizes any property pursuant to the warrant must give a copy of the warrant and receipt for the property taken to the person from whom or from whose premises property is taken. *Id.* The executing officer(s) must make a return of the warrant, together with an inventory of the property taken, to the judge who issued the warrant. *Id.*

A warrant will be found defective if it merely authorizes a search for property which was used in committing a violation of the New Jersey statutes, cited by title only, without a description of the items to be seized. *See State v. Muldowney,* 60 *N.J.* at 600; *but see State v. Christow,* 147 *N.J. Super.* 258, 260-61 (App. Div. 1977) (upholding a warrant identifying any property in violation of the New Jersey Controlled Dangerous Substance Act to be seized as a reasonably certain description, leaving nothing to the discretion of the officers executing the search).

Generally, if a search warrant is found to be defective, all evidence seized in executing the warrant must be excluded. The federal courts carved out an exception to the exclusionary rule for situations where the police relied upon a warrant which was later found to be invalid. Under this “good faith” exception, evidence seized pursuant to a search warrant later declared to be invalid is admissible unless the defendant shows (1) the magistrate was not neutral and detached; (2) the officers were dishonest or reckless in preparing the affidavit upon which the

search warrant was issued; or (3) the officers could not have an objectively reasonable belief that probable cause existed. *United States v. Leon*, 468 *U.S.* 897, 922 (1984).

New Jersey, however, has rejected the "good faith" exception as a matter of state law. The Supreme Court of New Jersey found that this exception would undermine the State Constitution's guarantee of probable cause. *State v. Novembrino*, 105 *N.J.* at 157-58. In *State v. Handy*, 206 *N.J.* 39 (2011), the Court upheld the suppression of evidence uncovered during a search incident to arrest of a defendant where the police dispatcher incorrectly advised the arresting officer that there was an outstanding arrest warrant. In so ruling, the Court distinguished the United States Supreme Court's holding in *Herring v. United States*, 555 *U.S.* 134, 140 (2009). In *Herring*, the failure of a warrant clerk in an adjacent county to update the database to reflect that a warrant had been recalled did not trigger the exclusionary rule. In *Handy*, however, the dispatcher advised an officer on the scene that there was an outstanding arrest warrant, when the warrant contained a differently spelled name and a different date of birth. That conduct was deemed by the *Handy* Court to be objectively unreasonable and in violation of federal and state constitutional proscriptions against unreasonable searches and seizures. *Handy* 206 *N.J.* at 51-53. Compare to *Davis v. United States*, 564 *U.S.* ___, 131 *S.Ct.* 2419 (2011) (the Fourth Amendment's exclusionary rule does not apply to a search conducted by objectively reasonable relevance or binding appellate precedent, even when that precedent is subsequently overturned. Exclusion is warranted only when police "exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights").

A defendant may challenge the affidavit submitted in support of a search warrant. In order to do so, the defendant must allege that specific statements contained in the affidavit were knowingly false or made with reckless disregard for the truth, and offer proof demonstrating the falsity of the statements. Additionally, the defendant must show that without these material misstatements, the search warrant fails for lack of probable cause. Once a defendant makes this showing, he or she may be entitled to a hearing to test the veracity of the remainder of the affidavit. If the defendant shows by a preponderance of the evidence that material statements in the affidavit are false, the warrant will be declared invalid. *Franks v. Delaware*, 438 *U.S.* 154, 171-172 (1978); *State v. Howery*, 80 *N.J.* 563, 568, *cert. denied*, 444 *U.S.* 999 (1979).

Under *R.* 3:5-7(a) and (e), a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the seized evidence may be used against

him or her in a criminal proceeding may apply to the Superior Court to suppress the evidence and to have the seized property returned. The application must be brought where the criminal proceeding is threatened or pending, not where the property was seized. *See In re Meehler*, 177 *N.J. Super.* 337, 347 (App. Div.), *certif. denied*, 87 *N.J.* 349 (1981).

4. Exceptions to the Warrant Rule

A search warrant is generally required. *Illinois v. Gates*, 462 *U.S.* at 236; *State v. Valencia*, 93 *N.J.* 1 26, 133 (1983). Indeed, a warrantless search is presumed to be invalid. *Mincey v. Arizona*, 437 *U.S.* 385, 390 (1978); *State v. Valencia*, 93 *N.J.* at 133. However, several important exceptions exist which allow the police to search a particular place without a warrant. The burden is on the prosecution, seeking to validate a warrantless search, to bring it within one of these recognized exceptions. *Schneckloth v. Bustamante*, 412 *U.S.* 218, 219 (1973); *State v. Alston*, 88 *N.J.* at 230.

a. Abandoned Property

The first exception to the warrant requirement is made for abandoned property. For the exception to apply, however, the property must be abandoned in the constitutional sense: the person gave up his or her reasonable expectation of privacy in the property, without necessarily relinquishing his or her ownership interest. *State v. Hempele*, 120 *N.J.* 182, 213-214 (1990). Thus, in *Hempele*, the New Jersey Supreme Court found, in contrast to federal constitutional law under *California v. Greenwood*, 486 *U.S.* 35, 39-40 (1988), that there is an expectation of privacy in trash left for collection in an area accessible to the public. *Stare v. Hempele*, 120 *N.J.* at 209, 213-215. For property to be abandoned, the owner must give up more than physical control over the property. *State v. Hempele*, 120 *N.J.* at 213-14. An important factor in determining whether property has been abandoned is the denial of ownership by the defendant. *State v. Abreu*, 257 *N.J. Super.* 549, 556 (App. Div. 1992); *State v. Allen*, 254 *N.J. Super.* 62 (App. Div. 1992); *State v. Lee*, 245 *N.J. Super.* 441, 450-452 (App. Div. 1991).

b. Administrative Searches

The prohibition against unreasonable searches and seizures is applicable to commercial business enterprises as well as private homes. *New York v. Burger*, 482 *U.S.* 691, 699 (1987);

See v. City of Seattle, 387 *U.S.* 541, 543 (1967); *State v. Williams,* 84 *N.J.* 217, 223-225 (1980). Commercial property owners or operators have a legitimate expectation of privacy that extends not only to traditional searches conducted by police to gather evidence of a crime, but also to administrative inspections. *New York v. Burger,* 482 *U.S.* at 699; *Marshall v. Barlow's Inc.,* 436 *U.S.* 307, 312-313 (1978); *State v. Bonaccurso,* 227 *N.J. Super.* 159, 164-165 (Law Div. 1988).

Generally, an administrative search warrant must be obtained before a regulatory search can be undertaken. *See, e.g., See v. City of Seattle,* 387 *U.S.* at 545; *State v. Bromell,* 251 *N.J. Super.* 85, 91 (Law Div. 1991). However, in "closely regulated industries," administrative inspections of premises may be conducted without a warrant. *New York v. Burger,* 482 *U.S.* at 700; *Colonnade Catering Corp. v. United States,* 397 *U.S.* 72, 77 (1970); *State v. Dolce,* l78 *N.J. Super.* 275, 285 (App. Div. 1981). Some examples of industries which have been deemed by the courts to be "closely regulated" are: gun selling, *United States v. Biswell,* 406 *U.S.* 311, 316-317 (1972), the liquor industry, *Colonnade Catering Corp.,* 397 *U.S.* at 76-77; *State v. Williams,* 84 *N.J.* at 223; horse racing, *State v. Dolce,* 178 *N.J. Super.* at 283-285; *State v. Turcotte,* 239 *N.J. Super.* 285, 290 (App. Div. 1990); casino gambling establishments, *In re Martin,* 90 *N.J.* 295, 312-314 (1982); the pharmaceutical industry, *State v. Rednor,* 203 *N.J. Super.* 503, 507-508 (App. Div. 1985); wastewater treatment facilities, *In re Environmental Protection Dep't.,* 177 *N.J. Super.* 304, 313 (App. Div. 1981) and the meat packing industry, *State v. Bonaccurso,* 227 *N.J. Super.* at 167.

However, even in a pervasively regulated industry, a warrantless inspection will be deemed reasonable only if three criteria are satisfied. First, there must be a substantial government interest in the regulatory scheme under which the inspections are conducted. *New York v. Burger,* 482 *U.S.* at 713; *State v. Turcotte,* 239 *N.J. Super.* at 292. Second, the warrantless inspection must be necessary to further the regulatory scheme. *Burger,* 482 *U.S.* at 702; *Turcotte,* 239 *N.J. Super.* at 292. Finally, the regulatory inspection "in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *Burger,* 482 *U.S.* at 703; *Turcotte,* 239 *N.J. Super.* at 293. Analogizing participation in school sports to participation in closely regulated industries, the United States Supreme Court upheld random urinalysis drug testing of school athletes without a showing of individualized suspicion. *Vernonia School Dist. 47J v. Acton,* 515 *U.S.* 646, 115 *S.Ct.* 2386, 132 *L.Ed.2d* 564, 577 (1995).

c. Automobiles

A third exception to the search warrant requirement is the automobile exception. The automobile exception to the warrant requirement is shown, according to the United States Supreme Court, "if a car is readily mobile and probable cause exists to believe it contains contraband." *Pennsylvania v. Labron*, 518 *U.S.* 938, 116 *S.Ct.* 2485, 135 *L.Ed.2d* 1031, 1036 (1996). Under New Jersey standards, as enunciated by the New Jersey Supreme Court in *State v. Colvin*, 123 *N.J.* 428, 437 (1991), no warrant is required when "the police have no advance knowledge of the events to unfold" and there is the need for prompt police action. Thus, in New Jersey, the warrantless search of an automobile is permissible if three criteria are met: (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. *State v. Pena-Flores*, 198 *N.J.* 6, 28 (2009), citing *State v. Cooke*, 163 *N.J.* 657, 667-668 (2000). Under this exception, if the police have probable cause to believe that a particular vehicle contains contraband, the police may search the entire vehicle, including a container which could be expected to contain the contraband. *United States v. Ross*, 456 *U.S.* 798, 825 (1982); *Carroll v. United States*, 267 *U.S.* at 149; *State v. Esteves*, 93 *N.J.* 498, 504 (1983); *State v. Guerra*, 93 *N.J.* 146, 151 (1983). This exception is attributable to the diminished expectation of privacy that attends car ownership and use. *South Dakota v. Opperman*, 428 *U.S.* 364, 367 (1976); *State v. Esteves*, 93 *N.J.* at 504.

In both *State v. Dunlap*, 185 *N.J.* 543 (2006) and *State v. Birkenmeier*, 185 *N.J.* 552 (2006), the New Jersey Supreme Court reaffirmed the vitality and applicability of the automobile exception, depending upon satisfaction of two requirements to be determined on a case-by-case basis: (1) the existence of probable cause, and (2) exigent circumstances. In *Birkenmeier*, 185 *N.J.* at 563, the officer's observation of a laundry tote bag on the front passenger seat of the defendant's car and detection of a very strong odor of marijuana properly triggered the automobile exception and permitted the ensuing search of the passenger compartment of defendant's car. In *Dunlap*, 185 *N.J.* at 550-551, the Court invalidated a search of an automobile and the subsequent seizure of guns and heroin based upon the lack of exigent circumstances and the lack of basis to conclude that there was potential destruction of evidence.

If the probable cause extends to a particular container inside a particular vehicle, under federal law, the police may search the container and the entire vehicle. *California v. Acevedo,* 500 *U.S.* 565, 580 (1991). At least one Appellate Division court has applied the *Acevedo* rule, *State v. Lugo,* 249 *N.J. Super.* 565, 568 (App. Div. 1991), but its applicability to New Jersey State cases is uncertain. *See State v. Demeter,* 124 *N.J.* at 378, 381-386. *See also State v. Patino,* 83 *N.J.* 1, 14-15 (1980). The police may search the vehicle where they encounter it, or, if it is impracticable or unsafe to do so, the police may move the vehicle to police headquarters before searching it. *State v. Guerra,* 93 *N.J.* at 151; *State v. Alston,* 88 *N.J.* at 234-235; *State v. Martin,* 87 *N.J.* 561, 570 (1981).

The United States Supreme Court has decided that the automobile exception to the Fourth Amendment's warrant requirement extends to property belonging to passengers in an automobile. Thus, the Court held that police officers do not violate the Fourth Amendment by searching a vehicle passenger's belongings if they have probable cause to believe that the vehicle holds drugs or other contraband. *Wyoming v. Houghton,* 526 *U.S.* 295, 119 *S.Ct.* 1297, 143 *L.Ed.2d* 408 (1999).

If there is a significant delay between the occurrence of probable cause and the exigent circumstance, the warrantless search is more susceptible to review. *State v. Marsh,* 162 *N.J. Super.* 290, 297 (Law Div. 1978), *aff'd sub nom., State v. Williams,* 168 *N.J. Super.* 352 (App. Div. 1979). *See State v. Bell,* 195 *N.J. Super.* 49, 55 (App. Div. 1984).

Note that a motor vehicle search incident to a traffic citation is unconstitutional. *Knowles v. Iowa,* 525 *U.S.* 113, 119 *S.Ct.* 484, 142 *L.Ed.2d* 498 (1998). However, a pat down search of a car driver or passenger in a vehicle stopped for a traffic violation is permissible when an officer has reasonable suspicion that the driver or a passenger may be armed and dangerous. *Arizona v. Johnson,* 555 *U.S.* 323 (2009). A motorist's unwillingness or inability to produce a driver's license during a stop for a traffic violation does not, in the absence of further reason, justify a police search of the vehicle for the license or other identification. *State v. Lark,* 319 *N.J. Super.* 618, 624-627 (App. Div. 1999). However, in *State v. Irelan,* 375 *N.J. Super.* 100 (App. Div. 2005), the Appellate Division upheld the warrantless search of the passenger compartment of an automobile in connection with a stop and arrest of the driver for driving while intoxicated. Relying upon *State v. Cooke,* 163 *N.J.* 657, 661 (2000), the lower court had suppressed the handgun found during the course of the search because the police had no probable cause to

believe that the automobile contained evidence of the offense for which defendant was arrested. (*i.e.* open containers of alcohol) nor were exigent circumstances present. Reversing the lower court, the Appellate Division found that the search was justified under the automobile exception. The court held that there was probable cause to believe that alcohol was consumed in the vehicle, and thus that the vehicle contained open containers of alcohol, as well as exigent circumstances present.

d. Booking

The police may obtain, without a warrant, "routine booking information from an arrested individual, including photographing and fingerprinting." *County of Riverside v. McLaughlin*, 500 *U.S.* 44, 58 (1991); *Smith v. United States*, 324 *F.2d* 879, 882 (D.C. Cir. 1963). In *Maryland v. King*, 569 *U.S.* ___, 133 *S.Ct.* 1, 183 *L.Ed.2d* 667 (2012), the United States Supreme Court, by a 5 to 4 decision, used this rationale as basis for its decision that the government does not need a search warrant to procure DNA samples from individuals arrested for serious offenses.

e. Consent

Another exception to the search warrant requirement is consent by the person searched or the owner of the property searched. A police officer may ask for permission to search, even if the officer does not have a reasonable basis to believe the suspect is engaged in any criminal behavior. *Florida v. Bostick*, 501 *U.S.* 429, 435 (1991); *State v. Abreu*, 257 *N.J. Super.* at 555; *State v. Allen*, 254 *N.J. Super.* at 66.

The New Jersey Supreme Court announced, in *State v. Carty*, 170 *N.J.* 632 (2002) that law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing beyond an initial valid motor vehicle stop prior to seeking consent to search from the occupants of the motor vehicle. The *Carty* rule applies to all cases pending in the trial court and on direct appeal as of June 23, 2000, the day that the Appellate Division, in *Carty*, issued its opinion, 332 *N.J. Super.* 200 (App. Div. 2000), which was affirmed by the Supreme Court. *State v. Carty*, 174 *N.J.* 351 (2002).

In *State v. Elders*, 192 *N.J.* 234, 251 (2007), the New Jersey Supreme Court extended the *Carty* holding and held that law enforcement officers cannot request consent to search a disabled vehicle on the shoulder of a roadway unless they have reasonable and articulate suspicion or

believe that evidence of criminal wrongdoing will be found in the vehicle. However, in *State v. Domicz,* 188 *N.J.* 285, 305 (2006), the Court refused to extend to a search of a home *Carty's* requirement (in connection with automobile searches) that the law enforcement officer must have reasonable and articulate suspicion of criminal wrongdoing before the officer may request a consent to search.

In order for the consent to be valid, the consent must be voluntary -- that is, consent must be free of duress or coercion. *Schneckloth v. Bustamante,* 412 *U.S.* at 219. In New Jersey, the consent must also be knowing, *i.e.,* the suspect knew he or she had the right to refuse to consent. *State v. Maristany,* 133 *N.J.* 299, 305 (1993); *State v. Johnson,* 68 *N.J.* 349, 353-54 (1975). However, the officer asking for consent is not required to tell the suspect that he or she may refuse consent. *State v. Johnson,* 68 *N.J.* at 353-354. In determining whether the consent was a result of coercion, factors to consider are whether the (1) defendant was under arrest; (2) defendant previously refused to give consent; (3) defendant denied guilt; (4) consent was given after the officer indicated that he or she had a search warrant, *Bumper v. North Carolina,* 391 *U.S.* 543, 548-549 (1968); and (5) search produced evidence which the defendant must have known would be discovered. *United States v. Mitchell,* 322 *U.S.* 65, 70 (1944); *State v. King,* 44 *N.J.* 346, 252-253 (1965), *habeas corpus denied, sub nom. King v. Pinto,* 256 *F.Supp.* 522 (D.N.J. 1966); *State v. Hladun,* 234 *N.J. Super.* 518, 522-523 (Law Div. 1989). *See also State v. Price,* 108 *N.J. Super.* 272, 283 (Law Div. 1970).

A third party may provide valid consent to search when it appears, by clear and positive testimony, that the third party has common authority over the premises. *United States v. Matlock,* 415 *U.S.* 164, 171 (1974); *State v. Suazo,* 133 *N.J.* 315, 320 (1993). Any disclaimer by the third party of access to an area invalidates consent as to that area. *State v. Lee,* 245 *N.J. Super.* at 447. *See also State v. Allen,* 254 *N.J. Super.* at 67. A search will be upheld as valid, even when the third party did not have authority to consent to a search, when the officer reasonably believed the third party had common control over the premises, and therefore, authority to consent. *Illinois v. Rodriguez,* 497 *U.S.* 177, 186 (1990); *State v. Maristany,* 133 *N.J.* at 307; *State v. Bruzzese,* 94 *N.J.* 210, 219, 221 (1983), *cert. denied,* 465 *U.S.* 1030 (1984); *State in the Interest of C.S.,* 245 *N.J. Super.* 46, 50-51 (App. Div. 1990).

Third party consent to searches have arisen in various contexts. A third party spouse may consent to a search. *See United States v. Matlock*, 415 *U.S.* at 177; *State v. Crevina*, 110 *N.J. Super.* 571, 575 (Law Div. 1970), *affd*, 119 *N.J. Super.* 50 (App. Div. 1972).

Parents may consent to a search of the room of a child living with them, even if the child objects. *State v. Douglas*, 204 *N.J. Super.* 265, 280 (App. Div.), *certif. denied*, 102 *N.J.* 378 (1985).

A person with a limited property right in the premises to be searched (*e.g.*, landlord or hotel clerk) may give valid consent in some situations. Generally, however, consent by such person is non-binding on the defendant. *Stoner v. California*, 376 *U.S.* 483, 489 (1964); *Chapman v. United States*, 365 *U.S.* 610, 616 (1961); *State v. Coyle*, 119 *N.J.* 194, 215-216 (1990).

Moreover, a third party co-tenant of the defendant generally may consent to a search of the shared premises. *State v. Miller*, 159 *N.J. Super.* 552, 558 (App. Div. 1978); *State v. Hagan*, 99 *N.J. Super.* 249, 255 (App. Div. 1968).

In addition, an employer generally may not consent to the search of an area in which employees are permitted to keep personal items. *See State v. Ferrari*, 136 *N.J. Super.* 61, 66 (Law Div. 1975), *affd*, 141 *N.J. Super.* 67 (App. Div. 1976).

The person granting consent may limit the scope of the search. If the scope of the search is challenged, the test to determine what was consented to be searched is the objective reasonableness of the conversation between the officer and the person granting consent. *Florida v. Jimeno*, 500 *U.S.* 248, 251 (1991). *See also State v. Santana*, 215 *N.J. Super.* 63, 71-73 (App. Div. 1987). If the search is found to exceed the permissible scope, the search will be considered unreasonable. *Walter v. United States*, 447 *U.S.* 649, 656-657 (1980); *State v. Lee*, 245 *N.J. Super.* at 447.

When the validity of the consent is challenged, the State must prove that the consent given was clear, express and unequivocal. *Schneckloth*, 412 *U.S.* at 248; *State v. Sugar*, 100 *N.J.* 214, 234 (1985). There is a heavier burden if the defendant was lawfully detained at the time consent was given. *State v. Bindhammer*, 44 *N.J.* 372, 380 (1965). If the defendant was illegally detained, the consent is invalid. *Florida v. Royer*, 460 *U.S.* 491, 508 (1983). *See Dunaway v. New York*, 492 *U.S.* 200, 218-219 (1979); *Brown v. Illinois*, 422 *U.S.* 590, 601-602 (1975).

f. Emergency Aid Exceptions

The emergency aid exception to the warrant requirement is closely related to the community caretaking exception, discussed below. A warrantless search is justified under the emergency aid doctrine if the State demonstrates two factors: (1) the officer had "an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or to prevent serious injury" and (2) there was reasonable nexus between the emergency and the area or places to be searched. *State v. Edmonds*, 211 *N.J.* 117, 132 (2012); *See also Michigan v. Fisher*, 558 *U.S.* 45, 47-48 (2009); *State v. O'Donnell*, 203 *N.J.* 160, 164-165, *cert. denied*, ___ *U.S.* ___, 131 *S.Ct.* 803 (2010).

g. Exigent Circumstances Exception

Exigent circumstances is a fifth exception to the warrant requirement. In order to sustain a search under this exception, the police must demonstrate that emergent circumstances existed, and they must clearly show that probable cause to search existed at the time of the search. *Welsh v. Wisconsin,* 446 *U.S.* 740, 749 (1984); *Donnan v. United States,* 435 *F.2d* 385, 393 (D.C. Cir. 1970) (en banc); *State v. Hutchins,* 116 *N.J.* 457, 476 (1989). Three situations exist which justify a warrantless search under this exception: (1) potential destruction or removal of evidence, *Schmerber v. California,* 384 *U.S.* 757, 770 (1966); *State v. Hutchins,* 116 *N.J.* at 467, n.1; *State v. Lewis,* 116 *N.J.* at 487; (2) hot pursuit of a felon, *Warden v. Hayden,* 387 *U.S.* 294, 298-299 (1967); *State v. Bolte*, 115 *N.J.* 579, 592-593, *cert. denied*, 493 *U.S.* 939 (1989); and (3) imminent danger to human life, *Michigan v. Tyler*, 436 *U.S.* 499, 509-510 (1978); *State v. Scott,* 231 *N.J. Super.* 258, 274-75 (App. Div. 1989).

When determining whether exigent circumstances exist because of the possible destruction or removal of evidence, the courts have specified eleven factors to consider:

1. the degree of urgency involved and the amount of time necessary to obtain a warrant;
2. whether a reasonable belief exists that the contraband is about to be removed;
3. the possibility of danger to the police officers guarding the site of the contraband while a search warrant is sought;
4. whether information exists indicating that the possessors of the contraband are aware the police are on their trail;

5. the ready destructibility of the contraband and the knowledge that efforts to dispose of the contraband and to escape are characteristic behavior of persons engaged in this type of crime;
6. the gravity of the offense;
7. the possibility the suspect is armed;
8. the strengths and weaknesses of the facts establishing probable cause;
9. the time of the entry;
10. whether the exigent circumstances were intentionally "police-created;"
11. whether the physical character of the premises is conducive to police surveillance while a warrant is obtained. *State v. Valencia,* 93 *N.J.* at 137, quoting *United States v. Rubin,* 474 *F.2d* 262, 268-69 (3d Cir. 1973); *State v. Alvarez,* 238 *N.J. Super.* 560, 568 (App. Div. 1990).

"Police created" exigencies do not fall within the scope of this exception. *See State v. Hutchins,* 116 *N.J.* at 476. The court, however, must distinguish between intentionally created exigencies, and ones which arise naturally during the course of a police investigation. *State v. Hutchins,* 116 *N.J.* at 476. The United State Supreme Court has held that an exigency is not police created because the police did not seek to obtain a search warrant immediately after obtaining probable cause. *Cardwell v. Lewis,* 417 *U.S.* 583, 595-596 (1974). The reasonableness of the officer's decision must be evaluated in light of all the circumstances. *State v. Bruzzese,* 94 *N.J.* at 216-217; *State v. Bell,* 195 *N.J. Super.* at 55. In controlled dangerous substance cases, the police must have specific case-related facts justifying a belief that the evidence would be destroyed during the time it takes to obtain a warrant. *State v. Speid,* 255 *N.J. Super.* 398, 403 (Law Div. 1992). In *Missouri v. McNeely,* 569 *U.S.* ___, 133 *S.Ct.* 1562 (2013), the United States Supreme Court refused to endorse a per se rule that the natural dissipation of alcohol in the bloodstream justifies an exception to the requirement for nonconsensual blood testing in drunk driving investigations.

To qualify as an exigent circumstance as a result of a hot pursuit, the police must have "immediate or continuous pursuit of the [suspect] from the scene of the crime." *Welsh v. Wisconsin,* 466 *U.S.* at 753. However, the crime must be of a sufficient severity to justify a hot pursuit; motor vehicle violations and disorderly persons offenses do not justify hot pursuit. *State*

v. Bolte, 115 *N.J.* at 597. This pursuit may continue into the home of a third party. *Steagald v. United States*, 451 *U.S.* 204, 221 (1981).

In some situations, a warrantless search can be avoided by obtaining a telephonic search warrant. *State v. Valencia*, 93 *N.J.* at 137; *R.* 3:5-3. A telephonic search warrant may be issued only by a judge of the Superior Court and only after the police show that they have probable cause to search, that exigent circumstances exist which are sufficient to excuse them from appearing personally before the judge and obtaining a written warrant, and that the procedural safeguards as stated in *State v. Valencia* and *R.* 3:5-3(b) have been met.

h. Field Interrogation/Investigative Stops

See discussion in IE3, *infra*, regarding Street Interrogation and Investigative Stops.

i. Inadvertent/Inevitable Discovery

The inadvertent discovery exception to the exclusionary rule was first articulated in *Nix v. Williams*, 467 *U.S.* 431, 448 (1984), and adopted in New Jersey in *State v. Sugar (II)*, 100 *N.J.* at 238. This exception permits the admission of evidence which is the product of an illegal search "when…the evidence in question would inevitably have been discovered without reference to the police error or misconduct, [for] there is no nexus sufficient to prove a taint." *Nix v. Williams*, 467 *U.S.* at 448. Under federal law, this showing can be made based only on the preponderance of the evidence. *Id.* at 444.

In contrast, New Jersey has adopted a more restrictive formulation of this inevitable discovery doctrine. Pursuant to the New Jersey Supreme Court's decision in *Sugar (II)*, 100 *N.J.* at 238, the state must satisfy three requisites: (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independent of the unlawful discovery of the evidence. *See also State v. Sugar (III)*, 108 *N.J.* 151, 156-157 (1987); *State v. Hall*, 253 *N.J. Super.* 84, 92-93 (Law Div. 1990), *aff'd o.b.,* 253 *N.J. Super*. 32 (App. Div. 1991). Further, the State must satisfy these requisites by "clear and convincing proof," in contrast to the more

lenient federal preponderance of the evidence standard. *Sugar (II)*, 100 *N.J.* at 240. *See also Sugar (III)*, 108 *N.J.* at 157.

j. Incident to Lawful Arrest

Another exception is when the search is conducted incident to a lawful arrest. In order for this exception to apply, the arrest must have been valid; the search must have been contemporaneous to the arrest; and the search must have been confined to the arrestee's person and the area within the arrestee's immediate control. *Chimel v. California*, 395 *U.S.* 752, 762-763 (1969); *State v. Sims*, 75 *N.J.* 337, 353 (1978). The arrest, and thus the search, is lawful only when the police have the intent, and the right, to arrest the individual regardless of the outcome of the search. *Sims*, 75 *N.J.* at 353. The actual order of the search and the arrest is not dispositive, *State v. Doyle*, 42 *N.J.* 334, 343 (1964); *State v. Bell*, 195 *N.J. Super.* at 58. The arrest and search "occur as parts of a single transaction, as connected units of an integrated incident." *State v. Doyle*, 42 *N.J.* at 343. If the search is remote in time or place from the arrest, it will not be upheld as "incident" to the arrest. *United States v. Chadwick*, 433 *U.S.* 1, 15 (1977); *Preston v. United States*, 376 *U.S.* 364. 367 (1964); *State v. Barksdale*, 224 *N.J. Super.* 404, 415 (App. Div. 1988).

The search must be limited to the arrestee or the area within the arrestee's immediate control. *Chimel*, 395 *U.S.* at 763; *Doyle*, 42 *N.J.* at 344. When the defendant is arrested in a house, the police may conduct a "protective sweep" of the premises, provided the police have probable cause to believe other people on the property pose a threat to the safety of the police. *Maryland v. Buie*, 494 *U.S.* 325, 334 (1990); *State v. Henry*, 133 *N.J.* at 118; *State v. Smith*, 140 *N.J. Super.* 368, 372 (App. Div. 1976), *aff'd o.b.,* 75 *N.J.* 81 (1977). A protective sweep conducted by police on private property will be upheld when the officers are lawfully within private premises for a legitimate purpose, and the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an individual posing danger. The sweep will be upheld if it is conducted quickly and is restricted to areas where the person is posing a danger. *State v. Davila*, 203 *N.J.* 97, 125 (2010). In *Bailey v. United States*, 568 *U.S.* ___, 133 *S.Ct.* 1031 (2013), the United States Supreme Court held that occupants of a home being searched could not be detained beyond the immediate vicinity of the area covered by the search

warrant. If the police find a third person, the officer may search the area within this person's immediate control for weapons. *State v. Smith*, 140 *N.J. Super.* at 373.

In some situations, the arrestee may request to go to another part of the property or stop at his or her property (if the arrest was made on public property) before going to the police station. In these situations, the arresting officer may accompany the arrestee onto any part of the property to monitor the arrestee's movements. Any evidence discovered in plain view while accompanying the arrestee may be lawfully seized. *Washington v. Chrisman*, 455 *U.S.* 1, 7 (1982); *State v. Bruzzese*, 94 *N.J.* at 236-38.

When an occupant of a motor vehicle is arrested for a crime, the United States Supreme Court has held that the entire passenger compartment of the vehicle is within the arrestee's immediate control, and thus subject to a search. *New York v. Belton*, 453 *U.S.* 454, 460 (1981). This contemporaneous search includes any containers found in the passenger compartment. *Belton*, 453 *U.S.* at 460-462. However, in *Arizona v. Gant*, 556 *U.S.* 332 (2009), the Court limited *Belton's* reach, holding that police may search a vehicle incidental to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *Gant*, 566 *U.S.* at ___.

In so holding, the United States Supreme Court's holding in *Arizona v. Gant* closely aligned federal law with New Jersey law, as enunciated in *State v. Eckle*, 185 *N.J.* 523, 524 (2006). In *Eckle*, the New Jersey Supreme Court had rejected earlier readings of *New York v. Belton*, based on the greater protection against unreasonable search and seizure afforded by the New Jersey Constitution. Accordingly, based in no small part on broad scholarly criticism to which the *Belton* decision had been subjected, the New Jersey Supreme Court rejected *Belton* and restored the search incident to arrest standard to what it deemed to be its initial two purposes: the protection of the police, and the preservation of evidence. *Id.* at 539-540. Accordingly, once the occupant of a vehicle has been arrested, removed and secured elsewhere, the considerations supporting the search incident to arrest except are dissipated and the exception is inapplicable. If the occupant of the vehicle has been arrested but has not been removed and secured, the trial court will have to determine, on a case-by-case basis, whether or not the search incident to arrest exception is applicable in that determination, following the holdings of the

United States Supreme Court in *Chimel* and of the New Jersey Supreme Court in *State v. Welsh*, 84 *N.J.* 346 (1980). This will depend on whether or not the car's occupant was in a position to compromise police safety or to carry out the destruction of evidence. *Eckel*, 185 *N.J.* at 541. *See also State v. Dunlap*, 185 *N.J.* 543, 548-549 (2006), a companion case to *Eckel*, in which the Court applied the *Eckel* holding to invalidate a search once the defendant was removed and secured.

The New Jersey Supreme Court has explicitly held that an arrest for a mere motor vehicle violation, as opposed to a crime, does not permit the police to conduct a *Belton* search of the entire passenger compartment. *State v. Pierce*, 136 *N.J.* 184, 208-210 (1994).

In contrast, the United States Supreme Court has held that a full-body search of a person arrested for a minor traffic offence does not violate the Fourth Amendment. *Atwater v. City of Lago Vista*, 532 *U.S.* 318, 345-55 (2001). However, in *State v. Dangeifield*, 171 *N.J.* 446 (2002), the New Jersey Supreme Court clarified that its prior *Pierce* holding does not apply to offenses under the New Jersey Criminal Code. Thus, an individual may be arrested for a disorderly persons or petty disorderly persons offence committed in the presence of police officers, and may be searched incident to that arrest, consistent with the above rules.

k. Independent Source Exception

In *State v. Holland*, 176 *N.J.* 344 (2003), the Court promulgated a three-pronged framework to govern proper application of this exception: (1) the State must have probable cause to conduct the search at issue without the unlawfully-obtained evidence; (2) without the tainted knowledge or evidence, the State would have sought a proper warrant; and (3) the initial impermissible search was not the product of flagrant police misconduct. *Holland*, 176 *N.J.* at 360-361. The State must prove all three elements by clear and convincing evidence. *Id.* *See also State v. Smith*, 212 *N.J.* 365, 394-395 (2012).

l. Inventory/Community Caretaking Exception

When the police need to conduct an inventory of the contents of a motor vehicle, a search warrant is not required. When the police impound a vehicle, the police may search the vehicle so as to complete an inventory of the items in the vehicle. The vehicle must be lawfully impounded in order for this search to be valid. *South Dakota v. Opperman*, 428 *U.S.* at 369; *State v. Hill*,

115 *N.J.* 169, 176 (1989). If the police impound a vehicle following the driver's arrest, the impoundment is lawful only if the driver could not make other arrangements for the vehicle's custody and the vehicle could not be parked safely where the arrest occurred. *State v. Slockbower*, 79 *N.J.* 1, 9 (1979).

The community-caretaking exception to the warrant requirement is predicated on the need to protect life or property under emergent circumstances. *State v. Bogan*, 200 *N.J.* 61, 73 (2009). *See also Edmonds*, 211 *N.J.* 141-144. Before the police can enter or search a suspect's home without a warrant under this exception, they must have "an objectively reasonable basis to believe that an emergency required immediate action to protect life or prevent serious injury." *State v. Vargas*, 213 *N.J.* 301, 326 (2013), quoting *Edmonds*, 211 *N.J.* at 132.

m. Plain View

Another exception to the requirement of a search warrant to seize evidence is when the evidence is found in plain view. The three prerequisites for this exception to apply are: (1) the officer discovering and seizing the evidence had a "right of access," (2) the evidence was discovered inadvertently, and (3) the incriminating character of the evidence was immediately apparent to the discovering officer. *Horton v. California*, 496 *U.S.* 128, 136 (1990); *State v. Lewis*, 116 *N.J.* at 485; *State v. Bruzzese*, 94 *N.J.* at 236-38.

A "right of access" means that the officer seizing the evidence had a legal basis for being in the place where the evidence was discovered. *Coolidge v. New Hampshire*, 403 *U.S.* 443, 465-471 (1971); *State v. Perry*, 124 *N.J.* 128, 148-149 (1991). The "right of access" requirement will be satisfied if the officer was on a part of private property to which the public has access, such as a front porch or hallway of a multi-family dwelling. *State v. Alexander*, 170 *N.J. Super.* 298, 304 (Law Div. 1979). Evidence discovered in an automobile was legitimately discovered if an officer standing outside the automobile observed the evidence inside the vehicle, *State v. Johnson*, 274 *N.J. Super.* 137, 153 (App. Div.), *certif. denied*, 138 *N.J.* 265 (1994); *State v. Foley*, 218 *N.J. Super.* 210, 215-216 (App. Div. 1987), even if a flashlight was used. *See State v. Moller*, 196 *N.J. Super.* 511, 515 (App. Div. 1984).

Although under federal law the police may dispense with the inadvertency requirement, *see Horton v. California*, 496 *U.S.* at 136, New Jersey still requires that this prerequisite be satisfied. *Bruzzese*, 94 *N.J.* at 236-238. The only "exception" is when an officer looks into a

legitimately stopped vehicle from the outside. *Foley*, 218 *N.J. Super.* at 215-216. The rationale behind this "exception" is that an expectation of privacy does not exist in portions of a vehicle which can be seen by passersby. *Foley*, 218 *N.J. Super.* at 215-216.

Finally, the immediately apparent requirement is satisfied by showing the officer had probable cause to associate the seized items with criminal activity. *Arizona v. Hicks*, 480 *U.S.* 321, 326 (1987); *State v. Demeter*, 124 *N.J.* at 381-382.

The "plain view" exception applies equally to "plain smell." *State v. Guerra*, 93 *N.J.* at 150; *State v. Judge*, 275 *N.J. Super.* 194, 201 (App. Div. 1994).

A related concept is the open fields doctrine, recognized by the United States Supreme Court in *Hester v. United States*, 265 *U.S.* 57, 44 *S.Ct.* 445, 68 *L.Ed.* 898 (1924), and more recently ratified in *Oliver v. United States*, 446 *U.S.* 170, 183-184, 104 *S.Ct.* 1735, 1744, 80 *L.Ed.2d* 214 (1984); and *United States v. Dunn*, 480 *U.S.* 294, 297-99, 107 *S.Ct.* 1134, 1138, 94 *L.Ed.2d* 326 (1987). This doctrine excuses a warrantless entry onto private land by conservation officers investigating violations of fish and game laws. *State v. Gates*, 306 *N.J. Super.* 322, 333 (App. Div. 1997).

n. Special Needs Exception

The special needs exception is applicable when the search is conducted for reasons unrelated to law enforcement's investigation and prosecution of criminal activity and furthers an important state interest. *State v. Harris*, 211 *N.J.* 566, 582 (2012). In *Harris*, the Supreme Court held that weapons discovered during the domestic violence search of a defendant's premises are admissible in the defendant's subsequent trial on charges of possessing those weapons, if their illegal nature is readily apparent, such as by viewing the firearm's serial number and entering it into the National Crime Information Center database. This exception has been used, for instance, to uphold a statute requiring all those convicted of certain offenses to provide a blood sample for DNA testing, *State v. O'Hagen*, 189 *N.J.* 140 (2007), and to justify random suspicionless drug testing of students engaged in extracurricular activities or seeking special privileges. *Joyce v. Hunterdon Cent. High School*, 176 *N.J.* 568 (2003).

o. "Stop and Frisk"

Under the "stop and frisk" exception, the police may stop and question an individual they suspect of being involved in criminal activity. In order to do so, the police must have a reasonable belief, based upon objective and particularized facts, of the suspect's involvement. *United States v. Cortez,* 449 *U.S.* 411, 417-418, (1981); *Terry v. Ohio,* 392 *U.S.* 1, 27 (1968); *State v. Thomas,* 110 *N.J.* 673, 678 (1988). Additionally, an individual may be stopped if the police reasonably believe he or she was involved in a completed felony. *United States v. Hensley,* 469 *U.S.* 221, 229 (1985). If the police have specific facts leading to a reasonable inference that the suspect is armed, the police may conduct a protective search of the individual. *Sibron v. New York,* 392 *U.S.* 40, 63 (1968); *State v. Valentine,* 134 *N.J.* 536, 543, 544 (1994). This search must be reasonable in scope, *Terry,* 392 *U.S.* at 29 and is limited to a search for weapons. *Ybarra v. Illinois,* 444 *U.S.* 85, 93-94 (1979); *State v. Lund,* 119 *NJ.* 35,45 (1990). *See Terry v. Ohio,* 392 *U.S.* at 29.

A person has no constitutional right to flee from an investigatory stop, "even though a judge may later determine the stop was unsupported by reasonable and articulable suspicion." *State v. Crawley,* 187 *N.J.* 440, 458, *cert. denied,* 549 *U.S.* 1078 (2006). Thus, if an individual refuses to cooperate in the investigatory stop, and instead takes flight, that flight constitutes a break in the chain from an improper investigatory stop. *State v. Williams,* 192 *N.J.* 1, 10 (2007). Accordingly, the obstruction gave rise to a new criminal offense, warranting the police to arrest the suspect and properly search him incident to that arrest. *Id.*

Reasonable belief that the suspect is armed is entirely different from whether the police had a reasonable belief initially to stop the individual. *State v. Thomas,* 110 *N.J.* at 678-679. The reasonableness of the stop is determined by a "totality of the circumstances" test. *State v. Davis,* 104 *N.J.* 490, 500 (1986). Factors used in making this determination are objective observations, other sources of information, patterns of illegal behavior and inference and deductions from the information. *See, e.g., State v. Ruiz,* 286 *N.J. Super.* 155, 163 (App. Div. 1995); *State v. Doss,* 254 *N.J. Super.* 122, 127 (App. Div.), *certif. denied,* 130 *N.J.* 17 (1992). Race is not to be considered. *State v. Kuhn,* 213 *N.J. Super.* 275, 281 (App. Div. 1986).

Following a valid stop, the police must have circumstances to justify a frisk. Such circumstances include an articulable suspicion of a violent crime, *Terry,* 392 *U.S.* at 30-31, and specific and objective credible reasons to believe the suspect is armed. *Adams v. Williams,* 407 *U.S.* 143, 146-147 (1972); *State v. Lund,* 119 *N.J.* at 48. Other factors which may be

considered are the location of the stop *(i.e.,* high crime area), the time of the stop, the officer's knowledge of the suspect's criminal history and the officer's knowledge that the suspect was armed at the prior arrest. *State v. Tucker,* 136 *N.J.* 158, 168 (1994); *State v. Valentine,* 134 *N.J.* 536, 553-554 (1994); *State v. Butler, 278 N.J. Super.* 93, 104 (App. Div. 1994). The suspect's criminal history alone, however, is insufficient to justify a search. *State v. Valentine,* 134 *N.J.* at 548.

A stop, or investigative detention, is not subject to Fourth Amendment protection unless the police prevent the suspect from leaving, *Terry,* 392 *U.S.* at 119 n.16; *State v. Davis,* 104 *N.J.* at 497, or a reasonable person would believe he or she is not free to ignore the police. *California v. Hodari D.,* 499 *U.S.* 621, 628 (1991); *State v. Tucker,* 136 *N.J.* at 163-165 (rejecting, under state law, *Hodari* D.'s definition of "seizure" as requiring the application of physical force or show of authority to which the suspect yields). *See also United States v. Mendenhall,* 446 *U.S.* 544, 554 (1980). In determining whether a person is free to leave, a totality of the circumstances approach must be used. Factors to consider in making this determination are the location of the encounter, whether the police advised the individual that he or she was not required to cooperate and whether the police drew their weapons. *Florida v. Bostick,* 501 *U.S.* at 437.

The scope of the investigatory detention permissible must be "the least intrusive investigatory techniques reasonably available to verify or dispel [the officer's] suspicion in the shortest period of time reasonably possible." *State v. Davis,* 104 *N.J.* at 504. *See also Minnesota v. Dickerson,* 508 *U.S.* 266, 113 *S.Ct.* 2130, 124 *L.Ed.2d* 334, 344 (1993); *Florida v. Royer,* 460 *U.S.* at 500. When the police stop a motor vehicle, the driver may be asked to step outside the vehicle for safety reasons, even when the officer has no reason to believe the driver is armed and dangerous. *Pennsylvania v. Mimms,* 434 *U.S.* 106, 111 (1977); *State v. Smith,* 134 *N.J.* 599, 611 (1994). In *Maryland v. Wilson,* 519 *U.S.* 408. 117 *S.Ct.* 882, 137 *L.Ed.2d* 41 (1997), the United States Supreme Court held that the *Mimms* ruling could be extended to automobile passengers. Thus, the *Wilson* Court held that a law enforcement officer, as a matter of course, may order passengers in a car which has been lawfully stopped to get out of the car. In contrast, the New Jersey Supreme Court has held that *Mimms* cannot be automatically applied to passengers. Under *Smith,* the police may order a passenger to step out of a vehicle stopped for a traffic violation only upon specific and articulable facts that warrant

heightened caution (a lesser showing than that needed for a *Terry* protective par down). *State v. Smith*, 134 *N.J.* at 618. In *State v. Mai*, 202 *N.J.* 12, 22-23 (2010), the New Jersey Supreme Court recently reiterated that if there are facts in the totality of circumstance that would create in a police officer a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene, the police may both open the door of a vehicle and order the passenger to exit.

The protective search must be designed to discover weapons, not evidence of a crime. *Ybarra v. Illinois*, 444 *U.S.* at 93-94; *State v. Thomas*, 110 *N.J.* at 682-83. Provided that the search is within permissible bounds, contraband, other than weapons, discovered by touch without any manipulation during the search is admissible, as long as the officer conducting the search knew immediately upon touching the item that it was contraband. *Minnesota v. Dickerson*, 124 *L.Ed.2d.* at 347-348; *State v. Jackson*, 276 *N.J. Super*. 626, 631 (App. Div. 1994).

Terry permitted a pat-down search of a person reasonably believed to be armed. The scope of the permissible search was extended to the areas of the passenger compartment of a car where weapons could be hidden if the police believed the suspect could gain immediate control of the weapon. *Michigan v. Long*, 463 *U.S.* 1032, 1049-1050 (1983). This extended search was approved by the New Jersey Supreme Court in *State v. Lund*, 119 *N.J.* at 48.

If the police have a reason to believe that an individual stopped for questioning is involved in a violent crime, the right to frisk the individual is immediate and automatic. *Terry*, 392 *U.S.* at 33 (Harlan J., concurring); *Thomas*, 110 *N.J.* at 680. Reasonable suspicion that a suspect is armed may arise during the course of an investigatory detention. *Lund*, 119 *N.J.* at 46. However, a protective search is not automatically justified by a traffic stop. *Id.* Indeed, specific, articulable facts must demonstrate that a reasonably prudent person under the circumstances would be warranted in a concern for his or her own safety or the safety of others before a *Terry* search may be made of a vehicle occupant who has exited the vehicle. *State v. Smith*, 134 *N.J.* at 68.

Reasonable suspicion to conduct a *Terry* stop may be based on a tip, either from an informer or an ordinary citizen. Tips from ordinary citizens are generally more reliable than tips from informants. *Davis*, 104 *N.J.* at 506-507. An anonymous tip is a sufficient basis for reasonable belief only if it contains a detailed description of the suspect and indicates that the

suspect is currently armed. *State in the Interest of H.B.,* 75 *N.J.* 243, 248-249 (1977); *State v. Williams*, 251 *N.J. Super.* 617, 690-691 (Law Div. 1991).

Profiles derived from multiple crimes with the same essential facts or means may be sufficient to provide a reasonable basis to stop. *State v. Patterson,* 270 *N.J. Super.* 550, 557 (Law Div. 1993). Additionally, an investigatory stop may be made by police in one jurisdiction based upon a "flyer" issued by police in a different jurisdiction. The stop may be no more intrusive than that which would be permitted by the police in the jurisdiction issuing the "flyer." *United States v. Hensley,* 469 *U.S.* at 233.

The police may also conduct a "field interrogation." This occurs when the police encounter a citizen, but the encounter does not amount to a stop. *Florida v. Royer,* 460 *U.S.* at 497. The police do not need specific articulable facts in order to make contact. *State v. Sheffield,* 62 *N.J.* 441, 446-447, *cert. denied,* 414 *U.S.* 876 (1973)

A stop, initially lawful, may become an illegal arrest if the stop lasts too long. *United States v. Sharpe,* 470 *U.S.* 675, 685 (1985). If a stop does become an illegal arrest, all evidence seized must be suppressed as "fruit of the poisonous tree." *Florida v. Royer,* 460 *U.S.* at 507-508.

5. *Electronic Surveillance*

New Jersey traditionally is one of the leaders among states in its use of electronic surveillance as a tool for investigation of crimes. *See State v. Catania,* 85 *N.J.* 418, 440-441 n.3 (1981). Electronic surveillance, or wiretapping, in New Jersey is governed by *N.J.S.A.* 2A:156A-1 *et seq.* This statute generally parallels the federal wiretap statute, 18 *U.S.*C. § 2510 *et seq. Pascale v. Carolina Freight Carriers Corp.*, 898 *F. Supp.* 276, 281 (D.N.J. 1995); *In re Wire Communication,* 76 *N.J.* 255, 262 (1978); *State v. Fornino,* 223 *N.J. Super.* 531, 539, 544 (App. Div.), *certif. denied,* 111 *N.J.* 570, *cert. denied,* 488 *U.S.* 859 (1988). The New Jersey courts will generally look to constructions of the federal statute when interpreting the New Jersey wiretap statute. *Pascale v. Carolina Freight Carriers Corp.,* 898 *F.Supp.* at 287; *State v. Lane,* 279 *N.J. Super.* 209, 219 (App. Div. 1995). However in some ways, the State has given its citizens greater protection than the federal wiretapping law. *State v. Worthy,* 141 *N.J.* 368, 385 (1995); *State v. Catania,* 85 *N.J.* at 436-439.

The general rule is that any interception of a wire, electronic or oral communication using any electronic, mechanical or other device is illegal. *N.J.S.A.* 2A:156A-3a. This prohibition extends to disclosing or using the contents of a communication knowing that the information was obtained through an intercepted communication. *N.J.S.A.* 2A:156A-3b and 3c.

The statute defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic or oral communication [in turn defined in *N.J.S.A.* 2A:156A-2a, 2b and 2m, respectively] through the use of any electronic, mechanical or other device." *N.J.S.A.* 2A:156A-2c. "Electronic, mechanical or other device" is defined as "any device or apparatus... that can be used to intercept a wire, electronic or oral communication." *N.J.S.A.* 2A:156A-2d. Specifically excluded from this definition are (1) instruments furnished in the ordinary course of business by a communications service provider or subscriber for use in the subscriber's ordinary course of business, the provider's ordinary course of business, or by a law enforcement officer in the ordinary course of his or her duties; and (2) hearing aids used to correct subnormal hearing to not better than normal hearing. *N.J.S.A.* 2A:156A-2d.

a. Interceptions Outside the Scope of the Statute

Because a device is not employed, eavesdropping with an unaided ear is not within the scope of the statute. *See also United States v. Fisch,* 474 *F.2d* 1071, 1076-1077 (9th Cir.) (as to federal wiretap statute), *cert. denied,* 412 *U.S.* 921 (1973); *State v. Kuznitz,* 105 *N.J. Super.* 33, 38 (Law Div. 1969). *See also State v. McDermott,* 167 *N.J. Super.* 271, 277 (App. Div. 1979) (police use of extension phone to listen to conversation held not within the scope of federal or state wiretap statutes).

In addition to an interception by an instrument outside the scope of the definition of electronic, mechanical or other device, the statute provides for other types of interceptions which are outside the scope of the statute. *N.J.S.A.* 2A:156A-4. The interceptions fall into two classes. The first class is interceptions by private parties. These include interceptions (1) by the communications service provider when interception is necessary to perform the service or to protect the provider's rights or property, *N.J.S.A.* 2A:156A-4a; and (2) by a person when he or she is a party to the communication or receives prior consent from a party to the communication and the person is not acting under a color of law and will not use the

information for criminal or tortious conduct. *N.J.S.A.* 2A:156A-4d; *State v. Gora,* 148 *N.J. Super.* 582, 590-591 (App. Div.), *certif. denied,* 74 *N.J.* 275 (1977). Merely subscribing to telephone service, however, is not sufficient consent to intercept a communication on the subscriber's telephone line to which the subscriber is not a party. *N.J.S.A.* 2A:156A-4d.

The second class of interceptions is those which are conducted by law enforcement officers or at the direction of law enforcement officers. Interceptions which fall into this class include those (1) by a law enforcement officer who is a party to the communication or by a law enforcement officer requested by another law enforcement officer who is a party to the communication, *N.J.S.A.* 2A:156A-4b; and (2) by a person acting at the direction of a law enforcement officer when that person is a party to the communication or a party to the communication has given prior consent, provided the Attorney General, County Prosecutor or an authorized designee of either determines that a reasonable suspicion exists that evidence of criminal activity will be obtained, *N.J.S.A.* 2A:156A-4c.

Examples of valid interceptions falling into this second class of interceptions include interceptions which occur when an officer is attempting to obtain evidence of an attempt to bribe a police officer, *Lopez v. United States,* 373 *U.S.* 427, 437-439 (1963), or when an officer answers the telephone and records incoming calls during the execution of a search warrant. *State v. Garrigan,* 126 *N.J. Super.* 442, 448 (App. Div. 1973), *affd,* 64 *N.J.* 287 (1974).

Another type of valid interception is one between an informer and a suspect intercepted, without a warrant, via a device located on the informer's person with his or her knowledge. *United States v. White,* 401 *U.S.* 745, 749-750 (1971); *State v. Anepete,* 145 *N.J. Super.* 22, 25-26 (App. Div. 1976). In order for this interception to be legal under the New Jersey wiretap statute, the Attorney General, County Prosecutor or an authorized designee of either must authorize the interception. *See N.J.S.A.* 2A:156A-4c. A key distinction from the federal law is New Jersey's prohibition of the recording of a conversation by a party who is acting at the direction of a law enforcement agent without approval from the Attorney General. *State v. Minter,* 116 *N.J.* 269, 275 (1989).

For interceptions by or at the direction of law enforcement officers to be valid, the officer in charge of the investigation must file a written application with the Attorney General or County Prosecutor requesting authorization to intercept such communications. The application should set forth sufficient information for the Attorney General or County

Prosecutor to determine that reasonable suspicion exists that the communication will contain evidence of criminal activity. If the law enforcement officer's support for reasonable suspicion is based on a confidential informer's information, the identity of the confidential informer does not need to be placed on the application, as this application is discoverable pursuant to *R.* 3:13-3(b) and (c).

The Attorney General or County Prosecutor's determination that reasonable suspicion exists is not subject to judicial review. In fact, the reasons for finding reasonable suspicion do not need to be articulated. *State v. Parisi,* 181 *N.J. Super.* 117, 120 (App. Div. 1981). The Attorney General or County Prosecutor's authorization does not need to be in writing. *State v. Bisaccia,* 251 *N.J. Super.* 508, 512 (Law Div. 1991). The Attorney General or County Prosecutor must keep records of all requests for consensual interceptions, including the name of the person requesting the authorization, the reason for the request and the results of the interception.

b. Court Orders Authorizing Wiretaps

When the law enforcement officers are unable to obtain the consent of one party to the communication, they still may obtain a court order authorizing them to intercept communications. The procedure for a court order is laborious, inasmuch as it requires the law enforcement officer to complete a complicated application, obtain Attorney General or County Prosecutor approval, and then obtain court approval from a Judge of the Superior Court authorized by the New Jersey Supreme Court to enter wiretap orders. *See N.J.S.A.* 2A:156A-8; 2A:156A-2i. If the law enforcement officer fails to follow the application procedure or submits an incomplete application, the order authorizing the interception may be deemed invalid, and thus all intercepted communications and any evidence derived therefrom may be inadmissible.

When corroborating evidence is not available, the judge may hold an in camera hearing inquiring into a confidential informant's identity or additional supporting evidence to determine if the order should be issued. *N.J.S.A.* 2A:156A-10. The judge, upon a finding of probable cause, then issues the order authorizing the interception of communications.

i. Requirements for Wiretap Application

The application for an order must meet the requirements of *N.J.S.A.* 2A:156A-9. Initially, the application must indicate the applicant's authority to make the application, as well as the identity and qualifications of the agency or officer seeking the order and the identity of the Attorney General or County Prosecutor authorizing the application. The officer seeking authorization to conduct the wiretap must be qualified by either experience or training in the proper execution of a wiretap order. *N.J.S.A.* 2A:156A-10e. Specifically, the officer must have sufficient knowledge (1) to be sure to tap the correct line; (2) to operate the recording equipment and to understand that the communications must be recorded; (3) regarding minimization requirements (*N.J.S.A.* 2A:156A-12); (4) of limitations on disclosure of communications (*N.J.S.A.* 2A:156A-13); and (5) of the requirements regarding sealing, custody and destruction of the tapes (*N.J.S.A.* 2A:156A-14).

Secondly, the application must contain facts regarding (1) the identity of the person whose communications are to be intercepted (the "target"); (2) the offense which this person is believed to be committing; (3) the type of communication to be intercepted; (4) the time period during which the interceptions will take place; (5) the character and location of the involved facilities or the particular place where the communication is to take place; and (6) facts indicating that normal investigative techniques either failed or will fail or that they are too dangerous. *N.J.S.A.* 2A:156A-9.

(a) Identification of Targets

The courts have held that the completed application should name every person believed to be involved in the criminal activity. *United States v. Donovan,* 429 *U.S.* 413, 428 (1977); *State v. Murphy,* 148 *N.J. Super.* 542, 546-547 (App. Div. 1977); *State v. Cirillo,* 146 *N.J. Super.* 577, 587-588 (App. Div. 1977). However, the United States Supreme Court has held that a failure to identify in the application all persons likely to be overheard does not mandate suppression of the intercepted conversation. *United States v. Donovan,* 429 *U.S.* at 438-439.

(b) Identification of Offense

A court order is available only when the expected intercepted communication will provide evidence of one or more specifically enumerated crimes. *N.J.S.A.* 2A:156A-8. In

some situations, however, a wiretap order may be obtained to investigate an offense which is not enumerated. This usually occurs when the wiretap authorized to investigate an enumerated offense results in the interception of a communication regarding an unenumerated offense. In this situation, the initial wiretap may provide sufficient grounds to obtain an order so as to be able to investigate the additional offenses. Application for the order should be made as soon as practicable, and the order should be granted provided the intercepted communication was obtained during a good faith investigation of an enumerated offense. *See In re Grand Jury Subpoena Served on John Doe,* 889 *F.2d* 384, 387 (2d Cir. 1989), *cert. denied,* 494 *U.S.* 1079 (1990).

(c) Identification of the Anticipated Communication(s)

The facts describing the type of communication to be intercepted must be sufficient to find probable cause to believe that communication will take place over the facilities or in the location where the surveillance is to take place.

(d) The Time Period of the Intercept

The officer applying for the order should, using his or her experience in investigating similar cases, indicate the hours during which incriminating communications are expected to be made. The application should also contain a statement, if applicable, as to why the order should not terminate immediately upon intercepting the first described communication.

(e) Failure of Traditional Investigative Techniques

Finally, the statement regarding traditional investigative techniques must be case specific. *State v. Dye,* 60 *N.J.* 518, 526-527, *cert. denied,* 409 *U.S.* 1090 (1972). A statement that traditional surveillance techniques proved unsuccessful in previous investigations of similar cases is insufficient. *United States v. Spagnuolo,* 549 *F.2d* 705, 710 (9th Cir. 1977).

The application must also include a complete statement as to all known previous interception applications concerning the same facilities or same persons and the court's disposition of the application. *N.J.S.A.* 2A:156A-9. If a previous application was made targeting the particular person or facilities, new evidence warranting a new wiretap order must be presented before a new order maybe granted. *N.J.S.A.* 2A:156A-10f.

The contents of an intercepted communication and any evidence derived therefrom may be suppressed if the above requirements are not satisfied. For example, if the person authorizing the application does not, in fact, have authority to make such authorization, the application and order fails and the communication must be suppressed. *United States v. Giordano,* 416 *U.S.* 505, 527-528 (1974); *State v. Cocuzza,* 123 *N.J. Super.* 14, 21 (Essex Cty. Ct. 1973). Failure to disclose known prior applications also may result in suppression of the communication. *United States v. Bellosi,* 501 *F.2d* 833, 838-841 (D.C. Cir. 1974); *but see United States v. Van Horn,* 789 *F.2d* 1492, 1506 (11th Cir.) (inadvertent failure to disclose prior wiretap does not mandate suppression of intercepted communications), *cert. denied,* 479 *U.S.* 854 (1986).

ii. The Order Authorizing the Wiretap

For the order authorizing interception to be granted, the court must find probable cause that the "target" is involved in an enumerated offense; normal investigative procedures either failed or will be unsuccessful or are too dangerous; and that the place where the listening device is to be located is used in connection with the enumerated offense. *N.J.S.A.* 2A:156A-10. Also required is probable cause that a communication regarding the offense; a conspiracy to commit an enumerated offense; or, which may provide evidence aiding in apprehension of the perpetrator of an enumerated offense will be obtained from the interception. *See N.J.S.A.* 2A:156A-8. Probable cause sufficient to obtain a search warrant is sufficient to obtain a wiretap order. *United States v. Tehfe,* 722 *F.2d* 1114, 1118 (3d Cir. 1983), *cert. denied, sub nom. Sanchez v. United States, 466 U.S.* 904 (1984); *United States v. Falcone,* 505 *F.2d* 478,481 (3d Cir. 1974), *cert. denied,* 420 *U.S.* 955 (1975).

The order authorizing interception of a communication must be very specific. It must contain (1) the name of the judge issuing the order; (2) the name or description of the "target"; (3) the character and location of the facilities from which the interception is to take place; (4) description of the type of communication to be intercepted; (5) the identity of the law enforcement officer authorized to intercept the communications; and (6) the time period during which interception is authorized. *N.J.S.A.* 2A:156A-12a-f. Although the statute does not require the judge to specify the hours during which interception may occur, *State v. Dye,* 60 *N.J.* at 527, the better form of order contains such limitations. *State v. Christy,* 112 *N.J. Super.*

48, 77-78 (Law Div. 1970). The order also must indicate whether the order is to terminate immediately after the first interception of a described communication or continue until the expiration of the order. *See N.J.S.A.* 2A:156A-12f. The maximum length of time for which an order may authorize interception is 20 days, except for investigation of racketeering, the leader of an organized crime network or the leader of drug trafficking. For these offenses, the authorization order may be for thirty days. *N.J.S.A.* 2A:156A-12f and 12g. The twenty day order may be extended twice for a period of 10 days each. The 30 day order may be extended up to a maximum of six months in 30 day increments. *Id.* Sometimes periodic progress reports to the issuing judge may be required. *N.J.S.A.* 2A:156A-12h.

With respect to the facilities from which the communication is to be intercepted, the statute requires that the facility be specifically identified. *N.J.S.A.* 2A:156A-12c. Under certain circumstances, however, an order may be granted dispensing with the requirement that the facilities from which the communication is intercepted be specifically identified. This "roaming" order is available when the application identifies the target and shows that the target is purposely attempting to thwart interception by changing facilities. *N.J.S.A.* 2A:156A-12c.

Law enforcement officers must show a special need to obtain a wiretap order for a public telephone. The special need requirement is imposed to protect the privacy rights of innocent, non-target persons. The court has indicated that the special need requirement is satisfied by (1) specific evidence that the particular telephone is used to conduct illegal activity and (2) indicating that the law enforcement officer will minimize interception of calls by innocent persons. *State v. Sidoti,* 116 *N.J. Super.* 70, 76-78 (Essex Cty. Ct. 1971), *reversed on other grounds and remanded,* 120 *N.J. Super.* 208 (App. Div. 1972). The order authorizing interception from a public telephone must indicate that the special need exists. The order should also contain its effective date. Wiretap Guidelines, Guideline 2, 120 *N.J.L.J.* 1060 (Dec. 3, 1987). This date should be the date that all equipment is installed and functional.

An additional situation when a special need is required in order to obtain a wiretap is when the facilities to be tapped are used primarily by a husband and wife. *N.J.S.A.* 2A:156A-11. In this situation, the application must show that the husband and wife's primary habitation is being used by someone engaged in a criminal activity, although evidence that the husband or wife is actually participating in the criminal activity is not required. The special need is

automatically satisfied if evidence does exist that either the husband or wife is engaging in the criminal activities.

In order to obtain authorization to tap the telephone of a doctor, psychologist, attorney, clergy or newspaper person, the application must show that the doctor, psychologist, attorney, clergy or newspaper person is the person actually engaged in the criminal activity being conducted over the particular telephone. *N.J.S.A.* 2A:156A-11.

Extensions or renewals of wiretap orders are available. The application for an extension or renewal must contain the same information as the original application, as well as a statement indicating the results so far or a reasonable explanation for failing to obtain results. *N.J.S.A.* 2A:156A-9d. The application for extension or renewal may be submitted prior to the expiration of the original order or up to seven days thereafter. Wiretap Guidelines, Guideline 3, 120 *N.J.L.J.* 1060 (Dec. 3, 1987). Failure to apply for an extension or renewal within seven days from the expiration date of the original order will require the law enforcement officers to obtain a new original order which must be based on evidence different from the evidence supporting the original wiretap application, but which may be from a communication intercepted under the original order. *N.J.S.A.* 2A:156a-10f.

iii. Execution of the Wiretap Order

Once the police obtain an order authorizing interception or obtain the consent of a party to the communication, the police may proceed with the interception. The first requirement is that any intercepted communication be recorded. *N.J.S.A.* 2A:156A-14. While the Court in *State v. Sullivan,* 244 *N.J. Super.* 357, 363 (App Div. 1990) found that the State's failure to record a series of communications did not warrant suppression of intercepted conversations, that holding was criticized by the New Jersey Supreme Court in *State v. Worthy*, 141 *N.J.* at 384.

Additionally, the police have an affirmative duty to minimize the interception of innocent communications both extrinsically and intrinsically. *N.J.S.A.* 2A:156A-12. Extrinsic minimization is evidenced by reducing the hours and duration of the interception and intrinsic minimization results in terminating the interception upon discovering the communication is innocent. *State v. Catania,* 85 *N.J.* at 429. Intrinsic minimization must be both objectively reasonable and performed with a subjective good faith effort to minimize. Three factors will

be considered in determining whether intrinsic minimization is objectively reasonable: 1) the nature of the intercepted communication; 2) the scope of the criminal enterprise; and 3) the officer's reasonable expectation as to what the communication would contain based upon the information available at the time of the interception. *Id.* at 433-434. In determining whether the police made a subjective good faith effort to minimize, the following factors will be considered: 1) the efforts made to minimize; 2) the availability of written minimization instructions before the interception; and 3) the availability of lists of nonrelevant subject-matter and parties compiled during interceptions. *Id.* at 443-444. "Spot-monitoring," monitoring the communication every 30-40 seconds to see if the communication turned criminal after an initial determination that the communication was innocent, is prima facie evidence of subjective good faith minimization. *Id.* at 446; *State v. Pemberthy,* 224 *N.J. Super.* 280, 300 (App. Div.), *certif. denied,* 111 *N.J.* 633 (1988). Failure to minimize both extrinsically and intrinsically results in the suppression of all communications and evidence derived therefrom. *State v. Catania,* 85 *N.J.* at 534.

At the expiration of the court order authorizing interception of communications and any extensions thereof, the original recordings of the communications must be brought immediately to the judge authorizing the interception and sealed under that judge's direction. *N.J.S.A.* 2A:156A-14. *See also United States v. Diana,* 605 *F.2d* 1307, 1311 (4th Cir. 1979), *cert. denied,* 444 *U.S.* 1102 (1980). Even absent a showing that the tapes have been altered, if the tapes have not been sealed immediately, and a sufficient explanation for the delay has not been provided, the recorded communication and any evidence derived therefrom may be suppressed. *United States v. Diana,* 605 *F.2d* at 1314; *United States v. Gigante,* 538 *F.2d* 502, 506 (2d Cir. 1976); *State v. Cerbo,* 78 *N.J.* 595, 601-604 (1979), *habeas corpus denied, sub nom. Cerbo v. Fauver,* 469 *F.Supp.* 1004 (D.N.J. 1979), *affd,* 616 *F.2d* 714 (3d Cir.), *cert. denied,* 449 *U.S.* 858 (1980).

Duplicate tapes are generally made before the original tapes are sealed. *N.J.S.A.* 2A:156A-14. Once the prosecution has finished using these duplicate tapes, they may be made available to the defense. *N.J.S.A.* 2A:156A-16 and *N.J.S.A.* 2A:156A-21. The defendant has the right, however, to inspect the original recordings. *State v. Braeunig,* 122 *N.J. Super.* 319, 328 (App. Div. 1973). To do so, however, the defendant must obtain an order unsealing the original recordings from an authorized judge. Wiretap Guidelines, Guideline 3, 120 *N.J.L.J.*

1060 (Dec. 3, 1987). An order from a trial court judge is insufficient to unseal the recordings. *Id.,* Guideline 4. The defendant's right, however, is not absolute. The State may prevent disclosure when disclosure would create risk or danger to a person, jeopardize an ongoing criminal investigation, identify an informer, or disclose privileged or confidential information. *State v. Braeunig,* 122 *N.J. Super.* at 330. To prevent such disclosure, the State must obtain a protective order under *R.* 3:13-3(d).

No later than 90 days following the termination of the order authorizing interception of the communications, the authorizing judge must cause an inventory to be served. The inventory contains notice of the entry of the order or the application of a denied order; the date the order was entered or the application denied; the period of authorized or disapproved interception; and facts indicating whether communications were intercepted during the authorized period. *N.J.S.A.* 2A:156A-16. This inventory must be served on (1) all persons named in the order or application; (2) any person arrested as a result of an intercepted communication; (3) any person indicted as a result of an intercepted communication; (4) any person against whom an indictment is likely to be returned as a result of an intercepted communication; (5) any person likely to be a potential witness and whose communications were intercepted; and (6) any other parties to the intercepted communications. *N.J.S.A.* 2A:156A-16. In order to ensure that all proper persons are served with the inventory, the law enforcement officers have a duty to supply the judge with a description of the class of persons whose communications are intercepted but who are not named in the order. *United States v. Donovan,* 429 *U.S.* at 670. The officer in charge of serving the inventory must submit an affidavit to the authorizing judge once service is completed.

c. Challenges to the Electronic Surveillance

An aggrieved person in any trial, hearing or proceeding may move to suppress the contents of an intercepted communication and any evidence derived therefrom on the grounds that 1) the communication was unlawfully intercepted; 2) the authorization order is facially invalid; and 3) the interception did not comply with the authorization order. *N.J.S.A.* 2A:156A-21. The statute defines "aggrieved person" as "a person who was a party to any intercepted...communication or a person against whom the interception was directed." *N.J.S.A.* 2A:156A-2k. The courts have also found that a defendant alleged to have participated in the

underlying criminal activities involving use of the telephone which was tapped has standing to challenge the use of the intercepted communications, *State v. Mollica,* 114 *N.J.* 329, 340 (1989).

The statute states that the entire contents of all communications intercepted during or after any interception determined to violate the statute must be suppressed, as well as all evidence derived therefrom. *N.J.S.A.* 2A:156A-21. *State v. Lane,* 279 *N.J. Super.* at 219-220.

The motion to suppress the contents of an intercepted communication and the evidence derived therefrom must be made at least ten days before the trial, hearing or proceeding, unless the defendant did not have an opportunity to make the motion or he or she was unaware of the ground for the motion. *N.J.S.A.* 2A:156A-21. Motions made by co-indictees must be heard in a consolidated hearing. *Id.* A defendant does not have to show bad faith on the part of law enforcement officials in order to warrant suppression of evidence obtained in violation of New Jersey's wiretap statute. *State v. Worthy,* 141 *N.J.* at 384.

C. Pretrial Identifications

1. Introduction

The outcome of many criminal cases often hinges upon eyewitness identifications. Thus, often the question is not whether the crime was committed with the requisite criminal intent (an issue most often encountered in "white collar" criminal cases), but rather who committed the crime? In order to ascertain and prove the identity of the alleged culprit, the police and prosecution employ a variety of pretrial identification procedures. However, the Appellate Division has stated that "victim identification, however sincere, is notoriously unreliable." *State v. Thomas,* 245 *N.J. Super.* 428, 436 (App. Div. 1991). Indeed, in *State v. Delgado,* 188 *N.J.* 48, 60-61 n.6 (2006), the Court, citing empirical research, held that "[m]isidentification is widely recognized as the single greatest cause of wrongful conviction in this country." The inherent unreliability of eyewitness identifications was also recognized by the United States Supreme Court in *United States v. Wade,* 388 *U.S.* 218, 228 (1967) and by the New Jersey Supreme Court in *State v. Madison,* 109 *N.J.* 223, 232 (1988). The inherent unreliability of eyewitness identifications was recently addressed by the New Jersey Supreme Court in *State v. Cromedy,* 158 *N.J.* 112, 132-133 (1999). There, the Supreme Court held that

a trial court **must** issue a jury instruction on the potential unreliability of cross-racial eyewitness identifications when identification is a critical issue and the identity of the defendant as the perpetrator is not corroborated by other evidence.

The *Cromedy* holding's extension to "cross-ethnic" eyewitness identifications recently was rejected by the New Jersey Supreme Court in *State v. Romero*, 191 *N.J.* 59, 72 (2007). However, the Supreme Court held that additional language was required in the model jury charge that eyewitness identification, which may appear extremely convincing, must be critically analyzed and may be mistaken, and that the witness's lack of confidence, standing alone, may not necessarily be an indication of the reliability of the identification. *Romero*, 191 *N.J.* at 76.

2. Admissibility of Pretrial Identifications – Generally

The United States Supreme Court, and subsequently the New Jersey Supreme Court, have adopted a two-step analysis for determining the admissibility of such out-of-court identifications. In the first instance, the trial court must determine whether the identification procedure in question was impermissibly suggestive, and if so, then whether it resulted in a "very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 *U.S.* 277, 285 (1968); *State v. Madison*, 109 *N.J.* at 232 (recently reaffirmed in *State v. Herrera*, 187 *N.J.* 493, 503-504 (2006)). The operative question is whether, under the totality of the circumstances, the identification is unreliable. *Manson v. Braithwaite*, 432 *U.S.* 98, 114 (1967); *State v. Farrow*, 61 *N.J.* 434, 451 (1972), *cert. denied*, 410 *U.S.* 937 (1973). Factors to be considered in determining the likelihood of misidentification include the "opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the time of the confrontation and the time between the crime and the confrontation." *Manson v. Braithwaite*, 432 *U.S.* at 114, citing *Neil v. Biggers*, 409 *U.S.* 188, 199 (1972); *State v. Clausell*, 121 *N.J.* 298, 327-328 (1990); *State v. Madison*, 109 *N.J.* at 240). If the pretrial identification procedures are found to be impermissibly suggestive, the State has the burden of proving by clear and convincing evidence at a pretrial hearing that the identifications had a source independent of the police-conducted identification procedures. *United States v. Wade*, 388 *U.S.* at 240; *State v. Madison*, 109 *N.J.* at 223.

In a recent blockbuster decision, *State v. Henderson*, 208 *N.J*. 208 (2011), the New Jersey Supreme Court demonstrated why it is still considered to be one of the most progressive and enlightened courts in the country. In *Henderson,* the court considered the entire issue of eyewitness identifications, after having remanded the matter to a Special Master for hearings and recommendations from instructions. The Court relied upon recent scientific research and expert testimony on the field of eyewitness identification. The Court noted that an array of variables can affect and dilute memories and lead to misidentifications. These variables consist of two categories:

Systemic variables, such as lineup procedures that are within the control of the criminal justice system, and estimator variables, which are factors related to the witness, the perpetrator or the event itself (such as distance, lighting or stress), over which the legal system has no control. *Id.* at 247.

The Court then addressed system variables, those within the State's control. The Court found that the following certain procedures needed to be implemented in order to remedy systemic issues that result in a misidentification: 1) The Court found that failure to perform a lineup, a double-blind or blind fashion, can increase the likelihood of misidentification. Double-blind administrators do not know the identity of the actual suspect, while a blind administrator is aware of that information but takes measures to keep from knowing where the suspect is located in a line up or photo array. *Id.* at 248-250; 2) Witnesses must be given pre-identification instructions that the suspect may or may not be in the lineup or array, and that the witness should not feel any compulsion to make an identification. The failure to give proper pre-lineup instructions can increase the risk of misidentification. 3) Proper care must be exercised in constructing a live or photo lineup. A suspect should be included in a lineup comprised of similar-looking individuals. Lineup must include a minimum number of fillers--generally at least five. Lineups should not feature more than one suspect. All lineup procedures must be recorded and preserved. Courts must consider whether a lineup is poorly constructed when evaluating the admissibility of an identification. When appropriate, jurors should be told that poorly constructed or biased lineups may affect the reliability of an identification and enhance a witness' confidence. *Id.* at 251-252; 4) The police should avoid confirmatory or post-identification feedback, and the witness' own words must evidence confidence before any possible feedback. *Id.* at 233-254; 5) Multiple viewing of the suspect should be avoided. *Id.* at

255-256. At this time, both simultaneous and sequential lineups are permitted. *Id.* at 256-258. Further, the Court did not restrict the use of composites at this time. *Id.* at 258-259. Showups conducted more than two hours after an event present a heightened risk of misidentification, and, as with lineups, showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that the witness should not feel compelled to make an identification. *Id.* at 259-261.

The Court then discussed a number of "estimator variables"–factors beyond the control of the criminal justice system – that impact the reliability of identifications. These include stress, weapons focus, duration, distance, lighting, a witness' age and level of intoxication, characteristics of the perpetrator such as disguises/changes in facial features, memory decay, race bias, co-witnesses' feedback and speed of identification. *Id.* at 261-272. All of these factors, among others, should be considered by a court in evaluating the overall reliability and admissibility of an identification if a defendant makes an initial showing of suggestiveness committed by the criminal justice actors. *Id.* at 291-292.

The Court ultimately held that the *Manson/Madison* test does not adequately meet its stated goals of providing a sufficient measure for reliability nor does it defer, and in fact overstates the jury's innate ability to evaluate eyewitness testimony. *Id.* at 288. Accordingly, the Court created a revised framework for evaluating identification evidence. First, to obtain a pretrial hearing a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. Second, the burden then shifts to the State to show that the proferred eyewitness identification is reliable, including both police procedures and estimator variables, but the Court may end the hearing at any time if it finds from the testimony that the defendants threshold allegation of suggestiveness is without basis. Third, the defendant retains the ultimate burden to prove a very substantial likelihood of irreparable misidentification. Fourth, if after weighing the evidence presented, a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the Court should suppress the identification evidence. If the evidence is admitted, the Court must provide appropriate jury instructions. *Id.* at 288-289.

In a companion case to *Henderson, State v. Chen*, 208 *N.J.* 307 (2011), the Court held that even without any police action, when a defendant presents evidence that an identification was made under highly suggestive circumstances that would lead to a mistaken identification.

Therefore, the Court slightly modified the *Henderson* first prong of the approach to require that a defendant present evidence that the identification was made under highly suggestive circumstances that could lead to a mistaken identification, as opposed to merely suggestive circumstances, when there is suggestive behavior but no prior action. *Chen*, 208 *N.J.* at 327.

Finally, in *State v. Lazo,* 209 *N.J.* 9, 21 (2012), the Court held that it was reversible error for a detective to tell the jury why the detective included the defendant's photo in a photo array.

In light of its decisions in *Henderson* and *Chen*, the New Jersey Supreme Court approved the adoption of new *Rule* 3:11, amendments to *Rule* 3:13, and three revised jury charges, all effective September 4, 2012.

New *Rule* 3:11 requires that for out of court identification resulting from a photo array, line lineup or showing conducted by a law enforcement officer to be admissible, a record must be made, preferably contemporaneous or as soon as practicable after the identification is made, of the identification procedure. The record of the out of court identification procedure must give details of what transpired during that process, including eight items. If the record is lacking important details as to what occurred during the out of court identification procedure, and if it was feasible to obtain and preserve those details, then the court has a variety of remedial options available. The court may declare the identification inadmissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge to be used in evaluating the reliability of the identification.

Rule 3:13 was amended to allow the defendant discovery of all records, including notes, reports, and electronic recordings relating to an identification procedure, as well as identifications made or attempted to be made.

The new model jury instructions are directed to in-court identifications only, out-of-court identifications only, and in-court and out-of-court identifications. Each of those jury charges discusses the factors identified and discussed at length in *Henderson* as affecting the reliability of such identifications, including both system and estimator variables.

3. Varying Types of Pretrial Identifications

The above standards apply to the panoply of pretrial identification procedures utilized by the police. Thus, the constitutional due process safeguards applicable to visual identifications apply to "show-up" identifications, where the suspect is presented to the victim or witness. *Neil*

v. Biggers, 409 *U.S.* at 195, 199-200; *Stovall v. Denno*, 388 *U.S.* 293, 302 (1967); *State v. Herrera*, 187 *N.J.* at 504; *State v. Carter*, 91 *N.J.* 86, 130 (1982); *State v. Brent*, 265 *N.J. Super.* 577, 584 (App. Div. 1993), *rev'd on other grounds*, 137 *N.J.* 107 (1994). Similarly, the same standards are also applicable to voice identifications, *State v. Clausell*, 121 *N.J.* at 328, to photographic displays, *Simmons v. United States*, 390 *U.S.* at 384; *State v. Clausell*, 121 *N.J.* at 325-327; *State v. Madison*, 109 *N.J.* at 234-239; and to lineups. *Gilbert v. California*, 388 *U.S.* 263 (1967); *United States v. Wade*, 388 *U.S.* at 240.

The admissibility of hypnotically-refreshed eyewitness testimony was addressed in *State v. Hurd*, 86 *N.J.* 525 (1981). In *Hurd*, the New Jersey Supreme Court adopted the trial court's use of the *Neil v. Biggers* two-part test, *State v. Hurd*, 173 *N.J. Super.* 333 (Law Div. 1980), *aff'd*, 86 *N.J.* at 547-548, and also affirmed the six procedural safeguards which must be met before a party may introduce hypnotically refreshed testimony: (1) A psychiatrist or psychologist experienced in the use of hypnosis must conduct the session; (2) The professional conducting the hypnotic session must be independent of and not regularly employed by the prosecutor, investigator or defense; (3) Any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form; (4) Before inducing hypnosis, the hypnotist should obtain from the subject as detailed a description of the facts as the subject can recall; (5) All contacts between the hypnotist and the subject must be recorded; and (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview. *State v. Hurd*, 86 *N.J.* at 545-546. The *Hurd* criteria were extended by the Appellate Division as applicable to all testimony refreshed by hypnosis, even if the State played no role in the hypnosis of the witness whose testimony it proffers. *State v. Fertig*, 143 *N.J.* 115, 124 (1996).

4. Right to Counsel

Prior to indictment there is no Sixth Amendment right to have counsel present during any of these pretrial identification procedures. *Kirby v. Illinois*, 406 *U.S.* 682, 689 (1972); *State v. Earle*, 60 *N.J.* 550, 552 (1972); *State v. Satterfield*, 103 *N.J. Super.* 291, 294 (App. Div. 1968). Moreover, even after indictment, defendant has no constitutional right to have counsel present during a photographic display. *United States v. Ash*, 413 *U.S.* 300, 321 (1973); *State v. Farrow*,

61 *N.J.* at 450; *State v. Carter,* 183 *N.J. Super.* 576 (Law Div. 1982). However, there is a Sixth Amendment right to have counsel present during lineups or any corporeal identification procedures conducted after the initiation of formal adversary judicial criminal proceedings. *Moore v. Illinois,* 434 *U.S.* 220, 229, 231 (1977); *United States v. Wade*, 388 *U.S.* at 236-237; *Gilbert v. California*, 388 *U.S.* at 272.

The importance of having counsel present at these pretrial identification procedures is underestimated. As noted above, often cases turn on eyewitness identifications. The presence of defense counsel can help safeguard against unduly suggestive police identification techniques. In addition, the presence of defense counsel could help insure that an adequate record of the pretrial identification is preserved. The courts have held that when there is a failure to preserve a photographic array and the circumstances of the pretrial photographic identification cannot be reconstructed adequately, the courts may suppress testimony concerning that identification. *State v. Peterkin*, 226 *N.J. Super.* 25, 43 (App. Div.), *certif. denied,* 114 *N.J.* 295 (1988). Nevertheless, the failure to preserve the record of an identification procedure will not, by itself, invalidate the identification. *State v. Earle,* 60 *N.J.* at 552. In addition, the presence of defense counsel allows counsel to prepare better for trial by observing any doubts, hesitancies or misidentifications on the part of the witness(es).

5. Pretrial and Trial Procedures Involving Identifications

A pretrial *Wade* hearing (*United States v. Wade,* 388 *U.S.* at 240) is usually mandated when an identification is crucial to the prosecution's case. *See State v. Michaels,* 136 *N.J.* 299, 319 (1994). Such a hearing is conducted pursuant to *Rule* 104(a) of the New Jersey Rules of Evidence. In order to obtain such a hearing, the defendant must make a threshold showing that an arguable issue exists. *See State v. Long*, 119 *N.J.* 439, 487 (1990); *State v. Rodriguez,* 264 *N.J. Super.* 261 (App. Div. 1993), *affd,* 135 *N.J.* 3 (1994); *State v. Ortiz,* 203 *N.J. Super.* 518, 522 (App. Div.), *certif. denied,* 102 *N.J.* 335 (1985). At the hearing, the defendant has the initial burden of proving, by a preponderance of the evidence, that the pretrial identification procedure was so suggestive as to result in a substantial likelihood of misidentification. *State v. Hurd,* 86 *N.J.* at 548; *State v. Santoro,* 229 *N.J. Super.* 501, 504 (App. Div. 1990). If this is shown, the State must prove by clear and convincing evidence that the identification is free from the taint of suggestive identification procedure utilized. *See State v. Madison,* 109 *N.J.* at 245; *State v.*

Peterkin, 226 *N.J. Super*. at 45. If a trial judge finds that constitutional safeguards have been met, the issue of the weight to be given the identification is then for the jury. *Stare v. Farrow*, 61 *N.J.* at 451; *State v. Lutz*, 165 *N.J. Super.* 278, 289 (App. Div. 1979). A trial judge's rulings on the issue of the propriety of identification procedures will be sustained on appeal as long as they reasonably could have been reached on sufficient credible evidence present in the record. *State v. Scott*, 236 *N.J. Super.* 264, 267 (App. Div. 1989).

6. Non-Testimonial Identifications

a. Post-Arrest Procedures

Federal and New Jersey State Courts have held that various types of non-testimonial evidence may be procured from a defendant without violating the defendant's fifth amendment rights against self-incrimination. Thus, post-arrest, defendants have been compelled to appear in lineups, *State v. King*, 44 *N.J.* 346, 357 (1965), to give blood, hair and saliva samples, *State v. Dyal*, 97 *N.J.* 226, 238 (1984); *State v. Andreatta*, 61 *N.J.* 554, 551 (1972); *State v. Burke*, 172 *N.J. Super*. 555, 557-558 (App. Div. 1980), and to give handwriting and voice exemplars, *United States v. Dionisio*, 410 *U.S.* 1 (1973); *United States v. Wade*, 388 *U.S.* at 222-223; *Gilbert v. California*, 388 *U.S.* at 266-267; *State v. Carr*, 124 *N.J. Super*. 114, 118 (Law Div. 1973), all in the face of fourth and fifth amendment challenges by the defendant. Indeed, *N.J.S.A.* 2A:84A-19(a), *Rule* 503(a) of the New Jersey Rules of Evidence, explicitly provides that no person may refuse to submit to a corporeal identification or to an examination of his or her physical or mental condition on the basis of a self-incrimination claim.

Because these types of claims are considered non-testimonial, *i.e.*, the witness is not required to disclose any knowledge which he or she may have, and because there is no reasonable expectation of privacy in these items, compelled disclosure of this evidence does not run afoul of the fourth or fifth amendment. *United States v. Dionisio*, 410 *U.S.* at 5, 14-15; *Gilbert v. California*, 388 *U.S.* at 366-267; *Schmerber v. California*, 384 *U.S.* at 757 (1966); *State v. King*, 44 *N.J.* at 357; *State v. Burns*, 159 *N.J. Super*. 539, 543-544 (App. Div. 1978). The fourth or fourteenth amendment may provide guidelines for how the procedure is to be conducted. Thus, a blood sample should be taken in a medically acceptable manner at a hospital or other suitable health care facility. *Schmerber v. California*, 384 *U.S.* at 771-72; *State v. Dyal*,

97 *N.J.* at 238; *State v. Burns*, 159 *N.J. Super.* at 544. *See also Rochin v. California*, 342 *U.S.* 165 (1952), holding the pumping of a defendant's stomach against his will to retrieve pills that the defendant allegedly swallowed was conduct that "shocks the conscience" and hence was constitutionally impermissible. Furthermore, to the extent that a handwriting exemplar seeks to elicit information from a defendant such as the defendant's spelling of words or grammar, the procedure would become testimonial and hence violative of the defendant's fifth amendment rights. *State v. Carr*, 124 *N.J. Super.* at 119. Therefore, it is appropriate for a defendant to copy certain information, but not to respond to an agent's request for the defendant to write down words dictated by the agent, as that would implicate the defendant's thought processes, spelling and grammar. *See United States v. Campbell*, 732 *F.2d* 1017, 1021-1022 (1st Cir. 1984); *United States v. Wade*, 95 Cr. 0385 (RWS), 1995 *U.S. Dist. LEXIS* 11066 (August 3, 1995). *See also State v. Carr*, 124 *N.J. Super.* at 199. *But see, contra, United States v. Pheaster*, 544 *F.2d* 353, 371-372 (9th Cir. 1976), *cert. denied*, 429 *U.S.* 1099 (1997).

b. Pre-Charge Non-Testimonial Identifications

Individuals can be compelled, even prior to the initiation of formal charges against them, to provide "non-testimonial" identifications. In *United States v. Dionisio*, 410 *U.S.* 1, 12, 14 (1973) and in *United States v. Mara*, 410 *U.S.* 19, 21-22 (1973), the United States Supreme Court held that an individual subpoenaed to provide voice or handwriting samples must provide these exemplars, notwithstanding fourth or fifth amendment claims and despite the fact that there was no preliminary showing of reasonableness made before the subpoena was issued. *See also In re Grand Jury Investigation*, 219 *N.J. Super.* 90, 94 (Law Div. 1987).

In *Davis v. Mississippi*, 394 *U.S.* 721, 727 (1969), the United States Supreme Court ruled that an individual could be investigatorily detained, precharge, in order to obtain fingerprints, even if there was no probable cause to detain that individual. The *Davis* decision was followed by the New Jersey Supreme Court in *State v. Hall*, 93 *N.J.* 552, 561-562, *cert. denied*, 464 *U.S.* 1008 (1983), wherein the court approved investigatory detention of an individual in order to conduct a lineup notwithstanding the lack of probable cause to believe that the individual committed a crime. The *Hall* court set forth a four-part test which a court must follow to authorize an investigatory detention: (1) the court must determine that a crime has occurred, the crime is unsolved and is under active investigation; (2) the police must demonstrate a reasonable

and well-grounded basis to believe that the individual sought to be detained may have committed the crime under investigation; (3) the results of the detention will significantly advance the criminal investigation and will serve to determine if the suspect probably committed the crime; and (4) the investigative results cannot otherwise practicably be obtained. *State v. Hall*, 93 *N.J.* at 562. In addition, there must be procedures in place appropriate to the nature of the investigatory detention to minimize the intrusiveness of the detention. *Id.* at 562-563. Thus, in most cases the suspect should be given: (1) sufficient notice of the proposed detention; (2) the opportunity to arrange a convenient time for the detention; and (3) an opportunity to have counsel present during the detention. *Id.* at 564-565.

Subsequent to the *Hall* decision, the Court promulgated *R.* 3:5A, governing investigative detention. This rule codifies the *Hall* requirements for investigative detentions in order to compel a person to submit to non-testimonial identification procedures. *See State v. Rolle,* 265 *N.J. Super.* 482, 486 (App. Div.), *certif. denied,* 134 *N.J.* 562 (1993). The evidence of physical characteristics which may be compelled under this section include fingerprints, palm prints, footprints, physical measurements, handwriting and handprinting samples, blood samples, urine samples, saliva samples, hair samples, fingernail scrapings, photographs, voice exemplars, display of designated portions of the body, the taking of photographs, and appearance in a lineup. *R.* 3:5A-9. This rule cannot be used to detain a suspect for a purpose beyond the limited scope of investigatory detention for non-testimonial identification (i.e., for interrogation). *State v. Rolle*, 265 *N.J. Super.* at 488.

D. The Grand Jury

Whether a defendant has been arrested, or whether an individual in a white collar matter is the subject of an investigation, sooner or later a defense attorney or prosecutor must deal with the grand jury, a peculiar institution with a procedure all its own.

Article I, paragraph 8 of the New Jersey Constitution guarantees an accused the right to indictment for all criminal proceedings except disorderly and petty disorderly persons offenses, *i.e*, those punishable by a maximum term of imprisonment in excess of sixth months. *In re Yengo,* 84 *N.J.* 111, 120 (1980), *cert. denied,* 449 *U.S.* 1124 (1981); *Application of Hart,* 265 *N.J. Super.* 285, 290 (Law Div. 1993). The grand jury has three distinct but interrelated powers--it may investigate crimes, it may charge individuals with crimes in an indictment or refuse to

return an indictment, or it may issue a presentment of its findings in a public document. The grand jury's special role was eloquently described by then Chief Justice Hughes in his dissent in *State v. Vinegra,* 73 *N.J.* 484, 497 (1977) as follows:

> Its role is hybrid in the sense that it acts for the people not only in the exercise of its investigative, indictment and presentment power, but just as importantly in defense of the citizen as to whom it finds no probable or just cause to hold to trial by an indictment or expose to public denunciation by a presentment.
>
> While its accusatory role is more publicly noticed, its function to shield the citizen's rights became apparent very early in its history. The grand jury system can be traced at least as far back as 1166 when its forerunner operated as an arm of the English Crown. . . . From its inception as a body for accusation, the grand jury slowly evolved into a protector which acted to shield individuals from unfounded Royal prosecutions.

1. Overview of the Grand Jury

Just who are these grand jurors? The grand jury simply is a group of randomly selected individuals from the community, selected in a manner free of any taint of discriminatory purpose. *State v. Ramseur,* 106 *N.J.* 123, 215 (1987); *State v. Rochester,* 54 *N.J.* 85, 88 (1969); *State v. Porro,* 152 *N.J. Super.* 259, 265-266 (Law Div. 1977), *aff'd,* 158 *N.J. Super* 269 (App. Div.), *cert. denied,* 439 *U.S.* 1047 (1978). The grand jurors number no more than twenty-three and no less than sixteen for a quorum. *R.* 3:6-1.

Grand juries are convened in every county of the State by the Assignment Judge. *R.* 3:6-1. There is also at least one State Grand Jury always in existence, *N.J.S.A.* 2A:73A-2, which is impanelled and is subject to the same rules applicable to county grand juries. *R.* 3:6-11. The Chief Justice of the New Jersey Supreme Court has designated an Assignment Judge of the Superior Court to impanel and supervise the State Grand Jury or Grand Juries. All grand jurors serve for the term of the grand jury, which is not to exceed twenty (20) weeks unless otherwise ordered by the Assignment Judge. *R.* 3:6-10. Under this same rule, the Assignment Judge may extend the term of the grand jury for a definite period of time not to exceed three (3) months,

unless any further order is entered extending the grand jury term for further terms of three (3) calendar months each.

A typical grand jury often hears a multitude of different cases while impaneled. Some cases are presented and completed in one session, while other cases may require a number of sessions to be presented fully. Thus, there arises the question of what happens when a grand juror, who misses a session at which evidence is presented, is later called upon to vote on an indictment. Under *State v. Del Fino,* 100 *N.J.* 154, 164 (1985), a court giving preliminary instructions to a grand jury must charge that any grand juror who has missed a session should review a transcript of the evidence presented and should inspect any tangible evidence adduced during the missed session. Moreover, under *State v. Ciba-Geigy,* 222 *N.J. Super.* 343, 354-355 (App. Div.), *certif. granted,* 111 *N.J.* 574 (1988), a grand juror's failure to have informed himself about evidence presented during a session at which he was not in attendance disqualified him from that portion of the indictment relating to the evidence which was missed. *See also State v. Reynolds,* 166 *N.J. Super.* 570, 576 (Law Div. 1981), *aff'd,* 185 *N.J. Super.* 494 (App. Div.), *certif. denied,* 91 *N.J.* 543 (1982).

No judge is present in the grand jury courtroom. Rather, there is a foreperson and a deputy foreperson selected by the Assignment Judge, *State v. Ramseur,* 106 *N.J.* at 236-238, who have the power to administer oaths and endorse all indictments (the deputy foreperson acts only in the absence of the foreperson). *N.J.S.A.* 2A:73-4; *R.* 3:6-4. While in session, the only people who may be present in the grand jury room are the grand jury clerk, who keeps the minutes of the grand jury (*R.* 3:6-5), the grand jurors themselves, the prosecuting attorney(s), the witness under examination, an interpreter when needed, and a court stenographer. *R.*3:6-6. Noticeably absent from that list is the attorney for the witness under examination, because that attorney is prohibited from appearing in the grand jury room with his or her client. *See, e.g., Van Hom v. City of Trenton,* 80 *N.J.* 528, 536 n.2 (1981). However, the witness must be afforded a reasonable opportunity to consult with his or her attorney, upon request by the witness. Therefore, it is recommended that attorneys instruct their witnesses to request an opportunity to speak with counsel waiting outside the grand jury room if the witness is concerned about a particular line of questioning. Alternatively, it is recommended that counsel advise their clients to come out from the grand jury room at regular time intervals (*i.e.,* every fifteen or twenty

minutes) so that the witness may clear his or her head, consult with counsel about problem areas, and allow counsel to debrief his or her client more effectively, and in a more timely fashion.

2. Grand Jury Secrecy

Grand jury proceedings are shrouded in secrecy. All persons permitted to be present in the grand jury room, with the exception of witnesses, are required to take an oath of secrecy under *R.* 3:6-7. The secrecy of grand jury proceedings has been justified as follows:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subordination of perjury or tampering with the witnesses who may testify before a grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Procter & Gamble Co., 356 *U.S.* 677, 681 n.6 (1958); *State v. Doliner,* 96 *N.J.* 236, 247 (1984); *Stewart v. Dexter,* 218 *N.J. Super.* 417, 419 (Law Div. 1986). Any person found to have purposely, with the intent to injure another, disclosed such information is guilty of a crime of the fourth degree under *N.J.S.A.* 2A:73B-3(a) and also subject to a civil suit for actual damages, punitive damages not less than $1,000 and not more than $100,000, as well as reasonable costs and attorneys' fees under subsection (b) of this same statute. Disclosure of grand jury information thus can be made only upon a showing of particularized need, *State v. Doliner,* 96 *N.J.* at 246, or pursuant to the rules governing discovery in criminal cases (*i.e., R.* 3:13). *R.* 3:6-7. Significantly, witnesses before a grand jury are not subject to this secrecy obligation. *State v. Graziani,* 60 *N.J. Super.* 1, 22 (App. Div. 1959), *affd,* 31 *N.J.* 538, *cert. denied,* 363 *U.S.* 830 (1960). Therefore, by debriefing witnesses who have appeared before the grand jury as soon as possible after they testify, a defense attorney may be able to learn a

tremendous amount of information regarding the grand jury's investigation of his or her client. fu this manner, defense counsel may at least be able to obtain a glimpse behind the curtain of secrecy shrouding the grand jury.

3. Grand Jury Practice - Prosecutorial Powers and Discretion

It is precisely because of grand jury secrecy, as the grand jury functions without direct judicial scrutiny, that a body of case law has evolved regarding the prosecutor's interaction with the grand jury. The prosecutor has tremendous latitude in presenting cases and evidence to a grand jury. *State v. Childs,* 242 *N.J. Super.* 121, 129 (App. Div.), *certif. denied,* 127 *N.J.* 321 (1990). If a prosecutor has probable cause to believe that the accused committed an offense defined by a statute, the decision whether or not to prosecute and what charge to file or bring before a grand jury generally rests in his or her discretion. *State v. Hermann,* 80 *N.J.* 122, 127 (1979); *Matter of L.Q.,* 227 *N.J. Super.* 41, 48 (App. Div. 1988). This broad discretion is only subject to constitutional restraints, *i.e.,* the decision not to prosecute may not be deliberately based on an unjustifiable standard, such as race, religion or any other arbitrary classification. *Wayte v. United States,* 470 *U.S.* 598, 608 (1985); *Matter of L.Q.,* 227 *N.J. Super.* at 48.

The prosecutor may vigorously question a hostile or uncooperative witness. *See State v. Schamberg,* 146 *N.J. Super.* 559, 563 (App. Div. 1977), *certif. denied,* 75 *N.J.* 10 (1977). The prosecutor may summarize the evidence and comment on testimony of witnesses. *State v. Childs,* 242 *N.J. Super.* at 128.

The prosecutor also serves as legal advisor to the grand jury by advising the jury with respect to admissibility of evidence and proper procedure, as well as "explaining the testimony with reference to the law of the case." *State v. Hart,* 139 *N.J. Super.* 565, 567 (App. Div. 1976). By providing the grand jury with the applicable law, the prosecutor supplements the investigative power of the grand jury. *State v. Laws,* 262 *N.J. Super.* 551, 562 (App. Div.), *certif. denied,* 134 *N.J.* 475 (1993). A prosecutor's reading of the applicable statutes without further explanation was deemed to be sufficient to charge the grand jury on the elements of the offense it was considering. *State v. Ball,* 268 *N.J. Super.* 72, 118-120 (App. Div. 1993), *affd,* 141 N.J. 142 (1995). Even if a grand jury charge is deemed to be erroneous, such error ordinarily will be deemed harmless upon the subsequent conviction of the defendant by a petit jury. *See State v.*

Warmbrun, 277 *N.J. Super.* 51, 60 (App. Div. 1994), *certif. denied,* 140 *N.J.* 277 (1995); *State v. Ball,* 268 *N.J. Super.* at 120.

In *In the Matter of the Grand Jury Appearance Request by Larry S. Loigman, Esq.,* 183 *N.J.* 133 (2005), the New Jersey Supreme Court recently held (reversing the Appellate Division's decision) that a private person does not have the right to bypass law enforcement authorities and present matters directly to the grand jury. The Court extensively reviewed the history and function of the grand jury, as well as the duties of the prosecutor, in the course of its refusal to recognize a common law right to access to the grand jury by private citizens.

4. Limits on Prosecutorial Discretion Before the Grand Jury

The broad prosecutorial powers before a grand jury are not totally unfettered. In *State v. Hart,* 139 *N.J. Super.* 565, 567-68 (App. Div. 1976), and later in *State v. Butteifoss,* 234 *N.J. Super.* 606, 611 (Law Div. 1988), the courts have made it clear that a prosecutor may not participate in the grand jury's deliberations, express his or her views on questions of fact, comment on the weight or sufficiency of the evidence, or in any way attempt to influence or direct the grand jury in its findings. The courts will dismiss an indictment obtained in the wake of such prosecutorial misconduct, as made clear in *Hart* and *Butterfoss.* While the matter may be presented again to another grand jury, nevertheless a defendant may be able to attack a subsequent indictment, *inter alia,* on the basis of statute of limitations or on the basis that any taint from the first investigation was not sufficiently purged in the subsequent investigation. *See, e.g., State v. Sugar,* 100 *N.J.* 214, 245 n.6 (1985). In addition, a second indictment is not necessarily always a foregone conclusion, given the prosecutor's need to husband scarce resources.

Further parameters on the appropriateness of prosecutorial conduct before the grand jury have been set forth by the courts. In *State v. Murphy,* 110 *N.J.* 20 (1988), prosecutors unilaterally determined, without presenting the matter to the assignment judge, that a grand juror was not unduly biased or prejudiced to continue sitting on the panel. While the Court did not dismiss the indictment before it, the Court warned that it would not hesitate to dismiss an indictment if the improper action of the prosecution recurred. *State v. Murphy,* 110 *N.J.* at 36. The Court further held that even absent prejudice to the defendant, the court would not hesitate to vindicate the impartibility of the grand jury by dismissing an indictment if it believed that the

conduct of the prosecutors in obtaining an indictment "amounted to intentional subversion of the grand jury process." *State v. Murphy*, 110 *N.J.* at 35-36.

Recent case law holds that a prosecutor has a duty to present to the grand jury evidence which directly negates guilt and is clearly exculpatory (such as the credible testimony of a reliable, unbiased alibi witness that demonstrates that the accused could not have committed the crime). *State v. Hogan*, 144 *N.J.* 216, 233-237 (1996), modifying *State v. Smith*, 269 *N.J. Super.* 86, 93 (App. Div. 1993), *certif. denied*, 137 *N.J.* 164 (1994); *State v. Gaughran*, 260 *N.J. Super.* 283, 285 (Law Div. 1992). These decisions are contrary to federal law, as articulated by the United States Supreme Court in *United States v. Williams*, 504 *U.S.* 36, 118 *L.Ed.2d* 352 (1992), wherein the Court held that the courts below erroneously exercised their "supervisory powers" over the grand jury by dismissing an indictment when the prosecutor did not disclose to the indicting grand jury substantial exculpatory evidence. Of course, it is a basic tenet of constitutional law that New Jersey, like any other state, may impose higher standards under its state law than are required by the Federal Constitution. *State v. Mollica*, 114 *N.J.* 329, 352 (1989); *State v. Deatore*, 70 *N.J.* 100, 112 (1976); *State v. Johnson*, 68 *N.J.* 349, 353 (1975). Therefore, a defense counsel with knowledge of potentially clearly exculpatory evidence should make sure that the prosecutor knows of this evidence pre-indictment, *see State v. Hogan*, 144 *N.J.* at 237, 238 so that an indictment possibly may be avoided. Similarly, as a practical matter, a prosecutor should encourage the pre-indictment submission of even remotely exculpatory information. It is far easier for the prosecutor to address and possibly redress any "holes" in the prosecution case before the grand jury rather than before a petit jury.

The courts apply differing standards in assessing grand jury abuse claims, depending upon whether the grand jury was used before or after indictment. Before indictment, the issue is whether the evidence sought by the State via the grand jury was relevant to the crime under investigation. *State v. Francis*, 191 N.J. 571, 591 (2007). In contrast, once a defendant has been indicted, the government is precluded from using the grand jury for the "sole or dominant purpose" of obtaining additional evidence against the defendant. *Francis*, 191 N.J. at 590.

5. The Grand Jury's Powers

a. Subpoena Power

The grand jury is entitled to every person's evidence, and thus its authority to subpoena witnesses is "not only historic, but essential to its task." *Branzburg v. Hayes*, 408 *U.S.* 665, 689 (1972). "When the grand jury is performing its investigatory function into a general problem area...society's interest is best served by a thorough and extensive investigation." *Wood v. Georgia,* 370 *U.S.* 375, 392 (1962). The grand jury may explore an anonymous charge or pursue a rumor. *In re Addonizio,* 53 *N.J.* 107, 126 (1968). Its powers are not circumscribed by "questions of propriety or forecasts of the probable result...or by doubts whether the particular individual will be found properly subject to an accusation of a crime." *Blair v. United States,* 250 *U.S.* 273, 282 (1919); *Matter of Grand Jury Subpoenas,* 241 *N.J. Super.* 18, 26 (App. Div. 1989). Therefore, there is no prerequisite of probable cause, like that necessary for a search warrant, for a grand jury to initiate an investigation. *In re Addonizio,* 53 *N.J.* at 126.

i. Who Must Testify?

All persons must appear and give testimony before the grand jury in the absence of a recognized privilege not to testify. *Branzburg v. Hayes,* 408 *U.S.* at 688. *Matter of L.Q.,* 227 *N.J. Super.* at 47 (minor victim of sexual assault enjoyed no qualified privilege to refrain from testifying before a grand jury, notwithstanding the fact the witness had suicidal thoughts). This obligation similarly extends to the production of documents. *In re Addonizio,* 53 *N.J.* at 128-129. *See* Form 1, Sample Grand Jury Subpoena. Independent of the grand jury, a prosecutor has no authority to subpoena witnesses pretrial. *State v. Misik,* 238 *N.J. Super.* 367, 376 (Law Div. 1989). As a practical matter, however, subpoenas are issued by the prosecutor in the name of the grand jury, often without the prior knowledge or consent of the grand jury. If challenged, all that a prosecutor has to do in validating a subpoena is to show that such documents bear some possible relationship, however indirect, to the ongoing grand jury investigation. *In re Grand Jury Subpoena Duces Tecum,* 167 *N.J. Super.* 471, 473 (App. Div. 1979). The representation of the prosecutor is sufficient to establish the existence and nature of the grand jury investigation. *Id.* at 472.

ii. What Privileges May Be Asserted?

(a) The Privilege Against Self-Incrimination

The other limits on the otherwise broad latitude of the grand jury's subpoena power are privileges, whether constitutional, statutory or common law. First and perhaps foremost is the Fifth Amendment privilege against self-incrimination, codified in New Jersey, not in its Constitution but in *N.J.S.A.* 2A:84A-17 and 2A:84A-19 and *New Jersey Rules of Evidence* (*N.J.R.E.)* 501, 503. Thus, if a witness is a target of the grand jury--*i.e.*, there is sufficient evidence for the grand jury to indict the witness and the prosecutor has the subjective intent to indict the witness--the target must be advised by the prosecutor in the grand jury of the witness's privilege against self-incrimination. *State v. Vinegra,* 73 *N.J.* at 488-489; *Van Hom v. City of Trenton,* 80 *N.J.* at 536 n.2. The Fifth Amendment privilege against self-incrimination is also implicated not just by testimony but by a subpoena calling for the production of documents or tangible objects. *In re Addonizio,* 53 *N.J.* at 129. Under *United States v. Doe,* 465 *U.S.* 605 (1984) and *Matter of Grand Jury Proceedings of Guarino,* 104 *N.J.* 218, 226-229 (1986), the act of producing documents was recognized as having testimonial aspects, *i.e.*, that the documents being produced are authentic documents responsive to the subpoena within the witness's possession, custody or control, and that there are no other documents otherwise responsive to the subpoena. Therefore, a testimonial subpoena or a subpoena *duces tecum* calling for the production of documents addressed to an individual may be objected to if there is a reasonable apprehension by the witness that a truthful answer may be one link in a chain of evidence which may be used by a prosecutor to inculpate the witness. *N.J.S.A.* 2A:84A-18; *N.J.R.E.* 502. Corporations, partnerships, or organizations have no Fifth Amendment rights, or rights under the New Jersey common law, *see Woodward-Clyde Consultants v. Chemical & Pollution Sciences,* 105 *N.J.* 464, 474 (1987); *Matter of Grand Jury Proceedings of Guarino,* 104 *N.J.* at 222-223.

Immunity may be granted to a witness pursuant to *N.J.S.A.* 2A:81-17.3 upon the request of the Attorney General and order of the court, or under *N.J.S.A.* 2A:81-17.2a2 (which differs markedly in its scope of protection from 2A:81:17.3). *N.J.S.A.* 2A:81-17.2a2 is applicable automatically to public employees who otherwise refuse to testify based upon a self-incrimination assertion. A grant of immunity requires the witness to testify notwithstanding an

assertion of the privilege against self-incrimination with the proviso that such testimony may not be used against the witness. *See State v. Vinegra,* 73 *N.J.* at 489; *N.J.S.A.* 2A:81-17.3.

(b) Attorney-Client Privilege

There are other privileges applicable in the grand jury context, which limit the prosecution's ability to elicit evidence. Among the most important of these privileges, also applicable in the grand jury context, is the attorney-client privilege as codified in *N.J.S.A.* 2A:84A-20 and *N.J.R.E.* 504. *See Matter of Grand Jury Subpoenas,* 241 *N.J. Super.* at 26. Like a witness asserting his or her Fifth Amendment privilege (*see In re Addonizio,* 53 *N.J.* at 116-117), the witness asserting an attorney-client privilege cannot simply refuse to appear before the grand jury, but instead must invoke this privilege on a question by question basis. *Matter of Grand Jury Subpoenas,* 241 *N.J. Super.* at 34. A notable exception to the attorney-client privilege is the so-called "crime/fraud" exception embodied in *N.J.R.E.* 504(2)(a) and discussed in *Matter of Nackson,* 114 *N.J.* 527, 535 (1989), relating to future (and not past) crimes. *Matthews v. Hoagland,* 48 *N.J. Eq.* 455, 465 (Ch. 1891).

(c) Newsperson's Privilege

Another significant privilege applicable in the grand jury context is the New Jersey Shield Law, or newsperson's privilege contained in *N.J.S.A.* 2A:84A-21 *et seq.* and Rule 508 of the New Jersey Rules of Evidence. By its terms, the privilege is applicable in any court or administrative agency proceeding and also before a petit or grand jury. This privilege, *inter alia,* allows a newsperson to refuse to disclose his or her source and the information gathered by the newsperson, *In re Schuman,* 222 *N.J. Super.* 387, 390 (App. Div. 1988), *rev'd on other grounds,* 114 *N.J.* 14 (1989), unless overcome by clear and convincing evidence that the privilege has been waived (like any other privilege, *see N.J.S.A.* 2A:84A-29; *N.J.R.E.* 530). Additionally, this privilege may be overcome if a showing is made, by a preponderance of evidence that (1) there is a reasonable probability that the subpoenaed materials are relevant, material and necessary to the defense, (2) they could not be secured from any less intrusive source, (3) the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure and (4) the request is not overbroad, oppressive or unreasonably burdensome.

(d) Spousal/Marital and Other Privileges

There is also the spousal privilege contained in *N.J.S.A.* 2A:84A-17(2); *N.J.R.E.* 501(2). This privilege prohibits a spouse from testifying in a criminal action, including a grand jury proceeding, while they are married. *State v. Mauti*, 208 *N.J.* 519, 534 (2010); *In re Vitable*, 188 *N.J. Super.* 61, 70 (App. Div.), *certif. denied,* 94 *N.J.* 506 (1983). The spousal privilege is unavailable if: 1) the spouse consents, 2) the accused is charged with an offense against the spouse, or 3) the complainant is the spouse or a child to whom the accused or the spouse stands in the place of a parent. Closely related to the spousal privilege is the marital privilege--confidential communications, contained in *N.J.S.A.* 2A:84A-22; *N.J.R.E.* 509. Under this statute, a communication made in confidence between spouses cannot be compelled unless both consent to the disclosure, or unless the communication is relevant to an issue in an action between them, or in a criminal action or proceeding, including a grand jury proceeding, *see In re Vitabile,* 188 *N.J. Super.* at 70, if either spouse consents. *State v. Mauti*, 208 *N.J.* at 533.

Other privileges applicable in the grand jury context, contained in *Rules* 501 *et seq.* of the New Jersey Rules of Evidence, are the physician/patient privilege, *N.J.S.A.* 2A:84A-22.1; *N.J.R.E.* 506; *State v. Doliner,* 96 *N.J.* at 254; psychologist/patient privilege, *N.J.S.A.* 45:14B-28; *N.J.R.E.* 505; *Doliner*, 96 *N.J.* at 54; and cleric/penitent privilege, *N.J.S.A.* 2A:84A-23; *N.J.R.E.* 511. Other potentially applicable privileges include attorney work product, *see State v. Weston,* 216 *N.J. Super.* 543 (Law Div. 1986), as well as the Speech and Debate Clause of the New Jersey Constitution, Article 11, section 4, paragraph 9. *See State v. Township of Lyndhurst,* 278 *N.J. Super.* 192, 200, 201 (Ch. Div. 1994).

b. Indictment

An indictment may be found only upon the concurrence of twelve or more jurors. *State v. Ciba-Geigy,* 222 *N.J. Super.* at 351; *State v. Reynolds,* 166 *N.J. Super.* at 572; *R.* 3:6-8. It is solely entrusted to the grand jury whether or not to indict, depending upon whether a *prima facie* case of a violation of a criminal statute has been made out. *Trap Rock Industries, Inc. v. Kohl,* 59 *N.J.* 471, 487 (1971), *cert. denied*, 405 *U.S.* 1065 (1972). The standard is whether there is "evidence, which if unexplained or uncontradicted, would carry the case to a jury and justify the conviction of the accused." *Id.* The indictment is returned in open court to the Assignment Judge, or in the absence of the Assignment Judge, to any Superior Court Law Division Judge in

the county. *R.* 3:6-8(a). *See* Forms 2 and 3, Sample Indictments. If there is no bill found--that is, if the grand jury refuses to indict--that fact must be reported by the foreperson in writing to the court if a criminal complaint has been previously filed against the defendant, so that the individual, if previously detained, may be released. *R.* 3:6-8(b).

There is a presumption of regularity that attaches to the grand jury's proceedings. *State v. New Jersey Trade Waste Ass'n,* 96 *N.J.* 8, 19 (1984); *State v. Hill,* 166 *N.J. Super.* 224, 228-229 (Law Div. 1978), *rev'd on other grounds,* 170 *N.J. Super.* 485 (App. Div. 1979); *State v. Graziani,* 60 *N.J. Super.* at 22. An indictment must allege each essential element of the offense so that there is an assurance that the grand jury considered each element of the offense. *State v. LeFurge,* 101 *N.J.* 404, 418 (1986); *State v. Wein,* 80 *N.J.* 491, 497 (1979); *State v. Federico,* 198 *N.J. Super.* 120, 130 (App. Div. 1984), *aff'd,* 103 *N.J.* 169 (1986). Similarly, there must be at least "some evidence" as to each element of a prima facie case. *State v. Bennett,* 194 *N.J. Super.* 231, 234 (App. Div. 1984); *State v. Hill,* 166 *N.J. Super.* at 228-229.

The indictment may be based largely or wholly on hearsay and other evidence which may not be legally competent or admissible at trial. *State v. Schmidt,* 213 *N.J. Super.* 576, 584 (App. Div. 1986) *rev'd. on other grounds,* 110 *N.J.* 258 (1988); *State v. Bennett,* 194 *N.J. Super.* at 234. Moreover, a second indictment may be sought after a first grand jury refused to indict or after a judge dismisses or quashes an indictment prior to, at least, the empaneling of a jury to try the indictment. *State v. Jones,* 183 *N.J. Super.* 172,178 (App. Div. 1982). Once again, the only apparent limitation on this discretion is prosecutorial retaliation. *State v. Long,* 119 *N.J.* 439, 465- 467 (1990); *State v. Buckrham,* 173 *N.J. Super.* 87, 89-90 (App. Div. 1980).

In short, once the grand jury has returned an indictment, the indictment should not be dismissed except on the "clearest and plainest ground." *State v. Perry,* 124 *N.J.* 128, 168 (1991), and only when the indictment is manifestly deficient or palpably defective. *State v. Hogan,* 144 *N.J.* at 229. The decision whether to dismiss an indictment is within the sound discretion of the trial court, *State v. McCrary,* 97 *N.J.* 132, 144 (1984), which determination will not be disturbed on appeal unless the trial court clearly abused its discretion. *State v. Hogan,* 144 *N.J.* at 229.

c. Presentments

As noted above, the grand jury's powers are not limited to returning indictments. Rather, the grand jury may return a presentment on conditions of public interest even though no violation

of any penal statute has been found. *In re Addonizio,* 53 *N.J.* at 124; *R.* 3:6-9. A presentment, like an indictment, requires the concurrence of at least twelve jurors. *R.* 3:6-9(a). A public official may be named in the presentment only where that public official is intimately and inescapably associated with the public affairs or conditions being condemned in the presentment. *R.* 3:6-9(a).

The presentment, like an indictment, is returned in open court to the Assignment Judge. *R.* 3:6-9(b). The Assignment Judge must promptly examine the presentment before the grand jury is discharged to ascertain if any crime has been committed for which an indictment may be voted, and, if so, the Assignment Judge must remand to the grand jury the presentment, along with appropriate instructions. *See In re Essex County Grand Jury,* 46 *N.J.* 467, 471 (1966); *Matter of Investigation into Hamilton Township Board of Education,* 205 *N.J. Super.* 248 (App. Div. 1985); *R.* 3:6-9(c). Moreover, if the presentment censures a public official, it is incumbent upon the Assignment Judge to scrutinize the presentment to ensure that the censured public official is conclusively proven to have failed to discharge his or her public duty in a noncriminal fashion. The Assignment Judge has the right to strike the presentment in whole or in part if it appears that the presentment: 1) is false, 2) is based on partisan motives, 3) indulges in personalities, 4) is without bases, or 5) should be stricken for other good cause. *R.* 3:6-9(c); *Hamilton Township Board of Education,* 205 *N.J. Super.* at 249. If the Judge decides not to strike a presentment censuring a public official, a copy of the presentment must be served forthwith upon the public official to afford the official an opportunity to move for a hearing. *Id.* Such portions of a presentment that are not stricken are filed and made public.

6. Waiver of Indictment

Like most rights, the right to an indictment may be waived by a defendant. Typically, the right to indictment is waived by a defendant in conjunction with a pre-indictment plea bargain, in which a defendant agrees to plead guilty to an accusation. The waiver usually must be in writing signed by a defendant. *R.* 3:7-2; *State v. Wagner,* 180 *N.J. Super.* 564, 568 (App. Div. 1981). However, in *State v. Ciuffreda,* 127 *N.J.* 73, 81-82 (1992) and *State v. Battle,* 256 *N.J. Super.* 268, 281-283 (App. Div.), *certif. den.,* 130 *N.J.* 393 (1992), the courts, while reaffirming *Wagner,* held that waiver of indictment may be implied to sustain a defendant's conviction on a

lesser related charge, although not technically a lesser-included charge, where the defense either requests or consents to a jury instruction on that lesser charge.

If indictment is waived, further proceedings are based upon an accusation. *R.* 3:7-2. An accusation is a charging document, like an indictment, but one which is prepared solely by the prosecuting attorney and never presented to a grand jury. *Id.*

7. Form of Indictment or Accusation

The rules governing the form of an indictment or accusation are the same, and are contained in *R.* 3:7-3. An indictment or accusation must contain a written statement of the essential facts constituting the crime charged. Both an indictment and an accusation are required to be signed by the prosecuting attorney, and must recite the specific statute(s) allegedly violated. Neither one necessarily must contain a formal commencement. There are special requirements set forth in *R.* 3:7-3(b) for an indictment charging a defendant with murder. No more than one offense may be charged in a single count of an indictment. *State v. McDougald,* 120 *N.J.* 523, 563 (1990); *State v. New Jersey Trade Waste Ass'n.,* 96 *N.J.* at 21.

Surplusage in the indictment or accusation may be stricken by the court on a defendant's motion. *R.* 3:7-3(a); *State v. Salaam,* 225 *N.J. Super.* 66, 73 (App. Div. 1988). Finally, an indictment or accusation may be amended to correct an error in form or description of the crime intended to be charged, or to charge a lesser-included defense, provided that the amendment does not charge an offense separate or different from that alleged, and the defendant will not be prejudiced thereby in his or her defense on the merits. *R.* 3:7-4; *State v. Batt,* 53 *N.J.* 391, 402-403 (1969). Thus, pursuant to this rule, amendment is permissible when a nonessential specification of the allegation is implicated, *see State v. J.S.,* 222 *N.J. Super.* 247, 257-258 (App. Div.), *certif. denied,* 111 *N.J.* 588 (1988), but not when the proposed amendment goes to the substance of the offense, *see State v. Graham,* 223 *N.J. Super.* 571, 577 (App. Div. I988) or charges a more serious offense. *State v. Koch,* 161 *N.J. Super.* 63, 66 (App. Div. 1988).

E. Arrest and Bail

Often, a defense attorney's first contact with his or her client is after the client has been arrested. The question that inevitably arises at this stage is how the client ended up in this situation.

Arrests may be made either on the basis of a warrant, or without a warrant. In either case, there is a prerequisite of probable cause, which must be found by a judicial officer, as required by the Fourth Amendment and by Article I, paragraph 7 of the New Jersey Constitution. *Giordenello v. United States*, 357 *U.S.* 480, 485-486 (1958); *State v. Sims*, 75 *N.J.* 337, 353 (1978); *State v. Cullars*, 224 *N.J. Super.* 32, 37-38 (App. Div.), *certif. denied*, 111 *N.J.* 605 (1988); *R.* 3:3-1. Probable cause to arrest an individual "is something less than proof needed to convict and something more than raw, unsupported suspicion." *State v. Davis*, 50 *N.J.* 16, 23-24 (1967), *cert. denied*, 389 *U.S.* 1054 (1968). *See also State v. Waltz*, 61 *N.J.* 83, 87 (1972). It is generally defined as "a well grounded suspicion or belief on that part of the...arresting officer that a crime has been committed." *State v. Burnett*, 42 *N.J.* 377, 387 (1964); *State v. Guerrero*, 232 *N.J. Super.* 507, 511 (App. Div. 1989). *See also State v. Moskal*, 246 *N.J. Super.* 12, 21 (App. Div. 1991). Phrased differently, the formulation of probable cause to arrest is as follows: "[p]robable cause exists where the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Sims*, 75 *N.J.* at 354, quoting from *Draper v. United States*, 358 *U.S.* 307, 313 (1959). Hearsay is admissible in support of this probable cause determination, including reliance upon informant information, but the hearsay information must be shown to be objectively trustworthy and reliable under all the circumstances. *Illinois v. Gates*, 462 *U.S.* 213, 238 (1983); *Jones v. United States*, 362 *U.S.* 257, 269 (1960); *State v. Lewis*, 116 *N.J.* 477, 486 (1989); *State v. Novembrino*, 105 *N.J.* 95, 121-122 (1987). The determination of probable cause to arrest is not necessarily the same as the probable cause needed for issuance of a search warrant. *State v. Chippero (II)*, 201 N.J. 14, 27-29 (2009).

1. Arrest Warrants and Criminal Summonses

a. Who May Issue?

An arrest warrant can only be issued by a judge, clerk or deputy clerk, municipal court administrator or deputy court administrator. *N.J.S.A.* 2A:8-27; *R.* 3:2-3; *State v. Ruotolo*, 52 *N.J.* 508, 512, 515 (1968). In contrast to a summons, a law enforcement officer may not issue an arrest warrant. *Gerstein v. Pugh*, 420 *U.S.* 103, 119, 125 n.26 (1975); *Wong Sun v. United*

States, 371 *U.S.* 471, 481-482 (1963); *Johnson v. United States*, 333 *U.S.* 10, 13-14, 17 (1948); *State v. Gonzalez*, 114 *N.J.* 592, 605 (1989); *R.* 3:3-1(a); *R.* 3:2-2. An arrest warrant is executed by the arrest of the defendant. *R.* 3:3-3. A summons, in contrast, is served like a summons and complaint in a civil matter in accordance with *R.* 4:4-4. *R.* 3:3-3(d). *State v. Kenison*, 248 *N.J. Super.* 189, 194, 209 (Law Div. 1990), *affd o.b.*, 248 *N.J. Super.* 126 (App. Div. 1991).

An arrest warrant may be issued by the criminal division manager of the county clerk's office upon the return of an indictment, *R.* 3:7-8, as there already has been a probable cause determination made by a grand jury. An arrest warrant also may be issued upon the filing of an accusation. *Id.*

b. Arrest Warrant or Summons?

R. 3:3-1(b) sets forth various factors to be considered by a judicial officer in determining whether a summons or arrest warrant should be issued. The rule provides (*R.* 3:3-1(b)(6)) that a summons rather than an arrest warrant shall be issued if the defendant is a corporation. *R.* 3:3-1(b) also articulates a preference for the issuance of a summons for an individual defendant's appearance, rather than an arrest warrant, unless the judicial officer finds one or more of six factors:

(l) The defendant is charged with murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, arson, burglary, first or second degree controlled dangerous substance crimes, any crime involving the use or possession of a firearm, or any conspiracy or attempt to commit any of these crimes;

(2) The defendant has failed to respond to a summons;

(3) The judicial officer has reason to believe that the defendant is dangerous to himself or herself, others, or property;

(4) There is an outstanding warrant for the defendant;

(5) The defendant's address is unknown and an arrest warrant is necessary to subject the defendant to the court's jurisdiction; or

(6) The judicial officer has reason to believe that the defendant will not appear in response to a summons.

In *State v. Dangeifield,* 171 N.J. at 460, the Supreme Court reiterated that *N.J.S.A.* 40A:14-152 authorizes municipal police officers, in their discretion, to arrest any "disorderly person" (including a petty disorderly offender), who commits such an offense in the presence of the arresting officer.

An attorney representing a defendant should request the prosecutor's agreement not to arrest the defendant. In this manner, the defendant can avoid the potential public humiliation of an arrest, and also the possibility of a "confession" in response to police interrogation. A prosecutor often will agree to this request, in order to avoid the expenditure of manpower to effect an arrest, provided that there is no basis for believing a defendant is dangerous or poses a flight risk.

Pursuant to the United States Supreme Court's interpretation of the Fourth Amendment, as made applicable to the states by the Fourteenth Amendment, the police must obtain an arrest warrant before entering a suspect's home to search for and arrest a suspect unless there are exigent circumstances present. *Payton v. New York,* 445 *U.S.* 573, 576, 583 (1980). The New Jersey Supreme Court has interpreted New Jersey's constitution in a similar manner. *State v. Hutchins,* 116 *N.J.* 457, 463 (1989). The police have the right, acting pursuant to a valid arrest warrant, to follow a fleeing suspect into a private residence, regardless of whether the police know the underlying offense for which the warrant was issued and regardless of whether the underlying offense is a major or minor one (such as a disorderly person or petty disorderly person offense versus a motor vehicle offense). *State v. Jones,* 143 *N.J.* 4, 14, 19 (1995). Some examples of exigent circumstances justifying warrantless entries into a suspect's home are where: (1) police are in hot pursuit of a fleeing felon posing a serious threat to public safety, *see Warden v. Hayden,* 387 *U.S.* 294, 298-299 (1967); *State v. Bolte,* 115 *N.J.* 579, 592-593, *cert. denied,* 493 *U.S.* 939 (1989) (2) other exigent circumstances are present, *see Welsh v. Wisconsin,* 466 *U.S.* 740, 749 (1984); *Dorman v. United States,* 435 *F.2d* 385, 392-93 (D.C. Cir. 1970) (enumerating several factors, including: a crime of violence, suspect reasonably believed to be armed, a clear showing of probable cause to arrest, a strong reason to believe that the suspect is in the premises, the likelihood that the suspect would escape if not swiftly apprehended, and the entry and search are made peaceably), or (3) there is a "buy/bust", as described in *State v. Henry,*

133 *N.J.* 104, *cert. den.* 510 *U.S.* 984, 114 *S.Ct.* 486, 126 *L.Ed.2d* 436 (1993) (upholding warrantless entry of residence to arrest persons who just sold drugs to an undercover police officer who, upon learning where the residence was, told other officers about the sale), or a drug offense involving the potential destruction of evidence. *United States v. Santana*, 427 *U.S.* 38, 43 (1976); *State v. Hutchins,* 116 *N.J.* at 467, n.l. Note that where a complaint alleges an indictable offense, the complaint and all available investigative reports must be forwarded to the prosecutor and the criminal division manager's office within 48 hours of filing. *R.* 3:2-1(b).

c. Complaints by Private Citizens

An arrest warrant or a summons may issue on a complaint lodged by a private citizen only upon a finding by a judicial officer, endorsed on the face of the warrant, that there is probable cause to believe that an offense has been committed and that the defendant has committed it. *R.* 3:3-1(a); *State v. Ross,* 189 *N.J. Super.* 67, 74 (App. Div. 1983). If a clerk, deputy clerk, municipal court administrator or deputy court administrator finds that no probable cause exists to issue an arrest warrant or summons, that determination must be reviewed by a judge after notice is given to the complainant, defendant, and the appropriate prosecuting agency. *R.* 3:3-1(f). As previously noted, if, after judicial review, the judge finds no probable cause, the judge must dismiss the complaint. *Id.*

d. Procedure and Form for Arrest Warrants and Summonses

The finding of probable cause necessary for the issuance of an arrest warrant is predicated upon the sworn complaint, statement or testimony of the complainant or a police officer, *R.* 3:3-1(a), which must be sworn to before the judicial officer. *See State v. Bobo,* 222 *N.J. Super.* 30, 33- 34 (App. Div. 1987). Whether a summons or warrant is issued, a defendant who appears must undergo the identification procedures required by *N.J.S.A.* 53:1-15. *R.* 3:3-1(e); *R.* 3:7-8. These procedures include fingerprinting (in the case of indictable offenses only, and not disorderly conduct, a traffic offense or an ordinance violation, *N.J.S.A.* 53:1-15; *State v. Conners,* 129 *N.J. Super.* 476, 481-482 (App. Div. 1974)) and photographing by the county sheriff’s office or state police. The warrant and the summons both must contain the defendant's name, or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. *R.* 3:2-3; *R.* 3:7-9. An arrest warrant is directed to

any officer authorized to execute it, and orders that the defendant be arrested and brought before the court that issued the warrant. *R.* 3:2-3; *R.* 3:7-9. Conditions of pretrial release already set by the court are to be endorsed on the face of the warrant. *R.* 3:7-9.

A summons is in the same form as an arrest warrant except that it is directed to the defendant and requires the defendant to appear before the court at a stated time and place. *R.* 3:2-2; *R.* 3:7-9. The summons must also state that if a defendant fails to appear at the stated time and place, a warrant for the defendant's arrest will be issued. *R.* 3:2-2; *R.* 3:7-9.

Any technical deficiency or irregularity in the warrant or arrest does not result in the discharge of the person arrested or appearing in response to the summons. Rather, an irregular or insufficient arrest warrant or summons may be amended. *R.* 3:3-4(a). Such a deficient warrant or summons also may be superseded by a new warrant or summons prior to or during the probable cause hearing if: (1) the document does not properly identify or describe the defendant, (2) the document does not properly identify the offense with which the defendant is charged, or (3) there are reasonable grounds to believe that the defendant, while not guilty of the offense specified in the warrant or summons, is guilty of some other offense.

e. Material Witness Orders

Finally, it is not only a defendant who may be arrested. *N.J.S.A.* 2C:104-1 *et seq.* sets forth criteria for the issuance of a material witness order by which a "material witness"---defined in 2C:104-1 as "a person who has information material to the prosecution or defense of a crime" --may be detained. To obtain such an order, the applicant must demonstrate probable cause to believe that: (1) the person has information material to the prosecution or defense of a pending criminal charge or grand jury investigation; and (2) the person is unlikely to respond to a subpoena. *N.J.S.A.* 2C:104-2(a); *R.* 3:26-3(b); *State v. Mesik*, 238 *N.J. Super.* 367, 385-386 (Law Div. 1989). The application may be accompanied by an application for an arrest warrant when there is probable cause to believe that the person will not appear at the material witness hearing. *Id.*

A warrantless arrest of an alleged material witness may take place only prior to the filing of the criminal charge or the initiation of the grand jury investigation, and the law enforcement officer has probable cause to believe that the alleged material witness has information material to a crime which has been committed, that the alleged material witness will refuse to cooperate with

the officer in the investigation of the crime, and that any delay necessary to obtain an arrest warrant or order to appear would result in the unavailability of the alleged material witness. *N.J.S.A.* 2C:104-5(a). An alleged material witness arrested without a warrant must be taken immediately to a judge, who must determine that there is probable cause to believe that the arrested individual is a material witness and, if criminal charges have not yet been filed, that such charges will be filed or a grand jury investigation will commence within 48 hours of the arrest. *N.J.S.A.* 2C:104-6(b). If such a showing is made, then the witness is held over for a material witness hearing, just as if the witness had been arrested on a warrant, *id.*, unless conditions for release are set. *N.J.S.A.* 2C:104-4. An individual should be released unless there is "clear and convincing evidence that the person will not be available as a witness unless confined." *N.J.S.A.* 2C:104-4(c).

At the material witness hearing, the witness is entitled to be represented by counsel. Counsel will be appointed if the witness cannot afford counsel. Additionally, the witness has the right to be heard and to present witnesses and evidence, to confront and cross-examine witnesses, and to have all of the evidence considered by the court in support of the application. *N.J.S.A.* 2C:104-6; *R.* 3:26-3(e). This hearing must take place within 48 hours of an arrest, *N.J.S.A.* 2C:104-6, or at least upon 48 hours' notice in the case of an order to appear. *N.J.S.A.* 2C:104-3(b).

An individual determined to be a material witness is entitled to the least restrictive conditions necessary to effectuate the witness's appearance. *N.J.S.A.* 2C:104-7(b); *R.* 3:26-3(f). If the judge finds by clear and convincing evidence that confinement is the only method that will ensure the appearance of the material witness, *N.J.S.A.* 2C:104-6(c), then the witness may be confined not in a jail or prison, but "in comfortable quarters and served ordinary food." *N.J.S.A.* 2C:104-7(a). The party obtaining the material witness order (unless that party is indigent) must bear the costs of confinement, which are at least $40 per day to the witness (and potentially more, up to the actual financial loss, if a judge finds that the interest of justice requires it). *N.J.S.A.* 2C:104-7(c).

A material witness order is a final order for purposes of appeal, but may be reconsidered at any time by the court which entered the order. *N.J.S.A.* 2C:104-9. Finally, a material witness may apply to the Superior Court for an order directing that a deposition be taken to preserve the witness's testimony. *N.J.S.A.* 2C:104-8. If a deposition is taken, the judge thereafter must vacate

the terms of confinement of the material witness and impose the least restrictive conditions to secure the appearance of the material witness at future proceedings. *Id.; R.* 3:26-4(g).

2. Warrantless Arrests

Whether a defendant has been legally arrested is often determinative of such other issues such as the legitimacy of a search incident to an arrest, *see State v. Sims,* 75 *N.J.* at 352, or the admissibility of a confession obtained through custodial interrogation. *See State v. Warlock,* 117 *N.J.* 596, 621 (1990). A warrantless arrest requires probable cause and an intent by the officer(s) to arrest based upon the information then available prior to the arrest and any subsequent police action. *State v. Ercolano,* 79 *N.J.* 25, 39 (1979); *State v. Sims,* 75 *N.J.* at 353. *See also State v. Hutchins,* 43 *N.J.* 85, 101 (1964). A valid warrantless arrest supported by probable cause is not ordinarily illegal simply because a warrant could have been obtained or because there is a reasonable delay between the arising of probable cause and the arrest. *State v. Henry,* 133 *N.J.* at 111; *State v. Doyle,* 42 *N.J.* 334, 343 (1964). In addition, an illegal arrest will not, standing alone, bar a subsequent charge, trial and conviction. *United States v. Crews,* 445 *U.S.* 463, 471 (1980); *State v. Smith,* 43 *N.J.* 67, 74 (1964), *cert. denied,* 379 *U.S.* 1005 (1965); *State v. Hyman,* 236 *N.J. Super.* 298, 301 (App. Div. 1989); *State v. Mulcahy,* 202 *N.J. Super.* 398, 404-405 (App. Div. 1985), *aff'd in part and rev'd in part on other grounds,* 107 *N.J.* 467 (1987). Felony arrests made in public places and supported by probable cause can be valid without a warrant. *United States v. Watson,* 423 *U.S.* 411, 417 (1976); *State v. Brown,* 205 *N.J.* 133, 145 (2011).

However, the New Jersey Supreme Court decided in *State v. Pierce,* 136 *N.J.* 184 (1994), that a mere traffic violation committed in the presence of a police officer, with no imminent threat to the public's safety, was an insufficient basis for an arrest (and subsequent search) where a summons would suffice. Similarly, a warrantless arrest for the violation of a disorderly persons statute or municipal ordinance, even if committed in the presence of a police officer, can only take place if the offense constitutes "a breach of the peace." *State v. Hurtardo,* 219 *N.J. Super.* 12 (App. Div. 1987), *rev'd on dissent below,* 113 *N.J.* 1 (1988); *N.J.S.A.* 40A:14-152. Thus, in *Hurtardo,* the Supreme Court agreed with Judge Skillman's dissenting opinion in the Appellate Division that littering did not constitute such a breach of the peace.

3. Street Interrogation/Investigative Stops

a. Street Interrogation

In *State v. Sheffield,* 62 *N.J.* 441, *cert. denied,* 414 *U.S.* 876 (1973), the New Jersey Supreme Court held that "street interrogation" or "field interrogation," where a police officer simply addresses questions to a person on the street, without more, does not involve "detention" (and thus a seizure) in the constitutional sense. Thus, a police officer, acting in a non-harassing, non-overbearing or non-confrontational manner, may question someone without a predicate of probable cause or even reasonable suspicion of criminal activity. *State v. Sheffield,* 62 *N.J.* at 446-447. *See also State v. Davis,* 104 *N.J.* 490, 497 n.6 (1986). However, the person stopped is not obliged to answer, answers may not be compelled, and a refusal to answer furnishes no basis for an arrest, although it may warrant further observation by the officer. *Florida v. Royer,* 460 *U.S.* 491, 497 (1983); *State v. Sheffield,* 62 *N.J.* at 446 (quoting from the concurring opinion of Mr. Justice White in *Terry v. Ohio,* 392 *U.S.* 1, 34 (1968)); *State v. Zito,* 54 *N.J.* 206, 215, 219-220 (1969).

In its landmark 2001 decision, the New Jersey Supreme Court, in *State v. Maryland,* 167 *N.J.* 471, 485 (2001), held that an individual may not be selected for a field inquiry based solely upon his or her race.

b. Investigatory Stops

The line between field interrogation and an investigatory stop is often blurred. Nevertheless, if a police officer accosts an individual and restrains that individual's freedom to walk away, there is a "seizure" of that person under the Fourth Amendment, and Article I, paragraph 7 of the New Jersey Constitution. *See Terry v. Ohio,* 392 *U.S.* at 16; *State v. Davis,* 104 *N.J.* at 498. The test is whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 *U.S.* 544, 554 (1980); *State v. Davis,* 104 *N.J.* at 498. Thus, the gravamen of an arrest is the restraint of a defendant's person and the restriction of his or her liberty of movement by the arresting officer. *State v. Doyle,* 42 *N.J.* 334, 343 (1964); *State v. Judge,* 275 *N.J. Super.* 194, 203 (App. Div. 1994).

In *Terry,* 392 *U.S.* at 4, as expounded upon subsequently in *United States v. Cortez,* 449 *U.S.* 411 (1981), the United States Supreme Court allowed a brief investigative seizure upon a showing less than probable cause. The standard authorizing such a stop is as follows:

> An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize the police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances - the whole picture - must be taken into account. Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

United States v. Cortez, 449 *U.S.* at 417-418. The *Cortez* case adopted a two-step analysis for determining whether the totality of circumstances creates a "particularized suspicion," a test which was adopted by the New Jersey Supreme Court in *State v. Davis,* 104 *N.J.* at 501, 504. Under this test, a court first must consider the officer's objective observations, and then whether the evidence "raise[s] a suspicion that the particular individual being stopped is engaged in wrongdoing." *United States v. Cortez,* 449 *U.S.* at 418; *State v. Davis,* 104 *N.J.* at 501.

An investigative stop must be temporary and may last no longer than necessary to effectuate the purpose of the stop. *Florida v. Royer,* 460 *U.S.* at 500; *State v. Davis,* 104 *N.J.* at 502. Additionally, the investigative efforts utilized by the police should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Florida v. Royer,* 460 *U.S.* at 500; *State v. Davis,* 104 *N.J.* at 502, 504. An investigative stop may lead to a so-called *Terry* search - a frisk of the outer clothing of a suspect to ascertain if the suspect is armed. *Terry v. Ohio,* 392 *U.S.* at 30-31; *State v. Davis,* 104 *N.J.* at 500 n.7. This *"Terry* frisk" is a protective search for weapons, which may take place only if a reasonable person, under the totality of circumstances, would believe that the suspect is armed and dangerous. *State v. Valentine,* 134 *N.J.* 536, 543 (1994); *State v. Lund,* 119 *N.J.* 35, 45 (1990);

State v. Thomas, 110 *N.J.* at 678-679. Where the totality of the circumstances creates an objectively reasonable concern for the officer's safety, retrieving the contents of a bulge from defendant's person is constitutionally permissible. *State v. Roach,* 172 N.J. 19, 29 (2002).

c. Sobriety Checkpoints

Often, police establish roadblocks, checkpoints or most frequently sobriety checkpoints. The constitutional validity of these checkpoints that meet certain guidelines was upheld in *Michigan Department of State Police v. Sitz,* 496 *U.S.* 444, 449-453 (1990) on federal constitutional grounds and in *State v. Kirk,* 202 *N.J. Super.* 28 (App. Div. 1985) on state constitutional grounds. In *Kirk,* the Appellate Division set forth the following general guidelines for determining the constitutional validity of a sobriety checkpoint:

> If the roadblock was established by a command or supervisory authority and was carefully targeted to a designated area at a specified time and place based on data justifying the site selection for reasons of public safety and reasonable efficacious or productive law enforcement goals, the road block will likely pass constitutional muster. Other factors which enhanced judicial approval were: (1) adequate warnings to avoid frightening the traveling public; (2) advance general publicity designed to deter drunken drivers from getting in cars in the first place; and (3) officially specified neutral and courteous procedures for the intercepting officers to follow when stopping drivers.

Kirk, 202 *N.J. Super.* at 40-41. *Accord, State v. Moskal,* 246 *N.J. Super.* at 15. *See also State v. Kadelak,* 280 *N.J. Super.* 349, 375 (App. Div. 1995) (upholding constitutionality of random roadside inspection safety checks).

The *Kirk* factors were endorsed by the New Jersey Supreme Court in *State v. Carty,* 170 *N.J.* 632, 652-53 (2002). Note that in *State v. Segars,* 172 *N.J.* 481, 490, 493 (2002), the New Jersey Supreme Court held that a Mobile Data Terminal (MDT) check of automobile license plates must not be based on impermissible motives, such as race, and evidence resulting from a stop based on improper use of an MDT should be suppressed.

4. Bail

Pursuant to Article I, paragraph 11 of the New Jersey Constitution, all persons charged with a crime cannot simply be jailed pretrial. Rather, every defendant, except one charged with a capital offense (for which the death penalty may be imposed) is entitled to bail before conviction "when the proof is evident or presumption great." This provision is substantially incorporated in *R.* 3:26-1, which echoes the "general policy against unnecessary sureties and detention." Article I, paragraph 12 of the New Jersey Constitution, paralleling the Eighth Amendment of the United States Constitution provides, *inter alia,* that "excessive bail shall not be required."

In *State v. Johnson,* 61 *N.J.* 351 (1972), the New Jersey Supreme Court set forth eight factors which must be considered by a court in setting bail. These factors are as follows: (1) the seriousness of the crime charged against the defendant, the apparent likelihood of conviction and the potential sentence; (2) the defendant's criminal record, if any; (3) the defendant's reputation and mental condition; (4) the length of the defendant's residence in the community; (5) the defendant's family ties and relationships; (6) the defendant's employment status, record of employment and financial condition; (7) the existence and identity of responsible community members who would vouch for the defendant's reliability; and (8) any other facts indicating the defendant's mode of life or ties to the community, or bearing on the risk of failure to appear. *State v. Johnson,* 61 *N.J.* at 365. Of course, the operative determination is what conditions best will insure the defendant's presence in court when required. *R.* 3:26-1(a). Money bail may not be used to protect the community by preventing release. *State v. Steele,* 430 *N.J. Super.* 24, 35 (App. Div. 2013). The sole purpose of monetary conditions is to assure the defendant's appearance. *State v. Korecky,* 169 *N.J.* 354, 359-360 (2001). To address concerns about community safety, the court may impose reasonable non-monetary conditions. *Steele,* 430 *N.J. Super.* at 36, *R.* 2:26-1(a). A court may order the release on a person's own recognizance ("ROR") or may impose other terms or conditions appropriate to this release.

Under *N.J.S.A.* 2C:6-1, a defendant charged with a fourth degree crime, a disorderly persons offense or a petty disorderly persons offense cannot be compelled to post bail in an amount exceeding $2,500.00 unless the court finds that the defendant poses a serious threat to the physical safety of potential evidence or persons involved in the alleged offense. If the court makes such a determination, for good cause, the bail amount for a defendant charged with these offenses may be in excess of $2,500.00

a. When Is Bail Set

Initial bail is set either: (a) when an arrest warrant is first obtained, *R.* 3:4-1(a); *R.* 3:7-9; (b) if no bail was set when an arrest warrant on a complaint issued, then "without unnecessary delay but never later than 12 hours after arrest, *R.* 3:4-1; or (c) in the case of a warrantless arrest, after the ensuing immediate preparation of a complaint and a finding of probable cause by a judicial officer, charging any crime enumerated in *R.* 3:3-1(b)(l) and *R.* 3:4-1(b)(l) (*i.e.*, murder, kidnapping, robbery, assault and aggravated assault, first or second degree controlled dangerous substance crimes, crimes involving the use or possession of a firearm, *etc.*), "without unnecessary delay, but in no event later than 12 hours after arrest"; (d) in the case of a warrantless arrest for an offense other than those enumerated above and where the law enforcement officer and the judicial officer determine that a warrant is necessary, using the same criteria as previously enunciated in the context of *R.* 3:3-1(b), again "without unnecessary delay but in no event later than 12 hours after arrest."

If a summons has been issued on the basis of a complaint, whether before or after arrest, and based upon either the law enforcement officer's initial determination or the judicial officer's determination, the defendant is released upon the service of the complaint. *R.* 3:4-l(b)(3).

b. Form of Bail

Bail may be posted either in the form of a bond, cash, or real estate. *R.* 3:26-4. Any bail bond must comply with the provisions of *R.* 1:13-3(b), requiring the principal and surety to submit to the court's jurisdiction, irrevocably appointing the court clerk as their agent for service of process (including any action to determine liability of the principal and/or surety), waiving any jury trial right and allowing a proceeding regarding their liability to take place by way of a motion in lieu of independent action.

If real property is posted, the original deed must be surrendered to the clerk of the county in which the offense occurred, and the property must have equity equal to or greater than the amount of the bail. *R.* 3:26-4(a). Note that under a 1994 statute, *N.J.S.A.* 2A:162-12, when the defendant is charged with a crime with "bail restrictions" as enumerated in the statute (including most first or second degree crimes), the unencumbered equity of the real property posted to secure bail must equal the amount of bail plus $20,000. *N.J.S.A.* 2A:163-12(b)(3).

Bail must also be satisfied by the posting of cash. In most counties, there is in place a 10% cash alternative program. Under the program, unless the crime is one of those enumerated in *N.J.S.A.* 2A:162-12(a), discussed above, or unless the judge specifies otherwise, bail may be satisfied by the deposit of ten percent of the amount of bail fixed and defendant's execution of a recognizance for the remaining ninety percent. *R.* 3:26-4(g). While a judge may rule that the ten percent cash bail is insufficient security, *see State v. Casavina,* 163 *N.J. Super.* 27, 29-31 (App. Div. 1978), it is improper for the court, in considering the amount of bail, to refer to the ten percent rather than to the full amount. *See State v. McNeil, 154 N.J. Super.* 479, 481 (App. Div. 1977). If the cash posted is owned by someone other than the defendant, no fee other than interest may be charged, and the person must submit an affidavit so stating, listing any other persons for whom the owner has posted bail, and swearing to the lawful ownership of the money. *R.* 3:26-4(g). A person other than the defendant posting the ten percent bail is not liable for the remaining ninety percent if the defendant fails to appear when required. *State v. Singleton,* 182 *N.J. Super.* 87, 89 (App. Div. 1981).

Defense counsel are strongly advised to in tum warn their clients about the importance of future appearances for all scheduled court events. In addition to risking the forfeiture of his or her bail if he or she does not show up, *R.* 3:26-6, a defendant also faces potential charges for bail jumping under *N.J.S.A.* 2C:29-7 and possible contempt charges under *N.J.S.A.* 2C:29-9.

c. Defendant's Presence

The defendant must be present for every pretrial scheduled event unless his or her attendance is excused by the court for good cause shown. *R.* 3:16(a). Indeed, an essential element of a defendant's Confrontation Clause rights under the Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution is the right of the accused to be present in the courtroom at every stage of the trial. *Illinois v. Allen,* 397 *U.S.* 337, 338 (1970); *State v. WA.,* 184 N.J. 45, 60 (2005); *State v. Hudson,* 119 *N.J.* 165, 171 (1990). Accordingly, the defendant must be present at every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, unless the defendant has waived appearance. *R.* 3:16(b); *State v. Hudson,* 119 *N.J.* at 182. A waiver may be found from (a) the defendant's express written or oral waiver placed on the record, or (b) the defendant's knowing, voluntary and unjustified absence after (1) the defendant has received actual notice in

court of the trial date, or (2) trial has already commenced with the defendant in attendance. *R.* 3:16(b). *State v. Grenci*, 197 N.J. 604, 617 (2009). The State does not have the burden of proving that the defendant's absence is voluntary when the defendant simply does not return to court after the first day of trial. *State v. Lynch*, 177 *N.J. Super*. 107, 113-114 (App. Div.), *certif. den.*, 87 *N.J.* 347 (1981). *See also State v. Butler*, 278 *N.J. Super*. 93, 101 (App. Div. 1994) (defendant's knowledge of trial date and failure to appear justifies inference of waiver of right to be present). Similarly, a defendant may be tried and convicted after he or she fails to appear despite being given actual notice at a pretrial conference of the time, date and place of his or her trial and being warned that he or she could be tried in absentia if he or she fails to appear. *State v. Finklea*, 147 *N.J.* 21, 218-220 (1996).

II. DEFENSE COUNSEL AND THE COMMENCEMENT OF ADVERSARY JUDICIAL PROCEEDINGS

By the time criminal defense counsel arrives on the scene, the police and/or prosecutor typically have had a considerable head start. Often, the State's investigation has been completed, and the defense counsel may become involved with the case for the first time at the arraignment. Thus, defense counsel constantly is engaged in a catch-up effort. The nature and extent of defense counsel's investigation is the most important factor in effective representation of the client. Indeed, defense counsel has the duty to conduct a reasonable investigation on behalf of the defendant or to make a reasonable decision that a particular investigation is unnecessary. A failure to conduct such an investigation, or reasonably to conclude that such an investigation is unnecessary, constitutes ineffective assistance of counsel. *Strickland v. Washington,* 466 *U.S.* 668, 690 (1984); *State v. Deutsch,* 229 *N.J. Super.* 374, 377 (App. Div. 1988). The investigation should, at the minimum, consist of questioning potential fact and expert witnesses who will testify for the Government (or at least endeavoring to question these witnesses). In addition, defense counsel should attempt to ascertain and interview potential defense witnesses, including potential expert witnesses. In talking to witnesses and reviewing documents, defense counsel should try to develop a factual basis for potential pretrial motions, as well as a trial defense to the charges.

Various ethical considerations must be kept in mind when interacting with witnesses. Witnesses who are represented by counsel may not be contacted directly, pursuant to Rule 4.2 of the Rules of Professional Conduct. Moreover, witnesses "belong" neither to the State nor to the defense, and cannot be counseled to refrain from talking to one party or another.

A. The Initial Client Interview and Retention

The most significant constraint on defense counsel in conducting the initial client interview, as well as subsequent interviews, is often overlooked. Rule 3.3 of the Rules of Professional Conduct ("RPC") prohibits a lawyer from putting a client on the witness stand when the lawyer knows the client's testimony is false. Thus, it provides that "[a] lawyer shall not knowingly...(4) offer evidence that the lawyer knows to be false." Accordingly, counsel must carefully extract facts from the client without unduly freezing the lawyer's ability to have the client testify in the event that there is a trial.

However, to accomplish this is often like walking a tightrope. The lawyer should ascertain from the client the identity of potential fact witnesses, whether the client made any statement to the police, and the defendant's prior criminal record, if any. Defense counsel thereby will begin to accumulate information and leads to other information to attack the State's case. The lawyer also immediately should advise the client not to speak with anyone about the case except defense counsel and any investigator personally introduced by defense counsel to the defendant. In this manner, defense counsel can minimize the possibility that potentially inconsistent statements or admissions will filter back to the State for use in the prosecution's case.

Another issue that must be addressed immediately is the issue of the attorney's fees. RPC 1.5(b) requires that there be a written retainer agreement when the lawyer has not regularly represented the client. Even if the lawyer has regularly represented the client, it is most advisable to have a written retainer agreement with the client to avoid or to minimize the possibility of misunderstandings down the road. *See* Form 5, Sample Retainer Agreement.

It is also vitally important that the attorney obtain the fees up front from the client for the criminal matter. *R.* 1:11-2 prohibits an attorney in a criminal case from withdrawing, except upon leave of court, after the defendant's initial plea. While such a motion is committed to the sound discretion of the trial court, *State v. Johnson*, 274 *N.J. Super.* 137, 147 (App. Div.), *certif. denied*, 138 *N.J.* 265 (1994), there is a presumption against granting requests to relieve counsel without the substitution of new counsel prepared to defend the case without delay. *State v. Biegenwald,* 126 *N.J.* 1, 21 (1991); *State v. Lowery*, 49 *N.J.* 476, 489 (1967); *State v. Johnson*, 274 *N.J. Super.* at 147; *State v. Furguson,* 198 *N.J. Super.* 395, 401-402 (App. Div.), *certif. denied*, 101 *N.J.* 266 (1985). Therefore, once an attorney is in the case, that attorney most likely is in it for the duration. As counsel, you do not want to be in a situation where you have to chase your client for any outstanding fees (particularly if the defendant has been convicted). Therefore, you should attempt to garner all fees in advance.

Once the fee issue is resolved, if applicable, the defense attorney should file a notice of appearance, pursuant *to R.* 3:8-1. Additionally, the defense attorney may wish to send a letter to the prosecutor, advising the prosecutor that the client is now represented by counsel. *See* Form 6, Letter to Prosecutor Re: Representation of Client.

B. Right to Counsel/Multiple Representation/Joint Defense Agreements

1. The Right to Counsel

The Sixth Amendment to the United States Constitution, as well as its New Jersey analogue, Article I, paragraph 10, guarantee an accused the right to counsel. This right to counsel presupposes reasonable, effective and adequate assistance of counsel. *Kimmelman v. Morrison,* 477 *U.S.* 365, 377 (1986); *Strickland v. Washington,* 466 *U.S.* 668, 687 (1984); *Gideon v. Wainwright,* 372 *U.S.* 335, 340 (1963); *State v. Fritz,* 105 *N.J.* 42, 58 (1987); *State v. Mingo,* 77 *N.J.* 576, 581 (1978). *See also State v. Buonadonna,* 122 *N.J.* 22, 24 (1991). The purpose of the right to counsel clauses of the Sixth Amendment and New Jersey Constitution is to enable a defendant to confront the prosecution and to ensure the integrity of the judicial process. *State v. Sanchez,* 129 *N.J.* 261, 265 (1992).

Pursuant to RPC 1.2, an attorney must confer with his or her client "as to a plea to be entered, whether to waive jury trial and whether the client will testify." Further, RPC 1.4(b) requires an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The right to adequate representation does not imply an absolute right to any particular counsel, but only the fair opportunity to consult with and secure competent counsel. *Wheat v. United States,* 486 *U.S.* 153, 159 (1988); *State v. Crifasi,* 128 *N.J.* 499,517 (1992), *State v. Rivera,* 232 *N.J. Super.* 165, 177 (App. Div.), *certif. denied,* 117 *N.J.* 169 (1989). Defendants who are indigent are entitled to be represented at public expense by assigned counsel or the Public Defender's office, pursuant to *N.J.S.A.* 2A:158A-16 and 17 and *R.* 3:4-2. *See Rodriguez v. Rosenblatt,* 58 *N.J.* 281, 285 (1971); *State v. Rush,* 46 *N.J.* 399, 403-04, 415 (1966); *State v. Horton,* 34 *N.J.* 518, 522-523 (1961). In *Alabama v. Shelton,* 535 *U.S.* 654, 122 *S.Ct.* 1764, 152 *L.Ed.2d* 888 (2002), the United States Supreme Court ruled that under the Sixth Amendment, judges may not impose suspended sentences, even in minor misdemeanor cases, if the state fails to provide defense counsel at trial. The *Shelton* case may result in more frequent resort by the states to forms of pretrial probation, such as those utilized in New Jersey, pretrial intervention or conditional discharges. (*See* Chapter II.E.) However, the State is not required to pay for counsel of choice at the public's expense. *Matter of Cannady,* 126 *N.J.* 486, 495 (1991); *State v. Stockling,* 160 *N.J. Super.* 486, 489 (App. Div. 1978).

Pursuant to *N.J.S.A.* 2A:158A-5.2, any person charged with a disorderly persons offense or with the violation of any law, ordinance or regulation of a penal nature "where there is a likelihood that the person so charged, if convicted, will be subject to imprisonment or, in the opinion of the court, any consequence of magnitude," is entitled to be represented by counsel at public expense if the person charged meets the requirements for indigency. Initial application for a Public Defender is made at or after the time of defendant's initial appearance (*see* section II.C, The Initial Appearance, *infra*). A defendant seeking the appointment of counsel at public expense must complete a Uniform Defendant Intake Report ("UDIR"). The application is made to the Administrative Office of the Courts, whose action is reviewable by the Assignment Judge of the Superior Court or his or her designee. *In re Frank,* 276 *N.J. Super.* 269, 275 (App. Div. 1994). The eligibility criteria for services of the office of the Public Defender are set forth in *N.J.S.A.* 2A:158A-14. These criteria include, along with other enumerated factors, the current employment status, salary, income, liquid assets, and financial ability of the defendant to engage and compensate private counsel and to make bail. The statute requires reimbursement by the defendant of the cost of services if the initial indigency determination is later found to be erroneous, *id,* or in part where the defendant has or reasonably expects to have means to meet some part of the costs of services rendered to him or her. *N.J.S.A.* 2A:l58A-16. The reasonable value of services rendered to a defendant under the Public Defender Act will be a lien on any and all property which a defendant has or may have when the value of the services exceeds $150.00. *N.J.S.A.* 2A:158A-17. In *In Re Subpoena Duces Tecum*, 214 *N.J.* 147 (2013), the Court set forth five factors that must be satisfied by the State before it can obtain financial information that defendants supply on an intake form: (1) The UDIR intake form must specifically warn the defendant that the financial information may be ordered to be disclosed by an Assignment Judge to a grand jury and a prosecutor; (2) The prosecution must ask the trial court to have the defendant affirm at an early court appearance attended by court-appointed counsel that (a) the financial and employment information on the UDIR is true, (b) the defendant understands that willfully false financial and employment information may subject the defendant to punishment, and (c) the defendant understands that the financial and employment information may be disclosed to the prosecution and grand jury; (3) The defendant's financial disclosures on the UDIR form cannot be used by the prosecutor to prove the pending case; (4) Prosecutors must use a grand jury subpoena to seek disclosure of the financial data on the form and not a trial

subpoena, and (5) Grand jury subpoenas should be presented to the Assignment Judge and Criminal Division Manager with an accompanying affidavit from the prosecutor that sets forth the basis for the subpoenas. *Id.* at 167-170.

An indigent defendant is entitled to State funding for competent experts, under *N.J.S.A.* 2A:158A-5, as part of the ancillary duties of the Public Defender's office, although not necessarily for the leading experts in the field. *State v. Manning*, 234 *N.J. Super.* 147, 162 (App. Div.), *certif. denied*, 117 *N.J.* 657 (1989). This entitlement to experts at public funding is not confined to indigents who are represented by the Public Defender's office. The Public Defender Law explicitly provides for the public payment of experts or other services required by privately represented defendants lacking sufficient monies for that purpose, if the Office of the Public Defender (subject to review by the Assignment Judge or his or her designee) deems it to be appropriate. *Matter of Cannady,* 126 *N.J.* at 497-498; *Matter of Kauffman*, 126 *N.J.* 499, 502 (1991); *State v. Arenas*, 126 *N.J.* 504, 509 (1991) (regarding the costs of transcripts on appeal).

Defendants possess not only the right to counsel, but the right to dispense with counsel and to proceed *pro se. Faretta v. California*, 422 *U.S.* 806, 835 (1975); *State v. Crifasi,* 128 *N.J.* at 509. A defendant can exercise this right to self-representation only by first knowingly and intelligently waiving the right to counsel. *McKaskle v. Wiggins*, 465 *U.S.* 168, 173 (1984); *Johnson v. Zerbst, 304 U.S.* 458, 465 (1938); *State v. Crifasi,* 128 *N.J.* at 509. The court must conduct an on the record inquiry of the defendant to insure that the waiver is made knowingly and voluntarily. *Johnson v. Zerbst,* 304 *U.S.* at 465; *State v. Buonadonna*, 122 *N.J.* at 35. The trial court must warn the defendant of the dangers and disadvantages of proceeding *pro se,* so that the record is clear that the right to counsel is waived knowingly and voluntarily. *Faretta,* 422 *U.S.* at 835; *State v. Davis, 45 N.J.* 195, 199 (1965). To ensure that a waiver of counsel is knowing and intelligent, the trial court should inform defendants seeking to proceed *pro se* of the nature of the charges against them, the statutory defenses to those charges, and the possible range of punishment. *State v. Crifasi,* 128 *N.J.* at 511. The court should also inform *pro se* defendants that they must conduct their defense in accordance with the relevant rules of criminal procedure and evidence, that a lack of knowledge of the law may impair their ability to defend themselves, and that their dual role as attorney and accused might hamper the effectiveness of their defense. *Id.* at 512. These decisions simply underscore the importance of the role played at trial by defense counsel, and emphasize the importance of having effective representation, especially

when one's liberty interests are at stake. At the same time, the trial court's goal is not to expose a defendant's familiarity with technical legal knowledge but only whether the defendant actually understands the nature and consequences of his or her waiver. *State v. King*, 210 *N.J.* 2, 19 (2012). Among the factors that the Court should consider is whether the defendant seeks to handle his or her defense entirely alone, or to handle only a portion of the trial, or to handle the trial with the assistance of standby counsel. *King*, 210 *N.J.* at 19.

The constitutional right to counsel extends to pretrial stages, at or after initiation of adversary judicial criminal proceedings (such as at or after hearings, indictment, information, or arraignment). See *Kirby v. Illinois*, 406 *U.S.* at 688-689; *State v. P.Z.*, 285 *N.J. Super.* 219 (App. Div. 1995). In *State v. Fann*, 239 *N.J. Super.* 507, 520-521 (Law Div. 1990), the court deemed the initial bail review held after the first appearance to be a "critical stage" at which the assistance of counsel must be made available to a defendant.

As noted above, (see section I.C., Pretrial Identifications, *supra*), defendant is entitled to have counsel present at any line-up or corporeal identification procedure after the initiation of formal adversary judicial proceedings. *Moore v. Illinois*, 434 *U.S.* at 229, 231; *United States v. Wade*, 388 *U.S.* at 236-237; *Gilbert v. California*, 388 *U.S.* at 272.

2. Multiple Representation

A defendant's entitlement to effective assistance of counsel does not necessarily mandate counsel of his or her choice. Thus, no attorney or law firm is permitted to enter an appearance for or represent more than one defendant in a multi-defendant case without obtaining the trial court's approval, pursuant to *R.* 3:8-2. Indeed, in New Jersey, the court deems the right to individual counsel to take precedence over the right to counsel of choice. Thus, courts will presume prejudice from the potential conflict of interest arising from the representation of multiple defendants, *State v. Belluci*, 81 *N.J.* 531, 546-547 (1980), in contrast to the federal system, wherein the United States Supreme Court required a showing of actual conflict to establish prejudice. *Holloway v. Arkansas*, 435 *U.S.* 475, 490 (1978). This potential conflict arises because it is necessary for defense counsel to explore all possibilities, including plea bargaining, to discharge his or her duties as defense counsel. *Holloway v. Arkansas*, 435 U.S. at 490; *State v. Land*, 73 *N.J.* 24, 29 (1977). Thus, one defendant may wish to plead guilty and implicate his or her co-defendant. Of course, a conflict then arises because counsel cannot use

confidences of his or her prior client as a basis for questioning, *RPC* 1.6, and thus may not be able to represent his or her current client adequately. Accordingly, the trial court must engage in a colloquy with the defendants seeking joint representation to insure that their waiver is informed and made with the full understanding that waiver may lead to an unjust result. See *State v. Carreaga*, 249 *N.J. Super.* 129, 132 (Law Div. 1991); *State v. Green*, 129 *N.J. Super*. 157, 164 (App. Div. 1974). Even after initially permitting joint representation, the court may decide that latter factual developments require separate representation. *See State v. Medina*, 254 *N.J. Super.* 668, 682-683 (App. Div. 1992). Thus, a court may reject the purported waiver if it deems the waiver to be insufficiently knowing or informed, or if it deems the conflict to be non-waivable. *See State v. Carreaga*, 249 *N.J. Super.* at 136; *State v. Medina*, 201 N.J. Super. 565, 579-580 (App. Div.), *certif. denied*, 102 *N.J.* 298 (1985). In general, conflicts of interest are governed by *RPC* 1.7, which prohibits representation of one client if that representation is adverse to another client, unless the lawyer reasonably believes that the representation will not adversely affect the relationship with the existing client and each consent after full disclosure. Even so, *RPC* 1.7 recognizes that, in certain circumstances, consent may be immaterial and an appearance of impropriety may preclude joint representation.

The payment of attorney's fees by a third party who could be implicated by the defendant's testimony "has the inherent risk of dividing an attorney's loyalty." *In re Abrams*, 56 *N.J.* 271, 275 (1970). Recently, in *In the Matter of Grand Jury Investigation*, 200 *N.J.* 481 (2009), the court set forth six factors that must coalesce under *Rules* 1.8(b), 1.7(a)(2) and 5.4(c) of the Rules of Professional Responsibility, in order to allow a lawyer paid by a third party to represent a client: 1) the client must give informed consent; 2) the lawyer's independent professional judgment and the lawyer-client relationship must be inviolate and cannot be interfered with by the third party; 3) there cannot be a current attorney-client relationship between the lawyer and the third party; 4) there must be no improper disclosures relating or referring to the representation of the client to the third party payee; 5) the third party payee should process and pay all invoices consistent with its regular course of paying its own counsel in the regular course of business; and 6) once a third party payee commits to pay for the representation of another, the third party payee may not be relieved of its continuing obligation to pay without leave of court, on notice to the lawyer and client, wherein the third party payee must bear the burden of proof that its obligation to continue to pay for the representation should

cease. *Id.* at 495-497. In *State v. Norman*, 151 *N.J.* 5, 34-36 (1997), the New Jersey Supreme Court held that there is a potential conflict of interest where an attorney for one defendant is being paid out of bail money posted by his co-defendant. In *Norman*, the court reiterated the presumption against waiver of such a conflict, "and waiver will be found only when it is on the record and when the trial court has assured itself that the defendant waiving the conflict is aware of the potential hazards of joint representation." *State v. Norman*, 151 *N.J.* at 35.

Pursuant to *R.* 3:8-2, a motion seeking to represent more than one defendant must be made "as early as practicable in the proceedings but no later than the arraignment/status conference so as to avoid delay of the trial." The court may, upon a showing of good cause, allow the motion to be made at any time.

In general, it is unwise to represent more than one defendant, especially in the pre-indictment context. While there may be many reasons why counsel would wish to represent more than one defendant, including the possibility of presenting a united defense, there are more numerous reasons why such representation should be avoided. An attorney representing more than one defendant pre-indictment runs the risk that the prosecution will seek to disqualify that counsel from representing *any* party if the conflict is deemed to be material and non-waivable. Therefore, a much sounder approach is to represent simply one individual or entity and to advise the other potential client to obtain separate counsel, preferably from a list of such counsel furnished by you. In this manner, counsel may be able to obtain the benefits of a united front via a joint defense agreement, without the potential pitfalls of multiple representation.

The risks of representing multiple defendants at trial are as great as, if not greater than pre- trial. Evidence may affect each of the defendants differently. One client may wish to testify on his or her own behalf while the other client may choose not to do so, thereby highlighting the differences between the clients represented by the same counsel. In addition, even assuming consistent defenses, there is always the possibility that one client may elect to plead guilty during the course of the trial and cooperate with the government, thereby creating an irreconcilable conflict between preserving the confidences of a client or former client, pursuant to RPC 1.6, and adequately and vigorously representing the client who elects not to plead guilty.

3. Joint Defense Agreements

One of the most effective ways in which defense counsel legally may coordinate multiple defense efforts, as well as find out about the strength of the prosecutor's case pre-indictment or pre-trial, is via a joint defense agreement. In a joint defense agreement, counsel for defendants or prospective defendants agree to share information with one another, without thereby waiving each client's separate attorney-client privilege and work product protection. Of course, each signatory to a joint defense agreement promises not to disclose any of the information shared pursuant to the agreement to any third party, including particularly the Government. These agreements typically have a provision whereby notice is given to other signatories of a party's intended withdrawal from the joint defense. This notice of withdrawal typically signifies that the withdrawing party is prepared to enter into a cooperation agreement with the government. The notice provision is designed to put on notice those remaining members of the joint defense so as to safeguard against any potential disclosure of confidential information shared pursuant to the joint defense agreement.

While a joint defense agreement gives defendants and their counsel the benefits of multiple representation without its concomitant risks, it is not without risks. Not surprisingly, prosecutors have been hostile to the notion of joint defense agreements. The courts have upheld the validity of these agreements and have refused to deem such agreements a waiver of each individual client's attorney-client privilege. *See, e.g., In re Bevill, Bresler v. Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964); *In the Matter of a Grand Jury Subpoena Duces Tecum Dated November 16, 1974,* 406 F.Supp. 381, 387-389 (S.D.N.Y. 1975). Nevertheless, prosecutors have attempted to attack these agreements in other ways. In *United States v. Anderson*, 790 F.Supp. 231, 232-233 (W.D. Wash. 1992), the Government convinced the court that an order to hold a hearing to resolve the issue of whether defense counsel should be disqualified due to a conflict of interest. The "conflict" in *Anderson* was that counsel "jointly" represented "several" defendants via a joint defense agreement. However, some of those defendants subsequently withdrew from the agreement and became government witnesses, thereby raising the issue of whether confidential information learned during the course of the joint defense agreement could be used to cross-examine those withdrawing defendants. *Contra, United States v. Bicostal Corp.,* 92 Cr. 261 (N.D.N.Y.

September 28, 1992) (finding no conflict arising for a client who is a signatory to a joint defense agreement). *See* Form 7, sample Joint Defense Agreement.

C. The Initial Appearance

The initial appearance usually is the first time that a defendant appears with counsel before a judicial officer. While a defendant may have appeared before a judicial officer upon an arrest for the purpose of setting bail, typically defense counsel either may not yet be retained or for some other reason may not have attended at that time (*i.e.,* availability or lack of notice). Some cases are only initiated upon the filing of a complaint. *R.* 3:4-2 governs the procedure for the filing of a complaint.

R. 3:4-2 provides that, at the defendant's initial appearance, the court must inform the defendant of the charge and furnish the defendant with a copy of the charge. The judge must also inform the defendant of the right to remain silent and that any statement made may be used against the defendant. At this time, the judge also must inform the defendant of the existence of the pretrial intervention program (*see* section II.E, Pretrial Intervention and Conditional Discharge, *infra*), and where and how the application may be made. The judge must also inform the defendant of the right to retain counsel and, if a defendant is indigent, the availability of the services of the Public Defender's office. Pursuant to a change in the Court Rules, effective September 1, 1996, the judge must specifically ask the defendant if he or she wants counsel, and the defendant's response must be recorded on the complaint. In the case of an indigent defendant charged with a non-indictable offense, counsel is assigned under a system established by the County Assignment Judge. *R.* 3:4- 2(b). It is important to note that counsel assigned for trial under *R.* 3:4-2(b) to represent an indigent defendant in a non-indictable case will be compelled to represent the defendant on appeal unless counsel files, along with the notice of appeal, an application for the assignment of counsel on appeal.

If the complaint charges an indictable offense, under *R.* 3:4-2(a) the court must inform the defendant of the right to a probable cause hearing and of the right to indictment by a grand jury and trial by a petit jury. It is at this time also that a defendant may waive his or her right to indictment and jury trial, provided that if the complaint charges an indictable offense which cannot be tried by the court on waiver, the court may neither ask for nor accept a plea to the offense. Bail is set at the initial appearance if it has not already been fixed.

D. The Probable Cause Hearing

A probable cause hearing in New Jersey is a relative rarity. This is true because most often an indictment is returned against a defendant, thereby vitiating the need for a probable cause determination, as the grand jury already has done so by its indictment of the defendant. *See State v. Smith,* 32 *N.J.* 501, 537 (1960), *cert. denied*, 364 *U.S.* 936 (1961); *State v. Mitchell*, 164 *N.J. Super.* 198, 201 (App. Div. 1978). The primary reason for a probable cause hearing is to ensure that a defendant is not retained in custody in the absence of probable cause, pursuant to *Gerstein v. Pugh,* 420 *U.S.* 103 (1975). In *County of Riverside v. McLaughlin,* 500 *U.S.* 44, 56-57 (1991), the United States Supreme Court expounded upon its earlier ruling in *Gerstein v. Pugh* and held that if a judicial determination of probable cause is not made within 48 hours of a warrantless arrest, the burden shifts to the Government to establish a bona fide emergency or some other extraordinary circumstance justifying the continued detention of a defendant.

The probable cause hearing proceeds, in the absence of an indictment, within a reasonable time after oral or written notice is given by the court to the county prosecutor. *R.* 3:4-3(a). The defendant has the right to cross-examine any witnesses called by the State at this hearing. The defendant also has the right to be represented by counsel at this hearing. *See Coleman v. Alabama,* 399 *U.S.* 1, 9-10 (1970).

If the court determines that the evidence shows probable cause to believe that an offense has been committed and that the defendant committed it, the court forthwith must bind the defendant over for trial. *Id.* If probable cause is not found, the defendant is discharged from custody if detained. *Id.* If a defendant is discharged for lack of probable cause and an indictment is not returned within 120 days, bail must be returned and conditions of pretrial release terminated. *R.* 3:4-3(b).

Frequently, the probable cause hearing is waived by defense counsel. There may be sound reasons to waive such a hearing, such as a good faith effort by the defendant to cooperate with the State. However, if a defendant is in custody, more often it may be beneficial to insist upon such a hearing. If the State seeks to avoid this hearing -- which inevitably it does -- it may thereafter hurriedly put together a grand jury presentation and indictment, thereby increasing the possibility of a successful defense attack on the indictment. Alternatively, if the State does not rush to indict the defendant, then defense counsel has an unparalleled opportunity to get a

preview of the testimony of government witnesses and cross-examine these witnesses. Additionally, pursuant to *R.* 3:13-3(c), defendant's counsel should be entitled to review the police reports of any officers who testify at this hearing. Thus, there are numerous opportunities for defense counsel to preview the strength of the State's evidence, and these opportunities should not be waived without substantial justification.

E. Pretrial Intervention and Conditional Discharges

Pretrial intervention ("PTI") provides a mechanism for a defendant to avoid criminal charges completely. While not every defendant is an appropriate candidate for PTI, it is a unique opportunity for some defendants to avoid the expense of trial, potential incarceration, as well as the stigma and other attendant consequences of a criminal conviction. From a defendant's standpoint, this opportunity should not be missed unless it is manifestly apparent that the defendant is not an appropriate candidate for PTI. Short of avoiding criminal charges altogether, or succeeding in having any such charges dismissed with prejudice, admission into a PTI program is the best possible result for most defendants.

1. Eligibility Criteria

There are five purposes of PTI: (1) to enable defendants to avoid ordinary prosecution by receiving early rehabilitative services to deter future criminal behavior; (2) to provide defendants who might by harmed by the imposition of criminal sanctions with an alternative to prosecution; (3) to avoid burdensome prosecutions for "victimless" offenses; (4) to relieve overburdened criminal court calendars to allow the expenditure of scarce resources on more serious criminal matters; and (5) to deter future criminal behavior of PTI participants. *State v. Nwobu,* 139 *N.J.* 236, 247 (1995); PTI Guideline 1.

The criteria for eligibility into PTI were first set forth in *State v. Leonardis,* 71 *N.J.* 85, 121-122 (1976), and are now contained in seventeen factors itemized in *N.J.S.A.* 2C:43-12 and in eight guidelines set forth under *R.* 3:28. In general, the appropriateness of a defendant's admission to PTI is determined by the defendant's amenability to rehabilitation as well as by the nature of the offense involved. *State v. Leonardis,* 71 *N.J.* at 98, 102. *See, e.g., N.J.S.A.* 2C:43-12b; PTI Guideline 7. Neither the criteria set forth in the statute nor in the rule are exhaustive or dispositive. *State v. Pickett,* 186 *N.J. Super.* 599, 604 (Law Div. 1982). A

defendant need not admit his or her guilt as a predicate to receiving supervisory treatment under PTI, *N.J.S.A.* 2C:43-12(g), nor must a defendant be compelled to abandon his or her motion to suppress evidence. *State v. Doss*, 254 *N.J. Super.* 122, 133 (App. Div.), *certif. denied*, 130 *N.J.* 17 (1992).

As noted above, *N.J.S.A.* 2C:43-12 lists 17 criteria which would be considered by prosecutors and criminal division managers in formulating their decisions regarding an applicant's eligibility for PTI. These factors include: (1) the nature and facts of the case, (2) the motivation and age of the defendant, (3) the needs and interests of the victim and society and (4) the desire of the victim or complainant to forego prosecution. The statute prescribes that also to be considered are, among other factors, whether or not the crime is of an assaultive or violent nature, the applicant's history of the use of physical violence towards others, or any involvement with organized crime. *Id.*

In addition to these statutory criteria, PTI Guideline 3 sets forth other factors to be considered. Among these factors are whether the defendant resides at such a distance from New Jersey as to bar effective counseling or supervisory procedures and whether the defendant is charged with a "minor violation" likely to result in a suspended sentence without probation or a fine. In these instances, PTI is not appropriate. Also present in the Guidelines is a rebuttable presumption against PTI eligibility for those defendants previously convicted of a criminal offense (particularly within the past five years, or a first or second degree offense at any time), or those defendants who were previously diverted or conditionally discharged pursuant to since-repealed *N.J.S.A.* 24:21-27 [now contained in part in *N.J.S.A.* 2C:36A-1], whereas *N.J.S.A.* 2C:43-12(g) absolutely bars PTI eligibility to those who previously received a section 27 supervisory treatment. The statute's prohibition of PTI eligibility to previously diverted defendants takes precedence over the guidelines. *State v. Collins*, 180 *N.J. Super.* 190, 205 (App. Div. 1981), *affd*, 90 *N.J.* 449 (1982).

A prosecutor also may place conditions upon a defendant's entry into the PTI program. Such conditions have included restitution, *State v. Jamiolkoski*, 272 *N.J. Super.* 326, 329 (App. Div. 1994), resignation from the police force, *State v. DeMarco*, 107 *N.J.* 562, 569-571 (1987), and payment of mandatory Drug Enforcement and Demand Reduction Penalties under *N.J.S.A.* 2C:33-15(a). *State v. Bulu*, 234 *N.J. Super.* 331, 341 (App. Div. 1989). However, a PTI conditioned on payment of restitution asserted by the defendant to be grossly excessive is an

abuse of discretion without a hearing to determine the fair amount of restitution. *State v. Jamiolkoski,* 272 *N.J. Super.* at 329; *State v. Castaldo,* 271 *N.J. Super.* 254, 260-261 (App. Div. 1994). *See also* PTI Guideline 3(K). Moreover, where the State grants admission to PTI on conditions, and so informs the defense, the State may not renege where the defendant fulfilled those conditions in reliance upon the State's initial determination. *State v. Davis, 244 N.J. Super.* 180, 193-194 (App. Div. 1990).

2. Procedural Requirements

Pursuant to *R.* 3:28(h), application for pretrial intervention must be made at the earliest opportunity, including before indictment, but in any event not later than twenty-eight days after indictment. The application is then filed with the criminal division manager's office, who must complete the evaluation and make a recommendation within twenty-five days of the filing of the application. *Id.* The application, along with the criminal division manager's evaluation and recommendation, is thereafter forwarded to the county prosecutor's office. *Id.* The county prosecutor's office must complete its review, and inform the defendant and the court, of its decision, within fourteen days of receipt of the criminal division manager's recommendation. *See* Form 8, a sample Pretrial Intervention Notification.

Pursuant to *N.J.S.A.* 2C:43-12(c) and PTI Guideline 8, the decisions and reasons therefor made by the designated judges, prosecutors and criminal division managers in granting or denying a defendant's PTI application must be in writing, and disclosed to the defendant. The prosecutor's statement of reasons may not simply "parrot" the language of relevant statutes, rules and guidelines, but must reflect, with sufficient specificity, the particular facts present in defendant's background or the offense which led to the decision to deny admission into PTI. *State v. Nwobu,* 139 *N.J.* at 249; *State v. Sutton,* 80 *N.J.* 110, 117 (1979). Similarly, the decision and basis therefor to terminate a defendant from the program or to dismiss charges, also must be in writing and disclosed to the defendant.

If a defendant has been rejected for entry into the PTI program, he or she must file an appeal on motion to the Presiding Judge of the Criminal Division or to the judge to whom the case has been assigned, within ten days of the rejection. *N.J.S.A.* 2C:43-12(f); *R.* 3:28(h). The motion must be returnable at the next status conference or at such time as the judge determines will promote an expeditious disposition of the case. *R.* 3:28(h). Decision on a PTI application

filed pre-indictment may be deferred by the prosecutor's office until after the matter has been presented to a grand jury. *Id;* PTI Guideline 7.

The standard of judicial review of a prosecutor's decision to accept or reject a defendant's PTI application is whether the prosecutor's decision represents "a patent and gross abuse of discretion." *State v. Nwobu,* 139 *N.J.* at 247; *State v. Bender,* 80 *N.J.* 84, 93 (1979); *State v. Leonardis (Leonardis II),* 73 *N.J.* 360, 382 (1977). The prosecutor's decision regarding PTI admission is entitled to "great deference." *State v. Nwobu,* 139 *N.J.* at 246; *State v. Kraft,* 265 *N.J. Super.* 106, 111-112 (App. Div. 1993). This abuse of discretion can be established only by demonstrating that the prosecutor failed to consider relevant factors, or considered irrelevant ones, or committed a clear error of judgment. *State v. Nwobu,* 139 *N.J.* at 247; *State v. lmbriani,* 291 *N.J. Super.* 171, 177 (App. Div. 1996).

A defendant admitted into the PTI program must execute in writing his or her assent, and that of the prosecutor, to the terms and duration of the supervisory treatment. *N.J.S.A.* 2C:43-13a. The typical PTI participation agreement contains a condition that the participant show convincing evidence that the participant will not now or in the future engage in criminal or disorderly conduct. *See State v. Pellegrino,* 254 *N.J. Super.* 117, 121 n.1 (App. Div. 1992). Thereafter, the designated judge, with the consent of the prosecutor and the defendant, may postpone all further proceedings against the defendant on these charges for a period not to exceed thirty-six months. *R.* 3:28(b). The charges are held in an inactive status, *N.J.S.A.* 2C:43-13(b), including a defendant's motion to suppress evidence. *See State v. Salomon,* 229 *N.J. Super.* 472, 475 (App. Div. 1989). At the conclusion of the supervisory treatment period, or earlier upon the motion of the criminal division manager, the designated judge may opt for one of three alternatives: (1) the judge may dismiss with prejudice the charges against the defendant on the recommendation of the criminal division manager and with the consent of the prosecutor and the defendant, *N.J.S.A.* 2C:43-13(d); *R.* 3:28(c)(1); (2) upon recommendation of the criminal division manager and with the consent of the prosecutor and the defendant, the judge may further postpone proceedings against the defendant on such charges for an additional period, as long as the aggregate of all such periods of postponement does not exceed thirty-six months, *R.* 3:28(c)(2); or (3) on the written recommendation of the criminal division manager or the prosecutor, or the court's own motion, the court may order the

prosecution of the defendant to proceed in the ordinary course, after giving notice to and an opportunity to be heard for the defendant. *R.* 3:28(c)(3).

A defendant who has violated any of the conditions of supervisory treatment is entitled to a summary hearing whether the violation warrants the defendant's dismissal from the program, modification of the conditions for continued participation in the program, or another supervisory treatment program. *N.J.S.A.* 2C:43-13(e); *State v. Fenton*, 221 *N.J. Super.* 16, 23 (Law Div. 1987); *State v. Wilson*, 183 *N.J. Super.* 86, 92, 97 (Law Div. 1981). If a defendant has been dismissed from the supervisory treatment program for violating the conditions thereof, the charges may be reactivated and the prosecutor may proceed as though no supervisory treatment had been commenced. *N.J.S.A.* 2C:43-13(e). No statement or other disclosure by a supervisory treatment participant may be used by or even disclosed to the prosecutor and no such statement is admissible in evidence in any civil or criminal proceeding against the participant. *N.J.S.A.* 2C:43-13(f); *R.* 3:28(c)(5). However, this statute and rule do not prohibit the criminal division manager from informing the prosecutor, or the court, upon request or otherwise as to whether or not the participant is satisfactorily responding to supervisory treatment. *N.J.S.A.* 2C: 43-3(f); *R.* 3:28(c)(5).

3. Conditional Discharges

Closely related to PTI is a conditional discharge afforded certain first time offenders under *N.J.S.A.* 2C:36A-1. *See State v. Leonardis,* 71 *N.J.* at 95 n.5. A conditional discharge is available to those charged with or convicted of any disorderly persons or petty disorderly person's offense under the Controlled Dangerous Substance provisions [chapter 35 or 36] of the Criminal Code. A conditional discharge is available to those who have never been convicted of any violation of any federal or state controlled dangerous substance offense, disorderly person or petty disorderly person offense. *N.J.S.A.* 2C:36A-1(a).

A conditional discharge is not available to any defendant unless the court concludes: (1) the defendant's continued presence in the community or in a treatment center poses no danger to the community; (2) the terms and conditions to supervisory treatment will be adequate to protect the public and will benefit the defendant by correcting any substance abuse or dependency; and (3) the person has never previously received supervisory treatment or PTI. *N.J.S.A.* 2C:36A-1(c). The defendant, or the court on its own motion, may move, on notice to the prosecutor, to

do one of two things: Under subsection (1) of this statute, a motion can be made to suspend further proceedings, and, with the defendant's consent, place the defendant under supervisory treatment under such reasonable terms and conditions as required; or, under subsection (2), after a plea or finding of guilt, and without entering a judgment of conviction, application can be made to place the defendant on supervisory treatment under such reasonable terms and conditions as required.

A referral to a residential treatment facility, which may be required as a term or condition of supervisory treatment, may not exceed the maximum period of incarceration which may be imposed for the offense charged or for which the individual has been convicted. *N.J.S.A.* 2C:36A- 1(b). Moreover, the maximum term permitted for supervisory treatment is three years. *Id.*

If a defendant violates a term or condition of supervisory treatment, the court may enter a judgment of conviction and proceed to sentencing, where there has been an adjudication of guilt, including a plea. If there has been no such determination of guilt, the court may resume proceedings against a defendant who has violated the terms of his or her conditional discharge. *Id.*

However, a defendant who successfully fulfills the terms and conditions of supervisory treatment is entitled to termination of the treatment and dismissal of the court proceedings without any adjudication of guilt. A person is entitled to only one termination of supervisory treatment and dismissal of charges under this section. *Id.*

F. Plea Bargains

1. Why are there Plea Bargains?

The vast majority of criminal cases in New Jersey and elsewhere are disposed of via plea bargains. From the prosecution viewpoint, a plea bargain assures the State of a conviction without the necessity of a time consuming and expensive trial, and allows for allocation of scarce resources. A plea agreement requiring a defendant's cooperation with the State is often the vehicle by which further prosecutions are fueled. From the defendant's vantage point, a plea bargain saves the expense of trial and allows for an opportunity to reduce considerably or eliminate the possibility of incarceration. As the New Jersey Supreme Court has stated,

> Plea bargaining has become firmly institutionalized in this State as a legitimate respectable and pragmatic tool in the efficient and fair administration of criminal justice. Courts across the country have adopted plea bargaining as an appropriate accommodation of the conflicting interests of society and persons accused of crime and as a needed response to an ever-burgeoning case load.

State v. Taylor, 80 *N.J.* 353, 360-361 (1979).

There are, however, some cases in which a plea bargain will not prevail. A prosecutor may be unwilling to plea bargain in a particular case, due to the seriousness or notoriety of the alleged crime or criminal. Other situations may compel the prosecutor to demand a plea which is certain to be unpalatable to the defense. On the other hand, a defendant sometimes will never plead guilty, as it may mean loss of a professional license to some, or treatment as a career criminal to others. Moreover, it merely restates the obvious that for a defendant to plead guilty, he or she must actually be guilty of the crime. Therefore, a defendant who believes that he or she is totally innocent cannot plead guilty.

2. *Types of Plea Agreements*

A plea agreement fundamentally is a matter of contract and may be specifically enforced. *Santobello v. New York*, 404 *U.S.* 257 (1971); *State v. Thomas*, 61 *N.J.* 314, 323-324 (1972). *See* Form 9, a sample Plea Agreement Offer. There are usually three types of plea agreements: (1) an agreement by the prosecution to dismiss other charges against the defendant in return for a guilty plea; (2) an agreement by the prosecution to recommend a particular sentence in consideration of the defendant's guilty plea; or (3) an agreement in which the defendant pleads guilty based upon indications by the court of the maximum sentence to be imposed pursuant to a procedure set forth in *R.* 3:9-3(c). Rule 3:9-3(c) allows the court to become involved in plea discussions, a role traditionally eschewed by the court, as made clear in *R.* 3:9-3(a). Under *R.* 3:9-3(c), the prosecutor and defense counsel may request the court to permit disclosure to the court of a tentative plea agreement and the reasons for the agreement. The court may then advise counsel whether it will concur in the tentative agreement. Alternatively, if no tentative agreement has been reached, counsel for the parties may consent to have the court advise them of the maximum sentence that it would impose in the event that the defendant pleaded guilty.

The underlying assumption in the court's advice, whether or not a tentative agreement has been reached, is that the information in the presentence report at the time of sentence is consistent with the representations made to the court at the time of the disclosure and supports the determination that the interests of justice would be served thereby. *R.* 3:9-3(c). The record should reflect if the court agrees conditionally to accept the plea agreement or conditionally advises the parties of its intended sentence. *Id.*

3. Requirements for Plea Agreements

The New Jersey Court Rules, and, in particular, *R.* 3:9-2, are designed to assure that a guilty plea: (1) contains a factual basis, (2) is given voluntarily, and (3) is given with an understanding of the nature of the charge and the consequences of the plea. *State v. Barboza*, 115 *N.J.* 415, 420-421 (1989). Thus, a plea of guilty pursuant to a plea agreement does not obviate the need for a sufficient factual basis for the guilty plea, *State v. Sainz*, 107 *N.J.* 283, 293 (1987); *State v. Butler*, 89 *N.J.* 220, 224-225 (1982), except in a capital case. *R.* 3:9-2; *State v. Davis*, 116 *N.J.* 341, 370 (1989). The New Jersey Supreme Court has stated a variety of reasons underscoring the requirement of a sufficient factual basis for a plea:

> [I]t is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." [citations omitted]. The factual basis requirement also affords the court an opportunity to observe the conditions under which the plea is made, provides a better record for appellate review if the plea is subsequently challenged, increases the visibility of charge-reduction practices, and aids correctional agencies in the performance of their function. [citation omitted].

State v. Barboza, 115 *N.J.* at 421. While *R.* 3:9-2 requires a factual basis for a plea, a court's failure to elicit a factual basis is not necessarily of constitutional dimension. *State v. Mitchell*, 126 *N.J.* 565, 577 (1992); *State v. Barboza*, 115 *N.J.* at 421 n.1. Such a failure to elicit a factual basis for the guilty plea will not render a sentence illegal unless there are indicia, such as contemporaneous claims of innocence, that the defendant does not understand enough about the

nature of the law as applied to the facts of the case to make a truly voluntary decision. *See McCarthy v. United States,* 394 *U.S.* 459, 467 (1969); *State v. Mitchell,* 126 *N.J.* at 577. Before accepting a guilty plea, the trial court should inquire, among other things, (1) whether anyone forced, threatened, or put the defendant under pressure to plead guilty; (2) whether the defendant understands that he or she is relinquishing constitutional rights; (3) whether the defendant understands the nature of the charge and content of the sentencing recommendation; and (4) whether the defendant is in fact guilty of the specific charge or charges. *State v. Campfield,* 213 *N.J.* 218, 230-231 (2013); *State ex rel. T.M.*, 166, *N.J.* 319, 336 (2001).

A defendant has a right to be informed of the direct or penal consequences of his plea, but not to those that are collateral. *State v. Howard*, 110 *N.J.* 113, 122 (1988). Such direct consequences include a period of parole ineligibility, *State v. Kovack,* 91 *N.J.* 476, 484 (1982), or, obviously, the possibility of the death penalty. *State v. Davis,* 116 *N.J.* at 376.

In a landmark decision, *Padilla v. Kentucky*, 559 *U.S.* 356 (2010), the United States Supreme Court held that an attorney's failure to advise a non-citizen client that a guilty plea would lead to a mandatory deportation deprived the client of their right to effective assistance of counsel under the Sixth Amendment. This decision should be read in concert with that of the New Jersey Supreme Court in *State v. Nunez-Valdez*, 200 *N.J.* 129 (2009). In *Nunez-Valdez,* the Court held that counsel's false or misleading information as to deportation consequences constituted ineffective assistance of counsel under the New Jersey State Constitution. Since *Padilla and Nunez-Valdez,* the New Jersey Administrative Office of the Courts has revised the plea form expressly to address potential deportation and immigration consequences of the plea. See Form 10, Sample Plea Form. This form now generally must be completed by defendants seeking to enter a guilty plea. In *Chaidez v. United States*, 568 *U.S.* ___, 133 *S.Ct.* 1103 (2013), the United States Supreme Court refused to apply *Padilla* retroactively to a person whose conviction became final before the Supreme Court's decision in *Padilla*. In so holding, the U.S. Supreme Court's decision was consistent with the decision of the New Jersey Supreme Court in *State v. Gaitan*, 209 *N.J.* 339 (2012) in refusing to apply *Padilla* retroactively.

In addition, the court should also explain to the defendant the possibility that restitution may be ordered as part of the sentence which the court could impose. *State v. Kennedy*, 152 *N.J.* 413, 425-26 (1998). Moreover, as a guilty plea may impact upon the ability of a public official

or law enforcement officer to retain his or her official position, pursuant to *N.J.S.A.* 2C:51-2, the Court should make certain that the defendant understands this consequence and the State must elicit in the allocution a basis for the disqualification order. *State v. Hupka*, 203 *N.J.* 222,242 (2010). Accordingly, such a provision also is contained in the Sample Plea Form. (Form 10). Under *R.* 3:9-2, the judge must personally address the defendant to ascertain the factual basis for the quality plea and to ensure that the guilty plea is knowing and voluntary.

Note, however, that the State's power to condition a plea upon certain actions by the defendant is not limitless. Thus, where the State had entered into a plea agreement with a co-defendant not to seek an extended 50-year term sentence in exchange for the co-defendant's promise not to testify at the defendant's murder trial, the plea agreement may improperly violate the defendant's right to compulsory process. *See State v. Fort*, 101 *N.J.* 123, 131 (1985); *State v. Correa*, 308 *N.J. Super.* 480, 485-486 (App. Div. 1998).

Further, in *State v. Brimage*, 153 *N.J.* 1, 22-23 (1998), the Supreme Court struck down the Attorney General's plea agreement guidelines, which permitted each county to adopt its own standard plea offer and policies for cases under the Comprehensive Drug Reform Act. The result of that policy was impermissibly to authorize intercounty disparity in sentencing, in contravention of the statutory goals of uniformity in sentencing and the appropriate balance between prosecutorial discretion and judicial discretion.

4. Conditional Pleas

Rule 3:9-3(f) allows a defendant to enter a conditional plea with the consent of the prosecutor and approval of the court. Such a plea allows the defendant the right to appeal from the adverse determination of any specified pretrial motion. If the defendant wins on appeal, the defendant must be given an opportunity to withdraw his or her plea.

Closely related to a *R.* 3:9-3(f) endorsement of conditional pleas is *R.* 3:5-7(d). Under this latter rule, the determination of a motion to suppress evidence adversely to the defendant may be reviewed on appeal notwithstanding the fact that a defendant pleads guilty subsequent to the determination of that motion. *See State v. Gibson*, 68 *N.J.* 499, 511-512 (1975).

Additionally, notwithstanding a provision in a plea agreement to the contrary, a defendant may always appeal even though he or she pleads guilty. However, pursuant to *R.* 3:9-3(d), if a plea agreement contains no appeal provision, and the defendant nevertheless appeals, the State

may annul the plea agreement by exercising its right no later than seven days prior to the date scheduled for oral argument or submission without argument.

Finally, note that under *R.* 3:9-2, a court may order upon a showing of good cause that the guilty plea not be evidential in any civil proceeding.

5. *Plea Cut-Off Date*

Rule 3:9-3(a) allows the court to refuse to accept negotiated pleas after the pretrial conference has been conducted unless the Criminal Presiding Judge approves this plea based on a material change of circumstance or the need to avoid a protracted trial or a manifest injustice. Plea cut off dates have been endorsed by the courts unless either the State or defendant can show a patent and gross abuse of discretion, constituting a miscarriage of justice. *See, e.g., State v. Brimage,* 271 *N.J. Super.* 369, 378 (App. Div. 1994). While plea cut off dates have been lauded by some as expediting resolution of numerous cases, others have criticized these dates as unfairly eliminating the ability for the State and the defendant to assess the strength of their cases as they are presented to a jury at trial before an appropriate disposition by plea agreement can be reached.

6. Withdrawal of Guilty Pleas

The courts are not bound to accept negotiated plea agreements. *See State v. Howard,* 110 *N.J.* at 123; *State v. Daniels,* 276 *N.J. Super.* 483, 487 (App. Div. 1994), *certif. denied,* 139 *N.J.* 443 (1995). Thus, *R.* 3:9-3(e) permits a court, at the time of sentencing, to vacate the plea or allow the defendant to withdraw the guilty plea if the interests of justice would not be served by effectuating the agreement reached or by imposing the sentence in accordance with the court's prior indication.

A defendant seeking to withdraw a guilty plea must make a motion prior to sentencing. *R.* 3:21-1. The disposition of a motion to withdraw a guilty plea is left to the sound discretion of the trial judge. According to the New Jersey Supreme Court, trial courts generally exercise their discretion liberally to allow withdrawal of plea and a trial on the merits when a defendant asserts his or her innocence and seeks to withdraw the guilty plea prior to sentencing and proceed to trial. *State v. Smullen,* 118 *N.J.* 408, 416 (1990), citing to *State v. Deutsch,* 34 *N.J.* 190, 198 (1961). A defendant has a heavier burden of presenting a plausible basis for the request to

withdraw a guilty plea when the plea is pursuant to a plea bargain. *State v. Smullen,* 118 *N.J.* at 416; *State v. Huntley,*

129 *N.J. Super.* 13, 18 (App. Div.), *certif. denied,* 66 *N.J.* 312 (1974). To vacate a negotiated plea, a defendant must show not only that he or she was misinformed of the terms of the agreement or that the sentence violated his or her reasonable expectations, but also that he or she is prejudiced by enforcement of the agreement. *State v. Howard,* 110 *N.J.* at 123. Moreover, a defendant seeking to withdraw a guilty plea after sentencing will be allowed to do so unless "to correct a manifest injustice," *R.* 3:21-1, obviously a more stringent standard. *State v. Howard,* 110 *N.J.* at 123; *State v. Taylor,* 80 *N.J.* at 359-360. In *State v. Slater,* 198 N.J. 145, 157-158 (2009), the New Jersey Supreme Court identified four factors for trial judges to consider and balance in their determination of a motion to withdraw a guilty plea: 1) whether the defendant has asserted a colorable claim of innocence; 2) the nature and strength of the defendant's reason for withdrawal; 3) the existence of a plea bargain; and 4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused. In assessing these factors, the Court further elucidated as follows: 1) a defendant may not rely upon a base assertion of innocence, but must present specific credible facts, and, where possible, point to particular facts in the record; 2) the timing of the motion is a factor as to the strength of that reason proffered, which can include being misinformed about a material element of plea negotiations which the defendant relied upon in entering the plea; 3) as a large majority of cases are resolved by plea agreements, this factor does not merit great weight; and, finally 4) whether the passage of time has hampered the State's ability to present important evidence, and whether the passage of time has hampered the State's ability to present important evidence, and whether the trial has begun. *Slater,* 196 N.J. at 158-162.

G. Immunity

Defense counsel may be successful in obtaining immunity for their clients, without the need for any guilty plea. There are different variations of immunity; immunity may be formal or informal, transactional or use.

Formal immunity has been discussed above in the grand jury context. *See*, Grand Jury, Section I.D(5)(a)(ii)(a), *supra.* Thus, upon request of the Attorney General or County Prosecutor, a court may order a witness to answer questions pursuant to *N.J.S.A.* 2A:81-17.3. *Whippany*

Paper Board v. Alfano, 176 *N.J. Super.* 363, 370 (App. Div. 1980); *Bayonne Municipal Investigating Comm. v. Servello,* 220 *N.J. Super.,* 413, 423 (Law Div. 1984). In extraordinary circumstances, where there is no countervailing governmental interest militating against the grant of immunity, a court may grant a defendant's request to confer immunity at trial for a witness whose proffered testimony is clearly exculpatory and essential to the defendant's case. *State v. Summers,* 197 *N.J. Super*. 510, 516-517 (Law Div. 1984). *See also State v. Cito,* 213 *N.J. Super.* 296, 301-302 (App. Div. 1986), *certif. denied,* 107 *N.J.* 141 (1987). Under *N.J.S.A.* 2A:81-17.3, a witness who previously refused to answer questions by invoking his or her privilege against self-incrimination may be compelled to answer questions. However, the order, like its federal analog, confers use immunity on the witness, in that the witness' statements, or the fruits therefrom, may not be used against the witness, except in a prosecution for perjury. *See United States v. Apfelbaum,* 445 *U.S.* 115, 130 (1980); *State v. Vinegra,* 73 *N.J.* at 489; *N.J.S.A.* 2A:81-71.3. If the witness later is indicted, the State bears the burden of proving that its proof is not tainted by any of the immunized testimony. *Kastigar v. United States,* 406 U.S. 441, 460 (1972); *State v. Strong,* 110 N.J. 583, 590-591 (1988). Therefore, while a formal immunity order does not completely insulate the witness from criminal prosecution, it does put considerable road blocks in the way of a potential future prosecution. The State must show, by clear and convincing evidence, that there is a legitimate and wholly independent source for every item of evidence later introduced against the defendant. *Kastigar,* 406 U.S. at 460; *Strong,* 110 *N.J.* at 590-591, 595-596. The grant of immunity is limited to answers responsive to the questions asked, and therefore, an immunized witness may not volunteer extraneous information in the hopes of thereby insulating himself or herself. *See In re Zicarelli v. Occhipinti, Russo,* 55 *N.J.* 249, 270-271 (1970), *aff'd,* 406 *U.S.* 472 (1972).

Informal immunity is also available. *See State v. Riley,* 242 *N.J. Super.* 113, 116-120 (App. Div. 1990). Informal immunity fundamentally is a contract between the State and the witness, and must be so honored. *See Riley,* 242 *N.J. Super.* at 118-120. It is sometimes possible to negotiate successfully an agreement whereby the witness is giving transactional immunity. A witness who is given transactional immunity may not be prosecuted for the crimes contained within the scope of the agreement. *See State v. Strong,* 110 *N.J.* 158. However, while the scope of informal immunity may be broader than formal immunity, informal immunity sometimes may not be as desirable as a formal grant of immunity. Informal immunity may

require the witness to be available to meet and cooperate with the prosecution on a continuing basis. Informal immunity agreements also may require the witness to refrain from any further criminal activity, or the agreement may be vitiated. In the event that the agreement is vitiated, all testimony given pursuant to that agreement may be used against the witnesses. *See* Form 11, sample Cooperation Agreement.

Typically, before the prosecutor is willing to offer a witness immunity, the prosecutor wants to know what the witness would say if the witness testifies. This is accomplished via an attorney proffer of what his or her client may say, or via a "queen for a day." In a "queen for a day" agreement, the witness is granted informal testimonial immunity solely for the purpose of evaluating whether or not to grant the witness full immunity. However, "queen for a day" agreements often may differ from a formal testimonial immunity order in that leads from the testimony may be excluded from the ambit of immunity. The parameters of the immunity naturally depend upon the negotiations between counsel, which in tum depend upon how much assistance the witness may lend to the prosecution, and how badly the witness's prospective testimony is needed. *See* Form 12, a sample Proffer Agreement

III. PRETRIAL PROCEDURES

A. Prearraignment Conferences

Within seven days after an indictment has been returned, or a sealed indictment unsealed, a copy of the indictment and the discovery for each defendant named in the indictment must either be delivered to the criminal division manager's office, or must be made available to the prosecutor's office. *R.* 3:9-1(a); *R.* 3:13(b).

The criminal division manager's office sets this prearraignment conference within 21 days of indictment. A defendant must attend this conference. If a defendant fails to appear at the conference, the criminal division manager must notify the criminal presiding judge, who may issue a bench warrant. *R.* 3:9-1(a).

At the prearraignment conference, the criminal division manager's office must: (1) advise a defendant of the charges; (2) notify the defendant in writing of the status conference, and, if the defendant so requests, (3) allow the defendant to apply for pretrial intervention. *R.* 3:9-1(a). In addition, if a defendant indicates that he or she cannot afford counsel, the defendant must complete the Uniform Defendant Intake Report so that a determination can be made regarding the defendant's indigency status and eligibility for representation by the Public Defender's Office or assigned counsel. *R.* 3:9-1(a).

No prearraignment conference is required where a defendant has counsel and (1) counsel has filed an appearance under *R.* 3:8-1; (2) discovery, if requested has been obtained; and (3) defendant and counsel have obtained a date, place and time for the arraignment/status conference. *R.* 3:9-1(a). Defense counsel must obtain a copy of the indictment and discovery within 28 days after the return or unsealing of the indictment. *R.* 3:9-1(a); *R.* 3:13-3(b).

B. Arraignment/Status Conference

The arraignment/status conference is held within 50 days of indictment, unless the defendant did not appear at the pre-arraignment conference or was unrepresented at the pre-arraignment conference. If either of those circumstances is present, the arraignment/status conference is to be held within 28 days of indictment, unless the defendant is a fugitive. *R.* 3:9-1(c). At the arraignment/status conference, the judge must advise the defendant of the substance of the charge(s), and confirm that the defendant has reviewed with counsel the indictment and

discovery. *R.* 3:9-1(c). The defendant must enter a plea of guilty or not guilty to the offense at this time. *R.* 3:9-1(c); *R.* 3:9-2. If a defendant refuses to plead or stands mute, the court must enter a plea of not guilty on behalf of the defendant. *R.* 3:9-2.

Prior to this status conference, the prosecutor and defense counsel are required to discuss the case, including any plea offer and any outstanding or anticipated motions and discovery issues. *R.* 3:9-1(b). Counsel are required to report to the court at the arraignment/status conference concerning the results of these discussions. *R.* 3:9-1(b); *R.* 3:9-1(c).

At the arraignment/status conference, the court will also set a date for the filing and hearing of pretrial motions, and may also schedule another status conference. *R.* 3:9-1(c). Each status conference must be held in open court with the defendant present. *Id.* *See* Form 13, Notice of Conference.

C. Discovery

1. Discovery from the Prosecution

Unlike the federal rules, the State rules provide that if a prosecutor makes a pre-indictment plea offer, the prosecutor must provide defense counsel at that time with all available relevant material that would be discoverable post-indictment. *R.* 3:13(a). The prosecutor can withhold providing pre-indictment discovery to a defendant if it would hinder or jeopardize a prosecution or investigation, as long as defense counsel has been advised that complete discovery has not been provided. *R.* 3:3-3(a)(1). Alternatively, if physical or electronic discovery would impose an unreasonable burden on the prosecutor's office, the prosecutor's office may offer to make the discovery available at the prosecutor's office. *R.* 3:13(a)(2). In any event, the prosecutor *must* provide defense counsel with any exculpatory information or material if a pre-indictment plea is offered. *R.* 3:13(a).

In addition, the State rules, in contrast to federal practice, provide for broad disclosure of the prosecution's file, as well as that of a defendant, as part of pretrial discovery. *See State v. Montague*, 55 *N.J.* 387, 394-395 (1970). Thus, the State must either provide, or permit the defendant to inspect and copy or photograph the following material:

(1) books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to writings, drawings, graphs, charts,

photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(2) records of an accused's statements or confessions signed or unsigned, and, a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

(3) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter, within the prosecutor's possession, custody or control;

(4) reports or records of the defendant's prior convictions;

(5) books, papers, documents, or copies thereof, or tangible objects, buildings or places within the prosecution's possession, custody or control, including, but not limited to writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(6) names and addresses of all persons whom the prosecutor knows to have relevant information or evidence, together with a designation of which these individuals may be called by the prosecutor as a witness;

(7) any statements, whether signed or unsigned from any person designated in paragraph six above, along with the record of any prior convictions of the individuals. The prosecutor must also provide the defendant with transcripts of all electronically recorded statements of co-defendants and witnesses by a date to be determined by the trial judge, but no later than 30 days before the trial date set at the pretrial conference. This rule applies only if the prosecutor intends to call that co-defendant or witness as a witness at trial.

(8) police reports within the possession, custody or control of the prosecutor; and

(9) names and addresses of each expert witness whom the prosecutor expects to call at trial, the expert's qualifications, the subject matter on which the expert is expected to testify, and a copy of the expert's report, or, if no report is prepared, a

> statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. This information must be disclosed, after request, at least 30 days prior to trial (except in the penalty phase of a capital case). If the prosecutor fails to do so, the expert testimony may be barred upon application by the defendant, if the defendant can show prejudice or unfair surprise. *State v. Labrutto,* 114 *N.J.* 187, 205 (1989); *State v. Dreher,* 251 *N.J. Super.* 300, 315- 316 (App. Div. 1991), *certif. denied,* 127 *N.J.* 564 (1992).

R. 3:13(b)(1)(A)-(I). In addition to these items, the defendant may order the transcription of all grand jury proceedings. *R.* 3:6-6(b). Defendants may also obtain any executed warrants and accompanying papers, pursuant *to R.* 3:5-6(c).

The prosecutor must also provide the defense with an inventory of the materials supplied in discovery: If any discoverable materials known to the prosecutor have not been supplied, the prosecutor must also provide defense counsel with a listing of the material and explain why those materials have not been produced.

The prosecution may charge five cents per letter size page, and seven cents per legal size page, for copies of discovery. Electronic records and non-printed materials must be provided free of charge, except for the costs of needed supplies such as computer discs. *R.* 3:13-5(a).

Under certain circumstances, defendants may obtain other discovery, beyond that which is specifically set forth in the rules. Thus, when justice requires the court may, for instance, grant an order compelling the prosecutor to arrange a line up. *See State In the Interest of WC.,* 85 *N.J.* 218, 221, 224, 226-228 (1981). In addition, a defendant may be entitled to have a court order the physical examination of a child sex abuse victim in limited situations. Such an examination will be ordered only if the defendant sufficiently shows that the examination can produce competent evidence that has substantial probative worth, and if admitted and believed by the trier of fact, that evidence could rebut or neutralize incriminating evidence or impugn the credibility of prosecution witnesses. In addition, the court must be satisfied that the defendant's need clearly outweighs the possible harmful consequences to the alleged victim. *State v. D.R.H.,* 127 *N.J.* 249, 260-261 (1992).

Further, the State must disclose to the defense all exculpatory material pursuant to *Brady v. Maryland,* 373 *U.S.* 83 (1963) and its progeny. *See, e.g., State v. Marshall,* 123 *N.J.* 1, 172-185 (1991); *R.* 3:13(b)(1). This definition of exculpatory information includes so called *Giglio*

v. United States, 405 *U.S.* 150, 154-155 (1972)] material, which consists of evidence which might be used to impeach the credibility of prosecution witnesses, such as promises of leniency, remuneration or plea agreements made with such material witnesses, or evidence of the witness' involvement in criminal activity. *See United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985); *State v. Carter*, 91 N.J. 86, 111 (1982); *State v. Satkin*, 127 *N.J. Super.* 306, 309-310 (App. Div. 1974). In addition, a prosecutor has a duty to learn of "any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419,437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490, 508 (1995). This includes information known to other members of the prosecutor's office or to other agencies cooperating in the criminal investigation. *State v. Jones*, 308 N.J. Super. 15, 42 (App. Div. 1998); *State v. Landano*, 271 N.J. Super. 1, 41-42 (App. Div.), *certif. denied*, 137 N.J. 164 (1994); *State v. Engel*, 249 N.J. Super. 336, 396 (App. Div.), *certif. denied*, 130 N.J. 393 (1991). However, the prosecutor is not required to provide to the defendant potentially exculpatory information contained in a public record of which the defendant knows and to which the defendant has access. *See State v. Orlando*, 269 *N.J. Super.* 116, 133-134 (App. Div. 1993), *certif. denied*, 136 *N.J.* 30 (1994). *See* Form 14, Request for Discovery; *see also* Form 15, Discovery from the State.

In *State v. Nash*, 212 *N.J.* 518 (2013) the Court recently held that a defendant was entitled to a new trial because exculpatory evidence – unknown to the prosecutor and the defense attorney – was not disclosed to the jury.

2. Discovery from the Defense

A defendant's obligation to provide reciprocal discovery to the State is triggered only if the defendant seeks discovery from the State, *R.* 3:13-3(b), or if the defendant provides notice that he or she intends to rely upon various defenses enumerated in *R.* 3:12 and discussed below. A defendant who does not seek discovery from the State must so notify the criminal division manager's office and the prosecution. *R.* 3:13-3(b).

While in certain cases the desire to avoid reciprocal discovery may justify a defendant's refusal to seek discovery from the State, most often it is imperative to obtain the State's discovery to prepare properly for trial. If a defendant does seek discovery from the State, the defendant in tum must either provide to the prosecution a copy of, or allow the prosecutor to

inspect and copy or photograph, the following discovery material no later than 7 days before the arraignment/status conference:

(1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter, which are within the possession, custody or control of defense counsel;

(2) any relevant books, papers, documents or tangible objects, buildings or places which are within the possession, custody or control of defense counsel, including, but not limited to writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(3) names and addresses of any person who may be called as a witness at trial, together with any written statement or memorandum reporting or summarizing any oral statement;

(4) any written statement or memorandum reporting or summarizing the oral statements of any witness whom the defense may call at trial. The defendant shall also provide the State with transcripts of all electronically recorded witness statements by a date to be determined by the trial court, but in no event later than 30 days before the trial date set at the pretrial conference; and

(5) the name and address of any expert witness whom the defense expects to call at trial, along with the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the expert's report, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Just as with the State's notice requirement about its expert witnesses, if the defense fails to provide all this information no later than 30 days prior to trial, the expert may be barred from testifying upon application by the prosecution.

R. 3:13(b)(2)(A)-(E). Moreover, like the prosecutor, the defense attorney must provide opposing counsel with a list of materials that have been supplied in discovery. Additionally, akin to the obligations placed on the prosecutor, the defense counsel must provide his or her adversary with

a listing of the materials that are missing and explain why they have not been supplied. *R.* 3:13(b)(2).

No motion for discovery may be filed unless the moving party certifies that counsel have conferred and attempted to reach agreement on any discovery issues. *R.* 3:13(c). Documents may be provided through the use of CD, DVD, email, internet, or other electronic means (in pdf form). *R.* 3:13(d).

It should be noted specifically, however, that the State is not entitled to notice of a defendant's intention to testify or not to testify until at the earliest after the State has rested, or perhaps, according to the better reasoned analysis, until just before the defendant has rested. *See Brooks v. Tennessee,* 406 *U.S.* 605, 610-612 (1972); *Matter of Mandell,* 250 *N.J. Super.* 125, 131 (App. Div. 1991).

Both the defendant and the State are under a continuing obligation to disclose any additional material or witnesses previously requested or ordered subject to discovery or inspection. *R.* 3:13-3(a). The remedy for a party's non-compliance with this continuing disclosure obligation is to allow the discovery, grant a continuance or delay during trial, prohibit a party from introducing in evidence the material not disclosed or such other relief as may be appropriate. *R.* 3:13-3(g).

3. Discovery Exceptions

The work product doctrine is specifically applicable in the criminal context and is set forth in *R.* 3:13-3(e). That doctrine allows a party to withhold from discovery "internal reports, memoranda or documents made by that party or the party's attorney or agents, in connection with the investigation, prosecution or defense of the matter." *Id.* The work product doctrine also insulates the State from discovering the defendant's records or statements, signed or unsigned, made to the defendant's attorney or agents. *Id.*

Any party may also move for a protective order to deny, restrict or defer discovery to the other party. *R.* 3:13-3(f)(l). Considerations which the court may take into account in determining whether the movant has established good cause, among others, are the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation, maintenance of such secrecy regarding an informant as is required for effective investigation of criminal activity *(see, e.g.,* Informer's Privilege under

N.J.R.E. 516; *N.J.S.A.* 2A:84A-28. *See, generally, State v. Florez,* 134 *N.J.* 570, 578-583 (1994)) and protection of confidential relationships and privileges recognized by law, such as those in *N.J.R.E.* 501 through 517. *R.* 3:13-3(f)(1).

A party may apply for a protective order on a showing of good cause, in whole or in part, in the form of an *ex parte,* in camera submission. If the protective order is granted, the judge must seal and preserve, for a potential appeal, the entire text of the statement. *R.* 3:13(f)(2).

4. Defendant's Obligation to Provide Notice

a. Statutory Defenses

If a defendant intends to rely upon certain defenses at trial, the defendant must give advance notice to the prosecution. These defenses include various statutory defenses found in the Code of Criminal Justice and enumerated in *R.* 3:12-1 including: Ignorance or Mistake, 2C:2-4(c); Renunciation Terminating Complicity for: Accomplice Liability, 2C:2-6(e)(3), Attempt Liability, 2C:5-1(d), or Conspiracy Liability, 2C:5-2(e); Intoxication, 2C:2-8(d); Duress, 2C:2-9(a); Entrapment, 2C:2-12(b); Insanity, 2C:4-1; and General Principles of Justification, 2C:3-1 to 2C:3- 11, such as self-defense.

The defendant must serve the prosecution with a notice of intention to claim any of these defenses within 7 days before the arraignment/status conference. *R.* 3:12-1. If the defendant requests or has received discovery pursuant to *R.* 3:13-3, the defendant must furnish the prosecutor with discovery relating to any such defense at the time the notice of intention to claim any of the defenses is served. *Id.* Within 14 days of receipt of this discovery, the prosecutor must provide discovery for any defense as which the prosecutor has received notice. *Id.* The court may enforce a party's failure to adhere to this obligation by precluding the defaulting party from presenting witnesses, concerning the defense, or grant an adjournment or delay during trial. *Id.*

Except for the defenses specifically enumerated in *R.* 3:12-1 and *R.* 3:12-2, the defendant is under no obligation to provide notice to the State of the defendant's intent to rely upon such a defense. *See State v. Alston,* 212 *N.J. Super.* 644, 648 (App. Div. 1986).

b. Notice of Alibi

As part of their standard discovery letter, prosecutors typically demand the defendant to advise the prosecutor whether the defendant intends to rely upon an alibi defense. In response, the defendant must notify the prosecutor, within 10 days of the prosecution's written demand, of defendant's alibi. *R.* 3:12-2(a). The defendant must sign a statement advising the prosecution of the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses upon whom the defendant intends to rely to establish this alibi. *Id.* Within 10 days of receipt of the alibi, the prosecutor must, upon written demand, furnish the defense with the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged offense. *Id.*

In *State v. Bradshaw,* 196 N.J. 492, 507-508 (2008), the Court set forth a four-part balancing test for the court to determine the sanction for a defendant's breach of the notice of alibi rule. Thus, the court must take into effect the following: 1) the prejudice to the State; 2) the prejudice to the defense; 3) whether any lesser sanction short of preclusion of the witness(es) is available to preserve the policy underlying the policy requirement, such as a continuance or a mistrial, and 4) whether the defendant's failure to comply with the alibi notice was willful and intended to obtain a tactical advantage.

If the defendant does not testify, the State may not introduce into evidence a defendant's alibi-witness notice. *State v. Irving,* 114 *N.J.* 427, 437-441 (1989); *State v. Gross,* 216 *N.J. Super.* 92, 96 (App. Div.), *certif. denied,* 108 *N.J.* 194 (1987). However, if a defendant does take the stand, the State may use the defendant's alibi notice during cross-examination as a prior inconsistent statement. *State v. Irving,* 114 *N.J.* at 437-441.

The State may cross-examine an alibi witness about his or her failure to advise the authorities about the defendant's alibi, but only if the State first establishes at a pretrial hearing that the witness was aware of the charges, realized that he or she possessed exculpatory information, had a motive to exculpate the defendant, knew how to communicate the exculpatory information, and was not silent on advice of defense counsel. *State v. Silva,* 252 *N.J. Super.* 622, 629-30 (App. Div. 1991), *affd,* 131 *N.J.* 438, 447-448 (1993). In addition, once the alibi notice listing the witness has been served, the witness may not be cross-examined or impeached on the basis of the witness's pretrial silence. *State v. Silva,* 252 *N.J. Super.* at 631.

5. *Depositions*

Unlike civil cases, depositions are rarely utilized in criminal cases. *State v. Harris, 263 N.J. Super.* 418,421 (Law Div. 1993). They are only available if a judge is convinced that a witness in a pending case is likely to be unable to testify at trial because of death or physical or mental incapacity. *R.* 3:13-2(a). Upon motion and notice to the parties, and after a showing that such action is necessary to prevent manifest injustice, the court may order the deposition to take place, and may further order the deponent to produce at that time any designated non-privileged books, papers, documents or tangible objects, including electronically stored information. *R.* 3:13-29(a). A material witness who has been committed for failure to give bail to appear to testify at a trial or hearing may be ordered, on written motion of the witness and notice to the parties, to appear for the witness's deposition, after which the witness may be discharged. *R.* 3:13-2(a). All depositions taken under this rule must be videotaped, unless the court otherwise orders. *R.* 3:13-2(b). The deposition must be taken before the judge, at a location convenient to the parties. If a judge is unable to be present at an out of state deposition, then the judge will appoint a designated person to perform that function. *Id.* The questioning of the witness and the determination of admissibility of evidence proceed in the same manner as at trial. *Id.*

The deposition may be used in lieu of live testimony at trial if the witness is unable to testify because of death or physical or mental incapacity. *R.* 3:13-2(c). The court must first find, however, that the circumstances of the taking of the deposition allowed full preparation and cross- examination by all parties. *Id.* The judge alternatively may order that only the audiotape testimony or a transcript of the witness's testimony be used to avoid undue prejudice to a party. *Id.*

In any case in which a deposition is used, the court must instruct the jury that the procedure is employed for the convenience of the witness and that the jury should draw no inference from its use. *R.* 3:13-2(d).

Note that pursuant to *N.J.S.A.* 2A:91-18, *et seq.*, out of state witnesses may be compelled to attend criminal trials.

6. Additional Discovery in Capital Case

In addition to any discovery required to be produced under *R.* 3:13-3, the prosecutor must furnish additional discovery to the defense in a capital case. In particular, the prosecutor must provide the defense at arraignment, as required by *N.J.S.A.* 2C:ll-3(c)(2), with a list of aggravating factors that may be proved at the sentencing hearing together with all discovery pertinent to these factors. *R.* 3:13-4(a). The prosecutor must also furnish the defense, at the time of arraignment, with any discovery in its possession that is relevant to the existence of any mitigating factors. *Id.* If a defendant pleads to or is found guilty of a capital offense, the defendant must provide the prosecutor with an itemization of all mitigating factors upon which the defendant intends to rely at sentencing, together with any discovery in the defendant's possession which supports any of these factors. *R.* 3:13-4(b). As with other discovery provisions, the obligation to disclose discovery relevant to the existence of aggravating and mitigating factors is a continuing one. *R.* 3:13-4(c).

D. Bills of Particulars

A defendant is entitled to a bill of particulars if the indictment or accusation is not sufficiently specific to enable the defendant to prepare a defense. *R.* 3:7-5. A defendant seeking a bill of particulars must make such a motion in accordance with the procedures governing the filing of all pretrial motions, set forth in *R.* 3:10-2. The application must clearly identify the particularization sought by the defense. *R.* 3:7-5. *See* Form 16, Notice of Motion for a Bill of Particulars. If the prosecution has furnished discovery to the defendant which covers the particulars, then it will not be ordered to provide a bill of particulars. *Id.* The prosecution must furnish the bill of particulars within 10 days of the court's order requiring production of the particularization.

E. Pretrial Motions

1. Timing

Defense counsel must be aware of the fact that there are certain motions which must be raised before trial, and that the court may deem the failure to raise these defenses in a timely manner a waiver of these defenses. *R.* 3:10-2(c). The motions which must be raised before trial

are defenses of double jeopardy, and all other defects in the institution of the prosecution or indictment or accusation. *Id.* The defense that the indictment or accusation fails to charge an offense or that the charge is based in whole or in part on an unconstitutional statute or regulation may be raised by motion either before trial and within 10 days after a guilty verdict or within such additional time as the court may fix during this 10 day period or on appeal. *R.* 3:10-2(d). The defense of lack of jurisdiction may be raised at any time during the pendency of the proceeding except during trial. *R.* 3:10-2(e).

The time for the filing of all other motions usually is set by the court at the arraignment/status conference. *R.* 3:10-2(a). These motions ordinarily are disposed of before a trial memorandum is prepared and a trial date is set. *R.* 3:10-2(b).

2. Types of Motions

There are obviously numerous motions which can be raised in a criminal case. These motions may be roughly classified into various groups, as follows:

a. Motions Directed to the Institution of Charges

Motions directed to the institution of the charges themselves consist of various types of motions. Each of those types of motions are discussed below:

i. Statute of Limitations

The general statute of limitations for most crimes in New Jersey is five years. *N.J.S.A.* 2C:1-6b(1). Prosecutions for disorderly persons offenses or petty disorderly persons offense must be commenced within one year of the alleged commission of the offense. *N.J.S.A.* 2C:1-6b(2). A prosecution for various offenses relating to misconduct of public officials *(N.J.S.A.* 2C:27-2 (bribery in official and political matters); *N.J.S.A.* 2C:27-7 (Compensating a Public Servant for Assistance); *N.J.S.A.* 2C:29-4 (compounding, *i.e.*, compensating someone or accepting remuneration to refrain from reporting criminal activity); *N.J.S.A.* 2C:30-2 (official misconduct) or *N.J.S.A.* 2C:30-3 (speculating or wagering an official action or information), or a conspiracy to commit any of these offenses, must be commenced within seven years after commission of the offense. *N.J.S.A.* 2C:1-6b(3). Various sex crimes committed against minors *(N.J.S.A.* 2C:14-2, 14-3 or 14-4) must be prosecuted within five years of the victim's attaining

the age of 18, or within two years after the discovery of the offense by the victim, whichever is later. *N.J.S.A.* 2C:1-6b(4). There is no statute of limitation for a criminal homicide or manslaughter prosecution under *N.J.S.A.* 2C:ll-3 or2C:ll-4. *N.J.S.A.* 2C:1-6a.

A prosecution is deemed to have been "commenced" for statute of limitations purposes when an indictment is returned for a crime, or when a warrant or other process is issued for a nonindictable offense, provided that there is no unreasonable delay in executing the warrant or process. *N.J.S.A.* 2C:1-6d. A superseding indictment charging a new crime will be deemed timely, even if returned after the statute of limitations has run, if based on the same conduct as the originally charged crime. *State v. Ochmanski,* 216 *N.J. Super.* 240, 246-247 (Law Div. 1987). *See also State v. Stem,* 197 *N.J. Super.* 49, 53-54 (App. Div. 1984).

The statute of limitations does not apply to a fugitive. *N.J.S.A.* 2C:1-6f. In addition, the period of limitation does not run during any time when a prosecution of an accused for the same conduct is pending in the State. *N.J.S.A.* 2C:1-6e.

The defense of the statute of limitation is an absolute bar to prosecution and it may be asserted at any time, prior to or after judgment, *State v. Stillwell,* 175 *N.J. Super.* 244, 251 (App. Div. 1980); *see also State v. Short,* 131 *N.J.* 47, 55 (1993), as it is deemed to be a jurisdictional motion under *R.* 3:10-2(e).

ii. Speedy Trial/Unnecessary Delay

The Sixth Amendment to the United States Constitution protects a defendant's right to a speedy trial after arrest or indictment. *United States v. MacDonald,* 456 *U.S.* 1, 7 (1992); *State v. Szima,* 70 *N.J.* 196, 199-200, *cert. denied,* 429 *U.S.* 896 (1976). This provision protects defendants against prosecutorial delay and minimizes the possibility of a lengthy incarceration prior to trial. *Pollard v. United States,* 352 *U.S.* 354, 361 (1957); *State v. Long,* 119 *N.J.* 439, 470 (1990).

The New Jersey Court Rules provide for the implementation of the speedy trial right in two situations: delays between indictment and trial, and delay between the initial complaint and the return of an indictment by a grand jury. *State v. Szima,* 133 *N.J. Super.* 469,472 (App. Div. 1975), *rev'd on other grounds,* 70 *N.J.* 196, *cert. denied,* 429 *U.S.* 896 (1976).

R. 3:25-3 provides that if there is an unreasonable delay in presenting the charge to the grand jury or in filing an accusation against a defendant held to answer on a complaint, the

Assignment Judge or his or her designee, may dismiss the motion on its own or on motion of the defendant. In addition, *R.* 3:25-2 provides a mechanism by which a defendant who has been in custody awaiting trial on an indictment (other than for a capital offense) for at least 90 days after indictment to move for a trial date. The court must fix a trial date, after allowing the prosecutor an opportunity to be heard. If the prosecutor is unable to proceed on the trial date, the court is authorized by *R.* 3:25-2 to enter such orders as the interest of justice requires, including pretrial release of the defendant.

If there is unreasonable delay in the disposition of an indictment or accusation, the judge to whom the case has been assigned may dismiss the matter on the judge's own motion or that of the defendant. *R.* 3:25-3.

In general, the courts consider four factors in determining whether to dismiss an indictment or accusation because of delay in prosecution: (1) length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice suffered by the defendant because of the delay. *Barker v. Wingo,* 407 *U.S.* 514, 530 (1972); *State v. Cahill,* 213 *N.J.* 253, 264-270, 277 (2013); *State v. Townsend,* 186 N.J. 473, 487 (2006); *State v. Cappadona,* 127 *N.J. Super.* 555, 558 (App. Div.), *certif. denied,* 65 *N.J.* 574, *cert. denied,* 419 *U.S.* 1034 (1974). *See also State v. Long,* 119 *N.J.* at 470; *State v. Gallegan,* 117 *N.J.* 345, 355 (1989).

iii. Double Jeopardy

The Fifth Amendment to the United States Constitution and the more narrow Article I, paragraph 11 of the New Jersey Constitution provide defendants with protection against being tried or punished twice for the same offense. *See North Carolina v. Pearce,* 395 *U.S.* 711, 717 (1969); *State v. Currie,* 41 *N.J.* 531,535-536 (1964). In addition, *N.J.S.A.* 2C:1-9, 2C:1-10, and 2C:1-11 all address, respectively, when prosecution is barred by former prosecutions for the same offense, for a different offense, or for an offense in another jurisdiction. State protection under the New Jersey Constitution, Art. I, 1)[11, is at least coextensive with the protection afforded by the federal double jeopardy clause. *State v. Womack,* 145 *N.J.* 576,586, *cert. denied,* 519 *U.S.* 1011, 117 *S.Ct.* 517, 136 *L.Ed.2d* 405 (1996); *State v. Koedatich,* 118 N.J. 513,518 (1990).

Jeopardy attaches in a bench trial when the first witness is sworn in. *Seifass v. United States,* 420 *U.S.* 377, 388 (1975); *State v. Lynch,* 79 *N.J.* 327, 341 (1979); *State v. Samarel,* 231 *N.J. Super.* 134, 139 (App. Div. 1989). Jeopardy attaches in a jury trial when the jury is sworn in. *Crist v. Bretz,* 437 *U.S.* 28, 35 (1978); *State v. Lynch,* 79 *N.J.* at 341; *N.J.S.A.* 2C:1-9d. Double jeopardy and collateral estoppel objections must be raised in a timely manner under *R.* 3:10-2, or they will be deemed waived. *State v. Lane,* 279 *N.J. Super.* 209, 215 (App. Div.), *certif. denied,* 141 *N.J.* 94 (1995).

Various factors determine whether a later prosecution is barred by an earlier one for the same offense for which the proofs are identical. If the former prosecution resulted in an acquittal by a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction, then the subsequent prosecution is barred by *N.J.S.A.* 2C:1-9a. *State v. DeLuca,* 108 *N.J.* 98, 106-107, *cert. denied,* 484 *U.S.* 944 (1987). This holds true even if the first acquittal was erroneously granted. *See Sanabria v. United States,* 437 *U.S.* 54, 69 (1978); *State in Interest of J.O.,* 242 *N.J. Super.* 248, 253-254 (App. Div.), *certif. denied,* 122 *N.J.* 385 (1990); *State v. Costello,* 224 *N.J. Super.* 157, 162-163 (App. Div.), *certif. denied,* 111 *N.J.* 596 (1988). In addition, a subsequent prosecution will be barred if the former identical offense (1) resulted in a conviction or (2) was terminated after complaint or indictment, by a final order or judgment for the defendant, which necessarily required a determination inconsistent with a fact or legal proposition that must be established for a conviction and the conviction or order or judgment has not been reversed, set aside or vacated. *N.J.S.A.* 2C:1-9c and b, respectively. Finally, after jeopardy attaches, if there is an improper termination of a prosecution for reasons not amounting to an acquittal, a second prosecution is barred. *N.J.S.A.* 2C:1-9d. This subsection further specifies that termination of a prosecution is not improper if: (1) the defendant consents or waives his right to object to the termination, such as by filing a motion to dismiss; (2) the trial court declares a mistrial because of the jury's inability to reach a verdict after a reasonable time for deliberation; or (3) the trial court finds that termination is required by a sufficient legal reason and a manifest or absolute or overriding necessity. *Id.* If the first trial terminates in a mistrial on defendant's motion, a second trial is prohibited pursuant to the double jeopardy clause only upon a showing of bad faith on the part of the prosecutor intended to "goad" the defendant into moving for a mistrial. *Oregon v. Kennedy,* 456 U.S. 667,

675-676, 102 S.Ct. 2083, 2089, 72 L.Ed. 2d 416, 424-25 (1982); *State v. Gallegan,* 117 N.J. 345, 357-58 (1989); *State v. Cooper,* 307 N.J. Super. 196, 201-203 (App. Div. 1997).

Subsequent prosecutions are barred under certain circumstances if the prosecution was for a different offense. If the former prosecution resulted in an acquittal or conviction and the subsequent prosecution is for (1) an offense of which the defendant could have been convicted in the first prosecution; (2) an offense for which the defendant should have been tried under *N.J.S.A.* 2C:l-8, unless the court orders a separate trial of the charge; or (3) the same conduct unless (a) the charge for which the defendant is subsequently prosecuted required proof of a fact not required by the other, and the second offense entails a substantially different harm or evil; or (b) the second offense was not consummated when the first trial commenced. *N.J.S.A.* 2C:l-10a(l)-(3). *See generally, State v. Yoskowitz,* 116 *N.J.* 679, 690-699 (1989). Additionally, a subsequent prosecution is barred if the first prosecution was terminated, post-indictment or post-complaint, by an acquittal or a final order or judgment for the defendant which has not been set aside, reversed or vacated and which order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense. *N.J.S.A.* 2C:1-10b. Finally, double jeopardy will preclude a subsequent prosecution when the former prosecution was improperly terminated, as set forth in 2C:1-9, and the subsequent prosection is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated, as set forth in 2C:1-9. *N.J.S.A.* 2C: l-10c.

Under the federal law prior to 1997, and state law, a civil proceeding in which a penalty is imposed may be a subsequent criminal prosecution if the penalty is punitive rather than remedial. *See United States v. Halper,* 490 U.S. 435, 448-451 (1989); *Merin v. Maglaki,* 126 N.J. 430, 440- 445 (1992); *State v. Ciba-Geigy Corp.,* 253 N.J. Super. 51, 60 (App. Div. 1992). However, in 1997, the United States Supreme Court decided the case of *Hudson v. United States,* 522 U.S. 93, 96, 118 S.Ct. 488, 493-495, 139 L.Ed.2d 450, 459-461 (1997), and largely disavowed the *Halper* double jeopardy analysis. Instead, the Court stated that whether a sanction triggers double jeopardy constraints is whether the sanction essentially constitutes a criminal penalty. *Id.* at 99-101, 118 S.Ct. at 493-94, 139 L.Ed.2d at 458-59. In *State v. Black,* 153 N.J. 438, 446 (1998), the New Jersey Supreme Court found it to be unnecessary to reevaluate New Jersey's double jeopardy jurisprudence in light of Hudson. In *Black,* the court found that even under the old *Halper* standard, defendant's claim, that revocation of a defendant's

parole did not bar a subsequent criminal prosecution for absconding from parole, was meritless. *Id.* at 454. However, a "penalty", such as forfeiture, may violate the Eighth Amendment's prohibition of excessive fines. *See Austin v. United States,* 509 U.S. 602, 621-22, 113 S.Ct. 2801, 2812, 125 L.Ed.2d 488, 506 (1993); *State v. 1987 Chevrolet Camara*, 307 N.J. Super. 34, 47 (App. Div.), *certif. denied,* 153 N.J. 214 (1998); *State v. $3,000 in United States Currency*, 292 N.J. Super. 205, 213 (App. Div. 1996).

Essentially the same provisions govern in the case of former prosecutions in another jurisdiction under *N.J.S.A.* 2C:1-11. In general, if the first prosecution is based on the same conduct, and resulted in an acquittal, conviction or improper termination, a subsequent prosecution will be barred. *N.J.S.A.* 2C:1-11a. There are exceptions to this general rule when (1) the second prosecution requires proof of a different fact and the two prosecutions are aimed at preventing substantially different harms or evils, (2) the second prosecution is for a much more serious harm or evil than the initial prosecution; or (3) the second offense was not consummated when the trial commenced. *Id.*

Double jeopardy does not bar a subsequent prosecution if the first prosecution: (a) was before a court which lacked jurisdiction over the defendant or over the offense; (b) was procured by the defendant without the knowledge of the appropriate prosecuting officer; or (c) resulted in a judgment of conviction subsequently held invalid on a petition for post-conviction relief, except that a defendant may not be reprosecuted for a greater inclusive offense. *N.J.S.A.* 2C:1-12a-c.

iv. Lack of Jurisdiction

Jurisdictional issues consist of jurisdiction over the person and jurisdiction over the offense. Both of these issues arise very rarely in criminal prosecutions, because of the wide breadth and reach of the criminal statutes. Pursuant *to R.* 3:10-2(e), this defense is not waivable and may be raised at any time during or after the proceedings except during trial. *State v. Streater,* 233 *N.J. Super.* 537, 541 (App. Div.), *certif. denied,* 117 *N.J.* 667 (1989). *R.* 3:10-2(d) and (e) preserve the State's right to appeal from a trial court's determination of lack of jurisdiction. *State v. Ingram,* 226 *N.J. Super.* 680, 683 (Law Div. 1988).

Territorial jurisdiction issues arise most often if the alleged crime was committed within an area of exclusive federal jurisdiction, such as a federal military base or recreation area. *See*

State v Schumann, 218 *N.J. Super.* 501,506-508 (App. Div. 1987), *modified,* 111 *N.J.* 470 (1988); *State v. Ingram,* 226 *N.J. Super.* at 686-687. These issues also arise in connection with conduct by a defendant which takes place out of state but which has in state components. *See, e.g., State v. Schmidt,* 213 *N.J. Super.* 576, 585-586 (App. Div. 1986) (defendant outside the state responsible for conduct in state committed by conspirator), *rev'd on other grounds,* 110 *N.J.* 258 (1988). *See State v. McDowney,* 49 *N.J.* 471, 474 (1967) (the case must be tried in the state in which the crime is committed); *State v. Streater,* 233 *N.J. Super.* at 543-544 (planning and preparing in New Jersey for crime of theft by deception committed in another state was sufficient to confer jurisdiction in New Jersey court).

Note that the Superior Court may assert jurisdiction over non-indictable offenses when they are lesser-included offenses of indictable offenses. *N.J.S.A.* 2A:3-4; 2A:8-21(a) and (g); *R.* 3:1- 5(a); *State v. DeLuca,* 108 *N.J.* at 111.

An illegal arrest taints only the evidence that is the product of the arrest; it does not necessarily taint the entire prosecution. *State v. Mulcahy,* 107 *N.J.* 467, 482 (1987). Thus, the requirements of due process are met when a defendant present in court (even as a result of an illegal arrest) is convicted after having been fairly apprised of the charges against him or her and after a fair trial in accordance with constitutional procedural safeguards. *Frisbie v. Collins,* 342 *U.S.* 519, 522 (1952); *Goodlet v. Goodman,* 34 *N.J.* 358, 362, *cert. denied,* 368 *U.S.* 855 (1961).

v. Grand Jury Irregularities

The law governing grand jury proceedings has been discussed in Section I.D., *supra.* Motions which challenge the indictment based on prosecutorial misconduct, insufficiency of the facts supporting the indictment's charges or other motions directed at irregularities in the grand jury proceedings must be brought before trial pursuant *to R.* 3:10-2(c). Other motions attacking the legal sufficiency of the charge or that the charge is based upon an unconstitutional statute or invalid regulation, must be brought pursuant to *R.* 3:10-2(d) either before trial or within 10 days after a guilty verdict.

vi. Immunity

If a defendant has been fortunate to receive transactional immunity (described in Section ll.G., *supra),* but unfortunate enough to be prosecuted again for the "same offense", the

defendant must move to dismiss pursuant *toR.* 3:10-2. *See State v. Kenny,* 68 *N.J.* 17, 21-24 (1975). Obviously, if the immunity is transactional and the second prosecution is for an offense within the ambit of the immunity, then the second indictment must be dismissed. *State v. Kenny,* 68 *N.J.* at 32.

vii. Selective Prosecution

Under the Equal Protection component of the Fifth Amendment's Due Process Clause, and New Jersey's equivalent, the decision whether to prosecute may not be based on an arbitrary classification such as race or religion. *United States v. Armstrong,* 517 *U.S.* 456, 116 *S.Ct.* 1480, 134 *L.Ed.2d* 687 (1996); *Oyler v. Boles,* 368 *U.S.* 448, 456 (1962); *State v. Perry,* 124 *N.J.* 128, 167-169 (1991). A defendant's allegations of selective prosecution by the State must be raised in the context of a motion under *R.* 3:10-2. The defendant must plead and prove intentional selectivity as well as an unjustifiable basis for the discrimination. *Wayte v. United States,* 470 *U.S.* 598, 608 (1986); *State v. Perry,* 124 *N.J.* at 168.

viii. Competence to Stand Trial

A legally incompetent defendant cannot, consistent with due process, be compelled to stand trial. *Drape v. Missouri,* 420 *U.S.* 162, 171-172 (1975); *State v. Spivey,* 65 *N.J.* 21,36 (1994). The standard to be applied in determining whether a defendant is capable of standing trial is whether the defendant is able to comprehend his or her position, consult intelligently with counsel and plan his or her defense. *State v. Spivey,* 65 *N.J.* at 36; *State v. Auld,* 2 *N.J.* 426, 435 (1949). *See Dusky v. United States,* 362 *U.S.* 402 (1960). If there is a "bona fide doubt" as to the defendant's competency to stand trial, defense counsel should raise the issue and request a hearing. *Drape v. Missouri,* 420 *U.S.* at 177 n.l3; *State v. Lucas,* 30 *N.J.* 37, 74 (1959). The judge, acting upon his or her own observations, may also *sua sponte* order a competency hearing. *State v. Spivey,* 65 *N.J.* at 36; *State v. Lucas,* 30 *N.J.* at 73. Once a defendant raises a bona fide doubt as to competency, the State then has the burden of providing the defendant's competency to stand trial by a preponderance of the evidence. *State v. Lambert,* 275 *N.J. Super.* 125, 129 (App. Div. 1994); *State v. Otero,* 238 *N.J. Super.* 649, 652-654 (Law Div. 1989).

In making this determination concerning the defendant's competency to stand trial, the court may rely upon evidence of a defendant's irrational behavior, his or her demeanor at trial

and any prior medical opinion on competence to stand trial. *Drope v. Missouri*, 420 *U.S.* at 180; *State v. Lambert*, 275 *N.J. Super.* at 129. In addition, *N.J.S.A.* 2C:4-4b has codified the other factors to be considered by the court in making this determination, which basically consist of whether the defendant possesses the capacity to comprehend the rudimentary aspects of the trial and can participate in an adequate presentation of the defense.

If the competency of the defendant to stand trial is called into question, the court may appoint at least one qualified psychiatrist to examine and report upon the defendant's mental condition. *N.J.S.A.* 2C:4-5a. The court may order the defendant committed to a hospital or other suitable facility for the examination for a period not exceeding 30 days, which may be extended for an additional fifteen days upon a showing of particular need. *N.J.S.A.* 2C:4-5a(2).

If the court determines that the defendant lacks the fitness to proceed, the court must suspend the proceedings against the defendant. *N.J.S.A.* 2C:4-6b. The defendant may be released, placed in an outpatient program or institutionalized for the period of time during which it can be determined whether it is substantially probable that the defendant could regain his or her competence within the foreseeable future. *ld.* If the defendant has not regained fitness to proceed within the time that the court initially deemed to be adequate from the time that the initial determination was made regarding the defendant's lack of competence to stand trial, the court must, after a hearing (if requested), dismiss the charges and order the defendant discharged or civilly committed to an institution. *N.J.S.A.* 2C:4-6c. The dismissal of the charges under this section is with prejudice. *State v. Gaffey*, 92 *N.J.* 374, 389 (1983). If the charges are not dismissed, there must be a review every six months until the court orders the defendant to stand trial or that the charges be dismissed. *N.J.S.A.* 2C:4-6C. Alternatively, if the court determines that it is not substantially probable that the defendant will regain his or her competence in the foreseeable future, the court may dismiss the charge with or without prejudice, *State v. Gaffey*, 92 *N.J.* at 389, and order the defendant released or civilly committed to an appropriate institution. *N.J.S.A.* 2C:4-6e.

ix. De Minimis Infractions

The New Jersey Criminal Code, *N.J.S.A.* 2C:2-11, provides a statutory defense to those being prosecuted for "de minimis infractions." Under this section, the assignment judge, on defendant's motion, may dismiss an indictment if it finds one of three factors: (1) the defendant's

conduct "was within a customary license or tolerance"; (2) the defendant's conduct did not actually cause or threaten the harm or evil sought to be prevented by the criminal statute allegedly violated or did so only to an extent too trivial to warrant the condemnation of conviction; or (3) the defendant's conduct presents such other extenuating circumstances that it could not reasonably be regarded as contemplated by the Legislature in enacting the criminal offense. *N.J.S.A.* 1C:2-11 a-c.

A motion seeking dismissal of an indictment under this section must be made prior to trial; this section may not be used to set aside a conviction. *State v. Zahl,* 259 *N.J. Super.* 372, 376-377 (Law Div. 1992). The cases are split whether the judge is restricted to the State's allegations and proofs in determining whether, under section b of the statute, the defendant's conduct "did not actually cause or threaten, the harm or evil sought to be prevented ..." *State v. Evans,* 193 *N.J. Super.* 560, 563, 566 (Law Div. 1984). *See also State v. Hegyi,* 185 *N.J. Super.* 229, 231-232 (Law Div. 1982) (contemplating a summary judgment like procedure, where the court considers facts beyond those presented to the grand jury). *Contra State v. Brown, 188 N.J. Super.* 656, 670-674 (Law Div. 1984) (possession of .65 grams of cocaine by a prisoner not too trivial so as to warrant dismissal of indictment, further stating that only the facts alleged by the prosecution should be taken into account by the court to determine whether the indictment should be dismissed under this section).

b. Motions Directed at the Fairness of the Proceedings

i. Change of Venue/Foreign Juries

Only a defendant may seek a change of venue. *R.* 3:14-2. Ordinarily, an offense is to be tried in the county where it was committed. *R.* 3:14-1. There are various exceptions to this general rule which are enumerated in *R.* 3:14-1(a) - U). Most often, a change of venue is sought on the basis of undue pretrial publicity. *See, e.g., State v. Marshall,* 123 *N.J.* at 73-79; *State v. Bey*, 96 *N.J.* 625, 629-630 (1984).

A motion for a foreign jury may be made by any party by applying to the trial judge to whom the case is assigned or to the Assignment Judge of the county in which the indictment was handed up or accusation filed. *R.* 3:14-2. The motion must be on notice to all other parties, and must be granted if the court finds it necessary to overcome the realistic likelihood of prejudice,

such as from pretrial publicity. *State v. Harris,* 156 N.J. 122, 146-47 (1998); *State v. Bey,* 96 *N.J.* at 630; *State v. Williams,* 93 *N.J.* 39, 67-68 n.l3 (1983); *R.* 3:14-2. Disposition of the motion is within the sound discretion of the trial court. *State v. Marshall,* 123 *N.J.* at 76; *State v. Biegenwald,* 106 *N.J.* 13, 33 (1987); *State v. Harris, 282 N.J. Super.* 409, 413 (App. Div. 1995). Note also that a continuance may be appropriate, where there is a concern about pretrial publicity, to allow the public fervor to cool. However, in *State v. Harris,* 156 N.J. at 147, the New Jersey Supreme Court enunciated that in future capital cases, a court should change the venue when "there is a realistic likelihood that presumptively prejudicial publicity will continue during the conduct of a trial." "Presumptively prejudicial publicity" was defined to include evidence that would be inadmissible at trial, editorial opinions on guilt or innocence, and media pronouncements that a defendant should be executed. *Id.* at 148.

ii. Disqualification/Recusal of Trial Judge

If there is a concern that the judge may have personal knowledge about the defendant or the defendant's alleged actions or that a judge already has weighed the evidence and rendered conclusions on the credibility of witnesses before verdict, then a motion for disqualification of the trail judge may be appropriate. *See New Jersey Div. of Youth and Family Services v. A.W,* 103 *N.J.* 591, 617 (1986); *James v. State of New Jersey,* 56 *N.J. Super.* 213, 217 (App. Div. 1959). Such a motion is made pursuant to *R.* 1:12-1 *et. seq.* Disqualification under this rule is also appropriate (1) when the judge may be related to any of the parties or the attorneys, (2) when the judge has been attorney of record or counsel in the action or when there is any other reason which might preclude a fair and unbiased hearing and judgment, or (3) if anything might reasonably lead counsel or the parties to believe that disqualification is appropriate. Disqualification of the trial judge is not appropriate merely because the court previously rendered an opinion in another action in which the same matter in controversy arose or because the court previously rendered an opinion on any question in controversy in the pending action in the course of previous proceedings therein. *R.* 1:12-1.

iii. Joinder and Severance

Two types of joinder exist: 1) joinder of offenses and 2) joinder of defendants. Both types of joinder are permissible when the offenses or defendants could have been joined in a

single indictment or accusation. *R.* 3:15-1(a). Joinder of offenses is proper when (1) the multiple offenses are based on the same conduct or arose from the same criminal episode, (2) such offenses are known at the time of the first trial and (3) all offenses are within the jurisdiction and venue of the same court. *N.J.S.A.* 2C:1-8(b); *R.* 3:15-1(b); *State v. Yoskowitz,* 116 *N.J.* 679,701 (1989). Failure to join offenses subject to mandatory joinder requirements bars subsequent prosecution of the omitted offense. *State v. Gregory,* 66 *N.J.* 510, 521-522 (1975). Joinder of defendants is proper when they have participated in an identical transaction or series of interrelated transactions, irrespective of whether they have also been charged with a conspiracy. *State v. Brown,* 118 *N.J.* 595, 605 (1990); *State v. Louf,* 64 *N.J.* 172, 176-177 (1973); *State v. Kropke,* 123 *N.J. Super.* 413, 417-418 (Law Div. 1973).

Severance of offenses is available when the defendant will be prejudiced by defending all offenses in one trial. For example, two entirely separate offenses should be tried separately because of the prejudice to the defendant. *State v. Baker,* 49 *N.J.* 103, 105, *cert. denied,* 389 *U.S.* 866 (1967); *State v. Orlando,* 101 *N.J. Super.* 390, 392 (App. Div.), *certif. denied,* 52 *N.J.* 500 (1968). When the multiple offenses are part of the same transaction or series of transactions, the defendant must show that the chance of prejudice is great if the court fails to sever the counts. *State v. Moore,* 113 *N.J.* 239, 273 (1988). In determining the potential prejudice, the court will look to whether evidence of the joined criminal offense will be admitted in a separate trial. If such evidence will be admitted, as under N.J.R.E. 404(b), the defendant will not be prejudiced and severance of the offenses should be denied. *State v. Oliver,* 133 *N.J.* 141, 151-153 (1993); *State v. Pitts,* 116 *N.J.* 580, 601-602 (1989). *See* Form 17, Notice of Motion to Sever Counts of the Indictment.

Prejudicial joinder of defendants arises in three situations. The first situation is when one defendant gives a confession, admission or statement which references the other defendant(s). *Bruton v. United States,* 391 *U.S.* 123, 137 (1968); *State v. Barnett,* 53 *N.J.* 559, 565 (1969); *State v. Young,* 46 *N.J.* 152, 159 (1965). The second situation arises when one defendant testifies at a joint trial, the other defendant does not, and the attorney for the testifying defendant seeks to comment on the non-testifying defendant's failure to testify. *De Luna v. United States,* 308 *F.2d* 140 (5th Cir. 1962). The final situation arises when one defendant's conduct may prejudice the other defendant, *State v. Sinclair,* 49 *N.J.* 525, 550 (1967), or when the weight of the evidence against one defendant greatly outweighs the evidence against the

other defendant. *State v. Bellucci,* 165 *N.J. Super.* 294, 300 (App. Div. 1979), *modified on other grounds and affirmed,* 81 *N.J.* 531 (1980); *State v. Hall,* 55 *N.J. Super.* 441,451 (App. Div. 1959).

Joinder of defendants and/or counts may result in prejudice to one or more defendants requiring severance of either the defendants or the counts. When prejudice will result, the defense attorney should make a motion for severance before trial. *R.* 3:10-2(c); *State v. Baker,* 49 *N.J.* at 105. *See* Form 18, Notice of Motion to Sever Defendant. The Court Rules require defense counsel at the arraignment or status conference to advise the court of his or her intention to move for severance. *R.* 3:15-2(c); *R.* 3:10-2. Failure to make the motion for severance amounts to a waiver of the objection to prejudicial joinder; however, the court may, if good cause is shown, grant relief from the waiver. *R.* 3:10-2(c).

The decision to grant a severance is entirely within the discretion of the trial judge and reversal of a conviction is available only when the trial judge abused his or her discretion. *State v. Brown,* 118 *N.J.* at 603; *State v. Belton,* 60 *N.J.* 103, 107 (1972); *State v. Laws,* 50 *N.J.* 159, 175 (1967), *cert. denied,* 393 *U.S.* 971 (1968). Although courts today are more cognizant of the possibility of prejudice resulting from joinder of offenses and/or defendants, the defendant must have a strong showing of prejudice for severance to be granted. *State v. Brown,* 118 *N.J.* at 605. Merely a belief by the defendant that he or she has a better chance of acquittal if tried separately is insufficient grounds for severance. *State v. Sciascia,* 200 *N.J. Super.* 28, 42-43 (App. Div.), *certif. denied,* 101 *N.J.* 277 (1985); *State v. Morales,* 138 *N.J. Super.* 225, 231 (App. Div. 1975). Generally, severance must be granted when a joint trial will be so long and so complex as to violate each defendant's right to a fair trial. *State v. Garafola,* 226 *N.J. Super.* 657, 661 (Law Div. 1988).

(a) Co-Defendant's Incriminatory Statements

As previously indicated, prejudicial joinder of defendants may arise in three situations. The first situation is when one defendant makes a confession, admission or statement which implicates the co-defendant(s). *Bruton v. United States,* 391 U.S. at 137; *State v. Barnett,* 53 *N.J.* at 565; *State v. Young,* 46 *N.J.* at 159. Under *Bruton* and *Young,* the prosecutor may not introduce evidence of the confession, admission or statement without "effectively deleting" all references to all co- defendants. "Effective deletion" means the elimination of any direct or

indirect identification of co- defendants, as well as the elimination of any statement which could be damaging to a co-defendant once the co-defendant is otherwise identified. *State v. Gardner,* 54 *N.J.* 37, 44 (1969); *State v. Young,* 46 *N.J.* at 159. As a result of the confession, admission or statement, or of the effective deletion, separate trials may be necessary. For example, when "effective deletion" results in deleting portions of the confession, admission or statement which exculpates the defendant making the confession, admission or statement, separate trials are required because of the prejudice to the confessing defendant. *State v. Barnett,* 53 *N.J.* at 565.

In any case in which the prosecution intends to offer into evidence at a joint trial a confession, admission or statement made by one defendant, the prosecution must file a motion to determine whether "effective deletion" is possible. *R.* 3:15-2(a). If the prosecution fails to make this motion, the court may refuse to admit the confession, admission or statement. *ld.* Once the court rules that "effective deletion" is possible, the court will determine which portions of the confession, admission or statement must be deleted. *R.* 3:15-2(a). If the court deletes portions of the confession, admission or statement which exculpate the defendant making the statement and the defendant is subsequently convicted in a joint trial, the courts will not automatically reverse a conviction. Rather, the confessing defendant must show prejudice against him or her as a result of the omission of the excised portions of the statement. *State v. Gardner,* 54 *N.J.* at 45; *State v. Carter,* 54 *N.J.* 436, 445-446 (1969), *cert. denied,* 397 *U.S.* 948 (1970); *State v. Biddle,* 150 *N.J. Super.* 180, 182 (App. Div.), *certif. denied,* 75 *N.J.* 542 (1977).

Prior to making a motion for effective deletion, the prosecution should assess the confession, admission or statement to determine which portions are likely to be excised. If the redacted confession, admission or statement is too different from the crime so as not to bear a resemblance, the prosecution should move for separate trials instead of effective deletion. This situation will arise most often when one defendant's testimony is needed to convict the other defendant. If the motion for severance is not granted, the prosecution may not use the confession, admission or statement implicating a co-defendant as part of its direct case. However, the prosecutor may cross-examine on the basis of this statement if the defendant making the statement testifies. In this situation, the confessing defendant is subject to cross-examination by the co- defendant, and therefore, the non-confessing defendant's confrontation clause rights are not violated. *State v. Stupi,* 231 *N.J. Super.* 284, 291-292 (App. Div. 1989).

The implicated defendant may waive his or her right to severance from a co-defendant who made a statement. *State v. Buonadonna*, 122 *N.J.* 22, 39-40 (1991). To waive this right, the implicated defendant's counsel should indicate the waiver on the record in the defendant's presence. Thus, the defendant does not personally need to waive the right. *ld.* If the prosecution seeks to try more than two defendants in a joint trial where there is a confession by a defendant inculpating others, all defendants must waive the right to severance before a joint trial may proceed. *Id.*

(b) Mutually Antagonistic Defenses or Trial Positions

The second situation when prejudice may result as a result of joinder of defendants is when the defendants seek to take mutually antagonistic or prejudicial positions. *See, e.g., State v. Sinclair,* 49 *N.J.* at 550; *State v. Pickles,* 46 *N.J.* 542, 567 (1966). Thus, the situation may arise when one defendant testifies and the attorney for the testifying defendant seeks to comment on the co-defendant's failure to testify. *De Luna v. United States,* 308 *F.2d* 140, 155 (5th Cir. 1962) ("If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately."). Several New Jersey cases has rejected *De Luna* and held that it is improper for a testifying defendant's attorney to comment on a codefendant's failure to testify. *See, e.g., State v. Morales,* 138 *N.J. Super.* at 231; *State v. Guibilio,* 139 *N.J. Super.* 251, 258 (Law Div. 1976).

Separate trials are appropriate when the defendants present mutually exclusive theories of defenses and one defendant testifies. *State v. Brown, 219 N.J. Super.* 412, 419 (Law Div. 1987). Defenses are mutually exclusive when a jury is limited to believing only one of the defendants and must choose between them, leading to a finding that only one of them is guilty. Mere hostility, conflict or antagonism between the defendants is insufficient. *State v. Brown,* 118 *N.J.* at 606; *State v. Johnson,* 274 *N.J. Super.* 137, 150-151 (App. Div.), *certif. denied,* 138 *N.J.* 265 (1994).

Another variation of this problem is when a defendant claims that his or her co-defendant will exculpate the first defendant but only after resolution of the second defendant's potential criminal liability. The courts have held that the defendant must show: (1) the significantly exculpatory and credible nature of the proffered testimony and (2) a greater likelihood that a co-

defendant will testify and provide exculpatory testimony for the defendant in separate trials than in a joint trial. *State v. Sanchez, 143 N.J.* 273, 286-287, 291-292 (1996); *State v. Manney,* 26 *N.J.* 362, 369 (1958); *State v. Morales,* 138 *N.J. Super.* at 230; *State v. Boiardo,* 111 *N.J. Super.* 219, 233-234 (App. Div.), *certif. denied,* 57 *N.J.* 130 (1970), *cert. denied,* 401 *U.S.* 948 (1971). If a motion for severance of defendants is granted, generally, the non-confessing or non-testifying defendant, who purportedly will exculpate the others, should be tried first. *United States v. Echeles,* 352 *F.2d* 892, 898 (7th Cir. 1965); *State v. Sanchez,* 143 *N.J.* at 291-293; *State v. Scovil,* 159 *N.J. Super.* 194, 198-200 (Law Div. 1978).

(c) Disparity in Weight of Evidence

The third situation of prejudicial joinder of defendants is when the weight of the evidence against one defendant greatly outweighs the evidence against the other defendant. *State v. Hall,* 55 *N.J. Super.* at 451. In this scenario, severance is proper when (1) the weight of the evidence against the moving defendant is substantially less than that against the other defendant; (2) a possibility exists that the moving defendant may be found guilty by reason of association with the non-moving defendant and (3) proper jury instructions cannot adequately preserve the separate status of co- defendants. *State v. Brown,* 118 *N.J.* at 605; *State v. Freeman,* 64 *N.J.* 66, 68 (1973); *State v. Bellucci,* 165 *N.J. Super.* at 300; *State v. Hall,* 55 *N.J. Super.* at 451.

(d) Motions to Suppress Evidence

Various types of motions may be brought to suppress evidence. The fruits of an illegal search or seizure under the Fourth Amendment may be attacked on the basis of any of the grounds discussed above in Section LB. A defendant's confession may be attacked on the basis that the police did not adequately administer or honor the defendant's *Miranda* rights, that the confession was elicited in violation of the defendant's right to counsel, or that the confession was involuntary. A pretrial identification procedure may be attacked on the basis of suggestiveness. These motions generally are determined at pretrial hearings, pursuant *toR.* 3:5-7, *R.* 3:9-1(d), and *R.* 3:10-2, if the defendant makes a sufficient colorable showing that his or her constitutional rights have been infringed upon. *See* Form 19, Notice of Motion to Suppress Evidence. *See also* Form 20, Order Suppressing Evidence.

Under *R.* 3:10-7, if a motion is determined adversely to a defendant who has not previously pleaded, the defendant must be permitted to plead. However, unless the defendant has conditionally pled under *R.* 3:9-3(f), a plea previously entered must stand, irrespective of the determination of a motion to suppress or to dismiss. *R.* 3:10-7. If the court dismisses an indictment or accusation, it may still order that the defendant be held in custody for a specified time until a new indictment or accusation is filed. *R.* 3:10-1.

F. Pretrial Conference

Once the court determines that (1) discovery is completed; (2) all motions have been decided or scheduled; (3) all reasonable efforts to dispose of the case without trial have been made; and (4) further negotiations or an additional status conference will not resolve the case or result in progress towards disposition of the case, the court must conduct a pretrial conference. *R.* 3:9-l(e). This pretrial conference is conducted in open court with the prosecutor, defense counsel and the defendant present. *Id.*

At the conference, unless objected to, the court will ask the prosecutor to describe, without prejudice, the State's anticipated factual proofs at trial. The court will also address the defendant to make certain that the defendant understands: (1) the State's final plea offer, if one exists; (2) the sentencing exposure for the offense charged, if convicted; (3) that ordinarily a negotiated plea will not be accepted after the pretrial conference has been conducted and a trial date set; (4) the consequence of rejection of an opportunity to plead pursuant to a negotiated plea; and (5) that the defendant has a right to reject the plea offer and go to trial where the State must prove the defendant's guilt beyond a reasonable doubt. *Id.*

The court will order that a trial memorandum be prepared if the case is not otherwise disposed of at the pretrial conference. *See* Form 21, Trial Memorandum. The court will review the trial memorandum on the record with counsel and the defendant present. The trial judge will sign the pretrial memorandum and, in consultation with counsel, will set the trial date. Only those admissions at the conference reduced to writing and signed by the defendant and his or her counsel may be used against the defendant. *Id.* Finally, at the pretrial conference, the court will advise the defendant of the right to be present at trial and the consequences of a failure to appear for trial, including the possibility that the trial will take place in the defendant's absence. *Id.* The defendant will be asked to acknowledge in writing

that he or she has been apprised of the trial date, and the consequences of failure to appear on that date. The defendant will also be asked to acknowledge his or her understanding that, barring extraordinary circumstances, the filing of the pretrial memorandum ends all plea negotiations, and that no further bargaining will take place. *See* Form 21.

IV. TRIAL

A. Right to a Jury Trial

An accused is guaranteed the right to a jury trial in serious crimes pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, paragraph 9 of the New Jersey Constitution, as construed by the New Jersey Supreme Court. *Duncan v. Louisiana,* 391 *U.S.* 145, 159-161 (1968); *State v. Hamm,* 121 *N.J.* 109, 113-115 (1990), *cert. denied,* 499 *U.S.* 947 (1991). The line of demarcation between "petty" and "serious" offenses for purposes of determining whether the defendant has a right to a jury trial is that a "petty" offense carries a maximum authorized term of incarceration of not more than six months. *Baldwin v. New York,* 399 *U.S.* 66, 69-70 (1970). In New Jersey, a jury trial is not required unless the maximum penalty to which the defendant is exposed exceeds six months incarceration and a $1,000 fine. *In re Yengo,* 84 *N.J.* 111, 121 (1980), *cert. denied,* 449 *U.S.* 1124 (1981); *State v. Owens,* 54 *N.J.* 153, 157-158 (1969), *cert. denied,* 396 *U.S.* 1021 (1970); *In re: Buehrer,* 50 *N.J.* 501, 517-519 (1967). Thus, there is no jury trial right for persons charged with disorderly persons offenses or petty disorderly persons offenses under the New Jersey Criminal Code. *N.J.S.A.* 2C:1-4b. In New Jersey, a person may be tried without a jury on related petty offenses, and may be sentenced to concurrent jail sentences, as long as none of the sentences, individually or when aggregated, exceeds six months. *State v. Hamm,* 121 *N.J.* at 112; *State v. Owens,* 54 *N.J.* at 163. The United States Supreme Court decided that a defendant facing trial on two or more "petty offenses" is not entitled to a jury trial, even if he or she potentially could be incarcerated for in excess of six months in the aggregate. *Lewis v. United States,* 518 *U.S.* 322, 116 *S.Ct.* 2163, 135 *L.Ed.2d* 590 (1996). However, even if the defendant, upon conviction, may be subject to a six month or less term of incarceration, the statutory penalties and the term of incarceration may be so severe that they clearly reflect a legislative determination that the offense is serious, and hence there is a right to trial by jury. *Blanton v. City of North Las Vegas, Nevada,* 489 *U.S.* 538, 542-543, 545 (1989). A 10 year license suspension, a fine of $1,000, incarceration for 180 days, and up to 90 days community service for a person convicted for a third driving while intoxicated offense does not trigger a jury trial right. *State v. Hamm,* 121 *N.J.* at 123-127.

B. Waiver of Jury Trial

A defendant has a constitutional right to have each element of a crime decided by a jury, and none of these elements may be withheld from the jury and decided by a judge as a matter of law. *State v. Anderson*, 127 *N.J.* 191, 200 (1992). However, a defendant may be permitted to waive his or her jury trial right under certain circumstances.

A defendant may waive his or her jury trial right in writing and with approval of the court, after the prosecuting attorney has received notice and an opportunity to be heard. *Singer v. United States*, 380 *U.S.* 24, 36-38 (1965); *State v. Dunne*, 124 *N.J.* 303, 311-312 (1991); *R.* 1:8-1. Thus, a defendant has no constitutional right to a trial by judge alone, and therefore an accused's request to waive a jury trial may be denied by the court. *State v. Davidson*, 225 *N.J. Super.* 1, 8-9 (App. Div.), *certif. denied*, 111 *N.J.* 594 (1988). *See also State v. Belton*, 60 *N.J.* 103, 110 (1972). In *State v. Dunne*, 124 *N.J.* at 317, the New Jersey Supreme Court set forth the following seven criteria to guide a trial court in determining whether to accept a defendant's waiver of his or her jury trial right: (1) the gravity of the offense; (2) the position of the State; (3) the duration and complexity of the State's case; (4) the amenability of issues to a jury resolution; (5) the existence of a highly charged atmosphere; (6) the presence of technical matters interwoven with facts; and (7) the anticipated need for numerous rulings on the admissibility of evidence.

C. Number of Jurors

The United States Supreme Court has approved a jury of fewer than 12 persons, *Williams v. Florida*, 399 *U.S.* 78, 100, 102-103 (1970), but no fewer than six persons. *Ballew v. Georgia*, 435 *U.S.* 223, 239 (1978). However, where a six person jury is utilized, the verdict must be unanimous in the case of non-petty offenses. *Burch v. Louisiana*, 441 *U.S.* 130, 139-140 (1979).

In New Jersey, pursuant to *R.* 1:8-2(a), 12 person juries are mandated in criminal cases. However, at any time before verdict, the parties may stipulate in writing to a jury of less than 12 persons only in non-capital cases with the court's approval. *R.* 1:8-2(a). The verdict must be unanimous, N.J. Const. Article I, paragraph 9; *R.* 1:8-9; *State v. Parker*, 124 *N.J.* 628, 633 (1991), *cert. denied*, 503 *U.S.* 939 (1992), and the jury must be instructed that it must be unanimous "on whatever specifications it finds to be predicate of a guilty verdict." *State v. Parker*, 124 *N.J.* at 641-642.

In its discretion, the court may order that any number of alternate jurors be impanelled. *R.* 1:8-2(d). All jurors must sit and hear the case. The court may excuse any of them for good cause, provided the number is not reduced below 12 or such other number as was stipulated between the parties. *Id.* If there are more than 12 jurors (or fewer, if so stipulated) left on the jury at the conclusion of the judge's charge, the clerk of the court draws the names of those 12 who will sit. *Id.* The court may decide not to discharge the alternates after the first 12 jurors' names have been drawn. *Id.* These alternates are to be kept sequestered from the other jurors and may be substituted for any original juror discharged by the court because of illness or other inability to continue. *Id.* A juror's inability to continue must be on a personal basis, not related to the juror's interaction with other jury members. *State v. Valenzuela,* 136 *N.J.* 458, 468 (1994). In the event that an alternate is then substituted for one of the original 12 jurors, the court must order the jury to recommence deliberations anew. *State v. Valenzuela,* 136 *N.J.* at 470, 474-475; *State v. Trent,* 79 *N.J.* 251, 257 (1979).

D. Jury Selection/Voir Dire

1. Voir Dire

In New Jersey, as is generally true in the federal system (Fed.R.Crim.P. 24(a)), the trial court initially interrogates prospective jurors in the box after the juror's number has been drawn, pursuant to *N.J.S.A.* 2A:74-1. *R.* **1**:8-3(a). Pursuant to the First and Sixth Amendments, applicable to the states via the Due Process Clause of the Fourteenth Amendment, a jury selection generally must take place in a courtroom open to the public, except in rare instances implicating the defendant's right to a fair trial or the government's interests in inhibiting the disclosure of sensitive information. *Presley v. Georgia,* 558 U.S. _, 130 S.Ct. 721, 175 L.Ed. 2d 675 (2010). The interrogation is not conducted under oath except in death penalty cases. *ld; State v. Hunt,* 115 *N.J.* 330, 351 (1989); *State v. Biegenwald,* 106 *N.J.* 13, 29 (1987). The purpose of the examination is to ascertain whether the jurors should be challenged for cause or whether a party wishes to exercise one of his or her peremptory challenges. *R.* 1:8-3(a). Voir dire is designed to attempt to ensure an impartial jury and a fair trial. *State v. Martini,* 131 *N.J.* 176, 210 (1993), *cert. denied,* 516 *U.S.* 875, 116 *S.Ct.* 203, 133 *L.Ed.2d* 137 (1995); *State v. Perry,* 124 *N.J.* 128, 155 (1991). The parties or their attorneys are permitted to

supplement the court's voir dire interrogation, in the court's discretion, under this rule. However, the usual practice is (in non-capital cases) that the attorneys for the parties will request that the court ask supplemental voir dire questions of the potential jurors. *See State v. Biegenwald,* 106 *N.J.* 13, 27-30 (1987). In capital cases, trial courts have been directed to be sensitive to permitting attorneys to conduct some voir dire. *State v. Erazo,* 126 *N.J.* 112, 129 (1991); *State v. Biegenwald,* 106 *N.J.* at 30. The court has wide latitude in dealing with voir dire questions proposed by the parties, and the court's determination will be reversed on appeal only if the defendant can demonstrate prejudice resulting from the scope of the voir dire questioning. *State v. Perry,* 124 *N.J.* 128, 154-158 (1991); *State v. Williams,* 113 *N.J.* 393, 410 (1988); *State v. Murray,* 240 *N.J. Super.* 378, 392 (App. Div.), *certif. denied,* 122 *N.J.* 334 (1990). *See* Form 22, Proposed Voir Dire Questions.

At the minimum, voir dire questioning usually consists of the following inquiries: (1) accusations of crime against the potential jurors and their family members or friends, (2) previous service on grand juries or petit juries, along with an explanation of the meaning of an indictment, and (3) the difference between the role of the jury and that of the judge. *State v. Moore,* 122 *N.J.* 420, 443-457 (1991); *State v. Lumumba,* 253 *N.J. Super.* 375, 391-394 (App. Div. 1992); *State v. Oates,* 246 *N.J. Super.* 261, 269 (App. Div. 1991). However, the court is not required, at least absent a specific request, to ask these questions. *State v. Loftin,* 287 *N.J. Super.* 76, 105 (App. Div.), *certif. denied,* 144 *N.J.* 175 (1996). The court should inquire whether the jurors know any of the parties, counsel or potential witnesses. *See State v. Deatore,* 70 *N.J.* 100, 104-106 (1976). When there are special circumstances which suggest the presence of racial overtones in the issues to be tried, the judge should make specific inquiry into a juror's racial prejudice. *See Rosales-Lopez v. United States,* 451 *U.S.* 182, 189-191 (1981); *State v. Ramseur,* 106 *N.J.* 123, 243-248 (1987); *State v. Anderson,* 198 *N.J. Super.* 340, 355 (App. Div.), *certif. denied,* 101 *N.J.* 283 (1985). Such an inquiry is not necessary unless racial overtones are present in the case. *Turner v. Murray,* 476 *U.S.* 28, 37-38 (1986); *State v. Perry,* 124 *N.J.* at 157-158. Voir dire is also designed to ascertain the extent of taint, if any, of the jury as a result of pretrial publicity. *State v. Biegenwald,* 106 *N.J.* at 22. Whether or not to inquire of potential jurors about attitudes concerning substantive defenses or other rules of law which may become implicated in a trial or in the charge is within the discretion of the trial court. *State v.*

Manley, 54 *N.J.* 259, 269-271 (1969); *State v. Talbot,* 135 *N.J. Super.* 500, 512 (App. Div. 1975), *affd,* 71 *N.J.* 160 (1976).

A juror's failure to disclose potentially prejudicial material during voir dire may warrant a new trial to a defendant (without regard to whether a defendant demonstrates prejudice). *In re Kozlov,* 79 *N.J.* 232, 239 (1979); *State v. Williams,* 190 *N.J. Super.* 111, 115-17 (App. Div. 1983). When a juror incorrectly omits information during voir dire, the omission is presumed prejudicial if it has the potential to be prejudicial, and the defendant is excused from the necessity of showing prejudice. Nevertheless, the defendant still has to show that had he or she known of the omitted information, he or she would have exercised a peremptory challenge to exclude the juror. *State v. Cooper,* 151 N.J. 326, 349-51 (1997).

2. Challenges to the Array of Jurors

A challenge to the array of jurors is an objection to all jurors collectively. It is based on an alleged defect in the panel of jurors as a whole, attributable usually to the method of drawing the panel. This challenge must be made and decided before any individual juror is examined. *R.* 1:8-3(b); *State v. Turner,* 246 *N.J. Super.* 22, 28 (App. Div.), *certif. denied,* 126 *N.J.* 335 (1991). Any issue of fact arising in the context of a challenge to the array is tried by the court. *R.* 1:8-3(b). At least 10 days prior to the date set for the commencement of trial (20 days before trial in capital cases), the clerk of the court must make available to any party requesting the petit jury list to make a potential challenge to the array. *R.* 1:8-5; *State v. Long,* 198 *N.J. Super.* 32, 38-39 (App. Div. 1984).

While a defendant has no right to a jury that includes members of his or her own race, *State v. Bey (Ill), 129 N.J.* 557, 583 (1992); *State v. Ramseur,* 106 *N.J.* 123, 216 (1987), a defendant is entitled to have a jury panel selected from a lise representing a cross-section of the community, pursuant to the Sixth Amendment of the U.S. Constitution and Article I, paragraphs 9 and 10 of the New Jersey Constitution. *Peters v. Kiff,* 407 *U.S.* 493, 500 (1972); *Williams v. Florida,* 399 *U.S.* at 100; *State v. Ramseur,* 106 *N.J.* at 216. Under the Equal Protection Clause of the Fourteenth Amendment and Article I, paragraph 5 of the New Jersey Constitution, jurors must be selected in a manner free of any taint of discriminatory purpose. *Strauder v. West Virginia,* 100 *U.S.* (10 *Otto)* 303, 309-310 (1880); *State v. Ramseur,* 106 *N.J.* at 216.

To establish a prima facie violation of the Equal Protective Clause of the Fourteenth Amendment based upon the jury array, a defendant must show: (1) a constitutionally cognizable group, i.e., a group capable of being singled out for discriminatory treatment; (2) substantial under- representation over a significant period of time; and (3) discriminatory purpose. *Castaneda v. Partida*, 430 *U.S.* 482, 494 (1977); *State v. Bey (III)*, 129 *N.J.* at 583; *State v. Coyle*, 119 *N.J.* 194, 213 (1990); *State v. Ramseur*, 106 *N.J.* at 215-217. To establish a violation of the Sixth Amendment's guarantee to a criminal defendant of the right to be tried by a jury representing a fair cross-section of the community, a defendant must show: (1) a constitutionally cognizable group; (2) unfair and unreasonable representation over time; and (3) systematic exclusion. *Duren v. Missouri*, 439 *U.S.* 357, 364 (1979); *State v. Bey (III)*, 129 *N.J.* at 583; *State v. Coyle*, 119 *N.J.* at 213.

To rebut a defendant's showing under the fair cross-section theory, the State must show that a significant state interest is manifestly and properly advanced by those aspects of the jury selection process that results in disparate exclusion of the distinctive group. *Duren v. Missouri*, 439 *U.S.* at 367-368; *State v. Ramseur*, 106 *N.J.* at 217. The State may rebut a prima facie equal protection violation by showing, for example, that permissibly racially neutral selection criteria and procedure have produced the disproportionate result. *See Castaneda v. Partida*, 430 *U.S.* at 497-498; *State v. Ramseur*, 106 *N.J.* at 216.

3. Challenges for Cause

Challenges for cause are based upon a perceived inability of a juror to sit fairly and impartially. *See State v. Ramseur*, 106 *N.J.* at 225; *State v. Deatore*, 70 *N.J.* at 104-106; *State v. Jackson* 43 *N.J.* 148, 158 (1964), *cert. denied*, 379 *U.S.* 982 (1965). A juror may be unable to sit fairly and impartially because of some relationship or familiarity with counsel, the parties (including law enforcement) or the victim. *See State v. Reynolds*, 124 *N.J.* 559, 567 (1991); *State v. Singletary*, 80 *N.J.* 55, 63 (1979); *State v. Deatore*, 70 *N.J.* at 104-106. A juror may be unable to be fair and impartial by the juror's own admission, *Catando v. Sheraton Paste Inn*, 249 *N.J. Super.* 253, 261 (App. Div.), *certif. denied*, 127 *N.J.* 550 (1991), or simply by virtue of having served within the past 12 months in violation of *N.J.S.A.* 2A:69-4, *see State v. McNamara*, 212 *N.J. Super.* 102, 106-107 (App. Div. 1986), *certif. denied*, 108 *N.J.* 210 (1987),

or having been convicted of a crime. *N.J.S.A.* 2A:69-1. *State v. Williams*, 190 *N.J. Super.* at 115.

A defendant may be entitled to a new trial where the defendant was forced to use a peremptory challenge to excuse a juror who should have been excused for cause. *See State v. Deatore*, 70 *N.J.* at 104-106; *State v. Pereira*, 202 *N.J. Super.* 434, 438 (App. Div. 1985). However, the New Jersey Supreme Court has clarified that a defendant will be entitled to a new trial based upon the court's improper failure to excuse a juror for cause only if the defendant can establish (1) the trial court erred by failing to remove a juror for cause; (2) the juror was eliminated by use of a peremptory challenge, and the defendant exhausted all of his or her peremptory challenges; and (3) one of the remaining jurors was partial to the State. *State v. DiFrisco*, 137 *N.J.* 434, 471 (1994), *cert. denied*, 516 *U.S.* 1129, 116 *S. Ct.* 949, 133 *L.Ed.2d* 873 (1996).

4. Peremptory Challenges

A peremptory challenge is a challenge of a juror which may be exercised without stating a reason and without court approval. *State v. Brunson*, 101 *N.J.* 132, 138 (1985). Its function is "to eliminate extremes of impartiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise." *State v. Brunson*, 101 *N.J.* at 137-138, quoting from *Swain v. Alabama*, 380 *U.S.* 202, 219 (1965). In a criminal case in New Jersey, each defendant has at least 10 peremptory challenges or at least 20 in the event a defendant is tried alone on certain serious charges enumerated in *R.* 1:8-3(d) *(i.e.*, murder, aggravated manslaughter, kidnapping, robbery or sexual assault). The State is allotted 12 peremptory challenges when a defendant has 20 and six additional peremptory challenges for each 10 afforded defendants who are jointly tried for these enumerated crimes. *Id.* In all other cases, the State has 10 peremptory challenges for each 10 challenges allowed to the defendants. *Id.*

Where both sides have an equal number of peremptory challenges, the State first exercises its first peremptory challenge with the defendant thereafter alternating with the State. *R.* 1:8-3(e)(l). When there is more than one defendant and/or an uneven number of peremptory challenges, the court must establish the order of challenges on the record prior to the commencement of the jury selection process. *R.* 1:8-3(e)(2). If any side does not

exercise its peremptory challenge, it may still subsequently exercise that challenge against any juror unless all parties pass successive challenges. *R.* 1:8-3(e)(3).

A peremptory challenge may not be exercised in a constitutionally unacceptable manner. Race may not be used as a basis for excluding a juror peremptorily. *Batson v. Kentucky*, 476 *U.S.* 79, 90-93 (1986); *State v. Watkins,* 114 *N.J.* 259, 266 (1989); *State v. Gilmore,* 103 *N.J.* 508, 535-536 (1986). Gender or any other suspect group "bias" may not be used as a basis for a peremptory challenge. *J.E.B. v. Alabama ex rel. T.B.,* 511 *U.S.* 127, 114 S.Ct. 1419, 128 L. Ed. 2d 89, 106-107 (1994); *Batson v. Kentucky,* 476 *U.S.* at 97; *State v. Gilmore,* 103 *N.J.* at 526, n. 3. In *State v. Fuller, 182 N.J.* 174 (2004), the New Jersey Supreme Court held that peremptory challenges may not be used to remove potential jurors who wear religious garb or engage in religious activities. This proscription against discriminatory peremptory challenges applies not only to the prosecution, but to the defense also. *Georgia v. McCollum*, 505 *U.S.* 42, 59 (1992). The *McCollum* decision quoted with approval in this regard (505 *U.S.* at 49-50) the New Jersey Appellate Division's decision in *State v. Alvarado,* 221 *N.J. Super.* 324, 328 (App. Div. 1987).

To ensure that peremptory challenges are exercised in a constitutionally acceptable manner, the courts have established the following procedure: 1) the defendant must make a timely objection, prior to the swearing in of the jury, and before the end of jury selection; 2) the defendant must produce evidence sufficient to draw an inference that discrimination has occurred; 3) the burden then shifts to the party exercising the peremptory challenge to come forward with evidence that the peremptory challenges under review are justifiable on the basis of concern about situation- specific bias; 4) the trial court must judge whether the party attacking the peremptory challenge has proved, by a preponderance of the evidence, and against the backdrop of the proponent's rebuttal, whether the proponent exercised its peremptory challenges on the constitutionally impermissible basis of group bias. *Johnson v. California*, 545 U.S. 162, 170-172 (2005); *State v. Osorio*, 199 N.J. 486, 492-493 (2009).

The courts look to five specific but non-exclusive factors in considering whether the defendant [or the prosecution] has made the requisite showing of improper exercise of peremptory challenges. They are as follows: (1) The prosection [or the defense] has struck most or all members of an identified group from the venire; (2) The prosecution [or the defense] has used a disproportionate number of his or her peremptories against this group; (3) The

prosecutor [or defense counsel] failed to ask or propose questions to the challenged jurors; (4) Other than race, the challenged jurors are as heterogeneous as the community; and (5) The challenged jurors, unlike the victim, are the same race as the defendant. *State v. Watkins,* 114 *N.J.* at 266; *State v. Gilmore,* 103 *N.J.* at 536. *See also State v. McDougald,* 120 *N.J.* 523, 554-557 (1990).

Once the defense [or the prosecution] has made this prima facie showing of discriminatory exercise of peremptory challenges, the burden shifts to the other side. To justify the exercise of peremptories, the State [or defense] need not show reasons rising to the level of a challenge for cause. Rather, the State [or defendant] must only show a genuine ground for believing that a prospective juror might have had an individual or personal bias that would make excusing the potential juror rational and desirable. *Batson v. Kentucky,* 476 *U.S.* at 97; *State v. Gilmore,* 103 *N.J.* at 538. The judge must balance the prima facie showing of discriminatory exercise of peremptories with the proffered explanation. *State v. Gilmore,* 103 *N.J.* at 539. If the defendant has sustained his or her burden of showing an impermissible exercise of peremptory challenges, then all jurors of the venire, including the ones thus far selected, must be dismissed. *State v. Gilmore,* 103 *N.J.* at 539.

5. The Jury Foreperson and Return of the Verdict

The jury foreperson's job is to announce publicly the jury's verdict. *See State v. Rodriguez,* 254 *N.J. Super.* 339, 347, 350 (App. Div. 1992). This juror is usually the first juror in the jury box who is not selected as an alternate or discharged. *R.* 1:8-4. Often, the jurors are polled, at the request of a party or upon the court's own motion, to ensure that all the jurors agree with the verdict announced by the foreperson. *R.* 1:8-10. *See State v. Vasorich,* 13 *N.J.* 99, 126, *cert. denied,* 346 *U.S.* 900 (1953); *State v. Millett,* 272 *N.J. Super.* 68, 95 (App. Div. 1994). If there is not unanimity among the jurors, the court may direct the jury to deliberate further, or it may discharge the jury. *R.* 1:8-10; *State v. Rodriguez,* 254 *N.J. Super.* at 348.

6. Prejudicial Publicity and Jury Sequestration

Inherent in the right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, paragraph 10 of the New Jersey Constitution is the right that the jury verdict be based on evidence received in open court not

from outside sources. *Sheppard v. Maxwell,* 384 *U.S.* 333, 351 (1966); *State v. VanDuyne,* 43 *N.J.* 369, 386 (1964), *cert. denied,* 380 *U.S.* 987 (1965). Jurors may be influenced by pretrial or midtrial publicity. In *State v. Williams,* 93 *N.J.* 39, 59 (1983), the court recognized that the public and press have a constitutional right to access to criminal pretrial proceedings. However, the court recognized that, under certain circumstances, the proceedings could be closed to all but the participants. *State v. Williams,* 93 *N.J.* at 61. The Supreme Court in *Williams,* 93 *N.J.* at 62-63, stated the trial court has the responsibility to preserve the integrity of the jury throughout the pretrial stages of the prosecution as well as during trial. *State v. Koedatich,* 112 *N.J.* 225, 282 (1988), *cert. denied,* 488 *U.S.* 1017 (1989) and *State v. Biegenwald,* 106 *N.J.* 13, 33, 35-36 (1987) discussed a change of venue and appropriate jury selection process as means to assure a fair and impartial jury in the face of extensive publicity about a case. Qualified jurors need not be completely ignorant of the facts and issues. *Murphy v. Florida,* 421 *U.S.* 794, 798-800 (1975); *State v. Biegenwald,* 106 *N.J.* at 36-37.

With respect to midtrial publicity, a court may not rely solely upon its protective instructions to the jurors not to read any newspaper articles. *State v. Bey (I),* 112 *N.J.* 45, 81 (1988). When faced with a post-impanelment motion to question the jury about exposure to trial publicity, the court should engage in a two-part inquiry. *State v. R.D.,* 169 N.J. 551, 558 (2001); *State v. Bey (I),* 112 *N.J.* at 83-84. First, the court should examine the information disseminated to determine if it has the capacity to prejudice the defendant. *State v. Bey (I),* 112 *N.J.* at 84. Second, the court should determine if there is a realistic possibility that such information may have reached one or more of the jurors. *State v. Bey (I),* 112 *N.J.* at 86. If the court finds a realistic possibility that evidence with the capacity to prejudice a defendant's right to a fair trial may have reached members of the jury, it should conduct a voir dire to determine whether any exposure has occurred. *Id.* If such exposure has occurred, the court has available to it the same procedures as with pretrial voir dire. For example, the court could send the juror back to the panel with a warning to be more careful to avoid publicity, or it may excuse the juror and substitute an alternate. *State v. Bey (I),* 112 *N.J.* at 87-88 n.27. There is no *per se* requirement that a trial judge voir dire the remaining jurors after excusing a juror, although it is the better practice for the court to ask probing questions to assure itself that the juror's extraneous knowledge has not been communicated, even non-verbally, to the other jurors. *State v. R.D.,* 169 N.J. at 562-63.

Another drastic alternative to deal with a publicity laden trial is sequestration of the jury. *State v. Allen, 13 N.J.* 132, 142 (1977). Juries are sequestered prior to the final charging of the jury only under extraordinary circumstances. *R.* 1:8-6(a). Courts will exercise their discretion to order sequestration of a jury prior to charge to protect the jurors or for some other extraordinary circumstance. *Id.; State v. Moriarity,* 133 *N.J. Super.* 563, 569 (App. Div.), *certif. denied,* 68 *N.J.* 172 (1975).

E. Opening Statements and Summations

The State makes its opening statement in a criminal trial first, before any evidence is offered. *R.* 1:7-1. The defense may, but is not required to, make an opening statement. *R.* 1:7-1(a); *see State v. Williams,* 232 *N.J. Super.* 414, 418-419 (App. Div.), *certif. denied,* 117 *N.J.* 63 (1989). If the defense chooses to make an opening statement, it must do so immediately after the State's opening statement. *R.* 1:7-1(a).

The function of the opening statement is to apprise the jury (and not the defendant) of facts to prepare them for the evidence which they will hear. *State v. Lynch,* 79 *N.J.* 327, 336 (1979); *State v. Stamberger,* 209 *N.J. Super.* 579, 581 (Law Div. 1985). The State generally should lay out the facts that will establish the defendant's guilt on each element of each charged offense. However, if the State fails to do so, the appropriate remedy generally is not to dismiss the case by declaring a mistrial but to allow the State to reopen and allow the defendant to assert whatever prejudice he or she suffered as a consequence of the reopening. *State v. Lynch,* 79 *N.J.* at 334-336; *State v. Portock,* 205 *N.J. Super.* 499, 507-508 (App. Div. 1985); *State v. Stamberger,* 209 *N.J. Super.* at 581-582.

The prosecution is afforded considerable leeway, within reasonable limits, in making opening statements and summations. *State v. DiFrisco,* 137 *N.J.* at 474. This leeway is not unfettered. It is subject not only to the parameters of the decisional law, but also to ethical considerations. *State v. Williams,* 113 *N.J.* 393, 447 (1988). Although a prosecutor is limited to comments on the evidence and is allowed only to draw reasonable inferences supported by proofs, nevertheless, a prosecutor may make a vigorous and forceful presentation of the State's case. *State v. Harris,* 141 *N.J.* 525, 559 (1995); *State v. Zola,* 112 *N.J.* 384, 426 (1988), *cert. denied,* 489 *U.S.* 1022 (1989); *State v. Bucanis,* 26 *N.J.* 45, 57, *cert. denied,* 357 *U.S.* 910 (1958). While the prosecution is free to comment on the credibility of witnesses, the

prosecution may not personally vouch for a witness's credibility or express a personal belief or opinion as to the truthfulness of a witness's testimony. *State v. Marshall,* 123 *N.J.* 1, 156 (1991); *State v. Staples,* 263 *N.J. Super.* 602, 605 (App. Div. 1993). Similarly, the prosecution may not express his or her personal belief of a defendant's guilt. *State v. Koedatich,* 112 *N.J.* 225, 322 (1988), *cert. denied,* 488 *U.S.* 10 (1989); *State v. Ramseur,* 106 *N.J.* 123, 321 (1987); *State v. Michaels,* 264 *N.J. Super.* 579, 640 (App. Div. 1993), *affd,* 136 *N.J.* 299 (1994). In addition, a prosecutor may not comment on a defendant's failure to testify. *Griffin v. California,* 380 *U.S.* 609, 614 (1965); *State v. Johnson,* 120 *N.J.* 263, 296 (1990); *State v. Gosser,* 50 *N.J.* 438, 452 (1967), *cert. denied,* 390 *U.S.* 1035 (1968); *State v. Engel,* 249 *N.J. Super.* 336, 381-382 (App. Div.), *certif. denied,* 130 *N.J.* 393 (1991). Note, too, that the New Jersey Supreme Court held to be improper a prosecutor's remarks in summation, as well as in cross-examination, in which the prosecutors insinuated that the defense's expert witnesses were biased due to their "hefty fees" and that these experts shaded their testimony to get further employment in similar situations. *State v. Smith,* 167 *N.J.* 158 (2001). In *State v. Daniels,* 182 *N.J.* 80, 98-99 (2004), the New Jersey Supreme Court rejected the United States Supreme Court's holding in *Portuondo v. Agard,* 529 *U.S.* 61 (2000), and found that the prosecutor may not make generic comments during summation (as well as during cross-examination) that simply because a defendant was present throughout the trial, the defendant therefore had an opportunity to tailor his or her testimony.

The test for determining whether prosecutorial misconduct constitutes reversible error is whether the misconduct was so egregious that it deprived defendant of a fair trial. *Darden v. Wainwright,* 477 *U.S.* 168, 181 (1986); *State v. Pennington,* 119 *N.J.* 547, 565 (1990); *State v. Ramseur,* 106 *N.J.* at 322. Factors to be considered in analyzing whether prosecutorial misconduct deprived defendant of a fair trial are as follows: (1) whether defense counsel made a timely and proper objection; (2) whether the remark was withdrawn properly; and (3) whether the court gave the jury a curative instruction. *State v. Marshall,* 123 *N.J.* at 153; *State v. Zola,* 112 *N.J.* at 384; *State v. Ramseur,* 106 *N.J.* at 323.

F. Sequestration of Witnesses

Unlike sequestration of jurors, a motion for sequestration of witnesses during trial is routinely granted. *See State v. Green,* 129 *N.J. Super.* 511, 517 (App. Div. 1972). The party

opposing witness sequestration must advance sound reasons why there should be no sequestration. *State v. DiModica*, 40 *N.J.* 404, 413 (1963); *State v. Lanzel*, 253 *N.J. Super.* 168, 170, 172 (Law Div. 1991).

However, if a witness sequestration order is violated, the offending witness ordinarily should not be precluded from testifying. Rather, unless the aggrieved party can show substantial prejudice, the witness should be allowed to testify, and the parties (1) may interrogate the witness about the order violation, and (2) comment in their summations upon the witness's violation of the order. *State v. Horton*, 199 *N.J. Super.* 368, 372-373 (App. Div. 1985); *State v. Tillman*, 122 *N.J. Super.* 137, 143 (App. Div.), *certif. denied*, 62 *N.J.* 428 (1973).

Note that, as part of a defendant's compulsory process rights, enshrined in both Federal (Sixth Amendment) and State (New Jersey Constitution, Article 1, paragraph 10) Constitutions, the attendance of out of state material witnesses and documents may be compelled via subpoena. *See, e.g.*, the Uniform Law compelling attendance of out of state witnesses and documents, *N.J.S.A.* 2A:81-18 *et seq. Washington v. Texas*, 388 *U.S.* 14, 17-18 (1967); *State v. Fort*, 101 *N.J.* 123, 128-130 (1985); *State v. Farquharson*, 280 *N.J. Super.* 239, 248-249 (App. Div.), *certif. denied*, 142 *N.J.* 517 (1995).

G. Defendant's Trial Rights

Defendants are entitled to numerous other constitutional and statutory protections during the course of trial. They are cloaked with the presumption of innocence, have the right to confront and cross-examine witnesses against them, can only be convicted upon proof of guilt beyond a reasonable doubt, and must be convicted based on evidence admitted. N.J. Constitution, Article 1, paragraph 10. *In re Yengo*, 84 *N.J.* 111, 120 (1980), *cert. denied*, 449 *U.S.* 1124 (1981); *In re Ruth M. Buehrer*, 50 *N.J.* 501, 516 (1967). These protections are constitutionally derived from a defendant's due process rights as well as by statute in New Jersey. *See In re Winship*, 397 *U.S.* 358, 363 (1970); *State* v. *Thomas*, 132 *N.J.* 247, 253 (1993); *N.J.S.A.* 2C:1-3a (proof beyond a reasonable doubt); *State v. Cabbell*, 207 *N.J.* 311, 328 (right to confront and cross-examine witnesses before a jury).

A defendant also has the right to testify on his or her own behalf. *Rock v. Arkansas*, 483 *U.S.* 44, 51-53 (1987); *Nix v. Whiteside*, 475 *U.S.* 157, 164 (1986); *State v. Savage*, 120 *N.J.* 594, 628 (1990); *N.J.S.A.* 2A:81-8. Alternatively, a defendant has the right to forego any such

testimony pursuant to his or her privilege against self-incrimination. *State v. Browning, 19 N.J.* 424, 427 (1955); *State v. Morales,* 138 *N.J. Super.* 225, 229 (App. Div. 1975); *N.J.S.A.* 2A:84A-17(1); *N.J. Evid. R.* 501(1). Where a defendant is represented by counsel, it is counsel's obligation to advise his or her client concerning the potential risks and benefits inherent in exercising or waiving the right to testify. *State v. Savage,* 120 *N.J.* at 630-631. Under those circumstances, the trial court should inquire of the defense attorney whether the attorney has explained the options available to the defendant. *State v. Moore,* 122 *N.J.* 420,460 (1991); *State v. Savage,* 120 *N.J.* at 631.

A defendant who opts not to testify is entitled to a jury instruction that the jury may not permit this fact to enter into its deliberations. *Carter v. Kentucky,* 450 *U.S.* 288, 303 (1981); *State v. Oliver,* 133 *N.J.* 141, 160 (1993). Such an instruction should ordinarily be given upon request of the defendant, but it is not constitutional error to give this charge over the defendant's objection. *Lakeside v. Oregon,* 435 *U.S.* 333, 339 (1978); *State v. Lynch,* 177 *N.J. Super.* 107, 115 (App. Div.), *certif. denied,* 87 *N.J.* 347 (1981). If not all defendants in a multi-defendant trial request the cautionary instruction, the court must nevertheless give the instruction, and the other defendants who did not request the charge cannot claim reversible error. *See State v. Jackson,* 204 *N.J. Super.* 13,21 (App. Div. 1983), *affd,* 99 *N.J.* 379 (1985); *State v. McNeil, 164 N.J. Super*. 27,31-32 (App. Div. 1978), *certif. denied,* 79 *N.J.* 497 (1979).

A defendant need not call any witnesses, but instead may rely upon the presumption of innocence. *In re Winship,* 397 U.S. 358, 363 (1970). Recently in *State v. Hill,* 199 N.J. 545, 566-567 (2009), the New Jersey Supreme Court held that a jury charge, based on *State v. Clawans,* 38 N.J. 162, 170 (1962), that the jury may draw an adverse inference based on an adversary's failure to call a witness should be given rarely, if ever, to apply to a criminal defendant. The reasoning of the Supreme Court was that otherwise the jury may be confused that a defendant has an obligation to produce that witness and improperly assists the State in its obligation to prove each and every element of a charged crime beyond a reasonable doubt. *Hill,* 199 N.J. at 566.

A defendant also has the right to be present at every stage of his or her own trial. *Illinois v. Allen,* 397 *U.S.* 337, 338 (1970); *State v. Whaley,* 168 *N.J.* 94,99-100 (2001); *R.* 3:16(b). The right of presence includes not only jury selection, *State v. Smith,* 346 *N.J. Super.* 233, 236-37

(App. Div. 2002), but also was recently extended to cover sidebar conferences during jury selection. *State v. WA.*, 184 *N.J.* 45, 66 (2005).

A defendant who is incarcerated should not ordinarily be compelled to appear for trial in a prison uniform or handcuffs. *Estelle v. Williams,* 425 *U.S.* 501, 504 (1976); *State v. Kuchera,* 198 N.J. 482 (2009); *State v. Artwell,* 177 N.J. 526, 537 (2002); *State v. Martini,* 131 *N.J.* at 235. The general rule is that both defense and prosecution witnesses should enter the courtroom in civilian attire supplied by correctional authorities, except if it is impractical, if there is an extraordinary risk of flight or danger, or if the inmate refuses. *Kuchera,* 198 N.J. at 496-497, 501. However, the error is not necessarily reversible, as the defendant must show prejudice. *Estelle v. Williams,* 425 *U.S.* at 507; *State v. Carrion-Collazo,* 221 *N.J. Super.* at 112. Before ordering a defendant to be restrained in the presence of the jury, the trial court must hold a hearing, however informal, out of the presence of the jury and place on the record the court's reasons for restraining the defendant. These reasons may be based on evidence adduced at trial, information obtained from law enforcement officers or information from criminal records. *State v. Damon,* 286 *N.J. Super.* 492,499 (App. Div. 1996); *State v. Roberts,* 86 *N.J. Super.* 159, 166-167 (App. Div. 1965).

As noted earlier, there is a constitutional right to counsel post indictment. *State v. Clausell,* 121 N.J. at 350-355. A defendant has a constitutional right to proceed without counsel, as long as the defendant voluntarily and intelligently elects to do so. *Farretta v. California,* 422 U.S. 806, 818 (1975); *State v. Dubois,* 189 N.J. 454, 468-69 (2007); *State v. Crifasi,* 128 N.J. 499, 510-512 (1992).

The trial judge possesses broad discretion to intervene in a criminal trial when necessary, especially when a patty's basic rights are being threatened. *State v. Ray,* 43 N.J. 19, 25 (1964); *State v. Giudo,* 40 N.J. 191, 207 (1963). The trial judge may intervene when expedition is necessary to prevent a waste of judicial time and resources, when testimony requires clarification, or when a witness appears to be in distress or having trouble articulating his or her testimony. *State v. Riley,* 359 U.S. 313 (1959). However, in *State v. O'Brien,* 200 N.J. 520 (2009), the New Jersey Supreme Court recently reiterated that a judge in a jury trail should limit questioning to protect the defendant's right to fair and balanced proceedings. *Id.* at 535, quoting *State v. Taffaro,* 195 N.J. 442, 450-451 (2008). When a trial judge questions a witness in such a way that he or she takes over the role of the prosecutor, it can give the jury the impression that

the judge does not believe the witness, and that impression can deny a defendant's right to a fair trial. *O'Brien,* 200 N.J. at 535.

H. Motions for a Judgment of Acquittal

After the State has rested, and/or after all parties have rested, a defense attorney should make a motion for a judgment of acquittal pursuant to *R.* 3:18-1. This motion should be granted by the court (even on its own initiative) if the evidence is insufficient to warrant a conviction of the crime(s) charged. *Jackson v. Virginia,* 443 *U.S.* 307, 319 (1979); *R.* 3:18-1; *State v. Martin,* 119 *N.J.* 2, 8 (1990); *State v. Reyes,* 50 *N.J.* 454, 458 (1967). The judge must evaluate the State's evidence in its entirety, including all direct and circumstantial evidence, give the State the benefit of all favorable testimony and inferences therefrom, and then determine whether or not a reasonable jury could find the defendant guilty beyond a reasonable doubt of the crime charged. *State v. Palacio,* Ill *N.J.* 543, 550 (1988); *State v. Reyes,* 50 *N.J.* at 458-459. The State's proofs need not exhaust all possibilities other than the hypothesis of guilt in order to have the matter submitted to the jury. *State v. Thomas,* 256 *N.J. Super.* 563, 572 (App. Div. 1992), *affd,* 132 *N.J.* 247 (1993).

If the motion is denied at the close of the State's case, a defendant may offer evidence without having specifically reserved the right to do so. *R.* 3:18-1. On review, the appellate court may give no consideration to the evidence adduced during the defendant's case. *State v. Reyes,* 50 *N.J.* at 459; *State v. Milton,* 255 *N.J. Super.* 514, 521 (App. Div. 1992); *State v. Lemken,* 136 *N.J. Super.* 310, 314 (App. Div. 1974), *affd,* 68 *N.J.* 348 (1975).

If an indictment is dismissed on a motion for a judgment of acquittal, a defendant may not be retried without running afoul of double jeopardy. *State v. Tropea,* 78 *N.J.* 309, 316 (1978); *State v. Ortiz,* 202 *N.J. Super.* 233, 241 (App. Div.), *certif. denied,* 102 *N.J.* 300 (1985).

A motion for a judgment of acquittal may be renewed or made for the first time within 10 days after a jury returns a verdict of guilty or is discharged without having returned a verdict. *R.* 3:18-2. The court ruling on such a motion may set aside the guilty verdict and order the entry of a judgment of acquittal. *Id.* The standards used by the court are the same as under *R.* 3:18-1. *See State v. Palacio,* 111 *N.J.* at 550; *State v. Rodriguez,* 141 *N.J. Super.* 7, 11 (App. Div. 1976), *certif. denied,* 71 *N.J.* 495 (1976). Note that unlike a judgment of acquittal entered after the State's case, a judgment of acquittal entered after the jury verdict may be appealed by the State,

pursuant *toR.* 2:3-1(b)(3). *State v. Kleinwaks,* 68 *N.J.* 328, 334-335 (1975); *State v. Bowen,* 154 *N.J. Super.* 368, 371 n.l (App. Div. 1977), *certif. denied,* 77 *N.J.* 479 (1978).

I. Mistrial Motions and Motions for a New Trial

1. Mistrial

Motions for a mistrial and motions for a new trial are governed by the same standard. The test is whether manifest injustice would result [or has resulted] from continuation of the trial and submission of the case to the jury. *See State v. Martini,* 131 *N.J.* 176,268 (1993), *cert. denied,* 516 *U.S.* 875, 116 *S.Ct.* 203, 133 *L.Ed.2d* 137 (1995); *State v. DiRienzo,* 53 *N.J.* 360, 383 (1969); *State v. Lozada,* 257 *N.J. Super.* 260, 277 (App. Div.), *certif. denied,* 130 *N.J.* 595 (1992); *State v. Hubbard,* 123 *N.J. Super.* 345, 351 (App. Div.), *certif. denied,* 63 *N.J.* 325 (1973). Mistrial motions have an additional component -- whether the error is of such a nature which may be effectively cured by a cautionary instruction or other curative steps. *State v. Winter,* 96 *N.J.* 640, 647 (1984); *State v. Ribalta,* 277 *N.J. Super.* 277, 291 (App. Div. 1994), *certif. denied,* 139 *N.J.* 442 (1995). A trial judge's decision on a mistrial motion will not be disturbed on appeal unless manifest justice would result. *State v. LaBrutto,* 114 *N.J.* 187, 207 (1989); *State v. Rechtstaffer,* 70 *N.J.* 395,410-411 (1976); *State v. Farmer,* 48 *N.J.* 145, 170-171 (1966), *cert. denied,* 386 *U.S.* 991 (1967); *State v. Mangrella,* 214 *N.J. Super.* 437, 441 n. 3 (App. Div. 1986), *certif. denied,* 107 *N.J.* 127 (1987).

2. *New Trial*

The trial court's determination of a motion for a new trial, like appellate review of such a determination, is dependent upon whether it is clearly and convincingly shown that there was a manifest denial of justice if the jury verdict is not set aside. *R.* 3:20-1; *State v. Sims,* 65 *N.J.* 359, 373-374 (1974); *State v. Johnson, 203 N.J. Super.* 127 (App. Div.), *certif. denied,* 102 *N.J.* 312 (1985). A new trial on the basis that the guilty verdict was against the weight of the evidence will be ordered only when it appears to the trial court, giving due regard to the jury's opportunity to assess the credibility of all witnesses, that a manifest denial of justice has occurred. *State v. Ball,* 268 *N.J. Super.* 72, 121 (App. Div. 1993), *affd,* 141 *N.J.* 142 (1995).

Generally, a motion for a new trial must be made within 10 days after the verdict or finding of guilty. *R.* 3:20-2. There are two exceptions to this rule. A motion for a new trial based upon newly-discovered evidence may be made at any time. *Id.* A motion on this basis must show that the evidence is (1) material, (2) discovered after trial, and not reasonably discoverable prior to trial, and (3) of such a nature as to probably change the jury's verdict. *See State v. Carter,* 85 *N.J.* 300, 314 (1981); *State v. Robinson,* 253 *N.J. Super.* 346, 360 (App. Div.), *certif. denied,* 130 *N.J.* 6 (1992); *State v. Engel,* 249 *N.J. Super.* 336, 402 (App. Div. 1991), *certif. denied,* 130 *N.J.* 393 (1992). In addition, a motion for a new trial on the basis that the defendant did not waive his or her appearance for a trial must be made prior to sentencing. *Id.*

J. Requests to Charge and Jury Charges

Both the prosecution and defense counsel should submit proposed jury charges. The function of a request to charge is to elicit from the court a declaration of the law, coupled with an instruction to the jury on how it is to be applied by them in reaching a conclusion on the issues before them. *State v. Green,* 86 *N.J.* 281, 289-290 (1981). These proposed charges should be submitted prior to the close of the evidence. *Id.* The court will hold a charging conference prior to closing arguments. *R.* 1:8-7(b). *State v. Hakim,* 205 *N.J. Super.* 385, 389 (App. Div. 1985). At this conference, the court will rule upon the various requests to charge submitted by counsel and inform counsel of the court's intended charge. *Id.*

The purpose of the jury charge is to "explain the law to the jury in the context of the material facts of the case." *State v. Martini,* 131 *N.J.* 176,271 (1993), *cert. denied,* 516 *U.S.* 875, 116 *S.Ct.* 203, 133 *L.Ed.2d* 137 (1995), quoting *State v. Concepcion,* 111 *N.J.* 373,379 (1988). An appropriate charge is essential to a fair trial. *State v. Clausell,* 121 *N.J.* 298, 330 (1990); *State v. Collier,* 90 *N.J.* 117, 122 (1982). A party is not entitled to the exact charge proposed by the party but is entitled to a charge which fully, clearly and as accurately as possible sets forth the fundamental issues in the case. *State v. LaBrutto,* 114 *N.J.* 187, 204 (1989); *State v. Green,* 86 *N.J.* at 288-289; *State v. Ball,* 268 *N.J. Super.* 72, 112 (App. Div. 1993), *affd,* 141 *N.J.* 142 (1995).

It is incumbent on the court to ensure that its instructions are accurate and fair, and therefore, the court may reject a party's partisan request to charge. *State v. Green,* 86 *N.J.* at 289-290; *State v. Gelb,* 212 *N.J. Super.* 582, 588-589 (App. Div. 1986), *certif. denied,* 107 *N.J.*

633 (1987). On review, the alleged erroneous portion(s) of the charge cannot be dealt with in isolation. Rather, the charge must be examined as a whole to determine its fairness and accuracy. *State v. Martini,* 131 *N.J.* at 271; *State v. Marshall,* 123 *N.J.* 1, 135 (1991); *State v. LaBrutto,* 114 *N.J.* at 204.

The trial judge should read the entire jury instructions to the jury. *State v. Lindsey,* 245 *N.J. Super.* 466, 476 (App. Div. 1991). Written charges may be submitted to the jury at the discretion of the trial court. *R* 1:8-8. Pursuant to a July 15, 2013 notice, Rules 1:8-7 and 1:8-8 have been amended, effective January 1, 2014. The amended Rules require trial judges "whenever practicable" to give each side a copy of the proposed instructions, marked as a court exhibit, for attorney review. After such review, the trial judge should provide to the jury panel at least two copies of the written instructions to use in the jury room during deliberations, except if the trial court finds that the preparation of written instructions will cause undue delay in the trial. The courts typically use the model jury charges to instruct the jury on the law but must mold the instructions in a manner to explain the law in the context of the material facts of the case. *State v. Concepcion,* 111 *N.J.* at 379; *State v. Hinds,* 278 *N.J. Super.* 1, 14 (App. Div. 1994), *reversed on other grounds,* 143 *N.J.* 540 (1995).

A defendant is entitled to a charge on all lesser-included offenses supported by the evidence. *State v. Short,* 131 *N.J.* 47, 53 (1993); *State v. Saulnier,* 63 *N.J.* 199, 205 (1973); *State v. Farrell,* 250 *N.J. Super.* 386, 391 (App. Div. 1991); *N.J.S.A.* 2C:1-8e. The test when the defendant requests the charge is whether the evidence provides a rational basis on which a jury could acquit the defendant on the greater charge and convict the defendant of the lesser offense. *State v. Brent,* 137 *N.J.* 107, 113-119 (1994); *State v. McClary,* 252 *N.J. Super.* 222, 227 (App. Div. 1991), *certif. denied,* 130 *N.J.* 6 (1992); *N.J.S.A.* 2C:1-8d. Even over a defendant's objection, a lesser-included offense not explicitly charged in the indictment may be charged to the jury if it is fairly contained within the charge which is in the indictment. *State v. Brent,* 137 *N.J.* at 113-119; *State v. Sloane,* 111 *N.J.* 293, 303 (1988); *State v. LeFurge,* 101 *N.J.* 404, 423-424 (1986). A defendant may request a charge on a lesser- included offense to give the jury a chance to convict on a lesser charge while the prosecution may do so to enhance the chances of a conviction. *State v. Brent,* 137 *N.J.* at 113-119; *State v. Saulnier,* 63 *N.J.* at 205.

A trial judge has an obligation, even absent a defense request, to instruct the jury regarding either an affirmative defense or one negating an element of the offense. However, this

obligation is triggered only when the evidence clearly indicates or clearly warrants such a charge. *State v. Rivera*, 205 *N.J.* 472, 489 (2011).

The jury should not be charged on a lesser-included motor vehicle violation, because such an offense is to be decided by the judge, not the jury. *State* v. *Muniz,* 118 *N.J.* 319, 332-334 (1990). However, the court may make the jury aware that there are other lesser-included midair vehicle offenses implicated by defendant's conduct even though the jury is not permitted to determine defendant's guilt or innocence of these offenses. *State* v. *Muniz,* 118 *N.J.* at 332; *State* v. *Brown,* 118 *N.J.* 595, 620 (1990).

K. Verdicts

When multiple charges are submitted to the jury, the court may decide that a written verdict sheet should also be submitted. *R.* 3:19-1(b). Special interrogatories verdict forms are disfavored but not per se prohibited. *State* v. *Florez,* 261 *N.J. Super.* 12, 29 (App. Div. 1992), *affd,* 134 *N.J.* 570 (1994); *State* v. *M.L.,* 253 *N.J. Super.* 13, 26-27 (App. Div. 1991), *certif. denied,* 127 *N.J.* 560 (1992). *See also State* v. *Simon,* 79 *N.J.* 191, 199-200, 207-208 (1979). The verdict must be returned in open court. *R.* 1:8-9.

The trial courts possess the inherent authority, under *R.* 3:19-1(a), to accept interim or partial verdict, absent a showing of prejudice to a defendant. However, the routine use of partial verdicts is "strongly disfavored," according to the New Jersey Supreme Court's decision in *State v. Shomo,* 129 *N.J.* 248, 257-258 (1992). In *Shomo,* the Court stated that partial verdicts may be accepted, absent a showing of prejudice to the defendant when (1) the jury has deliberated at length; (2) the charges against a defendant are rooted in unrelated facts; (3) the court has reason to be concerned that a juror may become ill before deliberations conclude; (4) there is a risk of taint to the jury's decision-making process; or (5) the State has indicated its intention to dismiss the unresolved counts. *State v. Shomo,* 129 *N.J.* at 257-258. In addition, the court must be assured that the jury understands the finality of its verdict, the verdict is taken and recorded in open court, and the jury, if requested, is polled. *ld.* A judge may not require the jury to deliberate for an unreasonable length of time once it has advised the court that it is unable to reach a verdict. *State v. Ramseur,* 106 *N.J.* 123, 302 (1987); *State v. Roach,* 222 *N.J. Super.* 122, 129-130 (App. Div. 1987), *certif. denied,* 110 *N.J.* 317 (1988).

Inconsistent verdicts are normally permitted as long as the evidence is sufficient to establish guilt of the substantive offense beyond a reasonable doubt, and the review of the sufficiency of the evidence on the guilty verdict is independent of the jury's determination that the evidence on another court was insufficient. *United States v. Powell,* 469 *U.S.* 57, 67 (1984); *State v. Petties,* 139 *N.J.* 310, 319 (1995); *State v. Ortiz,* 253 *N.J. Super.* 239, 245 (App. Div.), *certif. denied,* 130 *N.J.* 6 (1992).

If there is a jury question prior to the verdict, the proper procedure is to (1) instruct the jury to put its question down in writing; (2) put the question on the record; (3) allow the attorneys an opportunity to be heard as to the proposed answer; and (4) bring the jury back into the courtroom for proper instruction. *See State v. Brown,* 275 *N.J. Super.* 329, 334 (App. Div.), *certif. denied,* 138 *N.J.* 269 (1994).

If the jurors have indicated that they are deadlocked and unable to reach a verdict because of one dissenting juror, the judge may not dismiss that juror. *State v. Valenzuela,* 136 *N.J.* 458, 468-469 (1994); *State v. Singleton,* 290 *N.J. Super.* 336, 347 (App. Div. 1996). Rather, the court should question the juror to establish a record whether the juror possesses the intellect and emotional stability to discharge his or her duty as a juror. *State v. Valenzuela,* 136 *N.J.* at 468, 472; *State v. Miller,* 76 *N.J.* 392, 406-407 (1978); *State v. Singleton,* 290 *N.J. Super.* at 347-348. In general, in the case of a deadlocked jury, the trial court must inquire of the jury if further deliberations are likely to result in a verdict. If the answer is no, the judge should declare a mistrial. *State v. Valenzuela,* 136 *N.J.* at 469; *State v. Singleton,* 290 *N.J. Super.* at 347.

L. Post Verdict Interrogation of Jurors

Litigants and their attorneys are prohibited from post-trial jury interrogation of jurors, absent a strong showing that a litigant has been harmed by jury misconduct. *State v. Koedatich,* 112 *N.J.* at 289; *State v. Athorn,* 46 *N.J.* 247, 250 (1966), *cert. denied,* 384 *U.S.* 962 (1966); *State v. Loftin,* 287 *N.J. Super.* 76, 107 (App. Div. 1996). The purpose of this rule is to ensure free debate in cases to come, *State v. LaFera,* 42 *N.J.* 97, 106-107 (1964), and to prevent the unsettling of verdicts after they are recorded. *State v. Athorn,* 46 *N.J.* at 251. *State v. Koedatich,* 112 *N.J.* at 288, identified two scenarios which would constitute good cause under this rule: (1) where racial or religious bigotry is manifest in deliberations; or (2) where a juror

informs or misinforms his or her colleagues on the jury about the facts of the case based on the juror's personal knowledge of facts not in evidence.

V. SENTENCING, APPEALS AND EXPUNGEMENT

A. Pre-Sentencing Procedure

If a defendant is convicted, a presentence investigation is conducted by the probation department in all cases except death penalty cases. *State v. Roth*, 95 *N.J.* 334, 357 (1984); *State v. Reed, 211 N.J. Super.* 177, 184-185 (App. Div. 1986), *certif. denied,* 110 *N.J.* 508 (1988); *N.J.S.A.* 2C:44-6a; *R.* 3:21-2(a). The purpose of this investigation is to prepare a report for the court which presents all material having any bearing whatsoever on the sentence to be imposed. *See State v. Kunz,* 55 *N.J.* 128, 144-145 (1969). The presentence report is disclosed to the defendant and the prosecutor. *R.* 3:21-2(a). *N.J.S.A.* 2C:44-6b enumerates the information required to be contained in the presentence report: (1) an analysis of the circumstances surrounding the commission of the crime; (2) the defendant's prior criminal history; (3) the defendant's family situation; (4) the defendant's financial resources and debts, including any amount owed by way of restitution, fine or special assessment; (5) the defendant's employment history; (6) the defendant's personal habits; (7) the disposition of any charge against any co-defendants; (8) a report of any compensation paid by the Violent Crimes Compensation Board as a result of the commission of the crime, and (9) a statement by the victim, if the victim chooses to provide one, detailing the harm or loss suffered by the victim and the impact of the crime upon the victim's family. The presentence report may also include a report on the defendant's physical and mental condition, and any other factor that the probation officer deems relevant or the court orders to be included. *N.J.S.A.* 2C:44-6b; *R.* 3:21-2. Finally, the presentence report should include an assessment of the gravity and seriousness of the harm inflicted on the victim. *N.J.S.A.* 2C:44-6b. This analysis should include an analysis whether the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill-health or extreme youth. *Id.*

The probation department's presentence investigation is often neglected or given short shrift by both prosecutors and defense counsel, to the detriment of their respective clients. Early involvement with the probation officer, including the submission of a sentencing memorandum, can help to ensure that a client's particular concerns will be considered, and that a complete picture of the defendant and the crime will be presented in context. Keep in mind that the presentence report goes a long way in establishing the sentence that the court will impose.

B. Sentencing - Substantive

1. General Terms of Imprisonment

It is imperative for an attorney involved in practicing criminal law to know about the potential sentences provided for in the New Jersey Code of Criminal Justice. Most frequently, the potential sentence is the single most determinative factor in whether or not a defendant will go to trial.

A defendant convicted of a first degree crime faces a potential term of incarceration of between 10 and 20 years, *N.J.S.A.* 2C:43-6(1), while a defendant convicted of a crime of the second degree faces a potential five to 10 year term of incarceration, *N.J.S.A.* 2C:43-6(2). A defendant convicted of a third degree crime faces a potential jail term of three to five years, *N.J.S.A.* 2C:43-6(3), while a fourth degree criminal conviction carries with it a potential term of incarceration not to exceed 18 months. *N.J.S.A.* 2C:43-6(4). The maximum term of incarceration for a defendant convicted of a disorderly persons offense is six months, while for a petty disorderly persons conviction the maximum sentence which may be imposed is 30 days. *N.J.S.A.* 2C:43-8.

There is a presumption of incarceration for persons convicted of a first or second degree crime, unless the court determines that imprisonment "would be a serious injustice which overrides the need to deter such conduct by others." *N.J.SA.* 2C:44-1d. There is a presumption of non- incarceration for persons convicted of third (except theft or unlawful taking of a motor vehicle or eluding) and fourth degree crimes who have not been previously convicted of an offense, unless the court believes that imprisonment is necessary for the protection of the public. *N.J.S.A.* 2C:44-1e.

2. Extended Terms

Extended terms of incarceration may be imposed on certain defendants who meet the criteria enumerated in *N.J.S.A.* 2C:44-3. An extended term of incarceration may be imposed only after written notice to the defendant of the basis of the application, and an opportunity for the defendant to hear, controvert and rebut the evidence against him or her. *N.J.S.A.* 2C:44-6e. In general, an extended term of incarceration may be imposed if the court finds that the

defendant has been convicted of a crime of the first, second or third degree, and a defendant (1) is a "persistent offender" (over the age of 21 who has been previously convicted of at least two crimes, the latest of which is within 10 years of the date of the crime for which the defendant is being sentenced), *N.J.S.A.* 2C:44-3a; (2) a "professional criminal" (a defendant who committed a crime as part of a continuing criminal activity in concert with two or more persons" and the circumstances of the crime show that the defendant knowingly devoted himself or herself to criminal activity a major source of livelihood), *N.J.S.A.* 2C:44-3b; or (3) offered, received or expected to receive something of pecuniary value unrelated to the proceeds of the crime, *N.J.S.A.* 2C:44-3c. An extended term of imprisonment under any of these three subsections is discretionary and available only if the prosecutor applies for it within 14 days of the defendant's guilty plea or the verdict of guilty. *See State v. Martin,* 110 *N.J.* 10, 16 (1988); *State v. Dunbar,* 108 *N.J.* 80, 87-88 (1987); *R.* 3:21-4(e).

Second firearms offenders may be sentenced to extended terms of incarceration under *N.J.S.A.* 2C:44-3d even absent formal application by the prosecutor. *State v. Martin,* 110 *N.J.* at 16. However, notice and a hearing are still required under this subsection. *State v. Martin,* 110 *N.J.* at 16-17; *State v. Latimore,* 197 *N.J. Super.* 197, 220-222 (App. Div. 1984), *certif. denied,* 101 *N.J.* 328 (1985). Extended terms of incarceration may be imposed on other violent criminal offenders (enumerated in the statute) who utilized or possessed a stolen motor vehicle in connection with the commission of the crime, *N.J.S.A.* 2C:44-3f, and sex offenders where the victim of the crime is under 16 years of age or less, *N.J.S.A.* 2C:44-3g or who have violated a sentence of community supervision by committing certain violent crimes or other sex offenses. *N.J.S.A.* 2C:43-6.4.

An extended term must be imposed under N.J.S.A. 2C:43-6(f) on a repeat drug offender. The constitutionality of this statute was recently upheld by the New Jersey Supreme Court, in the face of Sixth Amendment concerns, in *State v. Thomas,* 188 N.J. 137 (2006), due to the fact that the fact finding by the sentencing judge under that statute was relegated to whether or not defendant had a prior conviction or non-qualitative assessment. *State v. Thomas,* 188 N.J. at 151.

In a companion case to *Thomas, State v. Pierce,* 188 N.J. 155 (2006), the Court held that a sentencing court does not engage in impermissible fact finding (in violation of the Sixth Amendment) when it assesses a prior record of convictions and determines that a defendant

is statutorily eligible for a discretionary extended term as a persistent offender. If the sentencing court determines that those statutory eligibility requirements for an extended term are met (without considering protection of the public as one such factor as previously suggested in *State v. Dunbar,* 108 N.J. 80 (1987)), then the maximum sentence to which a defendant may be subject, for purposes of *Apprendi v. New Jersey,* 530 *U.S.* 466 (2000), is the top of the extended term range. *Id.* at 169. Within that range, the sentencing court is free to assess the aggravating and mitigating factors (which may then include protection of the public as one such factor). *Id.*

Under *N.J.S.A.* 2C:43-7, extended terms of incarceration increase the allowable terms of incarceration which may be imposed on a defendant as follows:

1. In certain cases of aggravated manslaughter, kidnapping in the first degree, or aggravated sexual assault where the victim is 16 years of age or less, between 30 years and life imprisonment;
2. For crimes of the first degree except murder or the other crimes enumerated in paragraph 1, between 20 years and life imprisonment;
3. For crimes of the second degree, between 10 and 20 years;
4. For crimes of the third degree, between 5 and 10 years;
5. In cases of fourth degree weapons crimes and bias motivated crimes, five years, and between three and five years for fourth degree drug cnmes.
6. In murder cases, between 35 years and life imprisonment, of which the defendant must serve 35 years before becoming eligible for parole.
7. In certain cases of kidnapping, between 30 years and life imprisonment of which the defendant must serve 30 years before becoming eligible for parole.

N.J.S.A. 2C:43-7a(l)-(5).

In one of a trio of cases decided in August, 2005, *State v. Franklin,* 184 *N.J.* 516 (2005), the Court unanimously overturned a sentence where the trial court had imposed an extended term of incarceration, based upon the court's determination that the defendant, a second time offender, committed the crime while armed with a gun. The Court held that imposition of an extended term based upon judicial fact finding by a preponderance of the evidence violated a defendant's Sixth Amendment right to trial by jury and Fourteenth Amendment right to due process under *Apprendi v. New Jersey,* 530 *U.S.* 466 (2000) and *Blakely v. Washington,* 542 *U.S.* 296 (2004).

Thus, under the statute as interpreted by *Franklin* to conform to constitutional requirements, if the State seeks an extended term of incarceration under the Graves Act, it must first indict the defendant for possessing or using a gun in the commission of one of the designated crimes, and then must submit the charge to a jury.

3. Presumptive Sentences

In *State v. Natale*, 184 *N.J.* 458 (2005), the New Jersey Supreme Court unanimously overturned New Jersey's prior practice under N.J.S.A. 2C:44-1 (f) (1) of presumptive terms. Under the statute, a judge could sentence a defendant to a term of imprisonment greater than the presumptive term if the judge found one or more statutory aggravating factors. The Court held unconstitutional a sentence above the presumptive statutory term based solely on a judicial finding of aggravating factors other than a defendant's prior criminal conviction. *Id.* at 484. The Court found that such a sentencing scheme violated a defendant's Sixth Amendment right to trial by jury under *Apprendi v. New Jersey,* 530 *U.S.* 466 (2000); *Blakely v. Washington,* 542 *U.S.* 296 (2004) and *United States v. Booker,* 543 *U.S.* 220 (2005), because it allowed a sentence to be imposed beyond the presumptive sentence based upon a juge's determination, instead of that by a jury, as to the aggravating factors. To redress this problem, the Court eliminated presumptive terms. *Id.* at 487-489.

The court may also sentence a defendant convicted of a first or second degree crime to a term appropriate to a crime of one degree lower than the conviction when the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors. *N.J.S.A.* 2C:44-lf(2). The sentence imposed pursuant to this subsection does not become final for 10 days in order to allow the prosecution to appeal the sentence if it so desires. *Id; R.* 3:21-4(h).

4. Fines, Restitutions and Special Assessments

a. Fines

Unless the statute establishing the crime or some other section of the criminal code provides otherwise, the maximum fines which may be imposed on an individual defendant are set forth in *N.J.S.A.* 2C:43-3. This section states that individuals convicted of varying degrees of offenses may be ordered to pay a fine as follows:

1. $100,000 for a conviction of a crime of the first or second degree;
2. $7,500 for a conviction of a crime of the third or fourth degree;
3. $1,000 for a conviction of a disorderly persons offense; and
4. $500 for a conviction of a petty disorderly persons offense.

N.J.S.A. 2C:43-3a-d.

Alternatively, a defendant may be compelled to pay a higher amount equal to twice the pecuniary pain to the offender or loss to the victim caused by the conduct constituting the offense. *N.J.S.A.* 2C:43-3e. Defendants convicted of drug offenses may be compelled to pay a higher amount, up to three times the street value of the controlled dangerous substance. *N.J.S.A.* 2C:43-3h. Defendants who have been convicted a second time or more for tax offenses, fraud or theft may be compelled to pay a fine double those ordinarily set forth for the various degrees of offenses. *N.J.S.A.* 2C:43-3g.

A corporation convicted of a crime may be compelled to pay three times the amount of the fines discussed above, as set forth in *N.J.S.A.* 2C:43-3. *N.J.S.A.* 2C:43-4a. The corporation may also be compelled to pay restitution in accordance with *N.J.S.A.* 2C:44-2. *N.J.S.A.* 2C:43-4a. Finally, a corporation may face potential dissolution, forfeiture of its charter and/or revocation of any franchises held by it or of the certificate authorizing the corporation to conduct business in the State of New Jersey. *N.J.S.A.* 2C:43-4b. These sanctions may be imposed if a corporation or a high managerial agent of the corporation is convicted of an offense committed in conducting the affairs of the corporation. *Id.*

In *Southern Union Company v. United States*, 567 *U.S.* ___, 132 *S.Ct.* 2344, 183 *L.Ed.2d* 318 (2012), the United States Supreme Court recently extended the rationale of *Apprendi v. New Jersey* to the context of a criminal fine. Thus, a jury, and not the sentencing judge, must make the determination of facts that sets the fine's maximum amount. 132 *S.Ct.* at 2354, 2357.

b. Restitution

In addition to any fine, a defendant may be compelled to pay restitution to any victim of the defendant's crime. *N.J.S.A.* 2C:43-3. The amount of restitution may not exceed the victim's loss, except in cases of failure to pay any state, where the amount of restitution is the full amount of the tax evaded or avoided, plus full civil penalties and interest as provided by law. *Id.* Restitution may be ordered regardless of whether the defendant personally derived any pecuniary

benefit from his or her crime, as long as the victim suffered a loss and the defendant is able, or given a fair opportunity, will be able to pay restitution. *N.J.S.A.* 2C:44-2b; *State v. Paone,* 290 *N.J. Super.* 494, 496 (App. Div. 1996). In setting the amount of restitution or a fine, the court must consider the defendant's current and future financial circumstances. *State v. Newman,* 132 *N.J.* 159, 179 (1993); *State v. Ferguson,* 273 *N.J. Super.* 486, 499 (App. Div.), *certif. denied,* 138 *N.J.* 265 (1994); *N.J.S.A.* 2C:44-2c(1), c(2).

c. Assessments

In addition to any other fine, any person convicted of a violent crime resulting in death or injury to another person will be fined a special assessment of at least $100, but not to exceed $10,000, for each such crime. *N.J.S.A.* 2C:43-3.1. Any individual convicted of any crime not resulting in the injury or death of another person or of a disorderly or petty disorderly persons offenses is assessed a $50.00 maximum penalty. This money primarily goes to the Violent Crimes Compensation Board. *N.J.S.A.* 2C:43-3.1(c)(3), (c)(4). There is also a $75 safe neighborhoods assessment imposed on all individuals convicted of any crime, disorderly or petty disorderly persons offense, or any individual who applies for pretrial intervention. *N.J.S.A.* 2C:43-4a(1), a(2). Further, a $50 laboratory analysis fee is imposed of any person convicted of a controlled dangerous substance offense or any person who applies for supervisory treatment such as pretrial intervention. *N.J.S.A.* 2C:3-20a. Finally, there is a mandatory Drug Enforcement and Demand Reduction ("D.E.D.R.") penalty set forth in *N.J.S.A.* 2C:35-15 for those individuals convicted or adjudged of delinquent drug offenses.

C. Sentencing Procedure

At sentencing, the court will ask defense counsel and the defendant whether there are any corrections or proposed additions or deletions to the presentence report. *State v. Newman,* 132 *N.J.* at 179; *State v. Kunz,* 55 *N.J.* 128, 144 (1969); *State v. Martin,* 209 *N.J. Super.* 473, 480 (App. Div. 1986), *reversed on other grounds,* 110 *N.J.* 10 (1988); *R.* 3:21-2; *R.* 3:21-4(b). Sentence will not be imposed unless the defendant is present or has filed a written waiver of the right to be present. *R.* 3:21-4. A defendant does not have an absolute right to be absent at his or her sentencing. In deciding whether to grant a defendant’s request to waive his or her presence at sentencing, the trial court should assess various factors: the interests of the public, the

defendant, the victims and the State. *State v. Tedesco*, 214 *N.J.* 177, 191-192 (2013). The judge must afford the defendant the right of allocation, to make any statement in his or her own behalf and to present any information in mitigation of punishment. *R.* 3:21-4.

1. Criteria for Imprisonment or Non-Incarceration

The court must state its reasons for the imposition of a sentence. *R.* 3:21-4(f); *See* Form 23, Judgment of Conviction and Statement of Reasons. The New Jersey Legislature has enumerated criteria for withholding or imposing a sentence of imprisonment, which consist of 13 aggravating and mitigating circumstances. *N.J.S.A.* 2C:44-1a; *N.J.S.A.* 2C:44-1b. The 13 aggravating circumstances are as follows:

1. the nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel or depraved manner;
2. The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health or extreme youth, or was for any other reasons substantially incapable of exercising normal physical or mental power of resistance;
3. The risk that the defendant will commit another offense;
4. A lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of public trust under chapters 27 and 30, or the defendant took advantage of a position of trust or confidence to commit the offense;
5. There is a substantial likelihood that the defendant is involved in organized criminal activity;
6. The extent of the defendant's pnor criminal record and the seriousness of the offenses of which he has been convicted;
7. The defendant committed the offense pursuant to an agreement that he either pay or be paid for the commission of the offense and the pecuniary incentive was beyond that inherent in the offense itself;

8. The defendant committed the offense against a police or other law enforcement officer, correctional employee or fireman, acting in the performance of his duties while in uniform or exhibiting evidence of his authority; the defendant committed the offense because of the status of the victim as a public servant; or the defendant committed the offense against a sports official, athletic coach or manager, acting in or immediately following the performance of his duties or because of the person's status as a sports official, coach or manager;
9. The need for deterring the defendant and others from violating the law;
10. The offense involved fraudulent or deceptive practices committed against any department or division of State government;
11. The imposition of a fine, penalty or order of restitution without also imposing a term of imprisonment would be perceived by the defendant or others merely as part of the cost of doing business, or as an acceptable contingent business or operating expense associated with the initial decision to resort to unlawful practices;
12. The defendant committed the offense against a person who he knew or should have known was 60 years of age or older, or disabled;
13. The defendant, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a stolen motor vehicle.

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

The 13 mitigating circumstances in tum are as follows:

1. The defendant's conduct neither caused nor threatened serious harm;
2. The defendant did not contemplate that his [or her] conduct would cause or threaten serious harm;
3. The defendant acted under a strong provocation;
4. There were substantial grounds tending to cause or justify the defendant's conduct, though failing to establish a defense;
5. The victim of the defendant's conduct induced or facilitated its commission;

6. The defendant has compensated or will compensate the victim of his conduct for the damage or injury that he [or she] sustained, or will participate in a program of community service;
7. The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;
8. The defendant's conduct was the result of circumstances unlikely to recur;
9. The character and attitude of the defendant indicate that he [or she] is unlikely to commit another offense;
10. The defendant is particularly likely to respond affirmatively to probationary treatment;
11. The imprisonment of the defendant would entail excessive hardship to himself [herself] or his [or her] dependents;
12. The willingness of the defendant to cooperate with law enforcement authorities;
13. The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant.

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

When there is no presumption of incarceration or non-incarceration, these factors come into play in determining both whether to incarcerate and the length of imprisonment. *See State v. Kruse,* 105 *N.J.* 354, 360-361, 363 (1987); *State v. Yarbough,* 100 *N.J.* 627, 635 (1985), *cert. denied,* 475 *U.S.* 1014 (1986); *State v. Roth,* 95 *N.J.* 334, 368 (1984).

2. Criteria for Imposition of Fines and/or Restitution

a. Custodial Sentences

A specific term of imprisonment under *N.J.S.A.* 2C:43-2b(3) is distinct from imprisonment as a condition of probation under *N.J.S.A.* 2C:43-2b(2). In the latter case, a defendant convicted of a crime may be sentenced to a term of imprisonment not to exceed 364 days as a condition of probation (90 days in the case of a disorderly persons offense). All sentences of one year or longer (except in the case of offenders 26 years of age or less at the time of sentencing, pursuant to *N.J.S.A.* 2C:43-5) generally will be served in a state correctional

facility pursuant to *N.J.S.A.* 2C:43-10. *State v. O'Connor*, 105 *N.J.* 399, 420 (1987); *State v. Hartye*, 105 *N.J.* 411, 420 (1987). A person sentenced to a term of imprisonment not exceeding 18 months may be committed to the county penitentiary or workhouse, if the county has such a facility. *N.J.S.A.* 2C:43-10b. A sentence of less than one year will result in incarceration in the county jail, county workhouse or county penitentiary. *N.J.S.A.* 2C:43-10c. A defendant sentenced to a jail term in excess of 6 months cannot be compelled to serve that time in a county jail but may serve that time in a county workhouse or penitentiary. *N.J.S.A.* 2C:43-1Oc. Note further that a defendant is entitled to credit on the term of a custodial sentence for any time spent by the defendant in a jail or state hospital between arrest and sentence. *R.* 3:21-8.

Defense attorneys should seek a recommendation (albeit non-binding) from the judge to the Department of Corrections about the place of incarceration. Considerations such as proximity to family members, the prison population and degree of overcrowding and the physical conditions of the facilities, ought to be taken into account in seeking the most appropriate place of incarceration.

b. Non-Custodial Sentences

There are several alternatives to a sentence of imprisonment for a term. As noted above, a defendant may be placed on probation, and as a condition of probation, may be sentenced to spend up to 364 days in a county institution. *N.J.S.A.* 2C:43-2b(2). A term of incarceration is not the only condition of probation which may be imposed on a defendant. There are standard conditions adopted by the court, enumerated in *N.J.S.A.* 2C:45-1 as well as other special conditions which may be imposed (enumerated in *N.J.S.A.* 2C:45-1b(l)- (13).

A defendant also may be released under community supervision or may be required to perform community service. *N.J.S.A.* 2C:43-2b(5). Another alternative available to a jail term is a sentence to a halfway house or other residential facility in the community. *N.J.S.A.* 2C:43-2b(6). Finally, a defendant may be ordered to serve imprisonment at night or on weekends, with liberty to work or to participate in training or educational programs. *N.J.S.A.* 2C:43-2b(7).

Where a defendant has received a suspended sentence and has been placed on probation, the maximum period of suspension is the lesser of five years or the maximum term which could have been imposed by the court. *N.J.S.A.* 2C:45-2a.

c. Consecutive versus Concurrent Sentences

In *State v. Yarbough*, 100 *N.J.* 627, 630 (1985), *cert. denied,* 475 *U.S.* 1014 (1986), the New Jersey Supreme Court enunciated a guide to trial courts on the standards for imposition of consecutive sentences. Those standards are as follows:

1. There are no free crimes in a system where the punishment is specifically designed to fit the crime;
2. The reasons for imposing a consecutive or concurrent sentence should be articulated by the trial judge in imposing sentence;
3. Factors to be considered by the court should include the facts of the particular crimes, including whether or not:
    a. the crimes and their objectives were primarily independent of each other;
    b. the crimes involved separate acts of violence or threats of violence;
    c. the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to demonstrate a single period of aberrant behavior;
    d. any of the crimes involved multiple victims; or
    e. the convictions for which the sentences are to be imposed are numerous.
4. There should be no double counting of aggravating factors; and
5. Successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.

There is no overall outer limit on the accumulation of consecutive terms of imprisonment for multiple offenses. *State v. Brown*, 138 *N.J.* 481, 559 (1994); *N.J.S.A.* 2C:44-5a. When terms of imprisonment run concurrently, the shorter terms merge in and are satisfied by the discharge of the longest term. *N.J.S.A.* 2C:44-5e(1). When terms of imprisonment run consecutively, the terms are added to arrive at an aggregate term to be served equal to the sum of all terms. *N.J.S.A.* 2C:44-5e(2). Recently, in *Oregon v. Ice*, 555 U.S. 160 (2009), the United States Supreme Court reiterated that the decision to impose consecutive, as opposed to concurrent, sentences is a determination to be made solely by the sentencing judge, and that the Sixth Amendment does not mandate jury determination of any fact necessary for that determination.

There is also a set of statutory criteria to guide a court in determining whether to sentence a defendant to pay a fine and/or restitution, in addition to a sentence of imprisonment or probation. The criteria that a court must consider before requiring a defendant to pay a fine are as follows:

1. The defendant has derived a pecuniary gain from the offense or the court believes that a fine is particularly suited to deter the type of offense involved or to the correction of the offender;
2. The defendant is able, or given a fair opportunity to do so, will be able to pay the fine; and
3. The fine will not prevent the defendant from making restitution to the victim of the offense.

N.J.S.A. 2C:44-2a(1)-(3).

The criteria for imposition of restitution are in turn set forth in *N.J.S.A.* 2C:44-2b as follows:

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

Whenever a defendant is sentenced to pay a fine and/or make restitution, the court may not impose at the same time an alternative sentence in the event that the fine or restitution is not paid. *N.J.S.A.* 2C:44-2d. Rather, that determination must abide a hearing and determination as to wilfulness or good cause for the defendant's failure to pay. *N.J.S.A.* 2C:44-2d; *N.J.S.A.* 2C:46-2.

D. Parole Eligibility

The court must consider the defendant's eligibility for parole in determining the appropriate term of imprisonment. *N.J.S.A.* 2C:44-1c(2). At the time of sentencing, pursuant to a relatively recent amendment to the court rules, a court must state the approximate period of time that the defendant will have to serve before being eligible for parole for every defendant sentenced to a term of incarceration. *R.* 3:21-4(1). *See also N.J.S.A.* 2C:43-2e; 43-2f. The court's statement, the exact required text of which is set forth in the rule, is designed to inform the public, and not the defendant, of the actual time that a defendant will serve in

custody, according to the State Parole Board's Eligibility Tables. *R.* 3:21-4(i), Official Comment.

E. Intensive Supervision Program

The intensive supervisiOn program ("ISP") is "a sentencing alternative that removes carefully selected defendants from prison and releases them into the community under standards of supervision so strict as to substantially eliminate any risk to public safety. The goals are reduction in prison overcrowding, appropriate punishment of the offender and rehabilitation." *State v. Cannon,* 128 *N.J.* 546, 549 (1992). *See also State v. Haliski*, 140 *N.J.* 1, 19-20 (1995); *State v. Clay*, 230 *N.J. Super.* 509, 512-517 (App. Div. 1989), *affd o.b.*, 118 *N.J.* 251 (1990). ISP is available to any defendant, except those: (1) convicted of a first degree crime; (2) convicted of a crime involving organized criminal activity; (3) serving a statutorily mandated or court imposed parole ineligibility; (4) who previously completed an intensive supervision program; or (5) previously convicted of a first degree crime and released from incarceration for that crime within five years of the commission of the offense for which application is now being made. *N.J.S.A.* 2C:43-11a(l)-(5). See Form 29, sample Application for Admission into Intensive Supervision Program. Motions for entry into ISP are heard by a three judge panel, and the rules prohibit further appellate review of the panel's substantive decision. *R.* 3:21-l0(e).

F. Motion for Reduction or Change of Sentence

With certain exception, a motion to reduce or change a sentence must be filed no later than 60 days after the date of the judgment of conviction. *R.* 3:21-10(a); *See* Form 24, Notice of Motion for Reduction of Sentence. The court may reduce or change the sentence, either in response to a motion or on its own initiative only within 75 days from the date of the judgment of conviction. *Id.*

There are five exceptions to the above time frame for filing a motion to change or reduce a sentence. The following motions may be filed at any time and may be granted by the court at any time:

(1) changing a custodial sentence to allow a defendant to enter into a drug or alcohol abuse rehabilitation or treatment program (whether custodial or non-custodial);

(2) amending a custodial sentence to permit a defendant to be released because of illness or infirmity;

(3) changing a sentence for good cause shown upon joint application of the defendant and the prosecutor;

(4) changing a sentence as authorized by the Code of Criminal Justice;
or

(5) changing a custodial sentence to allow the defendant to enter into the Intensive Supervision Program.

R. 3:21-l0(b)(l)-(5).

G. Appeals

At the time of sentencing, the court must advise the defendant of the right to appeal, and, if the defendant is indigent, the right to appeal as an indigent. *R.* 3:21-4(g). A sentence of imprisonment is not stayed by an appeal or by notice of a petition for certification, unlike a sentence of a fine and/or probation, which may be stayed by the court. *R.* 2:9-3(b); *R.* 2:9-3(c). However, if the court sentences the defendant to a sentence appropriate to a crime one degree lower than the crime for which the defendant was convicted, pursuant to *N.J.S.A.* 2C:44-lf(2), and the State appeals, execution of the sentence is stayed. *R.* 2:9-3(d). Moreover, bail pending appeal is available to a defendant pursuant to *R.* 2:9-4 if it appears that the case involves a substantial question which should be determined by the appellate court and the safety of any portion of the community is not compromised if the defendant remains at large. An application for bail pending appeal should be made to the trial court first; and if denied, to the Appellate Division; and if denied again, to the Supreme Court. *R.* 2:9-4.

Appeals from final judgments must be taken within 45 days of entry of the judgment. *R.* 2:4-1. Appeals from final judgments in criminal cases are taken by serving a copy of the notice of appeal and request for transcript on all other parties who appeared in the action on the Appellate Section of the New Jersey Division of Criminal Justice, and by filing the original with the appellate court and a copy of the notice of appeal and the transcript request with the court from which the appeal is taken. *R.* 2:5-1(a). Appeals to the Appellate Division must also be accompanied by a Case Information Statement. *Id.* A copy of the notice of appeal and Case Information Statement is also to be mailed by ordinary mail, to the trial judge. *R.* 2:5-1(b).

Appendix IV to the Court Rules contains the requisite information which should be set forth in the notice of appeal. *R.* 2-51(f)(l). Appendix Vlll to the Court Rules contains the information required to be set forth in a Case Information Statement in a criminal case. *R.* 2-51(f)(2). *See* Form 25 (Notice of Appeal), Form 26 (Appellate Division Criminal Case Information Statement), and Form 27 (Request for Transcript).

H. Post-Conviction Relief

Rule 3:22-1 and following the New Jersey Court rules are "New Jersey's analogue to the federal writ of habeas corpus." *State v. Preciose,* 129 *N.J.* 451, 458 (1992). A petition for post-conviction relief is cognizable if it is grounded upon any of the following bases: (1) a substantial denial of defendant's constitutional rights in the conviction proceedings; (2) the lack of jurisdiction of the court to impose the judgment rendered upon the defendant's conviction; (3) the sentence imposed was in excess of or otherwise not in accordance with the sentence authorized by law; or (4) any other ground previously available on a basis for collateral attack by habeas corpus or other remedy. *R.* 3:22-2(a)-(d). One of the most common claims for post-conviction relief is ineffective assistance of trial counsel. *See Kimmelman v. Morrison,* 477 *U.S.* 365, 378 (1986); *State v. Preciose,* 129 *N.J.* at 460. Collateral attack on a conviction is not a substitute for an appeal from conviction. *R.* 3:22-3. A prior adjudication on the merits of any grounds for relief is conclusive, whether made in the initial direct proceeding or in any post-conviction proceeding. *R.* 3:22-5. Thus, an issue considered on appeal may not be revisited in a post-conviction collateral proceeding. *State v. Trantino,* 60 *N.J.* 176, 180 (1972); *State v. Smith,* 43 *N.J.* 67, 74, *cert. denied,* 379 *U.S.* 1005 (1965); *State v. White,* 260 *N.J. Super.* 531, 538 (App. Div. 1992), *certif. denied,* 133 *N.J.* 436 (1993).

Any claim for relief not raised in a prior proceeding or in the proceeding resulting in the conviction may not be asserted in a post-conviction proceeding unless: (1) the ground for relief could not reasonably have been raised in any prior proceeding; (2) enforcement of the bar would result in fundamental injustice; or (3) denial of the relief would be contrary to the Constitution of the United States or the State of New Jersey. *R.* 3:22-4. *See State v. D.D.M.,* 140 *N.J.* 83, 93 (1995); *State v. Mitchell,* 126 *N.J.* 565, 583 (1992). Moreover, unless excusable neglect for the delay is shown by the petitioner, a petition filed more than five years from the date of the

judgment of conviction will be denied as untimely. *R.* 3:22-12; *State v. Mitchell*, 126 *N.J.* at 576; *State v. Sloan*, 226 *N.J. Super*. 605, 612 (App. Div.), *certif. denied*, 113 *N.J.* 647 (1988).

Defense counsel filing a claim for post-conviction relief has an obligation to advance any argument that can be raised in support thereof, including defendant's *pro se* claims either by listing them or incorporating them by reference so that the Court may consider them. *State v. Webster*, 187 N.J. 254,257 (2006). *State v. Rue*, 175 N.J. 1, 18-19 (2002).

Pursuant to *R.* 3:22-6(a), an indigent defendant is entitled as a matter of right to counsel in connection with his or her first petition for post-conviction relief, without the need for a threshold determination that the defendant's argument bears some merit. *State v. Rue*, 175 *N.J.* 1, 15-18 (2002). In addition, there is a strong presumption in favor of oral argument on a defendant's first petition for post-conviction relief. *State v. Parker*, 212 *N.J.* 269, 282 (2012).

I. Loss of Rights and Expungement

There are numerous collateral consequences of a criminal conviction. Some of these consequences are spelled out in *N.J.S.A.* 2C:51-1, 51-2 and 51-3. They include forfeiture of public office, debarment from doing business with the State or any political subdivision thereof and disqualification from voting and jury service. Other consequences not enumerated in these statutes but which may flow from a criminal conviction include loss or suspension of professional license, loss of bonded status and/or employment and prohibition from purchasing or owning a firearm. *(N.J.S.A.* 2C:58-3c(1)).

Expungement is a way to ameliorate some of the consequences of a criminal conviction or even an arrest. The effect of an expungement, according to *N.J.S.A.* 2C:52-27, is to render an arrest, conviction and any proceedings related thereto as if they did not occur (with certain exceptions). The exceptions to the general effects of an expungement permit consideration of the prior records in connection with: (1) a pending petition for expungement; (2) a pending application for supervisory treatment or other diversion program for subsequent criminal charges; and (3) a pending application for employment with the judicial branch or with a law enforcement or corrections agency. *N.J.S.A.* 2C:52-27a-c. The expunged charges may be used in setting bail or imposing sentence (*N.J.S.A.* 2C:52-21), deciding on eligibility for parole (*N.J.S.A.* 2C:52-22) or for classifying or assigning defendants by the Department of Corrections.

(N.J.S.A. 2C:52-23). *See State v. XYZ Corp.*, 119 *N.J.* 416, 421-422 (1990); *State v. A.N.J.*, 98 *N.J.* 421, 428 (1985). *See* Form 28, Order of Expungement.

Only those individuals who have been convicted of no more than one crime (or one crime and no more than two disorderly or petty disorderly persons offenses) are eligible to have the crime expunged. *N.J.S.A.* 2C:52-2a; *State v. A.N.J.*, 98 *N.J.* at 426-427. Ten years from the date of the prior conviction, payment of fine, completion of probation or parole or release from imprisonment, whichever is latest, must have elapsed before an individual may apply for expungement. *N.J.S.A.* 2C:52-2a. The law was amended in 2010 to allow expungement, as an alternative to the ten year period, when the following three prongs can be shown: (1) at least five years have expired from the date of conviction, payment of fine, satisfactory completion of probation or parole, or release from incarceration, whichever is later; (2) the person has not been convicted of a crime, disorderly persons offense, or petty disorderly persons offense since the time of conviction; and (3) the court finds in its discretion that expungement is in the public interest, giving due consideration to the nature of the offense, and the applicant's character and conduct since conviction. *N.J.S.A.* 2C:52-2(a)(2). Expungement is also now available for convictions that involve small quantities of marijuana and hashish, *N.J.S.A.* 2C:52-2(c)(1) and (2), and for controlled dangerous substances crimes of the third or fourth degree where the court finds that expungement is consistent with the public interest. *N.J.S.A.* 2C:52-2(c)(3). Records of certain offenses, such as criminal homicide, kidnapping, aggravated sexual assault and aggravated criminal sexual contact, among other crimes, may not be expunged. *N.J.S.A.* 2C:52-2b.

To be eligible for expungement of convictions of disorderly persons or petty disorderly persons offenses, an individual may not have been convicted of a prior or subsequent crime, or three disorderly or petty disorderly persons offenses. *N.J.S.A.* 2C:52-3. In addition, the petition may not be brought until after five years from the last date from among the following events: (1) conviction; (2) payment of fine; (3) satisfactory completion of probation; or (4) release from incarceration.

Finally, individuals subject to arrests not resulting in convictions may apply for expungement immediately. *N.J.S.A.* 2C:52-6c. Individuals who have been diverted pretrial must wait six months after entry of the order of dismissal. *Id.*

The petition for expungement must contain: (1) the petitioner's date of birth; (2) the petitioner's date of arrest; (3) the statutes and offense(s) for which the petitioner was arrested and/or convicted; (4) the original indictment, summons or complaint number; (5) the petition's date of conviction or date of disposition of the matter if no conviction resulted; and (6) the court's disposition of the matter and the punishment imposed, if any. *N.J.S.A.* 2C:52-10a-f. Pursuant to *N.J.S.A* 52:10, copies of the petition must be served on, among others, the State Police, the Attorney General's office and the County Prosecutor's office for the county where the court is located.

FORMS

INDEX TO FORMS

FORM 1 GRAND JURY SUBPOENA DUCES TECUM

Subpoena Duces Tecum
Superior Court of New Jersey

State of New Jersey)
) SS
County of Mercer)

TO: _____

You are commanded to appear at: ***State Grand Jury***
Richard J. Hughes Justice Complex
4th Floor, West Wing
25 Market Street

in the City of Trenton on September 28, 2001 *at* 10:00 a.m. *to give evidence before the State Grand Jury and you are ordered to appear without prepayment of witness fee and bring with you the following records:* See attached Schedule A.

If you fail to appear and produce the said records, a warrant may be issued for your arrest and you may be charged with contempt.

WITNESS, the Honorable Linda R. Feinberg, Judge of the Superior Court,

this 6th *day of* September, 2001.

SEAL OF THE SUPERIOR COURT OF NEW JERSEY

Donald F. Phelan
Clerk of the Superior Court

Tracy Thompson, Deputy Attorney General, 609-777-3777

On _____, ____, *at* _____

at _____ *AM / PM, I served this subpoena on* _____ *by delivering a copy to h__.*

Date: _____

_____

_____
Signature and Title

Custodian of Records

SCHEDULE A

All documents of any nature whatever (including computer records) for the time period January 1, 1997 to the present, pertaining to ; to include but not limited to the following:

1. **All contracts and agreements to provide or receive goods and/or services;**
2. **Billing records including all supporting documentation;**
3. **All correspondence and memoranda;**
4. **All original checks to**
5. **Copies of corporation tax returns filed with the state of New Jersey.**

FORM 2 INDICTMENT (CONTROLLED DANGEROUS SUBSTANCE)

STATE OF NEW JERSEY,	: SUPERIOR COURT OF NEW JERSEY
	: LAW DIVISION - UNION COUNTY
	: CRIMINAL
	:
v.	: INDICTMENT NO.
	:
	: POSSESSION OF A CONTROLLED DANGEROUS
	: SUBSTANCE WITH INTENT TO DISTRIBUTE
	: (THIRD DEGREE)
Defendant.	:
	:

The Grand Jurors of the State of New Jersey, for the County of , upon their oaths present that , on or about , in the City of , in the County of aforesaid, and within the jurisdiction of this Court, did unlawfully and knowingly or purposely possess with intent to distribute Marijuana in a quantity of one ounce or more; contrary to the provisions of N.J.S. 2C:35-5(a)(1) and N.J.S. 2C:35-5(b)(11), and against the peace of this State, the Government and dignity of the same.

_____
COUNTY PROSECUTOR

ENDORSED:

_____
FOREPERSON

FORM 3 INDICTMENT (MONEY LAUNDERING, CONSPIRACY)

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION-CRIMINAL BRANCH

A.D. 2002 TERM 1ST SESSION 1ST PANEL D

THE STATE OF NEW JERSEY

INDICTMENT NO. _____

CHARGE(S):

MONEY LAUNDERING
(NJS 2C:21-25c);
CONSP TO COMMIT MONEY
LAUNDERING
(NJS 2C:5-2 & 2C:21-25);
MONEY LAUNDERING
(NJS 2C:21-25(b)(1));
MONEY LAUNDERING
(NJS 2C:21-25(b)(2a));
PROMOTING GAMBLING
(NJS 2C:37-2a(2))

DEFENDANT(S)

THE GRAND JURORS OF THE STATE OF NEW JERSEY FOR THE COUNTY OF HUDSON UPON THEIR OATHS, PRESENT THAT

ON DIVERS DATES BETWEEN ON OR ABOUT THE 1ST DAY OF OCTOBER 2000, THROUGH THE 16TH DAY OF MAY 2001, IN THE COUNTY OF HUDSON AND IN THE COUNTY OF BERGEN AFORESAID AND ELSEWHERE AND WITHIN THE JURISDICTION OF THIS COURT, did commit the offense of money laundering, in that

. knowingly did direct, organize, finance, plan, manage, supervise or control transactions in property known to be derived from criminal activity, that is an illegal gambling operation, as set forth hereinafter in Count 5, in an amount greater than $75,000 but less than $500,000, contrary to the provisions of N.J.S. 2C:21-25c, against the peace of this State, the Government and dignity of the same.

SECOND COUNT

And further PRESENT, That on the dates, places and in the jurisdiction set forth in the First Count herein, the said

_____ with the purpose of promoting or facilitating the commission of the crime of Money Laundering, in an amount of more than $75,000 but less than $500,000 did agree that one or more of them knowingly would engage in conduct which would constitute the aforesaid crime, that is, Money Laundering, or one or more of them knowingly would aid in the planning, attempt or solicitation of the said crime, that is, Money Laundering, in the amount more than $75,000 but less than $500,000, Second Degree, in violation of N.J.S. 2C:21-25, as set forth hereinafter in Count 3, contrary to the provisions of N.J.S. 2C:5-2, against the peace of this State, the Government and dignity of the same.

THIRD COUNT

And further PRESENT, That on the dates, places and in the jurisdiction set forth in the First Count herein, the said

____ did commit the offense of Money Laundering, in that

as either a principal or an accomplice knowingly did engage in transactions in property known to be derived from criminal activity, as set forth hereinafter in Count 5, in an amount more than $75,000 but less than $500,000, with intent to facilitate or promote a criminal activity, that is an illegal gambling operation as set forth in Count 5, contrary to the provisions of N.J.S. 2C:21-25(b)(1), against the peace of this State, the Government and dignity of the same.

FOURTH COUNT

And further PRESENT, That on the dates, places and in the jurisdiction set forth in the First Count herein, the said

did commit the offense of Money Laundering, in that

as either a principal or an accomplice did engage in a transaction involving property known to be derived from criminal activity as set forth in Count 5 hereinafter in an amount more than $75,000 but less than $500,000 knowing that the transaction was disguised in whole or in part to conceal or disguise the nature, location, source, ownership or control of the property derived from criminal activity, that is an illegal gambling operation as set forth in Count 5, contrary to the provisions of N.J.S. 2C:21-25(b)(2a), against the peace of this State, the Government and dignity of the same.

FIFTH COUNT

And further PRESENT, That on the dates, places and in the jurisdiction set forth in the First Count herein, the said

as either a principal or an accomplice did promote gambling by knowingly engaging in conduct which materially aided an any illegal gambling activity by receiving, in connection with an illegal lottery and gambling machine enterprise money or written records from a person other than a player whose chances or plays are represented by such money or records, contrary to the provisions of N.J.S. 2C:37-2a(2), against the peace of this State, the Government and dignity of the same.

MPD/am

_____, PROSECUTOR

A TRUE BILL	ASSIGNED TO THE SUPERIOR COURT
_____ FOREMAN	_____ 20 _____
PRESENTED:	_____ ASSIGNMENT JUDGE SUPERIOR COURT

FORM 4 NOTICE OF MOTION TO REDUCE BAIL

STATE OF NEW JERSEY, :	
	:
vs.	: NOTICE OF MOTION TO REDUCE BAIL
	:
Defendant.	:
	:

TO:

COUNSEL:

PLEASE TAKE NOTICE that on _____ at _____ or as soon thereafter as counsel may be heard,_____,attorneys for defendant _____, shall move before the Honorable, J.S.C., sitting at the _____ Courthouse,_____,New Jersey for an order pursuant to R. 3:26-3(d), reducing the $_____ cash bail previously set by the Court.

PLEASE TAKE FURTHER NOTICE that in support of this application, defendant shall rely upon the accompanying certification of _____ and the arguments of counsel. A proposed form of order is enclosed. Defendant respectfully requests oral argument.

Attorneys for Defendant

By:_____

Dated:

FORM 5 RETAINER LETTER

[Date]

Personal & Confidential

Re: Legal Representation

Dear:

This letter will serve as our retainer agreement. This firm will represent you in connection with the investigation concerning _____.

Our initial retainer will be $_____. You will be billed on an hourly basis against the retainer and we will advise you on a monthly basis of the status of the retainer. You will be billed at the firm's prevailing rate for all attorney time, which may be changed from time to time. It is anticipated that I, or persons under my direction will do the vast majority of the work. My hourly rate is $_____ per hour. The current rate of our associates and paralegals ranges from $____ to $____ per hour.

You will be billed on a monthly basis for all attorneys' fees, and all disbursements such as long distance telephone toll charges, computerized research, photocopying and similar expenses. You will also be responsible for fees for any experts and consultants and transcripts. All of our invoices are payable within thirty (30) days of their receipt. We will draw from the retainer account in the amount of the outstanding invoice balance. We expect that the retainer will be replenished within thirty (30) days after request is made. In the event that the retainer is not replenished within thirty (30) days after request is made, your signature on the copy of this letter shall constitute consent to allow our firm to withdraw as counsel of record in connection with any legal actions then pending in accordance with the applicable rules of the Court or to withdraw from general representation. Of course, any balance in the retainer at the completion of the matter will be returned to you.

It is understood that we make no promises to you as to the resolution of this matter, except that we promise to provide you with our best professional skills.

Our firm looks forward to the opportunity to represent you. Please read this letter carefully to make certain that you understand all the terms of this retainer agreement. If you are in agreement with the terms of this letter, kindly sign at the bottom and return a copy to me along with your check for the payment of $_____.

Very truly yours,

Accepted and Agreed to:

By:_____

Dated:

FORM 6 LETTER TO PROSECUTOR RE: REPRESENTATION OF CLIENT

[Date]

CERTIFIED MAIL, RETURN RECEIPT REQUESTED #

Prosecutor

RE:

Dear Sir/Madam:

This firm represents the defendant in the above matter. Please contact me if you wish to discuss this matter. In addition, pursuant to RPC 4.2, please refrain from contacting or questioning my client directly. I trust that you so advise your investigators. I would also request a conference with you prior to your consideration of filing any criminal charges against my client. Thank you.

Very truly yours

FORM 7 JOINT DEFENSE AGREEMENT

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT
PREPARED IN ANTICIPATION OF LITIGATION

JOINT DEFENSE MEMORANDUM AND AGREEMENT

1. This memorandum reflects discussions and agreement among and between the undersigned counsel on behalf of their named clients and in furtherance of a common defense effort on the clients' behalf, in contemplation of and preparation for anticipated litigation.

2. It is counsel's and client's belief that the _____ Office has been for some time and is now conducting an investigation of matters relating to the clients. The clients anticipate this investigation may cause the clients to be named as parties in civil and criminal litigation in which they will require the effective assistance of counsel to assert and protect their interest and rights. The nature of the investigation and the relationships among the clients make it likely that the anticipated litigation will present legal and factual issues common to the clients, thus warranting joint efforts in preparation for a potential common defense. In anticipation of such litigation, it is and has been the desire and purpose of the clients that every lawful, ethical and proper step be taken to assure that they and their respective counsel share and exchange strategies, legal theories, confidences, information, and documents which may be useful in each counsel's preparation for the possible litigation. Accordingly, clients and counsel have undertaken to engage in such exchanges and sharing in furtherance of a joint defense.

3. This memorandum confirms and details the purposes, nature and extent of that joint defense arrangement that has existed and will continue to exist for the benefit of the party clients. Each counsel has advised his or her client of the confidentiality of communications, documents, legal strategies and theories, confidences, and information assembled, conveyed and received pursuant to the attorney-client privilege and the attorney's work-product doctrine. Nevertheless, the clients believe that they will benefit by the sharing among and between them and their counsel such information, legal strategies and theories, documents and confidences. In this manner, counsel's ability to assert and protect common strategies and defenses, as well as client rights and interests, will be enhanced.

4. The clients are also firm in their resolve to maintain and preserve the confidentiality assured by the attorney-client privilege and the attorney's work product doctrine, and not to waive these privileges by the such sharing of the information, legal strategies and theories, documents and confidences, as described above for their mutual benefit. Counsel have advised their respective clients that it is their informed professional judgment that existing case and statutory law assure that clients and counsel may share and exchange such information, legal strategies and theories, documents, and confidences in a common effort to prepare for anticipated litigation in which they expect to be parties.

5. Accordingly, each of the clients and their counsel has agreed to reveal and in some instances has revealed information, legal strategies and theories, documents, and confidences within this arrangement for their joint defense. However, such disclosure has been and will be made only upon the express condition that no party client or counsel will disclose to any third party any information, legal strategies and theories, documents or confidences without the written consent, in advance, of all clients who are signators to this memorandum.

6. In rendering legal advice as to joint defense agreements and their effectiveness in maintaining and preserving the attorney-client privilege and attorney's work

product privilege, upon which advice the clients relied in entering into the common defense effort and joint defense agreement, counsel specifically relied upon the decisions in In the Matter of Bevill, Bressler & Schulman Asset Manag., 805 F.2d 120, 126 (3d Cir. 1986); Eisenberg v. Gagnon, 766 F.2d 770, 787 (3d Cir.), cert. denied sub nom., Weinstein v. Eisenberg, 474 U.S. 946 (1985); Continental Oil Company v. United States, 330 F.2d 347 (9th Cir. 1964); Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); and In the Matter of Grand Jury Subpoena Duces Tecum dated November 16, 1974, 406 F. Supp. 381 (S.D.N.Y. 1975).

7. Based upon the foregoing circumstances, mutual understandings and representations, counsel have agreed:

(a) to share and exchange only among and between themselves and the clients, information, legal strategies and theories, documents and confidences for the limited and restricted purpose of assisting counsel in asserting common claims and asserting and protecting respective client interests and rights;

(b) not to reveal to any third party any such information, legal strategy or theory, document or confidences without the written consent, in advance, of the client who contributed or caused the same to be contributed to the joint defense effort, except in the limited circumstance that any one or more of the clients shall become adversary parties to each other in subsequent civil litigation;

(c) to approve or authorize no waiver or modification of any provision of the joint defense agreement which is confirmed by this writing without a like memorandum signed by each counsel;

(d) not to reveal publicly the existence, nature or extent of this agreement, except to the extent necessary to counter efforts by law enforcement authorities to obtain information that is rendered confidential by this agreement; and

(e) to resolve any potential dispute or disagreement arising out of or relating to this agreement in appropriate in camera proceedings.

8. Nothing contained herein shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney and the fact that any attorney has entered this Agreement shall not in any way preclude that attorney from representing any interest that may be construed to be adverse to any other party to this Agreement or be used as a basis for seeking to disqualify any counsel from representing any other party in this or any other proceeding; and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies in any proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Agreement; and it is herein represented that each undersigned counsel to this Agreement has specifically advised his or her respective client of this clause.

Counsel and their clients who are parties to the joint defense agreement have signed this memorandum in the places provided below.

COUNSEL	CLIENT	DATE
By:_____	_____	_____
By:_____	_____	_____

FORM 8 PRETRIAL INTERVENTION NOTICE

Superior Court of New Jersey
Criminal Division
Hudson Vicinage

John A. Norton
Assistant Criminal Division Manager

Hudson County Administration Building
595 Newark Ave.
Jersey City, NJ 07306

Pretrial Intervention Notification

Please be advised that you may make application for enrollment in the Pretrial Intervention Program. Applications are accepted at the: Criminal Division Manager's Office
Room 101
595 Newark Ave.
Jersey City, NJ

Interviews are accepted Monday through Friday between the hours of 9:00 AM to 3:00 PM. Please bring the attached indictment and notice to appear in court with you.

1. The Pretrial Intervention Program (PTI) is a program in the New Jersey Criminal Code that allows certain defendants to earn a dismissal of their charges with the consent of the Prosecutor and the Court. Any defendant charged with a crime may apply for this program. However, the program is normally limited to first offenders who have not had prior rehabilitative opportunities such as probation. A defendant may participate in the Pretrial Intervention Program only once. PTI participation is voluntary and may include reporting to a probation officer, community service, restitution, alcohol or drug treatment and monitoring, and mental health evaluation. Participation in the Pretrial Intervention Program is limited to thirty-six months and after successful completion of the program charges may be dismissed with the consent of the Prosecutor.

2. Those defendants who previously were enrolled in either PTI or Conditional Discharge are not eligible for enrollment in Pretrial Intervention.

3. Defendants who have a prior conviction for a first or second degree crime (Homicide, Aggravated assault, Aggravated Sexual Assault, Sexual Assault, Robbery Aggravated Arson, Burglary while Armed, etc.), or who have completed a term of probation or parole within five years of their PTI application, or who are now charged with a first or second degree offense, or Sale of CDS and are not drug dependent must obtain the consent of the Prosecutor prior to filing a PTI application.

4. All applications for enrollment must be filed no later than 28 days after indictment. Any application beyond that date will not be accepted.

5. A nonrefundable $75.00 application fee is required by all persons applying for Pretrial Intervention. Applicants "may apply for a waiver of this fee, by reason of poverty pursuant to the Rules Governing the Courts of the State of New Jersey."

FORM 9 PLEA AGREEMENT OFFER

Glenn Berman
Prosecutor

Lawrence R. West
1st Assistant Prosecutor

Julia L. McClure
Deputy 1st Assistant Prosecutor

(732) 745-3300
FAX (732) 745-2791

COUNTY OF MIDDLESEX
PROSECUTOR'S OFFICE
P.O. BOX 71
NEW BRUNSWICK, N.J. 08903-0071

Thomas D. Rizzo
Chief

Joseph W. Krisza
Deputy Chief

John F. Mumber
Deputy Chief

FAX (732) 745-2089

RE: STATE V.
INDICTMENT NO.
FILE NO.

Dear Defense Counsel:

In reference to the above-captioned matter(s), the State offers the following plea prior to motions being filed and heard:

_____

_____

_____

In the event that motions are filed and heard, the above plea offer is withdrawn and the following plea offer is made:

_____

_____

_____

Please note that in addition to the terms set forth above (pre and post motion), the defendant - where applicable - must agree to make restitution on all counts of the indictment, forfeit any monies/ property seized, and pay any mandatory penalties. Unless specified, any/all fines are at the Court's discretion. Unless specified, conditions of probation - where applicable - are at the Court's discretion.

The State reserves the right to withdraw from its agreement to recommend a specific sentence without the defendant being allowed to withdraw his/her guilty plea should the defendant not appear for sentencing as directed by the Court.

Very truly yours,

Assistant Prosecutor

FORM 10 PLEA FORM

New Jersey Judiciary
Plea Form

County _____

Prosecutor File Number _____

Defendant's Name:

before Judge:

List the charges to which you are pleading guilty:

Ind./Acc./Comp.#	Count	Nature of Offense	Degree	Statutory Maximum	Time	Fine	VCCO Assmt*
_____	_____	_____	_____	**Max**	_____	_____	_____
_____	_____	_____	_____	**Max**	_____	_____	_____
_____	_____	_____	_____	**Max**	_____	_____	_____
_____	_____	_____	_____	**Max**	_____	_____	_____
_____	_____	_____	_____	**Max**	_____	_____	_____
Your total exposure as the result of this plea is:				**Total**	_____	_____	_____

		Please Circle Appropriate Answer	
2.	**a.** Did you commit the offense(s) to which you are pleading guilty?	[Yes]	[No]
	b. Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)?	[Yes]	[No]
3.	Do you understand what the charges mean?	[Yes]	[No]
4.	Do you understand that by pleading guilty you are giving up certain rights? Among them are:		
	a. The right to a jury trial in which the State must prove you guilty beyond a reasonable doubt?	[Yes]	[No]
	b. The right to remain silent?	[Yes]	[No]
	c. The right to confront the witnesses against you?	[Yes]	[No]
	d. Do you understand that by pleading **you are not waiving** your right to appeal (1) the denial of a motion to suppress physical evidence (*R.* 3:5-7(d)) or (2) the denial of acceptance into a pretrial intervention program (PTI) (*R.* 3:28(g))?	[Yes]	[No]
	e. Do you further understand that by pleading guilty **you are waiving** your right to appeal the denial of all other pretrial motions except the following: _____ _____ _____	[Yes]	[No]
5.	Do you understand that if you plead guilty:		
	a. You will have a criminal record?	[Yes]	[No]
	b. Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Victims of Crime Compensation Agency Assessment?	[Yes]	[No]
	c. You must pay a minimum Victims of Crime Compensation Agency assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive. $25 if offense occurred before January 1, 1986.)	[Yes]	[No]

* Victims of Crime Compensation Office Assessment

Defendant's Initials_____

5. **d.** If the offense occurred on or after February 1, 1993 but was before March 13, 1995, and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to $2.00 for each occasion when a payment or installment payment is made? [Yes] [No]

   e. If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction? [Yes] [No]

   f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation? [Yes] [No]

   g. If the crime occurred on or after January 9, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of $30? [Yes] [No]

   h. You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing? [Yes] [No]

6. Do you understand that **the court could,** in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed? [Yes] [No]

7. Did you enter a plea of guilty to any charges **that require** a mandatory period of parole ineligibility or a mandatory extended term? [Yes] [No]

   a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is _____ years and _____ months (fill in the number of years/months) and the maximum period of parole ineligibility can be _____ years and _____ months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.

   b. If you are pleading guilty to such a charge, the minimum mandatory extended term is _____ years and _____ months (fill in the number of years/months) and the maximum mandatory extended term can be _____ years and _____ months (fill in the number of years/months).

8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? [Yes] [No]

9. Are you presently on probation or parole? [Yes] [No]

   a. Do you realize that a guilty plea may result in a violation of your probation or parole? [Yes] [No] [NA]

10. Are you presently serving a custodial sentence on another charge? [Yes] [No]

    a. Do you understand that a guilty plea may affect your parole eligibility? [Yes] [No] [NA]

11. Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? [Yes] [No] [NA]

Defendant's Initials _____

12. List any charges the prosecutor has agreed to recommend for dismissal:

Ind./Acc./Compl.#	Count	Nature of Offense and Degree

13. Specify any sentence the prosecutor has agreed to recommend:

14. Has the prosecutor promised that he or she will **NOT**:

a. Speak at sentencing? [Yes] [No]

b. Seek an extended term of confinement? [Yes] [No]

c. Seek a stipulation of parole ineligibility? [Yes] [No]

15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? [Yes] [No] [NA]

16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [Yes] [No] [NA]

17. a. Are you a citizen of the United States? [Yes] [No]

b. Do you understand that if you are not a United States citizen or national, you **may** be deported by virtue of your plea of guilty? [Yes] [No]

c. Do you understand that if your plea of guilty is to a crime considered an "aggravated felony" under Federal law you **will** be subject to deportation/removal? [Yes] [No]

d. Do you understand that you have the right to seek legal advice on your immigration status prior to entering a plea of guilty? [Yes] [No]

18. a. Do you understand that pursuant to the rules of the Interstate Compact for Adult Offender Supervision if you are residing outside the State of New Jersey at the time of sentencing that return to your residence may be delayed pending acceptance of the transfer of your supervision by your state of residence? [Yes] [No]

b. Do you also understand that pursuant to the same Interstate Compact transfer of your supervision to another state may be denied or restricted by that state at any time after sentencing if that state determines you are required to register as a sex offender in that state or if New Jersey has required you to register as a sex offender? [Yes] [No]

19. Have you discussed with your attorney the legal doctrine of merger? [Yes] [No] [NA]

Defendant's Initials_____

20. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [Yes] [No] [NA]

21. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

_____

_____

_____

_____

_____

_____

22. Have any promises other than those mentioned on this form, or any threats, been made in order to cause you to plead guilty? [Yes] [No]

23. a. Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? [Yes] [No]

b. Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? [Yes] [No]

c. Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? [Yes] [No]

24. Are you satisfied with the advice you have received from your lawyer? [Yes] [No]

25. Do you have any questions concerning this plea? [Yes] [No]

Date:_____ Defendant:_____

Defense Attorney: _____

Prosecutor: _____

[ ] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

SUPPLEMENTAL PLEA FORM

FOR SEXUAL OFFENSES

The following additional questions need to be answered only if you are pleading guilty to an offense of Aggravated Sexual Assault, Sexual Assault or Aggravated Criminal Sexual Contact or an attempt to commit one of these crimes.

1. Do you understand you will be required to submit to a physical and psychological examination at the Avenel Diagnostic and Treatment Center the purpose of which is to determine if your conduct in committing the offense was characterized by a pattern of repetitive and compulsive behavior? [YES] [NO]

2. Do you understand if the examination reveals that your conduct is characterized by a pattern of repetitive and compulsive behavior, the judge may sentence you to confinement at the Adult Diagnostic and Treatment Center for a program of specialized treatment for your mental condition? [YES] [NO]

3. Do you understand you will be able to challenge the findings of the Adult Diagnostic and Treatment Center in a hearing and that at that hearing you will have the right to confront the witnesses against you and to cross examine them and then present evidence on your own behalf? [YES] [NO]

4. Do you understand if you are sentenced to the Adult Diagnostic and Treatment Center

   a. that any future parole will not be guided by the normal parole guidelines? [YES] [NO]

   b. that you will be eligible for release when the State Parole Board, after receiving a recommendation from a special classification review board, finds that you are capable of making an acceptable social adjustment in the community? [YES] [NO]

   c. that you could spend more time in treatment than you would spend if sentenced to state prison? [YES] [NO]

DATE: _____

DEFENSE ATTORNEY _____

PROSECUTOR _____

_____
Defendant

White–COURT Yellow–DEFENSE COUNSEL Pink–ASS'T. PROSECUTOR

Supplemental Plea Form for *No Early Release Act Cases*

The following questions need to be answered only if you are pleading guilty to a first or second degree violent crime and the crime occurred on or after June 9, 1997.

A violent crime means any crime in which you caused death, serious bodily injury, or you used or threatened the immediate use of a deadly weapon. A violent crime also includes any aggravated sexual assault, or sexual assault in which you used, or threatened the immediate use of, physical force. Deadly weapon means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner in which it is used or intended to be used, is known to be capable of producing death or serious bodily injury. Serious bodily injury means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

1. Are you pleading guilty to any first or second degree violent crime? [YES] [NO]

2. a. Do you understand that because of your plea of guilty to

_____
(LIST FIRST OR SECOND DEGREE VIOLENT CRIMES)

you will be required to serve 85% of the sentences imposed for that offense(s) before you will be eligible for parole on that offense(s)? [YES] [NO]

b. Do you understand that by pleading guilty to these charges, the minimum mandatory period of parole ineligibility is ____ years and ____ months (fill in the number of years/months) and the maximum period of parole ineligibility can be ____ years and ____ months (fill in number of years/months) and this period cannot be reduced by good time, work or minimum custody credits? [YES] [NO]

3. Do you understand that because you have plead guilty to these charges the court must impose a ____ year term of parole supervision and that term will begin as soon as you complete the sentence of incarceration? [YES] [NO]

First Degree Term of Parole Supervision - 5 years
Second Degree Term of Parole Supervision - 3 years

4. Do you understand that if you violate the conditions of your parole supervision that your parole may be revoked and you may be subject to return to prison to serve all or any portion of the remaining period of parole supervision, even if you have completed serving the term of imprisonment previously imposed? [YES] [NO]

DATE: _____ DEFENDANT: _____

DEFENSE ATTORNEY: _____

PROSECUTOR: _____

FORM 11 COOPERATION AGREEMENT

[Date]

Re: Cooperation Agreement with

Dear :

This letter sets forth the full and complete agreement between your client, _____, and the Division of Criminal Justice for the State of New Jersey.

If _____ fully complies with the terms set forth below, this Office will not prosecute _____ for any criminal violations arising out of his/her heretofore disclosed acts and conduct relating in any way to _____

_____ shall truthfully disclose all information concerning his/her activities and the activities of others about which representatives of this Office may inquire. _____ agrees to make himself/herself available for questioning at all reasonable times and shall truthfully testify in all proceedings, including grand jury and trial proceedings, as to any activities about which he/she is questioned. _____ shall also, at the request of this Office, provide any tangible items including documents, whether personal, partnership, corporate or otherwise, that are in his/her possession, custody, or subject to his/her control.

_____ must at all times give complete, truthful, and accurate information and testimony. Should it be determined by this Office that _____ has intentionally given materially false, incomplete or misleading testimony or information, or should _____ participate or attempt to participate in any criminal act subsequent to the date of this agreement, this agreement not to prosecute shall be null and void, and _____ shall thereafter be subject to prosecution for any criminal violation of which this Office has knowledge, including but not limited to perjury and obstruction of justice. Any such prosecution may be based upon any statements and information provided by _____, and all such statements and information may be used against him/her. To the extent that anything in this agreement is deemed inconsistent with N.J. Rule of Evidence 410, the provisions of N.J.R.E. 410 are hereby waived by you and _____.

Further, it is understood that this agreement with respect to criminal prosecution is limited to the Division of Criminal Justice for the State of New Jersey and cannot bind federal prosecuting authorities. This Office will bring this agreement and _____'s cooperation to the attention of other state or federal prosecuting authorities, if requested.

No additional promises, agreements, or conditions have been entered into with _____ other than those set forth in this letter, and none will be entered into unless in writing and signed by both parties.

If the above is satisfactory to both you and your client, it would be appreciated if the two of you would execute and date one of the two original copies of this letter at the designated places and return it to me at your earliest possible convenience.

Very truly yours,

I have read this letter and have discussed its terms with my attorney. I understand its terms and I hereby acknowledge that it fully sets forth my agreement with the Division of Criminal Justice. There have been no additional promises or representations made to me by any officials or employees of the State or by my attorney in connection with this matter.

Date: _____

Date: _____

, Esq.

Counsel for

FORM 12 PROFFER AGREEMENT

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
PO Box 085
TRENTON, NJ 08625-0085
TELEPHONE (609) 984-6500

JOHN J. FARMER, JR.
Attorney General

KATHRYN FLICKER
Director

October 1, 2001

Re: Proffer Agreement with
DCJ# :

Dear Mr. Kipnees:

It is my understanding that your client, , wishes to engage in a proffer session with representatives of the Division of Criminal Justice. In order to insure that there are no misunderstandings relating to this proffer session, I wish to advise you of the conditions that will apply to this meeting:

1. First, except for paragraph two and three below, no statements made by or other information provided by your client during the meeting will be used in a direct case against your client in any criminal proceeding in the State of New Jersey.

2. Second, the State may make derivative use of and may pursue any investigative leads, against your client or others, suggested by any statements made by or other information provided by your client.

3. Third, in the event your client is ever a witness against the State at any trial or other judicial proceeding, the attorney for the State may cross-examine your client concerning any statements made or other information provided by your client during the meeting. Evidence regarding such statements may also be introduced in rebuttal.

4. Fourth, it is understood by your client that this meeting may ultimately result in a plea bargain. However, this agreement does not constitute a plea bargaining session. This meeting will determine whether there is a basis for a plea bargain to occur. If this agreement is subsequently construed as a plea bargaining session, your client knowingly and voluntarily waives any right your client has pursuant to N.J.Rule of Evid. 410, which would prohibit the use against your client of statements made during plea discussions. It is further understood by your client that the agreement to provide information by way of a proffer is completely voluntary, without any promises or representations other than those set forth in this letter.

5. **Fifth**, your client understands and agrees that this agreement does not obligate the Division of Criminal Justice to enter into any future plea bargaining with your client. In addition, your client understands that this office has not made any additional promises to your client not contained in writing herein, and agrees that his decision to proffer information to the Division is completely voluntary, without any other promises or representations being made other than those set forth above.

If your client wishes to engage in a proffer session with the Division of Criminal Justice, please have your client sign the acknowledgment and return the original letter and acknowledgment to me. Should you have any questions or concerns, please feel free to contact me at (609) 777-3777.

Very truly yours,

Tracy M. Thompson

Tracy M. Thompson
Deputy Attorney General
Money Laundering Section

ACKNOWLEDGEMENT

I hereby acknowledge that this letter fully sets forth my agreement with this Office. I understand the above-stated conditions and find them to be fair and reasonable. I state that there have been no additional promises or representations made to me by officials or employees of the State of New Jersey or my attorney in connection with this matter, and that I enter into this agreement knowingly and voluntarily. Since I wish to engage in the meeting as described above, my attorney and I have signed and acknowledged this agreement.

_____

Witnessed by:

Robert Kipnees, Esq.
Attorney for Defendant

Dated: 10/01/01

FORM 13 NOTICE OF CONFERENCE

SUPERIOR COURT, OCEAN COUNTY
CRIMINAL DIVISION

~~IND.~~ # _____

CASE # _____

STATE OF NEW JERSEY VS. _____

You are hereby COMMANDED to appear before the SUPERIOR COURT OF NEW JERSEY, OCEAN COUNTY for a Pre-Arraignment/Arraignment/Status Conference, Trial, Sentence, Motion, or _____

On 4/22/02 (Date) at 9:00 (Time) AM/PM

Courtroom Number 17 Judge GIOVINE Attorney Kipness

NO FURTHER NOTICE WILL BE SENT TO YOU OR YOUR ATTORNEY ADVISING OF THIS COURT DATE. YOUR FAILURE TO APPEAR WILL RESULT IN A BENCH WARRANT BEING ISSUED FOR YOUR ARREST!!!!

(Bring this notice with you to Court.)

PTI Application to be done today. NO INTERVIEW today FF

FO/BG
Calendar Control Clerk or Designee

Date Issued: 3/14/02

Ocean County Courthouse
100 Hooper Avenue
Toms River, New Jersey 08753
(732) 929-2197

FORM 14 REQUEST FOR DISCOVERY LETTER

[Date]

CERTIFIED MAIL (R.R.R.)

Prosecutor

Re:

Dear:

This firm represents _____ in the above matter. Pursuant to New Jersey Court Rules 3:13-3(a) (1 through 11), demand is hereby made for all discovery materials as enumerated in the above-cited rules and regarding the above-captioned matter. Specifically, demand is made for the opportunity to inspect and copy or photograph any relevant:

1. Books, tangible objects, papers or documents obtained from or belonging to the defendant, including but not limited to writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

2. Records of statements or confessions, signed or unsigned, by the defendant (or any director, officer, employee, agent or representative thereof) or copies thereof, and a summary of any admission or declarations against penal interest made by the defendant (or any director, officer, employee, agent or representative thereof) that are known to the prosecution but not recorded;

3. Results or reports of physical or mental examinations and of scientific tests or experiments made in conjunction with the matter or copies thereof, which are in your possession, custody or control;

4. Reports or records of prior convictions of the defendant;

5. Books, papers, documents or copies thereof or tangible objects which are within the possession, custody or control of the [prosecuting authority], including but not limited to writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

6. Names and addresses of any person or persons who you know to have relevant evidence or information including a designation by you as to which of those persons you may call as witnesses;

7. Records of statements, signed or unsigned, by such person or by co-defendants which are within your possession, custody or control and any relevant record of prior conviction of such persons;

8. Transcripts of all electronically recovered statements of co-defendants and witnesses whom you may call at trial;

9. Police reports which are within your possession, custody or control;

10. Warrants, which have been completely executed, and the paper accompanying them including the affidavits, transcripts or summary of any oral testimony, return and inventory;

11. Names and addresses of each person whom you expect to call at trial as an expert witness, his or her qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness or, if no report is prepared, a statement of the facts and grounds for each opinion;

12. Pursuant to Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); State v. Satkin, 127 N.J. Super. 306 (App. Div. 1974) and their progeny, the defendant requests at this time any evidence, material or information within the possession, custody or control of the [prosecuting authority], or any entity working with the [prosecuting authority] as part of any joint prosecution or joint task force, the existence of which is known, or by exercise of due diligence may become known, which is favorable to or which exculpates the defendant or tends to establish a defense, in whole or in part, to the allegations of the summonses, or which may in any way be useful to the defendant on the issue of guilt or innocence or to mitigate punishment. This request includes any evidence, material or information which would tend to impeach the credibility of the person whom the attorney for the [prosecuting authority] intends to call as a witness, or is aware of any who may not be called as a witness at trial of this action. By way of illustration, but not limitation, such evidence relating to the credibility of State witnesses would include any material relating to the witness's physical, mental or psychiatric history which may tend to impair or reflect adversely on his or her reliability as a witness.

13. The defendant requests a production of all charts, summaries and/or calculations which are either material to the preparation of the defense or which the [prosecuting authority] intends to present in any form at trial, whether in its direct or rebuttal case.

14. The identity of any informant.

15. Any and all tapes or other recordings created in connection with the arrest, apprehension and/or detention of the defendant.

16. Please provide me with an inventory of all materials supplied. Moreover, if any discoverable materials known to you have not been supplied, please provide me with a list of all such material and explain why those materials have not been produced.

Please advise my of the cost of discovery and I will forward a check. Your prompt attention to these requests is greatly appreciated.

Very truly yours,

FORM 15 DISCOVERY FROM THE STATE

SOMERSET COUNTY PROSECUTOR'S OFFICE
40 NORTH BRIDGE STREET
P.O. BOX 3000
SOMERVILLE, NEW JERSEY 08876-1262

'AYNE J. FORREST
PROSECUTOR

TELEPHONE 908-231-7100
FAX 908-231-0781

November 21, 2001

Metor Corporate Campus One
P.O. Box 5600
Woodbridge, NJ 07095

Re: State v. _____
Indictment No.:

Dear Mr.

Enclosed please find a list of discoverable materials that are available for reproduction. Discovery is available at $.50 per page. The discovery in the above-captioned indictment totals 26 pages and the amount due is $13.00.

If you will be picking up discovery, you must bring a check or money order. If you desire to have the discovery mailed to you, you must send a check to this office. Upon receipt of check, the discovery will be mailed to you.

Very truly yours,

WAYNE J. FORREST
PROSECUTOR

By: _____
Laurie A. Head-Melillo
Assistant Prosecutor

LHM/at
Encs.

SOMERSET COUNTY PROSECUTOR'S OFFICE

STATE OF NEW JERSEY

v.

RECEIPT OF DISCOVERY

Indictment No.:

9	**Police Reports:**		
3 pgs.	Affidavit of Probable Cause	Ofc.	09/04/01
5 pgs.	Investigation Report	Ofc.	09/03/01
1 pg.	Miranda Warning		09/03/01
1	**Criminal Records:**		
1 pg.	NCIC Interstate Identification Index		09/04/01
16	**Additional:**		
10 pgs.	DMV Driver History Record		
1 pg.	DMV License/Registration/Insurance Card		
1 pg.	Speeding Report	Ofc.	09/03/01
4 pgs.	DMV Summons		

DISCOVERY COSTS:

26 pages @ $ .50 per page Total: $ 13.00

Please make check payable to the SOMERSET COUNTY PROSECUTOR'S OFFICE.

Discovery received:

____ day of _____, 2001

_____, Esq.
Attorney for the Defendant

Please Acknowledge Receipt of Discovery by Signing, Dating and Returning the Discovery Receipt and Bill of Particulars to this Office.

at/Date Mailed: 11/21/01 LHM

FORM 16 NOTICE OF MOTION FOR A BILL OF PARTICULARS

Attorneys for Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MIDDLESEX COUNTY
INDICTMENT NO.

STATE OF NEW JERSEY, :

Plaintiff, :

Criminal Action

vs. :

NOTICE OF MOTION FOR BILL OF PARTICULARS

JOHN DOE, :

Defendant. :

TO: _____, Esq.
MIDDLESEX COUNTY PROSECUTOR
P.O. Box 71
New Brunswick, NJ 08903

PLEASE TAKE NOTICE that on Friday, _____, the undersigned, Attorney for Defendant, shall apply to the Superior Court of New Jersey, Law Division (Criminal), at the Middlesex County Court House, New Brunswick, New Jersey, for an Order directing the State to provide Defendant with a Bill of Particulars. More specifically, Defendant seeks particulars as to:

1. (*List specific information required.*)
2.

The undersigned shall rely upon the brief submitted herewith and oral argument at the time of the motion.

Attorneys for Defendant

By_____

Dated: _____,

FORM 17 NOTICE OF MOTION TO SEVER COUNTS OF INDICTMENT

Attorneys for Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MIDDLESEX COUNTY
INDICTMENT NO.

STATE OF NEW JERSEY,

Plaintiff,

vs.

JOHN DOE,

Defendants.

Criminal Action

NOTICE OF MOTION TO SEVER COUNTS OF INDICTMENT

TO: _____, Esq.
MIDDLESEX COUNTY PROSECUTOR
P.O. Box 71
New Brunswick, NJ 08903

PLEASE TAKE NOTICE that on _____, the undersigned, Attorney for Defendant, shall apply, to the Superior Court of New Jersey, Law Division (Criminal), at the Middlesex County Court House, New Brunswick, New Jersey, for an Order severing Counts _____ from Counts _____ of the within Indictment. The undersigned shall rely upon the brief submitted herewith and oral argument at the time of the motion.

Attorneys for Defendant

By_____

Dated: _____,

FORM 18 NOTICE OF MOTION TO SEVER DEFENDANTS

Attorneys for Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MIDDLESEX COUNTY
INDICTMENT NO.

STATE OF NEW JERSEY, :
Plaintiff, :
Criminal Action
vs. :
JOHN DOE and RICHARD ROE, : NOTICE OF MOTION TO SEVER DEFENDANTS
Defendants. :

TO: _____, Esq.
MIDDLESEX COUNTY PROSECUTOR
P.O. Box 71
New Brunswick, NJ 08903

PLEASE TAKE NOTICE that on _____, the undersigned, Attorney for Defendant, shall apply, to the Superior Court of New Jersey, Law Division (Criminal), at the Middlesex County Court House, New Brunswick, New Jersey, for an Order severing the trial of Defendant John Doe from the trial of co-defendant Richard Roe. The undersigned shall rely upon the brief submitted herewith and oral argument at the time of the motion.

Attorneys for Defendant

By _____

Dated: _____,

FORM 19 NOTICE OF MOTION TO SUPPRESS EVIDENCE

STATE OF NEW JERSEY,	: STATE OF NEW JERSEY
	: COUNTY
	: LAW DIVISION
	:
v.	: CRIMINAL ACTION
	:
	: DOCKET NO.
	:
Defendant.	: NOTICE OF MOTION TO SUPPRESS EVIDENCE
	:

TO:

Dear Sir/Madam:

PLEASE TAKE NOTICE that the undersigned attorneys for defendant, will move before the Honorable _____, at _____, upon such date and time as the Court shall assign, or as soon thereafter as counsel may be heard, for an Order pursuant to R. 3:5-7(a) suppressing all evidence obtained during and a result of the warrantless, illegal and unconstitutional procedures utilized and searches conducted by the _____ in (1) searching defendant's person, (2) questioning the defendant, and (3) seeking witness identification of defendant, as well as all fruits of such illegal and unconstitutional conduct.

PLEASE TAKE FURTHER NOTICE that defendant will rely on his/her brief, to be submitted after the State has submitted its brief and within three (3) days prior to the date of the hearing, or as ordered by the Court pursuant to R. 3:5-7(b).

A trial date has been set for _____.

Defendant hereby requests a hearing on the motion.

A proposed form of Order is attached.

Attorneys for Defendant

By:_____

FORM 20 ORDER SUPPRESSING EVIDENCE

Attorney for Defendant, [redacted]

STATE OF NEW JERSEY,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION (CRIMINAL) MIDDLESEX COUNTY
Plaintiff;	
-vs-	INDICTMENT NO.00-[redacted] FILE NO. 0000[redacted]
[redacted],	CRIMINAL ACTION
Defendant.	ORDER

This matter having been opened to the Court by [redacted] Esq. of the law firm of [redacted] attorneys for defendant, [redacted], and [redacted], Assistant Prosecutor appearing for the State, on [redacted],2000, before the Honorable [redacted] and the parties appearing and for good cause shown;

IT IS on this [redacted] day of [redacted] 2000

ORDERED that all evidence seized from the defendant's home at [redacted], New Jersey on or about [redacted] pursuant to a no knock search warrant is hereby supressed.

[redacted] J.S.C.

FORM 21 TRIAL MEMORANDUM

PRETRIAL MEMORANDUM
SUPERIOR COURT OF NEW JERSEY _____ COUNTY

Defendant's Name: _____ Judge: _____

Indictment No(s): _____

1. List all indictments, counts, degrees and maximum jail sentence.

Indictment No.	Count	Charges & Degree	Max Jail
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

2. Does the defendant qualify for extended term? [YES] [NO]

   If yes, discretionary _____
   mandatory _____

3. Does the presumption of imprisonment apply? [YES] [NO]

   If yes, what counts? _____

4. Does a mandatory period of parole ineligibility apply? [YES] [NO]

   If yes, what counts? _____

   85% Law _____ Term _____
   Graves Act _____ Term _____
   School Zone _____ Term _____
   Other _____ Term _____

5. Maximum sentence if convicted. _____
   (including extended term, if applicable)

6. Maximum parole ineligibility period. _____

7. Do you understand that if you are found guilty, the Court in its discretion could impose a minimum period of confinement to be served before you become eligible for parole, which could be up to one-half of the total sentence imposed? [YES] [NO]

8. Do you understand that if you are found guilty, the Court could order that any sentence imposed be served consecutively to any sentence on a violation of probation, and/or parole, and/or sentence presently being served? [YES] [NO

   A. Are you presently on probation? [YES] [NC
   B. Are you presently on parole? [YES] [NC
   C. Are you presently serving a custodial sentence on another charge? [YES] [NC

_____
Defendant's Initials

PRETRIAL MEMORANDUM
SUPERIOR COURT OF NEW JERSEY _____ COUNTY

9. PLEA OFFER

Set forth in detail the plea agreement offered including sentencing recommendations.

10. Do you understand that if you reject this plea offer, the Court could impose a more severe sentence than recommended by the plea offer, up to the maximum sentence permitted if you are convicted after trial? [YES] [NO]

11. Do you understand that if you reject this plea offer today, no negotiated plea can be accepted by this Court unless specifically authorized by the Criminal Presiding Judge pursuant to R. 3:9-3(g)? [YES] [NO]

12. Additional/Supplemental information.

13. Discovery

A. All Pretrial discovery is complete.
B. The following Pretrial discovery is required.

C. Pretrial discovery to be completed by

_____
Defendant's Initials

PRETRIAL MEMORANDUM
SUPERIOR COURT OF NEW JERSEY _____ COUNTY

14. Motions/Hearings

A. There are no further Pretrial Motions/Hearings.

B. Trial: The following non-dispositive motions can be made and heard immediately prior to trial.

_____

_____

15. Co-Defendant Status: _____

_____

16. Unique Evidential Issues: _____

_____

_____ NO BRIEF REQUIRED

_____ BRIEF REQUIRED BY _____

17. Stipulations: _____

_____

18. Estimated trial time: State's case: _____

Defense case: _____

19. Interpreter needed? [YES] [NO]

If yes, please provide the following information:

If the defendant, what language? _____
If a witness, what language? _____

_____
Defendant's Initials

PRETRIAL MEMORANDUM
SUPERIOR COURT OF NEW JERSEY _____ COUNTY

20. Defendant and all counsel are hereby directed to return to court on the following date at 9:00 AM ready for trial. There will be no further notices required.

Any problems with witness availability must be brought to the Court's attention within ten (10) days of the signing of this Memorandum, or if discovered thereafter, as promptly as known.

Trial Date: _____

_____ _____
(Assistant Prosecutor) (Defense Counsel)

_____
(Judge)

Date of Memo: _____

1. I have been advised of my right to be present at the trial of this case. If I fail to appear for trial on the date scheduled for trial, the Court has the right to conduct the trial in my absence. If my case is not reached for trial on that date the judge will schedule a new date for trial. If I am not present on the original trial date, or any rescheduled trial date, the trial will proceed without me and I will be bound by the jury's verdict.

2. I further understand that if I do not appear for trial on the date fixed above or any adjourned trial date thereafter, I will lose any bail that has been posted and a bench warrant will be issued for my arrest.

3. I understand that except in extraordinary circumstances, the filing of this Memorandum ends all plea negotiations, and no further bargaining will take place. Any subsequent plea of guilty will be without a plea recommendation.

_____ _____
(Defendant) (Defense Counsel)

FORM 22 PROPOSED *VOIR DIRE* QUESTIONS

Plaintiff, v. Defendant.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION:CRIMINAL INDICTMENT NO. CRIMINAL ACTION DEFENDANT'S PROPOSED VOIR DIRE QUESTIONS

In addition to the Court's standard voir dire, including an inquiry into the occupation and employer of prospective jurors and their spouses, defendant respectfully requests that the Court include the following proposed questions. Defendant respectfully requests further that the Court ask whether the prospective jurors are employed on a full-time or part-time basis, and about their prior grand or petit jury service, if any.

1. Have you, or any member of your family or any of your close friends, ever been the victim of a crime, or participated in a criminal case as a complainant, a witness for the federal, state or county government or in any other capacity on behalf of the prosecution?

   a. If so, have you any opinions of the courts which would prevent you from being fair and impartial in this case?

b. If so, have you any opinion of the lawyers which would prevent you from being fair and impartial in this case?

c. If so, have you any opinion of the judges which would prevent you from being fair and impartial in this case?

2. Have you, or any member of your family, ever declared bankruptcy?

3. Have you, or any member of your family, ever been a creditor of a debtor in bankruptcy?

4. Have you, or any member of your family or close friend, ever lost money on an investment?

a. If so, will that prevent you from serving as a fair and impartial juror in this case?

5. Have you, or any member of your family, or a close friend ever had to obtain a high interest rate loan due to bad credit?

6. Have you, or any member of your family or close friend, ever worked for a bank, mortgage company, financial institution, accounting firm, or as a bookkeeper?

7. Have you ever had a job where you supervised others? What kind of job? How many people did you supervise?

8. Have you ever been an owner or the owner of a business? What type of business?

9. What newspapers or magazines do you read regularly? Which sections?

10. If you were the defendant on trial here today, or his counsel, or the Deputy Attorney General charged with the responsibility of prosecuting this case, do you

know of any reason why you would not be content to have your case tried by someone in your present state of mind?

Respectfully submitted,

Attorneys for Defendant

By:_____

DATED:

FORM 23 JUDGMENT OF CONVICTION AND STATEMENT OF REASON

State of New Jersey

v.

New Jersey Superior Court

_____ County

Law Division - Criminal

_____
Defendant (Specify Complete Name)

☐ Judgment of Conviction
☐ Change of Judgment
☐ Order for Commitment
☐ Indictment/Accusation Dismissed
☐ Judgment of Acquittal

_____ DATE OF BIRTH
_____ S.B.I. #
_____ DATE OF ARREST
_____ DATE IND / ACC FILED
_____ DATE OF ORIGINAL PLEA
☐ NOT GUILTY ☐ GUILTY ORIGINAL PLEA

ADJUDICATION BY: DATE
☐ GUILTY PLEA _____
☐ JURY TRIAL _____
☐ NON-JURY TRIAL _____
☐ Dismissed/Acquitted _____

ORIGINAL CHARGES

IND /ACC No.	Count	Description	Degree	Statute

FINAL CHARGES

Count	Description	Degree	Statute

It is, therefore, on _____ ORDERED and ADJUDGED that the defendant is sentenced as follows:

☐ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

☐ Defendant is to receive credit for time spent in custody. _____ TOTAL NO. DAYS _____ DATES (From / To)

_____ DATES (From / To)

Total Custodial Term _____ institution _____ Total Probation Term _____

Administrative Office of the Courts
State Bureau of Identification

CPS185 (Rev. 4/89) Replaces LR-34 & LR-35
CDR 4 (Rev. 4/85

COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE AOC STATISTICAL SERVICES DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

Statement of Reasons

3a

State of New Jersey v. _____ S.B.I. # _____ IND / ACIS # _____

Total FINE $ _____

Total RESTITUTION $ _____

If the offense occurred on or after January 9, 1986, a penalty of $30 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to *N.J.S.A* 2C:43-3.1. (Penalty is $25 if offense is before January 9, 1986, unless a higher penalty is noted.)

☐ Penalty imposed on count(s) _____

is $ _____ each.

Total VCCB Penalty $ _____

☐ Installment payments are due at the rate of $ _____ per _____,

beginning _____ (DATE)

If any of the offenses occurred *on or after* July 9,1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for *each* count. (Write in # times for each.)

___ 1st Degree @ $3000 ___ 4th Degree @ $750

___ 2nd Degree @ $2000 ___ Disorderly Persons or Petty

___ 3rd Degree @ $1000 Disorderly Persons @ $500

Total D.E.D.R. Penalty $ _____

☐ Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A mandatory driver's license suspension of _____ months is ORDERED

The suspension shall begin on _____ and end _____.

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____

Eye Color _____ Sex _____ Date of Birth _____

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____. Driver's license # _____.

☐ Your non-resident driving privileges are hereby revoked for _____ Months.

3) A forensic laboratory fee of $50 per offense is ORDERED. ___ Offenses @ $50.

Total LAB FEE $ _____

4) Name of Drugs Involved _____

NAME (Court Clerk or Person who prepares this form) TELEPHONE NUMBER

NAME (Attorney for Defendant at Sentencing)

STATEMENT OF REASONS

JUDGE (Name) JUDGE (Signature) DATE

Administrative Office of the Courts
State Bureau of Identification

CP6106 (Rev. 4/89) Rules LR-34 & LR-35
CDR 4 (Rev. 4/89)

COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE AOC STATISTICAL SERVICES, DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

FORM 24 NOTICE OF MOTION FOR REDUCTION OF SENTENCE

Attorneys for Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MIDDLESEX COUNTY
INDICTMENT NO.

STATE OF NEW JERSEY, :

Plaintiff, :

Criminal Action

vs. :

JOHN DOE, : NOTICE OF MOTION FOR REDUCTION OF SENTENCE

Defendants. :

TO: _____, Esq.
MIDDLESEX COUNTY PROSECUTOR
P.O. Box 71
New Brunswick, NJ 08903

PLEASE TAKE NOTICE that on _____, , the undersigned, Attorney for Defendant, shall apply, to the Honorable (sentencing judge), Superior Court of New Jersey, Law Division (Criminal), at the Middlesex County Court House, New Brunswick, New Jersey, for reduction of the sentence imposed, pursuant to Rule 3:21-10. The undersigned will rely upon the brief submitted herewith and oral argument at the time of the motion.

Attorneys for Defendant

By_____

Dated: _____,

FORM 25 NOTICE OF APPEAL

NOTICE OF APPEAL

PLEASE PRINT OR TYPE

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

TITLE IN FULL (AS CAPTIONED BELOW):

ATTORNEY OR PRO SE LITIGANT

NAME

ADDRESS

TELEPHONE NO.

ATTORNEY FOR

ON APPEAL FROM:

TRIAL COURT OR STATE AGENCY

TRIAL COURT OR AGENCY NUMBER

TRIAL COURT JUDGE

CIVIL [ ] CRIMINAL [ ] JUVENILE [ ]

NOTICE IS HEREBY GIVEN THAT
APPEALS TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FROM THE JUDGMENT [ ] ORDER [ ] STATE AGENCY DECISION [ ] ENTERED IN THIS ACTION ON

DATE

IF NOT APPEALING THE ENTIRE JUDGMENT, ORDER OR AGENCY DECISION, SPECIFY WHAT PARTS OR PARAGRAPHS ARE BEING APPEALED.

HAVE ALL ISSUES AS TO ALL PARTIES BEEN DISPOSED OF IN THIS ACTION IN THE TRIAL COURT OR AGENCY? (IN CONSOLIDATED ACTIONS, ALL ISSUES AS TO ALL PARTIES IN ALL ACTIONS MUST HAVE BEEN DISPOSED OF.) YES [ ] NO [ ]

IF NOT, HAS THE ORDER BEEN CERTIFIED AS FINAL PURSUANT TO R. 4:42-2? YES [ ] NO [ ]

IN CRIMINAL, QUASI-CRIMINAL AND JUVENILE ACTIONS:

GIVE A CONCISE STATEMENT OF THE OFFENSE AND OF THE JUDGMENT, DATE ENTERED AND ANY SENTENCE OR DISPOSITION IMPOSED.

IS DEFENDANT INCARCERATED? YES [ ] NO [ ]

WAS BAIL GRANTED OR THE SENTENCE OR DISPOSITION STAYED? YES [ ] NO [ ]

IF IN CUSTODY, GIVE THE PLACE OF CONFINEMENT.

ATTACH ADDITIONAL SHEETS IF NECESSARY

NOTICE OF APPEAL AND ANNEXED CASE INFORMATION STATEMENT HAVE BEEN SERVED ON:

	NAME	DATE OF SERVICE
TRIAL COURT JUDGE		
TRIAL COURT CLERK OR STATE AGENCY		
ATTORNEY GENERAL OR ATTORNEY FOR OTHER GOVERNMENTAL BODY PURSUANT TO R. 2:5-1(a), (e) or (h)		

OTHER PARTIES:

NAME AND DESIGNATION	ATTORNEY NAME, ADDRESS AND TELEPHONE NO.	DATE OF SERVICE

ANNEXED TRANSCRIPT REQUEST FORM HAS BEEN SERVED ON:

	NAME	DATE OF SERVICE	AMOUNT OF DEPOSIT
COURT REPORTER'S SUPERVISOR, CLERK OF COURT OR AGENCY			
COURT REPORTER			

EXEMPT FROM ANNEXING THE TRANSCRIPT REQUEST FORM DUE TO THE FOLLOWING:

[ ] NO VERBATIM RECORD.

[ ] TRANSCRIPT IN POSSESSION OF ATTORNEY OR PRO SE LITIGANT. (FOUR COPIES, ALONG WITH THE COMPUTER DISKETTE FROM THE TRANSCRIPT PREPARER, MUST BE SUBMITTED.) LIST THE DATE(S) OF THE TRIAL OR HEARING.

[ ] MOTION FOR ABBREVIATION OF TRANSCRIPT FILED WITH THE COURT OR AGENCY BELOW.

[ ] MOTION FOR FREE TRANSCRIPT FILED WITH THE COURT BELOW.

I CERTIFY THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF. I ALSO CERTIFY THAT, UNLESS EXEMPT, THE FILING FEE REQUIRED BY N.J.S.A. 22A:2 HAS BEEN PAID.

DATE _____ SIGNATURE OF ATTORNEY OR PRO SE LITIGANT _____

AD-9(Elec)
4/01

FORM 26 CRIMINAL CASE INFORMATION STATEMENT

SUPERIOR COURT OF NEW JERSEY — APPELLATE DIVISION

CRIMINAL CASE INFORMATION STATEMENT

(1) TITLE IN FULL:

FOR OFFICIAL USE ONLY

APPEAL DOCKET NO.
FILED:

DATE SENT:

(2) APPELLANT'S ATTORNEY(S):
NAME ADDRESS TELEPHONE CLIENT

(3) RESPONDENT'S ATTORNEY(S):
NAME ADDRESS TELEPHONE CLIENT

(4) GIVE DATE AND SUMMARY OF TERMS OF JUDGMENT ENTERED BELOW:

(5) Does this determination dispose of all issues as to all parties? Yes ____ No ____
(If not, leave to appeal must be sought. R. 2:2-4, 2:5-6.)

(6) Is the validity of a statute, executive order, franchise or constitutional provision of this State questioned? (R. 2:5-1(h)). Yes ____ No ____

(7) Is defendant presently confined? Yes ____ No ____
On bail? Yes ____ No ____
Is this an appeal of sentence only? Yes ____ No ____
Are there co-defendants? Yes ____ No ____

If so, state their names:

(8) GIVE A BRIEF STATEMENT OF THE FACTS AND PROCEDURAL HISTORY:

(OVER)

(9) **GIVE A COMPLETE LIST OF PROPOSED ISSUES THAT WILL BE RAISED ON THIS APPEAL AS THEY WILL BE DESCRIBED IN APPROPRIATE POINT HEADINGS PURSUANT TO R. 2:6-2(a)(5). Appellant or cross-appellant only.**

1. IS THERE ANY CASE NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT WHICH:

(10) **(A) Arises from substantially the same case or controversy as this appeal?** **Yes____ No___**

(11) **(B) Involves an issue that is substantially the same, similar or related to an issue in this appeal?** **Yes____ No___**

(12) **2. WAS THERE ANY PRIOR APPEAL INVOLVING THIS CASE OR CONTROVERSY?** **Yes____ No___**

IF YES, STATE:

(13) **Case Name:** **Appellate Division Docket No.:**

(14) **The time for filing your brief and appendix is governed by Rule 2:6-11 unless modified by court order. If any circumstances exist which might justify a shorter or longer period of time, give a detailed explanation. Your answer does not alter the time limits set forth in the Rules of Court.**

In the event there is any change with respect to any entry on the Case Information Statement, appellant shall have a continuing obligation to file an amended Case Information Statement on the prescribed form.

(15) _____ **(17)** _____
Name of Appellant or Respondent **Name of Counsel of Record**

(16) _____ **(18)** _____
Date **Signature of Counsel of Record**

ADMIN-38
3/96

FORM 27 REQUEST FOR TRANSCRIPT

Appellate Division

COURT TRANSCRIPT REQUEST
State of New Jersey (R. 2:5-3(a))

INSTRUCTIONS:
- Complete all information
- File a separate request for each court reporter or court clerk who recorded a portion of the proceeding
- Attach the Appellate or Supreme Court Clerk's copy to the Notice of Appeal (R. 2:5-1(f)) if an appeal
- Attach transcript fee.

NAME/ADDRESS (COURT REPORTER or COURT CLERK, if sound recorded)

TO: (1)

(2) PLAINTIFF(S)

V.

DEFENDANT(S)

TRIAL COURT DOCKET NUMBER
(3)

COUNTY/COURT
(4)

REQUESTING PARTY (Name/Address)
(5)

It is hereby requested that you prepare for use on (Check one)

(6) ___ appeal
___ non-appeal*

(7) an original and _____ copies of the following:

DATE OF PROCEEDING	TYPE OF PROCEEDING (e.g., trial, sentencing, motion, etc.)	NAME OF JUDGE
(8)	(9)	(10)

I agree to pay for the preparation and any copies ordered of the transcript(s) for the above date(s) pursuant to R. 2:5-3(d).

(11) _____
SIGNATURE OF REQUESTING PARTY DATE

Transcript fees are set by New Jersey Statute 2A:11-15. An additional sum or reimbursement may be required prior to or at the completion of the transcript order.

DEPOSIT ATTACHED $ (12) _____

* Only the Supervisor of Court Reporters should receive copies of non-appeal transcript requests.

CC: 1. CLERK, Appellate Division, or CLERK, Supreme Court (see INSTRUCTIONS above)
(13) 2. County Supervisor of Court Reporters _____
3. Other attorneys/Pro Se parties _____

ADMIN-41
3/96

FORM 28 ORDER OF EXPUNGEMENT

IN THE MATTER OF THE EXPUNGEMENT APPLICATION OF:	
Petitioner.	
PURSUANT TO N.J.S.A. 2C:52-6(b) :	**ORDER OF EXPUNGEMENT**

THIS MATTER having been opened to the Court by _____, attorneys for Petitioner,_____, upon a Verified Petition for Expungement, and it appearing that the requirements for expungement under N.J.S.A. 2C:52-1 et seq. have been satisfied:

IT IS on this day of , ,

(1) **ORDERED** that the Clerk of the _____ Court will remove from the Court records all information relating to the Complaint filed against Petitioner on _____, for _____, and place such information, and any other information relating to the apprehension, detention, trial or disposition of the offenses, in the control of the person within the office of the Court designated to retain control over expunged records; and it is further

ORDERED that any law enforcement agency which possesses records which include information relating to the Complaints which are the subject of this Order shall remove from its records all such information, including, but not limited to, any evidence of related apprehension, detention and trial or disposition of the Complaints, and place such information in the control of the person within the law enforcement agency designated to retain control over expunged records; and it is further

ORDERED that any records or information removed from Court or law enforcement agency records pursuant to this Order shall be deemed expunged; and it is further

ORDERED that the expunged records, or the information therein, shall not be released for any reason except as authorized by law and that the person designated to retain control over expunged records take sufficient precautions to ensure that such records and information are not released; and it is further

ORDERED that in response to requests for information or records, the Court office or law enforcement officers and agencies shall reply with respect to the arrest which is the subject of this Order, that there is no record information; and it is further

ORDERED that except as provided in N.J.S.A. 2C:52-27, the arrest, charges and all proceedings relating thereto, which are the subject of this Order, shall be deemed not to have occurred, and the Petitioner may answer accordingly any question relating to their occurrence; and it is further

ORDERED that this Order shall not prohibit the filing of reports required to be filed by the statutes and rules governing the Pretrial Intervention Registry maintained in this State, R.3:28(e), as amended effective January 15, 1979.

J.S.C

FORM 29 INTENSIVE SUPERVISION PROGRAM APPLICATION

Q. Who decides whether I get in?

A. You must be recommended by a Screening Board to a Panel of Judges who make the final decision.

Q. What happens after I apply?

A. It will take some time to review your application. Your presentence report will be reviewed. You will either receive a rejection letter or be interviewed by an officer. If interviewed, you will be asked what you intend to do about a job, a place to live, treatment and asked to identify someone living in your community (preferably a non-family member) who will help you.

Q. What happens if I get in?

A. You will be immediately released from prison into ISP if you are approved by the Resentencing Panel. Once in the program you will have to live up to all the requirements of the program. ISP is a tough program, but you will not be selected for the program unless the Resentencing Panel believes you can successfully complete ISP.

Q. What happens if I get into trouble?

A. Violation of any condition of ISP may result in your immediate return to prison. However, the majority of ISP participants are able to successfully complete the program.

Q. What is GAP?

A. GAP (Graduate Assistance Program) is ISP graduates (participants who complete ISP) who volunteer to become actively involved with participants. They serve as sponsors and /or network team members and act out as friends for the participant to help integrate each person back into society.

"ISP is not for everyone; it is only for those of you who want a chance to change and for those who could follow some basic rules. (Don't be influenced by losers and go wrong. Think on your own and good luck.)"

COLLECT CALLS ARE *NOT* ACCEPTED

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

INTENSIVE SUPERVISION PROGRAM

A Program of the Administrative Office Of the Courts

ISP
PO BOX 974
TRENTON, NJ 08625 –0974
(609) 984-0076

PLACE STAMP HERE

Director – ISP
Administrative Office of the Courts
PO Box 974
Trenton, New Jersey 08625-0974

INTENSIVE SUPERVISION PROGRAM

The Intensive Supervision Program (ISP) makes it possible for inmates who are sincerely interested in changing their lives to be released before parole. ISP permits offenders to serve the remainder of their sentences in the community rather than in prison. ISP is "prison without walls."

ISP is a strict no-nonsense program, but participants receive all the support, guidance and encouragement they need to successfully complete the program. You MUST obtain a full-time job, do 16 hours of community service per month, attend treatment programs including ISP group meetings, observe a nightly curfew, keep a daily diary and weekly budget, submit to frequent urine monitoring and pay all of your financial obligations. You may also be required to pay towards the cost incurred for supervising you in the program.

Your ISP Officer stands ready to give you all the help you will need to graduate from the program. The decision is up to you. Are you ready to make a change in your life for the better?

Information about ISP participants may be shared with other parties when deemed necessary or advisable by ISP.

BASIC QUESTIONS ABOUT ISP

Q. Am I eligible to apply to ISP?

A. You are eligible if you have been convicted and sentenced to a State Institution **UNLESS** the crime was **HOMICIDE** (including **DEATH BY AUTO**), **ROBBERY** or a **SEX OFFENSE**. Also, a conviction for a **FIRST DEGREE OFFENSE** will make you **INELIGIBLE**. ANYONE WHO PARTICIPATES IN THIS PROGRAM MUST LIVE IN NEW JERSEY DURING SUPERVISION.

Q. How do I apply?

A. Just answer the questions on this form, and send it to ISP. If you do not have answers to all questions, complete the application with as much information as you can. You may submit your application as soon as you begin serving your sentence.

(CONTINUED ON OTHER SIDE OF CARD)

Administrative Office of the Courts Revised 09/2008, CN10685-English

Fold along dotted line.

MUST BE COMPLETED IN INK OR TYPED (DO NOT USE PENCIL)

THIS SECTION FOR ISP USE ONLY

YOUR NAME (LAST / FIRST / MIDDLE INITIAL):

DATE OF BIRTH:

SOCIAL SECURITY NUMBER:

YOUR INSTITUTION:

YOUR NUMBER AT THE INSTITUTION AND SBI NUMBER:

SENTENCE(S):

JUDGE(S):

DATE OF SENTENCE:

INDICTMENT NUMBER(S):

OFFENSE(S):

DO YOU HAVE ANY PENDING CHARGES? ("X" ONE)

☐ Yes ☐ No

If yes, what are the charges?

HAVE YOU EVER BEEN ON ISP?

☐ Yes ☐ No

NAME OF COUNTY WHERE SENTENCED:

Town and County where arrested on the charges:

NAME / ADDRESS OF YOUR ATTORNEY:

ATTORNEY WAS ("X" ONE):

☐ Hired by me or my family ☐ Public Defender

If you were accepted into the program, where would you live in New Jersey?

ADDRESS (STREET / TOWN):

TELEPHONE NUMBER: ( )

List one or two people in your community and / or family who would be willing to help you get into ISP.

1. NAME: TELEPHONE NUMBER: ( )

ADDRESS (STREET / TOWN):

2. NAME: TELEPHONE NUMBER: ( )

ADDRESS (STREET / TOWN):

YOUR SIGNATURE: DATE:

CP0092 (07/08)