



## NEW JERSEY LAW REVISION COMMISSION

### Tentative Report Addressing the Jessica Lunsford Act in New Jersey's Sexual Assault Statute – N.J.S. 2C:14-2

**June 17, 2021**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **August 16, 2021**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Project Summary

An offender convicted of an aggravated sexual assault in which the victim is less than 13 years old will be sentenced to life imprisonment and must serve a minimum of twenty-five years of this sentence.<sup>1</sup> A prosecutor “in consideration of the interests of the victim” may offer the defendant a negotiated plea agreement of fifteen years, during which the defendant would not be eligible for parole.<sup>2</sup>

The Jessica Lunsford Act (JLA)<sup>3</sup> does not require the State to present a statement of reasons explaining the departure from the twenty-five-year mandatory minimum sentence.<sup>4</sup> The JLA also does not provide a sentencing court with the opportunity to review the prosecutor’s exercise of discretion to “protect against arbitrary and capricious prosecutorial decisions.”<sup>5</sup> The absence of these safeguards served as the basis of the constitutional challenge considered by the New Jersey Supreme Court in *State v. A.T.C.*<sup>6</sup>

The Commission recommends the modification of the Jessica Lunsford Act to address the infirmities identified by the New Jersey Supreme Court in *State v. A.T.C.*

## Statute Considered

N.J.S. 2C:14-2 subsection a.(1) provides, in pertinent part:

a. An actor is guilty of aggravated sexual assault if the actor commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The victim is less than 13 years old;...

Subsection a. of the statute also provides, with regard to sentencing, that:

Aggravated sexual assault is a crime of the first degree.

Except as otherwise provided in subsection d. of this section, a person convicted under paragraph (1) of this subsection **shall be sentenced** to a specific term of years which shall be fixed by the court and shall be between 25 years and life imprisonment of which the person shall serve 25 years before being eligible for parole, unless a longer term of parole ineligibility is otherwise provided pursuant to this Title. [emphasis added]

Subsection d., to which subsection a. refers, provides that:

d. Notwithstanding the provisions of subsection a. of this section, where a defendant

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<sup>1</sup> N.J. STAT. ANN. §§ 2C:14-2(a), (d) (West 2021), commonly referred to as the Jessica Lunsford Act (JLA).

<sup>2</sup> *Id.*

<sup>3</sup> See *supra* note 1.

<sup>4</sup> N.J. STAT. ANN. §§ 2C:14-2(a), (d) (West 2021).

<sup>5</sup> *State v. A.T.C.*, 239 N.J. 450, 456 (2019), quoting *State v. Vasquez*, 129 N.J. 189, 196 (1992).

<sup>6</sup> *State v. A.T.C.*, 239 N.J. 450, 456 (2019).

is charged with a violation under paragraph (1) of subsection a. of this section, the prosecutor, in consideration of the interests of the victim, may offer a negotiated plea agreement in which the defendant would be sentenced to a specific term of imprisonment of not less than 15 years, during which the defendant shall not be eligible for parole. In such event, the court may accept the negotiated plea agreement and upon such conviction shall impose the term of imprisonment and period of parole ineligibility as provided for in the plea agreement, and may not impose a lesser term of imprisonment or parole or a lesser period of parole ineligibility than that expressly provided in the plea agreement. The Attorney General shall develop guidelines to ensure the uniform exercise of discretion in making determinations regarding a negotiated reduction in the term of imprisonment and period of parole ineligibility set forth in subsection a. of this section.

### **Background**

In 2014, during the course of a child pornography investigation, the defendant in *State v. A.T.C.* admitted that his computer contained video files of his girlfriend's daughter that he had recorded on a number of occasions beginning when she was ten years old.<sup>7</sup> The victim, then twelve years old, corroborated the defendant's confession in addition confirming that he had sexually assaulted her on multiple occasions.<sup>8</sup>

Defendant waived his right to indictment and a trial by jury.<sup>9</sup> Subject to the mandatory minimum term of incarceration set forth in the JLA, the defendant accepted a negotiated plea agreement from the State pursuant to which he would plead guilty to first-degree sexual assault of a child under thirteen years of age.<sup>10</sup> At the plea hearing, the trial court noted the recommended term of incarceration pursuant to the plea agreement – twenty years imprisonment, with a twenty-year period of parole ineligibility.<sup>11</sup>

Prior to the scheduled date of his sentencing, the defendant moved to modify his sentence.<sup>12</sup> He argued that the JLA violates the separation of powers doctrine by “vesting in the prosecutor sentencing authority constitutionally delegated to the judiciary.”<sup>13</sup> The Court denied the defendant's motion, holding that since sentencing courts retain the right to reject plea agreements under the JLA, the statute does not run afoul of the separation of powers doctrine.<sup>14</sup>

At the defendant's sentencing hearing, the State advised the Court that it had “balance[d] the relevant factors set forth in the Attorney General Guidelines.”<sup>15</sup> The State did not, however,

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<sup>7</sup> *A.T.C.*, 239 N.J. at 456-457.

<sup>8</sup> *Id.* at 457.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* The defendant also pled guilty to second-degree endangering the welfare of a child by distributing child pornography, contrary to N.J.S. 2C:24-4(b)(5)(a).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 458.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 459. See *Uniform Plea Negotiations Guidelines to Implement the Jessica Lunsford Act*, P.L. 2014, c. 7 (May 29, 2014), [https://www.state.nj.us/lps/dcj/agguide/lumsford\\_act.pdf](https://www.state.nj.us/lps/dcj/agguide/lumsford_act.pdf) (JLA Guidelines) (last visited Mar. 01, 2021). It

present a statement of reasons “justifying its decision to waive the twenty-five-year term of incarceration and period of parole ineligibility prescribed by N.J.S.A. 2C:14-2(a).”<sup>16</sup> There was no discussion, either at the plea hearing or during sentencing, as to why the “interests of the victim” warranted such a departure, or the degree thereof.<sup>17</sup>

Consistent with the plea agreement, the Court sentenced the defendant to incarceration for twenty years, with twenty years of parole ineligibility.<sup>18</sup>

The defendant appealed his convictions and the denial of his motion to modify his sentence.<sup>19</sup> The Appellate Division rejected the defendant’s argument that the JLA’s mandatory sentencing provisions violated the separation of powers doctrine.<sup>20</sup> The Court noted, however, that the authority to decide the punishment a defendant shall receive cannot be given to the prosecuting authority by the Legislature.<sup>21</sup> The authority to impose a punishment is strictly a judicial function.<sup>22</sup> The Court determined that the JLA “reserve[s] to the judiciary the power to approve or reject any agreement between the defendant and the *State*.”<sup>23</sup>

The New Jersey Supreme Court granted the defendant’s petition for certification for the limited purpose of addressing his facial challenge to the JLA as “unconstitutional for violating the separation of powers doctrine.”<sup>24</sup>

### Analysis

Before the New Jersey Supreme Court, the defendant argued that the JLA was unconstitutional because it authorizes a prosecutor to negotiate a plea agreement that has a recommended sentence outside the range set forth in the statute without requiring a statement of reasons that would permit judicial review.<sup>25</sup> Defendant urged the Court to hold the Act unconstitutional unless it is amended by the Legislature to “confer on sentencing judges the discretion to sentence defendants to any term of incarceration between fifteen and twenty-five-years.”<sup>26</sup>

- *The Jessica Lunsford Act*

The Jessica Lunsford Act was enacted on May 15, 2014.<sup>27</sup> Pursuant to the JLA, defendants who are convicted of the aggravated sexual assault of a child under thirteen years of age will be

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should be noted that the link uses the name Lumsford instead of Lunsford.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The defendant was also sentenced to a concurrent twenty-year term, with twenty years parole ineligibility for his conviction of distribution of child pornography.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 460.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (Emphasis in original).

<sup>24</sup> See *State v. A.T.C.*, 236 N.J. 112 (2018) and *Id.*

<sup>25</sup> *A.T.C.*, 239 N.J. at 461.

<sup>26</sup> *Id.*

<sup>27</sup> See *L. 2014, c. 7*, § 1. *Id.* at 462.

sentenced to specific term of imprisonment between 25 years and life imprisonment.<sup>28</sup> As an incentive for defendants to plead guilty, thereby sparing the victim from having to participate in a trial, the JLA authorizes plea bargaining.<sup>29</sup> The Attorney General was required by the JLA to promulgate guidelines for use in sexual assault cases, and did so.<sup>30</sup>

- *The JLA Guidelines*

In the JLA Guidelines, the Attorney General identified seven “factors and circumstances” for the State to consider when contemplating the reduction of the twenty-five-year term of incarceration and parole ineligibility imposed by N.J.S. 2C:14-2(a).<sup>31</sup> The amount of the reduction, however, “is vested in the reasoned discretion of the prosecutor and latitude therefore is afforded to reduce the stipulated sentence based upon variable factors considering the interests of the victim.”<sup>32</sup>

In *A.T.C.*, the New Jersey Supreme Court observed that “the JLA and the Attorney General’s JLA Guidelines recognize the court’s discretion to accept or reject a plea bargain entered into by the defendant and the State.”<sup>33</sup> Neither the JLA nor the JLA Guidelines, however, “ensure[] that the court is informed of the prosecutor’s reasoning when it determines whether to accept or reject a plea agreement offered pursuant to N.J.S.A. 2C:14-2(a).”<sup>34</sup>

- *The Separation of Powers*

The New Jersey Constitution, in Article III, paragraph 1, sets forth the separation of governmental power, stating that those powers “shall be divided among three distinct branches, the legislative, executive, and judicial.”<sup>35</sup> It further states that “[n]o person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others...”<sup>36</sup>

The Constitution empowers the Legislature to define crimes and to establish appropriate punishments.<sup>37</sup> This authority means that the Legislature may enact mandatory-sentencing statutes that eliminate the opportunity for a lesser punishment.<sup>38</sup> The executive branch, through the prosecutor, “determines the extent of a defendant’s sentencing exposure when deciding what charges will be brought.”<sup>39</sup> Finally, the determination of “[a] criminal sentence is always and solely committed to the discretion of the trial court...”<sup>40</sup> This authority must be exercised “within

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<sup>28</sup> N.J. STAT. ANN. § 2C:14-2(a) (West 2021).

<sup>29</sup> N.J. STAT. ANN. § 2C:14-2(d) (West 2021), *see* *A.T.C.*, 239 N.J. at 463-464.

<sup>30</sup> *Id.* at 464.

<sup>31</sup> *Id.* *See* [https://www.state.nj.us/lps/dcj/agguide/lumsford\\_act.pdf](https://www.state.nj.us/lps/dcj/agguide/lumsford_act.pdf) (JLA Guidelines). *JLA Guidelines* at 2-3 (a) – (g).

<sup>32</sup> *Id.* at 464-465.

<sup>33</sup> *Id.* at 465. N.J. STAT. ANN. § 2C:14-2(d) (West 2021) (providing that the court “may” accept the negotiated plea agreement).

<sup>34</sup> *Id.* at 465-466.

<sup>35</sup> N.J. Const., art. III, ¶ 1.

<sup>36</sup> *Id.*

<sup>37</sup> *A.T.C.*, 239 N.J. at 467.

<sup>38</sup> *Id.* at 467-468.

<sup>39</sup> *Id.* at 467-468 citing *State v. Lagares*, 127 N.J. 20, 27 (1992).

<sup>40</sup> *Id.* at 468 citing *State v. Hess*, 207 N.J. 123, 151 (2011).

the standards prescribed by the Code of Criminal Justice.<sup>41</sup>

- *Plea Bargains*

A plea agreement between a prosecutor and defense attorney encompasses a discussion about the alleged criminal transgression and the possible sentence.<sup>42</sup> The role of the prosecutor is “strictly limited to an agreement to recommend a form of leniency....”<sup>43</sup> After being made aware of the terms of the plea agreement, a court, in its discretion, is required to give the agreement due consideration “after being made aware of the full situation.”<sup>44</sup> Even when the State and a defendant have effectuated a plea agreement, the judge retains the exclusive authority to sentence the defendant.<sup>45</sup> A court may not simply accept a plea bargain “without reviewing the factual support and the circumstance surrounding its formation.”<sup>46</sup>

- *Constitutionality*

The New Jersey Supreme Court held that the JLA does not violate the separation of powers doctrine if: (1) the State provides the court with a statement of reasons explaining its decision to depart from the twenty-five-year mandatory minimum sentence; and (2) the court reviews the prosecutor’s exercise of discretion to determine whether it was arbitrary and capricious.<sup>47</sup>

### **Pending Bills**

To this time, six bills have been introduced in the current session of the New Jersey Legislature that pertain to N.J.S. 2C:14-2.<sup>48</sup> None of these bills address the issue discussed in this Report.

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 470.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* citing *Lagares*, 127 N.J. at 28.

<sup>47</sup> *Id.* at 476.

<sup>48</sup> See A.B. 3796, 219th Leg., First Annual Sess. (N.J. 2020) (Makes it aggravated sexual assault or sexual contact for transportation network company or taxicab driver to commit act of sexual penetration or sexual contact using coercion or without permission on passenger); S.B. 1594, 219th Leg., First Annual Sess. (N.J. 2020) is identical to A.B. 2003, 219th Leg., First Annual Sess. (N.J. 2020) (Makes all persons convicted of sexual assault subject to the No Early Release Act) (a version of this bill has been introduced in every session dating back to 2012); A.B. 2736, 219th Leg., First Annual Sess. (N.J. 2020) (provides that crimes committed outside the State under certain circumstances may be prosecuted in New Jersey); A.B. 717, 219th Leg., First Annual Sess. (N.J. 2020) (provides for jurisdiction for prosecution for certain crimes against minors committed outside New Jersey); A.B. 773, 219th Leg., First Annual Sess. (N.J. 2020) (provides for mandatory terms of imprisonment for certain sexual assaults upon a minor) (a version of this bill has been introduced to the Legislature every year since 2000). See <https://www.njleg.state.nj.us/bills/bills0001.asp> (last visited Mar. 02, 2021).

## Conclusion

The JLA was enacted as an incentive for defendants to plead guilty, thereby sparing the victim from having to participate in a trial.<sup>49</sup> The ability of the State to enter into a plea bargain with a defendant does not obviate the requirement that a court consider the agreement after being made aware of the circumstances of the case in issue.<sup>50</sup>

The proposed revisions contained in the Appendix are designed to address the constitutional infirmities identified by the New Jersey Supreme Court in *State v. A.T.C.* The proposed language requires that a prosecutor provide the sentencing court with a statement explaining why a defendant was offered a plea bargain that would result in a term of incarceration, or period of parole ineligibility, less than that prescribed by the statute.

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<sup>49</sup> N.J. STAT. ANN. § 2C:14-2(d) (West 2021), *see* *A.T.C.*, 239 N.J. at 463-464.

<sup>50</sup> *A.T.C.*, 239 N.J. at 470.

## Appendix

The proposed modifications to N.J.S. 2C:14-2 (shown with ~~striketrough~~ or underlining), follow:

a. An actor is guilty of aggravated sexual assault, a crime of the first degree, if the actor commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The victim is less than 13 years old;

(2) The victim is at least 13 but less than 16 years old; and

(a) The actor is related to the victim by blood or affinity to the third degree, or

(b) The actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or

(c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;

(3) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, carjacking, kidnapping, homicide, aggravated assault on the victim or a person other than the victim, burglary, arson, or criminal escape;

(4) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;

(5) The actor is aided or abetted by one or more other persons and the actor commits the act using coercion or without the victim's affirmative and freely-given permission;

(6) The actor commits the act using coercion or without the victim's affirmative and freely-given permission and severe personal injury is sustained by the victim;

(7) The victim, at the time of sexual penetration, is one whom the actor knew or should have known was:

(a) physically helpless or incapacitated;

(b) intellectually or mentally incapacitated; or

(c) had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the distinctively sexual nature of the conduct, including, but not limited to, being incapable of providing consent, or incapable of understanding or exercising the right to refuse to engage in the conduct.

~~Aggravated sexual assault is a crime of the first degree.~~



Except as otherwise provided in subsection d. of this section, a person convicted under paragraph (1) of this subsection shall be sentenced to a specific term of years which shall be fixed by the court and shall be between 25 years and life imprisonment of which the person shall serve 25 years before being eligible for parole, unless a longer term of parole ineligibility is otherwise provided pursuant to this Title.

b. An actor is guilty of sexual assault, a crime of the second degree, if the actor commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim.

c. An actor is guilty of sexual assault, a crime of the second degree, if the actor commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The actor commits the act using coercion or without the victim's affirmative and freely-given permission, but the victim does not sustain severe personal injury;

(2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status;

(3) The victim is at least 16 but less than 18 years old and:

(a) The actor is related to the victim by blood or affinity to the third degree;  
or

(b) The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or

(c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;

(4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim;

(5) The victim is a pupil at least 18 but less than 22 years old and has not received a high school diploma and the actor is a teaching staff member or substitute teacher, school bus driver, other school employee, contracted service provider, or volunteer and the actor has supervisory or disciplinary power of any nature or in any capacity over the victim. As used in this paragraph, "teaching staff member" has the meaning set forth in N.J.S.18A:1-1.

~~Sexual assault is a crime of the second degree.~~

d. (1) Notwithstanding the provisions of subsection a. of this section, where a defendant is charged with a violation under paragraph (1) of subsection a. of this section, the prosecutor ~~in consideration of the interests of the victim~~, may, in consideration of the interests of the victim, offer a negotiated plea agreement in which the defendant would be sentenced to a specific term of imprisonment of not less than 15 years, during which the defendant shall not be eligible for parole.

(2) When the prosecutor and the defendant enter into a negotiated plea, pursuant to this subsection, the prosecutor shall provide to the sentencing court a statement setting forth

the reasons why the defendant was offered a plea agreement in which the term of incarceration, or the period of parole ineligibility, is less than that prescribed in paragraph (1) of subsection a. of this section.

(3) In such event, the court shall review the prosecutor's exercise of discretion, as set forth in subsection d.(2) of this section, using the arbitrary and capricious standard and may:

(A) accept the negotiated plea agreement and upon such conviction shall impose the term of imprisonment and period of parole ineligibility as provided for in the plea agreement, and

(B) not impose a lesser term of imprisonment or parole or a lesser period of parole ineligibility than that expressly provided in the plea agreement.

(4) The prosecutor may request that the sentencing court hold an in camera hearing, pursuant to N.J. Court Rule 1:2-1, when the prosecutor concludes that it is necessary to reveal, in the statement of reasons, any of the following information regarding the victim or members of the victim's immediate family:

(A) mental health records;

(B) physical health records; or,

(C) any other confidential information.

(5) The Attorney General shall develop guidelines to ensure the uniform exercise of discretion in making determinations regarding a negotiated reduction in the term of imprisonment and period of parole ineligibility set forth in subsection a. of this section.

**Credits:** L.1978, c. 95, § 2C:14-2, eff. Sept. 1, 1979. Amended by L.1979, c. 178, § 26, eff. Sept. 1, 1979; L.1983, c. 249, § 2, eff. July 7, 1983; L.1989, c. 228, § 3, eff. Dec. 29, 1989; L.1997, c. 194, § 1, eff. Aug. 8, 1997; L.2001, c. 60, § 1, eff. April 19, 2001; L.2004, c. 130, § 13, eff. Aug. 27, 2004; L.2011, c. 232, § 4, eff. March 17, 2012; L.2013, c. 214, § 3, eff. July 1, 2014; L.2014, c. 7, § 1, eff. May 15, 2014; L.2019, c. 108, § 1, eff. May 10, 2019; L.2019, c. 474, § 1, eff. Jan. 21, 2020.

#### **Comment**

Originally enacted as one block paragraph, section d. has been formatted so that it is consistent with contemporary legislative drafting style, and to make each provision easily identifiable and comprehensible.

- Sections a., b., and c.

The degree of the crime has been moved from the bottom of the section to the top of the section so that the degree of the crime is clear and unambiguous. Although the location of the text has changed, the substance of these portions of the statute have not been modified.

- Section d. – the Jessica Lunsford Act

Subsections d. has been modified to reflect the holding of the New Jersey Supreme Court in *State v. A.T.C.*, 239 N.J. 450 (2019). The format of this subsection has been updated to make it easier to read. These provisions also include minor, non-substantive, language changes.