



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Relating to Mandatory Sentencing; Factors Requiring Jury Determination

May 06, 2019

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 **Sept 1, 2019**.

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:

John M. Cannel, Retired, Reviser of Statutes
New Jersey Law Revision Commission
153 Halsey Street, 7th fl.
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: cannel@njlrc.org
Web site: <http://www.njlrc.org>

Introduction

This project examines the Criminal Code to determine which sentencing provisions were affected by a progression of constitutional cases requiring that elements of an offense be proved to the jury and found beyond a reasonable doubt.

The two key United States Supreme Court cases on this issue are *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). *Apprendi* held that a fact that increased the maximum sentence allowed for the offense was an element of the offense and must be found by the jury beyond a reasonable doubt. *Alleyne* extended the principle to facts that increase the minimum sentence allowed. *Southern Union Company v. U.S.*, 132 S. Ct. 2344, 2350 (2012) applied the same rule to fines. New Jersey cases have implemented this Constitutional principle.¹ After the *Apprendi* decision, the Legislature amended the provisions on bias crimes, the subject of *Apprendi*. No other legislative actions have been taken to address provisions that were either specifically found to be unconstitutional or are similar to those provisions.

The basic rule is that any finding that changes the range of potential sentences available, by raising the maximum lawful sentence or requiring a minimum sentence, is an element of the offense and must be found by the jury beyond a reasonable doubt. Findings of fact by the sentencing judge that are used in exercising discretion as to the particular sentence within the range allowed by statute, however, are permitted. If a particular finding is necessary to justify a minimum sentence that is available or imposition of a sentence at the top of the range set, that finding may be made by the judge. If a particular finding requires the imposition of a minimum sentence or increases the maximum sentence, that finding must be made by the jury. There is one significant exception to the basic rule: findings that the defendant had prior convictions may be made by the judge.

Applying this rule, there are a number of statutes that are unconstitutional and need revision. These are statutes that specifically call for a decision by the judge. There are many others that specify a fact that affects the range of available sentences but do not indicate how that fact is determined. It can be assumed that these statutes will be applied constitutionally so that the jury finds the fact in question. The Commission does not recommend revision of these statutes.

The Commission does recommend revision of the statutes that call for a determination by a judge of a fact (other than the existence of prior convictions) that change the sentencing options available. Proposed revisions of these statutes follow. Deletions are indicated by strikeouts; new

¹ See, e.g. *State v. Natale*, 184 N.J. 458 (2005); *State v. Grate*, 220 N.J. 317 (2017), *State v. Kiriakakis*, 235 N.J. 420 (2018).

language by underlines. In each case, the revisions transfer finding the fact in question from the judge to the jury. Those changes preserve the substance of sentencing scheme as established by the Legislature. However, the revisions would require submission of an extra element to the jury. If the element is found, the special sentencing is applicable. A jury verdict without the extra element is akin to finding of a lesser included offense; there is a conviction but not one that allows the sentencing enhancement.

Some revisions involve difficult decisions. The change shown in 2C:44-5.1 is problematic. In most cases bail status is a legal, rather than a factual matter. A legal matter might well be left to the judge. But see, *State v. Anderson*, 127 N.J. 191 (1992) holding that the issue of materiality in perjury prosecutions must be decided by the jury. In addition, in some cases the time of commission of the crime is a factual matter. As a result, the Commission decided that these issues must be left to the jury.

The revision to 2C:44-3 also presents problems. The material in the first paragraph that is before subsection (a) does not need revision. The exception to the general rule allows a judge to decide whether a defendant has had prior convictions. Subsection (a) requires a finding of prior convictions but also the age of the defendant was when prior crimes occurred and when those crimes occurred. While there is no case allowing a judge to determine these facts, these issues seem a part of deciding whether prior convictions occurred and so no revision is recommended.

Proposed Revisions

2C:11-5 Death by auto or vessel.

a. Criminal homicide constitutes reckless vehicular homicide when it is caused by driving a vehicle or vessel recklessly.

Proof that the defendant fell asleep while driving or was driving after having been without sleep for a period in excess of 24 consecutive hours may give rise to an inference that the defendant was driving recklessly. Proof that the defendant was driving while intoxicated in violation of R.S.39:4-50 or was operating a vessel under the influence of alcohol or drugs in violation of section 3 of P.L.1952, c.157 (C.12:7-46) shall give rise to an inference that the defendant was driving recklessly. Proof that the defendant was operating a hand-held wireless telephone while driving a motor vehicle in violation of section 1 of P.L.2003, c.310 (C.39:4-97.3) may give rise to an inference that the defendant was driving recklessly. Proof that the defendant failed to maintain a lane in violation of R.S.39:4-88 may give rise to an inference that the defendant was driving recklessly. Nothing in this section shall be construed to in any way limit the conduct or conditions that may be found to constitute driving a vehicle or vessel recklessly.

b. Except as provided in paragraphs (3) and (5) of this subsection, reckless vehicular homicide is a crime of the second degree.

(1) If the defendant was convicted with the additional element of operating the auto or vessel while under the influence of any intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or with a blood alcohol concentration at or above the prohibited level as prescribed in R.S.39:4-50, or if the defendant was operating the auto or vessel while his driver's license or reciprocity privilege was suspended or revoked for any violation of R.S.39:4-50, section 2 of P.L.1981, c.512 (C.39:4-50.4a), by the Chief Administrator of the New Jersey Motor Vehicle Commission pursuant to P.L.1982, c.85 (C.39:5-30a et seq.), or by the court for a violation of R.S.39:4-96, the defendant shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, during which the defendant shall be ineligible for parole.

~~(2) The court shall not impose a mandatory sentence pursuant to paragraph (1) of this subsection unless the grounds therefor have been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish by a preponderance of the evidence that the defendant was operating the auto or vessel while under the influence of any intoxicating liquor, narcotic, hallucinogenic or habit producing drug, or with a blood alcohol concentration at or above the level prescribed in R.S.39:4-50 or that the defendant was operating the auto or vessel while his driver's license or reciprocity privilege was suspended or revoked for any violation of R.S.39:4-50, section 2 of P.L.1981, c.512 (C.39:4-50.4a), by the Chief Administrator of the New Jersey Motor Vehicle Commission pursuant to P.L.1982, c.85 (C.39:5-30a et seq.), or by the court for a violation of R.S.39:4-96. In making its findings, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information.~~

(3) Reckless vehicular homicide is a crime of the first degree if the defendant was operating the auto or vessel while in violation of R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a) while:

(a) on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property;

(b) driving through a school crossing as defined in R.S.39:1-1 if the municipality, by ordinance or resolution, has designated the school crossing as such; or

(c) driving through a school crossing as defined in R.S.39:1-1 knowing that juveniles are present if the municipality has not designated the school crossing as such by ordinance or resolution.

A map or true copy of a map depicting the location and boundaries of the area on or within 1,000 feet of any property used for school purposes which is owned by or leased to any elementary or secondary school or school board produced pursuant to section 1 of P.L.1987, c.101 (C.2C:35-7) may be used in a prosecution under subparagraph (a) of this paragraph.

It shall be no defense to a prosecution for a violation of subparagraph (a) or (b) of this paragraph that the defendant was unaware that the prohibited conduct took place while on or within 1,000 feet of any school property or while driving through a school crossing. Nor shall it be a defense to a prosecution under subparagraph (a) or (b) of this paragraph that no juveniles

were present on the school property or crossing zone at the time of the offense or that the school was not in session.

(4) If the defendant was operating the auto or vessel in violation of R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a), the defendant's license to operate a motor vehicle shall be suspended for a period of between five years and life, which period shall commence upon completion of any prison sentence imposed upon that person.

(5) Reckless Vehicular homicide is a crime of the third degree if the defendant proves by a preponderance of the evidence that the defendant did not commit any conduct constituting driving a vehicle or vessel recklessly other than failing to maintain a lane in violation of R.S.39:4-88.

c. For good cause shown, the court may, in accepting a plea of guilty under this section, order that such plea not be evidential in any civil proceeding.

d. Nothing herein shall be deemed to preclude, if the evidence so warrants, an indictment and conviction for aggravated manslaughter under the provisions of subsection a. of N.J.S.2C:11-4.

As used in this section, "auto or vessel" means all means of conveyance propelled otherwise than by muscular power.

e. Any person who violates paragraph (3) of subsection b. of this section shall forfeit the auto or vessel used in the commission of the offense, unless the defendant can establish at a hearing, which may occur at the time of sentencing, by a preponderance of the evidence that such forfeiture would constitute a serious hardship to the family of the defendant that outweighs the need to deter such conduct by the defendant and others. In making its findings, the court shall take judicial notice of any evidence, testimony, or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. Forfeiture pursuant to this subsection shall be in addition to, and not in lieu of, civil forfeiture pursuant to chapter 64 of this Title.

COMMENT

The proposed revision moves factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea.

2C:35-8 Distribution to persons under age 18; enhanced punishment

~~Upon the application of the prosecuting attorney, any~~ A person being at least 18 years of age who has been convicted with the added element for violating subsection a. of N.J.S. 2C:35-5 or section 1 of P.L. 1987, c. 101 (C. 2C:35-7) by distributing a controlled dangerous substance or controlled substance analog to a pregnant female or a person 17 years of age or younger shall, except as provided in N.J.S. 2C:35-12, be subject to twice the term of imprisonment, fine and penalty, including twice the term of parole ineligibility, if any, authorized or required to be imposed by subsection b. of N.J.S. 2C:35-5 or section 1 of P.L. 1987, c. 101 (C. 2C:35-7) or any other provision of this title. In addition, the presumption of non-imprisonment for certain offenders set forth in subsection e. of N.J.S. 2C:44-1 shall not apply to any person subject to enhanced punishment pursuant to this section.

The court shall not impose more than one enhanced sentence pursuant to this section. If the defendant is convicted of more than one offense which is otherwise subject to enhanced punishment pursuant to this section, the court shall impose enhanced punishment based upon the most serious such offense for which the defendant was convicted, or, where applicable, the offense which mandates the imposition of the longest term of parole ineligibility. Notwithstanding the provisions of paragraph (2) of subsection a. of 2C:44-5, nothing herein shall prevent the court from also imposing an extended term pursuant to subsection f. of N.J.S. 2C:43-6. ~~The court shall not impose an enhanced sentence pursuant to this section unless the prosecutor has established the ground therefor by a preponderance of the evidence at a hearing, which may occur at the time of sentencing. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing or other court proceedings, and shall also consider the presentence report and any other relevant information.~~ It shall not be relevant to the imposition of enhanced punishment pursuant to this section that the defendant mistakenly believed that the recipient of the substance was 18 years of age or older, even if the mistaken belief was reasonable. Nor shall it be relevant to the imposition of enhanced punishment pursuant to this section that the defendant did not know that the recipient was pregnant.

COMMENT

The proposed revision moves factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea.

2C:35A-3 Criteria for imposition of anti-drug profiteering penalty

a. In addition to any other disposition authorized by this title, including but not limited to any fines which may be imposed pursuant to the provisions of N.J.S.2C:43-3 and except as may be provided by section 5 of this chapter, where a person has been convicted of a crime defined in chapter 35 or 36 of this Title or any crime involving criminal street gang related activity as defined in subsection h. of N.J.S.2C:44-3 or an attempt or conspiracy to commit such a crime, the court shall, upon the application of the prosecutor, sentence the person to pay a monetary penalty in an amount determined pursuant to section 4 of this chapter, provided the defendant has been convicted with an additional element of court finds at a hearing, which may occur at the time of sentencing, that the prosecutor has established by a preponderance of the evidence one or more of the grounds specified in this section. The findings of the court shall be incorporated in the record, and in making its findings, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing or other court proceedings and shall also consider the presentence report and any other relevant information.

b. Any of the following shall constitute grounds for imposing an Anti-Drug Profiteering Penalty:

(1) The defendant was convicted of: (a) a violation of N.J.S.2C:35-3 (leader of narcotics trafficking network), or (b) a violation of subsection g. of N.J.S.2C:5-2 (leader of organized crime), or (c) an offense defined in chapter 41 of this Title (racketeering) which involved the manufacture, distribution, possession with intent to distribute or transportation of any controlled dangerous substance or controlled substance analog.

(2) The defendant is a drug profiteer. A defendant is a drug profiteer when the conduct constituting the crime shows that the person has knowingly engaged in the illegal manufacture,

distribution or transportation of any controlled dangerous substance, controlled substance analog or drug paraphernalia as a substantial source of livelihood. In making its determination, the court may consider all of the attending circumstances, including but not limited to the defendant's role in the criminal activity, the nature, amount and purity of the substance involved, the amount of cash or currency involved, the extent and accumulation of the defendant's assets during the course of the criminal activity and the defendant's net worth and his expenditures in relation to his legitimate sources of income.

(3) The defendant is a wholesale drug distributor. (a) A defendant is a wholesale drug distributor when the conduct constituting the crime involves the manufacture, distribution or intended or attempted distribution of a controlled dangerous substance or controlled substance analog to any other person for pecuniary gain, knowing, believing, or under circumstances where it reasonably could be assumed that such other person would in turn distribute the substance to another or others for pecuniary gain. It shall not be necessary for the prosecution to establish to whom the substance was distributed or intended or attempted to be distributed, and the court may draw all reasonable inferences from the nature of the defendant's conduct and the substance involved that such other person, while not specifically identified, would in turn distribute the substance to another or others for pecuniary gain. In making its determination, the court shall consider all of the attending circumstances, including but not limited to the defendant's role in the criminal activity, the nature, amount and purity of the substance involved, and the likelihood that a substance of such purity would be intended to be distributed directly to the ultimate consumer of the substance.

(b) Notwithstanding that the prosecutor has established that the defendant is a wholesale drug distributor within the meaning of this paragraph, the court shall not impose an anti-drug profiteering penalty on that ground if the defendant establishes by a preponderance of the evidence at the hearing that his participation in the conduct constituting the crime was limited solely to operating a conveyance used to transport a controlled dangerous substance or controlled substance analog, or loading or unloading the substance into such a conveyance or storage facility. Nothing in this paragraph shall be construed to establish a basis for not imposing a penalty where the prosecutor has established any other ground or grounds specified in this section for the imposition of an anti-drug profiteering penalty.

(4) The defendant is a professional drug distributor. A professional drug distributor is a person who has at any time, for pecuniary gain, unlawfully distributed a controlled dangerous substance, controlled substance analog or drug paraphernalia to three or more different persons, or on five or more separate occasions regardless of the number of persons to whom the substance or paraphernalia was distributed.

(5) The defendant was involved in criminal street gang related activity.

c. In making its determination, the court may rely upon expert opinion in the form of live testimony or by affidavit, or by such other means as the court deems appropriate.

d. For the purposes of this chapter, an act is undertaken for pecuniary gain if it involves or contemplates the transfer of anything of value in exchange for a controlled dangerous substance, controlled substance analog or drug paraphernalia, provided that the thing of value received or intended to be received in exchange for the substance or paraphernalia is or was reasonably believed to be of a higher value than that expended by the defendant or by any other person with whom the actor is acting in concert, to acquire or manufacture the substance or

paraphernalia. It shall also include any act which would constitute a violation of subsection a. of N.J.S.2C:35-5, N.J.S.2C:35-11, N.J.S.2C:36-3 or any other crime for which the actor was paid or expected to be paid in return for performing such act, or from which the actor received a benefit for himself or another or injured another or deprived another of a benefit. There shall be a rebuttable presumption at the hearing that any manufacturing, distribution or possession with intent to distribute which contemplates or involves the payment or exchange of anything of value constitutes an act undertaken for pecuniary gain. It shall not be necessary for the prosecution to establish that any intended profit or payment was actually received; nor shall it be relevant that the act, payment in return for such act or the transfer of anything of value in exchange for the substance or paraphernalia, occurred or was intended to occur in another jurisdiction.

COMMENT

The proposed revision moves factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea.

2C:35A-4 Calculation of anti-drug profiteering penalty

a. Where the ~~prosecutor has established~~ defendant has been convicted of a specified crime including, as an additional element, one or more grounds for imposing an Anti-Drug Profiteering Penalty pursuant to section 3 of this chapter, the court shall assess a monetary penalty as follows:

(1) \$200,000.00 in the case of a crime of the first degree; \$100,000.00 in the case of a crime of the second degree; \$50,000.00 in the case of a crime of the third degree; \$25,000.00 in the case of a crime of the fourth degree;

(2) an amount equal to three times the street value of all controlled dangerous substances or controlled substance analogs involved, or three times the market value of all drug paraphernalia involved, if this amount is greater than that provided in paragraph (1) of this subsection; or

(3) an amount equal to three times the value of any benefit illegally obtained by the actor for himself or another, or any injury to or benefit deprived of another.

b. When the court is for any reason unable to determine the amount of the penalty pursuant to paragraph (2) of subsection a., the court shall assess a penalty in the amount appropriate to the degree of the offense as provided in paragraph (1) of subsection a.

c. In determining the street value of the substance involved or the market value of drug paraphernalia involved, the court shall take into account all amounts of the substance or paraphernalia reasonably believed to have been involved in the course of the criminal activity in which the defendant knowingly participated, and it shall not be relevant for the purposes of this section that some of those amounts or paraphernalia were involved in acts or transactions which occurred, or which were intended to occur, in another jurisdiction.

~~d. Where the prosecution requests that the court assess a penalty in an amount calculated pursuant to paragraph (2) or (3) of subsection a., the prosecutor shall have the burden of establishing by a preponderance of the evidence the appropriate amount of the penalty to be assessed pursuant to that paragraph. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at trial, plea hearing or other court proceedings~~

~~and shall also consider the presentence report and other relevant information, including expert opinion in the form of live testimony or by affidavit. The court's findings shall be incorporated in the record, and such findings shall not be subject to modification by an appellate court except upon a showing that the finding was totally lacking support in the record or was arbitrary and capricious.~~

COMMENT

The proposed revision moves factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea.

2C:38-5 Unlawful Possession of Weapons.

a. Machine guns. Any person who knowingly has in his possession a machine gun or any instrument or device adaptable for use as a machine gun, without being licensed to do so as provided in N.J.S.2C:58-5, is guilty of a crime of the second degree.

b. Handguns. (1) Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S.2C:58-4, is guilty of a crime of the second degree. (2) If the handgun is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person it is a crime of the third degree.

c. Rifles and shotguns. (1) Any person who knowingly has in his possession any rifle or shotgun without having first obtained a firearms purchaser identification card in accordance with the provisions of N.J.S.2C:58-3, is guilty of a crime of the third degree.

(2) Unless otherwise permitted by law, any person who knowingly has in his possession any loaded rifle or shotgun is guilty of a crime of the third degree.

d. Other weapons. Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree.

e. Firearms or other weapons in educational institutions.

(1) Any person who knowingly has in his possession any firearm in or upon any part of the buildings or grounds of any school, college, university or other educational institution, without the written authorization of the governing officer of the institution, is guilty of a crime of the third degree, irrespective of whether he possesses a valid permit to carry the firearm or a valid firearms purchaser identification card.

(2) Any person who knowingly possesses any weapon enumerated in paragraphs (3) and (4) of subsection r. of N.J.S.2C:39-1 or any components which can readily be assembled into a firearm or other weapon enumerated in subsection r. of N.J.S.2C:39-1 or any other weapon under circumstances not manifestly appropriate for such lawful use as it may have, while in or upon any part of the buildings or grounds of any school, college, university or other educational institution without the written authorization of the governing officer of the institution is guilty of a crime of the fourth degree.

(3) Any person who knowingly has in his possession any imitation firearm in or upon any part of the buildings or grounds of any school, college, university or other educational institution, without the written authorization of the governing officer of the institution, or while on any school bus is a disorderly person, irrespective of whether he possesses a valid permit to carry a firearm or a valid firearms purchaser identification card.

f. Assault firearms. Any person who knowingly has in his possession an assault firearm is guilty of a crime of the second degree except if the assault firearm is licensed pursuant to N.J.S.2C:58-5; registered pursuant to section 11 of P.L.1990, c.32 (C.2C:58-12); or rendered inoperable pursuant to section 12 of P.L.1990, c.32 (C.2C:58-13).

g. (1) The temporary possession of a handgun, rifle or shotgun by a person receiving, possessing, carrying or using the handgun, rifle, or shotgun under the provisions of section 1 of P.L.1992, c.74 (C.2C:58-3.1) shall not be considered unlawful possession under the provisions of subsection b. or c. of this section.

(2) The temporary possession of a firearm by a person receiving, possessing, carrying or using the firearm under the provisions of section 1 of P.L.1997, c.375 (C.2C:58-3.2) shall not be considered unlawful possession under the provisions of this section.

h. A person who is convicted of a crime under subsection a., b., f. or j. of this section shall be ineligible for participation in any program of intensive supervision; provided, however, that this provision shall not apply to a crime under subsection b. involving only a handgun which is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person.

i. A person convicted of violating subsection a., b. or f. of this section shall be sentenced by the court to a term of imprisonment, which shall include the imposition of a minimum term during which the defendant shall be ineligible for parole, if, as an element of the offense, defendant is convicted of the crime as one involving organized criminal activity. ~~the court finds that the aggravating circumstance set forth in paragraph (5) of subsection a. of N.J.S.2C:44-1 applies.~~ The minimum term of parole ineligibility shall be fixed at five years. The sentencing court shall make a finding on the record as to whether the aggravating circumstance set forth in paragraph (5) of subsection a. of N.J.S.2C:44-1 applies, and the court shall presume that there is a substantial likelihood that the defendant is involved in organized criminal activity if there is a substantial likelihood that the defendant is a member of an organization or group that engages in criminal activity. The prosecution at the sentencing hearing shall have the initial burden of producing evidence or information concerning the defendant's membership in such an organization or group.

j. A violation of subsections a., b., c. or f. of this section by a person who has a prior conviction of any of the crimes enumerated in subsection d. of section 2 of of P.L.1997, c.117 (C.2C:43-7.2) is a first degree crime.

COMMENT

The proposed revision in subsection (i) moves factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea.

2C:43-6 Sentence of imprisonment for crime; ordinary terms; mandatory terms.

a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows:

(1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years;

(2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years;

(3) In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between three years and five years;

(4) In the case of a crime of the fourth degree, for a specific term which shall be fixed by the court and shall not exceed 18 months.

b. As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsections a. and b. of 2C:44-1, or the court finds that the aggravating factor set forth in paragraph (5) of subsection a. of N.J.S.2C:44-1 applies, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term set pursuant to a maximum period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

c. A person who has been convicted under subsection b. or d. of N.J.S.2C:39-3, subsection a. of N.J.S.2C:39-4, subsection a. of section 1 of P.L.1998, c.26 (C.2C:39-4.1), subsection a., b., c., or f. of N.J.S.2C:39-5, subsection a. or paragraph (2) or (3) of subsection b. of section 6 of P.L.1979, c.179 (C.2C:39-7), or subsection a., b., e. or g. of N.J.S.2C:39-9, or of a crime under any of the following sections: 2C:11-3, 2C:11-4, 2C:12-1b., 2C:13-1, 2C:14-2a., 2C:14-3a., 2C:15-1, 2C:18-2, 2C:29-5, who, as an element of the offense, is convicted that while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in 2C:39-1f, shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

The minimum terms established by this section shall not prevent the court from imposing presumptive terms of imprisonment pursuant to 2C:44-1f. (1) except in cases of crimes of the fourth degree.

A person who has been convicted of an offense enumerated by this subsection and who as an element of that offense was convicted of having used or possessed a firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of a firearm as defined in 2C:44-3d., shall be sentenced by the court to an extended term as authorized by 2C:43-7c., notwithstanding that extended terms are ordinarily discretionary with the court.

~~d. (1) The court shall not impose a mandatory sentence pursuant to subsection c. of this section, 2C:43-7c. or 2C:44-3d., unless the ground therefor has been established at a hearing. At~~

~~the hearing, which may occur at the time of sentencing, the prosecutor shall establish by a preponderance of the evidence that the weapon used or possessed was a firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information.~~

(2) The court shall not impose a mandatory sentence pursuant to subsection c. of this section for a violation of paragraph (2) of subsection b. of N.J.S.2C:39-5; a violation of paragraph (2) of subsection c. of N.J.S.2C:39-5, if unless the jury finds that the rifle or shotgun is not in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person; or a violation of paragraph (1) of subsection c. of N.J.S.2C:39-5.

e. A person convicted of a third or subsequent offense involving State taxes under N.J.S.2C:20-9, N.J.S.2C:21-15, any other provision of this code, or under any of the provisions of Title 54 of the Revised Statutes, or Title 54A of the New Jersey Statutes, as amended and supplemented, shall be sentenced to a term of imprisonment by the court. This shall not preclude an application for and imposition of an extended term of imprisonment under N.J.S.2C:44-3 if the provisions of that section are applicable to the offender.

f. A person convicted of manufacturing, distributing, dispensing or possessing with intent to distribute any dangerous substance or controlled substance analog under N.J.S.2C:35-5, of maintaining or operating a controlled dangerous substance production facility under N.J.S.2C:35-4, of employing a juvenile in a drug distribution scheme under N.J.S.2C:35-6, leader of a narcotics trafficking network under N.J.S.2C:35-3, or of distributing, dispensing or possessing with intent to distribute on or near school property or buses under section 1 of P.L.1987, c.101 (C.2C:35-7), who has been previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog, shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by subsection c. of N.J.S.2C:43-7, notwithstanding that extended terms are ordinarily discretionary with the court. The term of imprisonment shall, except as may be provided in N.J.S.2C:35-12, include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, not less than seven years if the person is convicted of a violation of N.J.S.2C:35-6, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

The court shall not impose an extended term pursuant to this subsection unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish the ground therefor by a preponderance of the evidence. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information.

For the purpose of this subsection, a previous conviction exists where the actor has at any time been convicted under chapter 35 of this title or Title 24 of the Revised Statutes or under any similar statute of the United States, this State, or any other state for an offense that is

substantially equivalent to N.J.S.2C:35-3, N.J.S.2C:35-4, N.J.S.2C:35-5, N.J.S.2C:35-6 or section 1 of P.L.1987, c.101 (C.2C:35-7).

g. Any person who has been convicted under subsection a. of N.J.S.2C:39-4 or of a crime under any of the following sections: N.J.S.2C:11-3, N.J.S.2C:11-4, N.J.S.2C:12-1b., N.J.S.2C:13-1, N.J.S.2C:14-2a., N.J.S.2C:14-3a., N.J.S.2C:15-1, N.J.S.2C:18-2, N.J.S.2C:29-5, N.J.S.2C:35-5 who, as an element of that offense, was convicted of, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a machine gun or assault firearm shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at 10 years for a crime of the first or second degree, five years for a crime of the third degree, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

The minimum terms established by this section shall not prevent the court from imposing presumptive terms of imprisonment pursuant to paragraph (1) of subsection f. of N.J.S.2C:44-1 for crimes of the first degree.

A person who has been convicted of an offense enumerated in this subsection and who and, as an element of that offense, was convicted of having used or possessed a machine gun or assault firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of any firearm as defined in subsection d. of N.J.S.2C:44-3, shall be sentenced by the court to an extended term as authorized by subsection d. of N.J.S.2C:43-7, notwithstanding that extended terms are ordinarily discretionary with the court.

~~h. The court shall not impose a mandatory sentence pursuant to subsection g. of this section, subsection d. of N.J.S.2C:43-7 or N.J.S.2C:44-3, unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of sentencing, the prosecutor shall establish by a preponderance of the evidence that the weapon used or possessed was a machine gun or assault firearm. In making its finding, the court shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information.~~

i. A person who has been convicted under paragraph (6) of subsection b. of 2C:12-1 of causing bodily injury while eluding shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between one-third and one-half of the sentence imposed by the court. The minimum term established by this subsection shall not prevent the court from imposing a presumptive term of imprisonment pursuant to paragraph (1) of subsection f. of 2C:44-1.

COMMENT

The proposed revisions move factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea.

2C:43-6.5. Mandatory Minimum Prison Term for Public Officer, Employee Convicted of Certain Crimes; Waiver, Reduction.

a. Notwithstanding the provisions of subsection a. of N.J.S.2C:43-6 and except as otherwise provided in subsection c. of this section, if the defendant is convicted of being a person who serves or has served as a public officer or employee under the government of this State, or any political subdivision thereof, ~~who is convicted of~~ and an element of the conviction is that it is a crime that involves or touches such office or employment as set forth in subsection b. of this section, shall be sentenced to a mandatory minimum term of imprisonment without eligibility for parole as follows: for a crime of the fourth degree, the mandatory minimum term shall be one year; for a crime of the third degree, two years; for a crime of the second degree, five years, and for a crime of the first degree, 10 years, unless the provisions of any other law provide for a higher mandatory minimum term. As used in this subsection, "a crime that involves or touches such office or employment" means that the crime was related directly to the person's performance in, or circumstances flowing from, the specific public office or employment held by the person.

b. Subsection a. of this section applies to a conviction of any of the following crimes:

- (1) Paragraph (4) of subsection a. of N.J.S.2C:13-5, criminal coercion;
- (2) N.J.S.2C:20-4, theft by deception, if the amount involved exceeds \$10,000;
- (3) Subsection d. of N.J.S.2C:20-5, theft by extortion;
- (4) N.J.S.2C:20-9, theft by failure to make required disposition of property received, if the amount involved exceeds \$10,000;
- (5) N.J.S.2C:21-10, commercial bribery;
- (6) Section 3 of P.L.1994, c.121 (C.2C:21-25), money laundering;
- (7) Section 97 of P.L.1999, c.440 (C.2C:21-34), false contract payment claims;
- (8) N.J.S.2C:27-2, bribery in official matters;
- (9) N.J.S.2C:27-3, threats and other improper influence in official and political matters;
- (10) Section 100 of P.L.1999, c.440 (C.2C:27-9), unlawful official business transaction where interest is involved;
- (11) Section 5 of P.L.2003, c.255 (C.2C:27-10), acceptance or receipt of unlawful benefit by public servant for official behavior;
- (12) Section 6 of P.L.2003, c.255 (C.2C:27-11), offer of unlawful benefit to public servant for official behavior;
- (13) N.J.S.2C:28-1, perjury;
- (14) N.J.S.2C:28-5, tampering with witnesses;
- (15) N.J.S.2C:28-7, tampering with public records or information;
- (16) N.J.S.2C:29-4, compounding;
- (17) N.J.S.2C:30-2, official misconduct;

- (18) N.J.S.2C:30-3, speculating or wagering on official action or information; or
- (19) Section 3 of P.L.2003, c.31 (C.2C:30-7), pattern of official misconduct.

c. (1) On motion by the prosecutor stating that the defendant has provided substantial assistance in a criminal investigation or prosecution of another person, the court may waive or reduce the mandatory minimum term of imprisonment required by subsection a. of this section. The appropriate waiver or reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (i) the court's evaluation of the significance and usefulness of the defendant's assistance, giving substantial weight to the prosecutor's evaluation of the assistance rendered;
- (ii) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (iii) the nature and extent of the defendant's assistance;
- (iv) any injury suffered, or any danger or risk of injury to the defendant or his family resulting for his assistance;
- (v) the timeliness of the defendant's assistance.

In making such a determination, the court shall give substantial weight to the prosecutor's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

(2) If the court finds by clear and convincing evidence that extraordinary circumstances exist such that imposition of a mandatory minimum term would be a serious injustice which overrides the need to deter such conduct in others, the court may waive or reduce the mandatory minimum term of imprisonment required by subsection a. of this section. In making any such

finding, the court must state with specificity its reasons for waiving or reducing the mandatory minimum sentence that would otherwise apply.

(3) If, pursuant to paragraph (1) or (2) of this subsection, the court waives or reduces the mandatory minimum term required by subsection a. of this section, such sentence shall not become final for 10 days in order to permit the appeal of the sentence by the prosecution.

d. (1) a prosecutor shall not recommend the admission into or consent to the referral to a pretrial intervention program of a person who serves or has served as a public officer or employee under the government of this State, or any political subdivision thereof, who is charged with a crime that involves or touches such office or employment as set forth in subsection b. of this section, without the prior approval of the Attorney General.

(2) A person who serves or has served as a public officer or employee under the government of this State, or any political subdivision thereof, who is convicted of a crime that involves or touches such office or employment as set forth in subsection b. of this section shall be ineligible for participation in any program of intensive supervision during any period of parole ineligibility.

e. The Attorney General shall develop guidelines to ensure the uniform exercise of discretion in making determinations regarding the waiver or reduction of a mandatory minimum term of imprisonment pursuant to paragraph (1) of this subsection c. of this section and

participation in a pretrial intervention program pursuant to paragraph (1) of subsection d. of this section.

COMMENT

The proposed revision moves factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea.

2C:43-7.1 Life imprisonment without parole

a. Life Imprisonment Without Parole. A person convicted of a crime under any of the following: N.J.S.2C:11-3; subsection a. of N.J.S.2C:11-4; a crime of the first degree under N.J.S.2C:13-1, paragraphs (3) through (6) of subsection a. of N.J.S.2C:14-2; N.J.S.2C:15-1; or section 1 of P.L.1993, c.221 (C.2C:15-2), who has been convicted of two or more crimes that were committed on prior and separate occasions, regardless of the dates of the convictions, under any of the foregoing sections or under any similar statute of the United States, this State, or any other state for a crime that is substantially equivalent to a crime under any of the foregoing sections, shall be sentenced to a term of life imprisonment by the court, with no eligibility for parole.

b. Extended Term for Repeat Violent Offenders. A person shall be sentenced to an extended term of imprisonment pursuant to N.J.S.2C:43-7 if:

(1) The person is convicted of any of the following crimes: a crime of the second degree under N.J.S.2C:11-4; a crime of the second or third degree under subsection b. of N.J.S.2C:12-1; a crime of the second degree under N.J.S.2C:13-1; a crime under N.J.S.2C:14-3 for aggravated criminal sexual contact under any of the circumstances set forth in paragraphs (3) through (6) of subsection a. of N.J.S.2C:14-2; a crime of the second degree under N.J.S.2C:15-1; a crime of the second degree under N.J.S.2C:18-2; or a crime of the second degree under N.J.S.2C:39-4 for possession of a weapon with the purpose of using it unlawfully against the person of another, and the person has been convicted of any of the foregoing crimes or any of the crimes enumerated in subsection a. of this section or under any similar statute of the United States, this State, or any other state for a crime that is substantially equivalent to a crime enumerated in this subsection or in subsection a. of this section committed on two or more prior and separate occasions regardless of the dates of the convictions; or

(2) The person is convicted of a crime enumerated in subsection a. of this section, does not have two or more prior convictions that require sentencing under subsection a. and has two or more prior convictions that would require sentencing under paragraph (1) of this subsection if the person had been convicted of a crime enumerated in paragraph (1).

c. The provisions of this section shall not apply unless the prior convictions are for crimes committed on separate occasions and unless the crime for which the defendant is being sentenced was committed either within 10 years of the date of the defendant's last release from confinement for commission of any crime or within 10 years of the date of the commission of the most recent of the crimes for which the defendant has a prior conviction.

d. The court shall not impose a sentence of imprisonment pursuant to this section, unless:

(1) the ground was an element of crime of which the defendant was convicted; or

(2) the ground ~~therefor~~ is prior conviction of a crime and it has been established at a hearing after the conviction of the defendant and on written notice to the defendant of the ground proposed. The defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue. Prior convictions shall be defined and proven in accordance with N.J.S.2C:44-4.

e. For purposes of this section, a term of life shall mean the natural life of a person sentenced pursuant to this section. Except that a defendant who is at least 70 years of age and who has served at least 35 years in prison pursuant to a sentence imposed under this section shall be released on parole if the full Parole Board determines that the defendant is not a danger to the safety of any other person or the community.

COMMENT

The proposed revision moves factfinding from the judge. Except where the basis for enhanced punishment is a prior conviction, there must either be a jury determination or an admission by the defendant as part of a guilty plea. Where the basis is a prior conviction, current case law allows the judge to make the finding.

2C:44-3 Criteria for sentence of extended term of imprisonment.

The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in subsection a., b., c., or f. of this section. If the grounds specified in subsection d. are found, and the person is being sentenced for commission of any of the offenses enumerated in N.J.S.2C:43-6c. or N.J.S.2C:43-6g., the court shall sentence the defendant to an extended term as required by N.J.S.2C:43-6c. or N.J.S.2C:43-6g., and application by the prosecutor shall not be required. The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime under N.J.S.2C:14-2 or N.J.S.2C:14-3 to an extended term of imprisonment if the grounds specified in subsection g. of this section are found. The court shall, upon application of the prosecuting attorney, sentence a person to an extended term if the imposition of such term is required pursuant to the provisions of section 2 of P.L.1994, c.130 (C.2C:43-6.4). The finding of the court shall be incorporated in the record.

a. The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

b. The defendant has been convicted of a crime of the first, second or third degree and is convicted of the offense with the additional element of being a professional criminal. A professional criminal is a person 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 he has knowingly devoted himself to criminal activity as a major source of livelihood.

c. The defendant has been convicted of a crime of the first, second or third degree and convicted of the offense with the additional element of having committed the crime as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value the amount of which was unrelated to the proceeds of the crime or he procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

d. Second offender with a firearm. The defendant is at least 18 years of age and has been previously convicted of any of the following crimes: 2C:11-3, 2C:11-4, 2C:12-1b., 2C:13-1, 2C:14-2a., 2C:14-3a., 2C:15-1, 2C:18-2, 2C:29-5, 2C:39-4a., or has been previously convicted of an offense under Title 2A of the New Jersey Statutes or under any statute of the United States or any other state which is substantially equivalent to the offenses enumerated in this subsection and that as an element of the prior offense, he used or possessed a firearm, as defined in 2C:39-1f., in the course of committing or attempting to commit any of these crimes, including the immediate flight therefrom.

e. (Deleted by amendment, P.L.2001, c.443).

f. The defendant has been convicted of a crime under any of the following sections: N.J.S.2C:11-4, N.J.S.2C:12-1b., N.J.S.2C:13-1, N.J.S.2C:14-2a., N.J.S.2C:14-3a., N.J.S.2C:15-1, N.J.S.2C:18-2, N.J.S.2C:29-2b., N.J.S.2C:29-5, N.J.S.2C:35-5, and that as an element of that offense, the defendant is convicted of, in the course of committing or attempting to commit the crime, including the immediate flight therefrom, the defendant used or was in possession of a stolen motor vehicle.

g. The defendant has been convicted of a crime under N.J.S.2C:14-2 or N.J.S.2C:14-3 that as additional elements of that offense, the defendant is convicted that the offense was one, involving violence or the threat of violence and the victim of the crime was 16 years of age or less.

For purposes of this subsection, a crime involves violence or the threat of violence if the victim sustains serious bodily injury as defined in subsection b. of N.J.S.2C:11-1, or the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon as defined in subsection c. of N.J.S.2C:11-1, or threatens to inflict serious bodily injury.

COMMENT

The proposed revisions of subsection (b), (c), (d), (f), and (g) removes factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea. Note that the issue in subsection (d) concerns the prior rather than the current offense. No revision is recommended to subsection (a) as current case law allows the sentencing judge to find whether the defendant has prior convictions.

2C:44-5.1 Penalties for committing certain offenses while released on bail, own recognizance increased.

a. A person who has been convicted under subsection a. of N.J.S.2C:39-4 of possession of a firearm with intent to use it unlawfully against the person of another; or a crime under N.J.S.2C:11-3; N.J.S.2C:11-4; N.J.S.2C:13-1; subsection a. of N.J.S.2C:14-2; subsection a. of N.J.S.2C:14-3; N.J.S.2C:15-1; N.J.S.2C:18-2 if the burglary is a crime of the second degree or the structure was adapted for overnight accommodation of persons; or a crime of the first,

second or third degree under subsection b. of N.J.S.2C:12-1; shall be sentenced to an extended term of imprisonment pursuant to the provisions of N.J.S.2C:43-7 and shall be subject to double the fine authorized for that crime under the provisions of N.J.S.2C:43-3 if the defendant was convicted with the additional element that at the time of the commission of the crime the defendant was released on bail or on his own recognizance for one of the enumerated crimes and was convicted of that crime.

~~b. The court shall not impose a sentence of imprisonment pursuant to this section unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to the defendant of the ground proposed. The defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue.~~

COMMENT

The proposed revision moves factfinding from the judge. To support the increased punishment, there must either be a jury determination or an admission by the defendant as part of a guilty plea.