SUPREME COURT OF NEW JERSEY
DOCKET NO. 089188

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Final Judgment of the Superior Court of New
v.	:	Jersey, Appellate Division.
ZAIRE J. CROMEDY,	:	Middlesex Indictment No. 21-10-1004
Defendant-Appellant.	:	Sat Below:
	:	Hon. Jack M. Sabatino, P.J.A.D.,
	:	Hon. Hany A. Mawla, P.J.A.D., Hon. Joseph L. Marczyk, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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RELEVANT STATUTORY CITATIONS

In most pertinent part, L. 2013, c. 113, effective August 8, 2013, amended N.J.S.A. 2C:39-5 and N.J.S.A. 2C:43-6 as follows:

To add subsection (j) to N.J.S.A. 2C:39-5:

> "1. N.J.S.2C:39-5 is amended to read as follows …. 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 … [N.J.S.A. 2C:43-7.2] is a first degree crime."

To add N.J.S.A. 2C:39-5(j) to an enumerated list of offenses in N.J.S.A. 2C:39-5(h):

> "1. N.J.S.2C:39-5 is amended to read as follows …. 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 …."

To add N.J.S.A. 2C:39-5(f), but not N.J.S.A. 2C:39-5(j), to an enumerated list of offenses in N.J.S.A. 2C:43-6(c):

> "2. N.J.S.2C:43-6 is amended to read as follows …. c. A person who has been convicted under … subsection a., b., c., or f. of N.J.S.2C:39-5 … who … was in possession of a firearm … shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term…."

(Dsa 30-35)

RECORD CITATIONS

Record materials are cited as follows:

"Dsa" – defendant's supplemental appendix;
"1T" – June 7, 2022 plea transcript;
"2T" – November 4, 2022 sentencing transcript;
"3T" – June 5, 2023 SOA transcript;
"4T" – October 20, 2021 grand jury transcript; and
"PSR" – presentence report.

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PRELIMINARY STATEMENT

This appeal is about a sentencing court's erroneous ruling that a parole disqualifier was mandatory, when the plain language of the Legislature's Criminal Code gave the court discretion not to impose it. Because the parole disqualifier was not mandatory but discretionary, this Court must remand for resentencing.

Cromedy pled guilty to a first-degree charge of unlawful possession of a handgun by a person with a prior NERA conviction. The court rejected his argument that the first-degree conviction was not subject to the mandatory sentencing terms of N.J.S.A. 2C:43-6(c) ("the Graves Act"), and imposed a 10-year prison term with a 5-year Graves Act mandatory parole disqualifier.

On appeal, Cromedy argued that the sentencing court erred by imposing a Graves Act mandatory parole disqualifier because the "first degree crime" in N.J.S.A. 2C:39-5(j) is not enumerated as a qualifying conviction in the Graves Act. However, the Appellate Division affirmed, and held that the mandatory terms of the Graves Act applied. The Panel construed N.J.S.A. 2C:39-5(j) not as a substantive crime with elements that must be proven beyond a reasonable doubt, but as a first-degree grading of N.J.S.A. 2C:39-5(a), (b), (c), and (f) , which are enumerated in the Graves Act.

This Court must reverse, and hold that N.J.S.A. 2C:39-5(j) identifies a first-degree substantive crime that is not subject to the Graves Act. As a preliminary

matter, other Appellate Division judges have disagreed with the statutory construction by the Panel in the instant case. The Model Jury Charge Committee disagreed as well: it issued a model charge that construed N.J.S.A. 2C:39-5(j) as a substantive first-degree crime. Prosecutors likewise have disagreed, and have litigated the State's right to charge N.J.S.A. 2C:39-5(j) as a substantive first-degree crime.

First, the principles of statutory interpretation require reversal. (Point I.A.) The plain language of N.J.S.A. 2C:39-5 unambiguously expresses that subsection (j) identifies a "first degree crime" under which a person may be "convicted," without a conviction under any other subsection. Notably, the Appellate Division failed entirely to notice plain language in N.J.S.A. 2C:39-5(h) that directly refers to N.J.S.A. 2C:39-5(j), and resolves the issue. (Point I.A.1.) Further, the plain language of N.J.S.A. 2C:43-6(c), the Graves Act, expresses that N.J.S.A. 2C:39-5(j) — which is omitted — is not a qualifying enumerated conviction. (Point I.A.2.) That ends the Court's inquiry. (Point I.A.3.) But even if this Court reaches the legislative history, that history reinforces the plain meaning, because the Legislature simultaneously enumerated N.J.S.A. 2C:39-5(f) but not N.J.S.A. 2C:39-5(j) as a qualifying conviction in N.J.S.A. 2C:43-6(c), in the very same bill in which it enumerated N.J.S.A. 2C:39-5(j) as a qualifying conviction in N.J.S.A.

2C:39-5(h). (Point I.A.4.) If any ambiguity remains, the lenity canon of construction still requires reversal. (Point I.A.5.)

Second, the Appellate Division's contrary interpretation is not supported. (Point I.B.) The Appellate Division failed to consider the unambiguous text of the statute before jumping to ambiguous extrinsic statements. (Point I.B.1.) The Appellate Division's interpretation was based on several flawed assumptions — that it would be absurd for the Legislature to have not specified that the Graves Act did not apply; that the Legislature could not rationally believe creating a first-degree offense without a mandatory parole disqualifier provides sufficient punishment; and that the plain language is not analogous to other substantive crimes in the Code. These assumptions do not stand up to scrutiny. (Point I.B.2.) The Appellate Division's construction would transform the Legislature's plain language, creating four first-degree Graves Act offenses in a statute that has none. (Point I.B.3.)

Because the sentencing court illegally applied a mandatory parole disqualifier, this Court must remand for a new sentencing hearing. (Point I.C.)

PROCEDURAL HISTORY

On October 27, 2021, a Middlesex County Grand Jury returned Indictment No. 21-10-1004 against Zaire Cromedy, accusing him of second-degree eluding, contrary to N.J.S.A. 2C:29-2(b) (count one), and first-degree unlawful possession

of a handgun by a person with a prior NERA conviction, contrary to N.J.S.A. 2C:39-5(j) (count two). (Dsa 1) The Grand Jury also returned Indictment No. 21-10-1003, accusing him of second-degree being a certain person not to possess a handgun, contrary to N.J.S.A. 2C:39-7 (count one). (Dsa 2)

On June 7, 2022, Cromedy appeared before the Hon. Joseph Paone, J.S.C., and pled guilty to count two of Indictment No. 21-10-1004. (1T 4-1 to 9; Dsa 3-8) As part of the parties' agreement, Cromedy explicitly preserved his right to argue that the N.J.S.A. 2C:39-5(j) conviction did not require imposition of an N.J.S.A. 2C:43-6(c) mandatory parole disqualifier. (1T 10-24 to 11-18; Dsa 8)

On November 4, 2022, when Cromedy appeared before Judge Paone for sentencing, the State recommended a 10-year prison term with a 5-year parole disqualifier. (2T 12-10 to 13) Cromedy argued that the N.J.S.A. 2C:39-5(j) conviction is not subject to the mandatory terms of the Graves Act, N.J.S.A. 2C:43-6(c), because N.J.S.A. 2C:43-6(c) does not list N.J.S.A. 2C:39-5(j) as a qualifying enumerated crime. (2T 3-21 to 23) Cromedy asked for a 10-year prison term with no parole disqualifier. (2T 3-23 to 24) However, the court disagreed with Cromedy's argument that a parole disqualifier was not mandatory. (2T 17-1 to 7; Dsa 9) Judge Paone imposed a 10-year prison term with a 5-year mandatory parole disqualifier. (2T 14-6 to 10; Dsa 10-12) The remaining charges were dismissed.

On March 4, 2024, the Appellate Division affirmed the sentencing court's imposition of a mandatory parole disqualifier. (Dsa 13-29) In a published opinion, the Panel "h[e]ld N.J.S.A. 2C:39-5(j) is a grading statute that enhances the degree of the offense and subjects those with a prior conviction under NERA who are later convicted of a firearms offense under N.J.S.A. 2C:39-5(a), (b), (c), or (f), to enhanced sentencing under the Graves Act." (Dsa 14) The Panel rejected the premise that N.J.S.A. 2C:39-5(j) established a "stand-alone," "substantive" "first-degree crime," and instead found that N.J.S.A. 2C:39-5(j) enhanced the degree and sentence of N.J.S.A. 2C:39-5(b)(1) for those with a prior NERA conviction, turning N.J.S.A. 2C:39-5(b)(1), "a crime of the second degree," into "a first degree crime." (Dsa 24)

On August 3, 2024, Cromedy filed an amended petition for certification. The question presented was: "Is N.J.S.A. 2C:39-5(j) a substantive first-degree crime not subject to the Graves Act, or is it a grading statute?" On November 1, 2024, this Court granted certification, and ordered supplemental briefing.

STATEMENT OF FACTS

On August 6, 2021, officers arrested Cromedy at his sister's residence, then conducted a warrantless search of nearby residential property, and discovered and seized a firearm hidden underneath a stone. (PSR 4) On June 7, 2022, Cromedy

pled guilty to first-degree possession of a handgun by a person with a prior NERA conviction, contrary to N.J.S.A. 2C:39-5(j). (1T 9-9 to 10-4)

By agreeing to a guilty plea for a violation of N.J.S.A. 2C:39-5(j), a first-degree crime, the State obtained a waiver of Cromedy's rights, including his right to file pre-trial motions, and to argue at a jury trial that the State could not prove constructive possession beyond a reasonable doubt. (PSR 4; 1T 8-5 to 24)

At sentencing, the court did not reach the issue of whether under the circumstances it would have imposed a discretionary parole disqualifier had it not ruled that the Graves Act mandatory parole disqualifier applied. (2T 14-6 to 10; 17-1 to 7; Dsa 9) Among other circumstances, Cromedy himself was the "victim of a horrific shooting" before he was arrested in the instant case. (2T 7-25 to 8-3; PSR 13, 18) Cromedy was "shot in both arms, both legs, [his] back and [his] neck." (PSR 13, 18) In total, he "had 12 bullets in his body." (2T 8-3) His injuries from being "shot a number of times" were "serious": He still has at least one "bullet lodged in his back as a right of being shot" (2T 13-19 to 20; PSR 13, 18), and a "number of [other] bullets that are still in his body that couldn't be surgically removed." (2T 8-5 to 7) He also "has a tube in his right arm for his blood circulation." (PSR 13, 18; 2T 8-3 to 5) He "continue[s] to require medical intervention" for "pain." (2T 13-21 to 23)

LEGAL ARGUMENT

POINT I

Because N.J.S.A. 2C:39-5(j) codifies a substantive "first degree crime" that is not listed in N.J.S.A. 2C:43-6(c), sentencing courts are barred from imposing a mandatory N.J.S.A. 2C:43-6(c) parole disqualifier for N.J.S.A. 2C:39-5(j) convictions. This Court must vacate the erroneous imposition of a 5-year mandatory parole disqualifier, and remand for resentencing.

This Court must reverse the Appellate Division opinion, vacate the illegal imposition of a mandatory parole disqualifier, and remand for re-sentencing. N.J.S.A. 2C:39-5(j) must be construed as a substantive crime that is not eligible for a mandatory Graves Act parole disqualifier. Because the plain language is unambiguous, this Court should not reach the legislative history, but if it does, that history reinforces the plain language. Alternatively, the rule of lenity bars a mandatory parole disqualifier. The Appellate Division's contrary interpretation is wrong. The defendant agrees with the State that on resentencing, the court may evaluate anew the prosecutor's argument for a discretionary parole bar, along with Cromedy's argument for no parole bar.

This Court's review of the proper interpretation of N.J.S.A. 2C:39-5(j) and N.J.S.A. 2C:43-6(c) is de novo. In the Matter of Registrant R.H., 258 N.J. 1, 12 (2024). No "deference" is owed to the "trial court or Appellate Division's

interpretive legal conclusions." State v. Cooper, 256 N.J. 593, 605 (2024). Rather, this Court must apply "fresh eyes." State v. Morrison, 227 N.J. 295, 308 (2016).

The "framework for regulating the possession of firearms and other weapons is contained in three sections of Chapter 39," including "39-5, Unlawful Possession of Weapons," which "prohibit[s] possession of firearms and other weapons[.]" State v. Harmon, 104 N.J. 189, 197 (1986). The Graves Act, N.J.S.A. 2C:43-6(c), is a sentencing statute that "imposes a mandatory minimum term of incarceration on an offender []who uses or possesses a firearm while committing … certain designated crimes." State v. Nance, 228 N.J. 378, 384 (2017) (emphasis added).

The Legislature amended N.J.S.A. 2C:39-5 and N.J.S.A. 2C:43-6 via passage of L. 2013, c. 113, effective August 8, 2013. The amendment added subsection (j) to N.J.S.A. 2C:39-5. It states: "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 [N.J.S.A. 2C:43-7.2] is a first degree crime." (Dsa 30-35)

Courts have since interpreted this plain language to unambiguously identify a substantive crime, and indeed the State has advanced this interpretation of the plain language. See Morrison, 227 N.J. at 308 (even on de novo review of a statute's plain language, this Court may be "persuaded by the[] reasoning" of lower courts). Prior to this case, in State v. Mack, 2017 WL 4530254 (App. Div. 2017) and State v. Canadas, 2018 WL 3371010 (App. Div. 2018), the Appellate Division

interpreted N.J.S.A. 2C:39-5(j) to codify a separate "first degree crime" that does not come within the Graves Act. (Dsa 36-39; Dsa 47-58) This Court should adopt the holdings in Mack and Canadas, which persuasively undercut the Panel's reasoning. Specifically, this Court should hold that N.J.S.A. 2C:39-5(j) is a substantive statute identifying a first-degree crime not subject to the Graves Act.

In Mack, the State asked the Appellate Division to establish that its prosecutors have discretion to charge N.J.S.A. 2C:39-5(j) as a separate, substantive, stand-alone first degree crime — and got what it asked for. (Dsa 36-39) The State charged Mack with violating N.J.S.A. 2C:39-5(j), a "first-degree crime," but the trial court then held that N.J.S.A. 2C:39-5(j) was a sentencing statute and not a substantive statute, and that prosecutors did not have discretion to charge it as a separate crime. Mack, 2017 WL at *1. Thus, the trial court dismissed the State's indictment charging Mack with a separate crime under N.J.S.A. 2C:39-5(j). Ibid. The State appealed and argued that N.J.S.A. 2C:39-5(j) does establish a separate crime. Ibid. Mack agreed with the State that N.J.S.A. 2C:39-5(j) is a separate crime. Ibid. Reversing the trial court, the Appellate Division also agreed with the State, and "h[e]ld that N.J.S.A. 2C:39-5(j) is a substantive statute identifying a separate crime subject to indictment and trial by jury." Ibid.

After the State won its appeal in Mack, the Model Jury Charge Committee also approved a model charge for first-degree N.J.S.A. 2C:39-5(j), consistent with

the State's position that it is a substantive crime of which a defendant may be charged and convicted. (Dsa 40-46) The Committee adopted the State's position that when the State charges the defendant with violating first-degree N.J.S.A. 2C:39-5(j) based on possession of a handgun and a prior NERA conviction, a trial court should tell the jury: "Count ___ charges the defendant with possession of a handgun by a previously convicted person." (Dsa 40) The model explained that to secure an N.J.S.A. 2C:39-5(j) conviction, the State must prove all elements of the crime beyond a reasonable doubt, including "[t]hat the defendant has a prior conviction of an enumerated crime in N.J.S.A. 2C:43-7.2[.]" (Dsa 40)

That prosecutorial discretion that the State won in Mack — the discretion to charge N.J.S.A. 2C:39-5(j) as a first-degree firearms crime — comes with a trade-off, because N.J.S.A. 2C:39-5(j) is not an offense "designated" in N.J.S.A. 2C:43-6(c). Nance, 228 N.J. at 384. And following Mack, Canadas held that N.J.S.A. 2C:39-5(j) is not subject to the mandatory sentencing terms in N.J.S.A. 2C:43-6(c). (Dsa 47-58) In Canadas, the State charged the defendant with subsection (j), and he was convicted at a bifurcated trial. 2018 WL at *1. Relying on the Graves Act, the trial court sentenced Canadas on the N.J.S.A. 2C:39-5(j) offense to an extended term of 30 years in prison, including at least 15 years without parole. Id. at *2. Canadas argued that his sentence was illegal because the N.J.S.A. 2C:39-5(j) offense "does not come within the Graves Act." Ibid. The Appellate Division

agreed, and held, "The trial court erred in imposing a mandatory extended-term sentence on a firearm crime not enumerated in N.J.S.A. 2C:43-6(c) …. 'Because the Graves Act extended term sentencing provisions enumerate the crimes that trigger such sentences, and because [N.J.S.A. 2C:39-5(j)] is not so enumerated,' defendant's sentence for that crime 'should have been imposed without a Graves Act extended term.'" Id. at *10 (citing State v. Livingston, 340 N.J. Super. 133, 140 (App. Div. 2001), aff'd, 172 N.J. 209, 215-16 (2002)).

Here, the Appellate Division split from the well-reasoned holdings in Mack and Canadas that N.J.S.A. 2C:39-5(j) expresses a substantive crime of which one may be charged and convicted, and instead held that N.J.S.A. 2C:39-5(j) expresses the "gradation of a penalty" for N.J.S.A. 2C:39-5(a), (b), (c), and (f) convictions. (Dsa 24) This Court should find that the Appellate Division erred, and hold that N.J.S.A. 2C:39-5(j) is a substantive statute identifying a separate crime that does not come within the Graves Act because it is not enumerated therein.

A. Given the principles of statutory interpretation, N.J.S.A. 2C:39-5(j) must be construed as a substantive offense that does not require an N.J.S.A. 2C:43-6(c) mandatory parole disqualifier.

1. The plain language of N.J.S.A. 2C:39-5 expresses that subsection (j) codifies a substantive "first degree crime" of which a person may be "convicted," without being convicted of a crime under any other subsection.

The plain language of N.J.S.A. 2C:39-5 is unambiguous: subsection (j) is a substantive statute establishing a first-degree crime of which a person may be

charged and convicted, independent of convictions for other N.J.S.A. 2C:39-5 charges.

The "plain language of the statute" is both the "start[ing]" point and the "best indicator of legislative intent," which is what statutory interpretation aims to "determine," R.H., 258 N.J. at 12, and "effectuate," In the Interest of K.O., 217 N.J. 83, 91 (2014), as its "overriding goal." State v. Hudson, 209 N.J. 513, 529 (2012). This Court has consistently emphasized the importance of the statutory text: "The first rule of statutory interpretation is to look to the plain language of the statute." State v. Bell, 250 N.J. 519, 534 (2022); see also State v. Scriven, 226 N.J. 20, 34 (2016) (the words in the statute are the "best indicator of the statute's meaning"); Lenihan, 219 N.J. at 262 (the plain language of the statute was "chosen by the Legislature"); K.O., 217 N.J. at 91, 94 (the "first step … is to consider the plain language of the statute," and to give "deference to the words chosen by the Legislature"); Hudson, 209 N.J. at 529 ("we adhere to the belief" that the "inquiry … begins with the language of the statute"); State v. Hupka, 203 N.J. 222, 231-32 (2010) (we "begin by reading and examining the text of the act and drawing inferences concerning the meaning from its composition and structure").

Thus, our starting point is the plain language of N.J.S.A. 2C:39-5(j). R.H., 258 N.J. at 12. That "statute's plain language …support[s] the interpretation that N.J.S.A. 2C:39-5(j) is a substantive provision identifying a separate crime,"

because it explicitly refers to itself as a "first degree crime." Mack, 2017 WL at *2. As the Appellate Division concluded in Mack, "the language 'first degree crime' plainly means that subsection j is identifying a separate substantive offense." Ibid. That is, Mack inferred from subsection (j)'s plain language — "is a first degree crime" — that the Legislature had added a substantive "crime" to (j).

It is a "guiding principle" that the plain language of subsection (j) must also be read alongside the "surrounding statutory provisions" in N.J.S.A. 2C:39-5, so as to give "context" to the "overall scheme." K.O., 217 N.J. at 95. See also Cooper, 256 N.J. at 605 ("Statutes must be read in their entirety."); Facebook v. New Jersey, 254 N.J. 329, 353 (2023) ("also look to other parts of the statute for context"); State v. Brown, 463 N.J. Super. 33, 49 (App. Div. 2020) (plain language should be read "in relation to other constituent parts" of the statute).

Thus, subsection (j) of N.J.S.A. 2C:39-5 must be read "in the context" of subsection (h) of N.J.S.A. 2C:39-5 — the only other provision in N.J.S.A. 2C:39-5 in which the Legislature directly referred to subsection (j) — to "give sense to the legislation as a whole." R.H., 258 N.J. at 12; K.O., 217 N.J. at 95. The legislation that added subsection (j), L. 2013, c. 113, also amended subsection (h), so that N.J.S.A. 2C:39-5(h) now reads: "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." N.J.S.A. 2C:39-5(h) (underlining how the

legislation amended N.J.S.A. 2C:39-5(h)). (Dsa 30-35) For at least five reasons, the plain language of the amendment to subsection (h) is incompatible with construing subsection (j) as a grading statute rather than as a substantive offense.

First, subsection (h)'s plain language directly refers to subsection (j) as a statute under which a person may be "convicted" of a crime. In assessing plain language, we apply the "ordinary meaning." R.H., 258 N.J. at 12. Here, there is little mystery as to meaning; as the Appellate Division put it, "'conviction' simply means 'conviction,' in New Jersey or elsewhere." Matter of K.M.G., 477 N.J. Super. 167, 177 (App. Div. 2023). Dictionaries confirm that to be "convicted" means to be "guilty of a criminal offense." New Oxford American Dictionary (3d. ed. 2010); see also Black's Law Dictionary (11th ed. 2019) (defining "convict" as "to find (a person) guilty of a criminal offense"). For the Legislature to say that a person may be "convicted of a crime under … j" expresses that subsection (j) is a substantive criminal statute under which a person may be guilty.

Second, subsection (h)'s use of the term "or" expresses in plain language that convictions under subsections (a), (b), and (f) are distinct from a conviction under subsection (j). The ordinary meaning of the placement of the word "or" in the list "subsection a., b., f. or j." (emphasis added) is that a person may be "convicted of a crime under" subsection (j) without being "convicted of a crime under" any of the preceding subsections. See New Oxford American Dictionary

(defining "or" as a conjunction that is "used to link alternatives") (emphasis added). That is, subsection (h)'s plain language use of "or" indicates that subsection (j) does not grade subsections (a), (b), or (f); it is an alternative substantive statute under which a person may be separately "convicted of a crime."

Third, the plain language of subsection (h) groups subsection (j) alongside subsections (a), (b), and (f) — other substantive possessory offenses — in one list of enumerated "convict[ions]" that make a person statutorily "ineligible" for an intensive supervision program. It is a "helpful" principle of statutory construction that "words may be … controlled by those with which they are associated." Germann v. Matriss, 55 N.J. 193, 220 (1970) (anglicizing the principle of noscitur a sociis, a canon of construction that translates as "to be known by associates"); see also H.D., 241 N.J. at 418 ("Relevant canons of statutory construction" may assist in "determin[ing] the Legislature's intent."). Here, because the Legislature in subsection (h) associated subsection (j) with subsections (a), (b), and (f) in the same list, our understanding of (j) is "controlled" by that association, Germann, 55 N.J. at 220; the inference is that subsection (j) was categorized by the Legislature as being a substantive statute, just like subsections (a), (b), and (f), which no one disputes are substantive. It would have been a nonsensical mix if the Legislature had intended to group a grading statute alongside three substantive crimes in its single list of enumerated N.J.S.A. 2C:39-5 statutes.

Fourth, subsection (h)'s plain language listing of "a., b., f., or j." expresses that subsection (j) is a distinct offense from subsections (a), (b), and (f), not a grading of the others, because when interpreting statutes we presume that the Legislature avoided unnecessary surplusage. If subsection (j) graded subsection (a), (b), and (f) convictions, rather than being a separate crime, then it would have been redundant to list subsections (a), (b), and (f) alongside subsection (j). To spell out the redundancy, if subsection (j) were a statute that grades other convictions, then subsection (h) would mean, in part: "A person who is convicted of a crime under subsection a., b., f. or [a., b., … or f.] … shall be ineligible …." That redundancy would not be sensible. When construing a statute, courts should "avoid rendering any part of the statute superfluous." K.O., 217 N.J. at 91. There is a "bedrock assumption" that the Legislature did not use "meaningless or unnecessary language." Ibid. See also State v. Gargano, 476 N.J. Super. 511, 524 (App. Div. 2023) (interpretation should not "render any language … void or insignificant"). To avoid rendering as meaningless surplusage the Legislature's mention of convictions under subsections (a), (b), and (f) in subsection (h)'s list, subsection (j) must be construed as a substantive crime.

Fifth, the omission of subsection (c) from subsection (h)'s plain language likewise expresses that subsection (j) is an offense distinct from subsection (c). The inclusion in subsection (h) of subsections (a), (b), (f), and (j), but not (c), implies

the Legislature excluded subsection (c). United States v. Nasir, 17 F.4th 459, 471-72 (3d. Cir. 2021) (anglicizing the principle of expressio unius est exclusio alterius, a "canon of construction" that translates as "the expression of one thing is the exclusion of the other"). That is, subsection (h) does not make persons convicted of possessing a rifle or shotgun, N.J.S.A. 2C:39-5(c), ineligible for intensive supervision, because subsection (c) was omitted from subsection (h); a person convicted under subsection (c) is not subject to the same restrictions as those convicted under subsections (a), (b), (f), or (j). However, if subsection (j) graded subsection (a), (b), (c), and (f) convictions, rather than being a separate crime, then subsection (c) would logically be implied in subsection (h) despite the former's omission. To spell it out, if subsection (j) were a statute that grades other convictions, then subsection (h) would mean: "A person who is convicted of a crime under subsection a., b., f. or [a., b., c., or f.] … shall be ineligible …." But subsection (c) is not implied in subsection (h), because if subsection (c) were implied in subsection (h), then it would have been arbitrary for the Legislature to also explicitly list subsections (a), (b), and (f), which would likewise be implied in subsection (h) by subsection (j) if the latter were a grading statute. The inference from the disparate treatment of these statutes in subsection (h) is that the Legislature intended subsections (a), (b), (c), (f), and (j) to all be distinct crimes, with different consequences; the last is not a statute that grades the others.

In summary, the plain language of N.J.S.A. 2C:39-5 indicates that subsection (j) is a substantive crime. Subsection (j) refers to itself as being a "crime," not a grading statute. It must also be read contextually alongside subsection (h), which refers to subsection (j) as a criminal statute under which a person may be "convicted," including without being convicted of a crime under any subsection but (j). Subsection (h) further categorizes subsection (j) by enumerating it alongside a group of qualifying statutes that includes subsections (a), (b), and (f) — all criminal statutes under which a person may be convicted, not grading statutes. Finally, construing subsection (j) not as a substantive offense but as a statute that grades subsections (a), (b), (c), and (f) would absurdly render subsection (h)'s enumeration of subsections (a), (b), and (f) as three unnecessary surplusages, while also requiring subsection (c) to be implicitly read into subsection (h), even though the Legislature excluded subsection (c) from subsection (h) by omission. Reading the plain language of N.J.S.A. 2C:39-5 in context, subsection (j) is unambiguously a substantive offense of which a person may be convicted, without being convicted under any other subsection.

2. The plain language of N.J.S.A. 2C:43-6(c) expresses that a conviction under N.J.S.A. 2C:39-5(j) does not require a mandatory parole disqualifier, because the latter is omitted from the former's enumerated list of qualifying convictions.

The next issue is whether a conviction under N.J.S.A. 2C:39-5(j) is subject to the Graves Act, N.J.S.A. 2C:43-6(c). The plain language of N.J.S.A. 2C:43-6(c)

unambiguously resolves the issue: an N.J.S.A. 2C:39-5(j) conviction is not subject to the Graves Act's mandatory terms.

Again, our "starting point" and the "best indicator" of the Legislature's intent is the "plain language" of the statute. R.H., 258 N.J. at 12. The plain language of N.J.S.A. 2C:43-6(c) lists the qualifying offenses of which a person "has been convicted" that require a mandatory parole disqualifier, and N.J.S.A. 2C:39-5(j) is not among the enumerated convictions.

In Canadas, the Appellate Division held that the "plain language" of Chapter 43 dictates that N.J.S.A. 2C:39-5(j) is not a Graves Act offense, because N.J.S.A. 2C:43-6(c) does not enumerate N.J.S.A. 2C:39-5(j). 2018 WL at *7. The Appellate Division explained that "N.J.S.A. 2C:43-6(c) … clearly and unambiguously lists only 'subsection a., b., c., or f. of N.J.S. 2C:39-5' among the enumerated firearm crimes eligible for such [Graves Act mandatory] terms." Id. at *10. The Legislature "pointedly did not add [N.J.S.A. 2C:39-5(j)'s first-degree offense] to N.J.S.A. 2C:43-6(c)'s list." Id. at *12. And the "legislators' words are by far the most decisive evidence of what they would have done[.]" Id. at *13.

Canadas's explanation of how to interpret an omission in the plain language of N.J.S.A. 2C:43-6(c)'s list has been echoed elsewhere. As the Appellate Division also explained in State v. Bailey, 2022 WL 274271, *1 n.2 (App. Div. 2022) (Dsa 59-66), when the "State also moved pursuant to N.J.S.A. 2C:43-6(c)" for an

"extended term of imprisonment for a defendant convicted of certain Chapter 39 crimes … [t]he judge denied this motion, finding subsection (j) was not one of the Chapter 39 crimes enumerated in N.J.S.A. 2C:43-6(c)." And appellate courts, including this Court, routinely apply the expressio unius est exclusio alterius canon of construction, Nasir, 17 F.4th at 471-72, to statutes throughout the Code. See, e.g., R.H., 258 N.J. at 12 (a term "should not be implied where excluded" by the plain language); Cooper, 256 N.J. at 606 ("when a statute enumerates predicate crimes, that list is deemed to be exclusive"); State v. Fuqua, 234 N.J. 583, 591 (2018) ("we will not … add a [term] to a statute that the Legislature chose to omit"); State v. Olsvary, 357 N.J. Super. 206, 211 (App. Div. 2003) ("'Where a statute fails to provide a penalty it has been uniformly held that it is beyond the power of the Court to prescribe a penalty.'") (quoting State v. Fair Lawn Service Center, 20 N.J. 468, 473 (1956)); State v. Staten, 327 N.J Super. 349 (App. Div. 2000) (the Legislature's "failure to include the word 'attempt'" in the NERA statute "is strongly indicative of the Legislature's intention that NERA does not apply to a mere attempt," because "penal statutes are to be strictly construed").

Also, N.J.S.A. 2C:43-6(c) must be construed "in pari materia … as a unitary and harmonious whole" with related sections. Williams, 255 N.J. at 46 ("When more than one statute deals with the same subject … we interpret them together"). Thus, N.J.S.A. 2C:43-6(c) must be "harmoni[zed]" with N.J.S.A. 2C:39-5, as these

statutes prescribe which weapons possession offenses carry a mandatory parole disqualifier. Williams, 255 N.J. at 46. That means harmonizing N.J.S.A. 2C:39-5(h)'s inclusion of subsection (j) with N.J.S.A. 2C:43-6(c)'s exclusion of the same.

N.J.S.A. 2C:43-6(c) omits N.J.S.A. 2C:39-5(j) as a qualifying conviction even though subsection (j) was enumerated as a qualifying conviction in N.J.S.A. 2C:39-5(h) and is therefore not superfluous. Courts "should not add language to section (x) that the Legislature chose to include in section (y) but left out of (x)." R.H., 258 N.J. at 12. "[W]hen 'the Legislature has carefully employed a term in one place yet excluded it in another, it should not be implied where excluded.'" Cooper, 256 N.J. at 605 (citing Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 234 (1998)). See also Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); Staten, 327 N.J. Super. at 354-55 (the Legislature omitted attempts as qualifying NERA convictions even though it did include attempts as qualifying convictions in other statutes, such as the Graves Act, so the "failure to include the word 'attempt' in NERA is strongly indicative of the Legislature's intention that NERA does not apply to a mere attempt").

Finally, N.J.S.A. 2C:43-6(c) must be read "in the context" of "surrounding statutory provisions" within N.J.S.A. 2C:43-6 — including subsection (b) — to

"give sense to the legislation as a whole." R.H., 258 N.J. at 12; K.O., 217 N.J. at 95. Statutes dealing with "specific[s]" may be exceptions to statutes of "general" application. Williams, 255 N.J. at 47. N.J.S.A. 2C:43-6(b) (expressing that courts "may fix a minimum term" where "aggravating factors substantially outweigh the mitigating factors") is a "general" statute of broad application that makes parole disqualifiers permissive; N.J.S.A. 2C:43-6(c) enumerates specific exceptions for which parole disqualifiers are mandatory. N.J.S.A. 2C:39-5(j) is not specifically enumerated in N.J.S.A. 2C:43-6(c), so the plain language indicates no exception to the general rule that parole disqualifiers are not mandatory. See State v. Rodriguez, 238 N.J. 105, 116 (2019) ("when the Legislature wishes to leave the imposition of a period of parole ineligibility to the discretion of the judge," it has done so by being "silent as to the imposition of a minimum term and parole ineligibility. In that case, nothing precludes the sentencing judge from imposing a discretionary period of parole ineligibility").

3. Because the plain language of N.J.S.A. 2C:39-5 and N.J.S.A. 2C:43-6 is unambiguous, that ends this Court's inquiry.

The plain language of N.J.S.A. 2C:39-5 and N.J.S.A. 2C:43-6 leaves no ambiguity: a court may not impose an N.J.S.A. 2C:43-6(c) mandatory parole bar for an N.J.S.A. 2C:39-5(j) conviction. "If the meaning of the text is clear and unambiguous on its face, we must enforce that meaning." Canadas at *10.

It would be inappropriate to resort to extrinsic sources to create ambiguity where it does not exist. This Court has emphasized further inquiry is counter-productive if a statute's plain language resolves the inquiry. See R.H., 258 N.J. at 12 ("When the plain language of a statute is clear, our task is complete.").[1]

This Court should not re-write either N.J.S.A. 2C:39-5(j) or N.J.S.A. 2C:43-6(c). See Scriven, 226 N.J. at 34 ("It is not our function to rewrite a plainly written statute or to presume that the Legislature meant something other than what it conveyed in its clearly expressed language.").

4. Even if this Court reaches the legislative history, that history reinforces the plain meaning: that an N.J.S.A. 2C:39-5(j) conviction does not mandate an N.J.S.A. 2C:43-6(c) parole disqualifier.

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[1] See also Cooper, 256 N.J. at 605 ("If the language is clear, the Court need not look beyond the text to determine its meaning."); Facebook, 254 N.J. at 353 ("When the text is clear, our inquiry is complete."); Bell, 250 N.J. at 534 ("If in ascribing to those words their ordinary meaning and significance, the Legislators' intent is self-evident, we need not search further for guidance."); State v. Fede, 237 N.J. 138, 148 (2019) ("If the plain language of a statute is clear, that ends the matter; we then are duty bound to apply that plain meaning."); Lenihan, 219 N.J. at 262 ("When the Legislature's chosen words lead to one clear and unambiguous result, the interpretive process comes to a close, without the need to consider extrinsic aids."); Hudson, 209 N.J. at 529 ("If the language leads to a clearly understood result, the judicial inquiry ends without any need to resort to extrinsic sources. In other words, extrinsic aids may not be used to create ambiguity when the plain language of the statute itself answers the interpretative question"); State v. Regis, 208 N.J. 439, 447 (2011) ("If a statute's language is unambiguous, then the Court's interpretive process is over."); Hupka, 203 N.J. at 232 ("If a plain-language reading of the statute leads to a clear and unambiguous result, then our interpretive process is over."); State v. Gandhi, 201 N.J. 161, 180 (2010) ("when a statute's language appears clear, we need delve no deeper than the act's literal terms to divine the Legislature's intent").

Examination of the legislative history is "only" permissible when statutory plain language is ambiguous, which is not the case here. Regis, 208 N.J. at 447. Nevertheless, the history of the legislation that enacted subsection (j) strongly reinforces the unambiguous plain meaning. (Dsa 30-35)

As the Appellate Division found in Canadas, when "the Legislature created N.J.S.A. 2C:39-5(j)," it "simultaneously revised N.J.S.A. 2C:43-6(c)'s list of crimes" that require a mandatory parole disqualifier. Canadas, 2018 WL at *11. The Legislature "added N.J.S.A. 2C:39-5(f) … to the list of enumerated crimes," "but did not add N.J.S.A. 2C:39-5(j) to that list." Ibid. The Appellate Division explained, "We read the Legislature's choice to add only N.J.S.A. 2c:39-5(f) to N.J.S.A. 2C:43-6(c) 'as proof that the Legislature intended to specify offenses subject to the [Graves Act], rather than leaving to the courts to draw such inferences.'" Ibid. (citing State v. Patterson, 435 N.J. Super. 498 (App. Div. 2014)).

Simultaneously, the Legislature revised N.J.S.A. 2C:39-5(h) by adding N.J.S.A. 2C:39-5(j) to its list of enumerated crimes. (Dsa 30-35) That is, in the same bill, the Legislature added "or j." to the list of enumerated convictions in N.J.S.A. 2C:39-5(h), but did not add "or j." to the list of enumerated N.J.S.A. 2C:39-5 convictions in N.J.S.A. 2C:43-6(c), even though the Legislature did add "or f." to the list of enumerated N.J.S.A. 2C:39-5 convictions in N.J.S.A. 2C:43-

6(c). (Dsa 30-35) Therefore, "there is no legislative history … which contradicts the plain meaning of the act"; rather, the history reinforces that meaning. Id. at *13.

5. Alternatively, if the Code is ambiguous, then the rule of lenity bars imposition of a mandatory parole disqualifier.

If the Legislature did not unambiguously pass a law requiring a mandatory parole disqualifier for N.J.S.A. 2C:39-5(j) prosecutions, then the judiciary should not get ahead of the Legislature. The lenity canon requires that, "where it is not clear whether something is permitted under a criminal statute, the benefit of this lack of clarity should accrue to the defendant." State v. Rivastineo, 447 N.J. Super. 526, 531-32 (App. Div. 2016). See also K.O., 217 N.J. at 97 (where "reasonable people can differ" on the meaning of a statute, a court should "decline to give [a] statute its harshest possible reading," and should interpret it according to "the more lenient construction"); State v. Rangel, 213 N.J. 500, 515 (2013) ("when interpreting a criminal statute, ambiguities that cannot be resolved by either the statute's text or extrinsic aids must be resolved in favor of the defendant").

In expounding on why it is objectionable to impose the "most severe sanctions" based on criminal statutes that are "not … model[s] of perfect clarity," K.O., 217 N.J. at 96, courts have frequently cited "two policies that have long been part of our tradition." United States v. Bass, 404 U.S. 336, 348 (1971). First, a criminal defendant is entitled to "fair warning … of what the law intends to do if a certain line is passed." State v. Gelman, 195 N.J. 475, 482 (2008). Second, because

the Legislature, and not the courts, should define the contours of criminal activity, there is an "instinctive distaste against men and women languishing in prison unless the lawmaker has clearly said they should." Id. at 482-83. Essentially, "No one shall be punished for a crime unless that crime and its punishment are clearly set forth in positive law." Regis, 208 N.J. at 451-52.

The severe consequences of judicially converting many of N.J.S.A. 2C:39-5's second- and third-degree offenses into first-degree offenses, including several offenses subject to the Graves Act — N.J.S.A. 2C:39-5(a), (b)(1), (c)(2), and (f) — should give this Court great pause. Many offenders who would have served second- or third-degree terms under the plain language of N.J.S.A. 2C:39-5 and N.J.S.A. 2C:43-6(c) would instead be exposed to much longer first-degree ordinary or extended terms, up to and including life terms for what could be a second-ever offense, with a mandatory parole disqualifier of up to half of life to boot. These severe consequences are why the Appellate Division held in Canadas that, "even if N.J.S.A. 2C:43-6(c)'s text was ambiguous, the rule of lenity would require us to interpret it as inapplicable to N.J.S.A. 2C:39-5(j)." Id. at *12.

The evidence is abundant here that it is, at minimum, reasonable to construe the plain language of N.J.S.A. 2C:39-5(j) as a substantive first-degree charge, to which the Graves Act would not apply, even if that is not the only possible interpretation. First, the Model Jury Charge Committee's approval of instructions

construing N.J.S.A. 2C:39-5(j) as a standalone charge, where the prior conviction is treated as an element of the offense, attests to the reasonableness of that conclusion. The prosecutor in this case reasonably applied that framework in front of the Grand Jury, when she explained that Cromedy's "prior criminal conviction" was one of the "elements of the offense." (4T 38-12 to 17) (emphasis added)

Second, the State's prosecutors elsewhere have routinely construed N.J.S.A. 2C:39-5(j) as a substantive first-degree charge: In Mack, for example, the State appealed from the trial court's dismissal of its indictment because the prosecutor construed N.J.S.A. 2C:39-5(j) as "establish[ing] a first-degree crime subject to indictment and trial by jury," and the trial court did not. 2017 WL at *1. Nor is Mack an aberration: prosecutors frequently construe N.J.S.A. 2C:39-5(j) as a substantive crime, not as a statute that grades N.J.S.A. 2C:39-5(a), (b), (c), and (f). See, e.g., State v. Demby, 2024 WL 3039795, *1 (App. Div. 2024) (the State charged defendant with one count of first-degree N.J.S.A. 2C:39-5(j) and a separate count of second-degree N.J.S.A. 2C:39-5(b)) (Dsa 67-76); State v. Higgs, 253 N.J. 333, 346 (2023) (same); State v. Thomas, 2023 WL 7545329, *1 (App. Div. 2023) (same) (Dsa 77-81); State v. Gibbs, 2023 WL 2720949, *2 (App. Div. 2023) (same) (Dsa 82-85); State v. Cambrelen, 473 N.J. Super. 70, 74, 74 n.2 (App. Div. 2022) (same); State v. Maloney, 2022 WL 16645704 (App. Div. 2022), *1 (App. Div. 2022) (same) (Dsa 86-111); State v. Neal, 2022 WL 802801, *1, *1 n.1

(App. Div. 2022) (same) (Dsa 112-116); State v. Allah-Shabazz, 2021 WL 796593, *1 n.1 (App. Div. 2021) (same) (Dsa 117-121); Bailey, 2022 WL at *1 (same) (Dsa 59-66); State v. W.B., 2020 WL 7419063, *1 (App. Div. 2020) (same) (Dsa 122-126); State v. Grady, 2019 WL 2571441, *1 (App. Div. 2019) (same) (Dsa 127-130); Canadas, 2018 WL at *1 (same) (Dsa 47-58); State v. Wilkins, 2018 WL 1415587, *1 (App. Div. 2018) (same). (Dsa 131-134) Third, other courts confronting the issue have persuasively construed the plain language of the Code differently than the Appellate Division did in the instant case. See, e.g., Bailey, 2022 WL at *1 n.2; Canadas, 2018 WL at *10; Mack, 2017 WL at *1.

The Legislature has not given "fair warning" of any first-degree Graves Act crimes in N.J.S.A. 2C:39-5. Gelman, 195 N.J. at 482. There should be "instinctive distaste" against a judicial re-writing of N.J.S.A. 2C:39-5 and N.J.S.A. 2C:43-6(c) to create four new first-degree Graves Act crimes in N.J.S.A. 2C:39-5, when lawmakers have not "clearly" enacted any. Regis, 208 N.J. at 451-52.

B. The Appellate Division's contrary interpretation in the instant case is wrong and must be reversed.

1. The Appellate Division failed to review unambiguous plain language in the enacted amendments to N.J.S.A. 2C:39-5 and N.J.S.A. 2C:43-6, and instead jumped straight to conclusions about ambiguous language in the unenacted extrinsic sponsor statements.

First, the Appellate Division gave short shrift to the plain language. The Panel stated that it "decline[d] to rely upon" the plain language "exclusio[n]" of

subsection (j) from N.J.S.A. 2C:43-6(c)'s enumerated list of offenses. Cromedy, 478 N.J. Super. at 165. And that was it for the Panel's plain language analysis: the Appellate Division did not mention subsection (h) of N.J.S.A. 2C:39-5 anywhere in its opinion, and failed to notice that the enacted plain language of N.J.S.A. 2C:39-5(h) characterized subsection (j) as a substantive criminal statute.

Second, the Appellate Division overlooked how the Legislature's procedure reinforced the plain meaning of its amendments. In a single sentence, the Panel dismissed the Legislature's simultaneous amendment to the plain language of N.J.S.A. 2C:43-6(c) in the same bill that amended the plain language of N.J.S.A. 2C:39-5: "The fact the Legislature amended the Graves Act on the same day it enacted N.J.S.A. 2C:39-5(j) does not convince us of its intent." Id. at 166. Again, that was it for the Panel's analysis of whether the Legislature's procedure shed light on the meaning of the plain language: the Appellate Division failed to notice that the Legislature added subsection (j) to an enumerated list of offenses in N.J.S.A. 2C:39-5, in the same bill that added N.J.S.A. 2C:39-5(f) but excluded (j) from the enumerated list of offenses in N.J.S.A. 2C:43-6.

Instead, the Panel skipped to a review of unenacted extrinsic statements. (Dsa 21-22) Specifically, the Appellate Division underlined a passage in the sponsors' statement that framed the bill as "upgrad[ing] the crime" to a "first-degree offense": "This bill upgrades the crime of unlawful possession of a firearm

to a first[]degree crime in certain circumstances…" Ibid. (emphasis by Appellate Division). The Panel said, "The statement … evinces the Legislature's intent to upgrade weapons possession offenses." Ibid. The Panel appeared to believe that the ambiguous term "upgrades" in the statement, which does not appear in the enacted language, indicates that N.J.S.A. 2C:39-5(j) is not substantive.

For at least four reasons, the Appellate Division's reliance on extrinsic materials was an unpersuasive substitute for a review of the plain language. First, as explained supra, the Panel erred by reaching sponsors' statements at all, because the plain language of N.J.S.A. 2C:39-5 and N.J.S.A. 2C:43-6(c) expresses a "pointed[]" and "decisive" legislative choice in a "clear and unambiguous" manner, which is reinforced by the Legislature's "simultaneous" amendments. Canadas, 2018 WL at *10-13. See Hudson, 209 N.J. at 529 ("extrinsic aids may not be used to create ambiguity" when the "plain language of the statute itself answers the interpretative question").

Second, sponsors' statements "may represent the viewpoint of just one person, or a small group of lawmakers." DiProspero v. Penn, 183 N.J. 477, 499 (2005). The term "upgrades" did not appear in the plain language of N.J.S.A. 2C:39-5 as enacted by the whole Legislature, so no weight should be accorded.

Third, the sponsors' extrinsic use of the term "upgrades" is unilluminating. As this Court explained, sponsors' extrinsic statements may be "contradictory,

ambiguous or otherwise without substantial probative value in determining legislative meaning[.]" DiProspero, 183 N.J. at 499. The term does not necessarily refer to the substantive crimes in subsections (a), (b), (c), and (f) being upgraded to first-degree crimes. Rather, the legislator's usage may simply mean that the entire "unlawful possession" statute, N.J.S.A. 2C:39-5 as a whole, was upgraded, with the addition of subjection (j) as a substantive "first degree crime." That would be an unremarkable use of the term. For example, in State v. Brooks, 366 N.J. Super. 447 (App. Div. 2004), the Appellate Division described N.J.S.A. 2C:35-7.1 as a statute "which upgrades the crime of distribution of CDS to the second degree and enhances the penalties for distribution within 500 feet of a public housing facility"; yet no one contends N.J.S.A. 2C:35-7.1 is a statute that grades the degree and penalty of N.J.S.A. 2C:35-5 convictions rather than being a substantive crime itself. Id. at 457 (emphasis added). Moreover, as the Appellate Division explained in Mack, the sponsors' statements repeat subsection (j)'s plain language identifying it as a "first degree crime" and a "crime of the first degree"; therefore, the "legislative history [also] support[s] the interpretation that N.J.S.A. 2C:39-5(j) is a substantive provision identifying a separate crime." 2017 WL at *2.

Fourth, the sponsors' statements are best characterized as being "silent on the specific issue." K.O., 217 N.J. at 95. As this Court once explained, "sponsor or committee statements" may simply fail to "address[] the specific issue." Ibid. That

is the case here, where the sponsors' statements never say that N.J.S.A. 2C:39-5(j) is not a substantive provision, and never say that it requires a Graves Act sentence. Canadas, 2018 WL at *12 ("legislative history makes no mention of including N.J.S.A. 2C:39-5(j) as an enumerated offense under N.J.S.A. 2C:43-6(c)"). The Panel's strategy in the instant case of divining meaning from the unenacted, extrinsic, ambiguous term "upgrades" was akin to looking for clues in tea leaves when the plain language of the statute was clear and unambiguous.

2. The Appellate Division erred by finding in the instant case that no mandatory parole disqualifier would be "absurd," after previously holding that it would be "not absurd."

The Panel found that it would be "absurd" and not "sensible" to interpret N.J.S.A. 2C:39-5(j) as a substantive crime for which the Graves Act does not apply. Cromedy, 478 N.J. Super. at 167. But that is undermined by the Appellate Division's persuasive explanation in Canadas, 2018 WL at *10, that excluding N.J.S.A. 2C:39-5(j) from the Graves Act "was not absurd." Here, the Panel relied on at least three unfounded bases to support its newfound claim of absurdity.

i. The Appellate Division erroneously reversed the Code's presumption against mandatory parole disqualifiers.

The Appellate Division advanced an erroneous presumption: that N.J.S.A. 2C:39-5(j) could not be a substantive crime because the Legislature specified nowhere in the Code that an N.J.S.A. 2C:39-5(j) conviction is not subject to a mandatory parole disqualifier. Specifically, the Appellate Division wrote, "[If] the

Legislature wanted to exempt first-degree unlawful weapons offenses from the Graves Act, it would have said so." Cromedy, 478 N.J. Super. at 166.

The Panel's presumption in favor of a mandatory parole disqualifier unless the Code says otherwise is wrong, for at least three reasons. First, it reverses the Code's presumption of an ordinary sentence without a parole disqualifier, N.J.S.A. 2C:43-6(a), unless a sentencing court exercises discretion to depart from the ordinary sentence, N.J.S.A. 2C:43-6(b), or unless the Legislature has specified that a particular substantive crime carries a mandatory parole disqualifier, e.g., N.J.S.A. 2C:43-6c. The Legislature knows not only how to specify that a substantive statute requires a mandatory parole disqualifier, but to emphasize it. See Rodriguez, 238 N.J. at 117 ("the Legislature chose this language — 'fixed minimum sentence'" in N.J.S.A. 2C:40-26 to emphasize "no discretion").

For that reason, one cannot presume that a criminal statute is not substantive merely because the Legislature has not specified that a mandatory parole disqualifier would apply upon conviction. Many serious substantive crimes do not carry mandatory parole disqualifiers. See, e.g., N.J.S.A. 2C:35-7.1(a) (making it a substantive second-degree crime, without any mandatory parole disqualifier, to violate N.J.S.A. 2C:35-5(a) within 500 feet of public property).

Second, the Appellate Division's presumption that the Legislature "would have said" if it were exempting other serious weapons offenses from mandatory

parole disqualifier does not even apply to other N.J.S.A. 2C:39-5 convictions. As the Appellate Division put it in Canadas, 2018 WL at *11: "N.J.S.A. 2C:43-6(c) does not include all firearm offenses, as it also omits N.J.S.A. 2C:39-5(e)," making it a crime to possess "any firearm" in a school. Ibid. Like N.J.S.A. 2C:39-5(j), N.J.S.A. 2C:39-5(e) is a substantive crime even though it is also excluded from N.J.S.A. 2C:43-6(c), and even though the Legislature did not say that it "wanted to exempt" subsection (e) from the Graves Act. Cromedy, 478 N.J. Super. at 166.

Third, although it is true that N.J.S.A. 2C:43-6(d)(2) lists some Chapter 39 exemptions from the Graves Act, it is still specious to say that the Legislature "would have said so" if it "wanted to exempt" N.J.S.A. 2C:39-5(j). Ibid. The Appellate Division reasoned that the Legislature "set[] forth the offenses the Legislature exempted from the Graves Act, namely, convictions for unlawful possession of a BB gun, air gun, or spring guns, and those convicted of the unlawful possession of an unloaded rifle or shotgun." Ibid. But the Legislature only specified these exemptions in N.J.S.A. 2C:43-6(d)(2) for offenses that otherwise remain enumerated in the Graves Act under N.J.S.A. 2C:43-6(c). Ibid. By contrast, it would serve no purpose for the Legislature to spell out that N.J.S.A. 2C:39-5(j) is exempt from the Graves Act when it is not enumerated in N.J.S.A. 2C:43-6(c). There is likewise no reason for the Legislature to spell out that N.J.S.A. 2C:39-5(e) is exempt from the Graves Act when it is not enumerated in

N.J.S.A. 2C:43-6(c). Rather, as the Appellate Division explained in Canadas, by excluding weapons offenses from N.J.S.A. 2C:43-6(c), the Legislature exempted the excluded provisions from the Graves Act. 2018 WL at *11. It was unfounded for the Appellate Division to claim that a firearm statute cannot be substantive merely because it was omitted from N.J.S.A. 2C:43-6(c) and the Legislature did not specify that the omission was intentional. Cromedy, 478 N.J. Super. at 166-67.

ii. The Appellate Division erroneously found that because first-degree offenders without a mandatory parole disqualifier may be paroled earlier than they would be with a mandatory parole disqualifier, it would be absurd for N.J.S.A. 2C:39-5(j) to be a substantive crime.

The Appellate Division also advanced the erroneous presumption that N.J.S.A. 2C:39-5(j) could not be a substantive crime because if it were, it may result in some disparity in real time of imprisonment. Specifically, the Appellate Division wrote, "Even more compelling is the fact that… those convicted of first-degree firearm offenses … could serve lesser sentences than individuals convicted of lower-degree firearm offenses …. A first-degree offender could arguably receive a ten-year sentence and become eligible for parole before a second-degree offender[,]" which would be an "absurd result." Cromedy, 478 N.J. Super. at 167.

This is a flawed means of interpretation, for at least six reasons. First, it is a results-driven canon, but the inquiry as to whether a statute is a substantive crime of which one may be convicted is independent of the inquiry as to the sentencing consequences, and precedes the latter. See Bell, 250 N.J. at 534 ("since it is the

legislative branch that defines the unit of prosecution or 'offense' and ordains its punishment, we must first determine whether the legislature has in fact undertaken to create separate offenses") (emphasis added). That is, whether a statute is a substantive crime is an issue that does not turn on a judicial feeling that the penalties prescribed by the Legislature would be too lenient.

Second, the Legislature "could rationally believe that creating a first-degree offense provided sufficient punishment"; "it was not absurd for the Legislature to impose different penalties" on different firearm crimes. 2018 WL at *10, 12. Canadas explained that the "Legislature's addition of N.J.S.A. 2C:39-5(j)" and "making it a first-degree offense, and thus increasing the range of imprisonment to ten-to-twenty years from the third-degree offenses' three-to-five years and the second-degree offenses' five-to-ten years" was already "a substantial step to combating … serious crimes," without also requiring a Graves Act term. Id. at *12. The "ten-to-twenty-year sentencing range provided by N.J.S.A. 2C:39-5(j) … is exceeded by only a few, very serious offenses." Id. at *13. "Nothing in the act or its legislative history even hints the Legislature intended such a dramatic increase" as to require "both" a first-degree term and a Graves Act mandatory parole disqualifier in N.J.S.A. 2C:39-5(j). Id. at *12-13 (emphasis in original).

Third, under the Code, "some disparity in sentencing is inevitable." State v. Benjamin, 228 N.J. 358, 365 (2017). An odd sentencing result does not mean that

the Legislature did not intend the statutes of conviction to be substantive. A person convicted of second-degree distribution within 500 feet of public property, N.J.S.A. 2C:35-7.1, may serve a 5-year prison sentence with no parole disqualifier, while a person convicted of a lesser grading, third-degree distribution in a school zone, N.J.S.A. 2C:35-7, may serve a 5-year prison sentence with a mandatory parole disqualifier of at least 3 years. See State v. Murray, 338 N.J. Super. 80, 90 (App. Div. 2001) ("Unlike [third-degree] N.J.S.A. 2C:35-7, there is no statutory mandatory period of parole ineligibility for a conviction under [second-degree] N.J.S.A. 2C:35-7.1."). A person convicted of first-degree arson for hire, N.J.S.A. 2C:17-1(d), may serve a 10-year prison sentence without a NERA parole disqualifier, while a person convicted of a lesser grading, second-degree aggravated arson, N.J.S.A. 2C:17-1(a)(1), may serve a 10-year prison sentence with a NERA parole disqualifier; the second-degree arson crime is subject to NERA while the first-degree arson crime is not. See N.J.S.A. 2C:43-7.2(d)(11).

Fourth, the judiciary retains the power to impose a discretionary parole disqualifier of up to one-half of a sentence imposed. N.J.S.A. 2C:43-6(b). Given that judicial sentencing authority, even without a mandatory parole disqualifier, the risk of disparity being "absurd" is minimal. Cromedy, 478 N.J. Super. at 167.

Fifth, the State retains power to indict the defendant on multiple charges, some requiring a mandatory parole disqualifier and some not. As many of the

attached unpublished cases show, it is a common practice, for example, for the State to include a first-degree subsection (j) charge, which is not a Graves Act offense, and a separate second-degree N.J.S.A. 2C:39-5(b)(1) charge, which is a Graves Act offense. In appropriate cases, the State can negotiate pleas to both charges, and still obtain a first-degree Graves Act sentence. See State v. Connell, 208 N.J. Super. 688, 696 (App. Div. 1986) ("when a Graves Act crime merges with a non-Graves Act crime … the Graves Act crime survives the merger").

Sixth, it was misleading for the Appellate Division to not acknowledge that a conviction for a first-degree crime also exposes defendants to dramatically longer maximum sentences. See N.J.S.A. 2C:43-6(a) (ordinary terms of 10 to 20 years). Even an individual serving a 10-year sentence at the bottom of the first-degree range will be exposed to a maximum term greater than or equal to any sentence in the second, third-, or fourth degree range. N.J.S.A. 2C:43-6(a) (ordinary terms are collectively between 0 and 10 years for second, third-, and fourth-degree offenders). Cromedy's complaint that a first-degree offender could "become eligible for parole before a second-degree offender," 478 N.J. Super. at 167, obscures that offenders with records who violate parole frequently serve the full sentence in prison, and also that first-degree offenders are potentially exposed to decades-long extended prison terms, up to and including life, no matter how non-violent the possession. See N.J.S.A. 2C:43-7(a) (extended prison term for "crime

of the first degree" is "between 20 years and life imprisonment"). In Canadas, for example, the sentencing court imposed "an extended term of thirty years in prison" for the first-degree crime. 2018 WL at *2. Even without a mandatory parole disqualifier, the consequences of a first-degree conviction can be far more punitive and life-changing than a second-, third-, or fourth-degree conviction.

iii. The Appellate Division erroneously found that N.J.S.A. 2C:39-5(j) is analogous to other grading statutes, so it would not be sensible to construe it as a substantive crime.

The Appellate Division also erroneously found that N.J.S.A. 2C:39-5(j) is analogous to other grading statutes. Specifically, the Panel found, "The more sensible interpretation of N.J.S.A. 2C:39-5(j) is as a grading statute. Other examples of grading statutes enacted by the Legislature demonstrate our point …. [T]he Legislature can express the gradation of a penalty for a certain offense …. N.J.S.A. 2C:39-5(j) is [such] an expression[.]" Cromedy, 478 N.J. Super. at 167.

For at least four reasons, the Appellate Division was wrong to analogize the language of N.J.S.A. 39-5(j) to grading statutes that "express … a penalty for a certain offense." Ibid. First, the Appellate Division analogized N.J.S.A. 2C:39-5(j) to N.J.S.A. 2C:14-2(a)(1), citing the latter as a grading statute that "demonstrate[s] [the panel's] point." Ibid. The panel reasoned, "N.J.S.A. 2C:14-2(a)(1) upgrades sexual assault of a victim less than thirteen years old to a first-degree offense and mandates a minimum sentence of twenty-five years of imprisonment before parole

ineligibility." Ibid. But there is a stark difference between N.J.S.A. 2C:14-2a(1) and N.J.S.A. 2C:39-5(j): N.J.S.A. 2C:14-2(a) says not only that paragraph (1) is "a crime of the first degree," but also that "a person convicted under paragraph (1) … shall serve 25 years before being eligible for parole." Unlike N.J.S.A. 2C:14-2(a), N.J.S.A. 2C:39-5(j) refers to itself as a first-degree crime without also setting an enhanced mandatory period of parole ineligibility, or any other mandatory sentence. Far from "demonstrat[ing the Appellate Division's] point" that N.J.S.A. 2C:39-5(j) also expresses the grading of the penalty and is not a substantive criminal statute, N.J.S.A. 2C:14-2(a) underscores that N.J.S.A. 2C:39-5(j) is a substantive criminal statute that does not require any parole bar as a penalty. Ibid.

Second, the Appellate Division cited N.J.S.A. 2C:44-1(e) (which creates a presumption of non-imprisonment for first-time third- or fourth-degree offenders) as a counter-instance of the Legislature including language that "a defendant shall not be subject to a penalty." Ibid. The panel reasoned, "Conversely, subject to certain conditions, N.J.S.A. 2C:44-1(e) allows a court not to impose a term of imprisonment for 'a person convicted of an offense other than a crime of the first or second degree, who has not previously been convicted of an offense.'" The Appellate Division appears to mean that it construed N.J.S.A. 2C:39-5(j) as a grading statute because, unlike N.J.S.A. 2C:44-1(e), N.J.S.A. 2C:39-5(j) does not explicitly say that a defendant shall not be subject to a penalty. But this merely

underscores how far afield the Panel is. Far from "demonstrat[ing the Appellate Division's] point," the absence of any reference to penalties in subsection (j) merely underscores that (j) is not a grading statute.

Third, the Legislature knows how to emphasize that a penalty is elevated. The Legislature, for example, will frequently use the term "grading." See, e.g., N.J.S.A. 2C:13-1(c) ("Grading of kidnapping"); N.J.S.A. 2C:15-1(b) ("Grading" of robbery); N.J.S.A. 2C:16-1(e) ("Grading" of bias intimidation); N.J.S.A. 2C:18-2(b) ("Grading" of burglary); N.J.S.A. 2c:20-2(b) ("Grading" of theft). In other instances, the Legislature will frequently use terms like "otherwise" to indicate that it is not discussing a separate substantive charge, but rather the same substantive charge with a different grading. See, e.g., N.J.S.A. 2C:18-2(b) ("Otherwise"). In other instances, the Legislature will use the language of sentencing and penalties. See, e.g., N.J.S.A. 2C:35-5(b)(1) ("The defendant shall … be sentenced to a term of imprisonment …. The term of imprisonment shall include the imposition of a minimum term …."); N.J.S.A. 2C:39-4(a)(2) ("The term of imprisonment shall include the imposition of a minimum term."). The Legislature did not employ grading language in N.J.S.A. 2C:39-5(j).

Fourth, in contrast with the Panel here, Mack was convinced that N.J.S.A. 2C:39-5(j) is not a grading statute or a sentencing enhancement statute. Mack reasoned that other language "in the same statutory section" of Chapter 39,

specifically N.J.S.A. 2C:39-5(i), "supports our interpretation" that N.J.S.A. 2C:39-5(j) is a substantive provision identifying a separate crime, not a sentencing enhancement. Mack, 2017 WL at *2. N.J.S.A. 2C:39-5(i) immediately precedes N.J.S.A. 2C:39-5(j) and is unambiguously a sentencing enhancement, unlike N.J.S.A. 2C:39-5(j): N.J.S.A. 2C:39-5(i) directs that the defendant "shall be sentenced" to a "fixed" 5-year term of parole ineligibility if the "sentencing court" finds aggravating factor 5, organized crime. N.J.S.A. 2C:44-1(a)(5). Mack explained that "in contrast" with subsection (i) – which identifies the "'sentencing court' as the fact finder" – "subsection j never mentions a sentencing court," and instead "plainly states that it is creating a 'first degree crime.'" Ibid.

The analogy to other substantive crimes is more apt, for at least three reasons. First, as Mack said, N.J.S.A. 2C:39-5(j) is similar to "substantive criminal statute[s]" such as N.J.S.A. 2C:39-7, the "analogous crime of certain persons not to possess weapons." 2017 WL at *3. The certain persons statute requires the State to prove that "defendant possessed a firearm and [that] he had been previously convicted of an enumerated crime." Ibid. "Similar to the certain persons offense, N.J.S.A. 2C:39-5(j) requires proof that defendant possessed a particular type of firearm and defendant is 'a person who has a prior conviction of any of the crimes enumerated' in NERA." Ibid. The Appellate Division in Mack found that interpreting N.J.S.A. 2C:39-5(j) as a "substantive provision identifying a separate

crime" is "consistent with and supported by the established interpretation of the analogous criminal statute," N.J.S.A. 2C:39-7. Id. at *2.

Second, the Panel in the instant case gave a nonsensical reason for rejecting the analogy to N.J.S.A. 2C:39-7, that "[i]ntroducing evidence of a prior conviction, no matter how well sanitized, would severely prejudice the defense. We do not believe our Legislature intended to prejudice the defense this way and decline to interpret N.J.S.A. 2C:39-5(j) in such a fashion." Id. at 167, 170. But if courts will not recognize certain person enactments because they prejudice defendants, then N.J.S.A. 2C:39-7 must be struck from the Code as well. The defendant does not take that position; the better construction is to interpret N.J.S.A. 2C:39-5(j), like N.J.S.A. 2C:39-7, as a valid substantive offense. As for prejudice, the remedy is a bifurcated trial, which is exactly how the trial court handled the N.J.S.A. 2C:39-5(j) charge in Canadas. 2018 WL at *1. Notably, the Appellate Division in Mack, 2017 WL at *3, dismissed the concern raised in the Cromedy opinion with the State proving at trial that the defendant had previously been convicted. Indeed, it would be more prejudicial to defendants if the fact of a prior conviction elevates an offense without proof beyond a reasonable doubt, as allowed under Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), rather than it being an element of a separate substantive crime, which the State at least must prove beyond a reasonable doubt at trial. See In re Winship, 397 U.S. 358, 364 (1970) ("the Due Process Clause

protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

Third, the other element of N.J.S.A. 2C:39-5(j), requiring a violation of N.J.S.A. 2C:39-5(a), (b), (c), or (f), also has analogous provisions. It is common for substantive criminal statutes to have as an element a violation of another substantive criminal statute. For example, N.J.S.A. 2C:35-7.1 requires as an element of the second-degree crime that the offender "violate[] subsection a of N.J.S.A. 2C:35-5." This does not mean that N.J.S.A. 2C:35-7.1 is not a substantive crime. Moreover, N.J.S.A. 2C:35-7.1 and N.J.S.A. 2C:35-5(a) are "similar[ly]" analogous to N.J.S.A. 2C:39-5(j) and N.J.S.A. 2C:39-5(a), (b), (c), and (f), in that in each case, "the Legislature created an increased-grade offense," N.J.S.A. 2C:35-7.1 and N.J.S.A. 2C:39-5(j), and "did not include it in the list of offenses eligible for a mandatory ... term which included its predicate offense[s]," N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:39-5(a), (b), (c), and (f). 2018 WL at *11. Specifically, in the former case, the Legislature included drug distribution under N.J.S.A. 2C:35-5 "in N.J.S.A. 2C:43-6(f)'s list of offenses requiring an extended term sentence if the defendant previously committed certain drug offenses." Ibid. The Legislature "later created a higher degree offense in N.J.S.A. 2C:35-7.1 for a violation of N.J.S.A. 2C:35-5 if the defendant committed it within 500 feet of a public facility." Ibid. In Canadas, the Appellate Division found that N.J.S.A. 2C:35-7.1 is not "eligible for a

mandatory extended" term under N.J.S.A. 2C:43-6(f), because the former is not enumerated in the latter's 'list of offenses." Id. at *10. The "increased-grade crime 'cannot be subject to a mandatory … term … as currently written.'" Id. at *11 (citing Patterson, 435 N.J. Super. at 516). To subject N.J.S.A. 2C:35-7.1 to the mandatory term would be to re-write N.J.S.A. 2C:43-6(f), but "[c]ourts cannot rewrite a criminal statute to increase sentencing penalties that do not appear clearly on the face of that statute." Id. at *10. All of this applies to N.J.S.A. 2C:39-5(j) and its predicates offenses, indicating that N.J.S.A. 2C:39-5(j) is not a Graves Act offense. The Legislature included N.J.S.A. 2C:39-5(a), (b), (c), and (f) in N.J.S.A. 2C:43-6(c)'s list of offenses requiring a mandatory term; the Legislature created a higher degree offense in N.J.S.A. 2C:39-5(j) for a violation of these predicates by certain persons; and the higher degree offense is not eligible for the mandatory term under N.J.S.A. 2C:43-6(c), because it is not enumerated. Just as courts cannot re-write N.J.S.A. 2C:43-6(f), so can courts not re-write N.J.S.A. 2C:43-6(c).

3. The Appellate Division's construction will lead to upheaval that the Legislature did not intend.

The Appellate Division's rewriting of our sentencing law will cause upheaval. Generally, the Code gives prosecutors a "broad grant" in "charging discretion." State v. McCrary, 97 N.J. 132, 142 (1984). N.J.S.A. 2C:39-5 gives prosecutors discretion to choose amongst an array of second- and third-degree charges, some requiring a Graves Act mandatory parole disqualifier and some not.

Thus a prosecutor may charge a defendant under either the first-degree crime in subsection j; or the second- and third-degree crimes in subsections (a), (b), (c), and (f); or both. See Fuqua, 234 N.J. at 596 ("criminal statutes can overlap," and prosecutors can "proceed under either"); State v. Nicholson, 451 N.J. Super. 534, 551 (App. Div. 2017) ("A legislature may choose a belt-and-suspenders approach to promote its objectives by amending a statute to add an overlapping provision."). That is exactly what the State and defendant agreed upon in Mack. But the Appellate Division's construction would judicially transform the legislature's enactment, making it vastly more punitive, and constraining prosecutorial charging discretion to rely on first-degree charges only, N.J.S.A. 2C:39-5(a), (b), (c), or (f).

The judicial upending of charging discretion disadvantages both the State and defendants alike, because a carrot-and-stick approach is inhibited. There are many reasons why a prosecutor may require discretion to dangle a lower-degree charge: the alternative may be a risk of no conviction at all (e.g., if a defendant has a viable motion to suppress, an argument for dismissal, a self-defense justification, or the case is circumstantial) or there may be mitigating facts (e.g., if the possession was transitory, risk to others was minimal, the defendant had been threatened, the defendant lacked unlawful purpose, or the defendant cooperated). By treating first-degree N.J.S.A. 2C:39-5(j) as substantive, prosecutors have so wielded a carrot-and-stick approach. See, e.g., Neal, 2022 WL at *1 n.1 (the State

initially charged defendant with "first-degree … N.J.S.A. 2C:39-5(j)," then in exchange for his cooperation, defendant instead "entered a guilty plea to second-degree" N.J.S.A. 2C:39-5(b)). (Dsa 112-116) The foreseeable result of the Panel's upheaval of charging discretion will be longer sentences and more trials.

Additionally, the upheaval will very likely unsettle existing convictions and sentences. By redefining N.J.S.A. 2C:39-5(j) as a grading statute that elevates second- and third-degree N.J.S.A. 2C:39-5(a), (b), (c), and (f) convictions up to the first-degree range, the Panel has altered the legal ranges of commonly charged N.J.S.A. 2C:39-5 crimes. Based on a Public Defender records request to the Department of Corrections in 2023, there were approximately 4,295 defendants serving terms in state custody for all N.J.S.A. 2C:39-5 convictions, yet only a few dozen inmates from this population (approximately 1%) were listed by the DOC as serving time for first-degree N.J.S.A. 2C:39-5 convictions, as opposed to second-, third-, and fourth-degree N.J.S.A. 2C:39-5 convictions. Even without access to more granular data, there is good cause to suspect that prior NERA offenders are likely to make up a larger proportion of the N.J.S.A. 2C:39-5 inmate population than 1%. As the Sentencing Commission stated, "The vast majority of persons in prison, 64%, are serving a sentence under the Graves Act or NERA…. NERA is a driving force behind mass incarceration …." New Jersey Criminal Sentencing and Disposition Commission (2022 Report). If left in place, the Appellate Division's

reinterpretation of N.J.S.A. 2C:39-5 would put the legality of existing second- and third-degree N.J.S.A. 2C:39-5 convictions in doubt, where a defendant with a prior NERA conviction is serving a penalty below the first-degree range.

Nothing in the text or legislative history indicates that prosecutorial charging discretion is intended to be constrained in this way. And the Legislature knows how to make its intention "explicit," especially when enacting a sweeping change. State v. K.M.G., 477 N.J. Super. 167, 178 (2023). The Legislature does not "hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 468 (2001). It was unreasonable for the Appellate Division here to construe a legislative enactment in a manner that would strip prosecutors of discretion to charge anything under N.J.S.A. 2C:39-5 but first-degree Graves Act offenses, when the Legislature never so indicated, and the plain language unambiguously indicates otherwise. The opinions in Mack and Canadas offer the better road map.

C. The remedy is to remand for re-sentencing.

This Court must remand for re-sentencing on the first-degree charge without imposition of an illegal mandatory parole disqualifier. The defendant agrees with the State that the re-sentencing court may consider the prosecutor's N.J.S.A. 2C:43-6(b) request (2T 12-12 to 13), but it must also consider the defendant's request for no parole bar. (2T 3-24) The defendant requests that this Court reiterate two guiding principles: (1) that discretionary parole disqualifiers are the exception

and not the rule, and (2) that on remands for re-sentencing, the trial court must evaluate the defendant as he stands before the court.

First, discretionary "periods of parole ineligibility are the exception and not the rule." State v. Case, 220 N.J. 49, 66 (2014). "They are not to be treated as routine or commonplace." Ibid. Moreover, the "length of parole ineligibility terms … must ordinarily be consistent with the length of the base term." State v. Towey, 114 N.J. 69, 81 (1989). A 5-year discretionary parole disqualifier, the maximum, would be inconsistent with the 10-year base term, the minimum permitted. Ibid.

Here, the possession was non-violent, and as Cromedy himself had recently been the victim of serious gun violence by third-party perpetrators, the lower court should weigh whether Cromedy has already been meaningfully and specifically deterred from unlawful acts of gun violence, and had an out-of-the-ordinary reason to possess a firearm for self-defense. (2T 7-25 to 8-14; 13-19 to 23; PSR 13, 18)

Second, Cromedy is entitled to be reevaluated de novo as he stands before the court on the day of re-sentencing. "Where … we remand[] for resentencing — or where we direct reconsideration without directing the imposition of a specific sentence, the sentencing proceedings must be conducted anew." State v. Randolph, 210 N.J. 330, 351 (2012). "In a resentencing, a defendant … is entitled to the same full review and explanation of the finding and weighing of aggravating and mitigating factors." Ibid. In the "performance of that function," the judge must

consider "all current information relevant to an appropriate appraisal of the factors," including whether there was a "better" person "presently standing before the court at the time of resentencing, not a no-longer accurate version of him from the past." Id. at 333, 344. Thus, at a resentencing, "the trial court should view defendant as he stands before the court on that day." Id. at 354.

CONCLUSION

For the reasons argued in Point I, this Court must vacate the illegal imposition of a mandatory parole disqualifier, and remand for a de novo re-sentencing.

Respectfully submitted,

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