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AMENDED LETTER-PETITION AND APPENDIX ON BEHALF OF DEFENDANT-PETITIONER

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089188
APP. DIV. DOCKET NO. A-1145-22
INDICTMENT NO. 21-10-1004

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Petition for Certification from an Opinion of the Superior Court of New Jersey, Appellate Division
v.		
ZAIRE J. CROMEDY	:	
Defendant-Petitioner.	:	Sat Below: Hon. Jack M. Sabatino, P.J.A.D. Hon. Hany A. Mawla, J.A.D. Hon. Joseph L. Marczyk, J.A.D.

DEFENDANT IS CONFINED

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QUESTION PRESENTED FOR CERTIFICATION

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?

STATEMENT OF THE MATTER INVOLVED

Petitioner Zaire Cromedy pled guilty to a single count of unlawful possession of a handgun by a person with a prior NERA conviction, a "first degree crime." N.J.S.A. 2C:39-5(j). (Dpa 19-25)[1] At sentencing, he argued that his 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 3-22 to 24) The sentencing court disagreed, and imposed a 10-year prison term with a 5-year mandatory parole disqualifier. (Dpa 26-29)

The Appellate Division affirmed the sentencing court's illegal imposition of a mandatory parole disqualifier. 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." (Dpa 2) 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

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[1] Record materials are cited as follows:
"Dpa" – defendant-petitioner's appendix;
"1T" – June 7, 2022 plea transcript;
"2T" – November 4, 2022 sentencing transcript;
"3T" – June 5, 2023 SOA transcript; and
"PSR" – presentence report.

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." (Dpa 12)

The Panel's opinion transformed N.J.S.A. 2C:39-5, making it vastly more punitive for a large class of offenders. Previously, the Appellate Division had interpreted N.J.S.A. 2C:39-5(j), in State v. Mack, 2017 WL 4530254 (App. Div. 2017) and State v. Canadas, 2018 WL 3371010 (App. Div. 2018), to codify a substantive "first degree crime," albeit one not listed as carrying a mandatory parole disqualifier. (Dpa 30-45) The Model Jury Charge Committee likewise previously interpreted N.J.S.A. 2C:39-5(j) to codify a substantive "first degree crime," and approved jury instructions underscoring that it is a standalone offense. (Dpa 46-52) By splitting from Mack and Canadas, as well as the Model Jury Charge Committee, and redefining N.J.S.A. 2C:39-5(j) as a grading statute rather than as a substantive crime, the Panel altered the legal gradings and sentencing ranges of multiple other commonly charged N.J.S.A. 2C:39-5 crimes, rendering invalid countless plea agreements that treat N.J.S.A. 2C:39-5 subsections (a), (b), (c), and (f) as second- and third-degree offenses despite a defendant's prior NERA crime. Specifically, based on recent corrections data, the Public Defender believes that nearly 4,000 offenders are in state custody for those convictions. Because prior NERA offenses are common among N.J.S.A. 2C:39-5 offenders, if Cromedy

stands, then hundreds (if not thousands) of offenders are likely serving illegal second- and third-degree sentences, which must now all be vacated, and the matters scheduled for new plea negotiations, resentencings, or speedy trials. But that chaos is completely avoidable, because Mack and Canadas offer a better road map than Cromedy for how to interpret the Code. This Court should grant certification, hold that N.J.S.A. 2C:39-5(j) is a substantive first-degree crime that is not subject to the Graves Act, and remand for resentencing.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

I. Certification should be granted to resolve the Appellate Division split on whether N.J.S.A. 2C:39-5(j) is a substantive statute identifying a separate crime, or a grading statute, and whether it is subject to the Graves Act.

Our Court Rules demand certification when the decision under review is "in conflict" with other appellate decisions. R. 2:12-4. Here, the Appellate Division is split on whether N.J.S.A. 2C:39-5(j) is a substantive statute or a grading statute, and whether it is subject to the Graves Act: Prior to Cromedy, the Appellate Division held in State v. Mack, 2017 WL 4530254 (App. Div. 2017) and State v. Canadas, 2018 WL 3371010 (App. Div. 2018) 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. This Court should grant certification and follow the well-reasoned opinions in Mack and Canadas, not Cromedy.

Mack established that — contrary to Cromedy — N.J.S.A. 2C:39-5j is a substantive statute identifying a separate crime. In Mack, the State charged the defendant with violating N.J.S.A. 2C:39-5(j), "a first-degree crime." Mack, 2017 WL at *1. However, the trial court in Mack held that N.J.S.A. 2C:39-5(j) was a sentencing statute and not a substantive statute identifying a separate crime. Ibid. 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) establishes 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 "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.

Following Mack, Canadas established that — contrary to Cromedy — as a substantive crime, N.J.S.A. 2C:39-5(j) is not subject to N.J.S.A. 2C:43-6(c) because it is not enumerated in the latter. In Canadas, the defendant was convicted at a bifurcated trial of several Chapter 39 offenses, including N.J.S.A. 2C:39-5(j). Canadas, 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 on appeal that the extended term 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)) (internal marks omitted).

This Court should grant certification to resolve the split. This Court should hold that Cromedy erred by departing from the well-reasoned holdings in Mack and Canadas 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. In Cromedy, the Appellate Division alluded in Footnote 1 to the "the unpublished case law … that treated a subsection (j) offense as a 'substantive crime[,]'" but did not directly respond to Mack and Canadas, which persuasively undercut the reasoning in Cromedy. 478 N.J. Super. at 168 n.1.

1. **The Appellate Division is split over how to interpret the plain language of N.J.S.A. 2C:39-5(j) and N.J.S.A. 2C:43-6(c).**

First, the Appellate Division reasoned in Mack that "the 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." 2017 WL at *2. Specifically, N.J.S.A. 2C:39-5(j) explicitly refers to itself as a "first degree crime." Ibid. The Appellate

Division explained, "the language 'first degree crime' plainly means that subsection j is identifying a separate substantive crime." Ibid.

Likewise, the Appellate Division reasoned in Canadas that the "plain language" of Chapter 43 dictates 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. If the meaning of the text is clear and unambiguous on its face, we must enforce that meaning." Id. at *10 (citing State v. Grate, 220 N.J. 317, 330 (2015)). Here, 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. The "legislators' words are by far the most decisive evidence of what they would have done[.]" Id. at *13.

However, Cromedy gave short shrift to the plain language of the Code. The Panel brushed off Mack's "unpublished" finding that the plain language of subsection (j) identified a "substantive" crime; "decline[d] to rely upon" the "exclusio[n]" of N.J.S.A. 2C:39-5(j) from N.J.S.A. 2C:43-6(c)'s enumerated list of offenses; and found that the plain language was trumped by an alleged "general purpose" of N.J.S.A. 2C:43-6(c) to not exclude N.J.S.A. 2C:39-5(j). 478 N.J. Super. at 165. That subverted the Appellate Division's more persuasive

explanation in Mack and Canadas that the plain language of these statutes is "clear and unambiguous" and indicates a "pointed[]" and "decisive" legislative choice. Canadas, 2018 WL at *10-13.

2. The Appellate Division is split over how to interpret the legislative history of N.J.S.A. 2C:39-5(j) and N.J.S.A. 2C:43-6(c).

Second, the Appellate Division reasoned in Mack that 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. The legislative statement supporting N.J.S.A. 2C:39-5(j) – like the statute's plain language – refers to it as a "first degree crime" and as a "crime of the first degree." Ibid.

Likewise, the Appellate Division reasoned in Canadas that the legislative history supports a conclusion that N.J.S.A. 2C:39-5(j) is not a Graves Act offense. The Appellate Division explained that "examination of the … legislative history shows that the Legislature created N.J.S.A. 2C:39-5(j), and simultaneously revised N.J.S.A. 2C:43-6(c)'s list of crimes … but did not add N.J.S.A. 2C:39-5(j) to that list." Canadas, 2018 WL at *11. Specifically, the Legislature "added N.J.S.A. 2C:39-5(f) … to the list of enumerated crimes, but did not add the newly-enacted N.J.S.A. 2C:39-5(j) to that list. 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)). The "legislative history discussed the enactment of N.J.S.A. 2C:39-5(j) and the addition of N.J.S.A. 2C:39-5(f) to N.J.S.A. 2C:43-6(c), with no suggestion N.J.S.A. 2C:39-5(j) was also added." Canadas, 2018 WL at *11. The "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)." Id. at *12. Thus, "there is no legislative history justifying [a] reading … which contradicts the plain meaning of the act." Id. at *13.

Cromedy gave short shrift to the simultaneous legislative procedure; it asserted no significance to "the Legislature amend[ing] the Graves Act [N.J.S.A. 2C:43-6(c)] on the same day it enacted N.J.S.A. 2C:39-5(j)," proclaiming itself "not convince[d]." 478 N.J. Super. at 166. But in Canadas, the Appellate Division persuasively explained that the Legislature "simultaneously" revising N.J.S.A. 2C:43-6(c)'s list, without adding N.J.S.A. 2C:39-5(j) to that list, on the same day it enacted N.J.S.A. 2C:39-5(j), was convincing procedural "proof" that N.J.S.A. 2C:39-5(j) is not a Graves Act offense. 2018 WL at *11. The Cromedy opinion erred by dismissing that "simultaneous" procedure and instead highlighting a passage in the sponsors' statement that framed the bill as "upgrad[ing] the crime" to a "first-degree offense." 478 N.J. Super. at 166. Sponsors' statements "may represent the viewpoint of just one person, or a small group of lawmakers" and "may also be contradictory, ambiguous or otherwise without substantial probative

value in determining legislative meaning." DiProspero v. Penn, 183 N.J. 477, 499 (2005). Here, this sponsor word choice did not appear in the enacted legislation, so no weight should be accorded to it. But even if the term "upgrades" had appeared in the enacted plain language of N.J.S.A. 2C:39-5(j) — which it does not — that would still not indicate, as the Cromedy opinion seems to believe, that N.J.S.A. 2C:39-5(j) is not a substantive provision or requires a Graves Act sentence. Rather, as the Appellate Division persuasively explained in Mack, that same sponsors' statement framing N.J.S.A. 2C:39-5(j) as a "first degree crime" merely indicates that N.J.S.A. 2C:39-5(j) "identif[ies] a separate substantive crime" which does not appear in N.J.S.A. 2C:43-6(c)'s enumerated list of Graves Act offenses. 2017 WL at *2.

3. The Appellate Division is split over how to interpret N.J.S.A. 2C:39-5(j) and N.J.S.A. 2C:43-6(c) in light of other language in the same chapters.

Third, 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" – "subjection j never mentions a sentencing court," and instead "plainly states that it is creating a 'first degree crime.'" Ibid.

Likewise, Canadas found that Chapter 43's treatment of other offenses in N.J.S.A. 2C:39-5 supports N.J.S.A. 2C:39-5(j) not being a Graves Act offense. Canadas, 2018 WL at *11. N.J.S.A. 2C:39-5(j) is not the only Chapter 39 offense that N.J.S.A. 2C:43-6(c) does not enumerate, so it is not an aberration for N.J.S.A. 2C:39-5(j) to be a non-Graves Act offense within Chapter 39. The Appellate Division explained: "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.

The Cromedy court erred in reasoning that language in N.J.S.A. 2C:43-6(d)(2) supports N.J.S.A. 2C:39-5(j) being a Graves Act offense. N.J.S.A. 2C:43-6(d)(2) explicitly says that certain Chapter 39 offenses are not Graves Act offenses. Cromedy 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. Therefore, if the Legislature wanted to exempt first-degree unlawful weapon offenses from the Graves Act, it would have said so." 478 N.J. Super. at 166. This reasoning is specious: The Legislature only listed these

exemptions in N.J.S.A. 2C:43-6(d)(2) because these offenses otherwise remain enumerated as Graves Act offenses in N.J.S.A. 2C:43-6(c). 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.

4. The Appellate Division is split over how to interpret N.J.S.A. 2C:39-5(j) and N.J.S.A. 2C:43-6(c) in light of analogous provisions elsewhere in the Code.

Fourth, the Appellate Division reasoned in Mack that analogous provisions in the Code outside of N.J.S.A. 2C:39-5 support its conclusion that N.J.S.A. 2C:39-5(j) is "a substantive criminal statute." 2017 WL at *3. The Appellate Division cited N.J.S.A. 2C:39-7, "the analogous crime of certain persons not to possess weapons." Ibid. The certain persons statute requires the State to prove that "defendant possessed a firearm and 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 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.

Likewise, the Appellate Division reasoned in Canadas that analogous Code provisions outside of N.J.S.A. 2C:39-5 support its finding that N.J.S.A. 2C:39-5(j) is not a Graves Act offense. The Appellate Division cited a "similar situation where the Legislature created an increased-grade offense and did not include it in the list of offenses eligible for a mandatory extended term which included its predicate offense." 2018 WL at *11. Specifically, 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. The Appellate Division found that this public facility offense, 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 extended 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.

The Cromedy court erred in reasoning that other provisions of the Code support its conclusion that N.J.S.A. 2C:39-5(j) is a sentencing enhancement statute. Cromedy cited N.J.S.A. 2C:14-2(a)(1) as a sentencing enhancement statute that "demonstrate[s] our point. N.J.S.A. 2C14-2(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 eligibility." 478 N.J. Super. at 167. On the contrary, the stark difference between N.J.S.A. 2C:14-2(a) to N.J.S.A. 2C:39-5(j) strongly suggests that Mack and Canadas are correct and Cromedy is wrong. 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 referring to an enhanced mandatory period of parole ineligibility or any other mandatory sentence. Far from "demonstrat[ing Cromedy's] point" that N.J.S.A. 2C:39-5(j) enhances the sentence 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 a mandatory period of parole ineligibility. Ibid.

5. The Appellate Division is split over which interpretation is more absurd.

Fifth, Canadas found that even if there is any ambiguity in N.J.S.A. 2C:43-6(c), N.J.S.A. 2C:39-5(j) must be construed not to be a Graves Act offense because 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; and the rule of lenity applies. 2018 WL at *10, 12. The Appellate Division 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." Id. at *12. "Nothing in the act or its legislative history even hints the Legislature intended such a dramatic increase" as "to both create a new first-degree offense and require a[Graves Act] term for that offense." Id. at *12-13 (emphasis in original). 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. The Appellate Division further invoked "the doctrine of lenity," which requires resolving ambiguities in criminal statutes "in favor of the defendant." Id. at *12. The Appellate Division held: "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)." Ibid. (citing Patterson, 435 N.J. Super. at 518).

The Cromedy court erroneously "decline[d] to interpret N.J.S.A. 2C:39-5(j)" as a substantive criminal statute, because it believed it would be an absurd result to allow the State to "introduce[e] evidence of a prior conviction" that "would severely prejudice the defense." Id. at 167, 170. If that concern is dispositive, then all certain persons statutes in the Code should be struck. Otherwise, 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, similarly dismissed the Cromedy opinion's concern with the State proving at trial that the defendant had previously been convicted.

Additionally, Cromedy found that it would be "absurd" for N.J.S.A. 2C:39-5(j) to not be a Graves Act offense. 478 N.J. Super. at 167. That subverted the Appellate Division's more persuasive explanation in Canadas, 2018 WL at *10, that "it was not absurd" for N.J.S.A. 2C:39-5(j) to not be a Graves Act offense. Canadas explained that "making it a first-degree offense, and thus increasing the range of imprisonment" was already a "substantial" legislative response without also requiring a Graves Act term. Id. at *12. The Cromedy court unpersuasively asserted that first-degree offenders "could serve lesser sentences than individuals convicted of lower-degree firearm offenses." 478 N.J. Super. at 167. That is

misleading: even an individual serving a 10-year sentence at the bottom of the first-degree range will be exposed to an ordinary term greater than or equal to any sentence in the second, third-, or fourth degree range. Moreover, Cromedy's complaint that a first-degree offender could "become eligible for parole before a second-degree offender" obscures that offenders 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. Ibid.

II. Certification should be granted to protect the interests of prosecutors, criminal defendants, and courts, all of whom are prejudiced by the consequences of the Appellate Division's erroneous decision.

The Appellate Division opinion in Cromedy is a sweeping, draconian rewriting of our sentencing law with a chaotic consequence that extends far beyond this case: If enforced, it renders illegally lenient likely hundreds of current N.J.S.A. 2C:39-5 plea agreements and sentences. This Court must intervene.

Casting aside the well-reasoned holdings in Mack and Canadas that N.J.S.A. 2C:39-5(j) is a chargeable "first degree crime," the Panel held that N.J.S.A. 2C:39-5(j) is not a chargeable "first degree crime" at all, but instead "enhances the degree" and sentencing range of any N.J.S.A. 2C:39-5(a), (b), (c) or (f) conviction where the offender has a prior NERA conviction. That drastically raises the stakes of how to interpret N.J.S.A. 2C:39-5(j), because far more people are serving sentences for N.J.S.A. 2C:39-5(b)(1) convictions especially than N.J.S.A. 2C:39-

5(j) convictions, but plea agreements and sentences across New Jersey routinely treat subsection (b)(1) as a second-degree crime, regardless of whether a defendant has a prior NERA conviction that would render a second-degree sentence illegal.

An ordinary sentence for an N.J.S.A. 2C:39-5(b)(1) conviction is in the second-degree range, from a 5-year term with a 3.5-year mandatory parole disqualifier, up to a 10-year ordinary term with a 5-year mandatory parole disqualifier. But Cromedy interprets N.J.S.A. 2C:39-5(j) to mean that when a defendant with a prior NERA conviction is convicted of N.J.S.A. 2C:39-5b(1), the ordinary sentence is in the first-degree range, from a 10-year term with a 5-year parole mandatory parole disqualifier, up to a 20-year ordinary term with a 10-year mandatory parole disqualifier. Likewise, an extended-term sentence for an N.J.S.A. 2C:39-5(b)(1) conviction is in the first-degree range, from a 10-year term with a 5-year mandatory parole disqualifier, up to a 20-year term with a 10-year mandatory parole disqualifier. But Cromedy interprets N.J.S.A. 2C:39-5(j) to mean that an extended term sentence for a person with a prior NERA conviction who is convicted of N.J.S.A. 2C:39-5(b)(1) is a 20-year term with a 10-year mandatory parole disqualifier, up to a life term with a mandatory parole disqualifier of half of life.

Based on recent corrections data, there are close to 4,000 offenders who are serving sentences for second- and third-degree violations of N.J.S.A. 2C:39-5(a),

(b), (c), or (f). NERA offenses are common among N.J.S.A. 2C:39-5 offenders. The Appellate Division opinion in Cromedy puts the legality of these plea agreements and sentences in doubt.

Cromedy also jeopardizes convictions under subsection (j). Cromedy may hold that N.J.S.A. 2C:39-5(j) does not itself identify a crime, but the Department of Corrections still has custody over several dozen prisoners for N.J.S.A. 2C:39-5(j) convictions. If, as Cromedy holds, subsection (j) is not a substantive offense not subject to the Graves Act, but rather a grading statute, then these pleas, verdicts, and sentences are in jeopardy.

Furthermore, Cromedy severely reduced prosecutors' charging discretion in N.J.S.A. 2C:39-5 cases, in ways that will surely frustrate prosecutors as well as criminal defendants. In Mack, the State (with the defendant's agreement) fought successfully on appeal for prosecutorial discretion to charge N.J.S.A. 2C:39-5(j) as a substantive first-degree offense. But Cromedy stripped away that discretion while also — in cases where the defendant has a prior NERA offense — diminishing prosecutorial discretion to charge anything but first-degree Graves Act offenses. The entirely foreseeable result will be longer sentences and more trials.

The need for resolution is urgent. The trial and appellate courts are considering the applicability of N.J.S.A. 2C:39-5(j), and its effect on subsections (a), (b), (c), and (f), every day across the state, and there is a state of confusion.

See, e.g., State v. Consepcion, 2024 WL 2747116 (App. Div. 2024), cert. pending on other grounds (Docket No. 089554). (Dpa 53-57)[2] This Court should step in now, and decide the issue.

In summary, the petitioner respectfully submits that his appeal "presents a question of general public importance which has not been but should be settled" by this Court. R. 2:12-4 (grounds for certification).

Respectfully submitted,

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Public Defender
Attorney for Defendant-Petitioner

/s/ Daniel S. Rockoff
Assistant Deputy Public Defender
Attorney ID: 103522014

CERTIFICATION

I hereby certify that the foregoing petition presents a substantial issue of law and is filed in good faith and not for purposes of delay.

/s/ Daniel S. Rockoff
Assistant Deputy Public Defender
Attorney ID: 103522014

[2] By way of example, the undersigned recently appealed a sentence where another defendant pled guilty in Atlantic County to the first-degree offense in N.J.S.A. 2C:39-5(j). (Dpa 56) The undersigned argued that Cromedy was wrongly decided and that a parole bar was discretionary because the Graves Act did not apply to an N.J.S.A. 2C:39-5(j) conviction. The Appellate Division remanded for resentencing, appearing to accept that N.J.S.A. 2C:39-5(j) is a substantive crime and "agree[ing]" that "more explanation was needed to justify the parole bar and its length." But confusingly, the Appellate Division also ordered the trial court to re-litigate whether the Graves Act should be applied. (Dpa 56)