

## Sentencing C Guidelines for Dismissals Under the Graves Act

Directive #10-80  
Issued by:

April 27, 1981  
Chief Justice Robert N. Wilentz

The purpose of this directive from the Supreme Court is to assure that the mandatory three year prison term law is strictly enforced in accordance with the Legislature's intent.

Chapter 31 of the Laws of 1981 was enacted on February 12, 1981. Among other things, the Act requires that any defendant convicted under *N.J.S.A. 2C:39-4a* (possession of a firearm with a purpose to use it unlawfully), or *2C:11-3* (murder), *2C:11-4* (manslaughter), *2C:12-1b* (aggravated assault), *2C:13-1* (kidnapping), *2C:14-2a* (aggravated sexual assault), *2C:14-3a* (aggravated criminal sexual contact), *2C:15-1* (robbery), *2C:18-2* (burglary) or *2C:29-5* (escape) who, while committing or attempting to commit the crime, used or was in possession of a firearm, as defined in *N.J.S.A. 2C:39-1f*, "shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or 3 years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole." It also provides that a person who committed any of these offenses while using or possessing a firearm and who has previously been convicted of an offense involving the use or possession of a firearm, must receive an extended term, "notwithstanding that extended terms are ordinarily discretionary with the court."

The procedure for imposition of extended terms under this Act, including extended terms for fourth degree crimes where defendant used or possessed a firearm, is included in the Act. It also provides that when an extended term is required for someone convicted of any of those offenses involving use or possession of a firearm, a parole ineligibility term must be imposed as set forth in *N.J.S.A. 2C:43-7c*.

The Supreme Court has considered whether the legislative intent embodied in Chapter 31 requires any amendment to our existing procedure relating to "plea bargaining," including the power of the court to dismiss charges incident to pleas on other offenses. It has also considered whether that legislative intent necessitates any amendment to the procedure requiring that post-indictment applications to dismiss or downgrade charges be presented to the Assignment Judge.

*R. 3:25-1* permits sentencing judges to dismiss one or more counts of the same indictment, accusation or complaint, or of another indictment, accusation or complaint as part of the disposition of the same case or a related case. Our rules expressly recognize the concept of "plea bargaining," including the dismissal of one or more charges upon pleas to other charges. See, *R. 3:9-3* (b), (c), (e). As a result of a negotiated plea agreement with the prosecutor, the defendant may enter a plea on condition that other charges will be dismissed or that a sentence recommendation will be honored. However, if the court deems that the best interests of justice would not be served by effectuating that agreement, it may be rejected, and the defendant shall be permitted to withdraw his or her plea.

The obvious legislative intent of Chapter 31 is to mandate custodial sentences, involving mandatory minimum terms, upon conviction of offenses involving possession of a firearm or of certain offenses committed by a defendant while using or possessing a

firearm. Given that intent, the "interests of justice" cannot be served if judicial participation in plea bargaining or dismissals or downgrading amounts to circumventing the expressed legislative policy. Accordingly, no trial judge, at the time of disposition, may approve a negotiated plea which involves dismissal of an offense carrying a mandatory custodial term under Chapter 31, unless:

1. The prosecutor represents on the record that there is insufficient evidence to warrant a conviction, or that the possibility of acquittal is so great that dismissal is warranted in the interests of justice; or
2. A plea is being entered by the defendant to an offense (a) requiring a parole ineligibility term under Chapter 31, or (b) not requiring a mandatory parole ineligibility term but where the negotiated plea acknowledges that a parole ineligibility term is to be imposed at least equal in length to that which would have been required for the offense being dismissed; or
3. The prosecutor states on the record, either in camera or in open court, that the plea bargain is essential to assure defendant's cooperation with the prosecution.

Because use or possession of a firearm is not necessarily an element of an offense affected by Chapter 31, the court at the time of plea or sentencing must ascertain whether a firearm was used or possessed in connection with an offense to be dismissed.

The same requirements must be observed in dismissing or downgrading an indictment or counts thereof after indictment. It goes without saying, of course, that the court cannot accept a negotiated plea involving sentence recommendations which circumvent minimum terms.

A judge may deviate from the mandate of this directive, subject to requirements of law including the provisions of Chapter 31, only if, as a result of circumstances clearly not foreseen by this directive, he or she finds compelling reasons to do so and states them on the record. Any deviation must be in accordance with *N.J.S.A. 2C:43-6.2* and 6.3. Notice of any such deviation should be given to the Chief Justice.

The Supreme Court realizes that this directive may have an adverse impact on the speedy trial program to the extent that it prohibits some dispositions of criminal matters that might otherwise occur. The legislative intent of Chapter 31 must be followed, however, regardless of such possible consequences.

## EDITOR'S NOTE

The codified citation *N.J.S.A. 2C:43-6* has been added to the title. This directive was reproduced in its entirety as a footnote to *N.J.S.A. 2C:43-6* when the codified version of that statute was published in 1981. The reference to the 1981 legislation as "recently passed" in paragraph 1 has been deleted. The reference to an enclosed copy of the legislation has been deleted.

In the third paragraph, the quotation from that portion of the legislation amending *N.J.S.A. 2C:44-3* has been deleted. *N.J.S.A. 2C:44-3* provides that "an application by the prosecutor shall not be required" to impose an extended term for certain offenses enumerated in 2C:43-6c. That statutory language has been modified by *State v. Martin*, 110 *N.J.* 10 (1988), which requires notice to the defendant for an extended term application.

Any deviation from the mandate must be in accordance with the more recent enactment, *N.J.S.A. 2C:43-6.2* and 6.3. This reference has been inserted in the next to last paragraph of the directive. Finally, the language has been amended to render it gender neutral.